CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF ČONKA v. BELGIUM
(Application no. 51564/99)

JUDGMENT

STRASBOURG
5 February 2002

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

In the case of Čonka v. Belgium,

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

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr P. KŪRIS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, ,*judges*,
Mr VELAERS, ad hoc *judge*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 15 May 2001 and 15 January 2002,

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

PROCEDURE

1. The case originated in an application (no. 51564/99) 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 four Slovakian nationals, Mr Ján Čonka, Mrs Mária Čonková, Miss Nad'a Čonková and Miss Nikola Čonková ("the applicants"), on 4 October 1999.

2. The applicants alleged, in particular, that the circumstances of their arrest and deportation to Slovakia amounted to an infringement of Articles 5 and 13 of the Convention and of Article 4 of Protocol No 4.

3. The application was allocated to the Third 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 of the Rules of Court. Mrs Tulkens, the judge elected in respect of Belgium, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr J. Velaers to sit as an *ad hoc* judge in her place (Article 27 § 2 of the Convention and Rule 29 § 1).

4. By a decision of 13 March 2001 the Chamber declared the application partly admissible.

5. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 May 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the respondent Government*
Mr C. DEBRULLE, Director General, *Agent*,
Mr R. ERGEC, a lawyer, *Counsel*;
Mr F. BERNARD, Mr F. ROOSEMONT, Mr T. MICHAUX,
Mr P. SMETS, Mr J. GILLIAUX
and Mrs I. VERHEVEN, *Advisers*;

(b) *for the applicants*
Mr G.-H. BEAUTHIER, Mr N. VAN OVERLOOP,
and Mr O. DE SCHUTTER, *Counsel*.

The Court heard addresses by Mr Beauthier, Mr De Schutter, Mr Ergec, Mr Van Overloop and Mr Gilliaux and their answers to its questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Ján Čonka, Mrs Mária Čonková, Miss Nad'a Čonková and Miss Nikola Čonková are Slovakian nationals of Romany origin who were born in 1960, 1961, 1985 and 1991 respectively. The first two applicants are the parents of the third and fourth applicants.

8. The applicants say that on several occasions between March and November 1998 they were violently assaulted by skinheads in the Slovakian Republic. Indeed, in November 1998 Mr Čonka had been so seriously injured in an assault that he had had to be hospitalised. The police had been called but had refused to intervene. Several days later Mr and Mrs Čonka had been subjected to renewed insults and threats by skinheads, but the police had again refused to intervene.

As a result of those constant threats the applicants had decided to flee Slovakia and travel to Belgium, where they had arrived at the beginning of November 1998: Mr Čonka and the two minor children on 6 November and Mrs Čonka two days' later.

A. The applicants' request for asylum

9. On 12 November 1998 the applicants requested political asylum in Belgium.

10. On 3 March 1999 their applications for asylum were declared inadmissible by the Minister of the Interior through the Directorate-General of the Aliens Office on the ground that they had not produced sufficient evidence to show that their lives were at risk in Slovakia for the purposes of the Geneva Convention relating to the Status of Refugees. The decisions refusing permission to remain in Belgium were accompanied by a decision refusing permission to enter the territory itself endorsed with an order to leave the territory within five days.

11. On 5 March 1999 the applicants lodged an appeal under the urgent-applications procedure with the Commissioner-General for Refugees and Stateless Persons ("the Commissioner-General") against the decisions refusing them permission to remain in Belgium.

12. On 14 April 1999 Mr Čonka was invited to attend the General Commissioner's office to set out his grounds for seeking asylum. He failed to keep the appointment.

13. On 23 April 1999 Mrs Čonková, assisted by an interpreter, was heard by representatives of the Commissioner-General's Office at Ghent Prison, where she was in custody pending trial. On 17 May 1999 she was sentenced to eight months' imprisonment for theft by Ghent Criminal Court.

14. On 18 June 1999 the Commissioner-General's Office upheld the decision of the Aliens Office refusing the applicants permission to remain. Its decision in Mr Čonka's case was based on his failure to attend his appointment without showing due cause. As regards Mrs Čonková, in some two pages of reasons the Commissioner pointed out major discrepancies in her deposition and expressed serious doubts about her credibility.

For example, Mrs Čonková had declared among other things that on 4 November 1998 her husband, Mr Čonka, had been assaulted by skinheads so violently that he had had to be taken to hospital. The police had been called but had not come out. That incident had been the direct cause of their decision to flee Slovakia. However, the Commissioner-General considered that statement to be refuted by the fact that the travel tickets had been issued before the above incident on 4 November: Mrs Čonková's plane tickets on 2 October and her husband's and their children's bus tickets for the journey to Belgium on 2 November 1998. Furthermore, Mrs Čonková's account of the incident did not match her stepdaughter's, in particular on the important issue of whether the police had attended the scene.

The Commissioner stipulated in his decisions that the applicants could be deported to the country from which they had fled (Slovakia), and that for the purposes of calculating the five-day period for leaving the territory, which had been suspended by the application under the urgent procedure, time began to run again from the date of service of the decisions on the applicants.

15. On 24 June 1999 Mrs Čonková was released and a new order was served on her to leave the territory within five days, that is to say by midnight on 29 June.

16. On 3 August 1999 the applicants lodged applications with the *Conseil d'État* for judicial review of the decision of 18 June 1999 and for a stay of execution under the ordinary procedure. They also applied for legal aid.

17. On 23 September 1999 the *Conseil d'État* dismissed the applications for legal aid on the grounds that they had not been accompanied by the means certificate required by Article 676-3 of the Judicial Code, a photocopy, rather than the original, of the certificate having been enclosed with Mrs Čonková's application. Consequently, the applicants were invited by the orders refusing legal aid to pay the court fees within fifteen days after service. As they failed to respond to that invitation, their applications for judicial review and for a stay of execution were struck out of the list on 28 October 1999.

B. The applicants' arrest and deportation

18. At the end of September 1999 the Ghent police sent a notice to a number of Slovakian Romany families, including the applicants, requiring them to attend the police station on 1 October 1999. The notice was drafted in Dutch and Slovakian and stated that their attendance was required to enable the files concerning their applications for asylum to be completed.

19. At the police station, where a Slovakian-speaking interpreter was also present, the applicants were served with a fresh order to leave the territory dated 29 September 1999, accompanied by a decision for their removal to Slovakia and their detention for that purpose. The documents served, which were all in identical terms, informed the recipients that they could apply to the *Conseil d'État* for judicial review of the deportation order and for a stay of execution – provided that they did so within sixty days of service of the decision – and to the committals division (*chambre du conseil*) of the criminal court against the order for their detention. According to the Government, some of the aliens concerned were nevertheless allowed to leave the police station of their own free will on humanitarian grounds or for administrative reasons.

20. A few hours later the applicants and other Romany families, accompanied by an interpreter, were taken to a closed transit centre, known as Centre "127 *bis*", at Steenokkerzeel near Brussels Airport. It appears that the interpreter only remained at the centre briefly. According to the Government, he could have been recalled to the centre at the applicants' request. The applicants say that they were told that they had no further remedy against the deportation order.

21. While at the centre, the Slovakian families received visits from a delegation of Belgian Members of Parliament, the Slovakian Consul, delegates of various non-governmental organisations and doctors. At 10.30 p.m. on Friday 1 October 1999 the applicants' counsel, Mr Van Overloop, was informed by the President of the Romany Rights League that his clients were in custody. Taking the view that he was still instructed by them, Mr Van Overloop sent a fax on 4 October 1999 to the Aliens Office informing it that the applicants were in Transit Centre no. 127 *bis* awaiting repatriation to Slovakia. He requested that no action be taken to deport them, as he had to take care of a member of their family who was in hospital. However, Mr Van Overloop did not appeal against the deportation or detention orders made on 29 September 1999.

22. On 5 October 1999 the families concerned were taken to Melsbroek military airport, where the seat numbers allocated to them in the aircraft were marked on their hands with a ballpoint pen. The aircraft left Belgium for Slovakia at 5.45 p.m.

23. Shortly afterwards the Minister of the Interior declared in reply to a parliamentary question put on 23 December 1999:

> "Owing to the large concentration of asylum seekers of Slovakian nationality in Ghent, arrangements have been made for their collective repatriation to Slovakia... Reports I have received from the Mayor of Ghent and the Director-General of the Aliens Office indicate that the operation was properly prepared, even if the unfortunate wording of the letter sent by the Ghent police to some of the Slovakians may have been misleading. Both the Aliens Office and the Ghent Police Department were surprised by the large number of Slovakians who responded to the notice sent to them. That factual circumstance resulted in their being detained in Centre 127 *bis* for deportation a few days later..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Aliens Act

24. The procedure relating to the recognition of refugee status is governed under Belgian law by the Law of 15 December 1980 "on the Entry, Residence, Settlement and Expulsion of Aliens" ("the Aliens Act") and by the Royal Decree of 8 October 1981 "on the Entry, Residence, Settlement and Expulsion of Aliens".

The procedure for according refugee status is in two stages. The first concerns admissibility for refugee status, while the second concerns eligibility for such status.

The authorities with jurisdiction to take part in the examination of the issue of admissibility are the Aliens' Office and, on appeal, the Commissioner-General for Refugees and Stateless Persons, as

administrative authorities, and the *Conseil d'État*, which hears applications for judicial review. The relevant authorities at the eligibility stage are the Commissioner-General for Refugees and Stateless Persons, as the administrative authority, the Permanent Tribunal for Refugees' Appeals, as an administrative tribunal, and the *Conseil d'État*, which hears administrative appeals on points of law. Lastly, the committals division (*chambre du conseil*) of the criminal court has jurisdiction to hear appeals against orders depriving aliens of their liberty during or at the end of the proceedings (see below).

25. The provisions of the Aliens Act applicable in the instant case read as follows:

Section 6

"Except where permitted by international treaty, statute or Royal Decree, aliens may not stay more than three months in the Kingdom, unless a different period is stipulated in the visa or the authorisation in lieu stamped in their passport or on the travel document issued in lieu thereof..."

Section 7

"Without prejudice to any more favourable provision in any international treaty, the Minister or his or her delegate may order an alien who is not authorised or has not been given permission to remain for more than three months or to settle in the Kingdom to leave the territory before a set date:...

(2) if the alien has stayed in the Kingdom beyond the period fixed in accordance with section 6, or is unable to establish that the period has not expired...

In the same sets of circumstances, if the Minister or his or her delegate considers it necessary, they may have the alien deported.

The alien may be detained for that purpose for the time strictly necessary for the execution of the measure provided that the period of detention shall not exceed two months."

Section 8

"Any order to leave the territory or deportation order shall state which provision of section 7 is being applied."

Section 57(2)

"The Commissioner-General's Office for Refugees and Stateless Persons is hereby established. It shall be attached to the Ministry and shall comprise a Commissioner-General for Refugees and Stateless Persons and two deputies. The Commissioner-General and his or her deputies shall be wholly independent in taking their decisions and expressing their opinions."

Section 57(3)

"The Commissioner-General shall be in charge of the Commissioner-General's Office for Refugees and Stateless Persons.

The Commissioner-General shall be appointed by the King by a decree approved by the Cabinet on a proposal by the Minister.

The Commissioner-General shall be appointed for a period of five years. His or her term in office may be renewed..."

Section 63(2), paragraph 1

"An appeal under the urgent-applications procedure shall lie to the Commissioner-General of Refugees and Stateless Persons against decisions of the Minister or his or her delegate pursuant to section 52 refusing aliens claiming refugee status permission to enter, remain or settle in the Kingdom."

Section 71

"Aliens against whom a measure has been taken depriving them of their liberty pursuant to sections 7, 25, 27, section 29, sub-paragraph 2, section 51(5), § 3, sub-paragraph 4, section 52 *bis*, sub-paragraph 4, section 54, section 63(5), sub-paragraph 3, section 67 and section 74(6) may appeal against that measure by lodging notice of appeal with the committals division of the criminal court with jurisdiction for the place where they reside in the Kingdom or the place where they are found...

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

Section 72

"The committals division shall deliver its decision within five working days from the date an appeal is lodged after hearing the submissions of the alien or his or her counsel and the opinion of State Counsel's Office... If the committals division fails to deliver its decision within the period fixed, the alien shall be released.

The committals division shall review the legality of the detention and deportation orders but shall have no power to review their reasonableness.

An appeal shall lie against orders of the committals division by the alien, State Counsel's Office 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 committals division decides that the alien shall not remain in custody, he or she shall be released as soon as the decision has become final.

The Minister may order the alien to reside in a designated place either until the deportation order has been executed or until his or her appeal has been decided."

26. In a judgment of 14 March 2001 the Court of Cassation reversed a decision of the Indictment Division of the Liege Court of Appeal ordering an alien's release. The Indictment Division had held that, contrary to Article 13 of the Convention, the authorities had deprived the alien of an effective remedy in law by interpreting the fact that appeals to the *Conseil d'État* had no suspensive effect as meaning that it was lawful for illegal immigrants to be forcibly expelled. The Court of Cassation held that, on the contrary, the issue whether an alien who had applied for refugee status had an effective remedy for the purposes of Article 13 had to be examined in the light of the procedure as a whole. After observing that appeals to the Commissioner-General for Refugees and Stateless Persons under the urgent procedure were of suspensive effect and that aliens were entitled, when lodging applications with the *Conseil d'État* for judicial review, to apply at the same time for a stay of execution under the ordinary or extremely urgent procedure, it concluded that those remedies taken as a whole satisfied the requirements of Article 13 of the Convention.

B. The urgent procedure in the *Conseil d'État*

27. The relevant provisions of the Royal Decree of 5 December 1991 laying down the urgent procedure in the *Conseil d'État* read as follows:

Article 16

"In cases certified to be extremely urgent, Article 7 and 11 to 14 shall not be applicable.

In such cases, the president may issue a summons ordering the applicants, the respondent, any intervening party and any persons with an interest in the outcome of the case to attend a hearing (which may be held at the president's home) at the time indicated, including on bank holidays and on a few days' or a few hours' notice.

The order shall be served on Crown Counsel or on a designated member of the Crown Counsel's Office.

The notice shall, if applicable, indicate whether the administrative file has been lodged.

If the opposing party has not communicated the administrative file beforehand, it shall produce it to the president at the hearing and the president may suspend the hearing to allow the representative of the Crown Counsel's Office, the applicants and any intervening party to inspect it.

The president may order immediate execution of the judgment."

Article 25

"Applications for provisional measures shall be made separately from applications for a stay of execution or for judicial review.

The application shall be signed by a party, a person with an interest in the outcome of the case or a lawyer satisfying the conditions laid down by section 19, sub-paragraph 2, of the consolidated Acts."

Article 33

"If an applicant for a stay of execution also seeks extremely urgent provisional measures, Article 25 shall apply to his or her application. Articles 29 to 31 shall not be applicable.

In cases certified to be extremely urgent, the president may issue a summons ordering the parties and any persons with an interest in the outcome of the case to attend a hearing (which may be held at the president's home) at the time indicated, including on bank holidays and on a few days' or a few hours' notice.

The order shall be served on Crown Counsel or on a designated member of the Crown Counsel's Office.

The notice shall, if applicable, indicate whether the administrative file has been lodged.

The president may order immediate execution of the judgment."

28. The *Conseil d'État*'s practice direction on the "procedure to be followed by duty staff at weekends" includes the following passage concerning "the receipt of applications for stays under the extremely urgent procedure":

"The caretaker shall contact the duty judge, the representative of Crown Counsel's Office and the registrar so that the degree of urgency can be determined and a hearing date agreed. In cases concerning 'aliens', the registrar shall, at the judge's request, contact the Aliens Office to ascertain the scheduled repatriation date and shall seek confirmation by fax. It is advisable in all cases concerning 'aliens' for the Minister of the Interior and the Commissioner-General for Refugees and Stateless Persons to be recorded as the opposing parties. It is also prudent in cases involving imminent repatriation to order the applicant's appearance in person."

29. There are a number of examples in the case-law of the *Conseil d'État* of cases in which it ordered a stay of execution of a deportation order

on the same day as the application for a stay under the extremely urgent procedure or on the following day, or, in any event, before the time-limit for leaving the territory expired. These are to be found in the following judgments: nos. 40.383 of 20 September 1992, 51.302 of 25 January 1995, 57.807 of 24 January 1996, 75.646 of 2 September 1998, 81.912 of 26 July 1999, 84.741 of 18 January 2000 and 85.025 of 1 February 2000.

The *Conseil d'État* has also ruled that it may entertain applications for judicial review of deportation orders (see, for instance, the following judgments: nos. 56.599 of 4 December 1995, 57.646 of 19 January 1996, 80.505 of 28 May 1999 and 85.828 of 3 March 2000).

C. Other sources

30. In August 1999 there was a sharp increase in the number of asylum seekers from Slovakia. While the average for the first seven months of 1999 had been 22 applications monthly, including 51 applications in July alone, no less than 359 applications were made between 1 and 24 August 1999. On that latter date, the Director-General of the Aliens Office wrote to the Minister of the Interior and the Commissioner-General for Refugees and Stateless Persons to inform them of his intention to deal with asylum applications from Slovakian nationals rapidly in order to send a clear signal to discourage other potential applicants.

31. A "Note providing General Guidance on Overall Policy in Immigration Matters" approved by the Cabinet on 1 October 1999, contained, *inter alia*, the following passage:

> "A plan for collective repatriation is currently under review, both to send a signal to the Slovakian authorities and to deport this large number of illegal immigrants whose presence can no longer be tolerated."

32. The Report on Slovakia of the European Commission against Racism and Intolerance (ECRI) of 15 June 1998 contains the following passage:

> "In Slovakia as in several other countries of central and eastern Europe, Roma/Gypsies belong to the most disadvantaged sections of society. Apart from a few isolated cases, they live outside the public arena, cut off from decision-making centres and the main currents of political opinion. They are often the victims of skinheads' violence and are regularly subjected to ill-treatment and discrimination by the authorities."

33. A further report produced by the applicants and drawn up after a joint mission to Slovakia in February 1999 of the Aliens Office and the Commissioner-General's Office for Refugees and Stateless Persons appears to confirm the existence of serious discrimination against Roma, who are treated as a lower class.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

34. The applicants alleged that their arrest at Ghent Police Station on 1 October 1999 entailed a violation of Article 5 § 1, the relevant part of which reads as follows:

> "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: ...
>
> (f) 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."

35. The Court observes that in its decision on the admissibility of the application it joined to the merits the Government's preliminary objection that the applicants' had failed to exhaust domestic remedies, as they had not appealed to the committals division of the criminal court under section 71 of the Aliens Act.

36. As regards the merits, the applicants denied that their arrest had been necessary to secure their departure from Belgium. They complained above all of the manner of their arrest, saying that they had been lured into a trap as they had been induced into believing that their attendance at the police station was necessary to complete their asylum applications when, from the outset, the sole intention of the authorities had been to deprive them of their liberty. They had therefore been deceived about the purpose of their attendance at the police station and, accordingly, there had been an abuse of power that amounted to a violation of Article 5 § 1.

Consequently, no blame could attach to the applicants for their refusal to place any further trust in the authorities and their decision not to lodge an appeal with the Belgian courts. In any event, any such appeal would have been futile in the circumstances. The applicants had been trapped by the authorities, assembled as part of a collective-repatriation operation and placed in closed centres where they were told that no appeal was available to them; accordingly, they would not have been able to contact their lawyer, Mr Van Overloop, directly.

Mr Van Overloop had not learnt of his clients' detention until Friday 1 October 1999, when he was informed by the President of the Romany Rights League. At no stage between the applicants' arrest and the execution of the deportation order had any direct contact between them and their

lawyer been possible, in particular as they were not permitted to receive any telephone communications from the outside. Admittedly, they could have telephoned out, but they were convinced that it was impossible to appeal against their detention.

Consequently, Mr Van Overloop would not have been able to lodge an application with the Committals Division of the Ghent Criminal Court until Monday 4 October. Since the division sat on Mondays, Wednesdays and Fridays only, the case could not have been heard until Wednesday 6 October and the aircraft carrying the applicants left Belgium on Tuesday 5 October.

37. The Government pointed out that the applicants had been served on 3 March and 18 June 1999 with orders to leave the territory, which expressly stated that they were liable to detention with a view to deportation if they failed to comply. The applicants would therefore have been well aware that they were overstaying. Furthermore, Mrs Čonková had been convicted of theft by the Ghent Criminal Court. In those circumstances, it was absurd to suggest that the applicants had been acting in good faith. On the contrary, the "clean-hands" doctrine or the *nemo auditur* adage had to be applied in their case.

In addition, the fact that the tenor of the notice was potentially ambiguous could not suffice to give rise to an inference that there had been an abuse of power. That was a serious accusation that could only be made out if the authority had acted solely for unlawful reasons, which was manifestly not the case. Besides, the Minister of the Interior had publicly expressed regret for the "unfortunate wording" of the notice. However, the fact that other aliens who had attended the police station after receiving the notice were released after their cases had been considered demonstrated that the notices had not been sent with the sole aim of carrying out arrests. Even if they had been, the method used was nonetheless preferable to going to aliens' homes or to their children's schools to arrest them. Therefore, any ruse there had been had been a "little ruse".

The Government saw no grounds on which the applicants could have been exempted from the requirement to lodge an appeal with the committals division of the criminal court. In their view, if the applicants were capable of applying to the European Court of Human Rights, they must have been equally capable in the same circumstances of appealing to the committals division.

38. The Court notes that it is common ground that the applicants were arrested so that they could be deported from Belgium. Article 5 § 1(f) is thus applicable in the instant case. Admittedly, the applicants contest the necessity of their arrest for that purpose; however, Article 5 § 1(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing. In this respect Article 5

§ 1(f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that "action is being taken with a view to deportation" (see the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1862, § 112).

39. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see, among other authorities, the Bozano v. France judgment of 18 December 1986, Series A no. 111, p. 23, § 54, and the Chahal judgment cited above, p. 1864, § 118).

40. In the present case, the applicants received a written notice at the end of September 1999 inviting them to attend Ghent Police Station on 1 October to "enable the file concerning their application for asylum to be completed". On their arrival at the police station they were served with an order to leave the territory dated 29 September 1999 and a decision for their removal to Slovakia and for their arrest for that purpose. A few hours later they were taken to a closed transit centre at Steenokkerzeel.

41. The Court notes that, according to the Government, while the wording of the notice was admittedly unfortunate, as had indeed been publicly recognised by the Minister of the Interior (see paragraph 23 above), that did not suffice to vitiate the entire arrest procedure, or to warrant its being qualified as an abuse of power.

While the Court has reservations about the compatibility of such practices with Belgian law, particularly as the practice in the instant case was not reviewed by a competent national court, the Convention requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see paragraph 39 above). Although the Court by no means excludes its being legitimate for the police to use stratagems in order, for instance, to counter criminal activities more effectively, acts whereby the authorities seek to gain the trust of asylum seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention.

In that regard, there is every reason to consider that while the wording of the notice was "unfortunate", it was not the result of inadvertence; on the contrary, it was chosen deliberately in order to secure the compliance of the largest possible number of recipients. At the hearing, counsel for the Government referred in that connection to a "little ruse", which the authorities had knowingly used to ensure that the "collective repatriation" (see paragraph 23 above) they had decided to arrange was successful.

42. The Court reiterates that 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*, the K.-F. v. Germany judgment of 27 September 1997, *Reports* 1997-VII, p. 2975, § 70). In the Court's view, that requirement must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. It follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5.

43. That factor has a bearing on the issue to which the Court must now turn, namely the Government's preliminary objection, which it has decided to join to the merits. In that connection, the Court reiterates that by virtue of Article 35 § 1 of the Convention normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, among other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, § 66).

44. In the instant case, the Court identifies a number of factors which undoubtedly affected the accessibility of the remedy which the Government claim was not exhausted. These include the fact that the information on the available remedies handed to the applicants on their arrival at the police station was printed in tiny characters and in a language they did not understand; only one interpreter was available to assist the large number of Romany families who attended the police station in understanding the verbal and written communications addressed to them and although he was present at the police station, he did not stay with them at the closed centre; in those circumstances, the applicants undoubtedly had little prospect of being able to contact a lawyer from the police station with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed transit centre, they would no longer have been able to call upon the interpreter's services; despite those difficulties, the authorities did not offer any form of legal assistance at either the police station or the centre.

45. Whatever the position – and this factor is decisive in the eyes of the Court – as the applicants' lawyer explained at the hearing without the Government contesting the point, he was only informed of the events in issue and of his clients' situation at 10.30 p.m. on Friday 1 October 1999, such that any appeal to the committals division would have been pointless because, had he lodged an appeal with the division on 4 October, the case

could not have been heard until 6 October, a day after the applicants' expulsion on 5 October. Thus, although he still regarded himself as acting for the applicants (see paragraph 21 above), he was unable to lodge an appeal with the committals division.

46. The Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, *mutatis mutandis*, the Matthews v. the United Kingdom judgment [GC], no. 24833/94, § 34, ECHR 1999-I). As regards the accessibility of a remedy invoked under Article 35 § 1 of the Convention, this implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy. That did not happen in the present case and the preliminary objection must therefore be dismissed.

Consequently, there has been a violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

47. The applicants alleged a violation of Article 5 § 2 of the Convention, which provides:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

They said that they had been given insufficient information about the reasons for their arrest, and had thus been prevented from exercising the remedy to which they were entitled by virtue of Article 5 § 4 of the Convention. No representative of the Ministry of the Interior, which had issued the orders of 29 September 1999 requiring them to leave the territory, had given any official information to the persons detained at Ghent Police Station. They had had to make do with the information contained in the documents handed to them. That information was, however, incomplete, as it did not give sufficient details to them about the legal and factual grounds for their arrest, the arrangements for their removal or the remedies available to them.

48. The Government maintained that the requirements of Article 5 § 2 had been followed to the letter and explained that the detention order of 29 September 1999 contained reasons and had been served on the applicants two days later at the police station. When the papers were served, a Slovakian-speaking interpreter had been in attendance to provide those concerned with any explanation they might need on the content of the document.

49. In its decision on the admissibility of the complaint under Article 5 § 2, the Court joined the Government's preliminary objection to the merits. Since that objection is the same as the one raised under Article 5 § 1, and

regard being had to the conclusion set out in paragraph 45 above, it too must be dismissed.

50. As to the merits, the Court reiterates that paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4... . Whilst this information must be conveyed "promptly" (in French: "*dans le plus court délai*"), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see, *mutatis mutandis*, Murray v. the United Kingdom, Series A no. 300-A, p. 31, § 72).

51. In the instant case, on their arrival at the police station, the applicants were served with the decision ordering their arrest. The document handed to them for that purpose stated that their arrest had been ordered pursuant to section 7, subparagraph 1, (2) of the Aliens Act, in view of the risk that they might seek to elude deportation. A note in the documents mentioned an appeal to the committals division of the criminal court as being an available remedy against the detention order.

52. The Court has already noted that when the applicants were arrested at the police station a Slovakian-speaking interpreter was present, notably for the purposes of informing the aliens of the content of the verbal and written communications which they received, in particular, the document ordering their arrest. Even though in the present case those measures by themselves were not in practice sufficient to allow the applicants to lodge an appeal with the committals division (see paragraph 46 above), the information thus furnished to them nonetheless satisfied the requirements of Article 5 § 2 of the Convention. Consequently, there has been no violation of that provision.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

53. The applicants also complained of a violation of Article 5 § 4 of the Convention, which reads as follows:

> "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."

They submitted that the only remedy available to them to challenge their detention was an appeal to the committals division of the criminal court

under section 71 of the Aliens Act. However, that remedy did not satisfy the requirements of Article 5 § 4, since the committals division only carried out a very limited review of detention orders made under section 7 of the Aliens Act. That review was confined to the procedural lawfulness of the detention and the committals division did not have regard to the proportionality of the detention, that is to say to the issue whether in the light of the special facts of each case, detention was justified. Further, the circumstances of the applicants' arrest in the instant case were such that no appeal to the committals division would have been possible (see paragraph 36 above).

54. The Government, on the other hand, considered that the remedy satisfied all the requirements of Article 5 § 4.

55. The Court considers, firstly, that the fact that the applicants were released on 5 October 1999 in Slovakia does not render the complaint devoid of purpose, since the deprivation of liberty in issue lasted five days (compare with the Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, p. 20, § 45). It notes, however, that the Government's submissions on this point are the same as those on which they relied in support of their preliminary objection to the complaints under Articles 5 §§ 1, 2 and 4 of the Convention (see paragraphs 37 and 49 above). Accordingly, the Court refers to its conclusion that the applicants were prevented from making any meaningful appeal to the committals division (see paragraph 46 above). Consequently, it is unnecessary to decide whether the scope of the jurisdiction of the committals division satisfies the requirements of Article 5 § 4.

In conclusion, there has been a violation of Article 5 § 4.

IV. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL N° 4

56. The applicants complained of a violation of Article 4 of Protocol No. 4, which provides:

> "Collective expulsion of aliens is prohibited."

In their submission, the expression "collective expulsion" must be understood as meaning any "collective implementation of expulsion measures". The provision would become meaningless if a distinction were drawn between the prior decision and the execution of the measure, since the legislation of every member State now required a specific formal decision before expulsion, such that a distinction of that kind would mean that it would no longer be possible to challenge a collective expulsion and Article 4 of Protocol No. 4 would be deprived of all practical effect.

The applicants considered, in particular, that the orders for their expulsion reflected the authorities' determination to deal with the situation of a group of individuals, in this instance Roma from Slovakia, collectively. They submitted that there was evidence of that in certain official documents,

including letters sent on 24 August 1999 by the Director-General of the Aliens Office to the Minister of the Interior and the Commissioner-General for Refugees and Stateless Persons, in which the Director-General had announced that requests for asylum by Slovakian nationals would be dealt with rapidly in order to send a clear signal to discourage other potential applicants. The applicants also referred to a "Note providing General Guidance on Overall Policy in Immigration Matters", which was approved on 1 October 1999 by the Cabinet and containing the following passage: "A plan for collective repatriation is currently under review, both to send a signal to the Slovakian authorities and to deport this large number of illegal immigrants whose presence can no longer be tolerated" (see paragraph 31 above). Likewise, on 23 December 1999, the Minister of the Interior had declared in response to a parliamentary question: "Owing to the large concentration of asylum seekers of Slovakian nationality in Ghent, arrangements have been made for their collective repatriation to Slovakia" (see paragraph 23 above).

In the applicants' submission, those elements revealed a general system intended to deal with groups of individuals collectively from the moment the decision to expel them was made until its execution. In that connection, it was significant that the process had been christened "Operation Golf" by the authorities. Accordingly, irrespective of the formal appearance of the decisions that had been produced, it could not be said that there had been "a reasonable and objective examination of the particular circumstances of each of the aliens forming the group" in the instant case.

57. In response to that complaint, the Government objected that the applicants had failed to challenge the decisions which they alleged constituted a violation, namely those taken on 29 September 1999, in the *Conseil d'État*, notably by way of an application for a stay under the extremely urgent procedure.

The Court notes that that remedy is the same as the remedy relied on by the Government in connection with the complaint under Article 13 taken together with Article 4 of Protocol No. 4. Consequently, the objection must be joined to the merits and examined with the complaint of a violation of those provisions.

58. As to the merits of the complaint of a violation of Article 4 of Protocol No. 4 taken alone, the Government referred to the Court's decision in the case of Andric v. Sweden (no. 45917/99, [Section 1] 23.02.99, unpublished), in which the complaint was declared inadmissible, in support of their submission that there was no collective expulsion when an alien's immigration status was individually and objectively examined in a way that allowed him to put forward his case against expulsion. Although the orders made on 29 September 1999 to leave the territory had replaced the earlier orders, both the Aliens Office and the Commissioner-General's Office for Refugees and Stateless Persons, an independent, impartial and quasi-judicial

body, had afforded the applicants an opportunity to set out their cases. The decision concerning Mrs Čonková comprised three pages of detailed reasoning typed in small characters and explaining why she was at no risk of treatment contrary to Article 3 of the Convention in her country of origin. As for Mr Čonka, he had not even taken the trouble to attend his appointment with the Commissioner, despite receiving due notification.

Further consideration had been given to the aliens' cases at Ghent Police Station, since some asylum seekers whose applications had been refused were nevertheless allowed to walk free from the police station, notably on humanitarian grounds or for administrative reasons. The examination of some individual cases, including the Čonkas', had even continued until the applicants were about to board the aircraft, since a social-security payment had been made for October to each head of household, calculated to the nearest Belgian franc by reference to the number of people in each family. In short, the requirements of Article 4 of Protocol No. 4 had been amply satisfied.

59. The Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group (see Andric v. Sweden, cited above). That does not however mean that where the latter condition is satisfied, the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4.

60. In the instant case, the applications for asylum made by the applicants were rejected in decisions of 3 March 1999 that were upheld on 18 June 1999. The decisions of 3 March 1999 contained reasons and were accompanied by an order made on the same day requiring the applicants to leave the territory. They were reached after an examination of each applicant's personal circumstances on the basis of their depositions. The decisions of 18 June 1999 were also based on reasons related to the personal circumstances of the applicants and referred to the order of 3 March 1999 to leave the territory, which had been stayed by the appeals under the urgent procedure.

61. The Court notes, however, that the detention and deportation orders in issue were made to enforce an order to leave the territory dated 29 September 1999; that order was made solely on the basis of section 7, paragraph 1, (2) of the Aliens Act, and the only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions of 3 March and 18 June 1999. Admittedly, those decisions had also been accompanied by an order to leave the territory, but by itself, that order did not permit the applicants'

arrest. The applicants' arrest was therefore ordered for the first time in a decision of 29 September 1999 on a legal basis unrelated to their requests for asylum, but nonetheless sufficient to entail the implementation of the impugned measures. In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considers that the procedure followed did not enable it to eliminate all doubt that the expulsion might have been collective.

62. That doubt was reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation (see paragraphs 30 and 31 above); secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.

63. In short, at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account.

In conclusion, there has been a violation of Article 4 of Protocol No 4.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

64. The applicants said that they had no remedy available to complain of the alleged violations of Article 3 of the Convention and Article 4 of Protocol No. 4 that satisfied the requirements of Article 13 of the Convention, which provides:

> "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."

65. In the applicants' submission, the procedure before the Commissioner-General for Refugees and Stateless Persons did not offer the guarantees required by Article 13. Firstly, the alien concerned had no guarantee of being heard since, although that was the practice, it did not constitute a right. Secondly, he had no access to his case file, could not consult the record of notes taken at the hearing or demand that his observations be put on record. As regards the remedies available before the *Conseil d'État*, they were not effective for the purposes of Article 13, as they had no automatic suspensive effect. In expulsion cases, in which enforcement of the contested State measure produced irreversible consequences, the effectiveness of the remedy depended on its having

suspensive effect, which was thus a requirement of Article 13 of the Convention.

66. In particular, as regards remedies in the *Conseil d'État* under the extremely urgent procedure, the applicants accepted that in practice the judgment of the *Conseil d'État* was delivered before execution of the deportation order, but they argued that the law afforded no guarantee of that and the administrative authority was perfectly entitled to execute the deportation order without waiting for the judgment. Further, the success rate of such applications was as low as 1.36%. It was also to be noted in passing that the *Conseil d'État* considered that aliens ceased to have an interest in pursuing the proceedings after leaving Belgian territory and it declined jurisdiction to quash or stay orders to leave the territory if they merely constituted a means of executing another decision, unless the challenge was based on new grounds, different from those relied on to contest the decision which the order to leave the territory sought to enforce.

67. The Government said that the effectiveness of the available remedies had to be determined as a whole, having regard to the fact that two categories of remedy existed under Belgium law and could be exercised successively and cumulatively against deportation orders made by the Aliens Office. One appeal lay to the Commissioner-General for Refugees and Stateless Persons, the other to the *Conseil d'État*.

68. The former was an independent and impartial quasi-judicial body, as the Court of Cassation had again recently confirmed in a judgment of 14 March 2001 (see paragraph 26 above). Appeals to the Commissioner had automatic suspensive effect and the procedure afforded several procedural guarantees. First, due reasons setting out all the relevant circumstances of the case had to be given in the Commissioner's decisions. The adversarial principle was observed in the procedure so that every decision in asylum cases had to be based on evidence and information of which the applicant for refugee status was aware, which was common knowledge or which, failing that, had been the subject of adversarial argument.

In the instant case, Mrs Čonková had been heard at length by representatives of the Commissioner-General's Office, in the presence of an interpreter. She had not requested the assistance of a lawyer, but had been entitled to do so. Mr Čonka had not even kept his appointment.

69. An appeal lay against the decision of the Commissioner to the *Conseil d'État* by way of an application for judicial review and a stay of execution under the ordinary or extremely urgent procedure. The applicants had not used the extremely urgent procedure to apply for a stay of the decisions of 18 June 1999. Nor had they used it when challenging the deportation orders of 29 September 1999, which had replaced those of 18 June 1999.

70. The Government accepted that appeals to the *Conseil d'État* had no automatic suspensive effect and that the authorities were entitled in law not

to withhold executing a deportation order solely on the ground that an appeal to that court – even under the extremely urgent procedure – had been lodged. However, appeals to the *Conseil d'État* had in the past had automatic suspensive effect and that had very rapidly led to a glut of appeals being lodged as a delaying tactic, a state of affairs that had forced the legislature to cancel the automatic suspensive effect in 1991. However, in order to protect the effectiveness of the remedy before the *Conseil d'État*, the legislature had at the same time introduced the extremely urgent procedure, thus restoring a fair balance between two fundamental values of the Convention: the proper administration of justice and the conduct of proceedings within a reasonable time on the one hand, and effective judicial protection on the other.

71. The procedure for applying for a stay of execution under the extremely urgent procedure was effective both in practice and in law and accordingly satisfied the requirements of Article 13.

As a matter of law, the Court's case-law on the subject did not require available remedies to have suspensive effect automatically and as of right. On the contrary, the Jabari v. Turkey judgment of 11 July 2000 (no. 40035/98, § 50), for instance, showed that a mere power to issue a stay could suffice for the purposes of Article 13. The *Conseil d'État* had just such a power to issue a stay of execution under the extremely urgent procedure.

The procedure followed in such cases was very fast and applications had to be lodged before the period given to the alien to leave the territory had expired. In appropriate cases, the application could be dealt with in a single day. The president of the division could, by virtue of Article 16, paragraph 2 of the Royal Decree of 5 December 1991 laying down the urgent procedure in the *Conseil d'État*, issue a summons at any time requiring the parties to attend, even on bank holidays, and on a few hours' notice; he frequently did so in deportation cases. Furthermore, aliens were entitled by Article 33 of the Royal Decree to request the president to order provisional measures, including an injunction preventing deportation pending the outcome of the proceedings, under the extremely urgent procedure. Those procedures were available twenty-four hours a day and therefore afforded an effective remedy to check any inclination which the authorities might have to deport the alien before the *Conseil d'État* had delivered its judgment under the urgent procedure. In that connection, the Government referred to the *Conseil d'État*'s practice direction on the procedure to be followed by duty officers at weekends; the direction made it clear that, if the authorities were not prepared to defer execution of the deportation order, the hearing was to be set down and the judgment delivered before the measure was executed.

72. The numerous judgments cited by the Government in which the *Conseil d'État* had ordered stays of execution of orders for the deportation of aliens under the extremely urgent procedure showed how effective the

remedy was in practice. First, during the two judicial years that had preceded the events at the origin of the dispute, that is to say 1997 to 1998 and 1998 to 1999, the administrative division had stayed the execution of decisions taken against foreign nationals in 25.22% of cases under the procedure. The percentage was 10.88% in the Dutch-speaking division.

73. In addition, the case-law contained examples of cases in which the order to leave the territory had been stayed or quashed by itself. While it was true that in the past there had been cases in which the *Conseil d'État* had held that deportation orders were merely a means of executing orders to leave the territory that had been made earlier, that case-law had since evolved and deportation orders were now regarded as administrative decisions against which an appeal lay. Added to which, while it was true that aliens who had left the national territory ceased to have any interest in obtaining a stay of execution of the deportation order, they nonetheless retained an interest in having it quashed, unless their departure had been voluntary.

74. Lastly, the Government submitted that the effectiveness of a remedy could not be determined without having regard to the political and legal context in Belgium and, consequently, the margin of appreciation that Belgium ought to be recognised as having in the instant case. The right to an effective remedy did not guarantee a right to abuse process or to be incompetent.

The *Conseil d'État* was currently confronted with major abuses of process which undermined its effectiveness, the caseload generated by the application of the Aliens Act already accounting by itself for more than half of the litigation before it. The vast majority of the applications were dilatory. In those circumstances, the aim of the legislature had not been to restrict access to the administrative courts, but solely to abolish a rule – the automatic suspensive effect of appeals – that was bound to have an unanticipated and disastrous effect in the Belgian context, contrary to the principle of a proper administration of justice that underpinned Article 6 of the Convention.

75. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial

authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see, many among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000).

76. However, for Article 13 to be applicable, the complaint must also be arguable (see, *mutatis mutandis*, the Chahal v. the United Kingdom judgment of 15 November 1996, *Reports* 1996-V, p. 1870, § 147). In the instant case, the complaints of a violation of Article 3 which the Court declared manifestly ill-founded on 13 March 2001 were not arguable. Accordingly, there has been no violation of Article 13 taken together with Article 3.

77. The complaint of a violation of Article 4 of Protocol No. 4 may, however, in the Court's view, be regarded as arguable.

78. The Court observes in that connection that the expulsions in issue were carried out on the basis of orders to leave the territory dated 29 September 1999 which, according to the Government, replaced those made on 3 March and 18 June 1999 and in respect of which a remedy was available in the *Conseil d'État*, in particular an application for a stay of execution under the extremely urgent procedure.

The applicants failed to use that remedy despite the fact that their counsel was informed of the events in issue and his clients' position at 10.30 p.m. on 1 October 1999 and considered that he was still acting for them. The applicants do not deny that the *Conseil d'État* may be regarded as a "national authority" within the meaning of Article 13, but argue that the remedy was not sufficiently effective to comply with that provision, as it did not produce any automatic suspensive effect. That issue must accordingly be examined.

79. The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible (see, *mutatis mutandis*, *Jabari v. Turkey* judgment of 11 July 2000, no. 40035/98, § 50 (unpublished)). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see the Chahal v. the United Kingdom judgment cited above, p. 1870, § 145).

80. In the instant case, the *Conseil d'État* was called upon to examine the merits of the applicants' complaints in their application for judicial review. Having regard to the time which the examination of the case would take and the fact that they were under threat of expulsion, the applicants had

also made an application for a stay of execution under the ordinary procedure, although the Government say that that procedure was ill-suited to the circumstances of the case. They consider that the applicants should have used the extremely urgent procedure.

The Court is bound to observe, however, that an application for a stay of execution under the ordinary procedure is one of the remedies which, according to the document setting out the Commissioner-General's decision of 18 June 1999, was available to the applicants to challenge that decision. As, according to that decision, the applicants had only five days in which to leave the national territory, an application for a stay under the ordinary procedure does not of itself have suspensive effect and the *Conseil d'État* has forty-five days in which to decide such applications (section 17 (4) of the consolidated Acts on the *Conseil d'État*), the mere fact that that application was mentioned as an available remedy was, to say the least, liable to confuse the applicants.

81. An application for a stay of execution under the extremely urgent procedure is not suspensive either. The Government stressed, however, that the president of the division may at any time – even on bank holidays and on a few hours' notice, as frequently occurred in deportation cases – summons the parties to attend so that the application can be considered and, if appropriate, an order made for a stay of the deportation order before its execution. It will be noted that the authorities are not legally bound to await the *Conseil d'État*'s decision before executing a deportation order. It is for that reason that the *Conseil d'État* has, for example, issued a practice direction directing that on an application for a stay under the extremely urgent procedure the registrar shall, at the request of the judge, contact the Aliens Office to establish the date scheduled for the repatriation and to make arrangements regarding the procedure to be followed as a consequence. Two remarks need to be made about that system.

82. Firstly, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.

83. Secondly, even if the risk of error is in practice negligible – a point which the Court is unable to verify, in the absence of any reliable evidence – it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention

(see, *mutatis mutandis*, *Iatridis v. Greece*, [GC], no. 31107/96, § 58, ECHR 1999-II).

However, it appears that the authorities are not required to defer execution of the deportation order while an application under the extremely urgent procedure is pending, not even for a minimum reasonable period to enable the *Conseil d'État* to decide the application. Further, the onus is in practice on the *Conseil d'État* to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly, but there does not appear to be any obligation on it to do so. Lastly, it is merely on the basis of internal directions that the registrar of the *Conseil d'État*, acting on the instructions of a judge, contacts the authorities for that purpose, and there is no indication of what the consequences might be should he omit to do so. Ultimately, the alien has no guarantee that the *Conseil d'État* and the authorities will comply in every case with that practice, that the *Conseil d'État* will deliver its decision, or even hear the case, before his expulsion, or that the authorities will allow a minimum reasonable period of grace.

Each of those factors makes the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied.

84. As to the overloading of the *Conseil d'État*'s list and the risks of abuse of process, the Court considers that, as with Article 6 of the Convention, Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements (see, *mutatis mutandis*, the Süßmann v. Germany judgment of 16 September 1996, *Reports* 1996-IV, p. 1174, § 55). In that connection, the importance of Article 13 for preserving the subsidiary nature of the Convention system must be stressed (see, *mutatis mutandis*, Kudła v. Poland [GC], no. 30210/96, § 152, ECHR 2000-XI).

85. In conclusion, the applicants did not have a remedy available that satisfied the requirements of Article 13 to air their complaint under Article 4 of Protocol No. 4. Accordingly, there has been a violation of Article 13 of the Convention and the objection to the complaint of a violation of Article 4 of Protocol No. 4 (see paragraph 57 above) must be dismissed.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. 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

87. The applicants said that the assessment of the non-pecuniary damage which they had sustained as a result of the violations of the Convention depended on the measures that the Belgian State undertook to adopt in the future to ensure that the Court's judgment was fully enforced. Consequently, they wished to start discussions with the Belgian State regarding the consequences of the judgment.

88. The Government expressed no opinion on that point.

89. The Court points out that, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see Scozzari and Giunta v. Italy, [GC], no. 39221/98 and 41963/98, § 249, ECHR 2000-VIII). Consequently, the Court does not consider it appropriate to reserve the question. Ruling on an equitable basis, it assesses the non-pecuniary damage sustained by the applicants at 10,000 euros.

B. Costs and expenses

90. The applicants sought 19,850 euros for costs and expenses. They have provided details of the amount, which covers their representation before the Court by their three lawyers.

91. The Government submitted that the applicant's lawyers could not claim payment of their fees directly under Article 41 and that it was for the applicants themselves to seek reimbursement of those fees (unless they could be regarded as having insufficient means, in which case they should have made an application for legal aid, which they had not done). Subject to that reservation, the Government agreed to pay a sum that was proportionate to the seriousness of the complaints that were held to be well-founded.

92. Having regard to the circumstances, and in particular to the fact that the applicants were deported from Belgium, the Court considers the claims made on behalf of the applicants admissible. Ruling on an equitable basis, it nonetheless finds that the amount is excessive and reduces it to 9,000 euros.

C. Default interest

93. According to the information available to the Court, the statutory rate of interest applicable in Belgium at the date of adoption of the present judgment is 7% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection to the complaints under Article 5 §§ 1, 2 and 4 of the Convention of a failure to exhaust domestic remedies;
2. *Holds* unanimously that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 5 § 2 of the Convention;
4. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention;
5. *Holds* by four votes to three that there has been a violation of Article 4 of Protocol No. 4 to the Convention;
6. *Holds* unanimously that there has been no violation of Article 13 of the Convention taken together with Article 3;
7. *Holds* by four votes to three that there has been a violation of Article 13 of the Convention taken together with Protocol No. 4;
8. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) 10,000 (ten thousand) euros in respect of non-pecuniary damage;
      (ii) 9,000 (nine thousand) euros in respect of costs and expenses;
   (b) that simple interest at an annual rate of 7% shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in English, and notified in writing on 5 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ	J.-P. COSTA
Registrar	President

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

(a) partly concurring and partly dissenting opinion of Mr Velaers;

(b) dissenting opinion of Mr Jungwiert, joined by Mr Kūris.

J.-P.
S.D.

CONCURRING AND PARTLY DISSENTING OPINION OF MR VELAERS, JUDGE *AD HOC*

(*Translation*)

Article 5 §§ 1 and 4 of the Convention

1. I agree with the Court that the circumstances in which the applicants were deprived of their liberty amount to a violation of Article 5 §§ 1 and 4 of the Convention.

2. The Convention requires that any deprivation of liberty must be "in accordance with the procedure prescribed by law". Although the words "in accordance with a procedure prescribed by law" essentially refer to the domestic legislation and therefore state "the need for compliance with the relevant procedure under that law", in the Winterwerp judgment of 24 October 1979, § 45, the Court nonetheless added: "... the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein".

3. The ruse used by the Belgian police must therefore be examined in the light of the "general principles" of the Convention. Police methods and tactics may only be regarded as proper and fair if they are proportionate to the aims which the authorities seek to achieve, for the principle of proportionality is a general principle of the Convention. It is applied in a wide range of cases by the Court in its case-law (particularly in its case-law on paragraphs 2 of Articles 8 to 11, and Article 14) and may be regarded as part of the Article 5 requirement that persons are only to be deprived of their liberty "in accordance with the procedure prescribed by law". The method used by the Ghent police – the ruse – is to my mind inconsistent with the principle of proportionality. The persons who were to be deprived of their liberty were not criminals. They were illegal immigrants whose request for asylum had been turned down. While the Court rightly refused to exclude the possibility of the police being allowed to use ruses to make the fight against crime more effective (see § 41 of the judgment), in the instant case, the Ghent police were not concerned with a criminal investigation but with an administrative procedure of forcible expulsion. Although States are entitled to expel illegal immigrants in an effective manner and while there may not be many suitable alternatives and those there are in some cases have equally damaging consequences for the immigrants and their children, using a ruse such as that used by the Ghent police creates a danger that the public authorities will generally be perceived as not being credible in their administrative dealings with aliens illegally present on the national territory. In my opinion, that consequence means that the ruse used by the Ghent police contravened the principle of proportionality. In a State in which the

rule of law applies, illegal immigrants are not devoid of rights. They must be able to rely on communications of the administrative authorities that concern them.

4. Article 5 § 4 of the Convention guarantees anyone who is deprived of his liberty the right to take proceedings. I agree with the Court that, in the instant case, the remedy before the committals division was not accessible (see § 45 of the judgment). In addition, the Court rightly refers to its judgment in the case of Fox, Campbell and Hartley (see § 55 of the judgment). In that case, the applicants had been held for approximately 30 and 44 hours. On the day following their arrest the applicants instituted proceedings for *habeas corpus*, but they were released before the applications came on for hearing before a judge. The Court held that it was unnecessary to examine the merits of the applicants' complaint under Article 5 § 4, as they had each been speedily released before any judicial review of their detention had taken place. In the present case, the deprivation of liberty lasted five days, not just a few hours. Regard being had to the length of the detention, the Belgian State should have guaranteed the right to take proceedings before a court, notwithstanding the fact that the intention was to release the applicants immediately after their expulsion.

Article 4 of Protocol No. 4

5. I am unable to agree with the majority that Article 4 of Protocol No. 4 has been violated.

It was important for the Court to reinforce the definition of "collective expulsion" that has been given in the earlier decision of 23 February 1999 of the First Section of the Court in the Andric v. Sweden case. Measures forcing aliens as a group to leave a country do not amount to a collective expulsion if they were taken at the end and on the basis of a reasonable and objective examination of the personal circumstances of each of the aliens forming the group. The Belgian State was therefore found to have violated this provision not merely because the applicants were repatriated as a group, by air, but because the majority doubted that a reasonable and objective examination of the personal circumstances of the applicants had taken place in practice. I do not share those doubts.

6. The applicants' requests for asylum were turned down in decisions taken by the Aliens Office on 3 March 1999 that were upheld on 18 June 1999 by the Commissioner-General for Refugees and Stateless Persons. The majority recognise that those decisions were reasoned and taken following an examination of the aliens' personal circumstances. In my opinion, the personal circumstances of the applicants were also examined briefly a third time. On the day they were arrested, the Ghent police contacted the Aliens Office to check whether any of those arrested had leave to remain in Belgium. The fact that some of them were allowed to return home after their individual circumstances had been checked and their immigration status

found to be in order shows that even at that late stage in the deportation process, a final individual examination was carried out.

7. The majority's doubts stem from the fact that the deportation measures were taken pursuant to an order to leave the territory dated 29 September 1999, which referred solely to section 7(1), 2° of the Aliens Act, without making any reference to the personal circumstances of those concerned other than to say that they had been in Belgium for more than three months. To my mind, the measures taken on 29 September 1999 cannot be isolated from the earlier decisions regarding the asylum procedure. There applicants' individual circumstances had been examined on two or even three occasions and that had provided sufficient justification for the expulsions. By attaching importance to the fact that the final order to leave the territory made no reference to the applicants' request for asylum, or to the decisions of 3 March and 18 June 1999, the majority appear to have introduced a purely formal element into the definition of the concept of "collective expulsion". In that connection, the majority should have followed the decision in the Andric case, in which the Court held: "the fact that a number of aliens received similar decisions does not lead to the conclusion that there is a collective expulsion when each person has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis" (see the aforementioned decision, § 1).

8. The majority's doubts stem too from "a series of circumstances" concerning the forcible removal of the applicants (§ 62). In my opinion, those circumstances could not in any way have influenced the decisions that were taken in the applicants' cases after the examination of their individual circumstances and did not, therefore, justify those doubts. Thus, the fact that on 24 August 1999 the Director-General of the Aliens Office wrote to the Commissioner-General for Refugees and Stateless Persons informing him of his intention to deal with the Slovakian nationals' requests for asylum rapidly in order to send a signal to discourage further applicants obviously could not have influenced decisions taken previously, *in tempore non suspecto*, against the applicants by the Aliens Office (on 3rd March 1999) and the Commissioner-General for Refugees and Stateless Persons (on 18 June 1999). Indeed, the Commissioner-General is "a national authority, whose independence is guaranteed by law and who affords procedural guarantees to the alien" (Belgian Court of Cassation, 23 January 2001). The other circumstances referred to by the majority relate to the effective repatriation of the group. They relate to events at the end of September and cannot therefore justify the majority's doubts concerning the decisions taken against the aliens on 3 March 1999 and 18 June 1999. Indeed, the majority themselves acknowledge that the repatriation of the group does not contravene Article 4 of Protocol No 4 if there has been a reasonable and objective examination of the aliens' personal circumstances. Repatriation as

a group, an option the national authorities are free to choose for reasons of efficiency and economy, clearly cannot take place without prior preparation.

Articles 35 and 13 of the Convention

9. I cannot share the majority's opinion that an application to the Belgian *Conseil d'État* for a stay of execution of the deportation orders of 29 September 1999 under the extremely urgent procedure was not a remedy which the applicants were required to exhaust before lodging the complaint with the European Court of Human Rights (Article 35 of the Convention) and did not constitute an effective remedy (Article 13 of the Convention) which could have enabled the applicants to have the matters complained of put right.

10. As regards the complaints under Article 4 of Protocol No 4 concerning the measures taken on 29 September 1999 and the circumstances in which they were prepared and executed on 5 October 1999 by the removal of the aliens as a group by air, the sole relevant remedy requiring examination was the application to the Belgian *Conseil d'État* for a stay of execution of the measures of 29 September 1999 under the extremely urgent procedure.

The majority was right not to take into account the applicants' appeal to the Commissioner-General for Refugees and Stateless Persons against the decision of the Aliens Office of 3 March 1999. Although such appeals have automatic suspensive effect, the applicants were obviously unable to raise their complaints of a violation of Article 4 of Protocol No. 4 before the Commissioner-General, as he had taken his decision on 18 June 1999 and the complaints concerned the preparation and execution of the measures taken on 29 September 1999. For the same reason, the application made by the applicants on 3 August 1999 to the *Conseil d'État* was not to be taken into consideration either. Indeed, an application for a stay of execution under the ordinary procedure – the procedure used by the applicants – does not entail, either in law or in practice, any suspensive effect. The sole relevant remedy capable of putting right the applicants' complaints was an application for a stay of execution of the measures of 29 September 1999 under the extremely urgent procedure.

11. As to the accessibility of that remedy, the majority rightly noted that the applicants' counsel was "informed of the events in issue and his clients' position at 10.30 p.m. on 1 October 1999 and considered that he was still acting for them" (see § 78, second sub-paragraph, of the judgment). It follows that the applicants' lawyer could have made an application for a stay of execution under the extremely urgent procedure, which is available round the clock and is the equivalent of an emergency injunction.

12. As regards the effectiveness of this type of remedy, it can be seen from a number of judgments of the *Conseil d'État*, which were cited by the Belgian Government, that an application for a stay of execution under the

extremely urgent procedure offers reasonable prospects of success. The Belgian Government not only demonstrated, by numerous examples, that the procedure may be implemented extremely quickly, it also produced a large number of judgments in which the *Conseil d'État* had effectively suspended expulsion orders under the extremely urgent procedure. As to the success rate for applications under that procedure, the parties produced widely divergent statistics to the Court: the applicants set the rate at 1.36% while the Government produced a document delivered by the Head Registrar of the *Conseil d'État*, which indicates a rate of 25.22%. The Court, unfamiliar with the methods of calculation used, rightly did not seek to resolve that difference between the parties. However, in any event, it should be recalled that the effectiveness of a remedy does not depend on the certainty of a favourable outcome for the applicant, it suffices that there be real prospects of success. In view of the direct effect of Article 4 of Protocol No. 4 in Belgian law, it is clear that the Belgian *Conseil d'État* is empowered to stay the execution of any collective expulsion measure prohibited by that provision.

13. However, according to the majority, the application to the Belgian *Conseil d'État* for a stay of execution under the extremely urgent procedure does not satisfy the requirements of Article 13 of the Convention, as the suspensive nature of the application is too uncertain. In that connection, it should first be pointed out that under the Court's case-law, the effectiveness of a remedy depends on its suspensive effect when the complaints concern a violation of Article 3 of the Convention. Noting the "the irreversible nature of the damage which may result if the risk of torture or degrading treatment materialises", the Court requires that the measures in respect of which the remedy is sought cannot be executed before they have been examined by the national authorities. In the instant case, however, the Court held that the complaint of a violation of Article 3 of the Convention was manifestly ill-founded (see the admissibility decision of 13 March 2001, § 7) and, consequently, not arguable for the purposes of Article 13 (see paragraph 76 of the judgment). It is accordingly clear in this case that the applicants were in no danger of being subjected to torture or to inhuman or degrading treatment or punishment in their country of origin, Slovakia, after their expulsion.

14. Even if one accepts the majority's view that the effectiveness of a remedy concerning a complaint of a violation of Article 4 of Protocol No. 4 depends on its having suspensive effect, it should to be noted that under the case-law of the Court the remedy is not required to be automatically suspensive, it suffices that it has suspensive effect "in practice" (see the Soering v. the United Kingdom judgment of 7 July 1989, § 123; and the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, § 125).

15. In the present case, an application under the extremely urgent procedure to the *Conseil d'État* does not have automatic suspensive effect, but it may have the same effect in practice, for it is available round the clock. Under the procedure, the *Conseil d'État* issues a decision within a few hours, including at weekends. All applications under the extremely urgent procedure are automatically listed and dealt with directly. The *Conseil d'État* may order the parties' attendance at a designated place, and within a matter of days or hours. In that connection, an internal document reveals how the procedure operates. It says: "In cases concerning 'aliens' the registrar shall, at the judge's request, contact the Aliens Office to ascertain the scheduled repatriation date and shall seek confirmation by fax... It is ... prudent in cases involving imminent repatriation to order the applicant's appearance in person". Since an order for an appearance in person is binding, the State may not proceed with the alien's expulsion. In addition, the *Conseil d'État* may, as part of the same procedure, order provisional measures as a matter of extreme urgency in the form of an injunction not to remove the alien pending the outcome of the proceedings.

16. The Belgian Government maintained that these procedural elements guaranteed that the application had suspensive effect in practice. It must be said that that the applicants have not produced any concrete case in which an alien who had made an application for a stay of execution to the *Conseil d'État* under the extremely urgent procedure had been expelled while that application was pending. Nor have they produced any concrete example to show that the powers of the *Conseil d'État* in such proceedings are ineffective. In the absence of any such evidence, it is reasonable to suppose that in practice an application under the extremely urgent procedure has suspensive effect. Indeed, in paragraph 66 of the judgment, the majority summarise the applicants' argument as follows: "In particular, as regards remedies in the *Conseil d'État* under the extremely urgent procedure, the applicants accepted that in practice the judgment of the *Conseil d'État* was delivered before execution of the deportation order, but they argued that the law afforded no guarantee of that and the administrative authority was perfectly entitled to execute the deportation order without waiting for the judgment." That argument, which is correct in law, amounts to saying that the application has no automatic suspensive effect, but does have such effect in practice.

17. The Contracting States are afforded a certain margin of appreciation regarding the manner in which they comply with their obligations under Article 13 of the Convention. The Court stressed that fundamental principle in its Vilvarajah and Others judgment of 30 October 1991. In that judgment, which also concerned the forcible expulsion of an alien whose request for asylum had been turned down, the Court observed: "However, Article 13 does not go so far as to require any particular form of remedy, Contracting States being afforded a margin of discretion in conforming to their

obligations under this provision" (§ 122). In my opinion – and this factor is to my mind decisive in this case – the margin of appreciation should be wider when, as in the instant case, the complaint of a violation of Article 3 of the Convention is found to be manifestly ill-founded and, consequently, unarguable as regards Article 13 of the Convention.

18. It is for this reason that I consider that an application for a stay of execution to the *Conseil d'État* under the extremely urgent procedure should have been regarded as an accessible and effective domestic remedy, one which the applicants should have exhausted (Article 35) and which is sufficiently effective to comply with the requirement of Article 13 of the Convention.

DISSENTING OPINION OF JUDGE JUNGWIERT, JOINED BY JUDGE KŪRIS

(*Translation*)

I agree with the majority that there has been a violation of Article 5 §§ 1, 2 and 4 of the Convention. However, I am unable to concur with the opinion that there has been a violation of Article 4 of Protocol No. 4, or of Article 13 of the Convention taken together with Article 4 of Protocol No. 4. The reasons for this are as follows.

As regards compliance with Article 4 of Protocol No. 4, the first two applicants each made a request for asylum which was initially declared inadmissible by the Aliens Office on the ground that they had not produced sufficient evidence to show that their lives were at risk for one of the reasons set out in the Geneva Convention relating to the Status of Refugees. The Commissioner-General upheld the decisions of the Aliens Office refusing the applicants leave to remain. In Mr Čonka's case, his decision was based on Mr Čonka's failure to attend his appointment. As regards Mrs Čonkova, in some two pages of reasons, the Commissioner pointed out major discrepancies in her deposition and expressed serious doubts about her credibility.

Each decision was accompanied by an order to leave the territory. As the applicants did not comply, measures were taken for them to be forcibly expelled. The applicants were served with a notice requiring them to attend Ghent police station where a final examination of their files was carried out. The Ghent police contacted the Aliens Office. The aliens whose requests for asylum had been turned down and who were not entitled to remain in Belgium on any other grounds were deprived of their liberty and repatriated as part of a group. The fact that some of them were allowed to return home after their individual circumstances had been checked and their immigration status found to be in order shows that even at that late stage in the deportation process, a final individual examination was carried out.

The fact that the expulsion orders were executed in respect of a group and that some seventy aliens of Slovakian nationality were repatriated together by air does not imply that there was a "collective expulsion" within the meaning of Article 4 of Protocol No. 4, since the personal circumstances of each expelled alien were examined on three occasions. The fact that the last decisions of 29 September 1999 contain no reference to the reasons for the decisions of 3 March 1999 and 18 June 1999, but merely refer to the unlawful situation of those concerned (see section 7(1), 2° of the Aliens Act), does not alter the fact that the aliens' individual circumstances were examined and provides sufficient justification for the expulsions in issue. In that connection, I agree with the opinion expressed in the decisions in the

Andric case: "The fact that a number of aliens received similar decisions does not lead to the conclusion that there is collective expulsion when each person has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis" (see the Andric v. Sweden judgment, § 58).

Furthermore, this provision does not, in my opinion, prevent States from grouping together, for reasons of economy or efficiency, people who, at the end of similar proceedings, are to be expelled to the same country.

These considerations lead me to conclude that there has been no violation of Article 4 of Protocol No 4.

As regards Article 13 taken together with Article 4 of Protocol, it is the settled case-law of the Court that the Contracting the States are afforded a certain margin of appreciation regarding the manner in which they comply with the obligations imposed on them by Article 13. In addition, when it is alleged that an imminent measure will expose the person concerned to the risk of treatment prohibited by Article 3 of the Convention, only a remedy that has suspensive effect, if not automatically at least in practice, will be an effective remedy under Article 13 of the Convention (see the Soering v. the United Kingdom judgment of 7 July 1989, Series A no.161, p. 48, § 123 and the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 39, § 125).

Although the application which the applicants could have made to the *Conseil d'État* against the decisions of 29 September 1999 for a stay of execution under the extremely urgent procedure does not have automatic suspensive effect, it does have suspensive effect in practice, owing to the manner in which it is applied.

The extremely urgent procedure is available round the clock. Under the procedure, the *Conseil d'État* may issue a decision within a few hours, including at weekends. All applications under the extremely urgent procedure are automatically listed and dealt with directly. The *Conseil d'État* may order the parties' attendance at a designated place, and within a matter of days or hours. In that connection, an internal document reveals how the procedure operates. It says: "In cases concerning 'aliens' the registrar shall, at the judge's request, contact the Aliens Office to ascertain the scheduled repatriation date and shall seek confirmation by fax... It is ... prudent in cases involving imminent repatriation to order the applicant's appearance in person". Since an order for an appearance in person is binding, the State may not proceed with the alien's expulsion.

In addition, the *Conseil d'État* may, as part of the same procedure, order provisional measures as a matter of extreme urgency in the form of an injunction not to remove the alien pending the outcome of the proceedings. The Government have furnished a number of examples of the effectiveness of the machinery in practice, more particularly of aliens held in a closed

centre pending expulsion who have been able to lodge an application under the extremely urgent procedure.

As to the success rate of applications under that procedure, the parties produced widely divergent statistics to the Court: the applicants set the rate at 1.36% while the Government produced a document delivered by the registry of the *Conseil d'État*, which indicates a rate of 25.22%. That difference is probably the result of different methods of calculation being used. However, in any event, it should be recalled that the effectiveness of a remedy does not depend on the certainty of a favourable outcome. In the instant case, the Government have produced such a large number of judgments in which a stay of execution of an expulsion order was granted under the extremely urgent procedure that it is reasonable to deduce that the remedy is effective.

In conclusion, the applicants could have made an application for a stay of execution under the extremely urgent procedure against the decisions of 29 September 1999, but failed to do so. That remedy satisfies the requirements of Article 13. For this reason I consider that there has been no violation of that provision and that the Government's preliminary objection to the complaint of the violation of Article 4 of Protocol No. 4 is founded.