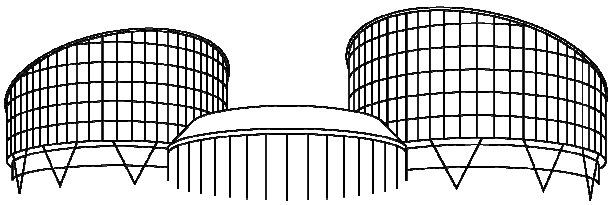

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 26494/09
Hayaati AHMED ALI
against the Netherlands and Greece

The European Court of Human Rights (Third Section), sitting on 24 January 2012 as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Luis López Guerra,
Linos-Alexandre Sicilianos, *judges,*
and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 19 May 2009,

Having regard to the interim measure indicated to Government of the Netherlands under Rule 39 of the Rules of Court,

Having regard to the parties' submissions,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Hayaati Ahmed Ali, is a Somali national who was born in 1980 and lives in Aalten. She was represented before the Court by Ms F.K.H. Blom, a lawyer practising in Utrecht. The Netherlands and Greek Governments were represented by their Agents, Mr R.A.A. Böcker of the Netherlands Ministry of Foreign Affairs and Mr F.P. Georgakopoulos, President of the Greek State Legal Council, respectively.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. The applicant is an asylum seeker who entered the European Union through Greece. According to the applicant, she and two others had been detained upon arrival in Greece in November 2006 by the Greek authorities because she had no identification documents. She claimed that the Greek authorities had not allowed her to file a written or oral request for asylum and that she and her cellmates had been ill-treated by the Greek authorities (beaten, deprived of food and drink and drugged prior to deportation) during the five days she had been detained in Greece. On the fifth day Greek officials had informed the applicant and her cellmates orally that they had been refused asylum and were to return to their countries of origin. According to the applicant, the breakfast she and her cellmates had been brought contained a sedative; they had subsequently been escorted to a vehicle that took them to a white airplane. With that aircraft the applicant had flown to a country unknown to her where Arabic was spoken. There a transit had been made to a flight that took the applicant to Mogadishu, where she had landed on 17 November 2006.

4. According to the Greek Government, the applicant had entered Greece illegally on 10 November 2006. She had no identity documents and had given her name as Zara Suleiman. A decision had been taken for her expulsion and detention, but the execution of this decision had been suspended for the duration of one month, during which time the applicant was to report to the police twice. The applicant had not been expelled to Somalia or any other country.

5. The applicant arrived in the Netherlands on 10 January 2007. She is currently staying in that country, where she applied for asylum on 15 March 2007. This application was dismissed, the Dutch administrative and judicial authorities holding that pursuant to Council Regulation (EC) No. 343/2003 ("the Dublin Regulation") Greece was competent to conduct the asylum proceedings.

B. Developments after the introduction of the application

6. On 5 June 2009 the President of the Chamber decided to indicate to the Government of the Netherlands that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to remove the applicant to Greece until further notice (Rule 39 of the Rules of Court).

7. On 3 November 2009 the Chamber decided, under Rule 54 § 2 (b) of the Rules of Court, that notice of the application should be given to the Governments and that they should be invited to submit written observations

on the admissibility and merits of the case. The applicant replied to the observations submitted by the Governments. Written observations were further received from the Council of Europe Commissioner for Human Rights and the United Nations High Commissioner for Refugees, whom the Chamber had invited to intervene as third parties in the Court's proceedings (Article 36 § 2 of the Convention), and from the Finnish and United Kingdom Governments, the Greek Helsinki Monitor, the Centre for Advice on Individual Rights in Europe and Amnesty International, whom the President had authorised to intervene (Article 36 § 2 of the Convention and Rule 44 § 2).

8. On 8 February 2011 the Court requested the Netherlands Government to indicate what, if any, practical consequences they would draw from the *M.S.S. v. Belgium and Greece* judgment ([GC], no. 30696/09, 21 January 2011). This judgment concerned the case of an Afghan national, who had entered the European Union through Greece, had travelled on to Belgium where he had applied for asylum, and been returned to Greece by the Belgian authorities. In the judgment, the Court had found *inter alia*, as regards Greece, violations of Article 3 in respect of the applicant's detention conditions in Greece (§§ 223-234) and in respect of his living conditions there (§§ 249-264); a violation of Article 13 taken together with Article 3 in respect of the Greek asylum procedure (§§ 294-322); and, regarding Belgium, violations of Article 3 in respect of the Belgian authorities' decision to expose the applicant to the asylum procedure in Greece (§§ 338-361) and in respect of the decision of those authorities to expose the applicant to the detention and living conditions in Greece (§§ 362-368).

9. By letter of 25 March 2011 the Netherlands Government replied that the applicant would be admitted to the Dutch asylum procedure and that her asylum application would be assessed on its merits. As the applicant had exhausted domestic remedies in respect of the decision that Greece was responsible for examining the asylum application, she would be required to submit a new asylum application.

10. Subsequently the applicant was requested to inform the Court whether, in the light of the Dutch Government's reply, she wished to maintain her application. In a letter of 13 April 2011 the applicant informed the Court that indeed she did. She explained that, if her asylum application of 15 March 2007 had been examined on its merits straight away, she would have qualified for a temporary residence permit for the purpose of asylum pursuant to a policy concerning Somalis originating from South and Central Somalia in place at the time. Five years later, i.e. in March 2012, she would then have been eligible for an indefinite residence permit. Withdrawing her application to the Court would mean losing that entitlement as the starting date for any eligibility of this nature would now be counted from the moment she submitted a new asylum application.

11. In their comments of 9 and 31 May 2011 respectively, the Netherlands and Greek Governments reiterated that the applicant would not be transferred to Greece; since such transfer was central to the application, they considered that the application had become without substance. Moreover, they submitted that the legal question in the case of *M.S.S.* was whether a Contracting Party was free to transfer a person to another Contracting Party without an examination of the grounds on which the asylum application was based. The refusal of a residence permit, let alone the modalities of a residence permit, were not part of that question, and nor could they have been as the Court only had jurisdiction to decide on the question whether an asylum seeker would be exposed to a real risk of a violation of Article 3 of the Convention upon return to his country of origin. The question of how the State avoided that risk, so the Governments submitted, was up to the State itself.

COMPLAINTS

Against the Netherlands

12. The applicant complained that her expulsion to Greece would be in breach of Article 3 of the Convention because of the danger of *refoulement* by the Greek authorities to her country of origin without proper asylum proceedings. The applicant also complained that she would run a real risk of being subjected to treatment in breach of Article 3 in Greece itself.

The applicant further complained under Article 13 that the Dutch authorities had not evaluated in substance the risk of *refoulement* from Greece to Somalia and the risk of a violation of Article 3 in case of a return to that country.

Against Greece

13. The applicant complained of having been subjected to treatment in breach of Article 3 of the Convention during her stay in Greece. She also complained that her detention upon arrival in Greece was in breach of Article 5 §§ 2 and 4 of the Convention, and that she was not provided with a fair trial as guaranteed by Article 6. In particular, the Greek authorities had acted in breach of the rights laid down in Article 6 § 3.

Invoking Article 13, the applicant further complained that the Greek authorities would, once again, not examine – let alone rigorously examine – her asylum claim and that she would not have an effective remedy in Greece against violations of the Convention, including the possibility to lodge a request under Rule 39 of the Rules of Court against Greece.

THE LAW

A. Complaints under Articles 3, 5 and 6 against Greece

14. The Court reiterates that under Article 35 § 1 of the Convention it examines a complaint if "all domestic remedies have been exhausted" and if it has been submitted "within a period of six months from the date on which the final decision was taken". Where no effective remedy is available to an applicant, the time-limit expires six months after the date of the acts or measures about which he or she complains, or after the date of knowledge of that act or its effect or prejudice on the applicant (see *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I).

15. The Court notes that the alleged events in Greece of which the applicant complained occurred in November 2006 and that they culminated in her alleged expulsion to Somalia where she claimed to have arrived on 17 November 2006. Having regard to her claim that no effective remedies for her Convention complaints are available in Greece, this complaint under Article 3 should thus at the latest have been introduced with the Court in May 2007, by which time she had already been in the Netherlands for some four months. This complaint was, however, not introduced until 19 May 2009. It follows that this complaint has been introduced out of time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

B. The remainder of the application

16. The Court notes that the applicant has been or will be admitted to the asylum procedure in the Netherlands, entailing that she will not be returned to Greece or any other country without a full examination of her asylum claims by the Dutch authorities. The question therefore arises whether there is an objective justification for continuing to examine the application or whether it is appropriate to apply Article 37 § 1 of the Convention, which provides as follows:

> "The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
>
> (a) the applicant does not intend to pursue his application; or
>
> (b) the matter has been resolved; or
>
> (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

17. The applicant wishing to pursue her application, the Court must, in order to ascertain whether Article 37 § 1 (b) applies to the present case,

answer two questions in turn: first, whether the circumstances complained of directly by the applicant still obtain and, second, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 97, 15 January 2007, and *El Majjaoui and Stichting Touba Moskee v. the Netherlands* (striking out) [GC], no. 25525/03, § 30, 20 December 2007). In the present case, that entails first of all establishing whether the applicant still risks being returned to Greece and, from there, to Somalia, without her asylum application being assessed on its merits; after that, the Court must consider whether the measures taken by the authorities constitute sufficient redress for the applicant's complaints.

18. As to the first question, it is clear that the merits of the applicant's asylum application are being, or will be, assessed in the Netherlands and that there is no question of the applicant being expelled to Greece.

19. As regards the second question, the Court considers that the mere fact that the applicant will not be eligible for an indefinite residence permit in 2012, which she claimed she would have been had her original asylum application been examined on its merits, is not capable of raising an issue under Article 3, either taken alone or in conjunction with Article 13. In this respect it is to be borne in mind that, although Article 3 may in certain circumstances imply the obligation not to expel a person (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1853, §§ 73-74; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 67-68, ECHR 2005-I), the protection afforded by Article 3 cannot be construed as guaranteeing, as such, the right to a residence permit (see *Bonger v. the Netherlands* (dec.), no. 10154/04, 15 September 2005), let alone the right to a particular residence permit. As the Court has previously held, the Convention does not lay down for the Contracting States any given manner for ensuring within their internal law the effective implementation of the Convention (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 90, ECHR 2007-I). Accordingly, if an applicant receives protection against being returned to a country in respect of which substantial grounds have been shown for believing that he or she would face a real risk of being subjected to treatment contrary to Article 3, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone (see *mutatis mutandis Sisojeva and Others*, cited above, § 91). Whether or not the applicant in the present case requires such protection will, as noted above, be assessed in the asylum proceedings to which she will now be admitted in the Netherlands.

20. Having regard to the facts, therefore, that the applicant will not be expelled to Greece, that the merits of her asylum claim will be examined by the Dutch authorities, and that – should those authorities decide that a return

to her country of origin would not expose her to a real risk of being subjected to treatment in breach of Article 3 – it is open to the applicant to apply to the Court once more, the Court considers that the present complaints have been adequately and sufficiently remedied.

21. Consequently, the Court finds that both conditions for the application of Article 37 § 1 (b) of the Convention are met. The matter giving rise to the applicant's complaints can therefore now be considered to be "resolved" within the meaning of Article 37 § 1 (b). Finally, no particular reason relating to respect for human rights as defined in the Convention requires the Court to continue its examination of the application under Article 37 § 1 *in fine*.

22. Accordingly, this part of the application should be struck out of the Court's list of cases.

For these reasons, the Court unanimously,

Declares inadmissible the applicant's complaints under Articles 3, 5 and 6 directed against Greece;

Decides to strike the remainder of the application out of its list of cases.

Santiago Quesada
Registrar

Josep Casadevall
President