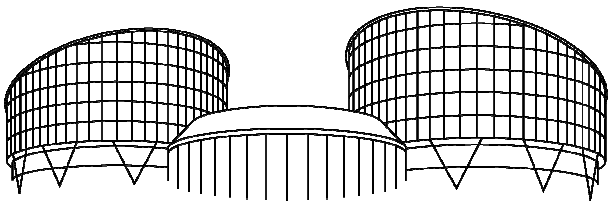

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF M.S.S. v. BELGIUM AND GREECE

(Application no. 30696/09)

JUDGMENT

STRASBOURG

21 January 2011

This judgment is final but may be subject to editorial revision.

In the case of M.S.S. v. Belgium and Greece,

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

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Ireneu Cabral Barreto,
Elisabet Fura,
Khanlar Hajiyev,
Danutė Jočienė,
Dragoljub Popović,
Mark Villiger,
András Sajó,
Ledi Bianku,
Ann Power,
Işıl Karakaş,
Nebojša Vučinić, *Judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 1 September and 15 December 2010,

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

PROCEDURE

1. The case originated in an application (no. 30696/09) against the Kingdom of Belgium and the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr M.S.S. ("the applicant"), on 11 June 2009. The President of the Chamber to which the case had been assigned acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr Z. Chihaoui, a lawyer practising in Brussels. The Belgian Government were represented by their Agent, Mr M. Tysebaert and their co-Agent, Mrs I. Niedlispacher. The Greek Government were represented by Mrs M. Germani, Legal Assistant at the State Legal Council.

3. The applicant alleged in particular that his expulsion by the Belgian authorities had violated Articles 2 and 3 of the Convention and that he had been subjected in Greece to treatment prohibited by Article 3; he also

complained of the lack of a remedy under Article 13 of the Convention that would enable him to have his complaints examined.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules). On 19 November 2009 a Chamber of that Section communicated the application to the respondent Governments. On 16 March 2010 the Chamber, composed of the following judges: Ireneu Cabral Barreto, *President*, Françoise Tulkens, Vladimiro Zagrebelsky, Danutė Jočienė, Dragoljub Popović, András Sajó, Nona Tsotsoria, *Judges*, and also Sally Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules.

6. In conformity with Article 29 § 1 of the Convention, it was decided that the Grand Chamber would examine the admissibility and the merits together.

7. The applicant and the Governments each filed written observations on the merits (Rule 59 § 1). Each of the parties replied to the other's observations at the hearing (Rule 44 § 5). Written observations were also received from the Netherlands and United Kingdom Governments and from the Centre for Advice on Individual Rights in Europe ("the Aire Centre") and Amnesty International, whom the acting President of the Chamber had authorised to intervene (Article 36 § 2 of the Convention and Rule 44 § 2). Observations were also received from the European Commissioner for Human Rights ("the Commissioner"), the Office of the United Nations High Commissioner for Refugees ("the UNHCR") and the Greek Helsinki Monitor ("GHM"), whom the President of the Court had authorised to intervene. The Netherlands and United Kingdom Governments, the Commissioner and the UNHCR were also authorised to take part in the oral proceedings.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 1 September 2010 (Rule 59 § 3).

There appeared before the Court:

– *for the Belgian Government*,

Mr Marc Tysebaert, Agent of the Government, *Agent*;
Mrs Isabelle Niedlispacher, co-Agent,
Mrs Edda Materne, lawyer, *Counsel*;
Mrs Valérie Demin, *attachée*, Aliens Office, *Adviser*.

– *for the Greek Government,*
Mr Konstantinos Georgiadis, Adviser,
State Legal Council, *Agent's delegate,*
Mrs Myrto Germani, Legal Assistant, State Legal Council, *Counsel*;

– *for the applicant,*
Mr Zouhaier Chihaoui, lawyer, *Counsel;*

– *for the United Kingdom Government, third-party intervener,*
Mr Martin Kuzmicki, *Agent,*
Ms Lisa Giovanetti, *Counsel*;

– *for the Netherlands Government, third-party intervener,*
Mr Roeland Böcker, *Agent,*
Mr Martin Kuijer, Ministry of Justice,
Mrs Clarinda Coert, Immigration and Naturalisation Department,
Advisers;

– *the European Commissioner for Human Rights, third-party intervener,*
Mr Thomas Hammarberg, Commissioner
Mr Nikolaos Sitaropoulos, Deputy Director,
Mrs Anne Weber, *Advisers;*

– *for the Office of the United Nations High Commissioner for Refugees, third-party intervener,*
Mr Volker Türk, Director of the International Protection Division, *Counsel,*
Mrs Madeline Garlick, Head of Unit, Policy and Legal Support, Europe Office,
Mr Cornelis Wouters, principal adviser on the law of refugees, National Protection Division, *Advisers*.

The Court heard addresses and replies to its questions from Mrs Niedlispacher, Mrs Materne, Mrs Germani, Mr Chihaoui, Mr Böcker, Ms Giovanetti, Mr Türk and Mr Hammarberg.

FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Entry into the European Union

9. The applicant left Kabul early in 2008 and, travelling via Iran and Turkey, entered the European Union through Greece, where his fingerprints were taken on 7 December 2008 in Mytilene.

10. He was detained for a week and, when released, was issued with an order to leave the country. He did not apply for asylum in Greece.

B. Asylum procedure and expulsion procedure in Belgium

11. On 10 February 2009, after transiting through France, the applicant arrived in Belgium, where he presented himself to the Aliens Office with no identity documents and applied for asylum.

12. The examination and comparison of the applicant's fingerprints generated a Eurodac “hit” report on 10 February 2009 revealing that the applicant had been registered in Greece.

13. The applicant was placed initially in the Lanaken open reception centre for asylum seekers.

14. On 18 March 2009, by virtue of Article 10 § 1 of Regulation no. 343/2003/EC (the Dublin Regulation, see paragraphs 65-82 below), the Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. When the Greek authorities failed to respond within the two-month period provided for in Article 18 § 1 of the Regulation, the Aliens Office considered this to be a tacit acceptance of the request to take charge of the application, pursuant to paragraph 7 of that provision.

15. During his interview under the Dublin Regulation on 18 March 2009 the applicant told the Aliens Office that he had fled Afghanistan with the help of a smuggler he had paid 12,000 dollars and who had taken his identity papers. He said he had chosen Belgium after meeting some Belgian North Atlantic Treaty Organisation (NATO) soldiers who had seemed very friendly. He also requested that the Belgian authorities examine his fears. He told them he had a sister in the Netherlands with whom he had lost contact. He also mentioned that he had had hepatitis B and had been treated for eight months.

16. On 2 April 2009, the UNHCR sent a letter to the Belgian Minister for Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and

recommending the suspension of transfers to Greece (see paragraphs 194 and 195, below). A copy was sent to the Aliens Office.

17. On 19 May 2009, in application of section 51/5 of the Act of 15 December 1980 on the entry, residence, settlement and expulsion of aliens ("the Aliens Act"), the Aliens Office decided not to allow the applicant to stay and issued an order directing him to leave the country. The reasons given for the order were that, according to the Dublin Regulation, Belgium was not responsible for examining the asylum application; Greece was responsible and there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters under Community law and the 1951 Geneva Convention relating to the Status of Refugees. That being so, the applicant had the guarantee that he would be able, as soon as he arrived in Greece, to submit an application for asylum, which would be examined in conformity with the relevant rules and regulations. The Belgian authorities were under no obligation to apply the derogation clause provided for in Article 3 § 2 of the Regulation. Lastly, the applicant suffered from no health problem that might prevent his transfer and had no relatives in Belgium.

18. On the same day the applicant was taken into custody with a view to the enforcement of that decision and placed in closed facility 127 bis for illegal aliens, in Steenokkerzeel.

19. On 26 May 2009 the Belgian Committee for Aid to Refugees, the UNHCR's operational partner in Belgium, was apprised of the contact details of the lawyer assigned to the applicant.

20. On 27 May 2009 the Aliens Office scheduled his departure for 29 May 2009.

21. At 10.25 a.m. on the appointed day, in Tongres, the applicant's initial counsel lodged an appeal by fax with the Aliens Appeals Board to have the order to leave the country set aside, together with a request for a stay of execution under the extremely urgent procedure. The reasons given, based in particular on Article 3 of the Convention, referred to a risk of arbitrary detention in Greece in appalling conditions, including a risk of ill-treatment. The applicant also relied on the deficiencies in the asylum procedure in Greece, the lack of effective access to judicial proceedings and his fear of being sent back to Afghanistan without any examination of his reasons for having fled that country.

22. The hearing was scheduled for the same day, at 11.30 a.m., at the seat of the Aliens Appeals Board in Brussels. The applicant's counsel did not attend the hearing and the application for a stay of execution was rejected on the same day, for failure to attend.

23. The applicant refused to board the aircraft on 29 May 2009 and his renewed detention was ordered under section 27, paragraph 1, of the Aliens Act.

24. On 4 June 2009 the Greek authorities sent a standard document confirming that it was their responsibility under Articles 18 § 7 and 10 § 1 of the Dublin Regulation to examine the applicant's asylum request. The document ended with the following sentence: “Please note that if he so wishes this person may submit an application [for asylum] when he arrives in Greece.”

25. On 9 June 2009 the applicant's detention was upheld by order of the *chambre du conseil* of the Brussels Court of First Instance.

26. On appeal on 10 June, the Indictments Chamber of the Brussels Court of Appeal scheduled a hearing for 22 June 2009.

27. Notified on 11 June 2009 that his departure was scheduled for 15 June, the applicant lodged a second request, through his current lawyer, with the Aliens Appeals Board to set aside the order to leave the territory. He relied on the risks he would face in Afghanistan and those he would face if transferred to Greece because of the slim chances of his application for asylum being properly examined and the appalling conditions of detention and reception of asylum seekers in Greece.

28. A second transfer was arranged on 15 June 2009, this time under escort.

29. By two judgments of 3 and 10 September 2009, the Aliens Appeals Board rejected the applications for the order to leave the country to be set aside – the first because the applicant had not filed a request for the proceedings to be continued within the requisite fifteen days of service of the judgment rejecting the request for a stay of execution lodged under the extremely urgent procedure, and the second on the ground that the applicant had not filed a memorial in reply.

30. No administrative appeal on points of law was lodged with the *Conseil d'Etat*.

C. Request for interim measures against Belgium

31. In the meantime, on 11 June 2009, the applicant applied to the Court, through his counsel, to have his transfer to Greece suspended. In addition to the risks he faced in Greece, he claimed that he had fled Afghanistan after escaping a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the international air force troops stationed in Kabul. In support of his assertions, he produced certificates confirming that he had worked as an interpreter.

32. On 12 June 2009 the Court refused to apply Rule 39 but informed the Greek Government that its decision was based on its confidence that Greece would honour its obligations under the Convention and comply with EU legislation on asylum. The letter sent to the Greek Government read as follows:

"That decision was based on the express understanding that Greece, as a Contracting State, would abide by its obligations under Articles 3, 13 and 34 of the Convention. The Section also expressed its confidence that your Government would comply with their obligations under the following:

- the Dublin Regulation referred to above;

- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and

- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

I should be grateful therefore if your Government would undertake to inform the Court of the progress of any asylum claim made by the applicant in Greece as well as the place of detention, if he is detained on arrival in Greece."

D. Indication of interim measures against Greece

33. On 15 June 2009 the applicant was transferred to Greece. On arriving at Athens international airport he gave his name as that used in the agreement to take responsibility issued by the Greek authorities on 4 June 2009.

34. On 19 June 2009 the applicant's lawyer received a first text message (sms), in respect of which he informed the Court. It stated that upon arrival the applicant had immediately been placed in detention in a building next to the airport, where he was locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor.

35. When released on 18 June 2009, he was given an asylum seeker's card ("pink card", see paragraph 89 below). At the same time the police issued him with the following notification (translation provided by the Greek Government):

"In Spata, on 18.06.2009 at 12.58 p.m., I, the undersigned police officer [...], notified the Afghan national [...], born on [...], of no registered address, that he must report within two days to the Aliens Directorate of the Attica Police Asylum Department to declare his home address in Greece so that he can be informed of progress with his asylum application."

36. The applicant did not report to the Attica police headquarters on Petrou Ralli Avenue in Athens (hereafter "the Attica police headquarters").

37. Having no means of subsistence, the applicant went to live in a park in central Athens where other Afghan asylum seekers had assembled.

38. Having been informed of the situation on 22 June 2009, the Registrar of the Second Section sent a further letter to the Greek Government which read as follows:

"I should be obliged if your Government would inform the Court of the current situation of the applicant, especially concerning his possibilities to make an effective request for asylum. Further, the Court should be informed about the measures your Government intend to take regarding:

a) the applicant's deportation;

b) the means to be put at the applicant's disposal for his subsistence."

39. The Greek authorities were given until 29 June 2009 to provide this information, it being specified that: "Should you not reply to our letter within the deadline, the Court will seriously consider applying Rule 39 against Greece."

40. On 2 July 2009, having regard to the growing insecurity in Afghanistan, the plausibility of the applicant's story concerning the risks he had faced and would still face if he were sent back to that country and the lack of any reaction on the part of the Greek authorities, the Court decided to apply Rule 39 and indicate to the Greek Government, in the parties' interest and that of the smooth conduct of the proceedings, not to have the applicant deported pending the outcome of the proceedings before the Court.

41. On 23 July 2009 the Greek Government informed the Court, in reply to its letter of 22 June 2009, that on arriving at Athens airport on 15 June 2009 the applicant had applied for asylum and the asylum procedure had been set in motion. The Government added that the applicant had then failed to go to the Attica police headquarters within the two-day time-limit to fill in the asylum application and give them his address.

42. In the meantime the applicant's counsel kept the Court informed of his exchanges with the applicant. He confirmed that he had applied for asylum at the airport and had been told to go to the Attica police headquarters to give them his address for correspondence in the proceedings. He had not gone, however, as he had no address to give them.

E. Subsequent events

43. On 1 August 2009, as he was attempting to leave Greece, the applicant was arrested at the airport in possession of a false Bulgarian identity card.

44. He was placed in detention for seven days in the same building next to the airport where he had been detained previously. In a text message to his counsel he described his conditions of detention, alleging that he had been beaten by the police officers in charge of the centre, and said that he wanted to get out of Greece at any cost so as not to have to live in such difficult conditions.

45. On 3 August 2009 he was sentenced by the Athens Criminal Court to two months' imprisonment, suspended for three years, for attempting to leave the country with false papers.

46. On 4 August 2009, the Ministry of Public Order (now the Ministry of Civil Protection) adopted an order stipulating that in application of section 76 of Law no. 3386/2005 on the entry, residence and social integration of third-country nationals in Greece, the applicant was the subject of an administrative expulsion procedure. It further stipulated that the applicant could be released as he was not suspected of intending to abscond and was not a threat to public order.

47. On 18 December 2009 the applicant went to the Attica police headquarters, where they renewed his pink card for six months. In a letter on the same day the police took note in writing that the applicant had informed them that he had nowhere to live, and asked the Ministry of Health and Social Solidarity to help find him a home.

48. On 20 January 2010 the decision to expel the applicant was automatically revoked by the Greek authorities because the applicant had made an application for asylum prior to his arrest.

49. In a letter dated 26 January 2010 the Ministry of Health and Social Solidarity informed the State Legal Council that, because of strong demand, the search for accommodation for the applicant had been delayed, but that something had been found; in the absence of an address where he could be contacted, however, it had not been possible to inform the applicant.

50. On 18 June 2010 the applicant went to the Attica police headquarters, where his pink card was renewed for six months.

51. On 21 June 2010 the applicant received a notice in Greek, which he signed in the presence of an interpreter, inviting him to an interview at the Attica police headquarters on 2 July 2010. The applicant did not attend the interview.

52. Contacted by his counsel after the hearing before the Court, the applicant informed him that the notice had been handed to him in Greek when his pink card had been renewed and that the interpreter had made no mention of any date for an interview.

53. In a text message to his counsel dated 1 September 2010 the applicant informed him that he had once again attempted to leave Greece for Italy, where he had heard reception conditions were more decent and he would not have to live on the street. He was stopped by the police in Patras and taken to Salonika, then to the Turkish border for expulsion there. At the last moment, the Greek police decided not to expel him, according to the applicant because of the presence of the Turkish police.

II. RELEVANT INTERNATIONAL AND EUROPEAN LAW

A. The 1951 Geneva Convention relating to the Status of Refugees

54. Belgium and Greece have ratified the 1951 Geneva Convention relating to the Status of Refugees ("the Geneva Convention"), which defines the circumstances in which a State must grant refugee status to those who request it, as well as the rights and duties of such persons.

55. In the present case, the central Article is Article 33 § 1 of the Geneva Convention, which reads as follows:

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

56. In its note of 13 September 2001 on international protection (A/AC.96/951, § 16), the UNHCR, whose task it is to oversee how the States Parties apply the Geneva Convention, stated that the principle of "*non-refoulement*" was:

> "a cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refoule* is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx."

B. Community law

1. The Treaty on European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

57. Fundamental rights, as guaranteed by the Convention, are part of European Union law and are recognised in these terms:

Article 2

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities..."

Article 6

"1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

...

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

2. The Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon, which entered into force on 1 December 2009)

58. The issues of particular relevance to the present judgment are covered by Title V – Area of Freedom, Security and Justice – of Part Three of the Treaty on the Functioning of the European Union on Union Policies and internal action of the Union. In Chapter 1 of this Title, Article 67 stipulates:

"1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It ... shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. ..."

59. The second chapter of Title V concerns "policies on border checks, asylum and immigration". Article 78 § 1 stipulates:

"The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention ... and other relevant treaties."

60. Article 78 § 2 provides, *inter alia*, for the Union's legislative bodies to adopt a uniform status of asylum and subsidiary protection, as well as criteria and mechanisms for determining which Member State is responsible for considering an application for asylum.

3. The Charter of Fundamental Rights of the European Union

61. The Charter of Fundamental Rights, which has been part of the primary law of the European Union since the entry into force of the Treaty of Lisbon, contains an express provision guaranteeing the right to asylum, as follows:

Article 18 – Right to asylum

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

4. The "Dublin" asylum system

62. Since the European Council of Tampere in 1999, the European Union has organised the implementation of a common European asylum system.

63. The first phase (1999-2004) saw the adoption of several legal instruments setting minimum common standards in the fields of the reception of asylum seekers, asylum procedures and the conditions to be met in order to be recognised as being in need of international protection, as well as rules for determining which Member State is responsible for examining an application for asylum ("the Dublin system").

64. The second phase is currently under way. The aim is to further harmonise and improve protection standards with a view to introducing a common European asylum system by 2012. The Commission announced certain proposals in its policy plan on asylum of 17 June 2008 (COM(2008) 360).

(a) The Dublin Regulation and the Eurodac Regulation

65. Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national ("the Dublin Regulation") applies to the Member States of the European Union and to Norway, Iceland and Switzerland.

66. The Regulation replaces the provisions of the Dublin Convention for determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed on 15 June 1990.

67. An additional regulation, Regulation no. 1560/2003 of 2 September 2003, lays down rules for the application of the Dublin Regulation.

68. The first recital of the Dublin Regulation states that it is part of a common policy on asylum aimed at progressively establishing an area of

freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

69. The second recital affirms that the Regulation is based on the presumption that the member States respect the principle of *non-refoulement* enshrined in the Geneva Convention and are considered as safe countries.

70. Under the Regulation, the Member States must determine, based on a hierarchy of objective criteria (Articles 5 to 14), which Member State bears responsibility for examining an asylum application lodged on their territory. The aim is to avoid multiple applications and to guarantee that each asylum seeker's case is dealt with by a single Member State.

71. Where it is established that an asylum seeker has irregularly crossed the border into a Member State having come from a third country, the Member State thus entered is responsible for examining the application for asylum (Article 10 § 1). This responsibility ceases twelve months after the date on which the irregular border crossing took place.

72. Where the criteria in the regulation indicate that another Member State is responsible, that State is requested to take charge of the asylum seeker and examine the application for asylum. The requested State must answer the request within two months from the date of receipt of that request. Failure to reply within two months is stipulated to mean that the request to take charge of the person has been accepted (Articles 17 and 18 §§ 1 and 7).

73. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged must notify the applicant of the decision to transfer him or her, stating the reasons. The transfer must be carried out at the latest within six months of acceptance of the request to take charge. Where the transfer does not take place within that time-limit, responsibility for processing the application lies with the Member State in which the application for asylum was lodged (Article 19).

74. By way of derogation from the general rule, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation (Article 3 § 2). This is called the “sovereignty” clause. In such cases the State concerned becomes the Member State responsible and assumes the obligations associated with that responsibility.

75. Furthermore, any Member State, even where it is not responsible under the criteria set out in the Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations (Article 15 § 1). This is known as the “humanitarian” clause. In this case that Member State will, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.

76. Another Council Regulation, no. 2725/2000 of 11 December 2000, provides for the establishment of the Eurodac system for the comparison of fingerprints ("the Eurodac Regulation"). It requires the States to register asylum seekers' fingerprints. The data is transmitted to Eurodac's central unit, run by the European Commission, which stores it in its central database and compares it with the data already stored there.

77. On 6 June 2007 the European Commission transmitted a report to the European Parliament and the Council on the evaluation of the Dublin system (COM(2007)299 final). On 3 December 2008 it made public its proposal for a recasting of the Dublin Regulation (COM(2008) 820 final/2). The purpose of the reform is to improve the efficiency of the system and ensure that all the needs of persons seeking international protection are covered by the procedure for determining responsibility.

78. The proposal aims to set in place a mechanism for suspending transfers under the Dublin system, so that, on the one hand, member States whose asylum systems are already under particularly heavy pressure are not placed under even more pressure by such transfers and, on the other hand, asylum seekers are not transferred to Member States which cannot offer them a sufficient level of protection, particularly in terms of reception conditions and access to the asylum procedure (Article 31 of the proposal). The State concerned must apply to the European Commission for a decision. The transfers may be suspended for up to six months. The Commission may extend the suspension for a further six months at its own initiative or at the request of the State concerned.

79. The proposal, examined under the codecision procedure, was adopted by the European Parliament at first reading on 7 May 2009 and submitted to the Commission and the Council.

80. At the Informal Justice and Home Affairs Council meeting in Brussels on 15 and 16 July 2010, the Belgian Presidency of the Council of the European Union placed on the agenda an exchange of views on the means of arriving at a single asylum procedure and a uniform standard of international protection by 2012. Discussion focused in particular on what priority the Council should give to negotiations on the recasting of the Dublin Regulation and on whether the ministers would back the inclusion of the temporary suspension clause.

81. The Court of Justice of the European Communities (CJEC), which became the Court of Justice of the European Union (CJEU) upon the entry into force of the Treaty of Lisbon, has delivered one judgment concerning the Dublin Regulation. In the *Petrosian* case (C-19/08, judgment of 29 January 2009) it was asked to clarify the interpretation of Article 20 §§ 1 and 2 concerning the taking of responsibility for an asylum application and the calculation of the deadline for making the transfer when the legislation of the requesting Member State provided for appeals to have suspensive

effect. The CJEU found that time started to run from the time of the decision on the merits of the request.

82. The CJEU has recently received a request from the Court of Appeal (United Kingdom) for a preliminary ruling on the interpretation to be given to the sovereignty clause in the Dublin Regulation (case of *N.S.*, C-411/10).

(b) The European Union's directives on asylum matters

83. Three other European texts supplement the Dublin Regulation.

84. *Directive 2003/9 of 27 January 2003, laying down minimum standards for the reception of asylum seekers in the Member States* ("the Reception Directive"), entered into force on the day of its publication in the Official Journal (OJ L 31 of 6.2.2003). It requires the States to guarantee asylum seekers:

- certain material reception conditions, including accommodation; food and clothing, in kind or in the form of monetary allowances; the allowances must be sufficient to protect the asylum seeker from extreme need;
- arrangements to protect family unity;
- medical and psychological care;
- access for minors to education, and to language classes when necessary for them to undergo normal schooling.

In 2007 the European Commission asked the CJEC (now the CJEU) to examine whether Greece was fulfilling its obligations concerning the reception of refugees. In a judgment of 19 April 2007 (case C-72/06), the CJEC found that Greece had failed to fulfil its obligations under the Reception Directive. The Greek authorities subsequently transposed the Reception Directive.

On 3 November 2009 the European Commission sent a letter to Greece announcing that it was bringing new proceedings against it.

85. *Directive 2005/85 of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status in the Member States* (the "Procedures Directive"), which entered into force on the day of its publication in the Official Journal (OJ L 326/13 of 13.12.2005), guarantees the following rights:

- an application for asylum cannot be rejected on the sole ground that it has not been made as soon as possible. In addition, applications must be examined individually, objectively and impartially;
- asylum applicants have the right to remain in the Member State pending the examination of their applications;
- the Member States are required to ensure that decisions on applications for asylum are given in writing and that, where an application is rejected, the reasons are stated in the decision and information on how to challenge a negative decision is given in writing;

- asylum seekers must be informed of the procedure to be followed, of their rights and obligations, and of the result of the decision taken by the determining authority;
- asylum seekers must receive the services of an interpreter for submitting their case to the competent authorities whenever necessary;
- asylum seekers must not be denied the opportunity to communicate with the UNHCR. More generally, the Member States must allow the UNHCR to have access to asylum applicants, including those in detention, as well as to information on asylum applications and procedures, and to present its views to any competent authority;
- applicants for asylum must have the opportunity, at their own cost, to consult a legal adviser in an effective manner. In the event of a negative decision by a determining authority, Member States must ensure that free legal assistance is granted on request. This right may be subject to restrictions (choice of counsel restricted to legal advisers specifically designated by national law, appeals limited to those likely to succeed, or free legal aid limited to applicants who lack sufficient resources).

The European Commission initiated proceedings against Greece in February 2006 for failure to honour its obligations, because of the procedural deficiencies in the Greek asylum system, and brought the case before the CJEC (now the CJEU). Following the transposition of the Procedures Directive into Greek law in July 2008, the case was struck out of the list.

On 24 June 2010 the European Commission brought proceedings against Belgium in the CJEU on the grounds that the Belgian authorities had not fully transposed the Procedures Directive – in particular, the minimum obligations concerning the holding of personal interviews.

In its proposal for recasting the Procedures Directive, presented on 21 October 2009 (COM(2009) 554 final), the Commission contemplated strengthening the obligation to inform the applicant. It also provided for a full and ex nunc review of first-instance decisions by a court or tribunal and specified that the notion of effective remedy required a review of both facts and points of law. It further introduced provisions to give appeals automatic suspensive effect. The proposed amendments were intended to improve consistency with the evolving case-law regarding such principles as the right to defence, equality of arms, and the right to effective judicial protection.

86. *Directive 2004/83 of 29 April 2004 concerns minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* ("the Qualification Directive"). It

entered into force 20 days after it was published in the Official Journal (OJ L 304 of 30.09.2004).

This Directive contains a set of criteria for granting refugee or subsidiary protection status and laying down the rights attached to each status. It introduces a harmonised system of temporary protection for persons not covered by the Geneva Convention but who nevertheless need international protection, such as victims of widespread violence or civil war.

The CJEC (now the CJEU) has delivered two judgments concerning the Qualification Directive: the *Elgafaji* (C-465/07) judgment of 17 February 2009 and the *Salahadin Abdulla and Others* judgment of 2 March 2010 (joined cases C-175, 176, 178 and 179/08).

C. Relevant texts of the European Commissioner for Human Rights

87. In addition to the reports published following his visits to Greece (see paragraph 160 below), the Commissioner issued a recommendation "concerning the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders", dated 19 September 2001, which states, *inter alia*:

> "1. Everyone has the right, on arrival at the border of a member State, to be treated with respect for his or her human dignity rather than automatically considered to be a criminal or guilty of fraud.
>
> 2. On arrival, everyone whose right of entry is disputed must be given a hearing, where necessary with the help of an interpreter whose fees must be met by the country of arrival, in order to be able, where appropriate, to lodge a request for asylum. This must entail the right to open a file after having being duly informed, in a language which he or she understands, about the procedure to be followed. The practice of *refoulement* "at the arrival gate" thus becomes unacceptable.
>
> 3. As a rule there should be no restrictions on freedom of movement. Wherever possible, detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures. Should detention remain the only way of guaranteeing an alien's physical presence, it must not take place, systematically, at a police station or in a prison, unless there is no practical alternative, and in such case must last no longer than is strictly necessary for organising a transfer to a specialised centre.
>
> ...
>
> 9. On no account must holding centres be viewed as prisons.
>
> ...
>
> 11. It is essential that the right of judicial remedy within the meaning of Article 13 of the ECHR be not only guaranteed in law but also granted in practice when a person alleges that the competent authorities have contravened or are likely to contravene a right guaranteed by the ECHR. The right of effective remedy must be guaranteed to

anyone wishing to challenge a *refoulement* or expulsion order. It must be capable of suspending enforcement of an expulsion order, at least where contravention of Articles 2 or 3 of the ECHR is alleged."

III. RELEVANT LAW AND PRACTICE IN GREECE

A. The conditions of reception of asylum seekers

1. Residence

88. The conditions of reception of asylum seekers in Greece are regulated primarily by Presidential Decree ("PD") no. 220/2007 transposing the Reception Directive. The provisions of this text applicable to the present judgment may be summarised as follows.

89. The authority responsible for receiving and examining the asylum application issues an asylum applicant's card free of charge immediately after the results of the fingerprint check become known and in any event no later than three days after the asylum application was lodged. This card, called the "pink card", permits the applicant to remain in Greece throughout the period during which his or her application is being examined. The card is valid for six months and renewable until the final decision is pronounced (Article 5 § 1).

90. Under Article 12 §§ 1 and 3 the competent authorities must take adequate steps to ensure that the material conditions of reception are made available to asylum seekers. They must be guaranteed a standard of living in keeping with their state of health and sufficient for their subsistence and to protect their fundamental rights. These measures may be subjected to the condition that the persons concerned are indigent.

91. An asylum seeker with no home and no means of paying for accommodation will be housed in a reception centre or another place upon application to the competent authorities (Article 6 § 2). According to information provided by the Greek Ministry of Health and Social Solidarity, in 2009 there were fourteen reception centres for asylum seekers in different parts of the country, with a total capacity of 935 places. Six of them were reserved for unaccompanied minors.

92. Asylum seekers who wish to work are issued with temporary work permits, in conformity with the conditions laid down in PD no. 189/1998 (Article 10 § 1 of PD no. 220/2007). Article 4 c) of PD 189/1998 requires the competent authority to issue the permit after making sure the job concerned does not interest "a Greek national, a citizen of the European Union, a person with refugee status, a person of Greek origin, and so on".

93. Asylum seekers have access to vocational training programmes under the same conditions as Greek nationals (Article 11).

94. If they are financially indigent and not insured in any way, asylum seekers are entitled to free medical care and hospital treatment. First aid is also free (Article 14 of PD no. 220/2007).

2. Detention

95. When the administrative expulsion of an alien is permitted under section 76(1) of Law no. 3386/2005 (see paragraph 119, below) and that alien is suspected of intending to abscond, considered to be a threat to public order or hinders the preparation of his or her departure or the expulsion procedure, provisional detention is possible until the adoption, within three days, of the expulsion decision (section 76(2)). Until Law 3772/2009 came into force, administrative detention was for three months. It is now six months and, in certain circumstances, may be extended by twelve months.

96. An appeal to the Supreme Administrative Court against an expulsion order does not suspend the detention (section 77 of Law no. 3386/2005).

97. Where section 76(1) is found to apply upon arrival at Athens international airport, the persons concerned are placed in the detention centre next to the airport. Elsewhere in the country, they are held either in detention centres for asylum seekers or in police stations.

98. Under Article 13 § 1 of PD no. 90/2008, lodging an application for asylum is not a criminal offence and cannot, therefore, justify the applicant's detention, even if he or she entered the country illegally.

B. The asylum procedure

1. Applicable provisions

99. The provisions applicable to the applicant's asylum application are found in the following Presidential Decrees: PD no. 61/1999 on the granting of refugee status and its withdrawal and the expulsion of an alien, residence permits for family members and means of cooperation with the UNHCR; and PD no. 90/2008 transposing Procedures Directive 2005/85, as amended by PD no. 81/2009.

(a) Access to the procedure

100. All nationals of third countries or stateless persons have the right to apply for asylum. The authorities responsible for receiving and examining the applications make sure that all adults are able to exercise their right to lodge an application provided that they present themselves before the authorities in person (Article 4 § 1 of PD no. 90/2008).

101. The authorities immediately inform asylum seekers of their rights and obligations by giving them a brochure, in a language they understand, describing the procedure for examining asylum applications and the asylum seeker's rights and obligations. If the asylum seeker does not understand the language used in the form, or is illiterate, he is informed orally, with the assistance of an interpreter (Article 1 § 6 of PD 61/1999 and Article 8 § 1 a) of PD no. 90/2008).

102. An information brochure has been drafted in collaboration with the UNHCR and exists in six languages (Arabic, English, French, Greek, Persian and Turkish).

103. When asylum seekers arrive at Athens international airport, the obligation to provide this information lies with the security services present in the airport. Interpretation is provided by interpreters from Attica police headquarters, non-governmental organisations or airport staff.

104. Asylum seekers must cooperate with the competent authorities (Article 9 § 1 of PD no. 90/2008). In particular, they must inform them of any change of address (Article 6 § 1 of PD no. 220/2007).

105. If they have not already done so at the airport, asylum seekers must then report, on a Saturday, to the Aliens Directorate at Attica police headquarters, to submit their applications for asylum. Since PD no. 81/2009 (Article 1) entered into force, the lodging of asylum applications has been decentralised to the fifty-two police headquarters in different parts of the country.

106. Asylum seekers who have applied for asylum at the airport must report within three days to Attica police headquarters to register their place of residence.

107. They are then invited to the police headquarters for an individual interview, during which they may be represented. The interview is held with the assistance of an interpreter and the person concerned is asked to confirm all the information contained in the application and to give details of their identity, by what route they arrived in Greece and the reasons why they fled their country of origin (Article 10 § 1 of PD no. 90/2008).

(b) Examination of the application for asylum at first instance

108. Until 2009, after the interview the police officer in charge of the interview transmitted the asylum application to one of the three refugee advisory committees within the Ministry of Public Order (now the Ministry of Civil Protection) for an opinion. These committees were made up of police officers and municipal representatives and in some cases the UNHCR was an observer. The committee to which the application was referred transmitted an opinion, in the form of an internal report, to the Attica police headquarters, which gave its decision.

109. PD no. 81/2009 provides for the decentralisation of the examination of asylum applications at first instance and the setting up of refugee

advisory committees in all fifty-two police headquarters round the country (Article 3). The examination procedure itself has not changed, but it now takes place in all fifty-two police headquarters in the different regions.

110. The decisions are taken on an individual basis, after careful, objective and impartial examination. The authorities gather and assess precise, detailed information from reliable sources, such as that supplied by the UNHCR on the general situation in the country of origin (Article 6 § 2 of PD no. 90/2008). As at every stage of the procedure, applicants are provided with an interpreter at the State's expense (Article 8 § 1 b) of PD 90/2008).

111. They have the right to consult a legal or other counsel at their own expense (Article 11 § 1 of PD no. 90/2008).

112. The decision is served on the applicant or his or her lawyer or legal representative (Article 8 § 1 d) of PD no. 90/2008). On this subject, point 10 in the brochure reads as follows:

> "...The [pink] card must mention the place of residence you have declared or the reception centre assigned to you for your stay. When the decision is given, it will be sent to the address you declared; that is why it is important to inform the police of any change of address without delay."

113. If the address is unknown, the decision is sent to the municipality where the head office of the service where the asylum application was lodged is located, where it will be displayed on a municipal notice board and communicated to the UNHCR (Article 7 § 2 of PD no. 90/2008).

114. The information is communicated in a language which the asylum seeker may reasonably be supposed to understand if he or she is not represented and has no legal assistance (Article 8 § 1 e) of PD 90/2008).

(c) Appeals against negative decisions

115. Until 2009, the refugee advisory committees examined asylum applications at second instance when these had been rejected (Article 25 of PD no. 90/2008). The UNHCR sat on these committees (Article 26 of PD no. 90/2008). Thereafter it was possible to apply to the Supreme Administrative Court to quash the decision. Article 5 of PD no. 81/2009 did away with the second-instance role of the refugee advisory committees. Since 2009 appeals against the first-instance decision have lain directly to the Supreme Administrative Court. In July 2009 the UNHCR decided that it would no longer take part in the procedure.

116. Unless the applicant has already been given the relevant information in writing, a decision to reject an application must mention the possibility of lodging an appeal, the time-limit for doing so and the consequences of letting the deadline pass (Articles 7 § 3 and 8 § 1 e) of PD 90/2008).

117. Appeals to the Supreme Administrative Court do not suspend the execution of an expulsion order issued following a decision to reject an

application for asylum. However, aliens have the right to appeal against a deportation order within five days of receiving notification thereof. The decision is then given within three working days from the day on which the appeal was lodged. This type of appeal does suspend the enforcement of the expulsion decision. Where detention is ordered at the same time as expulsion, the appeal suspends the expulsion but not the detention (section 77 of Law no. 3386/2005).

118. Asylum seekers are entitled to legal aid for appeals to the Supreme Administrative Court provided that the appeals are not manifestly inadmissible or ill-founded (Article 11 § 2 of PD no. 90/2008).

(d) Protection against *refoulement*

119. Law no. 3386/2005, as amended by Law no. 3772/2009 (section 76(1) c), authorises the administrative expulsion of an alien in particular when his or her presence in Greece is a threat to public order or national security. Aliens are considered to represent such a threat if there are criminal proceedings pending against them for an offence punishable by more than three months' imprisonment. Illegally leaving the country using a false passport or other travel document is a criminal offence under sections 83(1) and 87(7) of Law no. 3386/2005.

120. However, asylum applicants and refugees are excluded from the scope of this Law (sections 1 c) and 79 d)). Asylum seekers may remain in the country until the administrative procedure for examining their application has been completed, and cannot be removed by any means (Article 1 § 1 of PD no. 61/1999 and Article 5 § 1 of PD no. 90/2008).

(e) Authorisation to stay for humanitarian reasons and subsidiary protection

121. In exceptional cases, particularly for humanitarian reasons, the Minister of Public Order (now the Minister of Civil Protection) may authorise the temporary residence of an alien whose application for refugee status has been rejected, until it becomes possible for him or her to leave the country (section 25(6) of Law no. 1975/1991). Where such authorisation is given for humanitarian reasons the criteria taken into account are the objective impossibility of removal or return to the country of origin for reasons of *force majeure*, such as serious health reasons, an international boycott of the country of origin, civil conflicts with mass human rights violations, or the risk of treatment contrary to Article 3 of the Convention being inflicted in the country of origin (Article 8 § 2 of PD no. 61/1999). In this last case the Supreme Administrative Court considers that taking into consideration the risks in respect of Article 3 of the Convention is not an option but an obligation for the administrative authorities (see, for example, judgments nos. 4055/2008 and 434/2009).

122. Subsidiary protection may also be granted in conformity with PD no. 96/2008, which transposes Directive 2004/83/EC on minimum standards

for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

(f) Ongoing reforms in the asylum procedure

123. Following the parliamentary elections held in Greece in October 2009, the new Government set up an expert committee to give an opinion on the reform of the asylum system in Greece. Composed of experts from the Ministries of Civil Protection, the Interior and Health, and from the UNHCR, the Greek Council for refugees and the Ombudsman's office, as well as academics, the committee was asked to propose amendments to the current law and practice and make suggestions concerning the composition and modus operandi of a new civil authority to deal with applications for asylum, composed not of police officers, like today, but of public servants. It is also envisaged to restore the appellate role of the refugee advisory committees.

124. The proposals of the expert committee were submitted to the Greek Government on 22 December 2009 and a draft bill is being prepared. According to Greek Prime Minister George Papandreou, speaking at a press conference on 20 January 2010 with the participation of the United Nations High Commissioner for Refugees, Antonio Guterres, the aim pursued is to reform the legislative framework "to bring it into line with the 1951 Convention on refugees and with European law".

2. Statistical data on asylum in Greece

125. According to statistics published by the UNHCR, in 2008 Greece was in seventh place on the list of European Union Member States in terms of the number of asylum applicants received, with a total of 19,880 applications lodged that year (compared with 15,930 in 2009) (*Asylum Levels and Trends in Industrialized Countries*, 2009). 88% of the foreign nationals who entered the European Union in 2009 entered through Greece.

126. For 2008, the UNHCR reports a success rate at first instance (proportion of positive decisions in relation to all the decisions taken) of 0.04% for refugee status under the Geneva Convention (eleven people), and 0.06% for humanitarian or subsidiary protection (eighteen people) (UNHCR, *Observation on Greece as a country of asylum*, 2009). 12,095 appeals were lodged against unfavourable decisions. They led to 25 people being granted refugee status by virtue of the Geneva Convention and 11 for humanitarian reasons or subsidiary protection. Where appeals were concerned, the respective success rates were 2.87% and 1.26%. By comparison, in 2008 the average success rate at first instance was 36.2% in five of the six countries which, along with Greece, receive the largest number of applications (France, the United Kingdom, Italy, Sweden and

Germany) (UNHCR, *Global Trends 2008, Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*).

127. Until 2009, 95% of asylum applications went through Attica police headquarters. Since the processing of asylum applications was decentralised out to police headquarters all over the country, about 79% of the applications have been handled by Attica police headquarters.

IV. RELEVANT LAW AND PRACTICE IN BELGIUM

128. The Aliens Act organises the different stages of the asylum procedure. Where "Dublin" asylum seekers are concerned, the relevant provisions may be summarised as follows.

A. The Aliens Office

129. The Aliens Office is the administrative body responsible for registering asylum applications after consulting the Eurodac database. It is also responsible for interviewing asylum seekers about their background in order to determine whether Belgium is the country responsible under the Dublin Regulation for examining the asylum application. These aspects of the procedure are regulated by section 51/5 of the Aliens Act.

130. After the interview, the Aliens Office completes the "Dublin" request form. The form contains sections for general information about the asylum seekers and for more specific details of how they got to Belgium, their state of health and their reasons for coming to Belgium. There is no provision for asylum seekers to be assisted by a lawyer during the interview.

131. Where the Aliens Office considers that Belgium is responsible (positive decision) under the Dublin criteria or by application of the special clauses, or because the deadline for transfer has passed, it transmits the application to the Office of the Commissioner General for Refugees and Stateless Persons ("the CGRSP"), the Belgian body responsible for examining asylum applications.

132. Where the Aliens Office considers that Belgium is not responsible for examining the application (negative decision), it submits a request to the State responsible to take charge of the application. If that State agrees, explicitly or tacitly, the Aliens Office rejects the asylum application and issues a decision refusing a residence permit, together with an order to leave the country.

133. Reasons must be given for negative decisions ordering the transfer of asylum seekers. When the transfer is to Greece, the reasoning for the order to leave the country refers to the presumption that Greece honours its Community and international obligations in asylum matters and to the fact that recourse to the sovereignty clause is not obligatory in the Dublin Regulation. In some cases mention is made of the fact that the applicant has

adduced no evidence demonstrating the concrete consequences of the general situation for his or her individual situation.

134. There are no accurate statistics for determining in what proportion the Aliens Office applies the sovereignty clause. The positive decisions taken do not specify. At most it appears, from the data given in the Aliens Office's 2009 annual report, that in 2009 Belgium issued 1,116 requests to other Member States to take charge of asylum applications, 420 of which were to Greece, and that a total of 166 applications were referred to the CGRSP.

135. While efforts are being made to determine which State is responsible, the alien may be held or detained in a given place for as long as is strictly necessary, but no longer than one month.

B. The Aliens Appeals Board

136. Decisions taken by the Aliens Office concerning residence may be challenged by appealing to the Aliens Appeals Board. The Aliens Appeals Board is an administrative court established by the Law of 15 September 2006 reforming the *Conseil d'Etat* and setting up an Aliens Appeals Board. It took over the powers of the *Conseil d'Etat* in disputes concerning aliens, as well as those of the Permanent Refugee Appeals Board.

137. Appeals against orders to leave the country do not have suspensive effect. The law accordingly provides for the possibility of lodging an application for a stay of execution of such an order. Such an application for a stay of execution must be lodged prior to or, at the latest, at the same time as the appeal against the order.

1. Stay of execution under the extremely urgent procedure

138. By virtue of section 39/82 of the Aliens Act, where imminent danger is alleged, an application for a stay of execution of an order to leave the country may be lodged under the extremely urgent procedure. The Aliens Appeals Board will grant the application if it considers that the grounds relied on are sufficiently serious to justify setting aside the impugned decision, and if immediate execution of the decision is likely to cause serious, virtually irreparable damage to the person concerned. The application for a stay of execution must be lodged no later than five days, but no earlier than three working days, following notification of the order to leave the country. Prior to the entry into force on 25 May 2009 of the Law of 6 May 2009, the deadline was twenty-four hours. An application for a stay of execution under the extremely urgent procedure suspends the enforcement of the expulsion order.

139. Section 39/82(4) provides for an application for a stay of execution under the extremely urgent procedure to be examined within forty-eight

hours of its receipt by the Aliens Appeals Board. If the President of the division or the judge concerned does not give a decision within that time, the First President or the President must be informed and must make sure that a decision is taken within seventy-two hours of the application being received. They may even examine the case and take the decision themselves.

140. Under the case-law established by the *Conseil d'Etat* and taken over by the Aliens Appeals Board, deprivation of liberty is enough to establish the imminent nature of the risk, without a departure having actually been scheduled.

2. Examination of the merits

141. The Aliens Appeals Board then proceeds to review the lawfulness of the impugned decision under section 39/2(2) of the Aliens Act, verifying that the administrative authority's decision relies on facts contained in the administrative file, that in the substantive and formal reasons given for its decision it did not, in its interpretation of the facts, make a manifest error of appreciation, and that it did not fail to comply with essential procedural requirements or with statutory formalities required on pain of nullity, or exceed or abuse its powers (see, for example, Aliens Appeals Board, judgment no. 14.175 of 31 July 2008).

142. Where the application for a stay of execution is rejected and the applicant deported, the proceedings on the merits continue. The Aliens Appeals Board may dismiss appeals against the order to leave the country, however, on the grounds that as the applicants are no longer in the country they no longer have any interest in challenging that order (judgment no. 28.233 of 29 May 2009; see also judgment no. 34.177 of 16 November 2009).

3. Case-law of the Aliens Appeals Board in "Dublin" cases

143. The first cases in which asylum seekers reported difficulties in accessing the asylum procedure in Greece date back to April 2008. In its judgment no. 9.796 of 10 April 2008, the Aliens Appeals Board stayed the execution of a "Dublin" transfer to Greece under the extremely urgent procedure because the Greek authorities had not responded to the request for them to take charge of the asylum application concerned and the Aliens Office had not sought individual guarantees. The Aliens Appeals Board found that a tacit agreement failed to provide sufficient guarantees of effective processing of the asylum application by the Greek authorities. Since March 2009, however, the Aliens Office no longer seeks such guarantees and takes its decisions based on tacit agreements. The Aliens Appeals Board no longer questions this approach, considering that Greece has transposed the Qualification and Procedures directives.

144. In assessing the reasoning for the order to leave the country the Aliens Appeals Board takes into consideration first and foremost the facts revealed to the Aliens Office during the Dublin interview and recorded in the administrative file. Should evidence be adduced subsequently, including documents of a general nature, in a letter to the Aliens Office during the Dublin examination process or in an appeal against the order to leave the country, it is not systematically taken into account by the Aliens Appeals Board, on the grounds that it was not adduced in good time or that, because it was not mentioned in the asylum applicant's statements to the Aliens Office, it is not credible (see, for example, judgments no. 41.482 of 9 April 2010 and no. 41.351 of 1 April 2010).

145. In cases where the Aliens Appeals Board has taken into account international reports submitted by Dublin asylum applicants confirming the risk of violation of Article 3 of the Convention because of the deficiencies in the asylum procedure and the conditions of detention and reception in Greece, its case-law is divided as to the conclusions to be drawn.

146. Certain divisions have generally been inclined to take the general situation in Greece into account. For example, in judgments nos. 12.004 and 12.005 of 29 May 2008, the Board considered that the Aliens Office should have considered the allegations of ill-treatment in Greece:

> "The applicant party informed the other party in good time that his removal to Greece would, in his opinion, amount to a violation of Article 3 of the Convention, in particular because of the inhuman and degrading treatment he alleged that he had suffered and would no doubt suffer again there. ... The Board notes that in arguing that he faced the risk, in the event that he was sent back to Greece, of being exposed to inhuman and degrading treatment contrary to Article 3 of the Convention, and in basing his arguments on reliable documentary sources which he communicated to the other party, the applicant formulated an explicit and detailed objection concerning an important dimension of his removal to Greece. The other party should therefore have replied to that objection in its decision in order to fulfil its obligations with regard to reasoning."

147. In the same vein, in judgment no. 25.962 of 10 April 2009, the Aliens Appeals Board stayed execution of a transfer to Greece in the following terms:

> "The Board considers that the terms of the report of 4 February 2009 of the Commissioner for Human Rights of the Council of Europe, (...), and the photos illustrating the information contained in it concerning the conditions of detention of asylum seekers are particularly significant. ... While it postdates the judgments of the Board and of the European Court of Human Rights cited in the decision taken, the content of this report is clear enough to establish that despite its recent efforts to comply with proper European standards in matters of asylum and the fundamental rights of asylum seekers, the Greek authorities are not yet able to offer asylum applicants the minimum reception or procedural guarantees."

148. Other divisions have opted for another approach, which consists in taking into account the failure to demonstrate a link between the general situation in Greece and the applicant's individual situation. For example, in

judgment no. 37.916 of 27 February 2009, rejecting a request for a stay of execution of a transfer to Greece, the Aliens Appeals Board reasoned as follows:

> [Translation by the Registry]
>
> "The general information provided by the applicant in his file mainly concerns the situation of aliens seeking international protection in Greece, the circumstances in which they are transferred to and received in Greece, the way they are treated and the way in which the asylum procedure in Greece functions and is applied. The materials establish no concrete link showing that the deficiencies reported would result in Greece violating its *non-refoulement* obligation vis-à-vis aliens who, like the applicant, were transferred to Greece ... Having regard to the above, the applicant has not demonstrated that the enforcement of the impugned decision would expose him to a risk of virtually irreparable harm".

149. In three cases in 2009 the same divisions took the opposite approach and decided to suspend transfers to Athens, considering that the Aliens Office, in its reasoning, should have taken into account the information on the general situation in Greece. These are judgments nos. 25.959 and 25.960 of 10 April 2009 and no. 28.804 of 17 June 2009).

150. In order to harmonise the case-law, the President of the Aliens Appeals Board convened a plenary session on 26 March 2010 which delivered three judgments (judgments nos. 40.963, 40.964 and 10.965) in which the reasoning may be summarised as follows:

- Greece is a member of the European Union, governed by the rule of law, a Party to the Convention and the Geneva Convention and bound by Community legislation in asylum matters;
- based on the principle of intra-community trust, it must be presumed that the State concerned will comply with its obligations (reference to the Court's case-law in *K.R.S. v. the United Kingdom* (dec.), no. 32733/08, ECHR 2008-...);
- in order to reverse that presumption the applicant must demonstrate *in concreto* that there is a real risk of his being subjected to treatment contrary to Article 3 of the Convention in the country to which he is being removed;
- simple reference to general reports from reliable sources showing that there are reception problems or that *refoulement* is practised or the mere fact that the asylum procedure in place in a European Union Member State is defective does not suffice to demonstrate the existence of such a risk.

151. In substance, the same reasoning is behind the judgments of the Aliens Appeals Board when it examines appeals to set aside a decision. Thus, after having declared the appeal inadmissible as far as the order to leave the country was concerned, because the applicant had already been removed, the aforementioned judgment no. 28.233 of 29 May 2009 went on to analyse the applicant's complaints under the Convention – particularly Article 3 – and rejected the appeal because the applicant had failed to demonstrate any concrete link between the general situation in Greece and his individual situation.

C. *The Conseil d'Etat*

152. The provisions concerning referrals to the *Conseil d'Etat* and the latter's powers are found in the laws on the *Conseil d'Etat* coordinated on 12 January 1973.

153. A lawyer may lodge an administrative appeal with the *Conseil d'Etat* within thirty days of notification of the judgment of the Aliens Appeals Board.

154. If the appeal is to be examined by the *Conseil d'Etat*, it must be declared admissible. It will be declared admissible if it is not manifestly inadmissible or devoid of purpose; if it is claimed that there has been a breach of the law or a failure to comply with essential procedural requirements or with statutory formalities required on pain of nullity, as long as that claim is not manifestly ill-founded and the alleged error may have influenced the decision and is sufficient to justify setting it aside; or if its examination is necessary to guarantee the consistency of the case-law.

155. This procedure is not of suspensive effect. The *Conseil d'Etat* gives judgment on the admissibility of the application in principle within eight days.

156. Where the application is declared admissible, the *Conseil d'Etat* gives a ruling within six months and may overturn decisions of the Aliens Appeals Board for breach of the law or for failure to comply with essential procedural requirements or with statutory formalities required on pain of nullity.

157. The judgments referred to in the case file show that the *Conseil d'Etat* does not question the approach of the Aliens Appeals Board explained above and considers that no problem is raised under Article 13 of the Convention (see, for example, judgment no. 5115 of 15 December 2009).

D. The courts and tribunals

158. Decisions taken by the Aliens Office concerning detention (orders to detain applicants in a given place and orders to redetain them) may be

challenged in the courts. In its examination of applications for release, the Brussels Court of Appeal (Indictments Division) has developed case-law that takes into account the risks faced by the persons concerned were they to be sent back to Greece, as well as the Court's finding that Greece was violating its obligations under Article 3 (*S.D. v. Greece*, no. 53541/07, 11 June 2009, and *Tabesh v. Greece*, no. 8256/07, 26 November 2009).

V. INTERNATIONAL DOCUMENTS DESCRIBING THE CONDITIONS OF DETENTION AND RECEPTION OF ASYLUM SEEKERS AND ALSO THE ASYLUM PROCEDURE IN GREECE

A. Reports published since 2006

159. Since 2006 reports have regularly been published by national, international and non-governmental organisations deploring the conditions of reception of asylum seekers in Greece.

160. The following is a list of the main reports:

- European Committee for the Prevention of Torture, following its visit to Greece from 27 August to 9 September 2005, published on 20 December 2006;
- Report of the LIBE Committee delegation on its visit to Greece (Samos and Athens), European Parliament, 17 July 2007;
- Pro Asyl, "*The truth may be bitter but must be told - The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard*", October 2007;
- UNHCR, "*Asylum in the European Union. A Study of the implementation of the Qualification Directive*", November 2007;
- European Committee for the Prevention of Torture, following its visit to Greece from 20 to 27 February 2007, 8 February 2008;
- Amnesty International, "*Greece: No place for an asylum-seeker*", 27 February 2008;
- European Council on Refugees and Exiles ("ECRE"), "*Spotlight on Greece – EU asylum lottery under fire*", 3 April 2008;
- Norwegian Organisation for Asylum Seekers ("NOAS"), "*A gamble with the right to asylum in Europe – Greek asylum policy and the Dublin II regulation*", 9 April 2008;
- UNHCR, "*Position on the return of asylum seekers to Greece under the Dublin Regulation*", 15 April 2008;
- Human Rights Watch, "*Stuck in a revolving door – Iraqis and other asylum seekers and migrants at Greece/Turkey entrance to the European Union*", November 2008;

- Clandestino, "*Undocumented migration: counting the uncountable: data and trends across Europe*", December 2008;
- Human Rights Watch, "*Left to survive*", December 2008;
- Cimade, "*Droit d'asile: les gens de Dublin II, parcours juridique de demandeurs d'asile soumis à une réadmission selon le règlement Dublin II*", December 2008;
- European Commissioner for Human Rights, Mr T. Hammarberg, report prepared following his visit to Greece from 8 to 10 December 2008, 4 February 2009;
- Greek Council of Refugees, "The Dublin Dilemma – "*Burden shifting and putting asylum seekers at risk*", 23 February 2009;
- European Committee for the Prevention of Torture, report prepared following its visit to Greece from 23 to 28 September 2008, 30 June 2009;
- Austrian Red Cross and Caritas, "*The Situation of Persons Returned by Austria to Greece under the Dublin Regulation. Report on a Joint Fact-Finding Mission to Greece (May 23rd - 28th 2009)*", August 2009;
- Norwegian Helsinki Committee ("NHC"), NOAS and Aitima, "*Out the back door: the Dublin II Regulation and illegal deportations from Greece*", October 2009;
- Human Rights Watch, "*Greece: Unsafe and Unwelcoming Shores*", October 2009;
- UNHCR, Observations on Greece as a country of asylum, December 2009;
- Amnesty International, "*The Dublin II Trap: transfers of Dublin Asylum Seekers to Greece*", March 2010;
- National Commission for Human Rights (Greece), "*Detention conditions in police stations and detention areas of aliens*", April 2010;
- Amnesty International, "*Irregular migrants and asylum-seekers routinely detained in substandard conditions*", July 2010

B. Conditions of detention

161. The above-mentioned reports attest to a systematic practice of detaining asylum seekers in Greece from a few days up to a few months following their arrival. The practice affects both asylum seekers arriving in Greece for the first time and those transferred by a Member State of the European Union under the Dublin Regulation. Witnesses report that no information is given concerning the reasons for the detention.

162. All the centres visited by the bodies and organisations that produced the reports listed above describe a similar situation to varying degrees of gravity: overcrowding, dirt, lack of space, lack of ventilation,

little or no possibility of taking a walk, no place to relax, insufficient mattresses, dirty mattresses, no free access to toilets, inadequate sanitary facilities, no privacy, limited access to care. Many of the people interviewed also complained of insults, particularly racist insults, proffered by staff and the use of physical violence by guards.

163. For example, following its visit to Greece from 27 August to 9 September 2005 the CPT reported:

> "The building of the new special holding facilities for foreigners (...) represented an opportunity for Greece to adopt an approach more in line with the norms and standards developed within Europe. Regrettably, the authorities have maintained a carceral approach, often in threadbare conditions and with no purposeful activities and minimal health provision, for persons who are neither convicted nor suspected of a criminal offence and who have, as described by many Greek interlocutors, often experienced harrowing journeys to arrive in Greece."

In February 2007 the CPT inspected 24 police stations and holding centres for migrants run by the Ministry for Public Order and concluded that "persons deprived of their liberty by law enforcement officials in Greece run a real risk of being ill-treated". It added:

> "[Since the CPT's last visit to Greece, in 2005] there has been no improvement as regards the manner in which persons detained by law enforcement agencies are treated. The CPT's delegation heard, once again, a considerable number of allegations of ill- treatment of detained persons by law enforcement officials. Most of the allegations consisted of slaps, punches, kicks and blows with batons, inflicted upon arrest or during questioning by police officers. (...) In several cases, the delegation's doctors found that the allegations of ill-treatment by law enforcement officials were consistent with injuries displayed by the detained persons concerned."

In November 2008 Human Rights Watch expressed its concern in these terms:

> "Although Greek police authorities did not give Human Rights Watch unimpeded access to assess conditions of detention in the locations we asked to visit, we were able to gather testimonies from detainees that paint an alarming picture of police mistreatment, overcrowding, and unsanitary conditions, particularly in places where we were not allowed to visit, such as border police stations, the airport, Venna, and Mitilini. The detention conditions and police abuses described in the three preceding sections of this report certainly constitute inhuman and degrading treatment."

In its December 2008 report Cimade observed:

> ""In 2003 1,000 people arrived in Lesbos; in 2007 they numbered 6,000 and in the first eight months of 2008 there were 10,000 arrivals. (...) A group of demonstrators are waiting for us: chanting "no border, no nation, no deportation", about ten of them demanding that the place be closed down. Arms reach out through the fencing, calling for help. Three large caged-in rooms each holding 85 men: Afghans, Palestinians, Somalians, locked up all day long in appalling squalor. It is chilly in the late Greek summer and people are sleeping on the bare concrete floor. There is a strong smell that reminds me of the makeshift holding areas in the waiting zone at Roissy (...). Most of the men have been there several days, some for a month. They do not understand why they are there. The men have been separated from the women and

children. I go up to the second level: a Sri Lankan man with an infectious disease is being held in isolation in a small bungalow. The hangar where the women and children are held is the only open one. There are beds, but not enough, so there are mattresses on the bare concrete floor. It is late summer, but everyone complains that they are cold and there are not enough blankets. The last jail, the one for minors. There are twenty-five of them. (...)"

In his report dated February 2009, the European Commissioner for Human Rights declared:

"During the meeting with the Commissioner, the authorities in Evros department informed him that as at 1 December 2008 there were 449 irregular migrants detained by the police in six different places of detention in that department. The five most common nationalities were: Iraq (215), Afghanistan (62), Georgia (49), Pakistan (37) and Palestine (27). On 9 December 2008, date of the Commissioner's visit, at the two separate warehouse-type detention rooms of the Feres border guard station, which dates from 2000, there were 45 young, male, irregular migrants in detention, most of them Iraqis. (...) They were in fact crammed in the rooms, sleeping and stepping upon mattresses that had been placed on the floor and on a cement platform, one next to the other. In the bathrooms the conditions were squalid. Some detainees had obvious skin rashes on their arms and one with bare feet complained that the authorities did not provide him with shoes and clean clothes. (...). On 9 December 2008 the police authorities informed the Commissioner that at Kyprinos (Fylakio) there were 320 inmates in seven detention rooms, the majority of them being of Iraqi and Afghan nationalities."

164. The CPT visited the detention centre next to Athens international airport in August and September 2005. It noted:

"The conditions in the separate cell-block are of concern to the CPT's delegation. Each cell (measuring 9.5m²) had an official capacity of five persons, already too high. In fact, the registers showed that on many occasions, for example in May and June 2005 the occupancy rate reached six and even as high as nine persons per cell. An examination of the cells seemed to indicate that originally they had been designed for one person as there was only a single plinth in the cells – certainly no more than three persons, preferably no more than two, should be held overnight in such cells. The sanitary facilities were outside the cells and the delegation heard many complaints that the police guards did not respond rapidly to requests to go to the toilet; further, access to the shower appeared extremely limited, and five persons, in the same cell, claimed they had not had a shower in seven days – the overbearing hot, sweaty stench lent much credence to their allegation. The delegation also met a man who had spent one and a half months in one of the cells with no change of clothes, no access to fresh air nor any exercise nor any purposeful activity."

Following its visit to Greece in 2007, the CPT noted that there had been no improvement as regards the manner in which persons detained were treated and reported cases of ill-treatment at the hands of the police officers in the deportation cell at Athens International Airport:

"At Petru Rali Alien detention facility, a Bangladeshi national alleged that he had been slapped and kicked by the escorting police officers in the deportation cell at Athens International Airport after he had refused deportation. He further alleged that they had compressed his throat, pressed their fingers into his eye sockets, twisted his hands behind his back and kicked him on the back of the legs, the buttocks and in the

abdomen, after which he had fainted. On examination by one of the medical members of the delegation, the following injuries were observed: a small abrasion (approximately 0.3 cm) on the lower lip and a red linear contusion on the left cheek beneath the eye (2 cm), which had two abrasions therein; diffuse areas of purplish bruising on both sides of the forehead and a reddish bruise (2 cm) on the centre of the chest; swelling over the thyroid cartilage on the front of the neck and swelling of the outer parts of both upper arms; on the right leg, beneath and lateral to the kneecap, a diffuse area of purplish bruising with a reddish area (approximately 2 cm x 2 cm) in its proximal part.

165. At the time of its visits in October 2009 and May 2010, Amnesty International described the detention centre next to the airport as follows:

"The facility is divided into three sectors. The first consists of three cells, each approximately 7m2. There is one window in each cell, and the sector has two separate toilets and showers. The second consists of three large cells, each approximately 50m2. There are separate toilets in the corridor outside the cells. The third sector consists of nine very small cells, each approximately 10m2. The cells are arranged in a row, off a small corridor where a card phone is situated. On the opposite side of the corridor there are two toilets and two showers.

During the October 2009 visit, Amnesty International delegates were able to view the first two sectors where Dublin II returnees and other asylum-seekers were being held. The delegates observed that detainees were held in conditions of severe overcrowding and that the physical conditions were inadequate. Many asylum-seekers reported that they had been verbally abused by police officers.

During the organization's visit in May 2010, Amnesty International representatives were allowed to visit all three sectors. The police authorities told delegates that the first sector was used for the detention of Dublin II returnees and other asylum-seekers, the second for the detention of female irregular migrants convicted for attempting to leave Greece with false documents and the third for the detention of male irregular migrants convicted for attempting to leave Greece with false documents.

During the May 2010 visit, there were seven asylum-seekers held in the first sector (six male and one female) but no Dublin II returnees. In the second sector, 15 females were held in one cell, three of them pregnant. One of the pregnant women complained several times that she could not breathe, and was asking when she could go outside her cell. In another cell there was a man with an injured leg. Those held in the first and second sector told Amnesty International delegates that the police rarely unlocked the doors of their sectors. As a result, they did not have access to the water cooler situated outside, and were forced to drink water from the toilets. At the time of the visit approximately 145 detainees were held in the third sector in conditions of severe overcrowding. Among them, delegates found a Dublin II returnee. There were nine cells in total. The delegates were able to view two of the cells, each of which contained only one bed (a concrete base with a mattress on top) and held between 14 and 17 individuals. There were not enough mattresses, and detainees slept on the floor. As a result of the overcrowding and mattresses on the floor, there was no space to move around. The detainees told Amnesty International that, because of the lack of space, they could not all lie down and sleep at the same time. While the cells viewed had windows, the overcrowding meant that the ventilation was not sufficient. The heat in the cells was unbearable.

Detainees held in the third sector told Amnesty International that the police officers did not allow them to walk in the corridor outside their cells, and that there were severe difficulties in gaining access to the toilets. At the time of the organization's visit, detainees were knocking on the cell doors and desperately asking the police to let them go to the toilet. Amnesty International delegates observed that some people who were allowed to go to the toilet were holding a plastic water bottle half or almost completely full of urine. The police authorities admitted that in every cell detainees used plastic bottles for their toilet needs which they emptied when they were allowed to go to the toilet. The delegates also observed that the toilet facilities were dirty and the two showers had neither door nor curtain, and thus lacked any privacy.

The Athens airport police authorities told Amnesty International that the imposition of prison sentences on irregular migrants or asylum-seekers arrested at the airport for using false documents, who were unable to pay trial expenses, contributed to the overcrowding of the detention area.

At the time of the visit, the organization observed a complete lack of hygiene products such as soap, shampoo and toilet paper in all sectors. In addition, many of those detained told the delegates they had no access to their luggage, so they did not have their personal belongings, including changes of clothes. Some said that, as a result, they had been wearing the same clothes for weeks. Furthermore, there was no opportunity for outside exercise at all. Two individuals complained that they did not have access to their medication because it was in their luggage. Similar reports were received during the October 2009 visit. In addition, concerns regarding access to medical assistance remained unchanged since October 2009. The airport authorities told Amnesty International that there was no regular doctor in the facility and medical care was provided only when requested by a detainee by calling the airport's first aid doctors."

166. Following their visit on 30 April 2010, *Médecins sans Frontières – Greece* published a report which also described overcrowding in the detention centre (300 detainees) and appalling sanitary and hygiene conditions. In three cells for families, with a capacity of eight to twelve people, 155 people were being held without ventilation and with only three toilets and showers.

C. Living conditions

167. According to the people interviewed for the reports listed in paragraph 160 above, when asylum seekers were released the practice varied. At Athens international airport they were either given a pink card directly or they were told to report to Attica police headquarters to get one. Sometimes those in Greece for the first time were directly issued with an order to leave the country within a few days. If they arrived and were detained elsewhere in the country, the practice was more consistent and consisted of issuing them with an order to leave the country and sending them to a large city like Athens or Patras.

168. In any event it appears that they are given no information about the possibilities of accommodation. In particular, the people interviewed

reported that no one told them that they should inform the authorities that they had nowhere to live, which is a prerequisite for the authorities to try to find them some form of accommodation.

169. Those persons who have no family or relations in Greece and cannot afford to pay a rent just sleep in the streets. As a result, many homeless asylum seekers, mainly single men but also families, have illegally occupied public spaces, like the makeshift camp in Patras, which was evacuated and torn down in July 2009, or the old appeal court and certain parks in Athens.

170. Many of those interviewed reported a permanent state of fear of being attacked and robbed, and of complete destitution generated by their situation (difficulty in finding food, no access to sanitary facilities, etc.).

171. Generally, the people concerned depend for their subsistence on civil society, the Red Cross and some religious institutions.

172. Having a pink card does not seem to be of any benefit in obtaining assistance from the State and there are major bureaucratic obstacles to obtaining a temporary work permit. For example, to obtain a tax number the applicant has to prove that he has a permanent place of residence, which effectively excludes the homeless from the employment market. In addition, the health authorities do not appear to be aware of their obligations to provide asylum seekers with free medical treatment or of the additional health risks faced by these people.

In November 2008, Human Right Watch reported:

> "Asylum seekers of all nationalities who manage to obtain and maintain their red cards have little hope of receiving support from the government during the often protracted time their claims are pending. The homeless and destitute among them often lack housing accommodation and other basic forms of social assistance, in part, because Greece only has reception centre spaces for 770 of the most needy and vulnerable asylum seekers. Although three of the 10 reception centres are reserved for unaccompanied children, Human Rights Watch met unaccompanied children, among others, who were living in the streets, parks, and in abandoned buildings because of a lack of accommodations and other social services. A 15-year-old Nigerian boy registered with the police, but at the time Human Rights Watch interviewed him was living on the street with no assistance whatsoever: "I still don't have a place for me to live. The lawyers gave me an appointment to have a place to live. Now I sleep out on the streets. I don't live anywhere. I have cold in my body. I don't feel safe. I walk around until after 1 or 2 am and then I find a park to sleep in". The Norwegian Organization for Asylum Seekers (NOAS), the Norwegian Helsinki Committee, and Greek Helsinki Monitor reported jointly in April 2008 on accommodations and social conditions awaiting Dublin II returnees to Greece, finding the number of actual places available to such destitute asylum seekers to be "negligible" and the conditions of the few accommodation centres "deplorable." They observed, "The large majority of asylum seekers remain completely without social assistance with regard to accommodation and/or other forms of social assistance. Greece is in practice a country where asylum seekers and refugees are almost entirely left to their own devices."

D. The asylum procedure

1. Access to the asylum procedure

173. The reports mentioned in paragraph 160 above describe the numerous obstacles that bar access to the asylum procedure or make it very difficult in practice for both first-time arrivals and persons transferred under the Dublin Regulation who pass through Athens international airport.

174. The first-hand accounts collected by international organisations and non-governmental organisations and the resulting conclusions may be summarised as follows.

175. Very few applications for asylum are lodged directly with the security services at the international airport because of the lack of staff but also, in certain cases, because of the lack of information that the services even exist.

176. When they arrive at the airport asylum seekers are systematically placed directly in detention before their situation has been clarified.

177. When they are released, those who have come to Greece for the first time are sometimes issued with an order to leave the country, printed in Greek, without having first been informed of the possibility of applying for asylum or contacting a lawyer for that purpose. It has even been known to happen that persons returned under the Dublin Regulation who had applied for asylum when they first arrived in Greece were issued with an order to leave the country on the grounds that, in their absence, all the time-limits for lodging an appeal had expired.

178. At Athens airport several organisations have reported that the information brochure on the asylum procedure is not always given to persons returned under the Dublin Regulation. Nor are they given any other information about the procedures and deadlines or the possibility of contacting a lawyer or a non-governmental organisation to seek legal advice.

179. On the contrary, the police use “tricks” to discourage them from following the procedure. For example, according to several witnesses the police led them to believe that declaring an address was an absolute condition for the procedure to go ahead.

180. The three-day time-limit asylum seekers are given to report to police headquarters is in fact far too short in practice. The offices concerned are practically inaccessible because of the number of people waiting and because asylum applications can be lodged only on one day in the week. In addition, the selection criteria at the entrance to the offices are arbitrary and there is no standard arrangement for giving priority to those wishing to enter the building to apply for asylum. There are occasions when thousands of people turn up on the appointed day and only 300 to 350 applications are registered for that week. At the present time about twenty applications are

being registered per day, while up to 2,000 people are waiting outside to complete various formalities. This results in a very long wait before obtaining an appointment for a first interview.

181. Because of the clearly insufficient provision for interpretation, the first interview is often held in a language the asylum seeker does not understand. The interviews are superficial and limited in substance to asking the asylum seeker why he came to Greece, with no questions at all about the situation in the country of origin. Further, in the absence of any legal aid the applicants cannot afford a legal adviser and are very seldom accompanied by a lawyer.

182. As to access to the Court, although any asylum seeker can, in theory, lodge an application with the Court and request the application of Rule 39 of the Rules of Court, it appears that the shortcomings mentioned above are so considerable that access to the Court for asylum seekers is almost impossible. This would explain the small number of applications the Court receives from asylum seekers and the small number of requests it receives for interim measures against Greece.

2. Procedure for examining applications for asylum

183. The above-listed reports also denounce the deficiencies in the procedure for examining asylum applications.

184. In the vast majority of cases the applications are rejected at first instance because they are considered to have been lodged for economic reasons. Research carried out by the UNHCR in 2010 reveals that out of 202 decisions taken at first instance, 201 were negative and worded in a stereotyped manner with no reference whatsoever to information about the countries of origin, no explanation of the facts on which the decision was based and no legal reasoning.

185. The reports denounce the lack of training, qualifications and/or competence of the police officers responsible for examining the asylum applications. In 2008, according to the UNHCR, only eleven of the sixty-five officers at Attica police headquarters responsible for examining asylum applications were specialists in asylum matters.

186. According to several accounts, it was not unusual for the decision rejecting the application and indicating the time-limit for appeal to be notified in a document written in Greek at the time of issue or renewal of the pink card. As the cards were renewed every six months, the asylum seekers did not understand that their applications had in fact been rejected and that they had the right to appeal. If they failed to do so within the prescribed deadline, however, they were excluded from the procedure, found themselves in an illegal situation and faced the risk of being arrested and placed in detention pending their expulsion.

187. The European Commissioner for Human Rights and the UNHCR also emphasised that the notification procedure for “persons with no known

address" did not work in practice. Thus, many asylum seekers were unable to follow the progress of their applications and missed the deadlines.

188. The time taken for asylum applications to be examined at first instance and on appeal is very long. According to the UNHCR, in July 2009, 6,145 cases at first instance and 42,700 cases on appeal were affected by delays. According to information sent to the Commissioner by the Greek Ministry of Civil Protection, the total number of asylum applications pending had reached 44,650 in February 2010.

3. Remedies

189. Being opposed, *inter alia*, to the abolition in 2009 of the second-instance role played by the refugee advisory committees (see paragraph 122 above), the UNHCR announced in a press release on 17 July 2009 that it would no longer be taking part in the asylum procedure in Greece.

190. Concerning appeals to the *Conseil d'Etat*, the reports mentioned in paragraph 160 above denounce the excessive length of the proceedings. According to the European Commissioner for Human Rights, the average duration at the present time was five and a half years. They also emphasise that an appeal against a negative decision does not automatically suspend the expulsion order and that separate proceedings have to be initiated in order to seek a stay of execution. These can last between ten days and four years. Furthermore, they consider that the review exercised by the *Conseil d'Etat* is not extensive enough to cover the essential details of complaints alleging Convention violations.

191. Lastly, they remark that in practice the legal aid system for lodging an appeal with the *Conseil d'Etat* does not work. It is hindered by the reluctance and the resulting lack of lawyers on the legal aid list because of the length of the proceedings and the delays in their remuneration.

4. Risk of refoulement

192. The risk of *refoulement* of asylum seekers by the Greek authorities, be it indirectly, to Turkey, or directly to the country of origin, is a constant concern. The reports listed in paragraph 161 above, as well as the press, have regularly reported this practice, pointing out that the Greek authorities deport, sometimes collectively, both asylum seekers who have not yet applied for asylum and those whose applications have been registered and who have been issued with pink cards. Expulsions to Turkey are effected either at the unilateral initiative of the Greek authorities, at the border with Turkey, or in the framework of the readmission agreement between Greece and Turkey. It has been established that several of the people thus expelled were then sent back to Afghanistan by the Turkish authorities without their applications for asylum being considered.

193. Several reports highlight the serious risk of *refoulement* as soon as the decision is taken to reject the asylum application, because an appeal to the *Conseil d'Etat* has no automatic suspensive effect.

5. Letter of the UNHCR of 2 April 2009

194. On 2 April 2009 the UNHCR sent a letter to the Belgian Minister of Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece. A copy was sent to the Aliens Office. The letter read as follows (extracts):

> "The UNHCR is aware that the Court, in its decision in *K.R.S. v. the United Kingdom* ... recently decided that the transfer of an asylum seeker to Greece did not present a risk of *refoulement* for the purposes of Article 3 of the Convention. However, the Court did not give judgment on compliance by Greece with its obligations under international law on refugees. In particular, the Court said nothing about whether the conditions of reception of asylum seekers were in conformity with regional and international standards of human rights protection, or whether asylum seekers had access to fair consideration of their asylum applications, or even whether refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR believes that this is still not the case."

195. It concluded:

> "For the above reasons the UNHCR maintains its assessment of the Greek asylum system and the recommendations formulated in its position of April 2008, namely that Governments should refrain from transferring asylum seekers to Greece and take responsibility for examining the corresponding asylum applications themselves, in keeping with Article 3 § 2 of the Dublin Regulation."

VI. INTERNATIONAL DOCUMENTS DESCRIBING THE SITUATION IN AFGHANISTAN

196. Afghanistan has been embroiled in an armed conflict since 1979. The present situation is based on the civil war of 1994-2001, during which the *Mujahidin* (the veterans of the anti-Soviet resistance, many of whose leaders now hold public office) fought the Taliban movement, and fall-out from the attacks of 11 September 2001 in the United States.

197. According to the UNHCR ("Guidelines for assessing the international protection needs of Afghan asylum seekers", July 2009, which replaced those of December 2007), the situation in Afghanistan can be described as an intensifying armed conflict accompanied by serious and widespread targeted human rights violations. The Government and their international allies are pitted against groups of insurgents including the Taliban, the Hezb-e Eslami and Al-Qaeda. A complex array of legal and illegal armed groups and organised criminal groups also play an important role in the conflict. Despite efforts at reform, Afghanistan is still faced with

widespread corruption, lack of due process and an ineffective administration of justice. Human rights violations are rarely addressed or remedied by the justice system and impunity continues to be pervasive. The progressive strengthening of religious conservatism has pressured the Government and Parliament into curtailing fundamental rights and freedoms.

198. In the above-mentioned document, the UNHCR says that most of the fighting is still in the south and south-eastern part of the country. In the south the provinces of Helmand and Kandahar, Taliban strongholds, are the scene of fierce fighting. The conflict raging in the southern, south-eastern and eastern regions has displaced the population and caused numerous civilian casualties.

199. There is more and more evidence that the people implementing or thought to be implementing government projects and the non-governmental organisations or civil firms actually working or thought to be working with the international forces in Afghanistan face a very high risk of being targeted by anti-government factions.

200. As to the possibilities of internal relocation, the UNHCR points out that no region of Afghanistan is safe and that even if one were to be found, it might not be accessible as many of the main roads in Afghanistan are dangerous.

201. In Kabul the situation has deteriorated. Rising economic emigration is putting increasing pressure on the employment market and on resources such as infrastructure, land and drinking water. The situation is exacerbated by persistent drought, with the resultant spread of water-related diseases. Endemic unemployment and under-employment limit many people's ability to cater for their basic needs.

202. The UNHCR generally considers internal relocation as a reasonable alternative solution when protection can be provided in the relocation area by the person's family in the broad sense, their community or their tribe. However, these forms of protection are limited to regions where family or tribal links exist. Even in such situations case-by-case analysis is necessary, as traditional social bonds in the country have been worn away by thirty years of war, mass displacement of refugees and the growing rural exodus.

203. Bearing in mind the recommendations contained in these directives, the Belgian body responsible for examining asylum applications (the CGRSP, see paragraph 131 above) stated in a February 2010 document entitled “the Office of the Cimmissioner General for Refugees and Stateless Persons Policy on Afghan Asylum Seekers” that they granted protection to a large number of Afghan asylum seekers from particularly dangerous regions.

THE LAW

204. In the circumstances of the case the Court finds it appropriate to proceed by first examining the applicant's complaints against Greece and then his complaints against Belgium.

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY GREECE BECAUSE OF THE CONDITIONS OF THE APPLICANT'S DETENTION

205. The applicant alleged that the conditions of his detention at Athens international airport amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention, which reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The applicant

206. The applicant complained about both periods of detention – the first one, from 15 to 18 June 2009, following his arrival at Athens international airport, and the second one, from 1 to 7 August 2009, following his arrest at the airport. He submitted that the conditions of detention at the centre next to Athens international airport were so appalling that they had amounted to inhuman and degrading treatment. The applicant described his conditions of detention as follows: he had been locked in a small room with twenty other people, had had access to the toilets only at the discretion of the guards, had not been allowed out into the open air, had been given very little to eat and had had to sleep on a dirty mattress or on the bare floor. He further complained that during his second period of detention he had been beaten by the guards.

2. The Greek Government

207. The Government disputed that the applicant's rights under Article 3 had been violated during his detention. The applicant had adduced no evidence that he had suffered inhuman or degrading treatment.

208. In contrast with the description given by the applicant, the Government described the holding centre as a suitably equipped short-stay accommodation centre specially designed for asylum seekers, where they were adequately fed.

209. In their observations in reply to the questions posed by the Court during the hearing before the Grand Chamber, the Government gave more

detailed information about the layout and facilities of the centre. It had a section reserved for asylum seekers, comprising three rooms, ten beds and two toilets. The asylum seekers shared a common room with people awaiting expulsion, where there was a public telephone and a water fountain. The applicant had been held there in June 2009 pending receipt of his pink card.

210. The Government stated that in August 2009 the applicant had been held in a section of the centre separate from that reserved for asylum seekers, designed for aliens who had committed a criminal offence. The persons concerned had an area of 110 m2, containing nine rooms and two toilets. There was also a public telephone and a water fountain.

211. Lastly, the Government stressed the short duration of the periods of detention and the circumstances of the second period, which had resulted not from the applicant's asylum application but from the crime he had committed in attempting to leave Greece with false documents.

B. Observations of the European Commissioner for Human Rights and the Office of the United Nations High Commissioner for Refugees, intervening as third parties

212. The Commissioner stated that he had been informed by *Médecins sans Frontières – Greece* (see paragraph 166 above) of the conditions of detention in the centre next to the airport.

213. The UNHCR had visited the centre in May 2010 and found the conditions of detention there unacceptable, with no fresh air, no possibility of taking a walk in the open air and no toilets in the cells.

C. The Court's assessment

1. Admissibility

214. The Court considers that the applicant's complaints under Article 3 of the Convention concerning the conditions of his detention in Greece raise complex issues of law and fact, the determination of which requires an examination of the merits.

215. It follows that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Recapitulation of general principles

216. The Court reiterates that the confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, in particular under the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions (see *Amuur v. France*, 25 June 1996, § 43, *Reports of Judgments and Decisions* 1996-III).

217. Where the Court is called upon to examine the conformity of the manner and method of the execution of the measure with the provisions of the Convention, it must look at the particular situations of the persons concerned (see *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, § 100, ECHR 2008-... (extracts)).

218. The States must have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

219. The Court has held on numerous occasions that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see, for example, *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI).

220. The Court considers treatment to be “inhuman” when it was “premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering”.

Treatment is considered to be “degrading” when it 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 (*ibid*., § 92, and *Pretty v. the United Kingdom*, no. 2346/02, § 52, ECHR 2002-III). It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26). Lastly, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot

conclusively rule out a finding of violation of Article 3 (see *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III).

221. Article 3 of the Convention requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (see, for example, *Kudła*, cited above, § 94).

222. The Court has held that confining an asylum seeker to a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products, amounted to degrading treatment within the meaning of Article 3 of the Convention (see *S.D. v. Greece*, no. 53541/07, §§ 49 to 54, 11 June 2009). Similarly, a period of detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet is unacceptable with respect to Article 3 (*ibid*., § 51). The detention of an asylum seeker for three months on police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals has also been considered as degrading treatment (see *Tabesh v. Greece*, no. 8256/07, §§ 38 to 44, 26 November 2009). Lastly, the Court has found that the detention of an applicant, who was also an asylum seeker, for three months in an overcrowded place in appalling conditions of hygiene and cleanliness, with no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions amounted to degrading treatment prohibited by Article 3 (see *A.A. v. Greece*, no. 12186/08, §§ 57 to 65, 22 July 2010).

(b) Application in the present case

223. The Court notes first of all that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. The situation is exacerbated by the transfers of asylum seekers by other Member States in application of the Dublin Regulation (see paragraphs 65-82 above). The Court does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties involved in the reception of migrants and asylum seekers on their arrival at major international airports and of the disproportionate number of asylum seekers when compared to the capacities of some of these States. However, having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision.

224. That being so, the Court does not accept the argument of the Greek Government that it should take these difficult circumstances into account when examining the applicant's complaints under Article 3.

225. The Court deems it necessary to take into account the circumstances of the applicant's placement in detention and the fact that in spite of what the Greek Government suggest, the applicant did not, on the face of it, have the profile of an "illegal immigrant". On the contrary, following the agreement on 4 June 2009 to take charge of the applicant, the Greek authorities were aware of the applicant's identity and of the fact that he was a potential asylum seeker. In spite of that, he was immediately placed in detention, without any explanation being given.

226. The Court notes that according to various reports by international bodies and non-governmental organisations (see paragraph 160 above), the systematic placement of asylum seekers in detention without informing them of the reasons for their detention is a widespread practice of the Greek authorities.

227. The Court also takes into consideration the applicant's allegations that he was subjected to brutality and insults by the police during his second period of detention. It observes that these allegations are not supported by any documentation such as a medical certificate and that it is not possible to establish with certainty exactly what happened to the applicant. However, the Court is once again obliged to note that the applicant's allegations are consistent with numerous accounts collected from witnesses by international organisations (see paragraph 160 above). It notes, in particular, that following its visit to the holding centre next to Athens international airport in 2007, the European Committee for the Prevention of Torture reported cases of ill-treatment at the hands of police officers (see paragraph 163 above).

228. The Court notes that the parties disagree about the sectors in which the applicant was held. The Government submit that he was held in two different sectors and that the difference between the facilities in the two sectors should be taken into account. The applicant, on the other hand, claims that he was held in exactly the same conditions during both periods of detention. The Court notes that the assignment of detainees to one sector or another does not follow any strict pattern in practice but may vary depending on the number of detainees in each sector (see paragraph 165 above). It is possible, therefore, that the applicant was detained twice in the same sector. The Court concludes that there is no need for it to take into account the distinction made by the Government on this point.

229. It is important to note that the applicant's allegations concerning living conditions in the holding centre are supported by similar findings by the CPT (see paragraph 163 above), the UNHCR (see paragraph 213 above), Amnesty International and *Médecins sans Frontières – Greece*

(paragraphs 165 and 166 above) and are not explicitly disputed by the Government.

230. The Court notes that, according to the findings made by organisations that visited the holding centre next to the airport, the sector for asylum seekers was rarely unlocked and the detainees had no access to the water fountain outside and were obliged to drink water from the toilets. In the sector for arrested persons, there were 145 detainees in a 110 sq. m space. In a number of cells there was only one bed for fourteen to seventeen people. There were not enough mattresses and a number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot. Detainees' access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed in all sectors that there was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and the detainees were deprived of outdoor exercise.

231. The Court reiterates that it has already considered that such conditions, which are found in other detention centres in Greece, amounted to degrading treatment within the meaning of Article 3 of the Convention (see paragraph 222 above). In reaching that conclusion, it took into account the fact that the applicants were asylum seekers.

232. The Court sees no reason to depart from that conclusion on the basis of the Greek Government's argument that the periods when the applicant was kept in detention were brief. It does not regard the duration of the two periods of detention imposed on the applicant – four days in June 2009 and a week in August 2009 – as being insignificant. In the present case the Court must take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.

233. On the contrary, in the light of the available information on the conditions at the holding centre near Athens airport, the Court considers that the conditions of detention experienced by the applicant were unacceptable. It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker.

234. There has therefore been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY GREECE BECAUSE OF THE APPLICANT'S LIVING CONDITIONS

235. The applicant alleged that the state of extreme poverty in which he had lived since he arrived in Greece amounted to inhuman and degrading treatment within the meaning of Article 3, cited above.

A. The parties' submissions

1. The applicant

236. The applicant complained that the Greek authorities had given him no information about possible accommodation and had done nothing to provide him with any means of subsistence even though they were aware of the precarious situation of asylum seekers in general and of his case in particular. He submitted that he had been given no information brochure about the asylum procedure and that he had told the authorities several times that he was homeless. This was demonstrated, he submitted, by the words "no known place of residence" that appeared on the notification issued to him on 18 June 2009.

237. The applicant pointed out that steps had been taken to find him accommodation only after he had informed the police, on 18 December 2009, that his case was pending before the Court. He submitted that he had presented himself at the police headquarters a number of times in December and early January 2010 and waited for hours to find out whether any accommodation had been found. As no accommodation was ever offered he had, eventually, given up.

238. With no means of subsistence, he, like many other Afghan asylum seekers, had lived in a park in the middle of Athens for many months. He spent his days looking for food. Occasionally he received material aid from the local people and the church. He had no access to any sanitary facilities. At night he lived in permanent fear of being attacked and robbed. He submitted that the resulting situation of vulnerability and material and psychological deprivation amounted to treatment contrary to Article 3.

239. The applicant considered that his state of need, anxiety and uncertainty was such that he had no option but to leave Greece and seek refuge elsewhere.

2. The Greek Government

240. The Government submitted that the situation in which the applicant had found himself after he had been released was the result of his own choices and omissions. The applicant had chosen to invest his resources in

fleeing the country rather than in accommodation. Furthermore, he had waited until 18 December 2009 before declaring that he was homeless. Had he followed the instructions in the notification of 18 June 2009 and gone to the Attica police headquarters earlier to let them know he had nowhere to stay, the authorities could have taken steps to find him accommodation. The Government pointed out that the words "no known place of residence" that appeared on the notification he was given simply meant that he had not informed the authorities of his address.

241. Once the authorities had been informed of the applicant's situation, the necessary steps had been taken and he had now been found a place in a hostel. The authorities had been unable to inform the applicant of this, however, as he had left no address where they could contact him. In addition, since June 2009 the applicant had had a "pink card" that entitled him to work, vocational training, accommodation and medical care, and which had been renewed twice.

242. The Government argued that in such circumstances it was up to the applicant to come forward and show an interest in improving his lot. Instead, however, everything he had done in Greece indicated that he had no wish to stay there.

243. In any event the Greek Government submitted that to find in favour of the applicant would be contrary to the provisions of the Convention, none of which guaranteed the right to accommodation or to political asylum. To rule otherwise would open the doors to countless similar applications from homeless persons and place an undue positive obligation on the States in terms of welfare policy. The Government pointed out that the Court itself had stated that "while it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision" (*Chapman v. the United Kingdom* [GC], no. 27238/95, § 99, ECHR 2001-I).

B. Observations of the European Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the Aire Centre and Amnesty International, intervening as third parties

244. The Commissioner pointed out that in comparison with the number of asylum applications lodged in Greece each year, the country's reception capacity – which in February 2010 he said amounted to eleven reception centres with a total of 741 places – was clearly insufficient. He said that the material situation of asylum seekers was very difficult and mentioned the makeshift camp at Patras which, until July 2009, had housed around 3,000 people, mainly Iraqis and Afghans, in unacceptable conditions from the

point of view of housing and hygiene standards. During his visit in February 2010 he noted that in spite of the announcement made by the Government in 2008, construction work on a centre capable of housing 1,000 people had not yet started. The police authorities in Patras had informed him that about 70 % of the Afghans were registered asylum seekers and holders of "pink cards". He also referred to the case of three Afghans in the region of Patras who had been in Greece for two years, living in cardboard shelters with no help from the Greek State. Only the local Red Cross had offered them food and care.

245. The UNHCR shared the same concern. According to data for 2009, there were twelve reception centres in Greece with a total capacity of 865 places. An adult male asylum seeker had virtually no chance at all of being offered a place in a reception centre. Many lived in public spaces or abandoned houses or shared the exorbitant cost of a room with no support from the State. According to a survey carried out from February to April 2010, all the "Dublin" asylum seekers questioned were homeless. At the hearing the UNHCR emphasised how difficult it was to gain access to the Attica police headquarters – making it virtually impossible to comply with the deadlines set by the authorities – because of the number of people waiting and the arbitrary selection made by the security staff at the entrance to the building.

246. According to the Aire Centre and Amnesty International, the situation in Greece today is that asylum seekers are deprived not only of material support from the authorities but also of the right to provide for their own needs. The extreme poverty thus produced should be considered as treatment contrary to Article 3 of the Convention, in keeping with the Court's case-law in cases concerning situations of poverty brought about by the unlawful action of the State.

C. The Court's assessment

1. Admissibility

247. The Court considers that the applicant's complaints under Article 3 of the Convention because of his living conditions in Greece raise complex issues of law and fact, the determination of which requires an examination of the merits.

248. It follows that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

249. The Court has already reiterated the general principles found in the case-law on Article 3 of the Convention and applicable in the instant case (see paragraphs 216-222 above). It also considers it necessary to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home (see *Chapman*, cited above, § 99). Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living (see *Müslim v. Turkey*, no. 53566/99, § 85, 26 April 2005).

250. The Court is of the opinion, however, that what is at issue in the instant case cannot be considered in those terms. Unlike in the above-cited Müslim case (§§ 83 and 84), the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Directive 2003/9 laying down minimum standards for the reception of asylum seekers in the Member States ("the Reception Directive" – see paragraph 84 above). What the applicant holds against the Greek authorities in this case is that, because of their deliberate actions or omissions, it has been impossible in practice for him to avail himself of these rights and provide for his essential needs.

251. The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 147, ECHR 2010-...). It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.

252. That said, the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3.

253. The Court reiterates that it has not excluded "the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity" (see *Budina v. Russia*, dec., no. 45603/05, ECHR 2009...).

254. It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation

improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.

255. The Court notes in the observations of the European Commissioner for Human Rights and the UNHCR, as well as in the reports of non-governmental organisations (see paragraph 160 above) that the situation described by the applicant exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile as that of the applicant. For this reason the Court sees no reason to question the truth of the applicant's allegations.

256. The Greek Government argue that the applicant is responsible for his situation, that the authorities acted with all due diligence and that he should have done more to improve his situation.

257. The parties disagree as to whether the applicant was issued with the information brochure for asylum seekers. The Court fails to see the relevance of this, however, as the brochure does not state that asylum seekers can tell the police they are homeless, nor does it contain any information about accommodation. As to the notification the applicant received informing him of the obligation to go to the Attica police headquarters to register his address (see paragraph 35 above), in the Court's opinion its wording is ambiguous and cannot reasonably be considered as sufficient information. It concludes that the applicant was not duly informed at any time of the possibilities of accommodation that were available to him, assuming that there were any.

258. In any event the Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece. The Government themselves acknowledge that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers. The Court also notes that, according to the UNHCR, it is a well-known fact that at the present time an adult male asylum seeker has virtually no chance of getting a place in a reception centre and that according to a survey carried out from February to April 2010, all the Dublin asylum seekers questioned by the UNHCR were homeless. Like the applicant, a large number of them live in parks or disused buildings (see paragraphs 169, 244 and 242 above).

259. Although the Court cannot verify the accuracy of the applicant's claim that he informed the Greek authorities of his homelessness several times prior to December 2009, the above data concerning the capacity of Greece's reception centres considerably reduce the weight of the Government's argument that the applicant's inaction was the cause of his situation. In any event, given the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece, the Court considers that the Greek authorities should not simply have waited for the applicant to take the initiative of turning to the police headquarters to provide for his essential needs.

260. The fact that a place in a reception centre has apparently been found in the meantime does not change the applicant's situation since the authorities have not found any way of informing him of this fact. The situation is all the more disturbing in that this information was already referred to in the Government's observations submitted to the Court on 1 February 2010, and the Government informed the Grand Chamber that the authorities had seen the applicant on 21 June 2010 and handed him a summons without, however, informing him that accommodation had been found.

261. The Court also fails to see how having a pink card could have been of any practical use whatsoever to the applicant. The law does provide for asylum seekers who have been issued with pink cards to have access to the job market, which would have enabled the applicant to try to solve his problems and provide for his basic needs. Here again, however, the reports consulted reveal that in practice access to the job market is so riddled with administrative obstacles that this cannot be considered a realistic alternative (see paragraphs 160 and 172 above). In addition the applicant had personal difficulties due to his lack of command of the Greek language, the lack of any support network and the generally unfavourable economic climate.

262. Lastly, the Court notes that the situation the applicant complains of has lasted since his transfer to Greece in June 2009. It is linked to his status as an asylum seeker and to the fact that his asylum application has not yet been examined by the Greek authorities. In other words, the Court is of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering.

263. In the light of the above and in view of the obligations incumbent on the Greek authorities under the European Reception Directive (see paragraph 84 above), the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.

264. It follows that, through the fault of the authorities, the applicant has found himself in a situation incompatible with Article 3 of the Convention. Accordingly, there has been a violation of that provision.

III. ALLEGED VIOLATION BY GREECE OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE SHORTCOMINGS IN THE ASYLUM PROCEDURE

265. The applicant complained that he had no effective remedy in Greek law in respect of his complaints under Articles 2 and 3, in violation of Article 13 of the Convention, which reads as follows:

Article 13

> "Everyone whose rights and freedoms as 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."

266. He alleged that the shortcomings in the asylum procedure in Greece were such that he faced the risk of *refoulement* to his country of origin without any real examination of the merits of his asylum application, in violation of Article 3, cited above, and of Article 2 of the Convention, which reads:

Article 2

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> ..."

A. The parties' submissions

1. The applicant

267. The applicant submitted that he had fled Afghanistan after escaping an attempt on his life by the Taliban in reprisal for his having worked as an interpreter for the international air force troops based in Kabul. Since arriving in Europe he had had contacts with members of his family back in Afghanistan, who strongly advised him not to come home because the insecurity and the threat of reprisals had grown steadily worse.

268. The applicant wanted his fears to be examined and had applied for asylum in Greece for that purpose. He had no confidence in the functioning of the asylum procedure, however.

269. Firstly, he complained about the practical obstacles he had faced. For example, he alleged that he had never been given an information brochure about the asylum procedure at the airport but had merely been told

that he had to go to the Attica police headquarters to register his address. He had not done so because he had had no address to register. He had been convinced that having an address was a condition for the procedure to be set in motion. He had subsequently presented himself, in vain, at the police headquarters on several occasions, where he had had to wait for hours, so far without any prospect of his situation being clarified.

270. Secondly, the applicant believed that he had escaped being sent back to his own country only because of the interim measure indicated by the Court to the Greek Government. Apart from that "protection", he had no guarantee at this stage that his asylum procedure would follow its course. Even if it did, the procedure offered no guarantee that the merits of his fears would be seriously examined by the Greek authorities. He argued that he did not have the wherewithal to pay for a lawyer's services, that there was no provision for legal aid at this stage, that first-instance interviews were known to be superficial, that he would not have the opportunity to lodge an appeal with a body competent to examine the merits of his fears, that an appeal to the Supreme Administrative Court did not automatically have suspensive effect and that the procedure was a lengthy one. According to him, the almost non-existent record of cases where the Greek authorities had granted international protection of any kind whatsoever at first instance or on appeal showed how ineffective the procedure was.

2. The Greek Government

271. The Government submitted that the applicant had not suffered the consequences of the alleged shortcomings in the asylum procedure and could therefore not be considered as a victim for the purposes of the Convention.

272. The applicant's attitude had to be taken into account: he had, in breach of the legislation, failed to cooperate with the authorities and had shown no interest in the smooth functioning of the procedure. By failing to report to the Attica police headquarters in June 2009 he had failed to comply with the formalities for initiating the procedure and had not taken the opportunity to inform the police that he had no address, so that they could notify him of any progress through another channel. Furthermore, he had assumed different identities and attempted to leave Greece while hiding from the authorities the fact that he had applied for asylum there.

273. The Government considered that the Greek authorities had followed the statutory procedure in spite of the applicant's negligence and the errors of his ways. They argued in particular that this was illustrated by the fact that the applicant was still in Greece and had not been deported in spite of the situation he had brought upon himself by trying to leave the country in August 2009.

274. In the alternative, the Government alleged that the applicant's complaints were unfounded. They maintained that Greek legislation was in

conformity with Community and international law on asylum, including the *non-refoulement* principle. Greek law provided for the examination of the merits of asylum applications with regard to Articles 2 and 3 of the Convention. Asylum seekers had access to the services of an interpreter at every step of the proceedings.

275. The Government confirmed that the applicant's application for asylum had not yet been examined by the Greek authorities but assured the Court that it would be, with due regard for the standards mentioned above.

276. In conformity with Article 13 of the Convention, unsuccessful asylum seekers could apply for judicial review to the Supreme Administrative Court. According to the Government, such an appeal was an effective safety net that offered the guarantees the Court had requested in its *Bryan v. the United Kingdom* judgment (22 November 1995, § 47, Series A no. 335-A). They produced various judgments in which the Supreme Administrative Court had set aside decisions rejecting asylum applications because the authorities had failed to take into account certain documents that referred, for example, to a risk of persecution. In any event, the Government pointed out that providing asylum seekers whose applications had been rejected at first instance with an appeal on the merits was not a requirement of the Convention.

277. According to the Government, complaints concerning possible malfunctions of the legal aid system should not be taken into account because Article 6 did not apply to asylum procedures. In the same manner, any procedural delays before the Supreme Administrative Court fell within the scope of Article 6 of the Convention and could therefore not be examined by the Court in the present case.

278. Moreover, as long as the asylum procedure had not been completed, asylum seekers ran no risk of being returned to their country of origin and could, if necessary, ask the Supreme Administrative Court to stay the execution of an expulsion order issued following a decision rejecting the asylum application, which would have the effect of suspending the enforcement of the measure. The Government provided several judgments in support of that affirmation.

279. The Government averred in their oral observations before the Grand Chamber that even in the present circumstances the applicant ran no risk of expulsion to Afghanistan at any time as the policy at the moment was not to send anyone back to that country by force. The forced returns by charter flight that had taken place in 2009 concerned Pakistani nationals who had not applied for asylum in Greece. The only Afghans who had been sent back to Afghanistan – 468 in 2009 and 296 in 2010 – had been sent back on a voluntary basis as part of the programme financed by the European Return Fund. Nor was there any danger of the applicant being sent to Turkey because, as he had been transferred to Greece by another

European Union Member State, he did not fall within the scope of the readmission agreement concluded between Greece and Turkey.

280. In their oral observations before the Grand Chamber, the Government further relied on the fact that the applicant had not kept the appointment of 21 June 2010 for an initial interview on 2 July 2010, when that interview would have been an opportunity for him to explain his fears to the Greek authorities in the event of his return to Afghanistan. It followed, according to the Government, that not only had the applicant shown no interest in the asylum procedure, but he had not exhausted the remedies under Greek law regarding his fears of a violation of Articles 2 and 3 of the Convention.

B. Observations of the European Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the Aire Centre, Amnesty International and the Greek Helsinki Monitor, intervening as third parties

281. The Commissioner, the UNHCR, the Aire Centre, Amnesty International and GHM were all of the opinion that the current legislation and practice in Greece in asylum matters were not in conformity with international and European human rights protection standards. They deplored the lack of adequate information, or indeed of any proper information at all about the asylum procedure, the lack of suitably trained staff to receive and process asylum applications, the poor quality of first-instance decisions owing to structural weaknesses and the lack of procedural guarantees, in particular access to legal aid and an interpreter and the ineffectiveness as a remedy of an appeal to the Supreme Administrative Court because of the excessively long time it took, the fact that it had no automatic suspensive effect and the difficulty in obtaining legal aid. They emphasised that "Dublin" asylum seekers were faced with the same obstacles in practice as other asylum seekers.

282. The Commissioner and the UNHCR expressed serious concern about the continuing practice by the Greek authorities of forced returns to Turkey, be they collective or individual. The cases they had identified concerned both persons arriving for the first time and those already registered as asylum seekers.

C. The Court's assessment

1. Admissibility

283. The Greek Government submitted that the applicant was not a victim within the meaning of Article 34 of the Convention because he alone

was to blame for the situation, at the origin of his complaint, in which he found himself and he had not suffered the consequences of any shortcomings in the procedure. The Government further argued that the applicant had not gone to the first interview at the Attica police headquarters on 2 July 2010 and had not given the Greek authorities a chance to examine the merits of his allegations. This meant that he had not exhausted the domestic remedies and the Government invited the Court to declare this part of the application inadmissible and reject it pursuant to Article 35 §§ 1 and 4 of the Convention.

284. The Court notes that the questions raised by the Government's preliminary objections are closely bound up with those it will have to consider when examining the complaints under Article 13 of the Convention taken in conjunction with Articles 2 and 3, because of the deficiencies of the asylum procedure in Greece. They should therefore be examined together with the merits of those complaints.

285. Moreover, the Court considers that this part of the application raises complex issues of law and fact which cannot be determined without an examination of the merits. It follows that it is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Recapitulation of general principles

286. In cases concerning the expulsion of asylum seekers the Court has explained that it does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled (see, among other authorities, *T.I. v. the United Kingdom* (dec. no. 43844/98, ECHR 2000-III), and *Müslim*, cited above, §§ 72 to 76).

287. By virtue of Article 1 (which provides: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).

288. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see *Kudla* cited above, § 157).

289. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 53, ECHR 2007-V § 53).

290. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV).

291. Article 13 requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII).

292. Particular attention should be paid to the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration (see *Doran v. Ireland*, no. 50389/99, § 57, ECHR 2003-X).

293. Lastly, in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50), as well as a particularly prompt response (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)); it

also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Čonka v. Belgium*, no. 51564/99, §§ 81-83, ECHR 2002-I, and *Gebremedhin [Gaberamadhien]*, cited above, § 66).

(b) Application in the present case

294. In order to determine whether Article 13 applies to the present case, the Court must ascertain whether the applicant can arguably assert that his removal to Afghanistan would infringe Article 2 or Article 3 of the Convention.

295. It notes that, when lodging his application the applicant produced, in support of his fears concerning Afghanistan, copies of certificates showing that he had worked as an interpreter (see paragraph 31 above). It also has access to general information about the current situation in Afghanistan and to the Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan published by the UNHCR and regularly updated (see paragraphs 197-202 above).

296. For the Court, this information is *prima facie* evidence that the situation in Afghanistan has posed and continues to pose a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces. It further notes that the gravity of the situation in Afghanistan and the risks that exist there are not disputed by the parties. On the contrary, the Greek Government have stated that their current policy is not to send asylum seekers back to that country by force precisely because of the high-risk situation there.

297. The Court concludes from this that the applicant has an arguable claim under Article 2 or Article 3 of the Convention.

298. This does not mean that in the present case the Court must rule on whether there would be a violation of those provisions if the applicant were returned. It is in the first place for the Greek authorities, who have responsibility for asylum matters, themselves to examine the applicant's request and the documents produced by him and assess the risks to which he would be exposed in Afghanistan. The Court's primary concern is whether effective guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin.

299. The Court notes that Greek legislation, based on Community law standards in terms of asylum procedure, contains a number of guarantees designed to protect asylum seekers from removal back to the countries from which they have fled without any examination of the merits of their fears (see paragraphs 99-121 above). It notes the Government's assurances that the applicant's application for asylum will be examined in conformity with the law.

300. The Court observes, however, that for a number of years the UNHCR and the European Commissioner for Human Rights as well as many international non-governmental organisations have revealed repeatedly and consistently that Greece's legislation is not being applied in practice and that the asylum procedure is marked by such major structural deficiencies that asylum seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin (see paragraphs 160 and 173-195 above).

301. The Court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum (see paragraphs 173-188 above): insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision. These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation.

302. The Court is also concerned about the findings of the different surveys carried out by the UNHCR, which show that almost all first-instance decisions are negative and drafted in a stereotyped manner without any details of the reasons for the decisions being given (see paragraph 184 above). In addition, the watchdog role played by the refugee advisory committees at second instance has been removed and the UNHCR no longer plays a part in the asylum procedure (see paragraphs 114 and 189 above).

303. The Government maintained that whatever deficiencies there might be in the asylum procedure, they had not affected the applicant's particular situation.

304. The Court notes in this connection that the applicant claims not to have received any information about the procedures to be followed. Without wishing to question the Government's good faith concerning the principle of an information brochure being made available at the airport, the Court attaches more weight to the applicant's version because it is corroborated by a very large number of accounts collected from other witnesses by the Commissioner, the UNHCR and various non-governmental organisations. In the Court's opinion, the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures.

305. The Government also criticised the applicant for not setting the procedure in motion by going to the Attica police headquarters within the time-limit prescribed in the notification.

306. On this point the Court notes firstly that the three-day time-limit the applicant was given was a very short one considering how difficult it is to gain access to the police headquarters concerned.

307. Also, it must be said that the applicant was far from the only one to have misinterpreted the notice and that many asylum seekers do not go to the police headquarters because they have no address to declare.

308. Moreover, even if the applicant did receive the information brochure, the Court shares his view that the text is very ambiguous as to the purpose of the convocation (see paragraph 112 above), and that nowhere is it stated that asylum seekers can inform the Attica police headquarters that they have no address in Greece, so that information can be sent to them through another channel.

309. In such conditions the Court considers that the Government can scarcely rely on the applicant's failure to comply with this formality and that they should have proposed a reliable means of communicating with the applicant so that he could follow the procedure effectively.

310. Next, the Court notes that the parties agree that the applicant's asylum request has not yet been examined by the Greek authorities.

311. According to the Government, this situation is due at present to the fact that the applicant did not keep the appointment on 2 July 2010 to be interviewed by the refugee advisory committee. The Government have not explained the impact of that missed appointment on the progress of the domestic proceedings. Be that as it may, the applicant informed the Court, through his counsel, that the convocation had been given to him in Greek when he renewed his pink card, and that the interpreter had made no mention of any date for an interview. Although not in a position to verify the truth of the matter, the Court again attaches more weight to the applicant's version, which reflects the serious lack of information and communication affecting asylum seekers.

312. In such conditions the Court does not share the Government's view that the applicant, by his own actions, failed to give the domestic authorities an opportunity to examine the merits of his complaints and that he has not been affected by the deficiencies in the asylum procedure.

313. The Court concludes that to date the Greek authorities have not taken any steps to communicate with the applicant or reached any decision in his case, offering him no real and adequate opportunity to defend his application for asylum. What is more, the Court takes note of the extremely low rate of asylum or subsidiary protection granted by the Greek authorities compared with other European Union member States (see paragraphs 125-126 above). The importance to be attached to statistics varies, of course, according to the circumstances, but in the Court's view they tend

here to strengthen the applicant's argument concerning his loss of faith in the asylum procedure.

314. The Court is not convinced by the Greek Government's explanations concerning the policy of returns to Afghanistan organised on a voluntary basis. It cannot ignore the fact that forced returns by Greece to high-risk countries have regularly been denounced by the third-party interveners and several of the reports consulted by the Court (see paragraphs 160, 192 and 282).

315. Of at least equal concern to the Court are the risks of *refoulement* the applicant faces in practice before any decision is taken on the merits of his case. The applicant did escape expulsion in August 2009, by application of PD no. 90/2008 (see paragraphs 43-48 and 120 above). However, he claimed that he had barely escaped a second attempt by the police to deport him to Turkey. The fact that in both cases the applicant had been trying to leave Greece cannot be held against him when examining the conduct of the Greek authorities with regard to the Convention and when the applicant was attempting to find a solution to a situation the Court considers contrary to Article 3 (see paragraphs 263 and 264 above).

316. The Court must next examine whether, as the Government alleged, an application to the Supreme Administrative Court for judicial review of a possible rejection of the applicant's request for asylum may be considered as a safety net protecting him against arbitrary *refoulement*.

317. The Court begins by observing that, as the Government have alleged, although such an application for judicial review of a decision rejecting an asylum application has no automatic suspensive effect, lodging an appeal against an expulsion order issued following the rejection of an application for asylum does automatically suspend enforcement of the order.

318. However, the Court reiterates that the accessibility of a remedy in practice is decisive when assessing its effectiveness. The Court has already noted that the Greek authorities have taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of “persons of no known address” reported by the European Commissioner for Human Rights and the UNHCR (see paragraph 187 above), makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit.

319. In addition, although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system (see paragraphs 191 and 281 above), which renders the system ineffective in practice. Contrary to the Government's submissions, the Court considers that this situation may also be an obstacle hindering access to the remedy

and falls within the scope of Article 13, particularly where asylum seekers are concerned.

320. Lastly, the Court cannot consider, as the Government have suggested, that the length of the proceedings before the Supreme Administrative Court is irrelevant for the purposes of Article 13. The Court has already stressed the importance of swift action in cases concerning ill-treatment by State agents (see paragraph 293 above). In addition it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection and lives in a state of precariousness that the Court has found to be contrary to Article 3. It accordingly considers that the information supplied by the European Commissioner for Human Rights concerning the length of proceedings (see paragraph 190 above), which the Government have not contradicted, is evidence that an appeal to the Supreme Administrative Court does not offset the lack of guarantees surrounding the examination of asylum applications on the merits.

(c) Conclusion

321. In the light of the above, the preliminary objections raised by the Greek Government (see paragraph 283 above) cannot be accepted and the Court finds that there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy.

322. In view of that finding and of the circumstances of the case, the Court considers that there is no need for it to examine the applicant's complaints lodged under Article 13 taken in conjunction with Article 2.

IV. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO THE RISKS ARISING FROM THE DEFICIENCIES IN THE ASYLUM PROCEDURE IN GREECE

323. The applicant alleged that by sending him to Greece under the Dublin Regulation when they were aware of the deficiencies in the asylum procedure in Greece and had not assessed the risk he faced, the Belgian authorities had failed in their obligations under Articles 2 and 3 of the Convention, cited above.

A. The parties' submissions

1. The applicant

324. The applicant submitted that at the time of his expulsion the Belgian authorities had known that the asylum procedure in Greece was so deficient that his application for asylum had little chance of being seriously examined by the Greek authorities and that there was a risk of him being sent back to his country of origin. In addition to the numerous international reports already published at the time of his expulsion, his lawyer had clearly explained the situation regarding the systematic violation of the fundamental rights of asylum seekers in Greece. He had done this in support of the appeal lodged with the Aliens Appeals Board on 29 May 2009 and also in the appeal lodged with the Indictments Chamber of the Brussels Court of Appeal on 10 June 2009. The applicant considered that the Belgian authorities' argument that he could not claim to have been a victim of the deficiencies in the Greek asylum system before coming to Belgium was irrelevant. In addition to the fact that formal proof of this could not be adduced *in abstracto* and before the risk had materialised, the Belgian authorities should have taken the general situation into account and not taken the risk of sending him back.

325. In the applicant's opinion, in keeping with what had been learnt from the case of *T.I.* (dec., cited above) the application of the Dublin Regulation did not dispense the Belgian authorities from verifying whether sufficient guarantees against *refoulement* existed in Greece, with regard to the deficiencies in the procedure or the policy of direct or indirect *refoulement* to Afghanistan. Without such guarantees and in view of the evidence adduced by the applicant, the Belgian authorities themselves should have verified the risk the applicant faced in his country of origin, in accordance with Articles 2 and 3 of the Convention and with the Court's case-law (in particular the case of *NA. v. the United Kingdom*, no. 25904/07, 17 July 2008). In this case, however, the Belgian Government had taken no precautions before deporting him. On the contrary, the decision to deport him had been taken solely on the basis of the presumption – by virtue of the tacit acceptance provided for in the Dublin Regulation – that the Greek authorities would honour their obligations, without any individual guarantee concerning the applicant. The applicant saw this as a systematic practice of the Belgian authorities, who had always refused and continued to refuse to apply the sovereignty clause in the Dublin Regulation and not transfer people to Greece.

2. The Belgian Government

326. The Government submitted that in application of the Dublin Regulation Belgium was not responsible for examining the applicant's

request for asylum, and it was therefore not their task to examine the applicant's fears for his life and his physical safety in Afghanistan. The Dublin Regulation had been drawn up with due regard for the principle of *non-refoulement* enshrined in the Geneva Convention, for fundamental rights and for the principle that the Member States were safe countries. Only in exceptional circumstances, on a case-by-case basis, did Belgium avail itself of the derogation from these principles provided for in Article 3 § 2 of the Regulation, and only where the person concerned showed convincingly that he was at risk of being subjected to torture or inhuman or degrading treatment within the meaning of Article 3. Indeed, that approach was consistent with the Court's case-law, which required there to be a link between the general situation complained of and the applicant's individual situation (as in the cases of *Sultani*, cited above, *Thampibillai v. the Netherlands*, no. 61350/00, 17 February 2004, and *Y. v. Russia*, no. 20113/07, 4 December 2008).

327. The Belgian Government did not know in exactly what circumstances the sovereignty clause was used, as no statistics were provided by the Aliens Office, and when use was made of it no reasons were given for the decisions. However, in order to show that they did apply the sovereignty clause when the situation so required, the Government produced ten cases where transfers to the country responsible had been suspended for reasons related, by deduction, to the sovereignty clause. In half of those cases Poland was the country responsible for the applications, in two cases it was Greece and in the other cases Hungary and France. In seven cases the reason given was the presence of a family member in Belgium; in two, the person's health problems; and the last case concerned a minor. In the applicant's case Belgium had had no reason to apply the clause and no information showing that he had personally been a victim in Greece of treatment prohibited by Article 3. On the contrary, he had not told the Aliens Office that he had abandoned his asylum application or informed it of his complaints against Greece. Indeed, the Court itself had not considered it necessary to indicate an interim measure to the Belgian Government to suspend the applicant's transfer.

328. However, the Government pointed out that the order to leave the country had been issued based on the assurance that the applicant would not be sent back to Afghanistan without the merits of his complaints having been examined by the Greek authorities. Concerning access to the asylum procedure and the course of that procedure, the Government relied on the assurances given by the Greek authorities that they had finally accepted responsibility, and on the general information contained in the summary document drawn up by the Greek authorities and in the observations Greece had submitted to the Court in other pending cases. The Belgian authorities had noted, based on that information, that if an alien went through with an asylum application in Greece, the merits of the application would be

examined on an individual basis, the asylum seeker could be assisted by a lawyer and an interpreter would be present at every stage of the proceedings. Remedies also existed, including an appeal to the Supreme Administrative Court. Accordingly, although aware of the possible deficiencies of the asylum system in Greece, the Government submitted that they had been sufficiently convinced of the efforts Greece was making to comply with Community law and its obligations in terms of human rights, including its procedural obligations.

329. As to the risk of *refoulement* to Afghanistan, the Government had also taken into account the assurances Greece had given the Court in *K.R.S. v. the United Kingdom* (dec. cited above) and the possibility for the applicant, once in Greece, to lodge an application with the Court and, if necessary, a request for the application of Rule 39. On the strength of these assurances, the Government considered that the applicant's transfer had not been in violation of Article 3.

B. Observations of the Governments of the Netherlands and the United Kingdom, and of the Office of the United Nations High Commissioner for Refugees, the Aire Centre and Amnesty International and the Greek Helsinki Monitor, intervening as third parties

330. According to the Government of the Netherlands, it did not follow from the possible deficiencies in the Greek asylum system that the legal protection afforded to asylum seekers in Greece was generally illusory, much less that the Member States should refrain from transferring people to Greece because in so doing they would be violating Article 3 of the Convention. It was for the Commission and the Greek authorities, with the logistical support of the other Member States, and not for the Court, to work towards bringing the Greek system into line with Community standards. The Government of the Netherlands therefore considered that they were fully assuming their responsibilities by making sure, through an official at their embassy in Athens, that any asylum seekers transferred would be directed to the asylum services at the international airport. In keeping with the Court's decision in *K.R.S.* (cited above), it was to be assumed that Greece would honour its international obligations and that transferees would be able to appeal to the domestic courts and subsequently, if necessary, to the Court. To reason otherwise would be tantamount to denying the principle of inter-State confidence on which the Dublin system was based, blocking the application of the Regulation by interim measures, and questioning the balanced, nuanced approach the Court had adopted, for example in its judgment in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC] (no. 45036/98, ECHR 2005 VI), in assessing the responsibility of the States when they applied Community law.

331. The Government of the United Kingdom emphasised that the Dublin Regulation afforded a fundamental advantage in speeding up the examination of applications, so that the persons concerned did not have time to develop undue social and cultural ties in a State. That being so, it should be borne in mind that calling to account under Article 3 the State responsible for the asylum application prior to the transfer, as in the present case, was bound to slow down the whole process no end. The Government of the United Kingdom were convinced that such complaints, which were understandable in cases of expulsion to a State not bound by the Convention, should be avoided when the State responsible for handling the asylum application was a party to the Convention. In such cases, as the Court had found in *K.R.S.* decision (cited above), the normal interpretation of the Convention would mean the interested parties lodging their complaints with the courts in the State responsible for processing the asylum application and subsequently, perhaps, to the Court. According to the United Kingdom Government, this did not absolve the transferring States of their responsibility for potential violations of the Convention, but it meant that their responsibility could be engaged only in wholly exceptional circumstances where it was demonstrated that the persons concerned would not have access to the Court in the State responsible for dealing with the asylum application. No such circumstances were present in the instant case, however.

332. In the opinion of the UNHCR, as they had already stated in their report published in April 2008, asylum seekers should not be transferred when, as in the present case, there was evidence that the State responsible for processing the asylum application effected transfers to high-risk countries, that the persons concerned encountered obstacles in their access to asylum procedures, to the effective examination of their applications and to an effective remedy, and where the conditions of reception could result in a violation of Article 3 of the Convention. Not transferring asylum seekers in these conditions was provided for in the Dublin Regulation itself and was fully in conformity with Article 33 of the Geneva Convention and with the Convention. The UNHCR stressed that this was not a theoretical possibility and that, unlike in Belgium, the courts in certain States had suspended transfers to Greece for the above-mentioned reasons. In any event, as the Court had clearly stated in the case of *T.I.* (dec. cited above), each Contracting State remained responsible under the Convention for not exposing people to treatment contrary to Article 3 through the automatic application of the Dublin system.

333. The Aire Centre and Amnesty International considered that in its present form, without a clause on the suspension of transfers to countries unable to honour their international obligations in asylum matters, the Dublin Regulation exposed asylum seekers to a risk of *refoulement* in breach of the Convention and the Geneva Convention. They pointed out

considerable disparities in the way European Union Member States applied the Regulation and the domestic courts assessed the lawfulness of the transfers when it came to evaluating the risk of violation of fundamental rights, in particular when the State responsible for dealing with the asylum application had not properly transposed the other Community measures relating to asylum. The Aire Centre and Amnesty International considered that States which transferred asylum seekers had their share of responsibility in the way the receiving States treated them, in so far as they could prevent human rights violations by availing themselves of the sovereignty clause in the Regulation. The possibility for the European Commission to take action against the receiving State for failure to honour its obligations was not, in their opinion, an effective remedy against the violation of the asylum seekers' fundamental rights. Nor were they convinced, as the CJEU had not pronounced itself on the lawfulness of Dublin transfers when they could lead to such violations, of the efficacy of the preliminary question procedure introduced by the Treaty of Lisbon.

334. GHM pointed out that at the time of the applicant's expulsion there had already been a substantial number of documents attesting to the deficiencies in the asylum procedure, the conditions in which asylum seekers were received and the risk of direct or indirect *refoulement* to Turkey. GHM considered that the Belgian authorities could not have been unaware of this, particularly as the same documents had been used in internal procedures to order the suspension of transfers to Greece. According to GHM, the documents concerned, particularly those of the UNHCR, should make it possible to reverse the Court's presumption in *K.R.S.* (dec. cited above) that Greece fulfilled its international obligations in asylum matters.

C. The Court's assessment

1. Admissibility

335. The Belgian Government criticised the applicant for not having correctly used the procedure for applying for a stay of execution under the extremely urgent procedure, not having lodged an appeal with the Aliens Appeals Board to have the order to leave the country set aside and not having lodged an administrative appeal on points of law with the *Conseil d'Etat*. They accordingly submitted that he had not exhausted the domestic remedies and invited the Court to declare this part of the application inadmissible and reject it pursuant to Article 35 §§ 1 and 4 of the Convention.

336. The Court notes that the applicant also complained of not having had a remedy that met the requirements of Article 13 of the Convention for his complaints under Articles 2 and 3, and maintained, in this context, that

the remedies in question were not effective within the meaning of that provision (see paragraphs 370-377 below). It considers that the Government's objection of non-exhaustion of domestic remedies should be joined to the merits of the complaints under Article 13 taken in conjunction with Articles 2 and 3 of the Convention and examined together.

337. That said, the Court considers that this part of the application cannot be rejected for non-exhaustion of domestic remedies (see paragraphs 385-396 below) and that it raises complex issues of law and fact which cannot be determined without an examination of the merits; it follows that it is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. The responsibility of Belgium under the Convention

338. The Court notes the reference to the *Bosphorus* judgment by the Government of the Netherlands in their observations lodged as third-party interveners (see paragraph 330 above).

The Court reiterated in that case that the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity (see *Bosphorus*, cited above, § 152). The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (*ibid.*, § 153). State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion (*ibid.*, §§ 155-57).

The Court found that the protection of fundamental rights afforded by Community law was equivalent to that provided by the Convention system (*ibid.*, § 165). In reaching that conclusion it attached great importance to the role and powers of the ECJ – now the CJEU – in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance (*ibid.*, § 160). The Court also took care to limit the scope of the *Bosphorus* judgment to Community law in the strict sense – at the time the "first pillar" of European Union law (*ibid.*, § 72).

339. The Court notes that Article 3 § 2 of the Dublin Regulation provides that, by derogation from the general rule set forth in Article 3 § 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. This is the so-called

"sovereignty" clause. In such a case the State concerned becomes the Member State responsible for the purposes of the Regulation and takes on the obligations associated with that responsibility.

340. The Court concludes that, under the Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection does not apply in this case.

3. Merits of the complaints under Articles 2 and 3 of the Convention

(a) The *T.I.* and *K.R.S.* decisions

341. In these two cases the Court had the opportunity to examine the effects of the Dublin Convention, then the Dublin Regulation with regard to the Convention.

342. The case of *T.I.* (dec., cited above) concerned a Sri Lankan national who had unsuccessfully sought asylum in Germany and had then submitted a similar application in the United Kingdom. In application of the Dublin Convention, the United Kingdom had ordered his transfer to Germany

In its decision the Court considered that indirect removal to an intermediary country, which was also a Contracting Party, left the responsibility of the transferring State intact, and that State was required, in accordance with the well-established case-law, not to deport a person where substantial grounds had been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.

Furthermore, the Court reiterated that where States cooperated in an area where there might be implications as to the protection of fundamental rights, it would be incompatible with the purpose and object of the Convention if they were absolved of all responsibility *vis-à-vis* the Convention in the area concerned (see, among other authorities, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-I).

When they apply the Dublin Regulation, therefore, the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention.

Although in the *T. I.* case the Court rejected the argument that the fact that Germany was a party to the Convention absolved the United Kingdom from verifying the fate that awaited an asylum seeker it was about to transfer to that country, the fact that the asylum procedure in Germany apparently complied with the Convention, and in particular Article 3,

enabled the Court to reject the allegation that the applicant's removal to Germany would make him run a real and serious risk of treatment contrary to that Article. The Court considered that there was no reason in that particular case to believe that Germany would have failed to honour its obligations under Article 3 of the Convention and protect the applicant from removal to Sri Lanka if he submitted credible arguments demonstrating that he risked ill-treatment in that country.

343. That approach was confirmed and developed in the *K.R.S.* decision (cited above). The case concerned the transfer by the United Kingdom authorities, in application of the Dublin Regulation, of an Iranian asylum seeker to Greece, through which country he had passed before arriving in the United Kingdom in 2006. Relying on Article 3 of the Convention, the applicant complained of the deficiencies in the asylum procedure in Greece and the risk of being sent back to Iran without the merits of his asylum application being examined, as well as the reception reserved for asylum seekers in Greece.

After having confirmed the applicability of the *T.I.* case-law to the Dublin Regulation (see also on this point *Stapleton v. Ireland* (dec.), no. 56588/07, § 30, ECHR 2010-...), the Court considered that in the absence of proof to the contrary it must assume that Greece complied with the obligations imposed on it by the Community directives laying down minimum standards for asylum procedures and the reception of asylum seekers, which had been transposed into Greek law, and that it would comply with Article 3 of the Convention.

In the Court's opinion, in view of the information available at the time to the United Kingdom Government and the Court, it was possible to assume that Greece was complying with its obligations and not sending anybody back to Iran, the applicant's country of origin.

Nor was there any reason to believe that persons sent back to Greece under the Dublin Regulation, including those whose applications for asylum had been rejected by a final decision of the Greek authorities, had been or could be prevented from applying to the Court for an interim measure under Rule 39 of the Rules of Court.

(b) Application of these principles to the present case

344. The Court has already stated its opinion that the applicant could arguably claim that his removal to Afghanistan would violate Article 2 or Article 3 of the Convention (see paragraphs 296-297 above).

345. The Court must therefore now consider whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters, in spite of the *K.R.S.* case-law, which the Government claimed the administrative and judicial authorities had wanted to follow in the instant case.

346. The Court disagrees with the Belgian Government's argument that, because he failed to voice them at his interview, the Aliens Office had not been aware of the applicant's fears in the event of his transfer back to Greece at the time when it issued the order for him to leave the country.

347. The Court observes first of all that numerous reports and materials have been added to the information available to it when it adopted its *K.R.S.* decision in 2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis.

348. The authors of these documents are the UNHCR and the European Commissioner for Human Rights, international non-governmental organisations like Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, and non-governmental organisations present in Greece such as Greek Helsinki Monitor and the Greek National Commission for Human Rights (see paragraph 160 above). The Court observes that such documents have been published at regular intervals since 2006 and with greater frequency in 2008 and 2009, and that most of them had already been published when the expulsion order against the applicant was issued.

349. The Court also attaches critical importance to the letter sent by the UNHCR in April 2009 to the Belgian Minister in charge of immigration. The letter, which states that a copy was also being sent to the Aliens Office, contained an unequivocal plea for the suspension of transfers to Greece (see paragraphs 194 and 195 above).

350. Added to this is the fact that since December 2008 the European asylum system itself has entered a reform phase and that, in the light of the lessons learnt from the application of the texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights (see paragraphs 77-79 above).

351. Furthermore, the Court notes that the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece. The form the Aliens Office filled in contains no section for such comments (see paragraph 130 above).

352. In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not

concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

353. The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention (see, *mutatis mutandis*, *Saadi v. Italy* [GC], no. 37201/06, § 147, ECHR 2008-...).

354. The Court is also of the opinion that the diplomatic assurances given by Greece to the Belgian authorities did not amount to a sufficient guarantee. It notes first of all that the agreement to take responsibility in application of the Dublin Regulation was sent by the Greek authorities after the order to leave the country had been issued, and that the expulsion order had therefore been issued solely on the basis of a tacit agreement by the Greek authorities. Secondly, it notes that the agreement document is worded in stereotyped terms (see paragraph 24 above) and contains no guarantee concerning the applicant in person. No more did the information document the Belgian Government mentioned, provided by the Greek authorities, contain any individual guarantee; it merely referred to the applicable legislation, with no relevant information about the situation in practice.

355. The Court next rejects the Government's argument that the Court itself had not considered it necessary to indicate an interim measure under Rule 39 to suspend the applicant's transfer. It reiterates that in cases such as this, where the applicant's expulsion is imminent at the time when the matter is brought to the Court's attention, it must take an urgent decision. The measure indicated will be a protective measure which on no account prejudges the examination of the application under Article 34 of the Convention. At this stage, when an interim measure is indicated, it is not for the Court to analyse the case in depth – and indeed it will often not have all the information it needs to do so (see, *mutatis mutandis*, *Paladi v. Moldova* [GC], no. 39806/05, § 89, ECHR 2009-...). In the instant case, moreover, the letters sent by the Court clearly show that, fully aware of the situation in Greece, it asked the Greek Government to follow the applicant's case closely and to keep it informed (see paragraphs 32 and 39, above).

356. The respondent Government, supported by the third-party intervening Governments, lastly submitted that asylum seekers should lodge applications with the Court only against Greece, after having exhausted the domestic remedies in that country, if necessary requesting interim measures.

357. While considering that this is in principle the most normal course of action under the Convention system, the Court deems that its analysis of the obstacles facing asylum seekers in Greece clearly shows that applications lodged there at this point in time are illusory. The Court notes that the applicant is represented before it by the lawyer who defended him in Belgium. Considering the number of asylum applications pending in Greece, no conclusions can be drawn from the fact that some asylum seekers have brought cases before the Court against Greece. In this connection it also takes into account the very small number of Rule 39 requests for interim measures against Greece lodged by asylum seekers in that country, compared with the number lodged by asylum seekers in the other States.

358. In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.

359. The Government argued that the applicant had not sufficiently individualised, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The Court considers, however, that it was in fact up to the Belgian authorities, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3. The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable (see, *mutatis mutandis*, *Saadi*, cited above, § 132).

(c) Conclusion

360. Having regard to the above considerations, the Court finds that the applicant's transfer by Belgium to Greece gave rise to a violation of Article 3 of the Convention.

361. Having regard to that conclusion and to the circumstances of the case, the Court finds that there is no need to examine the applicant's complaints under Article 2.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO CONDITIONS OF DETENTION AND LIVING CONDITIONS CONTRARY TO ARTICLE 3

362. The applicant alleged that because of the conditions of detention and existence to which asylum seekers were subjected in Greece, by returning him to that country in application of the Dublin Regulation the Belgian authorities had exposed him to treatment prohibited by Article 3 of the Convention, cited above.

363. The Government disputed that allegation, just as it refused to see a violation of Article 3 because of the applicant's expulsion and the ensuing risk resulting from the deficiencies in the asylum procedure.

364. The Court considers that the applicant's allegations under the above-cited provision of the Convention raise complex issues of law and fact which cannot be determined without an examination of the merits; it follows that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

365. On the merits, the Court reiterates that according to its well-established case-law the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, §§ 90-91; *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 125, § 103; *H.L.R. v. France*, judgment of 29 April 1997, Reports 1997-III, § 34; *Jabari* cited above, § 38; *Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, ECHR 2007-I (extracts), no. 1948/04; and *Saadi*, cited above, § 152).

366. In the instant case the Court has already found the applicant's conditions of detention and living conditions in Greece degrading (see paragraphs 233, 234, 263 and 264 above). It notes that these facts were well known before the transfer of the applicant and were freely ascertainable from a wide number of sources (see paragraphs 162-164 above). It also wishes to emphasise that it cannot be held against the applicant that he did not inform the Belgian administrative authorities of the reasons why he did not wish to be transferred to Greece. It has established that the procedure before the Aliens Office made no provision for such explanations and that the Belgian authorities applied the Dublin Regulation systematically (see paragraph 352 above).

367. Based on these conclusions and on the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.

368. That being so, there has been a violation of Article 3 of the Convention.

VI. ALLEGED VIOLATION BY BELGIUM OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE LACK OF AN EFFECTIVE REMEDY AGAINST THE EXPULSION ORDER

369. The applicant maintained that there was no remedy under Belgian law, as required by Article 13 of the Convention, cited above, by which he could have complained about the alleged violations of Articles 2 and 3 of the Convention.

A. The parties' submissions

1. The applicant

370. The applicant submitted that he had acted as swiftly as possible in the circumstances in lodging a first application for a stay of execution of the expulsion measure under the extremely urgent procedure. He had come up against practical obstacles, however, which had hindered his access to the urgent procedure.

371. First, he explained that on the day the order to leave the country was issued, on 19 May 2009, he was taken into custody and placed in a closed centre for illegal aliens. Not until five days later, after the long Ascension Day weekend, had a lawyer been appointed, at his request, by the Belgian authorities, or had the Belgian Committee for Aid to Refugees at least been able to identify that lawyer to pass on general information to him concerning Dublin asylum seekers. This first lawyer, who was not a specialist in asylum cases, lodged an application for a stay of execution under the extremely urgent procedure after having had the file for three days, which in the applicant's opinion was by no means an excessively long time.

372. Secondly, the case had been scheduled for examination only one hour after the application was lodged, preventing the applicant's lawyer, whose office was 130 km away from the Aliens Appeals Board, from attending the hearing. According to the applicant, his counsel had had no practical means of having himself represented because it was not the task of

the permanent assistance service of the "aliens" section of the legal aid office to replace in an emergency lawyers who could not attend a hearing. In support of this affirmation he adduced a note written by the president of the section concerned. The applicant further submitted that as his departure was not imminent but scheduled for 27 May, his request might well have been rejected anyway because there was no urgency.

373. In addition to the practical inaccessibility of the urgent procedure in his case, the applicant submitted that in any event appeals before the Aliens Appeals Board were not an effective remedy within the meaning of Article 13 of the Convention in respect of the risk of violations of Articles 2 and 3 in the event of expulsion. It could therefore not be held against him that he had failed to exhaust that remedy.

374. First, he submitted that at the time of his removal his request for a stay of execution had no chance of succeeding because of the constant case-law of certain divisions of the Aliens Appeals Board, which systematically found that there was no virtually irreparable damage because it was to be presumed that Greece would fulfil its international obligations in asylum matters, and that presumption could not be rebutted based on reports on the general situation in Greece, without the risk to the person being demonstrated *in concreto*. Only a handful of judgments to the contrary had been delivered, but in a completely unforeseeable manner and with no explanation of the reasons.

375. In the applicant's opinion this increase in the burden of proof where the individuals concerned demonstrated that they belonged to a vulnerable group who were systematically subjected in Greece to treatment contrary to Article 3 of the Convention made appeals to the Aliens Appeals Board totally ineffective. Subsequent events had proved him right as he had effectively suffered, *in concreto*, from the very risks of which he had complained.

376. Subsequently, once his application under the extremely urgent procedure had been rejected, there had no longer been any point in the applicant continuing the proceedings on the merits as these would have had no suspensive effect and could not have prevented his removal. In fact it was the constant practice of the Aliens Appeals Board to dismiss such appeals because in such conditions the applicants no longer had any interest in having the measure set aside. Lastly, even if the Aliens Appeals Board had not declared the case inadmissible on that ground, the applicant could not have had the order to leave the country set aside because of the aforesaid constant case-law.

377. The applicant added that where administrative appeals on points of law against judgments of this type were lodged with the *Conseil d'Etat* the latter did not question the approach of the Aliens Appeals Board and considered that the situation raised no issue under Article 13 of the Convention.

2. The Belgian Government

378. The Belgian Government affirmed that the applicant had had several remedies open to him before the domestic courts that met the requirements of Article 13 of the Convention, but he had not properly exhausted them.

379. On the question of the extremely urgent procedure for applying for a stay of execution the Government pointed out that appeals could be lodged with the Aliens Appeals Board at any time, without interruption and with suspensive effect, and that the Court had confirmed the effectiveness of the procedure in the case of *Quraishi v. Belgium* (application no. 6130/08, decision of 12 May 2009). They alleged that the applicant had placed himself in an urgent situation by appealing to the Aliens Appeals Board only a few hours before his departure, when he had been taken into custody ten days earlier, under an order to leave the country. Penalising an applicant's lack of diligence was a long-standing practice of the *Conseil d'Etat*, and was justified by the exceptional nature of the procedure, which reduced the rights of the defence and the investigation of the case to a minimum. The fact that the flight had not been scheduled until 27 May was immaterial because, except in the example given by the applicant, the constant case-law of the Aliens Appeals Board showed that deprivation of liberty sufficed to justify the imminent nature of the danger.

380. Furthermore there was the fact that, in view of its urgency, the case had been scheduled for immediate examination but no one had attended the hearing, even though the applicant's counsel could have asked the permanent service of the legal aid office in Brussels to represent him before the Aliens Appeals Board.

381. The Government disputed the applicant's argument that his request for a stay of execution had no chance of succeeding, producing five of the Board's judgments from 2008 and 2009 ordering the suspension of transfers to Greece under the extremely urgent procedure on the grounds that, in view of the gravity of the applicants' complaints under Article 3 of the Convention, the order to leave the country was not, *prima facie*, sufficiently well-reasoned. According to the Government it was always in the applicants' interest to proceed with their applications for judicial review so as to give the Aliens Appeals Board and then the *Conseil d'Etat* an opportunity to propose a solution and analyse the lawfulness of the impugned measures.

382. The fact that the applicant had been removed in the interim should not have deterred him from continuing. In support of that affirmation the Government cited the Aliens Appeals Board's judgment no. 28.233 of 29 May 2009, which had declared an appeal admissible even though the applicant had already been transferred. The application was subsequently dismissed because there had no longer been any interest at stake for the applicant as the application concerned the order to leave the country and he

had not demonstrated *in concreto* that there had been any violation of Article 3 of the Convention.

383. Concerning the merits, the Government confirmed that, as it did when determining the existence of irreparable damage at the suspension stage, the constant case-law of the Aliens Appeals Board, which was in fact based on that of the Court, required the applicants to demonstrate the concrete risk they faced. However, just as the effectiveness of a remedy within the meaning of Article 13 did not depend on the certainty of it having a favourable outcome, the Government submitted that the prospect of an unfavourable outcome on the merits should not be a consideration in evaluating the effectiveness of the remedy.

384. The UNHCR, intervening as a third party, considered that the constant case-law of the Aliens Appeals Board and the *Conseil d'Etat* effectively doomed to failure any application for the suspension or review of an order to leave the country issued in application of the Dublin Regulation, as the individuals concerned were unable to provide concrete proof both that they faced an individual risk and that it was impossible for them to secure protection in the receiving country. In adopting that approach the Belgian courts automatically relied on the Dublin Regulation and failed to assume their higher obligations under the Convention and the international law on refugees.

B. The Court's assessment

385. The Court has already found that the applicant's expulsion to Greece by the Belgian authorities amounted to a violation of Article 3 of the Convention (see paragraphs 359 and 360 above). The applicant's complaints in that regard are therefore “arguable” for the purposes of Article 13.

386. The Court notes first of all that in Belgian law an appeal to the Aliens Appeals Board to set aside an expulsion order does not suspend the enforcement of the order. However, the Government pointed out that a request for a stay of execution could be lodged before the same court “under the extremely urgent procedure” and that unlike the extremely urgent procedure that used to exist before the *Conseil d'Etat*, the procedure before the Aliens Appeals Board automatically suspended the execution of the expulsion measure by law until the Board had reached a decision, that is, for a maximum of seventy-two hours.

387. While agreeing that that is a sign of progress in keeping with the *Čonka* judgment, cited above (§§ 81-83, confirmed by the *Gebremedhin* judgment, cited above, §§ 66-67), the Court reiterates that it is also established in its case-law (paragraph 293 above) that any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny and that, subject to a certain margin of appreciation left to the

States, conformity with Article 13 requires that the competent body must be able to examine the substance of the complaint and afford proper reparation.

388. In the Court's view the requirement flowing from Article 13 that execution of the impugned measure be stayed cannot be considered as a subsidiary measure, that is, without regard being had to the requirements concerning the scope of the scrutiny. The contrary would amount to allowing the States to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible.

389. However, the extremely urgent procedure leads precisely to that result. The Government themselves explain that this procedure reduces the rights of the defence and the examination of the case to a minimum. The judgments of which the Court is aware (paragraphs 144 and 148 above) confirm that the examination of the complaints under Article 3 carried out by certain divisions of the Aliens Appeals Board at the time of the applicant's expulsion was not thorough. They limited their examination to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation. Furthermore, even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the Aliens Office, the Aliens Appeals Board did not always take that material into account. The persons concerned were thus prevented from establishing the arguable nature of their complaints under Article 3 of the Convention.

390. The Court concludes that the procedure for applying for a stay of execution under the extremely urgent procedure does not meet the requirements of Article 13 of the Convention.

391. The fact that a few judgments, against the flow of the established case-law at the time, have suspended transfers to Greece (see paragraph 149 above) does not alter this finding as the suspensions were based not on an examination of the merits of the risk of a violation of Article 3 but rather on the Appeals Board's finding that the Aliens Office had not given sufficient reasons for its decisions.

392. The Court further notes that the applicant also faced several practical obstacles in exercising the remedies relied on by the Government. It notes that his request for a stay of execution under the extremely urgent procedure was rejected on procedural grounds, namely his failure to appear. Contrary to what the Government suggest, however, the Court considers that in the circumstances of the case, this fact cannot be considered to reveal a lack of diligence on the applicant's part. It fails to see how his counsel could possibly have reached the seat of the Aliens Appeals Board in time. As to the possibility of requesting assistance from a round-the-clock service, the Court notes in any event that the Government have supplied no proof of the existence of such a service in practice.

393. Regarding the usefulness of continuing proceedings to have the order to leave the country set aside even after the applicant had been transferred, the Court notes that the only example put forward by the Government (see paragraphs 151 and 382) confirms the applicant's belief that once the person concerned has been deported the Aliens Appeals Board declares the appeal inadmissible as there is no longer any point in seeking a review of the order to leave the country. While it is true that the Aliens Appeals Board did examine the complaints under Article 3 of the Convention in that judgment, the Court fails to see how, without its decision having suspensive effect, the Aliens Appeals Board could still offer the applicant suitable redress even if it had found a violation of Article 3.

394. In addition, the Court notes that the parties appear to agree to consider that the applicant's appeal had no chance of success in view of the constant case-law, mentioned above, of the Aliens Appeals Board and the *Conseil d'Etat*, and of the impossibility for the applicant to demonstrate *in concreto* the irreparable nature of the damage done by the alleged potential violation. The Court reiterates that while the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant, the lack of any prospect of obtaining adequate redress raises an issue under Article 13 (see *Kudla*, cited above, § 157).

395. Lastly, the Court points out that the circumstances of the present case clearly distinguish it from the *Quraishi* case relied on by the Government. In the latter case, which concerns events dating back to 2006 and proceedings before the Aliens Appeals Board in 2007, that is to say a few months after the Board began its activities, the applicants had obtained the suspension of their expulsion through the intervention of the courts. What is more, they had not at that stage been expelled when the Court heard their case and the case-law of the Aliens Appeals Board in Dublin cases had not by then been established.

396. In view of the foregoing, the Court finds that there has been a violation of Article 13 taken in conjunction with Article 3. It follows that the applicant cannot be faulted for not having properly exhausted the domestic remedies and that the Belgian Government's preliminary objection of non-exhaustion (see paragraph 335 above) cannot be allowed.

397. Having regard to that conclusion and to the circumstances of the case, the Court considers that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2.

VII. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

398. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

399. Under Article 46 of the Convention the High Contracting Parties undertake to abide by the final judgment of the Court in the cases to which they are parties, the Committee of Ministers being responsible for supervising the execution of the judgments. This means that when the Court finds a violation the respondent State is legally bound not only to pay the interested parties the sums awarded in just satisfaction under Article 41, but also to adopt the necessary general and/or, where applicable, individual measures. As the Court's judgments are essentially declaratory in nature, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in order to discharge its legal obligation under Article 46 of the Convention, provided that those means are compatible with the conclusions contained in the Court's judgment. In certain particular situations, however, the Court may find it useful to indicate to the respondent State the type of measures that might be taken in order to put an end to the – often systemic – situation that gave rise to the finding of a violation (see, for example, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV, and *Popov v. Russia*, no. 26853/04, § 263, 13 July 2006). Sometimes the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it (see *Assanidzé v. Goorgia* [GC], no. 71503/01, 8 April 2004, § 198, ECHR 2004-II; *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, of 30 June 2009, §§ 85 and 88, ECHR 2009-..).

400. In the instant case the Court considers it necessary to indicate some individual measures required for the execution of the present judgment in respect of the applicant, without prejudice to the general measures required to prevent other similar violations in the future (see, *mutatis mutandis*, *Broniowski v. Poland* [GC], no. 31443/96, § 193, ECHR 2004-V).

401. The Court has found a violation by Greece of Article 3 of the Convention because of the applicant's living conditions in Greece combined with the prolonged uncertainty in which he lived and the lack of any

prospect of his situation improving (see paragraph 263 above). It has also found a violation of Article 13 in conjunction with Article 3 of the Convention because of the shortcomings in the asylum procedure as applied to the applicant and the risk of *refoulement* to Afghanistan without any serious examination of his asylum application and without his having had access to an effective remedy (see paragraph 322 above).

402. Having regard to the particular circumstances of the case and the urgent need to put a stop to these violations of Articles 13 and 3 of the Convention, the Court considers it incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that meets the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant.

B. Article 41 de la Convention

403. Article 41 of the Convention provides:

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

1. Non-pecuniary damage

(a) In respect of Greece

404. The applicant claimed 1,000 euros (EUR) in compensation for the non-pecuniary damage sustained during the two periods of detention.

405. The Greek Government considered this claim ill-founded.

406. The Court has found that the applicant's conditions of detention violated of Article 3 of the Convention. It considers that the applicant must have experienced certain distress which cannot be compensated for by the Court's findings of violations alone. Having regard to the nature of the violations found in the instant case, the Court considers it equitable to uphold the applicant's claim and awards him EUR 1,000 in respect of non-pecuniary damage.

(b) In respect of Belgium

407. The applicant claimed EUR 31,825 in compensation for the non-pecuniary damage caused on the one hand by his detention in an open centre then in a closed centre in Belgium before his transfer to Greece (EUR 6,925) and on the other hand by the decision of the Belgian authorities to transfer him to Greece (EUR 24,900).

408. The Belgian Government argued that if the Court were to find Belgium liable the applicant could take legal action in the Belgian courts to obtain compensation for any non-pecuniary damage caused by his detention. In any event the Government considered the claim ill-founded, the applicant having failed to demonstrate any fault on the part of the State or to establish any causal link between the alleged fault and the non-pecuniary damage allegedly sustained.

409. The Court reiterates that it can award sums in respect of the just satisfaction provided for in Article 41 where the loss or damage claimed have been caused by the violation found, while the State is not required to pay sums in respect of damage for which it is not responsible (see *Saadi*, cited above, § 186). In the present case the Court has not found a violation of the Convention because of the applicant's detention in Belgium prior to his transfer to Greece. It accordingly rejects this part of the claim.

410. Concerning the alleged damage because of the transfer to Greece, the Court has found that the transfer gave rise to a violation of Article 3 of the Convention both because it exposed the applicant to treatment prohibited by that provision, in detention and during his stay in Greece, and because it exposed the applicant to the risks inherent in the deficiencies in the asylum procedure in Greece. It reiterates that the fact that the applicant could claim compensation in the Belgian courts does not oblige the Court to reject the claim as being ill-founded (see *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, § 16, Series A no. 14).

411. The Court considers that the applicant must have experienced certain distress for which the Court's findings of violations alone cannot constitute just satisfaction. Having regard to the nature of the violations found in the instant case, the Court considers it equitable to uphold the applicant's claim and awards him EUR 24,900 in respect of non-pecuniary damage.

2. Costs and expenses

(a) In respect of Greece

412. The applicant claimed the reimbursement of the cost of his defence before the Court against the Greek Government. According to the list of fees and expenses submitted by the applicant's lawyer, the costs and expenses as at 15 March 2010 totalled EUR 3,450 based on an hourly fee of EUR 75. The lawyer indicated that he had agreed with the applicant that the latter would pay him by instalments based on the above-mentioned hourly fee if he won the case before the Court.

413. The Greek Government found this claim excessive and unsubstantiated.

414. The Court considers it established that the applicant effectively incurred the costs he claimed in so far as, being a client, he entered into a

legal obligation to pay his legal representative on an agreed basis (see, *mutatis mutandis*, *Sanoma Uitgevers B.V. v. the Netherlands*, no. 38224/03, § 110, 31 March 2009). Considering also that the costs and expenses concerned were necessary and reasonable as to quantum, the Court awards the applicant EUR 3,450.

(b) In respect of Belgium

415. The applicant claimed the reimbursement of his costs and expenses before the Belgian courts and before the Court. The applicant's lawyer submitted a list of fees and expenses according to which the costs and expenses as at 15 March 2010 totalled EUR 7,680 based on an hourly fee of EUR 75, EUR 1,605 were claimed for the proceedings before the Belgian courts and EUR 6,075 for the proceedings before the Court against Belgium.

416. The Belgian Government invited the Court to reject the claim. They submitted that the applicant was entitled to free legal aid and to assistance with legal costs. It had therefore been unnecessary for him to incur any costs. His lawyer could obtain compensation for any costs incurred before the Belgian courts and before the Court in conformity with the provisions of the Judicial Code concerning legal aid. The Code provided for a system of reimbursement in the form of "points" corresponding to the services provided by the lawyer. In 2010 one point corresponded to EUR 26.91. The figure had been EUR 23.25 in 2009. Had these provisions been complied with the lawyer should already have been authorised to receive payment for the costs incurred in 2009. The Government also pointed out that under Article 1022 of the Judicial Code concerning reimbursement of legal costs, the party which lost the case was required to pay all or part of the legal costs of the other party. In cases where the proceedings could not be evaluated in monetary terms, the sum payable was determined by the courts. Where legal aid was granted and the costs awarded in the proceedings were higher, the Treasury could recover the sum paid in legal aid.

417. The applicant's lawyer confirmed that he had been appointed by the Belgian State as a legal aid lawyer, but only to defend the applicant before the first-instance court. For this he was entitled to "ten points". He said that he had not yet received any payment for legal aid. For the other proceedings he had agreed with the applicant that the applicant would pay him by instalments based on the above-mentioned hourly fee if he won the case before the Court. That commitment had been honoured in part. According to the applicant, there was no danger of the Belgian authorities paying him too much compensation because the procedural costs awarded were deducted from the legal aid payable. It followed that if the former exceeded the latter his lawyer would ask the legal aid office to stop the legal aid and that if the costs and expenses awarded by the Court were higher than

the amount awarded in legal aid, his lawyer would receive nothing in terms of legal aid.

418. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, among many other authorities, *Sanoma Uitgevers B.V. v. the Netherlands*, cited above, 109).

419. The Court first considers the costs and expenses relating to the proceedings before the domestic courts. It notes that the applicant has submitted no breakdown of the sum claimed in respect of the different proceedings brought. This prevents it from determining precisely what amounts correspond to the violations found in the instant case and to what extent they have been or could be covered by the legal aid. Because of this lack of clarity (see, *mutatis mutandis*, *Musiał v. Poland* [GC], no. 24557/94, § 61, ECHR 1999-II), the Court rejects these claims.

420. Turning its attention to the costs and expenses incurred in the proceedings before it against Belgium, the Court reiterates that it does not consider itself bound by domestic scales and practices, even if it may take inspiration from them (see *Venema v. the Netherlands*, no. 35731/97, § 116, ECHR 2002-X). In any event, for the same reasons as in respect of Greece (see paragraph 414 above), it awards the applicant EUR 6,075.

(c) In respect of Belgium and Greece

421. The applicant lastly claimed the reimbursement of the costs and fees incurred in connection with the hearing before the Court. According to the list of fees and expenses submitted by the applicant's lawyer, they amounted to EUR 2,550 for the pleadings and their preparation (at an hourly rate of EUR 75). Without submitting any receipts, he also claimed the reimbursement of EUR 296.74 EUR for his lawyer's travel to and accommodation in Strasbourg.

422. According to its established case-law, the Court rejects the part of the claim which is not substantiated by the requisite receipts.

423. For the remainder, considering it established that the costs and expenses claimed were necessarily incurred and were reasonable as to quantum, it awards the applicant EUR 2,550. Having regard to the responsibility for the different violations of the Convention found by the Court, Belgium and Greece will each pay half of that sum.

(d) Default interest

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

FOR THESE REASONS, THE COURT

1. *Joins to the merits*, by sixteen votes to one, the preliminary objections raised by the Greek Government and *rejects* them;

2. *Declares admissible*, unanimously, the complaint under Article 3 of the Convention concerning the conditions of the applicant's detention in Greece;

3. *Holds*, unanimously, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's conditions of detention;

4. *Declares admissible*, by a majority, the complaint under Article 3 of the Convention concerning the applicant's living conditions in Greece;

5. *Holds*, by sixteen votes to one, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's living conditions in Greece;

6. *Declares admissible*, unanimously, the complaint against Greece under Article 13 taken in conjunction with Article 3 of the Convention;

7. *Holds*, unanimously, that there has been a violation by Greece of Article 13 taken in conjunction with Article 3 of the Convention because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy;

8. *Holds*, unanimously, that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2 of the Convention;

9. *Joins to the merits*, unanimously, the preliminary objection raised by the Belgian Government, *rejects* it and *declares admissible*, unanimously, the complaints lodged against Belgium;

10. *Holds*, by sixteen votes to one, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State;

11. *Holds*, unanimously, that there is no need to examine the applicant's complaints under Article 2 of the Convention;

12. *Holds*, by fifteen votes to two, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to detention and living conditions in that State that were in breach of that Article;

13. *Holds*, unanimously, that there has been a violation by Belgium of Article 13 taken in conjunction with Article 3 of the Convention;

14. *Holds*, unanimously, that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2 of the Convention;

15. *Holds*, unanimously,
(a) that the Greek State is to pay the applicant, within three months, the following amounts,
(i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
(ii) EUR 4,725 (four thousand seven hundred and twenty-five euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

16. *Holds*,
(a) by fifteen votes to two, that the Belgian State is to pay the applicant, within three months, EUR 24,900 (twenty-four thousand nine hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
(b) by sixteen votes to one, that the Belgian State is to pay the applicant, within three months, EUR 7,350 (seven thousand three hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

17. *Rejects*, unanimously, the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 January 2011.

Michael O'Boyle	Jean-Paul Costa
Deputy Registrar	President

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

(a) Concurring opinion of Judge Rozakis;
(b) Concurring opinion of Judge Villiger;
(c) Partly concurring and partly dissenting opinion of Judge Sajó;
(d) Partly dissenting opinion of Judge Bratza.

J.-P.C.
M.OB.

CONCURRING OPINION OF JUDGE ROZAKIS

I have voted, with the majority, to find a violation on all counts concerning Greece, and am fully in agreement with the reasoning leading to the violations. Still, I would like to further emphasise two points, already mentioned in the judgment, to which I attach particular importance.

The first point concerns the Court's reference to the considerable difficulties that States forming the European external borders are currently experiencing "in coping with the increasing influx of migrants and asylum seekers". This statement, which is analysed and elaborated further in paragraph 223 of the judgment, correctly describes the general situation which prevails in many northern Mediterranean coastal countries. However, in the case of Greece, with its extensive northern borders but also a considerable maritime front, the migratory phenomenon has acquired a truly dramatic dimension in recent years. Statistics clearly show that the great majority of foreign immigrants – mainly of Asian origin – attempt to enter Europe through Greece, and either settle there or move on to seek a new life in other European countries. As it has alreadly been stated, almost 88 % of the immigrants (and among them asylum seekers) entering the European Union today cross the Greek borders to land in our continent. In these circumstances it is clear that European Union immigration policy – including Dublin II – does not reflect the present realities, or do justice to the disproportionate burden that falls to the Greek immigration authorities. There is clearly an urgent need for a comprehensive reconsideration of the existing European legal regime, which should duly take into account the particular needs and constraints of Greece in this delicate domain of human rights protection.

The second point concerns the Court's reference to the applicant's living conditions while in Greece, and the finding of a violation of Article 3 of the Convention. In paragraph 249 of the judgment the Court considered it necessary "to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living". However, as the Court rightly points out, in the circumstances of the case "the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law" (paragraph 250). What the Court meant by "positive law" is duly explained in paragraph 251, where it referred to the "existence of a broad consensus at the international and European level concerning [the need for special protection of asylum seekers as a particularly underprivileged and vulnerable population group], as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and

the standards set out in the European Union Reception Directive". Indeed this last European document clearly requires that the European Union's members guarantee asylum seekers "certain material reception conditions, including accommodation, food and clothing, in kind or in the form of monetary allowances. The allowances must be sufficient to protect the asylum seekers from extreme need".

The existence of those international obligations of Greece – and notably, vis-à-vis the European Union – to treat asylum seekers in conformity with these requirements weighed heavily in the Court's decision to find a violation of Article 3. The Court has held on numerous occasions that to fall within the scope of Article 3 ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative and it depends on all the circumstances of the case (such as the duration of the treatment, its physical and mental effects and, in some instances, the sex, age and state of health of the victim). In the circumstances of the present case the combination of the long duration of the applicant's treatment, coupled with Greece's international obligation to treat asylum seekers in accordance with what the judgment calls current positive law, justifies the distinction the Court makes between treatment endured by other categories of people – where Article 3 has not been found to be transgressed – and the treatment of an asylum seeker, who clearly enjoys a particularly advanced level of protection.

CONCURRING OPINION OF JUDGE VILLIGER

I agree to a large extent with the judgment. However, as regards the conclusion that there has been a violation by Greece of Article 13 taken together with Article 3 of the Convention (see the judgment at paragraph 321), I respectfully submit that the judgment does not adequately treat the issue under Article 3 of the Convention in respect of the applicant's possible deportation (*refoulement*) from Greece to Afghanistan. (There appears in this context also to be an issue under Article 2 of the Convention in the case file, but for convenience's sake I shall henceforth refer solely to Article 3.)

1. Is there a separate complaint under Article 3 of the Convention?

The starting point is whether the applicant is raising a complaint under Article 3 of the Convention about his possible deportation to Afghanistan. The judgment mentions not a word about this. In my opinion, there can be little doubt that he is. Thus, from the outset in the proceedings before the Court the applicant referred to:

> "the risks he had faced and would still face if he were sent back to that country [i.e. Afghanistan]"(§ 40).

Indeed, in view of this complaint *vis-à-vis* Greece, the Court applied interim measures under Rule 39 of its Rules of Court throughout the proceedings, thereby preventing the applicant from being deported to Afghanistan during the proceedings (see paragraph 40). Moreover, the Court obviously does not doubt the existence of such a complaint when it considers in the judgment that the applicant, in this respect,

> "has an arguable claim under ... Article 3 of the Convention " (§ 298).

Actually, one could argue that the entire application in all its configurations essentially turns on the applicant's fear that he will suffer treatment contrary to Article 3 if he is returned to Afghanistan.

In this respect, it does not surprise that the judgment contains a whole page on the situation in Afghanistan (see paragraphs 196 et seq.).

What does surprise is that the judgment refuses to acknowledge such a complaint under Article 3.

2. The issue: the approach chosen by the judgment

Despite the importance of this complaint, the judgment does not examine it separately under Article 3, at least not as regards Greece. Instead, it examines it only together with Article 13 of the Convention (see paragraphs 294 et seq.). This approach is, as far as I can see,

innovatory. In previous cases the Court has had no hesitations in examining the issue of *refoulement* first under Article 3 and then under Article 13 and finding violations under both provisions (see, for example, Chahal v. the United Kingdom, 15 November 1996, Reports of Judgments and Decisions 1996 V, and *Jabari* v. Turkey, no. 40035/98, ECHR 2000 VIII). It is difficult to comprehend the new approach which is now proposed. For, if the complaint is "arguable" under Article 3 (see section 1 above), surely it should first be examined under this provision, and only subsequently – if an additional complaint is raised about insufficient remedies – also under Article 13 of the Convention.

This is not merely a theoretical assessment of the relative position of the Convention provisions to each other. On the one hand, Article 3, expressing itself on the prohibition of torture or inhuman and degrading treatment or punishment, is a fundamental provision – a fortiori as this complaint lies at the basis of the present case (see section 1 above). The applicant's complaint raised under Article 3 merits per se to be treated on its own. On the other hand, as I shall point out, this innovatory approach entails practical consequences for the applicant (see section 6 below).

3. The criterion of this new approach

According to the new approach which examines Article 3 solely together with Article 13 in respect of the complaint against Greece concerning *refoulement*, it is stated in the judgment that:

> "[i]t is in the first place for the Greek authorities, who have responsibility for asylum matters, themselves to examine the applicant's request and the documents produced by him and assess the risks to which he would be exposed in Afghanistan. The Court's primary concern is whether effective procedural guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin" (§ 299).

Thus, the judgment requires that the national authorities first examine the issue of *refoulement* before the Court can do so.

4. Questions as to this new approach

The Court's new approach – that the authorities must first have examined the complaint about *refoulement* under Article 3 before the Court can do so – raises a number of questions.

(a) Exhaustion of domestic remedies

To begin with, it is not clear what the relationship is between this condition and the rule of the exhaustion of domestic remedies according to Article 35 § 1 of the Convention. Had it been found in the present case that the applicant did not bring his complaint before all the competent Greek

authorities, surely the complaint should then have been declared inadmissible for non-exhaustion of domestic remedies (see *Bahaddar v. the Netherlands*, 19 February 1998, *Reports* 1998 I, §§ 45 et seq.)? Instead, however, not only does the present judgment not declare the complaint under Article 3 concerning *refoulement* inadmissible, it even declares it "arguable" (see the citation above in section 1).

(b) Principle of subsidiarity

Without stating as much, the Court is very likely applying here the principle of subsidiarity, as it transpires from Article 1 of the Convention. According to this principle, it falls primarily to the States to guarantee and implement the rights enshrined in the Convention. The function of the Convention and the Court remains to provide a European minimum standard (Handyside v. the United Kingdom, 7 December 1976, § 48, Series A no. 24). I am all in favour of the principle of subsidiarity, but I think here is the wrong place to apply it. Tribute has already been paid to subsidiarity in this case by testing the complaint expressly or implicitly with various admissibility conditions and in particular with that of the exhaustion of domestic remedies (which is in itself an application of the principle of subsidiarity par excellence). Subsidiarity plays an important part, for instance, in applying the second paragraphs of Articles 8-11 of the Convention. Its role must surely be more restricted in the light of a cardinal provision such as Article 3 and in view of the central importance of the applicant's *refoulement* for this case. In any event, in my opinion, subsidiarity does not permit such a complaint to be "downgraded" so that it is no longer independently examined.

(c) The Court's experience in examining such issues

There is nothing new in the fact that the Court will on its own examine whether there is a risk of treatment in the applicant's home country which would be contrary to Article 3 of the Convention. The Court does this all the time. Even if domestic authorities have examined the implications of the deportation, it is not at all certain that their conclusions enable the Court, without any further examination of the case, to dispose of the matter. Often, the Court itself will have to undertake the necessary investigations as to the situation in the receiving State even after domestic authorities have dealt with the matter.

To mention but one example: in the case of *Saadi* v. Italy, concerning deportation to Tunisia, the domestic authorities' reasons for allowing that applicant's *refoulement* concerned mainly assurances which the Tunisian Government had given to Italy – assurances which the Court in its judgment found to be insufficient. The Court was then obliged to examine itself, and in detail, the situation in Tunisia, relying *inter alia* on Reports of Amnesty International and Human Rights Watch (see *Saadi* v. Italy [GC],

no. 37201/06, ECHR 2008). These arguments had not been examined by the Italian courts. This is precisely what the Court could and should have done in the present case.

(d) Preliminary examination

Indeed, one could argue that by describing the applicant's complaint about *refoulement* as being "arguable" (see section 1 above), the Court has already undertaken precisely such an examination of the matter. Had the complaint been inadmissible as being manifestly ill-founded, the Court could not have examined it together with Article 13 of the Convention for lack of an "arguable claim" (on this case-law see Soering v. the United Kingdom, 7 July 1989, § 117, Series A no. 161).

(e) Contradictory conclusion in respect of Belgium

A final question concerns a discrepancy in the judgment itself. While the Court refuses to examine Article 3 separately in respect of Greece, it does precisely so in respect of Belgium, where it finds, first, a violation of Article 3 and then a further one under Article 13 taken together with Article 3 of the Convention (see paragraphs 344 et seq.). Indeed, the reasoning under Articles 13 and 3 concerns circumstances which are quite similar to those concerning Greece.

5. Dangers for the applicant

The judgment points out on various occasions that there was, and is, a clear danger of the proceedings in Greece malfunctioning and the applicant being sent back to Afghanistan during the proceedings without a complete examination of his complaints having taken place. For instance, it is stated in the judgment that:

> "[s]everal reports highlight the serious risk of *refoulement* as soon as the decision is taken to reject the asylum application, because an appeal to the [Greek] Supreme Administrative Court has no automatic suspensive effect " (§ 194).

And again,

> "[o]f at least equal concern to the Court are the risks of *refoulement* the applicant faces in practice before any decision is taken on the merits of his case. The applicant did escape expulsion in August 2009 ... However, he claimed that he had barely escaped a second attempt by the police to deport him to Turkey" (§ 316).

Moreover,

> "[t]hat fact, combined with the malfunctions in the notification procedure in respect of 'persons of no known address' reported by the European Commissioner for Human Rights and the UNHCR ... makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit" (§ 319).

This risk of being expelled actually constitutes the very reason why the Court eventually finds a violation of Article 13 taken together with Article 3, namely:

> "because of the ... risk [which the applicant] faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy" (§ 322).

6. Implications for the Greek Government

As it stands, the judgment bases the finding of a violation solely on Article 13 of the Convention taken together with Article 3. The judgment is binding for the parties according to Article 46 of the Convention, and they are obliged to comply with it. But equally clearly, it hardly follows from the finding of a violation under Article 13 that a State is not allowed to deport the applicant to his home country. Such a finding would be overstretching the potential of a complaint under Article 13.

In the light of the present judgment, the Greek authorities may now conduct proceedings concerning the applicant's complaint (which they have assured the Court they will do – see paragraph 275). If the authorities eventually decide that the applicant may be deported to Afghanistan, he is of course free to file a further complaint before the Court with a renewed request for interim measures under Rule 39 of the Rules of Court. Here lies not the problem (other than the additional workload for the Court which this new approach implies).

The problem is, rather, whether the applicant will in future at all be able to file a new complaint once the proceedings in Greece have been terminated and while he is still on Greek territory. I need not even speculate on the circumstances of this risk, for the judgment itself strongly emphasises that there is no certainty whatsoever that the applicant will *de facto* be able to do so while still in Greece (see the various citations in section 5 above). As far as I am concerned, the Government's assurances in the present case may appear entirely credible. But what if in other, future cases in respect of other Governments no such assurances are given, or if they are not upheld?

In sum, such dangers are the direct result of treating the complaint about *refoulement* not separately under Article 3, but together with Article 13 of the Convention, as in the present judgment.

7. Invoking Article 46 of the Convention

Obviously, the judgment is aware of these weaknesses and worries and reacts to them by intervening with Article 46 as a form of *deus ex machina* and instructing the Greek Government not to deport the applicant to

Afghanistan during the pending proceedings (see the last line of paragraph 402). This instruction is begging the question, it is a *petitio principii*. Article 46 should only be applied if the Court has previously found a violation of the Convention – which it patently has not done where Article 3 of the Convention as regards the applicant's fear of deportation to Afghanistan is concerned. On what ground, indeed by what authority, can the judgment prohibit the deportation, if the Court has nowhere examined whether such deportation would be harmful to the applicant?

The Court has a very restricted role as regards the implementation of its judgments. The principle of subsidiarity requires that this task falls primarily to the Convention States under the supervision of the Committee of Ministers of the Council of Europe. This explains why the Court has so far only exceptionally applied measures according to Article 46 (important examples are mentioned in paragraph 399 of the judgment). By giving an instruction based on Article 46 in the present case, the judgment creates confusion as to the meaning and scope of this provision and sadly weakens the authority of the "tool" which Article 46 offers the Court to handle exceptional circumstances.

8. Alternative manner of proceeding

Had the applicant's complaint about *refoulement* been examined separately under Article 3 of the Convention, and had the Court found that there was a risk of treatment contrary to Article 3 in the event of the applicant's return to Afghanistan, the Court's conclusion in the operative part of the judgment would have been that "in the event of [the respondent State's] decision to deport [the applicant] to [the particular State], there would be a violation of Article 3 of the Convention" (see, *mutatis mutandis*, the Court's conclusion under Article 3 of the Convention in *Chahal*, cited above). The effect would be to prevent the Greek authorities from deporting the applicant to his home country. By warning against such a "potential violation" ("would be") the Court would in effect be prolonging the measure under Rule 39 of the Rules of Court which it upheld throughout the proceedings.

9. Conclusion

The judgment has implications not only for the present case but, more generally, in respect of future cases. A new approach (and condition) has been introduced for the examination of a *refoulement* under Article 3, namely by relying primarily on Article 13. It leaves open a legal loophole whereby a person, despite the finding by the Court of a violation under Article 13 of the Convention taken together with Article 3, can nevertheless be deported to a country where he or she may be subjected to ill-treatment

contrary to Article 3 of the Convention. It amounts to a *petitio principii* in such a situation to invoke Article 46 in order to prevent deportation.

For these reasons I believe that the Court should have separately examined the admissibility and merits of the complaint about *refoulement* under Article 3 of the Convention, insofar as it is directed against Greece.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÓ

I welcome most of the expected consequences of this judgment, namely the hoped-for improvements in the management of asylum proceedings under the Dublin system. It is therefore to my sincere regret that I have to dissent on a number of points.

My disagreements are partly of a technical nature. While I agree with the finding that Article 13 was violated as no effective remedy was available in Greece against a potential violation of Article 3, I find that the applicant cannot be regarded a victim in the sense of Article 34 of the Convention as far as the conditions of his stay in Greece are concerned, and also in regard to the deficiencies in the asylum procedure there. I agree with the Court that there was a violation regarding the conditions of his detention, but on slightly different grounds. I dissent as to the finding that Belgium is in violation of Article 3 of the Convention for returning the applicant into detention in Greece.

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY GREECE BECAUSE OF THE CONDITIONS OF THE APPLICANT'S DETENTION

I agree with the Court that the conditions of the applicant's detention at the Athens Airport Detention Center amount to inhuman and degrading treatment, notwithstanding the doubts that remain as to the actual conditions of his detention. There seem to be important differences between the different sectors of the Athens Airport Detention Center, and the actual conditions at the time of the applicant's two periods of detention may have varied. It may well be that at least one of the sectors did satisfy minimum requirements.

I am reluctant to ground a finding of inhuman and degrading treatment because of detention conditions on information relating to conditions at *other* premises or at times *other* than the material one. However, the insufficiency of the conditions of detention of migrants and asylum seekers in Greece has been repeatedly established by the Court in a number of cases (paragraph 222), and the shortcomings of the Athens Airport Detention Center were reported by the UNHCR. In such circumstances the Government should have provided convincing evidence about the conditions of the applicant's actual detention. However, the Government failed to provide the Court with reliable information as to which sector the applicant was actually held in (cf. paragraph 228). Given the above-mentioned legitimate suspicion, the absence of appropriate documentation becomes decisive, even if the detention was of short duration. The Greek Government should have proved that the placement was not in an

overcrowded place in appalling conditions of hygiene and cleanliness, amounting to degrading treatment prohibited by Article 3, but they failed to do so. Of course, in *A.A. v. Greece*, no. 12186/08, §§ 57 to 65, 22 July 2010, where these conditions were found to amount to humiliation, the period was considerably longer, namely 3 months. For the Court the duration of the detention in the present case is comparable in its effects to much longer stays in detention because of the assumed vulnerability of the applicant. I do not find the applicant particularly vulnerable (see below) but I do find the short term of detention inhuman because, as a rule, the relatively short-term restriction of freedom under deplorable conditions of people not accused of wrongdoing (as is the case here, at least for the first period of detention) causes considerable humiliation in itself.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY GREECE BECAUSE OF THE APPLIANT'S LIVING CONDITIONS

According to the Court the applicant, as an asylum seeker, is a member of a particularly underprivileged and vulnerable population group in need of special protection (paragraph 251). To my mind, although many asylum seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group, in the sense in which the jurisprudence of the Court uses the term (as in the case of persons with mental disabilities, for example), where all members of the group, due to their adverse social categorisation, deserve special protection. In the context of the Dublin system, particularly "vulnerable person or people" refers to specific categories within refugees, namely to victims of torture and unaccompanied children only[1], and their treatment is unrelated to their classification.

The concept of a vulnerable group has a specific meaning in the jurisprudence of the Court. True, if a restriction on fundamental rights applies to a particularly vulnerable group in society who have suffered considerable discrimination in the past, such as people with mental disabilities, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question (cf. also the examples of those subjected to discrimination on the grounds of their gender – *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94 –, race – *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 182, ECHR 2007 – or sexual orientation – *E.B. v. France* [GC], no. 43546/02, § 94, ECHR 2008). The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subjected to prejudice with lasting consequences, resulting

[1] It seems that in international humanitarian law "particularly vulnerable group" refers to priority treatment of certain categories of refugees.

in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs (cf. *Shtukaturov v. Russia*, no. 44009/05, § 95, 27 March 2008, and *Alajos Kiss v. Hungary*, no. 38832/06, 42 § ..., ECHR 2010-). Where a group is vulnerable, special consideration should be given to their needs, as in the case of the Roma, who have become a disadvantaged and vulnerable group as a result of their history (*Oršuš and Others v. Croatia* [GC], no. 15766/03, §§ 147-148, ECHR 2010-...).

Asylum seekers differ to some extent from the above-identified "particularly vulnerable groups". They are not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion. In fact, they are not socially classified, and consequently treated, as a group. For the reasons identified by the Court it is possible that some or many asylum seekers are vulnerable, i.e. they will feel a degree of deprivation more humiliating than the man on the Clapham omnibus, but this does not amount to a rebuttable presumption in regard to the members of the "class". Asylum seekers are far from being homogeneous, if such a group exists at all.

Could the treatment of asylum seekers by the Greek authorities amount to inhuman and degrading treatment? Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (amongst other authorities, *Price v. the United Kingdom*, no. 33394/96, §§ 24-30, ECHR 2001-VII, and *Valašinas v. Lithuania*, no. 44558/98, § 117, ECHR 2001-VIII).

Under Article 3 the humiliation or debasement and the lack of respect shown should originate from the State or, in exceptional circumstances, from private actors in a dominant position in a situation at least overwhelmingly controlled by the State, as is the case, for example, where the State tolerates prisoners abusing their fellow inmates. Moreover, the purpose of the State action or omission is also a matter for consideration, although even in the absence of such a purpose one cannot conclusively rule out a finding of a violation of Article 3 (*Peers* v. *Greece*, no. 28524/95, §§ 67-68, 74, and *Valašinas*, cited above, § 101). In the present case, even if the authorities were careless and insensitive in the asylum procedure, there is no evidence of any intention to humiliate.

The Court took into consideration the lack of accommodation (paragraph 258) and the failure to provide for the applicant's essential needs. This made the Court conclude that Article 3 of the Convention was violated as a result of the "living conditions" of the applicant. In this approach, for people who, like the applicant, are vulnerable (paragraph 263), such deprivations amount to inhuman and degrading treatment. Is this to mean that when it comes to

particularly vulnerable people, failure by the State to provide material services that satisfy essential needs amounts to a violation of Article 3?

The Court's present construction of insufficient living conditions as inhuman and degrading treatment is not without antecedents. The Court has already conceded, *obiter dicta*, that State responsibility could arise for "inhuman and degrading treatment" where an applicant, *in circumstances wholly dependent on State support*, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity (*Budina v. Russia*, Dec. no. 45603/05, CEDH 2009 -...). In that case the Court did in fact admit the possibility of social welfare obligations of the State in the context of Article 3 of the Convention. It did so in the name of dignity, and relying on a theory of positive obligations of the State. Such obligations would include the prevention of serious deprivation through appropriate government-provided services. This position, of course, would be perfectly compatible with the concept of the social welfare state and social rights, at least for a constitutional court adjudicating on the basis of a national constitution that has constitutionalised the social welfare state.

Relying on the *Budina* reasoning, the Court concludes "that *the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources..."* (paragraph 263). With the above formulation the Court's position regarding Article 3 of the Convention and the constitutional position of a welfare state are getting even closer. The current position seems to be that with regard to vulnerable groups in an undignified material situation, the State is responsible under Article 3 if it is passive over a lengthy period of time. The position of the Court implies that the applicant is living "in circumstances wholly dependent on State support". (However, being in possession of the "pink card", even the penniless have some independence *vis-à-vis* the State.)

The above position is open to criticism and not only because of the over-broad concept of vulnerability and dependence. In order to avoid the undignified situation of alleged total dependency, the Court seems to require that the Greek State should handle applications within a reasonably short time and with utmost care – a requirement that I fully agree with - and/or that it should provide adequately for basic needs (a conclusion I cannot follow.) There seems to be only a small step between the Court's present position and that of a general and unconditional positive obligation of the State to provide shelter and other material services to satisfy the basic needs of the "vulnerable". The Court seems to indicate that the welfare obligation arises in respect of vulnerable people only where it is the State's passivity that causes the unacceptable conditions ("*the authorities must be held responsible, because of their inaction, for the situation in which he has*

found himself for several months"). Perhaps, without delays in the asylum procedure and/or by affording asylum seekers a genuine opportunity to take care of themselves (e.g. by effectively engaging in gainful activities), there would be no State responsibility for the situation[1].

Even if the Court is not tempted to follow the path of the welfare revolution, an odd situation will arise.. For example, the mentally disabled, vulnerable as they may be, will not be entitled to the care of the State as their vulnerability is attributable to Nature and the conditions causing their suffering and humiliation are not attributable to the passivity of the State. Unlike this undeniably vulnerable group, however, asylum seekers will be entitled to government-provided services. In terms of vulnerability, dependence, and so on, the mentally disabled (and other vulnerable groups, whose members are subject to social prejudice) are in a more difficult situation than asylum seekers, who are not a homogeneous group subject to social categorisation and related discrimination. The passivity of the State did not cause the alleged vulnerability of the asylum seekers; they might be caught up in a humanitarian crisis, but this was not caused by the State, although the authorities' passivity may have contributed to it (see below). Even if asylum seekers were as vulnerable as the traditionally discriminated vulnerable groups, which they are not, the Grand Chamber confirmed again a year ago in *Orsus v. Croatia* (§ 148) that the duty of the State is to give "special consideration" to their needs, but not to provide adequate living conditions.

On a personal level, I find attractive the position that humanitarian considerations ("humanitarian standards") must guide the actions of the State. This is explicitly required by the Dublin Regulation: national authorities shall not sit idle when it comes to the misery of asylum seekers and migrants; but I find that human rights as defined by the Convention differ from humanitarian concerns. Greece has an obligation to take care of some basic needs of *needy* asylum seekers, but only because this is required under the applicable European Union law. There is a difference in this regard between EU law and conventional obligations which originate from the prohibition of inhuman and degrading treatment.

The European Commission (COM (2009) 554, final, 21 October, 2009) found that the current European Union asylum procedure system is defective. In particular, the minimum standards are (a) insufficient and (b) vague, thus lacking the potential to ensure fair and efficient examinations, and additional measures are to be taken to grant applicants a realistic

[1] Third party intervenors claimed that asylum seekers are deprived of the right to provide for their needs (paragraph 246). If this were corroborated and shown to be attributable to the State, e.g. if the practical difficulties of employment that were mentioned originated from restrictive regulation or official practice, I would find the State responsible under Article 3 for the misery of the asylum seekers. This point was, however, not fully substantiated.

opportunity to substantiate their requests for international protection. This is the gist of the present problem.

Asylum seekers are generally at least *somewhat* vulnerable because of their past experiences and the fact that they live in a new and different environment; more importantly, the uncertainty about their future can make them vulnerable. Waiting and hoping endlessly for a final official decision on a fundamental existential issue in legal uncertainty caused by official neglect arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, and therefore it may be characterised as degrading. The well-documented insufficiencies of the Greek asylum system (including the extremely low likelihood of success in the applications – 1% in Greece against more than 60 % in Malta) turn such a system into a degrading one.

An asylum system with a rate of recognition not exceeding 1 percent is suspect *per se* in terms of the fairness of the procedure; the Government failed to provide any justification for this apparent statistical aberration. The authorities should handle the applications in a timely and fair manner; when interviews are granted on Saturdays only (paragraph 105), and when even access to the Attica police headquarters is difficult, State passivity becomes pervasive. This mismanagement was never explained by the Government. Such passivity precludes a timely and fair procedure; in the absence of such a procedure, existential angst will become common. I find it decisive that asylum seekers are negatively affected by the lack of timely evaluation of their asylum applications (a matter clearly to be attributed to the State) in a process where their claim is not evaluated fairly. "Asylum seekers who remain in the asylum procedure for more than two years have a significantly higher risk of psychiatric disorders, compared to those who just arrived in the country. This risk is higher than the risk of adverse life events in the country of origin."[1] Given the high likelihood of a medical condition resulting from the passivity of the State in a procedure that is decisive for the fate of people living in dependency, there is an Article 3 responsibility of the State in situations like the present one. Had he been a victim under Article 34, the applicant's rights could have been found to have been violated.

The Court accepts that the applicant suffered degrading treatment as he alleges. This acceptance is based on general assumptions. The evidence relied upon is the general negative picture painted by international observers of the everyday lot of a large number of asylum seekers with the same

[1]Laban, C.J., *Dutch Study of Iraqi Asylum Seekers: Impact of a long asylum procedure on health and health related dimensions among Iraqi asylum seekers in the Netherlands; An epidemiological study.* Doctoral dissertation, 2010. p. 151 http://dspace.ubvu.vu.nl/bitstream/1871/15947/2/part.pdf. (comparing Iraqi asylum seekers whose asylum procedure has taken at least two years with Iraqi asylum seekers who had just arrived in the Netherlands, with additional literature).

profile as that of the applicant.[1] For this reason the Court sees no reason to question the truth of the applicant's allegations (paragraph 255). Likewise, for the Court, given the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece, the Court considers that the Greek authorities should not simply have waited for the applicant to take the initiative of turning to the prefecture to provide for his essential needs (paragraph 259). I do not consider asylum seekers as a group of people who are incapacitated or have lost control over their own fate.

General assumptions alone are insufficient to establish the international law responsibility of a State beyond reasonable doubt.[2]

Let us turn to the specifics of the applicant's case. The applicant was in possession of considerable means, as he paid USD12,000 to a smuggler to get him out of Afghanistan, managed to get from Greece to Belgium and had the means to obtain false Bulgarian identity papers and a ticket to Italy. Moreover, as a former interpreter he was capable of communicating in a foreign environment.

While the Greek asylum procedures are generally marked by too many problems, this does not exempt an asylum-seeker in the applicant's position from cooperating with the authorities in good faith. Lack of such cooperation would further undermine the system. The applicant failed to cooperate with the immigration system and, when a place in a reception centre was offered to him once he finally asked for it, he failed to cooperate. He did not allow the authorities to examine his alleged complaints. Therefore he cannot claim to be a victim of the system, which is otherwise generally degrading and humiliating. The insufficiencies of the system and the applicant's desire to live in Belgium are insufficient reasons not to rely on the asylum procedure available in Greece as the country of entry. The applicant, by his own actions, failed to give the domestic authorities an opportunity to examine the merits of his claims. To conclude differently would encourage forum shopping and undermine the present European Union refugee system, thereby causing further malfunctions and suffering.

However, all this does not affect his victim status in regard to Belgium. Belgium should not have deported him to Greece, where he was likely to be subjected to a humiliating process, given the known procedural

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[1] Once again, it is hard to accept that the typical asylum seeker or refugee has the same profile as the applicant, who had money and speaks English.

[2] The Court's case-law required there to be a link between the general situation complained of and the applicant's individual situation (*Thampibillai v. the Netherlands*, no. 61350/00, 17 February 2004, and *Y. v. Russia*, no. 20113/07, 4 December 2008). Where there is a mandatory procedure the general situation will apply *inevitably* to the applicant, therefore the nexus is established, and Greece is responsible; likewise Belgium, as it was aware of this fact. But it was not inevitable that M.S.S. would be kept for three days at a detention centre, as this does not follow from Greek law and there is no evidence of a standard practice in this regard; Belgium cannot be held responsible for the degrading detention.

shortcomings of the asylum system (but not for lack of adequate living conditions).[1]

III. ALLEGED VIOLATION BY GREECE OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE SHORTCOMINGS IN THE ASYLUM PROCEDURE AND THE SUBSEQUENT RISK OF REFOULEMENT

I found that the applicant lacked victim status regarding his stay in Greece during the asylum procedure. It therefore needs some explanation why I find that the applicant has standing regarding the risks of *refoulement*. Contrary to the Court, I do not find convincing the information that there is forced *refoulement* to Afghanistan (paragraph 314). At the material time (2009), referring to the Court's judgment in *K.R.S. v. the United Kingdom*, the UNCHR did not consider that the danger of *refoulement* existed in Greece (paragraph 195).[2] However, the Government's policy may change in this regard. Only a system of proper review of an asylum request and/or deportation order with suspensive effect satisfies the needs of legal certainty and protection required in such matters. Because of the shortcomings of the procedure in Greece, as described in paragraph 320, the applicant remains without adequate protection, irrespective of his non-participation in the asylum procedure, irrespective of his contribution to the alleged humiliation due to the deficiencies of the asylum procedure, and irrespective of the present risk of *refoulement*. For this reason the measure required by Judge Villiger should apply.

[1] Certainly, Belgium could not foresee that he would make efforts to bypass the Greek (and European Union) system as he simply wished to leave Greece. I do not find convincing the argument that the applicant wanted to leave Greece because of his state of need (paragraph 239). He left Greece six weeks after he applied for asylum. However, this personal choice which showed disregard for the asylum procedure does not absolve Belgium of its responsibilities which existed at the moment of the applicant's transfer to Greece. The inhuman and degrading nature of the asylum procedure was a matter known to Belgium. This does not apply to the applicant's detention in Greece (see below).

[2] The Court held this letter of the UNHCR of 2 April 2009 to be of critical importance (paragraph 349) when it came to the determination of Belgium's responsibility. Further, given the assurances of the Greek Government (paragraph 354) and the lack of conclusive proof of *refoulement*, there was nothing Belgium should have known in this regard; and Belgium has no responsibility in this respect.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION BY BELGIUM FOR EXPOSING THE APPLICANT TO CONDITIONS OF DETENTION AND LIVING CONDITIONS CONTRARY TO ARTICLE 3

For the Court, the expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country.

I agree that Belgium had enough information to foresee that the Greek asylum procedure did not offer sufficient safeguards against the humiliation inherent in this inefficient procedure, which was the basis for the finding of a violation of Article 3 in that regard (paragraph 360). (Here again, I find the living-conditions-based considerations irrelevant.) I could not come to the same conclusion regarding the applicant's detention. It was not foreseeable that the applicant would be detained, or for how long. The detention of transferred asylum seekers is not mandatory and there is no evidence in the file that such a practice is followed systematically. Even if one could not rule out that at the beginning of the asylum process, in the event of illegal entry, some restriction of liberty might occur, the Belgian State could not have foreseen that the applicant would not be placed in a section of the Airport Detention Centre that might have been considered satisfactory, at least for a short stay, and was designed to handle people in a situation comparable to that of the applicant. The Belgian State could certainly not have foreseen that the applicant would attempt to leave Greece illegally, for which he was again detained in one of the sections of the Airport Detention Centre and sentenced to two months imprisonment. It is for this same reason that I found the sum Belgium was ordered to pay in respect of non-pecuniary damage excessive.

V. ALLEGED VIOLATION BY BELGIUM OF ARTICLE 13 TAKEN IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION BECAUSE OF THE LACK OF AN EFFECTIVE REMEDY AGAINST THE EXPULSION ORDER

The applicant was ordered to leave Belgium and detained on 19 May 2009, and on 27 May 2009 the departure date was set for 29 May. There was enough time to organise adequate representation (the lawyer made an application only after studying the file for 3 days) and to take proper legal action. (However, the Aliens Appeals Board dismissed his application, while his personal appearance was hindered by his detention.) Appeals could be lodged with the Aliens Appeals Board at any time, round

the clock and with suspensive effect. The Court had confirmed the effectiveness of the procedure in the case of *Quraishi v. Belgium* (application no. 6130/08, decision of 12 May 2009). In the present case the Court evaluates only the impossibility for the applicant's lawyer to get to the hearing. For these reasons, I cannot follow the Court's conclusion in paragraph 392.

Nevertheless, I agree with the Court that there is a systemic problem in the Belgian deportation procedure resulting in the violation of Article 13. While the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant, the lack of any prospect of obtaining adequate redress in Belgian courts (paragraph 394) is decisive under Article 13. This in itself is sufficient for the finding of a violation.

PARTLY DISSENTING OPINION OF JUDGE BRATZA

1. It is with regret that I find myself in disagreement with the other judges of the Grand Chamber in their conclusion that Belgium violated Article 3 of the Convention by returning the applicant to Greece in June 2009. I could readily accept that, if Belgium or any other Member State were, in the light of the Court's findings in the present judgment as to the risk of *refoulement* in Greece and the conditions of detention and living conditions of asylum seekers there, forcibly to return to Greece an individual from a "suspect" country of origin such as Afghanistan, it would violate Article 3 even in the absence of an interim measure being applied by the Court. What I cannot accept is the majority's conclusion that the situation in Greece and the risks posed to asylum seekers there were so clear some 18 months ago as to justify the serious finding that Belgium violated Article 3, even though the Court itself had found insufficient grounds at that time to apply Rule 39 of the Rules of Court to prevent the return to Greece of the applicant and many others in a similar situation. The majority's conclusion appears to me to pay insufficient regard to the unanimous decision of the Court concerning the return of asylum seekers to Greece under the Dublin Regulation in the lead case of *K.R.S. v. the United Kingdom*, which was delivered in December 2008, less than 6 months prior to the return of the present applicant, and which has been relied on not only by national authorities but by the Court itself in rejecting numerous requests for interim measures.

2. As was noted in the *K.R.S.* decision itself, the Court had received, in the light of the UNHCR position paper of 15 April 2008, an increasing number of Rule 39 requests from applicants in the United Kingdom who were to be removed to Greece: between 14 May and 16 September 2008 the Acting President of the Section responsible had granted interim measures in a total of 80 cases. The Court's principal concern related to the risk that asylum seekers from "suspect" countries – in the *K.R.S.* case itself, Iran – would be removed from Greece to their country of origin without having had the opportunity to make an effective asylum claim to the domestic authorities or, should the need arise, an application to the Court under Rule 39. To this end, the Court sought and obtained certain assurances from the Greek authorities through the United Kingdom Government. These included assurances that no asylum seeker was returned by Greece to such countries as Afghanistan, Iraq, Iran, Somalia, Sudan or Eritrea even if his asylum application was rejected by the Greek authorities; that no asylum applicant was expelled from Greece unless all stages of the asylum procedure were completed and all the legal rights for review had been exhausted, according to the provisions of the Geneva Convention; and that an asylum seeker had a right to appeal against any expulsion decision made and to apply to the Court for a Rule 39 indication.

3. The Court in the *K.R.S.* decision also took express account of reports and other evidential material before it, including:

(i) the judgment of the Court of Justice of the European Communities ("the ECJ") of 19 April 2007 in *Commission v. Greece*, in which the ECJ found that Greece had failed to implement Council Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers: the Directive was subsequently transposed into Greek law in November 2007;

(ii) a report of the Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("the CPT") dated 8 February 2008 in which the CPT published its findings on a visit to Greece in February 2007. Having reviewed the conditions of detention for asylum seekers, the CPT made a series of recommendations concerning the detention and treatment of detainees, including a revision of occupancy rules so as to offer a minimum of 4 square metres of space per detainee, unimpeded access to toilet facilities and the provision of products and equipment for personal hygiene. The CPT also found the staffing arrangements in the detention facilities to be totally inadequate and directed that proper health care services be provided to detainees;

(iii) a report of Amnesty International of 27 February 2008, entitled "No place for an asylum seeker in Greece", which described the poor conditions in which immigration detainees were held in that country and the lack of legal guarantees with regard to the examination of their asylum claims, particularly the conduct of interviews in the absence of an interpreter or lawyer. While noting that Greece did not return persons to Afghanistan, the report criticised Greece for failing to process their applications in a prompt, fair way, leaving them without legal status and therefore without legal rights;

(iv) a report of 9 April 2008 of the Norwegian Organisation for Asylum Seekers, Norwegian Helsinki Committee and Greek Helsinki Monitor recording, *inter alia*, the keeping of asylum seekers in Greece in police custody; the very limited resources in the country for handling asylum applications; the lack of legal assistance for asylum seekers; the very small number of residence permits granted; the inadequate number of reception centre places; and the small number of police officers assigned to interview more than 20,000 asylum seekers arriving in Greece in the course of a year and the short and superficial nature of the asylum interviews;

(v) the position paper of the UNHCR of 15 April 2008, advising Member States of the European Union to refrain from returning asylum seekers from Greece under the Dublin Regulation until further notice. The position paper criticised the reception procedures for "Dublin returnees" at Athens Airport and at the central Police Asylum Department responsible for registering asylum applications. The paper characterised the percentage of asylum seekers who were granted refugee status in Greece as "disturbingly low" and criticised the quality of asylum decisions. Concern was further

expressed about the extremely limited reception facilities for asylum seekers and the lack of criteria for the provision of a daily financial allowance.

4. In its decision in *K.R.S.* the Court recalled its ruling in *T.I. v. the United Kingdom* to the effect that removal of an individual to an intermediary country which was also a Contracting State did not affect the responsibility of the returning State to ensure that the person concerned was not, as a result of the decision to expel, exposed to treatment contrary to Article 3 of the Convention. In this regard, the Court noted the concerns expressed by the UNHCR and shared by the various Non-Governmental Organisations and attached weight to the fact that, in recommending that parties to the Dublin Regulation should refrain from returning asylum seekers to Greece, the UNHCR believed that the prevalent situation in Greece called into question whether "Dublin returnees" would have access to an effective remedy as foreseen by Article 13 of the Convention.

5. Despite these concerns, the Court concluded that the removal of the applicant to Greece would not violate Article 3 of the Convention. In so finding, the Court placed reliance on a number of factors:

(i) On the evidence before the Court, which included the findings of the English Court of Appeal in the case of *R. (Nasseri) v. the Secretary of State for the Home Department*, Greece did not remove individuals to Iran, Afghanistan, Iraq, Somalia or Sudan and there was accordingly no risk that the applicant would be removed to Iran on his arrival in Greece.

(ii) The Dublin Regulation was one of a number of measures agreed in the field of asylum policy at European Union level and had to be considered alongside European Union Member States' additional obligations under the two Council Directives to adhere to minimum standards in asylum procedures and to provide minimum standards for the reception of asylum seekers. The presumption had to be that Greece would abide by its obligations under those Directives. In this connection, note had to be taken of the new legislative framework for asylum applications introduced in Greece and referred to in the letter provided to the Court by the Greek Government.

(iii) There was nothing to suggest that those returned to Greece under the Dublin Regulation ran the risk of onward removal to a third country where they would face ill-treatment contrary to Article 3 without being afforded a real opportunity, on the territory of Greece, of applying to the Court for a Rule 39 measure to prevent such removal. Assurances had been obtained from the Greek Dublin Unit that asylum applicants in Greece had a right of appeal against any expulsion decision and to seek interim measures from the Court under Rule 39. There was nothing in the materials before the Court which would suggest that Dublin returnees had been or might be prevented from applying for interim measures on account of the timing of their onward removal or for any other reason.

(iv) Greece, as a Contracting State, had undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein, including those guaranteed by Article 3: in concrete terms, Greece was required to make the right of any returnee to lodge an application with the Court under Article 34 of the Convention both practical and effective. In the absence of any proof to the contrary, it had to be presumed that Greece would comply with that obligation in respect of returnees, including the applicant.

(v) While the objective information before the Court on conditions of detention in Greece was of serious concern, not least given Greece's obligations under Council Directive 2003/9/EC and Article 3 of the Convention, should any claim arise from these conditions, it could and should be pursued first with the Greek domestic authorities and thereafter in an application to the Court.

In consequence of the Court's decision in *K.R.S.*, the interim measures under Rule 39 which had been applied by the Court pending the decision in that case were lifted.

6. Whether or not, with the benefit of hindsight, the *K.R.S.* case should be regarded as correctly decided by the Court, Member States concerned with the removal of persons to Greece under the Dublin Regulation were, in my view, legitimately entitled to follow and apply the decision in the absence of any clear evidence of a change in the situation in Greece which had been the subject of examination by the Court or in the absence of special circumstances affecting the position of the particular applicant. It is apparent that the *K.R.S.* case was applied by national authorities as a recent and authoritative decision on the compatibility with the Convention of returns to Greece, more particularly by the House of Lords in the *Nasseri* case, in which judgment was delivered on 6 May 2009. The decision was also expressly relied on by the Aliens Office in Belgium in rejecting the present applicant's request for asylum.

7. The majority of the Grand Chamber take the view that, as a result of developments before and since the *K.R.S.* case, the presumption that the Greek authorities would respect their international obligations in asylum matters should have been treated as rebutted by the Belgian authorities in June 2009. It is noted in the judgment that numerous reports and materials have been added to the information which was available to the Court when it adopted its *K.R.S.* decision, which agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedures in that country and the practice of direct or indirect *refoulement* on an individual or collective basis. These reports, it is said, have been published at regular intervals since 2006 “and with greater frequency in 2008 and 2009 and ... most of them had already been published when the expulsion order against the applicant was issued” (paragraph 348). In this regard “critical importance” is attached in the judgment to the letter

of 2 April 2009 addressed to the Belgian Immigration Minister which contained "an unequivocal plea for the suspension of transfers to Greece" (paragraph 349). Reliance is also placed on the fact that, since December 2008, the European asylum system has itself entered a "reform phase" aimed at strengthening the protection of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights.

8. I am unpersuaded that any of the developments relied on in the judgment decision should have led the Belgian authorities in June 2009 to treat the decision as no longer authoritative or to conclude that the return of the applicant would violate Article 3. As to the reports and other materials dating back to the years 2006, 2007 and 2008, while the material may be regarded as adding to the detail or weight of the information which had already been taken into account by the Court, it did not in my view change the substantive content of that information or otherwise affect the Court's reasoning in the *K.R.S.* decision. Moreover, I have difficulty in seeing how it can be held against the Belgian authorities that they failed to take account of material which was already in the public domain at the time of the *K.R.S.* decision itself.

9. I have similar difficulty in seeing how, in June 2009, the presumption of Greek compliance which the Court had found to exist in December 2008 could be rebutted by the numerous reports and other information which became available in the second half of 2009 and in 2010. The graphic detail in those reports and in the powerful submissions to the Court by the European Commissioner of Human Rights and the UNHCR as to the living conditions for asylum seekers in Greece, the grave deficiencies in the system of processing asylum applications in that country and the risk of onward return to Afghanistan, unquestionably provide a solid basis today on which to treat the presumption of compliance as rebutted. But this material post-dates the decision of the Belgian authorities to return the applicant and cannot in my view be prayed in aid as casting doubt on the validity of the *K.R.S.* decision at that time.

10. The same I consider applies to the majority's reliance on the proposal to modify the Dublin system by providing for a mechanism to suspend transfers, which proposal had not been adopted by the Commission or Council or implemented at the time of the applicant's return to Greece. The proposal has still not been adopted at the present day.

11. The letter of the UNHCR of April 2009 is clearly a document of some importance, coming as it did from an authority whose independence and objectivity are beyond doubt. The letter noted that, although the Court in *K.R.S.* had decided that the transfer of asylum seekers to Greece did not present a risk of *refoulement* under Article 3, the Court had not given judgment on compliance by Greece with its obligations under international

law on refugees. The letter went on to express the belief of the UNHCR that it was still not the case that the reception of asylum seekers in Greece complied with human rights standards or that asylum seekers had access to fair consideration of their asylum applications or that refugees were effectively able to exercise their rights under the Geneva Convention. The UNHCR concluded the letter by maintaining its assessment of the Greek asylum system and the recommendation which had been formulated in its position paper in April 2008, which had been expressly taken into account by the Court in its *K.R.S.* decision.

Significant as the letter may be, it provides to my mind too fragile a foundation for the conclusion that the Belgian authorities could no longer rely on the *K.R.S.* decision or that the return of the applicant to Greece would violate his rights under Article 3 of the Convention.

12. The diplomatic assurances given by Greece to the Belgian authorities are found in the judgment not to amount to a sufficient guarantee since the agreement of Greece to take responsibility for receiving the applicant under the Dublin Regulation was sent after the order to leave Belgium had been issued and since the agreement document was worded in stereotyped terms and contained no guarantee concerning the applicant in person.

It is true that the assurances of the kind sought by the United Kingdom authorities in the *K.R.S.* case after interim measures had been applied and after specific questions had been put by the Court to the respondent Government, were not sought by the Belgian authorities in the present case. However, the assurances given in *K.R.S.* were similarly of a general nature and were not addressed to the individual circumstances of the applicant in the case. Moreover, there was no reason to believe in June 2009 that the general practice and procedures in Greece, which had been referred to in the assurances and summarised in the *K.R.S.* decision, had changed or were no longer applicable. In particular, there was not at that time any evidence that persons were being directly or indirectly returned by Greece to Afghanistan in disregard of the statements relied on by the Court in *K.R.S.* Such evidence did not become available until August 2009, when reports first emerged of persons having been forcibly returned from Greece to Afghanistan on a recent flight, leading the Court to reapply Rule 39 in the case of the return of Afghan asylum seekers to Greece.

13. It is indeed the Court's practice prior to August 2009 with regard to interim measures in the case of returns to Greece to which I attach particular importance in the present case. The majority of the Grand Chamber are dismissive of the respondent Government's argument that the Court itself had not considered it necessary to suspend the applicant's transfer to Greece by applying Rule 39. It is pointed out that interim measures do not prejudge the examination of an application under Article 34 of the Convention and that, at the stage when interim measures are applied for, the Court is

required to take an urgent decision, often without the material with which to analyse the claim in depth.

14. I can accept that a State is not absolved from its responsibility under the Convention in returning an individual to a country where substantial grounds exist for believing that he faces a real risk of ill-treatment in breach of Article 3 by the mere fact that a Rule 39 application has not been granted by the Court. The role of the Court on any such application is not only different from that of national immigration authorities responsible for deciding on the return of the person concerned but is one which is frequently carried out under pressure of time and on the basis of inadequate information.

Nevertheless, the refusal of the Rule 39 application in the present case is not, I consider, without importance. I note, in particular, that it is acknowledged in the judgment (paragraph 355) that, at the time of refusing the application, the Court was "fully aware of the situation in Greece", as evidenced by its request to the Greek Government in its letter of 12 June 2009 to follow the applicant's case closely and to keep it informed. I also note that in that letter it was explained that it had been decided not to apply Rule 39 against Belgium, "considering that the applicant's complaint was more properly made against Greece" and that the decision had been "based on the express understanding that Greece, as a Contracting State, would abide by its obligations under Articles 3, 13 and 34 of the Convention".

However, of even greater significance in my view than the Court's refusal to apply Rule 39 in the present case, is the general practice followed by the Court at the material time in the light of its *K.R.S.* decision. Not only did the Court (in a decision of a Chamber or of the President of a Chamber) lift the interim measures in the numerous cases in which Rule 39 had been applied prior to that decision, but, in the period until August 2009, it consistently declined the grant of interim measures to restrain the return of Afghan asylum seekers to Greece in the absence of special circumstances affecting the individual applicant. In the period between 1 June and 12 August 2009 alone, interim measures were refused by the Court in 68 cases of the return of Afghan nationals to Greece from Austria, Belgium, Denmark, France, the Netherlands, Sweden and the United Kingdom.

I find it quite impossible in these circumstances to accept that Belgium and other Member States should have known better at that time or that they were not justified in placing the same reliance on the Court's decision in *K.R.S.* as the Court itself.

15. For these reasons, I am unable to agree with the majority of the Grand Chamber that, by returning the applicant to Greece in June 2009, Belgium was in violation of Article 3 of the Convention, either on the grounds of his exposure to the risk of *refoulement* arising from deficiencies

in the asylum procedures in Greece, or on the grounds of the conditions of detention or the living conditions of asylum seekers in that country.

16. Notwithstanding this view, the present case has thrown up a series of deficiencies in Belgium's own system of remedies in respect of expulsion orders which are arguably claimed to violate an applicant's rights under Articles 2 or 3 of the Convention. These deficiencies are, in my view, sufficiently serious to amount to a violation of Article 13 and, in this regard, I share the conclusion and reasoning in the Court's judgment. While this finding alone would justify an award of just satisfaction against Belgium, it would not in my view justify an award of the full sum claimed by the applicant, hence my vote against the award which is made against Belgium in the judgment.