CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF MUBILANZILA MAYEKA AND KANIKI MITUNGA v. BELGIUM

(Application no. 13178/03)

JUDGMENT

STRASBOURG

12 October 2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mr A. KOVLER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
Mr P. MARTENS, *ad hoc judge,*

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 21 September 2006,

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

PROCEDURE

1. The case originated in an application (no. 13178/03) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Congolese nationals, Ms Pulcherie Mubilanzila Mayeka and Miss Tabitha Kaniki Mitunga ("the applicants"), on 16 April 2003.

2. The applicants were represented by Mr D. Vanheule, a member of the Ghent Bar. The Belgian Government ("the Government") were represented by their Agent, Mr C. Debrulle, Director, Federal Office of Justice.

3. The applicants alleged, in particular, that the second applicant's detention and deportation had violated Articles 3, 8 and 13 of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Mrs F. Tulkens, the judge elected in respect of Belgium, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr P. Martens to sit as an *ad hoc* judge (Article 27 § 2 of the Convention Rule 29 § 1).

5. The applicants and the Government each filed further written observations (Rule 59 § 1). The parties replied in writing to each other's observations.

6. A hearing on admissibility and the merits took place in public in the Human Rights Building, Strasbourg, on 26 January 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr C. DEBRULLE, *Agent*,
Mr P. GÉRARD, *Counsel*,
Ms C. GALLANT, Attaché, Human Rights Office,
Legislation and Fundamental Rights and
Freedoms Department, Federal Government
Department of Justice,
Ms L. PEETERS, Director, Aliens Office Inspectorate,
Federal Government Department of the Interior,
Ms R. GOETHALS, Director, National Airport Transit Centre,
Ms N. BRACKE, Attaché, Departmental Head,
Border Inspection Department, Aliens Office, *Advisers*;

(b) *for the applicants*
Mr D. VANHEULE, *Counsel*.

The Court heard addresses by them.

7. By a decision of 26 January 2006, the Court declared the application admissible.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant was born in 1970 and the second applicant in 1997. They live in Montreal (Canada).

9. The applicants are a mother (hereafter "the first applicant") and her daughter (hereafter "the second applicant"). They explained that the first applicant had arrived in Canada on 25 September 2000, where she was granted refugee status on 23 July 2001 and obtained indefinite leave to remain on 11 March 2003.

10. After being granted refugee status, the first applicant asked her brother, K., a Dutch national living in the Netherlands, to collect the second applicant, then five years old, from the Democratic Republic of the Congo (hereafter "the DRC"), where she was living with her grandmother, and to look after her until she was able to join her.

11. At 7.51 p.m. on 17 August 2002 K. arrived at Brussels National Airport with the second applicant. He did not have the necessary travel and immigration papers for his niece or documents to show that he had parental authority and so he tried, unsuccessfully, to persuade the immigration authorities that the second applicant was his daughter.

He explained to the Belgian authorities that he had been on a trip to Kinshasa to visit his father's grave and that the first applicant had asked him to bring the second applicant to Europe in order to join her in Canada. The child had been living with a grandmother who was now too old to look after her and the first applicant's attempts to bring her to Canada lawfully had failed.

12. On the night of 17 to 18 August 2002 the federal police telephoned the first applicant to inform her of the situation and to give her a telephone number where she could ring her daughter. The first applicant explained that she had made an application to the Canadian authorities on behalf of her daughter.

13. On 18 August 2002 the second applicant was refused leave to enter Belgium and directions were made for her removal on the ground that she did not have the documents required by the Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980.

On the same day directions were issued for her to be held in a designated place at the border in accordance with section 74-5 of that Act.

Pursuant to that decision the second applicant was detained in Transit Centre no. 127. Her uncle returned to the Netherlands.

On the same day a lawyer was appointed by the Belgian authorities to assist the applicant and he applied for her to be granted refugee status.

14. On 19 August 2002 the Belgian authorities contacted the immigration department at the Canadian Embassy in The Hague to request information on the first applicant's immigration status in Canada. The immigration department informed them that the first applicant had applied for asylum and indefinite leave to remain in Canada. However, the application for asylum made no mention of the second applicant and so did not extend to her.

In the interim, the first applicant lodged an application in Canada for a visa for her daughter.

15. On 20 August 2002 a lawyer, Mr Ma., informed the authorities that he had been instructed to replace the lawyer initially assigned to the second applicant and that he was taking steps to secure leave for the first applicant to bring her daughter to Canada.

16. On 22 August 2002 the Aliens Office inquired informally of the Dutch authorities whether they would be willing to take over the second applicant's request for asylum under the Dublin Convention, but they refused.

It also asked K. to furnish the addresses of the members of the family in Kinshasa.

17. In a letter to Transit Centre no. 127 dated 23 August 2002, the lawyer thanked the staff at the centre for the friendly welcome they had given to the second applicant and the care with which they had attended to her needs.

18. On 26 August 2002 the immigration office at the Canadian Embassy in the Netherlands informed the Aliens Office by e-mail of the first applicant's former address in Kinshasa and her parents' address there.

19. On 27 August 2002 the second applicant's request for asylum was declared inadmissible by the Aliens Office, which refused her leave to enter and gave directions for her removal. The decision stated that she had a right of appeal against the refusal to the Commissioner-General for Refugees and Stateless Persons under the expedited procedure and could apply within thirty days to the *Conseil d'État* for an order setting aside the removal directions.

The second applicant lodged an appeal under the expedited procedure with the Commissioner-General for Refugees and Stateless Persons.

20. On 4 September 2002, in reply to an enquiry from the Aliens Office, the Belgian Embassy in the DRC advised that the addresses of the members of the applicant's family in Kinshasa it had obtained on the basis of information provided by the first applicant were incorrect. The applicants denied that K. had given false addresses.

21. In an e-mail of 23 September 2002 the immigration office at the Canadian Embassy in the Netherlands informed the Aliens Office that the first applicant had not yet been granted refugee status in Canada.

22. On 25 September 2002 at the hearing of the appeal under the expedited procedure, the Commissioner-General for Refugees and Stateless Persons upheld the refusal of leave to enter after finding that the second applicant's sole aim had been to join her mother in Canada and clearly could not form a basis for an application for refugee status. He drew the Minister of the Interior's attention to the fact that, as a minor, the second applicant was entitled to join her family by virtue of Article 10 of the Convention of New York on the Rights of the Child dated 20 November 1989.

23. On 26 September 2002 Mr Ma. sent a letter to the Aliens Office advising it that the first applicant had obtained refugee status in Canada and had applied to the Canadian authorities for a visa for her daughter. He asked the Aliens Office to place the second applicant in the care of foster parents on humanitarian grounds in view of her age and position until such time as the Canadian authorities had granted her leave to enter. He added that Ms M., an eighteen year-old Belgian national, would make a suitable foster parent. He explained that although the child was being well treated, she was very isolated at the centre and at risk of psychological damage as a result of being detained with adult foreign nationals whom she did not know.

The Aid to Young People in the French Community Department, from whom Mr Ma. had sought assistance, supported the proposal.

No reply was received to the request. From information in the case file it would appear that the Aliens Office dismissed the idea on the grounds that it would place the second applicant at risk, as a warrant had been issued in 1998 for the arrest of Ms M.'s father on suspicion of sexual offences against

minors and he lived in the same town as Ms M., albeit at a different address. The Aliens Office also considered that there was a very real danger that the child would be taken away by her uncle.

24. In October 2002 the Aliens Office contacted the Office of the United Nations High Commissioner for Refugees (HCR), the Red Cross and the Belgian Embassy in Kinshasa.

With the Embassy's help it was able, on the basis of K.'s statements, to identify and subsequently locate a member of the second applicant's family, namely her maternal uncle, B. (a student living on a university campus with five other people in what the Embassy described as suitable accommodation and who, according to the applicants, was the sole member of the family still living in the DRC). An official from the Belgian Embassy in Kinshasa went to B.'s home and explained the situation to him, but B. told him that he did not have the means to look after the child.

25. On 9 October 2002 the second applicant's lawyer lodged an application for her release with the *chambre du conseil* of the Brussels Court of First Instance under section 74-5, paragraph 1, of the Act of 15 December 1980. In the application, he sought an order setting aside the removal directions of 27 August 2002 and an order for the second applicant's release and placement with Ms M. acting as a foster parent or, failing that, with an institute for young children.

In the interim, he also contacted the HCR, which made enquiries of the family in Kinshasa from which it emerged that no one was prepared to look after the child.

26. On 10 October 2002 the Belgian authorities booked a seat on a flight on 17 October 2002 with the same airline as the second applicant had flown with on the outward journey (they cited its obligation under section 74-4 of the Act of 15 December 1980 to transport at its own cost anyone not in possession of the requisite travel papers or who had been removed on lawful grounds to the country from which he had come or any other country prepared to accept him). The HCR, Aid to Young People in the French Community Department and the Belgian Embassy in Kinshasa were informed.

27. On 11 October 2002 Brussels Crown counsel informed the Aliens Office of the second applicant's application and requested the case file, which the Aliens Office supplied on 14 October 2002.

28. According to the Government, B. was informed on 12 October 2002 that his niece would be arriving at 5.45 p.m. on 17 October.

29. In a letter of 15 October 2002, the Aliens Office advised Crown counsel of its views on the application for the second applicant's release:

> "... the enquiries have enabled the person concerned's family to be located in Kinshasa. In view of the positive results of the enquiries as a whole, a flight has already been arranged for Thursday 17 October 2002. The child will be met at Kinshasa by her family. A representative from our Embassy will also be present.

> Lastly, we would note that the sole responsibility for the length of the applicant's detention lies with her uncle, who has been uncooperative and has studiously avoided giving the Aliens Office the family's address. Accordingly, in the child's own interest, she should remain in detention until Thursday 17 October 2002, when she can be returned to her own family in Kinshasa."

On the same day, after receiving confirmation from the Aliens Office that the child was to be removed, the Belgian Embassy official in Kinshasa informed B. in the following letter, which was sent by recorded delivery:

> "Dear Sir,
>
> I wish to confirm the message which the Embassy has received from the Department in Brussels, namely, the return of your niece Mubilanzila Tabitha to Kinshasa (N'Djili) arriving on the Hewa Bora flight at 5.45 p.m. on Thursday 17 October 2002.
>
> Yours faithfully,
>
> ..."

30. On 16 October 2002 the *chambre du conseil* of the Brussels Court of First Instance held that the second applicant's detention was incompatible with Articles 3.1 and 3.2 of the Convention on the Rights of the Child and ordered her immediate release. Noting that it had no jurisdiction to authorise her placement in a foster home or an institution, it held that the application was well-founded in part. Its decision was served on the director of Transit Centre no. 127 that same day.

Crown counsel, who had the right to appeal against that decision within 24 hours, informed the director of the Centre by fax the same day that he was reserving his decision whether or not to appeal.

On the same day the HCR's representative in Brussels sent a fax to the Aliens Office requesting permission for the second applicant to remain in Belgium while her application for a Canadian visa was being processed. It drew the Office's attention to the fact that there did not appear to be an adult in Kinshasa who was able and willing to look after the second applicant, since, according to the information in its possession, B. was still a student. It added that the first applicant had had refugee status in Canada since 23 July 2001, that the second applicant's father had disappeared in August 2000 and that her twin sister had been taken to Congo Brazzaville four months earlier.

31. On 17 October 2002 the second applicant was deported to the DRC. She was accompanied by a social worker from Transit Centre no. 127 who placed her in the care of the police at the airport. On board the aircraft she was looked after by an air hostess who had been specifically assigned to accompany her by the chief executive of the airline. The second applicant travelled with three Congolese adults who were also being deported.

There were no members of her family waiting for her when she arrived. The Government explained that after considerable efforts, the Embassy

official had obtained B.'s agreement to come to the airport to meet his niece. However, he had reneged on his promise at the last minute.

32. The parties have not formally established whether or not a member of the Belgian Embassy was at the airport, as stated in the Alien Office's letter of 15 October 2002. The second applicant stayed at the airport until 5.23 p.m. before eventually being collected by Ms T., a secretary at the National Information Agency of the DRC, who offered her accommodation.

On the same day the first applicant rang Transit Centre no. 127 and asked to speak to her daughter. She was informed that she was no longer staying at the Centre and advised to contact the Aliens Office for further details, which she did. The Aliens Office did not provide her with any explanation but suggested she speak to the HCR, from whom she learnt of her daughter's deportation to Kinshasa.

33. On 18 October 2002 the official from the Belgian Embassy in Kinshasa went to B.'s home, only to discover that he had disappeared.

On the same day the Belgian authorities received a message from the Canadian Embassy in The Hague informing them that the first applicant had been granted refugee status and indefinite leave to remain in Canada with a work permit in 2002 and was consequently entitled to have her family join her.

34. The second applicant left the DRC on 23 October 2002 following the intervention of the Belgian and Canadian Prime Ministers, with the latter agreeing in principle to authorise the reunification of the family. The second applicant travelled to Paris with Ms T. and from there to Canada the same day on a Canadian visa. During the stop over in Paris, Ms T. and the second applicant were accompanied by two officials from the Belgian Embassy. The journey was paid for by the Belgian authorities.

The case attracted considerable attention from the press in the meantime.

35. On 25 October 2002 the airline which had flown the second applicant back to Kinshasa informed the Aliens Office that she had not travelled alone, but with four other aliens who were also being removed. It said that it had arranged for an air hostess to look after her until she was handed over to the authorities in Kinshasa.

36. On 29 October 2002 the first applicant applied to the Canadian authorities for a visa permitting family reunification.

37. At the request of the Aliens Office, the director of Transit Centre no. 127 described the second applicant's conditions at the centre in a letter of 23 November 2004. He explained that she had been looked after by two women who were themselves mothers, that she had played with other children, that her uncle and mother had telephoned her nearly every day and that she had been allowed to telephone them free of charge under the supervision of a team of social workers; he added that her lawyer had paid her a number of visits and had brought her telephone cards, confectionary and money, she had often played outdoors, had watched large numbers of

videos, done drawings and arithmetic and had been comforted if she showed any signs of distress after telephone calls from her family. The director also explained that during the removal procedure the second applicant had been accompanied to the embarkation area (more precisely, the federal police checkpoint) by a social worker and that the entire staff at Transit Centre no. 127 were concerned about the welfare of children, particularly unaccompanied minors.

II. RELEVANT DOMESTIC LAW AND PRACTICE

38. Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980

(a) Appeals against decisions on the entry, residence, settlement and expulsion of aliens

Section 63

"Administrative decisions may give rise to an appeal under the expedited procedure, an application to reopen the proceedings, a request for security measures to be lifted, an application to an administrative court to have the decision set aside or an appeal to an ordinary court in accordance with the following provisions.

No summary application for an interim order under Article 584 of the Judicature Code will lie against an administrative decision taken pursuant to sections 3, 7, 11, 19, Part II, Chapter II, and Part III, Chapter I*bis*. ..."

(b) Measures entailing deprivation of liberty

Section 71

"Aliens against whom a measure depriving them of their liberty has been taken pursuant to sections 7, 25, 27, 29, second paragraph, 51-5(3), fourth paragraph, 52*bis*, fourth paragraph, 54, 63-5, third paragraph, 67 and 74-6 may appeal against that measure by lodging a notice of appeal with the *chambre du conseil* of the criminal court with jurisdiction for the area in which they reside in the Kingdom or the area in which they have been found.

Aliens held in a designated place at the border pursuant to section 74-5 may appeal against the measure by lodging a notice of appeal with the *chambre du conseil* of the criminal court with jurisdiction for the area in which they are being held.

They may renew the appeal referred to in the preceding paragraphs at monthly intervals."

Section 72

"The *chambre du conseil* shall deliver its decision within five working days after the date the appeal is lodged after hearing the submissions of the alien or of his or her counsel and the opinion of Crown counsel. If the case has been referred to it by the Minister in accordance with section 74, the *chambre du conseil* must hear submissions from the Minister, his or her delegate or his or her counsel. If it fails to deliver its decision within the time allowed, the alien shall be released.

The *chambre du conseil* shall review the legality of the detention and of the removal directions but shall have no power to review their reasonableness.

An appeal shall lie against orders of the *chambre du conseil* by the alien, Crown counsel and, in the circumstances set out in section 74, the Minister or his or her delegate.

The procedure shall be the same as that applicable under the statutory provisions on pre-trial detention, with the exception of the provisions relating to arrest warrants, investigating judges, prohibitions on communications, release on licence or on bail, and the right to inspect the administrative file.

Counsel for the alien may consult the case file at the registry of the relevant court during the two working days preceding the hearing. The registrar shall notify counsel of the decision by registered letter."

Section 73

"If the *chambre du conseil* decides that the alien is not to remain in custody, he or she shall be released as soon as the decision becomes final. The Minister may order the alien to reside in a designated place either until the removal directions have been carried out or until his or her appeal has been decided."

Section 74

"If the Minister decides to prolong the alien's detention or to keep him or her under arrest pursuant to section 7, paragraph 5, section 25, paragraph 5, section 29, paragraph 3, section 74-5 § 3, or section 74-6 § 2, he or she must apply within five working days of that decision to the *chambre du conseil* with jurisdiction for the area in which the alien is resident in the Kingdom or was found to enable it to determine whether the decision is lawful. If no application is made to the *chambre du conseil* within that period, the alien shall be released. The remainder of the procedure shall be as stated in sections 72 and 73."

Section 74-4

"§ 1. Any public or private carrier bringing passengers into the Kingdom who are not in possession of the documents required by section 2 or who come within any of the other categories referred to in section 3 shall transport or arrange for the transport of such passengers without delay to the country from which they have come or to any other country prepared to accept them.

§ 2. Any public or private carrier which has brought passengers into the Kingdom will also be required to remove them if:

(a) the carrier that was due to take them to their country of destination refuses to allow them to embark; or

(b) the authorities in the State of destination refuse them leave to enter and send them back to the Kingdom and access to the Kingdom is refused because they do not possess the documents required by section 2 or they fall within any of the other categories referred to in section 3.

§ 3. If the passengers do not possess the documents required by section 2 and their immediate removal is not possible, the public or private carrier shall be jointly liable with the passengers for the costs of the passengers' accommodation and stay and any medical expenses they incur. ...”

Section 74-5

“§ 1. The following persons may be held in a designated place at the border pending the grant or refusal of leave to enter the Kingdom or their removal from the territory:

1° aliens who, pursuant to the provisions of this Act, are liable to be refused entry by the immigration authorities;

2° aliens who attempt to enter the Kingdom without satisfying the conditions set out in section 2, who claim to be refugees and request refugee status at the border.

§ 2. The Crown may designate other places within the Kingdom which will be assimilated to the places referred to in § 1.

Aliens held in such other places shall not be deemed to have been given leave to enter the Kingdom.

§ 3. Detention in a designated place at the border may not exceed two months. The Minister or his or her delegate may however prolong the detention of an alien referred to in § 1 for two-month periods provided:

1° the alien is the subject of enforceable removal directions, an enforceable decision to refuse entry or an enforceable decision upholding the refusal of entry; and

2° the steps necessary to remove the alien are taken within seven working days of the decision or measure referred to in 1° and are prosecuted with all due diligence and the alien's physical removal within a reasonable period remains possible.

After one extension has been granted, the decision referred to in the preceding paragraph may be taken only by the Minister.

The total length of detention shall under no circumstances exceed five months.

If the preservation of law and order or national security so demands, aliens may be held for further successive one-month periods after the time-limit referred to in the

preceding paragraph has expired, provided that the total length of their detention shall not on that account exceed eight months.

§ 4 The following may enter the Kingdom:

1° aliens referred to in § 1 against whom no decision or enforceable measure referred to in § 3, paragraph 1, 1° has been taken;

2° aliens referred to in § 1 against whom an enforceable decision or measure referred to in § 3, paragraph 1, 1° has been taken but in respect of whom the Minister or his or her delegate has not extended the period at the end of the two-month period or of any extension thereof;

3° aliens referred to in § 1 who have been held for a total period of five or eight months respectively.

..."

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

39. Convention on the Rights of the Child of 20 November 1989, ratified by Belgium by a law of 25 November 1991

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.."

Article 10

"1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

..."

Article 22

"1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention."

Article 37

"States Parties shall ensure that:

...

b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

..."

40. In its "Concluding observations of the Committee on the Rights of the Child: Belgium" of 13 June 2002, the Committee on the Rights of the Child made the following recommendation to the State:

"28. ...

(a) Expedite efforts to establish special reception centres for unaccompanied minors, with special attention to those who are victims of trafficking and/or sexual exploitation;

(b) Ensure that the stay in those centres is for the shortest time possible and that access to education and health is guaranteed during and after the stay in the reception centres;

(c) Approve as soon as possible the draft law on the creation of a guardianship service, in order to ensure the appointment of a guardian for an unaccompanied minor from the beginning of the asylum process and thereafter as long as necessary, and make sure that this service is fully independent, allowing it to take any action it considers to be in the best interests of this minor;

(d) Ensure unaccompanied minors are informed of their rights and have access to legal representation in the asylum process;

(e) Improve cooperation and exchange of information among all the actors involved, including the Aliens Office and other relevant authorities, police services, tribunals, reception centres and NGOs;

(f) Ensure that, if family reunification is carried out, it is done in the best interests of the child;

(g) Expand and improve follow-up of returned unaccompanied minors."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

41. The applicants complained that the second applicant had been detained and deported in violation of Article 3 of the Convention, which provides:

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

A. Detention of the second applicant

1. The applicants' submissions

42. The applicants submitted that the detention of the second applicant, who was then five years old, for nearly two months in a closed centre for adults constituted inhuman or degrading treatment prohibited by Article 3 of the Convention. They explained that Transit Centre no. 127 was a closed centre near Brussels Airport used to detain illegal immigrants pending their removal from the country. As had been noted in the Committee on the Rights of the Child's second report on Belgium dated 7 July 2002, no

facilities for children of the second applicant's age existed in 2002. Accordingly, no arrangements were in place to attend to the second applicant's needs and the only assistance she received was from another Congolese minor. Despite all the assistance given by individual members of staff, the fact remained that there had been a violation of Article 3 of the Convention as, at a crucial stage in her development, the second applicant had been denied freedom of movement, had been unable to play or express her feelings, and had been held in precarious conditions in an adult world where liberty was restricted. The Government had had other, more appropriate, options at their disposal. They could, for instance, have placed the second applicant with the Aid to Young People Department. The applicants noted, lastly, that the second applicant had suffered from sleeping disorders after her release from detention.

2. The Government's submissions

43. The Government argued that in order to determine whether the second applicant's detention for two months in a closed centre – Transit Centre no. 127 – was capable of constituting inhuman or degrading treatment, the facts of the case had to be looked out.

In their submission, it had not been possible for the child to be given permission to enter Belgian territory without any identity papers or a visa. Nor could she have been allowed to leave with her uncle, as he had not provided any evidence to show that he was her guardian or established that he was a relative. At that juncture the Canadian authorities had not offered to issue a laissez-passer, and indeed none had been requested by the applicants. Had the first applicant travelled to Belgium, her daughter's detention and subsequent removal would, no doubt, have been avoided.

44. The chances of finding accommodation in a more suitable centre were virtually non-existent and, above all, would not have guaranteed the child's supervision or, therefore, her protection. There had accordingly been a risk that she would disappear. Furthermore, although the place of detention was not adapted to the needs of a five-year-old child, particularly for what turned out to be quite a lengthy period, the explanation for this lay in the exceptional circumstances of the case and in the fact that, since situations of this type were relatively rare at the time, adequate procedures and structures had yet to be established.

Legislation had since been introduced in the form of the financial planning Act (*loi-programme*) of 24 December 2002, which provided for the appointment of a guardian and for the minor to be taken into care. In addition, on 19 May 2006, the Cabinet had approved in principle a measure intended to prohibit the detention in a closed centre of unaccompanied foreign minors arrested at the border.

45. The first applicant had been informed of her daughter's situation straightaway and had been allowed to speak with her on the telephone for as

long as she wished. The staff at the centre had gone to considerable lengths to look after the second applicant, as Mr Ma. had noted in his letter of 23 August 2002. Moreover, in his report of 23 November 2004, the director of Transit Centre no. 127 had noted that the medical and administrative staff at the centre had been attentive to her needs, that she had had daily telephone contact with her mother and uncle and had been integrated into the family life of children of her own age by the children's mothers. In the light of all this, it was not so much the second applicant's detention in the instant case that was in issue but the very principle of the detention of minors and the fact that the Belgian authorities had rejected the proposed alternative accommodation.

46. As to the length of the detention, the explanation for this lay in the lengths to which the authorities had gone to clarify the second applicant's situation, a particular example of this being the care with which the Commissioner-General for Refugees and Stateless Persons had examined her expedited appeal. Various requests for information had been made by the Aliens Office to various persons and bodies, including international organisations and private individuals in Canada and the Democratic Republic of Congo, in order to find the most appropriate solution. Another contributory factor had been the unceasing efforts the Belgian authorities had made to find a suitable home for the second applicant in her country of origin following the dismissal of her application for asylum.

47. The Government further alleged that areas of uncertainty remained in the case. For example, why was it no application for a visa was made at the time to enable the second applicant to continue her journey to Canada and what had become of the second applicant's father.

There were also question marks over the first applicant's conduct: she had not mentioned the existence of her two children in her application for asylum in Canada or sought a visa to enable her to travel to Belgium as a matter of urgency, firstly to be with her daughter and then to take her back to Canada. The Government considered that both the first applicant and the family had failed to co-operate with the competent authorities and had brought the situation of which they now complained upon themselves by treating certain matters as a "fait accompli". They argued that the first applicant could not therefore hold the Belgian State accountable for the two months during which it had looked after the second applicant as well as they were able.

3. The Court's assessment

48. Article 3 makes no provision for exceptions. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of

Europe (*Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 78).

In order to fall within the scope of Article 3, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions,* 1997-VIII, § 55).

In order to carry out this assessment, regard must be had to "the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' [and] that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (*mutatis mutandis*, *Selmouni v. France*, judgment of 28 July 1999 [GC], § 101, *Reports* 1999-V).

49. The Court will first examine the Article 3 complaint of the second applicant – she being the person who was detained – before proceeding to consider the complaint of her mother (the first applicant), who also claims that she was a victim of the measure.

(a) The second applicant

50. The Court notes that second applicant, who was only five years old, was held in the same conditions as adults. She was detained in a centre that had initially been designed for adults, even though she was unaccompanied by her parents and no one had been assigned to look after her. No measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel special mandated for that purpose. That situation lasted for two months. It is further noted that the respondent Government have acknowledged that the place of detention was not adapted to her needs and that there were no adequate structures in place at the time.

51. A five-year-old child is quite clearly dependent on adults and has no ability to look after itself so that, when separated from its parents and left to its own devices, it will be totally disoriented.

52. The fact that the second applicant received legal assistance, had daily telephone contact with her mother or uncle and that staff and residents at the centre did their best for her cannot be regarded as sufficient to meet all her needs as a five-year-old child. The Court further considers that the uncoordinated attention she received was far from adequate.

53. It reiterates that the obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman

or degrading treatment, including such ill-treatment administered by private individuals (see, *mutatis mutandis*, *Z and Others v. the United Kingdom*, judgment of 10 May 2001 [GC], ECHR 2001-V § 73; and *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VI, p. 2699, § 22). Steps should be taken to enable effective protection to be provided, particularly to children and other vulnerable members of society, and should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, pp. 3159-3160, § 116).

54. In this connection, the Court must examine whether or not the impugned regulations and practices, and in particular the manner in which they were implemented in the instant case, were defective to the point of constituting a violation of the respondent State's positive obligations under Article 3 of the Convention.

55. The second applicant's position was characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family from whom she had become separated so that she was effectively left to her own devices. She was thus in an extremely vulnerable situation. In view of the absolute nature of the protection afforded by Article 3 of the Convention, it is important to bear in mind that this is the decisive factor and it takes precedence over considerations relating to the second applicant's status as an illegal immigrant. She therefore indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention.

56. The Court observes that, whereas under the general law minors came within the jurisdiction of the youth courts, there was a legal void at the time in respect of unaccompanied foreign minors. The respondent Government accepted that the prospects of finding accommodation in a more suitable centre were virtually non-existent and that such centres as did exist did not have facilities for the child's supervision or, therefore, protection. Furthermore, there was no statutory basis on which the courts could review the conditions under which minors were held or require the authorities to provide legal, humanitarian and social assistance where necessary (see, *mutatis mutandis*, *Amuur v. France*, judgment of 25 June 1996, *Reports* 1996-III, § 53). The only available remedy was an application to the *chambre du conseil* under section 71 of the aforementioned Act. In such cases, the question before the *chambre du conseil* was whether the detention was lawful, not whether it was appropriate.

57. Following an application by the second applicant's lawyer on 9 October 2002, the *chambre du conseil* ruled on 16 October 2002 that the second applicant's detention was unlawful under the Convention on the Rights of the Child and ordered her immediate release. It expressly found

that it had no jurisdiction to examine the appropriateness of detention or the conditions in which she was held, or to modify the regime and order alternative arrangements.

Moreover, prior to applying to the *chambre du conseil* the second applicant's lawyer had referred the matter to the Aliens Office on 26 September 2002 when, because of her isolation and the risks of psychological damage, he requested her placement with foster parents or, failing that, in a specialised institution. The inescapable conclusion must therefore be that the domestic authorities failed to take action to avoid or remedy the alleged shortcomings, despite being expressly informed of the position.

Furthermore, in his decision of 25 September 2002, the Commissioner-General for Refugees and Stateless Persons had drawn the Minister of the Interior's attention to the fact that the second applicant was a minor and entitled to be reunited with her family by virtue of Article 10 of the Convention on the Rights of the Child. On 13 June 2002 the Committee on the Rights of the Child had recommended that the Belgian State should expedite efforts to establish special reception centres and that stays in such centres should be for the shortest time possible.

58. The Court considers that the measures taken by the Belgian authorities – informing the first applicant of the position, giving her a telephone number where she could reach her daughter, appointing a lawyer to assist the second applicant and liaising with the Canadian authorities and the Belgian Embassy in Kinshasa – were far from sufficient to fulfil the Belgian State's obligation to provide care for the second applicant. The State had, moreover, had an array of means at its disposal. The Court is in no doubt that the second applicant's detention in the conditions described above caused her considerable distress. Nor could the authorities who ordered her detention have failed to be aware of the serious psychological effects it would have on her. In the Court's view, the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment.

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

(b) The first applicant

60. The Court reiterates, firstly, that Article 3 affords absolute protection, irrespective of any reprehensible conduct on the part of the applicant (see, *mutatis mutandis*, *Soering*, judgment cited above, § 88). Accordingly, it cannot accept the Belgian Government's argument that the conduct of the first applicant was such as to prevent the Court from finding a violation.

61. The Court reiterates, secondly, that the issue whether a parent qualifies as a "victim" of the ill-treatment of his or her child will depend on the existence of special factors which gives the applicant's suffering a

dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship and the way in which the authorities responded to the parent's enquiries. The essence of such a violation lies in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of this latter factor that a parent may claim directly to be a victim of the authorities' conduct (see, *mutatis mutandis*, *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV, § 98; and *Hamiyet Kaplan and Others v. Turkey*, no. 36749/97, § 67, 13 September 2005).

62. As regards the Belgian authorities' conduct towards the first applicant, it is apparent from the material before the Court that the only action the Belgian authorities took was to inform her that her daughter had been detained and to provide her with a telephone number where she could be reached. The Court has no doubt that, as a mother, the first applicant suffered deep distress and anxiety as a result of her daughter's detention. In view of the circumstances of the case, the Court concludes that the level of severity required for a violation of Article 3 of the Convention was attained in the present case.

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

B. The second applicant's deportation

1. The applicants' submissions

64. The applicants also alleged that the Belgian authorities had engaged in treatment proscribed by Article 3 of the Convention in that they had deported the second applicant without awaiting the Canadian authorities' decision on their application for family reunification and had failed to ensure that she would be met by a member of the family or, at least, a Belgian official. They said that the second applicant, who was only five years old at the time, had travelled without anyone being assigned to accompany her and had been forced to wait at Kinshasa Airport from 5 p.m. until approximately 11 p.m., when Ms T. arrived to collect her. In their submission, deporting the child of a person with recognised refugee status was contrary to the fundamental rule that asylum seekers should not be expelled. There was, furthermore, a danger in such cases that the authorities in the country of origin would use the child's presence there to compel the refugee to return or even that they would seek to exact revenge on the child. The applicants added that the Belgian Government had been aware that neither B., who was a student, nor any other member of the family was in a position to look after the second applicant. In their submission, their case

had to be distinguished from the case of *Nsona v. the Netherlands* (judgment of 28 November 1996, *Reports* 1996-V), in which a nine-year-old girl had been deported in an aircraft belonging to one of her father's acquaintances and had been accompanied by a (sufficiently) close relative. The present case was different in that the second applicant had travelled alone. It was not enough to say that an air hostess had been assigned to look after her by the airline. Furthermore, the complications in *Nsona* had come about following the intervention of counsel for the applicant in that case, which was not the position in the present case. The fact that the Belgian authorities had been aware of the first applicant's refugee status in Canada and that the second applicant had ultimately returned to Europe after five days indicated that the decision to deport her was disproportionate. Lastly, as the applicants had already stated with regard to the second applicant's detention, the Government had had other means at their disposal.

2. The Government's submissions

65. The Government submitted that in the absence of papers authorising the second applicant to travel and to enter the country, the Belgian authorities had had no reason not to deport her. In addition, the first applicant had at no stage established that she was the child's mother and the Belgian authorities had managed to establish contact with other members of her family. In those circumstances, they had acted properly in sending the child back to the family. The Government said that removal had been necessary and that there had been a legal basis for it, so that the arguments had to be confined to the conditions in which the deportation had taken place.

They observed that the applicants had not alleged that the second applicant was at risk of treatment proscribed by Article 3 if she returned to Kinshasa; the applicants' argument was that, on account of her age, deportation itself constituted proscribed treatment. In the Government's submission, the arrangements made for the second applicant's removal were comparable to those in the *Nsona v. the Netherlands* case and, indeed, in certain respects were more favourable than in that case. Although the trauma suffered by the child and the lack of anyone to meet her at Kinshasa Airport were regrettable, there had been no problems with the conditions in which the second applicant travelled as she had been accompanied all the way to the airport by a social worker and there placed in the care of an air hostess who had been assigned to accompany her by the airline, as its report dated 25 October 2002 indicated. The Belgian authorities had, moreover, received assurances that members of the second applicant's family would collect her at the airport. Nor were the authorities responsible for the fact that her uncle, B., had reneged on his promise at the last minute; in any event, his failure to turn up had been of no consequence because the child was met by a representative of the Congolese authorities, who put her up for

the night. The Government considered that primary responsibility for the additional inconvenience that was caused to the child lay with B. Nevertheless, they acknowledged that the deportation was not executed with proper vigilance. In particular, they admitted that they should have anticipated the possibility that B. might not turn up and regretted not having done so. The Government nonetheless considered that the child's family had no grounds for complaint in that respect, as it was the family, and in particular the first applicant, who were responsible for the situation.

3. The Court's assessment

66. The Court will begin by examining the complaint concerning the second applicant's rights and would state at the outset that it is struck by the failure to provide adequate preparation, supervision and safeguards for her deportation.

For example, the Belgian authorities stood by their decision to proceed with the second applicant's deportation on 17 October 2002 despite two new factual developments, these being the *chambre du conseil*'s decision of the previous day to order her immediate release on the grounds that her detention was unlawful and the fact that the HCR had informed the authorities that the first applicant had acquired refugee status in Canada.

67. As regards the conditions in which the second applicants travelled, the Court notes that although an assistant from the centre accompanied her as far as customs, the second applicant had to travel alone as the Belgian authorities had not assigned an adult to accompany her.

As to the arrangements in her country of origin, the Belgian authorities merely informed her uncle B., who was the only relative they had managed to trace in Kinshasa, of her arrival, but did not expressly require his presence or make sure that he would be at the airport. The Court cannot, therefore, accept the Government's submission that they were not responsible for the situation or for the fact that B. did not to turn up. The Belgian authorities had not considered or made alternative arrangements for the second applicant's arrival and it was only after several hours' wait at the airport that a solution – and a wholly improvised one at that – was found by the Congolese authorities.

68. In the Court's view, this shows that the Belgian authorities did not seek to ensure that the second applicant would be properly looked after or have regard to the real situation she was likely to encounter on her return to her country of origin. This view is not altered by the fact that the airline decided to assign an air hostess – an ordinary member of the flight crew – to look after her for the duration of the flight or that the second applicant was ultimately taken into the home of a representative of the Congolese authorities after an almost six-hour wait at the airport.

69. The Court considers that the second applicant's deportation in such conditions was bound to cause her extreme anxiety and demonstrated such a

total lack of humanity towards someone of her age and in her situation as an unaccompanied minor as to amount to inhuman treatment. The Court also finds that by deporting the second applicant, the Belgian State violated its positive obligations to take requisite measures and precautions.

70. As regards the first applicant and in the light of the case-law it has cited in relation to the previous complaint (see paragraph 61 above), the Court notes in particular that the Belgian authorities did not trouble to advise her of her daughter's deportation so that she only became aware of it when she tried to reach her at the closed centre on the telephone after the deportation had already taken place. The Court has no doubt that this caused the first applicant deep anxiety. The disregard such conduct showed for her feelings and the evidence in the case file lead the Court to find that the requisite threshold of severity has been attained in the present case.

71. It follows from the foregoing that there has been a violation of both applicants' rights under Article 3 of the Convention on account of the second applicant's deportation.

II. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION

72. The applicants complained that the second applicant's detention and deportation also violated Article 8 of the Convention, which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The second applicant's detention

1. The applicants' submissions

73. The applicants submitted that the second applicant's detention also violated Article 8 of the Convention as it constituted disproportionate interference with their right to respect for their private and family life. The Belgian State was or should have been aware of the first applicant's refugee status in Canada because of the letters it had received from Mr Ma. and the HCR's intervention. The applicants argued that family reunification was a fundamental right of refugees and cited, among other authorities, "Recommendation no. 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe". In their submission, the obligations incumbent on States that were parties to the

Convention on the Rights of the Child signed in New York on 20 November 1989 (and in particular, Articles 3 and 10 thereof) could be used as a guide when assessing whether the interference with the child's family life had been necessary. The reasons given by the Government in no way justified the interference, which had consisted of the second applicant's detention notwithstanding a proposal by her lawyer for her to be placed with foster parents. Her illegal entry was not a reason for denying her fundamental rights; nor did her inability to travel to the Netherlands prevent her placement with foster parents. Furthermore, although family reunification in Canada would have taken some time, there had been no need to keep the child in a closed centre. Nor could the fact that members of her family had been located in Kinshasa serve to justify her detention since she was the daughter of a person with recognised refugee status and her return to her country of origin placed her safety and even her life at risk. The fact that the first applicant had been granted refugee status in Canada should, furthermore, have alerted the Belgian authorities to the need to act with great caution. Lastly, while the applicants accepted that the first applicant had been wrong to ask her brother to bring her daughter to Europe, they said that she had done so in the belief that it was in her daughter's best interests.

2. The Government's submissions

74. The Government pointed out that, while Article 8 did in principle apply to cases concerning aliens, an alien's family life had to be reconciled with the State's prerogatives in immigration cases. The Court had consistently affirmed in its case-law the principle that the State Parties to the Convention were entitled to control the entry of non-nationals into their territory and that that prerogative, which could result in interference with the alien's family life, had to be exercised in conformity with the second paragraph of Article 8. In the Government's submission, keeping an alien in detention after he or she had attempted to enter the national territory without complying with the relevant conditions and had asked to be given refugee status while the application for asylum was considered, could not in itself be considered to constitute a violation of his or her family life. Detention enabled the State to issue a deportation order that would be enforceable in practice in the event of the request for asylum being turned down. The Government accepted that it was legitimate to enquire whether these principles ought to be moderated when the immigrant concerned was a young child. However, they nevertheless considered that in the instant case there had been no infringement of the second applicant's family life for several reasons:

(i) on her arrival at the airport, her uncle had fraudulently tried to pass her off as his daughter;

(ii) no members of the family lived in Belgium;

(iii) according to the information that had been provided to the authorities, it would not have been legally possible for the second applicant to continue her journey to the Netherlands with her uncle;

(iv) the first applicant had not made any application for family reunification at the material time;

(v) certain members of the family whom it had been possible to locate in Kinshasa had been contacted personally and duly informed of the second applicant's arrival in her country of origin; moreover, there was no doubt that she would be permitted to enter the country;

(vi) the Belgian authorities were not informed that the first applicant had been granted refugee status until 18 October 2002, that is to say until after the deportation order had been executed

The Government further questioned why between July 2001 and August 2002 the first applicant had not made an application to the Canadian authorities and/or to the Canadian Embassy in Kinshasa with a view to arranging for her daughter's lawful immigration, preferring instead to use an illegal route with her brother's assistance. They said in conclusion that the second applicant's detention in a closed centre during the period necessary for the examination of her request for asylum and her appeal under the expedited procedure and from then till 17 October 2002 did not amount to interference that was contrary to the Convention.

3. The Court's assessment

75. The Court considers that, by its very essence, the tie between the second applicant, a minor child, and her mother – the first applicant – comes within the definition of family life within the meaning of Article 8 of the Convention (see, among other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, pp. 17-18, § 44; and *Hokkanen v. Finland*, judgment of 23 September 1994, Series A no. 299-A, pp. 19-20, § 54), especially considering that in the instant case the first applicant had been granted refugee status, so that the interruption of family life was solely a result of her decision to flee her country of origin out of a genuine fear of persecution within the meaning of the Geneva Convention of 28 July 1951 on the Status of Refugees. The respondent Government did not dispute the fact that the relationship between the applicants constituted family life and, in this connection, the Court reiterates that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life (see, *mutatis mutandis*, the following judgments: *Olsson v. Sweden* (*no. 1),* 24 March 1988, Series A no. 130, p. 29, § 59; *Eriksson v. Sweden*, 22 June 1989, Series A no. 156, p. 24, § 58; and *Gnahoré v. France*, 19 September 2000, *Reports* 2000-IX, § 50).

76. In the Court's view, the second applicant's detention amounted to interference with both applicants' rights under Article 8 of the Convention. Indeed, this was not disputed by the respondent Government.

77. The Court reiterates that an infringement of an individual's right to respect for his or her private and family life will violate Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims set out in paragraph 2 and is "necessary in a democratic society", in other words, proportionate to the pursued objectives. The question before the Court is whether the interference was justified under paragraph 2 of Article 8 of the Convention.

78. The Court observes that the detention was based on section 74-5 of the Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980 and was therefore in accordance with the law.

79. The second defendant was detained under the authorities' powers to control the entry and residence of aliens on the territory of the Belgian State. The decision to detain could have been in the interests of national security or the economic well-being of the country or, just as equally, for the prevention of disorder or crime. The Court therefore concludes that the interference pursued a legitimate aim for the purposes of the second paragraph of Article 8 of the Convention.

80. In order to determine whether the impugned measures were "necessary in a democratic society", the Court will examine, in the light of the case as a whole, whether the detention was necessary in a democratic society, that is to say whether it was justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002, § 33, *Boultif v. Switzerland*, no. 54273/00, § 46, ECHR 2001-IX; *Adam v. Germany* (dec.), no. 43359/98, 4 October 2001, *Mokrani v. France*, no. 52206/00, 15 July 2003, § 26). The Court's task here is to determine whether the second applicant's detention struck a fair balance between the competing interests in the case.

81. The Convention does not guarantee, as such, any right for an alien to enter or stay on the territory of the State of which he or she is not a national (see *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 19, § 43, and *Beldjoudi v. France*, judgment of 26 March 1992, Series A no. 234-A, p. 27, § 74). Furthermore, the Contracting States are under a duty to maintain public order, in particular by exercising their right, as a matter of well-established international law, to control the entry and residence of aliens. In this connection, detention in centres used for aliens awaiting deportation will be acceptable only where it is intended to enable the States to combat illegal immigration while at the same time complying with their international obligations, including those arising under the Convention for the Rights of the Child signed in New York in 1989 (and by Belgium in 1991).

Furthermore, the States' interest in foiling attempts to circumvent immigration rules must not deprive aliens of the protection afforded by these conventions or deprive foreign minors, especially if unaccompanied,

of the protection their status warrants. The protection of fundamental rights and the constraints imposed by a State's immigration policy must therefore be reconciled.

82. The Court observes that the effect of the second applicant's detention was to separate her from the member of her family in whose care she had been placed and who was responsible for her welfare, with the result that she became an unaccompanied foreign minor, a category in respect of which there was a legal void at the time. Her detention significantly delayed the applicants' reunification. The Court further notes that, far from assisting her reunification with her mother, the authorities' actions in fact hindered it. Having been informed at the outset that the first applicant was in Canada, the Belgian authorities should have made detailed enquiries of their Canadian counterparts in order to clarify the position and bring about the reunification of mother and daughter. The Court considers that that duty became more pressing from 16 October 2002 onwards, that being the date when the Belgian authorities received the fax from the HCR contradicting the information they had previously held.

83. The Court considers that the complaint can also be analysed from the perspective of the second applicant's private life. It has often said that the expression “private life” is broad and does not lend itself to exhaustive definition. Thus, private life, in the Court's view, includes a person's physical and mental integrity. The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (see, *mutatis mutandis*, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 33, § 29; *Botta v. Italy*, judgment of 24 February 1998, *Reports* 1998-I, p. 422, § 32; *Von Hannover v. Germany*, judgment of 24 June 2004, no. 59320/00, § 50, ECHR 2004-VI).

In this connection, in the absence of any risk of the second applicant's seeking to evade the supervision of the Belgian authorities, her detention in a closed centre for adults was unnecessary. Other measures could have been taken that would have been more conducive to the higher interest of the child guaranteed by Article 3 of the Convention on the Rights of the Child. These included her placement in a specialised centre or with foster parents. Indeed, these alternatives had in fact been proposed by the second applicant's counsel.

84. The Court considers that, in view of her young age, the second applicant cannot bear any responsibility for her uncle's attempts to deceive the Belgian authorities by passing her off as his daughter. The same applies to the conduct of her mother and family. Further, although the first applicant's conduct was questionable and does not appear to have been entirely fault-free, it was not such as to deprive her of victim status in the instant case.

85. Ultimately, since the second applicant was an unaccompanied foreign minor, the Belgian State was under an obligation to facilitate the family's reunification (*mutatis mutandis*, see the following judgments: *Johansen v. Norway*, 7 August 1996, *Reports* 1996-III, § 78; *Eriksson v. Sweden*, 22 June 1989, Series A no. 156, § 71; *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 94, *Reports* 2000-I; and *Nuutinen v. Finland*, 27 June 2000, no. 32842/96, § 127, ECHR 2000-VIII).

86. In the light of all the foregoing considerations, the Court finds that there has been disproportionate interference with the applicants' right to respect for their family life.

87. There has therefore been a violation of Article 8 of the Convention.

B. The second applicant's deportation

1. The applicants' submissions

88. The applicants relied on the arguments they had used with respect to the complaint under Article 3 of the Convention.

2. The Government's submissions

89. The Government argued that it had to be remembered that the first applicant had sought to deceive the Belgian authorities with her brother's help. Her brother had clearly stated to the Belgian authorities that it was not his intention to look after his niece, as he did not wish to have problems with the Dutch authorities. The first applicant could have used her refugee papers or her Congolese passport, which had been issued on 27 September 2002, to travel. Moreover, her request to the Canadian authorities for asylum did not extend to the second applicant and between July 2001 and August 2002 she had not taken any action with a view to family reunification. The inquiries that had been made had revealed that she had members of her family living in Kinshasa. Lastly, the second applicant's return to her country of origin had been organised in such a way that a Congolese official representative had been there to put her up when her family failed to meet her at Kinshasa.

3. The Court's assessment

90. The Court does not consider it necessary to recapitulate the circumstances in which the deportation took place, as these have already been described above (see paragraphs 66 et seq.). It reiterates that the Belgian State had positive obligations in the instant case, including an obligation to take care of the second applicant and to facilitate the applicants' reunification (see paragraph 85 above). By deporting the second applicant, the authorities did not assist their reunification (see paragraph 82

above). Nor did they ensure that the second applicant would in fact be looked after in Kinshasa (see paragraph 67 above). In these circumstances, the Court considers that the Belgian State failed to comply with its positive obligations and interfered with the applicants' rights to respect for their family life to a disproportionate degree.

91. There has therefore been a violation of both applicants' rights under Article 8 of the Convention as a result of the second applicant's deportation.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION AS A RESULT OF THE SECOND APPLICANT'S DETENTION

92. The applicants also argued that the second applicant's detention violated Article 5 § 1 (d) of the Convention, which provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; ..."

A. The applicants' submissions

93. In the applicants' submission, the second applicant's detention did not serve the purpose set out in paragraph (d) of Article 5, which was the only provision that permitted the detention of a minor. The sole aim of the detention in the present case had been to prevent the second applicant from entering Belgium and to facilitate her subsequent deportation to her country of origin. The applicants argued in the alternative that, were the Court to consider that the word "person" referred to in Article 5 § 1 (f) of the Convention included minors, the child's age and minority would nevertheless remain an important factor in assessing the lawfulness of the detention. In other words, when a minor was detained, a stricter review would be required, in accordance with the Convention on the Rights of the Child of 20 November 1989. In such cases, the Government would have to be able to prove that the detention was in the child's interest. In the second applicant's case, there had been no need for the detention. Alternatives had been available such as permitting her to enter the country and stay with foster parents under the supervision of the Aid to Younger People in the French Community Department. Furthermore, the second applicant's deportation could not be regarded as release from detention and so was in breach of the *chambre du conseil*'s order of 16 October 2002. The applicants added that Crown counsel had, in fact, had only one aim when he decided to defer his appeal against the order for the second applicant's release and that

was to facilitate her removal by the Belgian Government. They said that proof of this was to be found in the letter from the Aliens Office dated 15 October 2002. It followed that the second applicant's detention subsequent to the order of 16 October 2002 was unlawful, its sole purpose being to allow her deportation before the order for her release became final.

B. The Government's submissions

94. The basis for the detention of a foreign minor in Belgian law was to be found in section 74-5 of the Act of 15 December 1980, which made no distinction between aliens who had reached their majority and those who were still minors. There could be no one single answer to the question whether the detention of a foreign minor was lawful: the minor's age and the particular difficulties with which the Belgian authorities were confronted were essential criteria for deciding on the best solution for the child. In any event, it would be hazardous to work on the premise that if a child was very young, it could "as it were serve as a safe conduct for third parties", which was the situation that was in danger of arising if a rule was established prohibiting the detention of minors. The detention of a minor was, furthermore, consistent with the provisions of Article 5 § 1 (f) of the Convention. As regards more specifically the detention subsequent to the *chambre du conseil*'s order of 16 October 2002, while it was true that that court had ruled that the second applicant's continued detention in Transit Centre no. 127 was unlawful and had ordered her release, Crown counsel had a right under section 72 of the Act of 15 December 1980 to appeal within twenty-four hours of the date of the decision. It was only on the expiration of that period that the order became final (in accordance with section 73 of the Act) and the alien had to be released. In the present case, the order of 16 October 2002 had not become final until midnight on 17 October 2002 and it was only at that point, once the time-limit for appealing had expired, that the second applicant had to be released. The Government said that it followed from this that the second applicant's continued detention until 17 October 2002 – when she was taken to the airport to be put on the plane to Kinshasa – complied with the provisions of domestic law. The second applicant could not have been released because Crown counsel had the right to reserve his decision whether or not to appeal. While it would have been possible to find someone to look after the child for twenty-four hours, this would not have been without difficulty. In the Government's submission, it was not possible to say that the Belgian authorities' conduct was dictated by the success of the application for release as the flight had been booked a week previously. Lastly, it was quite clear that the detention ended when the deportation order was executed.

C. The Court's assessment

95. The Court notes at the outset that the first applicant has not been detained and accordingly cannot claim personally to have been a victim of a violation of Article 5 of the Convention.

96. In so far as this complaint concerns the second applicant, the Court reiterates that the Contracting States are entitled to control the entry and residence of non-nationals on their territory at their discretion, but stresses that this right must be exercised in conformity with the provisions of the Convention, including Article 5. In proclaiming the right to liberty, paragraph 1 of Article 5 contemplates the physical liberty of the person and its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion (see, *mutatis mutandis*, *Amuur v. France*, judgment of 25 June 1996, *Reports* 1996-III, § 42). The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see, *mutatis mutandis*, *K.-F. v. Germany*, judgment of 27 November 1997, *Reports* 1997-VII, p. 2975, § 70; *Čonka v. Belgium*, judgment of 5 February 2000, ECHR 2002-I, § 42; *D.G. v. Ireland*, judgment of 16 May 2002, ECHR 2002-III, § 74). Detention must be lawful both in domestic and Convention terms: the Convention lays down an obligation to comply with the substantive and procedural rules of national law and requires that any deprivation of liberty should be in keeping with the purpose of Article 5 which is to protect an individual from arbitrariness (see the following judgments: *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33, pp. 17-19, §§ 39 and 45; *Bozano v. France*, 18 December 1986, Series A no. 111, p. 23, § 54; and *Weeks v. the United Kingdom*, 2 March 1987, Series A no. 114, p. 23, § 42).

97. In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, the Court must assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that a national law authorising deprivation of liberty must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.

98. As regards the compatibility of the detention with domestic law in the instant case, the Court considers that two periods can be distinguished, these being the period prior to the order of 16 October 2002 in which the *chambre du conseil* declared the second applicant's detention unlawful and the period after that date. It observes that the Government have not sought to argue that the *chambre du conseil*'s ruling that the detention was illegal affected the second applicant's victim status. In any event, it notes that the ruling did not bring the detention to an end. In the Court's view, the finding by the domestic court that the first period of detention was unlawful raises serious doubts as to the lawfulness of the second period.

99. The second applicant was placed in detention pursuant to section 74-5 of the Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980, initially pending a decision on her application for asylum and subsequently pending her deportation. At that time, the Act did not contain any provisions specific to minors. Thus, the fact that the alien concerned was a minor was of no relevance to the application of the provisions governing his or her detention.

100. The Court does not agree with the second applicant's submission that paragraph (d) of Article 5 § 1 of the Convention is the only provision which permits the detention of a minor. It in fact contains a specific, but not exhaustive, example of circumstances in which minors might be detained, namely for the purpose of their educational supervision or for the purpose of bringing them before the competent legal authority to decide.

101. In the instant case, the ground for the second applicant's detention was that she had entered the country illegally as she did not have the necessary documents. Her detention therefore came within paragraph (f) of Article 5 § 1 of the Convention which permits "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

102. However, the fact that the second applicant's detention came within paragraph (f) of Article 5 § 1 does not necessarily mean that it was lawful within the meaning of this provision, as the Court's case-law requires that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see, *mutatis mutandis*, *Aerts v. Belgium*, judgment of 30 July 1998, *Reports* 1998-V, pp. 1961-1962, § 46, and other references referred to therein).

103. The Court notes that the second applicant was detained in a closed centre intended for illegal immigrants in the same conditions as adults; these conditions were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of her position as an unaccompanied foreign minor.

104. In these circumstances, the Court considers that the Belgian legal system at the time and as it functioned in this instance did not sufficiently protect the second applicant's right to liberty.

105. There has therefore been a violation of the second applicant's rights under Article 5 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 AND ARTICLE 13 OF THE CONVENTION

106. Relying on Articles 5 § 4 and 13 of the Convention, the applicants maintained that the Belgian State had rendered the second applicant's appeal futile and ineffective by proceeding to deport her the day after her release was ordered, in defiance of that order. Article 5 § 4 provides:

Article 5 § 4

"4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Article 13 reads as follows:

Article 13

"Everyone whose rights and freedoms as set forth in [the] 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."

A. The applicants' submissions

107. The applicants alleged that prolonging the second applicant's detention and then proceeding to deport her following an order by the *chambre du conseil* for her immediate release was contrary to the Convention and rendered the remedy ineffective. In their submission, even assuming that detention could be prolonged in order to enable Crown counsel to appeal against the order within twenty-four hours, detention could only be used for that purpose and not to deport her within that period. Furthermore, once the alien had been deported, the powers of review of the *chambre du conseil* and the indictments division became redundant, even though deportation did not amount to release. They concluded from the above that they had not had an effective remedy in respect of the second applicant's detention.

B. The Government's submissions

108. The Government maintained that the right of appeal to the *chambre du conseil* was an effective remedy within the meaning of the Convention. The *chambre du conseil*'s review concerned both the detention and the deportation order on which it was based. Referring specifically to the detention subsequent to the *chambre du conseil*'s order of 16 October 2002,

the Government argued that their observations on the issue of the lawfulness of the second applicant's detention showed that its extension until 17 October 2002 was lawful. The second applicant could not have been released because Crown counsel had the right to reserve his decision whether or not to appeal. While it would have been possible to find someone to look after the child for twenty-four hours, this would not have been without difficulty. In the Government's submission, it was not possible to say that the Belgian authorities' conduct was dictated by the success of the application for release as the flight had been booked a week previously. Lastly, it was quite clear that the detention ended when the deportation order was executed.

C. The Court's assessment

109. The Court has already found that since the first applicant was not detained, she could not personally claim to have been a victim of a violation of Article 5 of the Convention (see paragraph 95 above).

110. In so far as this complaint is also made by the second applicant, the Court refers firstly to its case-law holding that a complaint under Article 13 will be absorbed by a complaint under Article 5 § 4 since the requirements of Article 13 are less strict than those of Article 5 § 4, which must be regarded as the *lex specialis* for Article 5 grievances (*Chahal v. the United Kingdom* [GC], judgment of 15 November 1996, *Reports* 1996-V, § 126).

111. The Court will therefore examine the complaint solely under Article 5 § 4 of the Convention.

112. The purpose of Article 5 § 4 is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected (*De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, § 76). The remedies must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of leading, where appropriate, to his or her release (see, *mutatis mutandis*, *Slivenko v. Latvia* [GC], no. 48321/99, § 158, ECHR 2003-X).

113. The Court notes that the Belgian authorities made arrangements for the second applicant's deportation on the day after she lodged an application to the *chambre du conseil* for release, that is to say even before it had delivered its decision. Furthermore, the authorities did not at any stage reconsider the decision to deport her. The Court also notes that the second applicant was deported on the scheduled date, notwithstanding the fact that the twenty-four-hour period for an appeal by Crown counsel, during which a stay applied, had not expired. Crown counsel deliberately chose to reserve his decision after receiving a letter from the Belgian authorities informing him of their view that the second applicant should remain in detention so that she could be deported to Kinshasa. Lastly, the respondent Government

have acknowledged that the Belgian authorities' conduct was not dictated by the *chambre du conseil*'s decision to grant the application for release as her deportation had been arranged in advance.

Even assuming that the second applicant's deportation can be equated to "release" for the purposes of Article 5 § 4 of the Convention, it follows from the foregoing considerations that there was no link between her deportation and the exercise of the remedy or the fact that it was granted.

In these circumstances, the Court finds that the second applicant's appeal to the *chambre du conseil* appears, in the circumstances of the case, to have been ineffective.

114. There has therefore been a violation of Article 5 § 4 of the Convention. The Court does not consider that any separate examination of the complaint under Article 13 of the Convention is necessary.

V APPLICATION OF ARTICLE 41 OF THE CONVENTION

115. Article 41 of the Convention provides:

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

A. Damage

116. The applicants said that they had sustained non-pecuniary damage which they put at 10,000 euros (EUR) for the first applicant and EUR 25,000 for the second.

117. The Government observed that the first applicant had only requested family reunification after her daughter's deportation and arrival in Canada (on 29 October 2002) and said that the first applicant's role in the case had not been clearly established. Either she had been unaware that her daughter had left Kinshasa, in which case it had been on her brother's initiative and it was to him and not the Government that she should address her grievances, or she herself had been the instigator, in which case she ought not to be awarded anything because she had knowingly broken the law. In the light of these considerations, the Government submitted that a finding of a violation would afford adequate compensation for the non-pecuniary damage sustained by the first applicant. They left the issue of the non-pecuniary damage sustained by the second applicant to the Court's discretion whilst pointing out that they had had sought to defend her interests as best they could in what, to say the least, had been a complex situation.

118. In the light of the various violations it has found, including the violation of both the first and second applicant's rights under Article 3, which, as has been noted, confers absolute protection (*Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 88), the Court considers the sums claimed by each of the applicants reasonable and awards them the amounts by way of just satisfaction.

B. Costs and expenses

119. The applicants, who have produced detailed fee notes, claimed EUR 14,177.04 for costs and expenses. This amount was broken down into EUR 10,500 for the fees and expenses of Mr Vanheule, EUR 3,042 for the fees and expenses of Mr Ma., EUR 141 for the fees of a Canadian lawyer, Mr A., in connection with family reunification in Canada in 2002, EUR 35 for the costs of a visa to enable the first applicant to attend the hearing before the Court and EUR 459.04 in travel expenses.

120. The Government referred to the principles established by the Court and submitted that it should disallow the fees and expenses of Mr A., and at least part of the fees and expenses of Mr Ma. It left the remainder of the claim to the Court's discretion.

121. 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 also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (*Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002).

The Court notes that the Government have not contested Mr Vanheule's fees or the first applicant's claim in respect of the cost of her visa and travel expenses. It considers that the action taken by Mr Ma. was intended to prevent the violation it has found to have occurred and that the amount claimed in respect thereof is reasonable. Consequently, it awards the applicants the sum of EUR 14,036 for costs and expenses, less the amount which the Court has granted in legal aid.

C. Default interest

122. 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 UNANIMOUSLY

1. *Holds* that there has been a violation of the second applicant's rights under Article 3 of the Convention as a result of her detention;

2. *Holds* that there has been a violation of the first applicant's rights under Article 3 of the Convention as a result of the second applicant's detention;

3. *Holds* that there has been a violation of the second applicant's rights under Article 3 of the Convention as a result of her deportation;

4. *Holds* that there has been a violation of the first applicant's rights under Article 3 of the Convention as a result of the second applicant's deportation;

5. *Holds* that there has been a violation of both applicants' rights under Article 8 of the Convention as a result of the second applicant's detention;

6. *Holds* that there has been a violation of both applicants' rights under Article 8 of the Convention as a result of the second applicant's deportation;

7. *Holds* that the first applicant cannot claim to be a "victim" for the purposes of Article 34 of the Convention of a violation of Article 5 § 1 of the Convention;

8. *Holds* that there has been a violation of the second applicant's rights under Article 5 § 1 of the Convention;

9. *Holds* that the first applicant cannot claim to be a "victim" for the purposes of Article 34 of the Convention of a violation of Article 5 § 4 of the Convention;

10. *Holds* that there has been a violation of the second applicant's rights under Article 5 § 4 of the Convention;

11. *Holds* that no separate examination of the complaint under Article 13 of the Convention is necessary;

12. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 35,000 (thirty-five thousand euros) in respect of non-pecuniary damage (comprising EUR 10,000 for the first applicant and EUR 25,000 for the second applicant) and EUR 14,036 (fourteen thousand and thirty-six euros) for costs and expenses, plus any tax that may be chargeable;

(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;

13. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 12 October 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN Registrar	Christos ROZAKIS President