Nr. 2: M.S.S tegen België en Griekenland

Europees Hof voor de Rechten van de Mens 21 januari 2011, Appl. No. 30696/09 (Costa, Rozakis, Bratza, Lorenzen, Tulkens, Casadevall, Cabral Barreto, Fura, Hajiyev, Jočienė, Popović, Villiger, Sajó, Bianku, Power, Karakaş, Vučinić)

De Afghaanse M.S.S. arriveerde op 10 februari 2009 in België, waar hij asiel aanvroeg. In het kader van de Dublinverordening werd hij op 15 juni 2009 overgedragen aan Griekenland, waar hij onmiddellijk onder zeer slechte omstandigheden in detentie werd geplaatst. Na zijn vrijlating en verkrijging van een zogenaamde asielzoekerspas op 18 juni 2009 leefde hij zonder bestaansmiddelen op straat.
Het Hof oordeelt dat Griekenland art. 3 EVRM heeft geschonden vanwege de slechte detentie- en leefomstandigheden waaronder klager in Griekenland heeft verbleven. Ook heeft Griekenland art. 13 jo art. 3 EVRM geschonden vanwege de gebreken in de asielprocedure van klager en het risico op uitzetting naar Afghanistan zonder inhoudelijke behandeling van de asielaanvraag en zonder toegang tot effectieve rechtsmiddelen. Nu de Dublinverordening België de vrijheid gaf de behandeling van het asielverzoek aan zich te trekken, kon België niet volhouden dat de overdracht voortvloeide uit internationale verplichtingen. Het interstatelijk vertrouwensbeginsel was hier niet aan de orde. België heeft met de overdracht van M.S.S, in de wetenschap van de vernederende detentie- en leefomstandigheden in Griekenland, art. 3 EVRM geschonden. Ook heeft België art. 13 jo art. 3 EVRM geschonden nu de procedurele mogelijkheden in België geen effectief rechtsmiddel boden, onder meer door onvoldoende garanties van schorsende werking.
Het Hof veroordeelt zowel België als Griekenland wegens schending van art. 3 en art. 13 EVRM. Beide landen dienen aan klager schadevergoeding te betalen wegens immateriële schade en in verband met kosten en uitgaven.

Artt. 3 en 13 EVRM

M.S.S.
tegen
België en Griekenland

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

I. Alleged violation of Article 3 of the Convention by Greece because of the conditions of the applicant's detention
2. The applicant alleged that the conditions of his detention at Athens international airport amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention, which reads:
"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

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

2. The Greek Government
4. The Government disputed that the applicant's rights under Article 3 had been violated during his detention. The applicant had adduced no evidence that he had suffered inhuman or degrading treatment.
5. In contrast with the description given by the applicant, the Government described the holding centre as a suitably equipped short-stay accommodation centre specially designed for asylum seekers, where they were adequately fed.
6. In their observations in reply to the questions posed by the Court during the hearing before the Grand Chamber, the Government gave more detailed information about the layout and facilities of the centre. It had a section reserved for asylum seekers, comprising three rooms, ten beds and two toilets. The asylum seekers shared a common room with people awaiting expulsion, where there was a public telephone and a water fountain. The applicant had been held there in June 2009 pending receipt of his pink card.
7. The Government stated that in August 2009 the applicant had been held in a section of the centre separate from that reserved for asylum seekers, designed for aliens who had committed a criminal offence. The persons concerned had an area of 110 m2, containing nine rooms and two toilets. There was also a public telephone and a water fountain.
8. Lastly, the Government stressed the short duration of the periods of detention and the circumstances of the second period, which had resulted not from the applicant's asylum application but from the crime he had committed in attempting to leave Greece with false documents.

B. Observations of the European Commissioner for Human Rights and the Office of the United Nations High Commissioner for Refugees, intervening as third parties
9. The Commissioner stated that he had been informed by *Médecins sans Frontières – Greece* (see paragraph 166 above) of the conditions of detention in the centre next to the airport.
10. The UNHCR had visited the centre in May 2010 and found the conditions of detention there unacceptable, with no fresh air, no possibility of taking a walk in the open air and no toilets in the cells.

C. The Court's assessment
1. Admissibility
11. The Court considers that the applicant's complaints under Article 3 of the Convention concerning the conditions of his detention in Greece raise complex issues of law and fact, the determination of which requires an examinassions of the merits.
12. It follows that this part of the application is not manifestly ill-founded within the méningé of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits
(a) Recapitulation of general principles
13. The Court reiterates that the confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, in particular under the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions (see *Amuur v. France*, 25 June 1996, § 43, *Reports of Judgments and Decisions* 1996-III).
14. Where the Court is called upon to examine the conformity of the manner and method of the execution of the measure with the provisions of the Convention, it must look at the particular situations of the persons concerned (see *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, § 100, ECHR 2008-... (extracts)).
15. The States must have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct (see, among other authorities, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).
16. The Court has held on numerous occasions that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see, for example, *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI).
17. The Court considers treatment to be "inhuman" when it was "premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering".
Treatment is considered to be "degrading" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance (*ibid*., § 92, and *Pretty v. the United Kingdom*, no. 2346/02, § 52, ECHR 2002-III). It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26). Lastly, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III).
18. Article 3 of the Convention requires the State to ensure that detention conditions are compatible with respect for human dignity, that the manner and

method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured (see, for example, *Kudła*, cited above, § 94).

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

(b) Application in the present case

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

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

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

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

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

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

26. It is important to note that the applicant's allegations concerning living conditions in the holding centre are supported by similar findings by the CPT (see paragraph 163 above), the UNHCR (see paragraph 213 above), Amnesty International and *Médecins sans Frontières – Greece* (paragraphs 165 and 166 above) and are not explicitly disputed by the Government.

27. The Court notes that, according to the findings made by organisations that visited the holding centre next to the airport, the sector for asylum seekers was rarely unlocked and the detainees had no access to the water fountain outside and were obliged to drink water from the toilets. In the sector for arrested persons, there were 145 detainees in a 110 sq. m space. In a number of cells there was only one bed for fourteen to seventeen people. There were not enough mattresses

and a number of detainees were sleeping on the bare floor. There was insufficient room for all the detainees to lie down and sleep at the same time. Because of the overcrowding, there was a lack of sufficient ventilation and the cells were unbearably hot. Detainees' access to the toilets was severely restricted and they complained that the police would not let them out into the corridors. The police admitted that the detainees had to urinate in plastic bottles which they emptied when they were allowed to use the toilets. It was observed in all sectors that there was no soap or toilet paper, that sanitary and other facilities were dirty, that the sanitary facilities had no doors and the detainees were deprived of outdoor exercise.

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

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

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

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

II. Alleged violation of Article 3 of the Convention by Greece because of the applicant's living conditions

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

A. The parties' submissions

1. The applicant

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

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

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

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

2. The Greek Government

37. The Government submitted that the situation in which the applicant had found himself after he had been released was the result of his own choices and omissions. The applicant had chosen to invest his resources in fleeing the country rather than in accommodation. Furthermore, he had waited until 18 December 2009 before declaring that he was homeless. Had he followed the instructions in the notification of 18 June 2009 and gone to the Attica police headquarters earlier to let them know he had nowhere to stay, the authorities could have taken steps to find him accommodation. The Government pointed out that the words "no known place of residence" that appeared on the notification he was given simply meant that he had not informed the authorities of his address.

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

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

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

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

41. The Commissioner pointed out that in comparison with the number of asylum applications lodged in Greece each year, the country's reception capacity – which in February 2010 he said amounted to eleven reception centres with a total of 741 places – was clearly insufficient. He said that the material situation of asylum seekers was very difficult and mentioned the makeshift camp at Patras which, until July 2009, had housed around 3,000 people, mainly Iraqis and Afghans, in unacceptable conditions from the point of view of housing and hygiene standards. During his visit in February 2010 he noted that in spite of the announcement made by the Government in 2008, construction work on a centre capable of housing 1,000 people had not yet started. The police authorities in Patras had informed him that about 70% of the Afghans were registered asylum seekers and holders of "pink cards". He also referred to the case of three Afghans in the region of Patras who had been in Greece for two years, living in cardboard shelters with no help from the Greek State. Only the local Red Cross had offered them food and care.

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

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

C. The Court's assessment

1. Admissibility

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

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

2. Merits

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

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

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

49. That said, the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3.
50. The Court reiterates that it has not excluded "the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity" (see *Budina v. Russia*, dec., no. 45603/05, ECHR 2009...).
51. It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.
52. The Court notes in the observations of the European Commissioner for Human Rights and the UNHCR, as well as in the reports of non-governmental organisations (see paragraph 160 above) that the situation described by the applicant exists on a large scale and is the everyday lot of a large number of asylum seekers with the same profile as that of the applicant. For this reason the Court sees no reason to question the truth of the applicant's allegations.
53. The Greek Government argue that the applicant is responsible for his situation, that the authorities acted with all due diligence and that he should have done more to improve his situation.
54. The parties disagree as to whether the applicant was issued with the information brochure for asylum seekers. The Court fails to see the relevance of this, however, as the brochure does not state that asylum seekers can tell the police they are homeless, nor does it contain any information about accommodation. As to the notification the applicant received informing him of the obligation to go to the Attica police headquarters to register his address (see paragraph 35 above), in the Court's opinion its wording is ambiguous and cannot reasonably be considered as sufficient information. It concludes that the applicant was not duly informed at any time of the possibilities of accommodation that were available to him, assuming that there were any.
55. In any event the Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece. The Government themselves acknowledge that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers. The Court also notes that, according to the UNHCR, it is a well-known fact that at the present time an adult male asylum seeker has virtually no chance of getting a place in a reception centre and that according to a survey carried out from February to April 2010, all the Dublin asylum seekers questioned by the UNHCR were homeless. Like the applicant, a large number of them live in parks or disused buildings (see paragraphs 169, 244 and 242 above).
56. Although the Court cannot verify the accuracy of the applicant's claim that he informed the Greek authorities of his homelessness several times prior to December 2009, the above data concerning the capacity of Greece's reception centres considerably reduce the weight of the Government's argument that the applicant's inaction was the cause of his situation. In any event, given the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece, the Court considers that the Greek authorities should not simply have waited for the applicant to take the initiative of turning to the police headquarters to provide for his essential needs.
57. The fact that a place in a reception centre has apparently been found in the meantime does not change the applicant's situation since the authorities have not found any way of informing him of this fact. The situation is all the more disturbing in that this information was already referred to in the Government's observations submitted to the Court on 1 February 2010, and the Government informed the Grand Chamber that the authorities had seen the applicant on 21 June 2010 and handed him a summons without, however, informing him that accommodation had been found.
58. The Court also fails to see how having a pink card could have been of any practical use whatsoever to the applicant. The law does provide for asylum seekers who have been issued with pink cards to have access to the job market, which would have enabled the applicant to try to solve his problems and provide for his basic needs. Here again, however, the reports consulted reveal that in practice access to the job market is so riddled with administrative obstacles that this cannot be considered a realistic alternative (see paragraphs 160 and 172 above). In addition the applicant had personal difficulties due to his lack of command of the Greek language, the lack of any support network and the generally unfavourable economic climate.
59. Lastly, the Court notes that the situation the applicant complains of has lasted since his transfer to Greece in June 2009. It is linked to his status as an asylum seeker and to the fact that his asylum application has not yet been examined by the Greek authorities. In other words, the Court is of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering.
60. In the light of the above and in view of the obligations incumbent on the Greek authorities under the European Reception Directive (see paragraph 84 above), the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been

the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.
61. It follows that, through the fault of the authorities, the applicant has found himself in a situation incompatible with Article 3 of the Convention. Accordingly, there has been a violation of that provision.

III. Alleged violation by Greece of Article 13 taken in conjunction with Articles 2 and 3 of the Convention because of the shortcomings in the asylum procedure
62. The applicant complained that he had no effective remedy in Greek law in respect of his complaints under Articles 2 and 3, in violation of Article 13 of the Convention, which reads as follows:
Article 13
"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."
63. He alleged that the shortcomings in the asylum procedure in Greece were such that he faced the risk of *refoulement* to his country of origin without any real examination of the merits of his asylum application, in violation of Article 3, cited above, and of Article 2 of the Convention, which reads:
Article 2
"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
..."

A. The parties' submissions
1. The applicant
64. The applicant submitted that he had fled Afghanistan after escaping an attempt on his life by the Taliban in reprisal for his having worked as an interpreter for the international air force troops based in Kabul. Since arriving in Europe he had had contacts with members of his family back in Afghanistan, who strongly advised him not to come home because the insecurity and the threat of reprisals had grown steadily worse.
65. The applicant wanted his fears to be examined and had applied for asylum in Greece for that purpose. He had no confidence in the functioning of the asylum procedure, however.
66. Firstly, he complained about the practical obstacles he had faced. For example, he alleged that he had never been given an information brochure about the asylum procedure at the airport but had merely been told that he had to go to the Attica police headquarters to register his address. He had not done so because he had had no address to register. He had been convinced that having an address was a condition for the procedure to be set in motion. He had subsequently presented himself, in vain, at the police headquarters on several occasions, where he had had to wait for hours, so far without any prospect of his situation being clarified.
67. Secondly, the applicant believed that he had escaped being sent back to his own country only because of the interim measure indicated by the Court to the Greek Government. Apart from that "protection", he had no guarantee at this stage that his asylum procedure would follow its course. Even if it did, the procedure offered no guarantee that the merits of his fears would be seriously examined by the Greek authorities. He argued that he did not have the wherewithal to pay for a lawyer's services, that there was no provision for legal aid at this stage, that first-instance interviews were known to be superficial, that he would not have the opportunity to lodge an appeal with a body competent to examine the merits of his fears, that an appeal to the Supreme Administrative Court did not automatically have suspensive effect and that the procedure was a lengthy one. According to him, the almost non-existent record of cases where the Greek authorities had granted international protection of any kind whatsoever at first instance or on appeal showed how ineffective the procedure was.

2. The Greek Government
68. The Government submitted that the applicant had not suffered the consequences of the alleged shortcomings in the asylum procedure and could therefore not be considered as a victim for the purposes of the Convention.
69. The applicant's attitude had to be taken into account: he had, in breach of the legislation, failed to cooperate with the authorities and had shown no interest in the smooth functioning of the procedure. By failing to report to the Attica police headquarters in June 2009 he had failed to comply with the formalities for initiating the procedure and had not taken the opportunity to inform the police that he had no address, so that they could notify him of any progress through another channel. Furthermore, he had assumed different identities and attempted to leave Greece while hiding from the authorities the fact that he had applied for asylum there.
70. The Government considered that the Greek authorities had followed the statutory procedure in spite of the applicant's negligence and the errors of his ways. They argued in particular that this was illustrated by the fact that the applicant was still in Greece and had not been deported in spite of the situation he had brought upon himself by trying to leave the country in August 2009.
71. In the alternative, the Government alleged that the applicant's complaints were unfounded. They maintained that Greek legislation was in conformity with Community and international law on asylum, including the *non-refoulement* principle. Greek law provided for the examination of the merits of asylum applica-

tions with regard to Articles 2 and 3 of the Convention. Asylum seekers had access to the services of an interpreter at every step of the proceedings.
72. The Government confirmed that the applicant's application for asylum had not yet been examined by the Greek authorities but assured the Court that it would be, with due regard for the standards mentioned above.
73. In conformity with Article 13 of the Convention, unsuccessful asylum seekers could apply for judicial review to the Supreme Administrative Court. According to the Government, such an appeal was an effective safety net that offered the guarantees the Court had requested in its *Bryan v. the United Kingdom* judgment (22 November 1995, § 47, Series A no. 335-A). They produced various judgments in which the Supreme Administrative Court had set aside decisions rejecting asylum applications because the authorities had failed to take into account certain documents that referred, for example, to a risk of persecution. In any event, the Government pointed out that providing asylum seekers whose applications had been rejected at first instance with an appeal on the merits was not a requirement of the Convention.
74. According to the Government, complaints concerning possible malfunctions of the legal aid system should not be taken into account because Article 6 did not apply to asylum procedures. In the same manner, any procedural delays before the Supreme Administrative Court fell within the scope of Article 6 of the Convention and could therefore not be examined by the Court in the present case.
75. Moreover, as long as the asylum procedure had not been completed, asylum seekers ran no risk of being returned to their country of origin and could, if necessary, ask the Supreme Administrative Court to stay the execution of an expulsion order issued following a decision rejecting the asylum application, which would have the effect of suspending the enforcement of the measure. The Government provided several judgments in support of that affirmation.
76. The Government averred in their oral observations before the Grand Chamber that even in the present circumstances the applicant ran no risk of expulsion to Afghanistan at any time as the policy at the moment was not to send anyone back to that country by force. The forced returns by charter flight that had taken place in 2009 concerned Pakistani nationals who had not applied for asylum in Greece. The only Afghans who had been sent back to Afghanistan – 468 in 2009 and 296 in 2010 – had been sent back on a voluntary basis as part of the programme financed by the European Return Fund. Nor was there any danger of the applicant being sent to Turkey because, as he had been transferred to Greece by another European Union Member State, he did not fall within the scope of the readmission agreement concluded between Greece and Turkey.
77. In their oral observations before the Grand Chamber, the Government further relied on the fact that the applicant had not kept the appointment of 21 June 2010 for an initial interview on 2 July 2010, when that interview would have been an opportunity for him to explain his fears to the Greek authorities in the event of his return to Afghanistan. It followed, according to the Government, that not only had the applicant shown no interest in the asylum procedure, but he had not exhausted the remedies under Greek law regarding his fears of a violation of Articles 2 and 3 of the Convention.

B. Observations of the European Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the Aire Centre*,* Amnesty International and the Greek Helsinki Monitor, intervening as third parties
78. The Commissioner, the UNHCR, the Aire Centre*,* Amnesty International and GHM were all of the opinion that the current legislation and practice in Greece in asylum matters were not in conformity with international and European human rights protection standards. They deplored the lack of adequate information, or indeed of any proper information at all about the asylum procedure, the lack of suitably trained staff to receive and process asylum applications, the poor quality of first-instance decisions owing to structural weaknesses and the lack of procedural guarantees, in particular access to legal aid and an interpreter and the ineffectiveness as a remedy of an appeal to the Supreme Administrative Court because of the excessively long time it took, the fact that it had no automatic suspensive effect and the difficulty in obtaining legal aid. They emphasised that "Dublin" asylum seekers were faced with the same obstacles in practice as other asylum seekers.
79. The Commissioner and the UNHCR expressed serious concern about the continuing practice by the Greek authorities of forced returns to Turkey, be they collective or individual. The cases they had identified concerned both persons arriving for the first time and those already registered as asylum seekers.

C. The Court's assessment
1. Admissibility
80. The Greek Government submitted that the applicant was not a victim within the meaning of Article 34 of the Convention because he alone was to blame for the situation, at the origin of his complaint, in which he found himself and he had not suffered the consequences of any shortcomings in the procedure. The Government further argued that the applicant had not gone to the first interview at the Attica police headquarters on 2 July 2010 and had not given the Greek authorities a chance to examine the merits of his allegations. This meant that he had not exhausted the domestic remedies and the Government invited the Court to declare this part of the application inadmissible and reject it pursuant to Article 35 §§ 1 and 4 of the Convention.
81. The Court notes that the questions raised by the Government's preliminary objections are closely bound up with those it will have to consider when examining the complaints under Article 13 of the Con-

vention taken in conjunction with Articles 2 and 3, because of the deficiencies of the asylum procedure in Greece. They should therefore be examined together with the merits of those complaints.
82. Moreover, the Court considers that this part of the application raises complex issues of law and fact which cannot be determined without an examination of the merits. It follows that it is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

(a) Recapitulation of general principles

83. In cases concerning the expulsion of asylum seekers the Court has explained that it does not itself examine the actual asylum applications or verify how the States honour their obligations under the Geneva Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled (see, among other authorities, *T.I. v. the United Kingdom* (dec. no. 43844/98, ECHR 2000-III), and *Müslim*, cited above, §§ 72 to 76).
84. By virtue of Article 1 (which provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 § 1 of the Convention (see *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI).
85. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see *Kudla* cited above, § 157).
86. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 53, ECHR 2007-V § 53).
87. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 112, ECHR 1999-IV).
88. Article 13 requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII).
89. Particular attention should be paid to the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration (see *Doran v. Ireland*, no. 50389/99, § 57, ECHR 2003-X).
90. Lastly, in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50), as well as a particularly prompt response (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV (extracts)); it also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Čonka v. Belgium*, no. 51564/99, §§ 81-83, ECHR 2002-I, and *Gebremedhin [Gaberamadhien]*, cited above, § 66).

(b) Application in the present case

91. In order to determine whether Article 13 applies to the present case, the Court must ascertain whether the applicant can arguably assert that his removal to Afghanistan would infringe Article 2 or Article 3 of the Convention.
92. It notes that, when lodging his application the applicant produced, in support of his fears concerning Afghanistan, copies of certificates showing that he had worked as an interpreter (see paragraph 31 above). It also has access to general information about the current situation in Afghanistan and to the Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan published by the UNHCR and regularly updated (see paragraphs 197-202 above).
93. For the Court, this information is *prima facie* evidence that the situation in Afghanistan has posed and continues to pose a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces. It further

notes that the gravity of the situation in Afghanistan and the risks that exist there are not disputed by the parties. On the contrary, the Greek Government have stated that their current policy is not to send asylum seekers back to that country by force precisely because of the high-risk situation there.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

108. According to the Government, this situation is due at present to the fact that the applicant did not keep the appointment on 2 July 2010 to be interviewed by the refugee advisory committee. The Government have not explained the impact of that missed appointment on the progress of the domestic proceedings. Be that as it may, the applicant informed the Court,

through his counsel, that the convocation had been given to him in Greek when he renewed his pink card, and that the interpreter had made no mention of any date for an interview. Although not in a position to verify the truth of the matter, the Court again attaches more weight to the applicant's version, which reflects the serious lack of information and communication affecting asylum seekers.

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

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

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

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

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

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

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

116. In addition, although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system (see paragraphs 191 and 281 above), which renders the system ineffective in practice. Contrary to the Government's submissions, the Court considers that this situation may also be an obstacle hindering access to the remedy and falls within the scope of Article 13, particularly where asylum seekers are concerned.

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

(c) Conclusion

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

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

IV. Alleged violation of Articles 2 and 3 of the Convention by Belgium for exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece

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

A. The parties' submissions

1. The applicant

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

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

2. The Belgian Government

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

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

125. However, the Government pointed out that the order to leave the country had been issued based on the assurance that the applicant would not be sent back to Afghanistan without the merits of his complaints having been examined by the Greek authorities. Con-

cerning access to the asylum procedure and the course of that procedure, the Government relied on the assurances given by the Greek authorities that they had finally accepted responsibility, and on the general information contained in the summary document drawn up by the Greek authorities and in the observations Greece had submitted to the Court in other pending cases. The Belgian authorities had noted, based on that information, that if an alien went through with an asylum application in Greece, the merits of the application would be examined on an individual basis, the asylum seeker could be assisted by a lawyer and an interpreter would be present at every stage of the proceedings. Remedies also existed, including an appeal to the Supreme Administrative Court. Accordingly, although aware of the possible deficiencies of the asylum system in Greece, the Government submitted that they had been sufficiently convinced of the efforts Greece was making to comply with Community law and its obligations in terms of human rights, including its procedural obligations.

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

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

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

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

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

130. The Aire Centre and Amnesty International considered that in its present form, without a clause on the suspension of transfers to countries unable to honour

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

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

C. The Court's assessment

1. Admissibility

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

133. The Court notes that the applicant also complained of not having had a remedy that met the requirements of Article 13 of the Convention for his complaints under Articles 2 and 3, and maintained, in this context, that the remedies in question were not effective within the meaning of that provision (see paragraphs 370-377 below). It considers that the Government's objection of non-exhaustion of domestic remedies should be joined to the merits of the complaints under Article 13 taken in conjunction with Articles 2 and 3 of the Convention and examined together.

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

2. The responsibility of Belgium under the Convention

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

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

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

136. The Court notes that Article 3 § 2 of the Dublin Regulation provides that, by derogation from the general rule set forth in Article 3 § 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. This is the so-called "sovereignty" clause. In such a case the State concerned becomes the Member State responsible for the purposes of the Regulation and takes on the obligations associated with that responsibility.

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

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

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

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

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

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

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

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

Although in the *T.I.* case the Court rejected the argument that the fact that Germany was a party to the Convention absolved the United Kingdom from verifying the fate that awaited an asylum seeker it was about to transfer to that country, the fact that the asylum procedure in Germany apparently complied with the Convention, and in particular Article 3, enabled the Court to reject the allegation that the applicant's removal to Germany would make him run a real and serious risk of treatment contrary to that Article. The Court considered that there was no reason in that particular case to believe that Germany would have failed to honour its obligations under Article 3 of the Convention and protect the applicant from removal to Sri Lanka if he submitted credible arguments demonstrating that he risked ill-treatment in that country.

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

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

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

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

(b) Application of these principles to the present case

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

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

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

144. The Court observes first of all that numerous reports and materials have been added to the information available to it when it adopted its *K.R.S.* decision in

2008. These reports and materials, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis.

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

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

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

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

149. In these conditions the Court considers that the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof. On the contrary, it considers it established that in spite of the few examples of application of the sovereignty clause produced by the Government, which, incidentally, do not concern Greece, the Aliens Office systematically applied the Dublin Regulation to transfer people to Greece without so much as considering the possibility of making an exception.

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

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

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

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

154. While considering that this is in principle the most normal course of action under the Convention system, the Court deems that its analysis of the obstacles facing asylum seekers in Greece clearly shows that applications lodged there at this point in time are illusory. The Court notes that the applicant is represented before it by the lawyer who defended him in Belgium. Considering the number of asylum applications pending in Greece, no conclusions can be drawn

from the fact that some asylum seekers have brought cases before the Court against Greece. In this connection it also takes into account the very small number of Rule 39 requests for interim measures against Greece lodged by asylum seekers in that country, compared with the number lodged by asylum seekers in the other States.

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

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

(c) Conclusion

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

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

V. Alleged violation of Article 3 of the Convention by Belgium for exposing the applicant to conditions of detention and living conditions contrary to Article 3

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

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

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

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

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

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

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

VI. Alleged violation by Belgium or Article 13 taken in conjunction with Articles 2 and 3 of the Convention because of the lack of an effective remedy against the expulsion order

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

A. The parties' submissions

1. The applicant

167. The applicant submitted that he had acted as swiftly as possible in the circumstances in lodging a

first application for a stay of execution of the expulsion measure under the extremely urgent procedure. He had come up against practical obstacles, however, which had hindered his access to the urgent procedure.
168. First, he explained that on the day the order to leave the country was issued, on 19 May 2009, he was taken into custody and placed in a closed centre for illegal aliens. Not until five days later, after the long Ascension Day weekend, had a lawyer been appointed, at his request, by the Belgian authorities, or had the Belgian Committee for Aid to Refugees at least been able to identify that lawyer to pass on general information to him concerning Dublin asylum seekers. This first lawyer, who was not a specialist in asylum cases, lodged an application for a stay of execution under the extremely urgent procedure after having had the file for three days, which in the applicant's opinion was by no means an excessively long time.
169. Secondly, the case had been scheduled for examination only one hour after the application was lodged, preventing the applicant's lawyer, whose office was 130 km away from the Aliens Appeals Board, from attending the hearing. According to the applicant, his counsel had had no practical means of having himself represented because it was not the task of the permanent assistance service of the "aliens" section of the legal aid office to replace in an emergency lawyers who could not attend a hearing. In support of this affirmation he adduced a note written by the president of the section concerned. The applicant further submitted that as his departure was not imminent but scheduled for 27 May, his request might well have been rejected anyway because there was no urgency.
170. In addition to the practical inaccessibility of the urgent procedure in his case, the applicant submitted that in any event appeals before the Aliens Appeals Board were not an effective remedy within the meaning of Article 13 of the Convention in respect of the risk of violations of Articles 2 and 3 in the event of expulsion. It could therefore not be held against him that he had failed to exhaust that remedy.
171. First, he submitted that at the time of his removal his request for a stay of execution had no chance of succeeding because of the constant case-law of certain divisions of the Aliens Appeals Board, which systematically found that there was no virtually irreparable damage because it was to be presumed that Greece would fulfil its international obligations in asylum matters, and that presumption could not be rebutted based on reports on the general situation in Greece, without the risk to the person being demonstrated *in concreto*. Only a handful of judgments to the contrary had been delivered, but in a completely unforeseeable manner and with no explanation of the reasons.
172. In the applicant's opinion this increase in the burden of proof where the individuals concerned demonstrated that they belonged to a vulnerable group who were systematically subjected in Greece to treatment contrary to Article 3 of the Convention made appeals to the Aliens Appeals Board totally ineffective. Subsequent events had proved him right as he had effectively suffered, *in concreto*, from the very risks of which he had complained.
173. Subsequently, once his application under the extremely urgent procedure had been rejected, there had no longer been any point in the applicant continuing the proceedings on the merits as these would have had no suspensive effect and could not have prevented his removal. In fact it was the constant practice of the Aliens Appeals Board to dismiss such appeals because in such conditions the applicants no longer had any interest in having the measure set aside. Lastly, even if the Aliens Appeals Board had not declared the case inadmissible on that ground, the applicant could not have had the order to leave the country set aside because of the aforesaid constant case-law.
174. The applicant added that where administrative appeals on points of law against judgments of this type were lodged with the *Conseil d'Etat* the latter did not question the approach of the Aliens Appeals Board and considered that the situation raised no issue under Article 13 of the Convention.

2. The Belgian Government

175. The Belgian Government affirmed that the applicant had had several remedies open to him before the domestic courts that met the requirements of Article 13 of the Convention, but he had not properly exhausted them.
176. On the question of the extremely urgent procedure for applying for a stay of execution the Government pointed out that appeals could be lodged with the Aliens Appeals Board at any time, without interruption and with suspensive effect, and that the Court had confirmed the effectiveness of the procedure in the case of *Quraishi v. Belgium* (application no. 6130/08, decision of 12 May 2009). They alleged that the applicant had placed himself in an urgent situation by appealing to the Aliens Appeals Board only a few hours before his departure, when he had been taken into custody ten days earlier, under an order to leave the country. Penalising an applicant's lack of diligence was a long-standing practice of the *Conseil d'Etat*, and was justified by the exceptional nature of the procedure, which reduced the rights of the defence and the investigation of the case to a minimum. The fact that the flight had not been scheduled until 27 May was immaterial because, except in the example given by the applicant, the constant case-law of the Aliens Appeals Board showed that deprivation of liberty sufficed to justify the imminent nature of the danger.
177. Furthermore there was the fact that, in view of its urgency, the case had been scheduled for immediate examination but no one had attended the hearing, even though the applicant's counsel could have asked the permanent service of the legal aid office in Brussels to represent him before the Aliens Appeals Board.
178. The Government disputed the applicant's argument that his request for a stay of execution had no chance of succeeding, producing five of the Board's judgments from 2008 and 2009 ordering the suspen-

sion of transfers to Greece under the extremely urgent procedure on the grounds that, in view of the gravity of the applicants' complaints under Article 3 of the Convention, the order to leave the country was not, *prima facie*, sufficiently well-reasoned. According to the Government it was always in the applicants' interest to proceed with their applications for judicial review so as to give the Aliens Appeals Board and then the *Conseil d'Etat* an opportunity to propose a solution and analyse the lawfulness of the impugned measures.
179. The fact that the applicant had been removed in the interim should not have deterred him from continuing. In support of that affirmation the Government cited the Aliens Appeals Board's judgment no. 28.233 of 29 May 2009, which had declared an appeal admissible even though the applicant had already been transferred. The application was subsequently dismissed because there had no longer been any interest at stake for the applicant as the application concerned the order to leave the country and he had not demonstrated *in concreto* that there had been any violation of Article 3 of the Convention.
180. Concerning the merits, the Government confirmed that, as it did when determining the existence of irreparable damage at the suspension stage, the constant case-law of the Aliens Appeals Board, which was in fact based on that of the Court, required the applicants to demonstrate the concrete risk they faced. However, just as the effectiveness of a remedy within the meaning of Article 13 did not depend on the certainty of it having a favourable outcome, the Government submitted that the prospect of an unfavourable outcome on the merits should not be a consideration in evaluating the effectiveness of the remedy.
181. The UNHCR, intervening as a third party, considered that the constant case-law of the Aliens Appeals Board and the *Conseil d'Etat* effectively doomed to failure any application for the suspension or review of an order to leave the country issued in application of the Dublin Regulation, as the individuals concerned were unable to provide concrete proof both that they faced an individual risk and that it was impossible for them to secure protection in the receiving country. In adopting that approach the Belgian courts automatically relied on the Dublin Regulation and failed to assume their higher obligations under the Convention and the international law on refugees.
B. The Court's assessment
182. The Court has already found that the applicant's expulsion to Greece by the Belgian authorities amounted to a violation of Article 3 of the Convention (see paragraphs 359 and 360 above). The applicant's complaints in that regard are therefore "arguable" for the purposes of Article 13.
183. The Court notes first of all that in Belgian law an appeal to the Aliens Appeals Board to set aside an expulsion order does not suspend the enforcement of the order. However, the Government pointed out that a request for a stay of execution could be lodged before the same court "under the extremely urgent procedure" and that unlike the extremely urgent procedure that used to exist before the *Conseil d'Etat*, the procedure before the Aliens Appeals Board automatically suspended the execution of the expulsion measure by law until the Board had reached a decision, that is, for a maximum of seventy-two hours.
184. While agreeing that that is a sign of progress in keeping with the *Čonka* judgment, cited above (§§ 81-83, confirmed by the *Gebremedhin* judgment, cited above, §§ 66-67), the Court reiterates that it is also established in its case-law (paragraph 293 above) that any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny and that, subject to a certain margin of appreciation left to the States, conformity with Article 13 requires that the competent body must be able to examine the substance of the complaint and afford proper reparation.
185. In the Court's view the requirement flowing from Article 13 that execution of the impugned measure be stayed cannot be considered as a subsidiary measure, that is, without regard being had to the requirements concerning the scope of the scrutiny. The contrary would amount to allowing the States to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible.
186. However, the extremely urgent procedure leads precisely to that result. The Government themselves explain that this procedure reduces the rights of the defence and the examination of the case to a minimum. The judgments of which the Court is aware (paragraphs 144 and 148 above) confirm that the examination of the complaints under Article 3 carried out by certain divisions of the Aliens Appeals Board at the time of the applicant's expulsion was not thorough. They limited their examination to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation. Furthermore, even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the Aliens Office, the Aliens Appeals Board did not always take that material into account. The persons concerned were thus prevented from establishing the arguable nature of their complaints under Article 3 of the Convention.
187. The Court concludes that the procedure for applying for a stay of execution under the extremely urgent procedure does not meet the requirements of Article 13 of the Convention.
188. The fact that a few judgments, against the flow of the established case-law at the time, have suspended transfers to Greece (see paragraph 149 above) does not alter this finding as the suspensions were based not on an examination of the merits of the risk of a violation of Article 3 but rather on the Appeals Board's finding that the Aliens Office had not given sufficient reasons for its decisions.

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

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

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

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

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

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

VII. Application of Articles 46 and 41 of the Convention

A. Article 46 of the Convention

195. Article 46 of the Convention provides:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

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

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

198. The Court has found a violation by Greece of Article 3 of the Convention because of the applicant's living conditions in Greece combined with the prolonged uncertainty in which he lived and the lack of any prospect of his situation improving (see paragraph 263 above). It has also found a violation of Article 13 in conjunction with Article 3 of the Con-

vention because of the shortcomings in the asylum procedure as applied to the applicant and the risk of *refoulement* to Afghanistan without any serious examination of his asylum application and without his having had access to an effective remedy (see paragraph 322 above).
199. Having regard to the particular circumstances of the case and the urgent need to put a stop to these violations of Articles 13 and 3 of the Convention, the Court considers it incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that meets the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant.

B. Article 41 de la Convention
200. Article 41 of the Convention provides:
"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Non-pecuniary damage
(a) In respect of Greece
201. The applicant claimed 1,000 euros (EUR) in compensation for the non-pecuniary damage sustained during the two periods of detention.
202. The Greek Government considered this claim ill-founded.
203. The Court has found that the applicant's conditions of detention violated of Article 3 of the Convention. It considers that the applicant must have experienced certain distress which cannot be compensated for by the Court's findings of violations alone. Having regard to the nature of the violations found in the instant case, the Court considers it equitable to uphold the applicant's claim and awards him EUR 1,000 in respect of non-pecuniary damage.

(b) In respect of Belgium
204. The applicant claimed EUR 31,825 in compensation for the non-pecuniary damage caused on the one hand by his detention in an open centre then in a closed centre in Belgium before his transfer to Greece (EUR 6,925) and on the other hand by the decision of the Belgian authorities to transfer him to Greece (EUR 24,900).
205. The Belgian Government argued that if the Court were to find Belgium liable the applicant could take legal action in the Belgian courts to obtain compensation for any non-pecuniary damage caused by his detention. In any event the Government considered the claim ill-founded, the applicant having failed to demonstrate any fault on the part of the State or to establish any causal link between the alleged fault and the non-pecuniary damage allegedly sustained.
206. The Court reiterates that it can award sums in respect of the just satisfaction provided for in Article 41 where the loss or damage claimed have been caused by the violation found, while the State is not required to pay sums in respect of damage for which it is not responsible (see *Saadi*, cited above, § 186). In the present case the Court has not found a violation of the Convention because of the applicant's detention in Belgium prior to his transfer to Greece. It accordingly rejects this part of the claim.
207. Concerning the alleged damage because of the transfer to Greece, the Court has found that the transfer gave rise to a violation of Article 3 of the Convention both because it exposed the applicant to treatment prohibited by that provision, in detention and during his stay in Greece, and because it exposed the applicant to the risks inherent in the deficiencies in the asylum procedure in Greece. It reiterates that the fact that the applicant could claim compensation in the Belgian courts does not oblige the Court to reject the claim as being ill-founded (see *De Wilde, Ooms and Versyp v. Belgium* (Article 50), 10 March 1972, § 16, Series A no. 14).
208. The Court considers that the applicant must have experienced certain distress for which the Court's findings of violations alone cannot constitute just satisfaction. Having regard to the nature of the violations found in the instant case, the Court considers it equitable to uphold the applicant's claim and awards him EUR 24,900 in respect of non-pecuniary damage.

2. Costs and expenses
(a) In respect of Greece
209. The applicant claimed the reimbursement of the cost of his defence before the Court against the Greek Government. According to the list of fees and expenses submitted by the applicant's lawyer, the costs and expenses as at 15 March 2010 totalled EUR 3,450 based on an hourly fee of EUR 75. The lawyer indicated that he had agreed with the applicant that the latter would pay him by instalments based on the above-mentioned hourly fee if he won the case before the Court.
210. The Greek Government found this claim excessive and unsubstantiated.
211. The Court considers it established that the applicant effectively incurred the costs he claimed in so far as, being a client, he entered into a legal obligation to pay his legal representative on an agreed basis (see, *mutatis mutandis*, *Sanoma Uitgevers B.V. v. the Netherlands*, no. 38224/03, § 110, 31 March 2009). Considering also that the costs and expenses concerned were necessary and reasonable as to quantum, the Court awards the applicant EUR 3,450.

(b) In respect of Belgium
212. The applicant claimed the reimbursement of his costs and expenses before the Belgian courts and before the Court. The applicant's lawyer submitted a list of fees and expenses according to which the costs and expenses as at 15 March 2010 totalled EUR 7,680 based on an hourly fee of EUR 75, EUR 1,605 were claimed for the proceedings before the Belgian courts and EUR 6,075 for the proceedings before the Court against Belgium.
213. The Belgian Government invited the Court to reject the claim. They submitted that the applicant was

entitled to free legal aid and to assistance with legal costs. It had therefore been unnecessary for him to incur any costs. His lawyer could obtain compensation for any costs incurred before the Belgian courts and before the Court in conformity with the provisions of the Judicial Code concerning legal aid. The Code provided for a system of reimbursement in the form of "points" corresponding to the services provided by the lawyer. In 2010 one point corresponded to EUR 26.91. The figure had been EUR 23.25 in 2009. Had these provisions been complied with the lawyer should already have been authorised to receive payment for the costs incurred in 2009. The Government also pointed out that under Article 1022 of the Judicial Code concerning reimbursement of legal costs, the party which lost the case was required to pay all or part of the legal costs of the other party. In cases where the proceedings could not be evaluated in monetary terms, the sum payable was determined by the courts. Where legal aid was granted and the costs awarded in the proceedings were higher, the Treasury could recover the sum paid in legal aid.
214. The applicant's lawyer confirmed that he had been appointed by the Belgian State as a legal aid lawyer, but only to defend the applicant before the first-instance court. For this he was entitled to "ten points". He said that he had not yet received any payment for legal aid. For the other proceedings he had agreed with the applicant that the applicant would pay him by instalments based on the above-mentioned hourly fee if he won the case before the Court. That commitment had been honoured in part. According to the applicant, there was no danger of the Belgian authorities paying him too much compensation because the procedural costs awarded were deducted from the legal aid payable. It followed that if the former exceeded the latter his lawyer would ask the legal aid office to stop the legal aid and that if the costs and expenses awarded by the Court were higher than the amount awarded in legal aid, his lawyer would receive nothing in terms of legal aid.
215. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred, and were reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, among many other authorities, *Sanoma Uitgevers B.V. v. the Netherlands*, cited above, 109).
216. The Court first considers the costs and expenses relating to the proceedings before the domestic courts. It notes that the applicant has submitted no breakdown of the sum claimed in respect of the different proceedings brought. This prevents it from determining precisely what amounts correspond to the violations found in the instant case and to what extent they have been or could be covered by the legal aid. Because of this lack of clarity (see, *mutatis mutandis*, *Musial v. Poland* [GC], no. 24557/94, § 61, ECHR 1999-II), the Court rejects these claims.
217. Turning its attention to the costs and expenses incurred in the proceedings before it against Belgium, the Court reiterates that it does not consider itself bound by domestic scales and practices, even if it may take inspiration from them (see *Venema v. the Netherlands*, no. 35731/97, § 116, ECHR 2002-X). In any event, for the same reasons as in respect of Greece (see paragraph 414 above), it awards the applicant EUR 6,075.

(c) In respect of Belgium and Greece
218. The applicant lastly claimed the reimbursement of the costs and fees incurred in connection with the hearing before the Court. According to the list of fees and expenses submitted by the applicant's lawyer, they amounted to EUR 2,550 for the pleadings and their preparation (at an hourly rate of EUR 75). Without submitting any receipts, he also claimed the reimbursement of EUR 296.74 EUR for his lawyer's travel to and accommodation in Strasbourg.
219. According to its established case-law, the Court rejects the part of the claim which is not substantiated by the requisite receipts.
220. For the remainder, considering it established that the costs and expenses claimed were necessarily incurred and were reasonable as to quantum, it awards the applicant EUR 2,550. Having regard to the responsibility for the different violations of the Convention found by the Court, Belgium and Greece will each pay half of that sum.

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

For these reasons, the Court
1. Joins to the merits, by sixteen votes to one, the preliminary objections raised by the Greek Government and rejects them;
2. Declares admissible, unanimously, the complaint under Article 3 of the Convention concerning the conditions of the applicant's detention in Greece;
3. Holds, unanimously, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's conditions of detention;
4. Declares admissible, by a majority, the complaint under Article 3 of the Convention concerning the applicant's living conditions in Greece;
5. Holds, by sixteen votes to one, that there has been a violation by Greece of Article 3 of the Convention because of the applicant's living conditions in Greece;
6. Declares admissible, unanimously, the complaint against Greece under Article 13 taken in conjunction with Article 3 of the Convention;
7. Holds, unanimously, that there has been a violation by Greece of Article 13 taken in conjunction with Article 3 of the Convention because of the deficiencies in the asylum procedure followed in the applicant's case and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy;

8. Holds, unanimously, that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2 of the Convention;
9. Joins to the merits, unanimously, the preliminary objection raised by the Belgian Government, rejects it and declares admissible, unanimously, the complaints lodged against Belgium;
10. Holds, by sixteen votes to one, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State;
11. Holds, unanimously, that there is no need to examine the applicant's complaints under Article 2 of the Convention;
12. Holds, by fifteen votes to two, that there has been a violation by Belgium of Article 3 of the Convention because, by sending him back to Greece, the Belgian authorities exposed the applicant to detention and living conditions in that State that were in breach of that Article;
13. Holds, unanimously, that there has been a violation by Belgium of Article 13 taken in conjunction with Article 3 of the Convention;
14. Holds, unanimously, that there is no need to examine the applicant's complaints under Article 13 taken in conjunction with Article 2 of the Convention;
15. Holds, unanimously,
(a) that the Greek State is to pay the applicant, within three months, the following amounts,
(i) EUR 1,000 (one thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
(ii) EUR 4,725 (four thousand seven hundred and twenty-five euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
16. Holds,
(a) by fifteen votes to two, that the Belgian State is to pay the applicant, within three months, EUR 24,900 (twenty-four thousand nine hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
(b) by sixteen votes to one, that the Belgian State is to pay the applicant, within three months, EUR 7,350 (seven thousand three hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
17. Rejects, unanimously, the remainder of the claim for just satisfaction.
(… ; *red.*).

Noot

1. Over deze uitspraak is al veel geschreven. Deze uitspraak is geannoteerd door Battjes in RV 2011/68 en door Woltjer in EHRC 2011/42. Spijkerboer schreef over deze 'Uitspraak van de Maand' in A&MR 2011 (p. 32-33), en Battjes schreef een artikel getiteld: 'Straatsburg toezicht op Unie-asielrecht M.S.S. t. België en Griekenland' (A&MR 2012, p. 66-74). Ik zal dan ook – naar ik vrees – in herhaling vallen, maar deze uitspraak is dusdanig richtinggevend dat deze in de RV 2011 niet mag ontbreken. Het EHRM deed in deze zaak uitspraak voordat het Hof van Justitie oordeelde over de toepassing van artikel 3 lid 2 Dublinverordening (in de zaak N.S., zaak C-411/1, zie RV 2011/8).
2. De feiten in de zaak zijn als volgt: M.S.S., een Afghaanse asielzoeker, had in zijn land van herkomst als tolk gewerkt voor NAVO-militairen (r.o. 31 en 295). Na een moordaanslag door de Taliban vluchtte hij via Turkije naar Griekenland, waar hij geen asielaanvraag indiende maar wel werd geregistreerd. Vervolgens diende hij in België een asielaanvraag in die na een summiere behandeling werd afgewezen. Hij diende een klacht in bij het EHRM (schending 3 EVRM vanwege asielprocedure Griekenland, detentie- en leefomstandigheden aldaar en schending 3 jo. 13 EVRM vanwege ontbreken effectief rechtsmiddel tegen overdracht); een verzoek om een interim measure werd door het Hof afgewezen. Weer in Griekenland diende hij een asielaanvraag in, waarop toen het Hof dit arrest wees nog geen beslissing was genomen. M.S.S. verbleef in Griekenland tweemaal een korte periode in detentie en was verder dakloos en verstoken van voorzieningen. Eenmaal was hij bijna uitgezet naar Turkije. Ook tegen Griekenland diende hij klachten in (schending 3 EVRM vanwege detentieomstandigheden en leefomstandigheden en schending 3 jo 13 EVRM vanwege een asielprocedure met risico op refoulement).
3. Zowel ten aanzien van Griekenland als België worden door het EHRM drie schendingen vastgesteld. Griekenland heeft ten opzichte van M.S.S. artikel 3 EVRM geschonden vanwege de slechte detentieomstandigheden (para. 223-234), en ook vanwege het ontbreken van opvang (para. 249-264). Artikel 3 jo 13 EVRM is geschonden vanwege de slechte asielprocedure met een risico op refoulement (para. 294-322). België heeft artikel 3 EVRM geschonden vanwege de Griekse asielprocedure en dus door blootstelling aan indirect refoulement (para. 344-361), vanwege direct refoulement (de Griekse detentie-omstandigheden gebrek aan opvang, para. 362-368). Artikel 3 jo 13 EVRM is geschonden vanwege het systeem van de Belgische voorlopige voorzieningenprocedure (para. 385-397).
4. Tot zover de uitkomst van deze zaak. Ik wil hier met name ingaan op het element van de uitspraak waarin het EHRM tot de conclusie komt dat de Belgische autoriteiten niet langer het interstatelijk vertrouwensbeginsel mochten gebruiken. In een gedeeltelijke dissenting opinion van rechter Bratza (UK) geeft deze aan

dat het EHRM in de zaak *K.R.S.* (in deze zaak van het EHRM van 2 december 2008, klachtnr. 32733/08 oordeelde het Hof dat de overdracht aan Griekenland niet in strijd zou zijn met artikel 3 EVRM omdat K.R.S. de mogelijkheid zou hebben om in Griekenland een klacht bij het EHRM in te dienen en te vragen om een interim measure (Rule 39)) over dezelfde inhoudelijke informatie beschikte als nu in de zaak *M.S.S.*. Hij betoogt dat de hoeveelheid informatie is toegenomen, maar de inhoud van de informatie hetzelfde is gebleven.

De Belgische autoriteiten (en ook bijvoorbeeld de Nederlandse) hadden zich juist op de zaak *K.R.S.* beroepen om aan te geven dat overdracht van asielzoekers aan Griekenland nog was geoorloofd. Wat is er in de tijd tussen *K.R.S.* en *M.S.S.* (ongeveer twee jaar) veranderd? Wat is vereist om het interstatelijk vertrouwen te weerleggen? Gezien oudere uitspraken, maakt het Hof nogal onverwachte wendingen. Het is niet van belang dat M.S.S. bij het gehoor de tekortkomingen in de Griekse procedure niet gesteld had (r.o. 346): de Belgische beslissingsautoriteit kon ze kennen ("be aware", r.o. 346; "known", r.o. 352, dan wel "ought to have known", r.o. 358), onder meer op grond van de vele rapporten waarin misstanden waren gedocumenteerd. Het Hof gaat uit van een actieve onderzoeksplicht als rapporten over veelvuldige misstanden voorhanden zijn. De tweede wending is dat individualisering van risico op indirect refoulement niet is vereist (r.o. 359): het individuele gevaar volgt uit het algemene. Er hoeft geen individueel gevaar van refoulement te worden aangetoond (vgl. EHRM 11 januari 2007, klachtnr. 1948/04, *Salah Sheekh*).

5. De implicatie van dit arrest was: geen uitzetting naar Griekenland totdat de situatie voor asielzoekers daar verbeterd is, aangehouden "Griekse" zaken moesten alsnog op nationaal niveau worden behandeld; ten aanzien van andere lidstaten kan het interstatelijk vertrouwen weerlegd worden met behulp van algemene rapporten; voor het bestuur geldt een actieve onderzoeksplicht. Dit roept natuurlijk de vraag op of ook voor een aantal andere lidstaten reeds een *M.S.S.* -situatie was ontstaan of is ontstaan. Ook over de situatie van asielzoekers in Italië zijn een aantal rapporten verschenen, het EHRM heeft interim measures afgegeven en stelt vragen over opvangvoorzieningen voor amv's, kwetsbare asielzoekers en medische zorg. Een aantal rechtbanken hebben voorlopige voorzieningen toegewezen vanwege de gebrekkige opvangvoorzieningen voor kwetsbare personen (zie bijvoorbeeld Rb. Haarlem 12 april 2012, AWB 12/5949). De Afdeling Bestuursrechtspraak van de Raad van State, 16 april 2012 (201108684/1/V4) gaat daarin (nog) niet mee. Het betreft een hoger beroep van de minister tegen de uitspraak van rechtbank Zutphen van 26 juli 2011 in zaak nrs. 11/18403 en 11/18405. De Afdeling overweegt dat uit de door de minister aangedragen uitspraken van 14 juli 2011 (201002796/1/V3, 201007479/1/V3 en 201009278/1/V3) volgt dat, ook indien de aangevoerde documenten over de situatie in Italië worden beoordeeld op de in het arrest *M.S.S.* omschreven wijze, geen grond bestaat voor het oordeel dat deze aan overdracht van vreemdelingen aan Italië in de weg staan. De Afdeling heeft daartoe in die uitspraken overwogen dat de desbetreffende documenten geen concrete aanknopingspunten bevatten dat Italië asielzoekers die in het kader van de Dublinverordening worden overgedragen, in strijd met zijn non-refoulementverplichtingen verwijdert. Voorts heeft de Afdeling overwogen dat die documenten onvoldoende grond bieden voor de conclusie dat de detentie- en levensomstandigheden waar vreemdelingen in Italië mee te maken kunnen krijgen, of de toepassing van de asielprocedure in dat land, in de praktijk van een zodanige aard zijn dat op basis daarvan zou moeten worden geconcludeerd dat wat voor Griekenland heeft te gelden, in gelijke mate opgaat voor Italië. De overige stukken leiden eveneens niet tot het oordeel dat van overdracht naar Italië moet worden afgezien, de Afdeling verwijst hierbij naar haar uitspraak van 27 februari 2011, 201010541/1V4. Voorts bestaat geen grond voor het oordeel dat de minister zich niet op het standpunt heeft mogen stellen dat de medische voorzieningen in Italië moeten worden geacht vergelijkbaar te zijn met die in Nederland en dat de medische klachten in Italië kunnen worden behandeld.

6. Ook met betrekking tot Malta speelt een soortgelijk verhaal. Door het EHRM worden voor Malta bijna geen interim measures gegeven. Echter, in een uitspraak van de Raad voor Vreemdelingenbetwisting (België, 6 januari 2012, te vinden op Vluchtweb) wordt geoordeeld dat ten opzichte van Malta ernstige tekortkomingen in het systeem van asielverzoeken en opvang bestaan. De betreffende vreemdeling had eerder asiel aangevraagd in Nederland, maar is naar Malta gestuurd onder de Dublinverordening. Vanuit Malta is de vreemdeling naar België gereisd om daar asiel aan te vragen. De vreemdeling betoogt dat zij risico loopt op een schending van artikel 3 EVRM, omdat zij in Malta opnieuw zonder onderdak op straat dreigt te worden achtergelaten of arbitrair te worden vastgehouden. Tevens riskeert zij dat haar asielaanvraag niet goed zal kunnen worden behandeld aangezien zij tijdens haar vorige verblijf in Malta evenmin een advocaat toegewezen kreeg. De Raad verwijst naar de HvJ zaak *N.S.* 21 december 2011 (C-411/10 en C-493/10) waarin staat dat lidstaten een asielzoeker niet aan de verantwoordelijke lidstaat mogen overdragen wanneer zij niet onkundig kunnen zijn van het feit dat de tekortkomingen in het systeem van de asielprocedure en de opvangvoorzieningen voor asielzoekers in deze lidstaat ernstige, op feiten berustende gronden vormen om aan te nemen dat de asielzoeker een reëel risico zal lopen op schending van artikel 4 Handvest en artikel 3 EVRM. De Raad leidt uit de door de vreemdeling aangevoerde informatie af dat er nog aanzienlijke tekortkomingen bestaan inzake de opvang en de asielprocedure in Malta. In het rapport van Commissaris Hammarberg van 9 juni 2011 blijkt dat aanzienlijke gebreken bestaan inzake de detentiepolitiek en de leefomstandigheden in opvangcentra. De detentiepolitiek is moeilijk verzoenbaar met de voorschriften van het EVRM. Inzake de asielprocedure blijkt dat manifeste

tekortkomingen bestaan in het kader van zowel de juridische bijstand als de asielprocedure, mede veroorzaakt door de detentiepolitiek. De Belgische staat had niet onkundig kunnen zijn van deze tekortkomingen in het systeem van de asielprocedure en de opvangvoorzieningen en had deze in aanmerking moeten nemen bij haar oordeelsvorming. De Nederlandse Afdeling bestuursrechtspraak is een andere mening toegedaan in een uitspraak van 2 februari 2012 (hoger beroep van de vreemdeling tegen Rb. Den Bosch 7 november 2011, AWB 11/26772 en 11/26771). De Afdeling overweegt dat zij op 7 oktober 2011 (201001837/1/V3 en 201005977/1/V3) heeft geoordeeld dat geen grond bestaat voor het oordeel dat door de overdracht aan Malta een situatie zal ontstaan die strijdig is met artikel 3 EVRM dan wel artikel 13 EVRM, zodat de minister zich kan beroepen op het interstatelijk vertrouwensbeginsel. De Afdeling heeft in deze zaken overwogen dat de opvang in Malta voor verbetering vatbaar is en niet in alle gevallen als adequaat aan te merken is, doch er wordt in alle gevallen opvang geboden en in aanvulling op die opvang en op het verstrekken van voeding wordt een financiële toelage verstrekt. De informatie in het door de vreemdeling in de onderhavige zaak ingeroepen rapport (rapport van Th. Hammarberg, commissaris voor de mensenrechten van de Raad van Europa, van 9 juni 2011) wijkt niet zodanig af van de informatie die is ingeroepen in de zaken die hebben geleid tot voormelde uitspraken van 7 oktober 2011 dat de voorzieningenrechter aanleiding had moeten zien om in deze zaak anders te oordelen.

7. In de zaak *M.M.S.* wordt België ook veroordeeld voor schending van artikel 13 EVRM. Het Hof bekijkt eerst de schorsende werking. In België heeft het beroep tegen de afwijzing geen schorsende werking, maar het verzoek, een soort voorlopig voorziening, schort wel “automatisch” op (para. 386). België schond artikel 13 EVRM reeds omdat de beoordeling ‘not thorough’ was, nu de rechter zich beperkte tot de beoordeling of M.S.S. concreet bewijs had van onherstelbare schade die uit een eventuele schending van artikel 3 EVRM zou voortkomen (para. 389-390). Zie hierover (en ook over een mogelijke schending van artikel 13 EVRM door Nederland) verder de bespreking van *M.S.S.* door Spijkerboer in ‘Uitspraak van de Maand’ in A&MR 2011, p. 33.

Karin Zwaan