Human rights — Right to life — Prohibition of torture and inhuman or degrading treatment — European Convention on Human Rights, 1950, Articles 2 and 3 — Treatment contrary to Article 3 must reach a minimum level of severity in all circumstances — Confinement of aliens permissible only to prevent unlawful migration while still complying with international law — Conditions of detention to be compatible with human dignity — Whether Article 3 obliging States to provide accommodation to all persons within their jurisdiction or to provide all refugees with financial assistance to maintain certain standard of living — Whether States under positive obligation to provide decent material conditions and accommodation to impoverished and vulnerable asylum seekers — Principle of *non-refoulement* — Prohibition of direct and indirect *refoulement* — Article 13 — Right to an effective remedy — Remedy to be effective in law and practice — Effective remedy to Article 3 claim must involve close and rigorous scrutiny and include potential for execution of impugned measure — Article 41 — Just satisfaction — Non-pecuniary damages — Costs — Article 46 — Binding force and execution of judgments — Rules of Court — Rule 39 — Interim measures — *KRS* v. *United Kingdom*

MSS *v.* Belgium and Greece[1]

(Application No 30696/09)

European Court of Human Rights (Grand Chamber). 21 *January* 2011

(Costa, *President*; Rozakis, Bratza, Lorenzen, Tulkens, Casadevall, Cabral Barreto, Fura, Hajiyev, Jočienė, Popović, Villiger, Sajó, Bianku, Power, Karakaş and Vučinić, *Judges*)

Summary:[2] *The facts*:—Mr MSS ("the applicant"), an Afghan national, fled Afghanistan in 2008 and entered the European Union ("EU") through Greece. The Greek authorities ("the second respondent") detained him, took his fingerprints and issued him with an order to leave Greece. The applicant travelled to Belgium and claimed asylum on 10 February 2009. The Belgian authorities ("the first respondent") established that he had formerly been registered in Greece, and on 18 March 2009, under Article 10(1) of Council

[1] The names of the parties' representatives appear at para. 8 of the judgment.
[2] Prepared by Ms E. Fogarty.

Regulation No 343/2003/EC ("the Dublin Regulation"),[3] requested that the second respondent take charge of the claim. The second respondent's failure to respond was taken by the first respondent to be tacit acceptance *per* Article 18(1) of the Dublin Regulation.

In April 2009, the first respondent received a letter from the Office of the United Nations High Commissioner for Refugees ("UNHCR") criticizing conditions for asylum seekers in Greece and recommending that transfers to Greece be suspended. Nevertheless, the applicant was detained pending removal to Greece. He unsuccessfully challenged removal before the Aliens Appeals Board, and applied to the European Court of Human Rights on 11 June 2009, alleging that his removal by the first respondent, and the risk of ill-treatment he faced from the second respondent, were in breach of the European Convention on Human Rights, 1950 ("the Convention").

The applicant was removed on 15 June 2009. Upon arrival in Greece, he was detained for three days at Athens Airport in an overcrowded, overheated cell, with limited access to bathrooms, fresh air and food. On 18 June 2009, he was issued with a temporary residence permit for asylum seekers and an order in Greek to report his Greek address to the Attica Police Asylum Department within two days. Having no Greek address, the applicant did not report and instead began living rough in an Athens park with other homeless Afghan asylum seekers.

In August 2009, the applicant attempted to depart Athens Airport using a false Bulgarian identity card. He was arrested and detained at Athens Airport for one week, where it was alleged he was beaten. Over the following thirteen months to the date of judgment, his asylum claim remained unprocessed, he remained homeless, and he alleged that efforts were made by the second respondent to expel him to Turkey.

Held:—The first and second respondents had both violated Article 3 and Article 13 in conjunction with Article 3 of the Convention.

(1) The applicant's allegations against the second respondent (that his conditions of detention at Athens Airport were contrary to Article 3;[4] that his living conditions in Greece were contrary to Article 3; and that he had no effective remedy to those complaints, in violation of Article 13[5] in conjunction with Article 3 and Article 2)[6] were admissible (paras. 205-6, 214-15, 235-9, 247-8, 265-70 and 283-5).

(2) Confinement of aliens, accompanied by suitable safeguards, was acceptable only to enable States to prevent unlawful immigration while still

[3] The European Union sought to implement a common European asylum system ("the Dublin system"). The Dublin Regulation established the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. For further details, see paras. 65-82 of the judgment.

[4] For the text of Article 3, see para. 205 of the judgment.

[5] For the text of Article 13, see para. 265 of the judgment.

[6] For the text of Article 2, see para. 266 of the judgment.

complying with their international obligations. States' legitimate concerns regarding the circumvention of immigration restrictions could not deprive asylum seekers of their rights and protections. Article 3 prohibited torture and inhuman or degrading treatment in absolute terms, requiring States to ensure that detention conditions were compatible with human dignity, that detainees' health and well-being were adequately secured, and that they were not subject to distress or hardship of an intensity exceeding that unavoidable in detention. To fall within Article 3, ill-treatment had to attain a minimum level of severity in all the circumstances, including duration, physical and mental effect, and an individual's personal characteristics. The applicant's allegations as to the conditions of his detention were supported by similar findings by various human rights organizations and were not explicitly disputed by the second respondent. Those conditions amounted to degrading treatment contrary to Article 3 (paras. 216-21 and 223-4).

(3) With respect to the applicant's living conditions in Greece, Article 3 could not be interpreted as obliging Contracting States to provide everyone within their jurisdiction with a home, nor to provide refugees with financial assistance to maintain a certain standard of living. However, the obligation to provide decent material conditions and accommodation to impoverished and vulnerable asylum seekers had entered into positive law; it was possible that State responsibility under Article 3 could be engaged where an asylum seeker who was wholly dependent on State support was in a situation of serious deprivation or lack of human dignity. There was no reason to question that the applicant had spent many months in extreme poverty, unable to cater for his most basic needs and without any prospect of change; both UNHCR and the Council of Europe Commissioner for Human Rights had confirmed that situation for numerous asylum seekers in Greece. The second respondent provided the applicant with no information about seeking accommodation, and his order to register an address with the Attica police was ambiguously worded. Noting the very limited accommodation places for asylum seekers, particularly adult males, the second respondent must have known that the applicant was homeless. If his asylum claim had been promptly examined, the applicant's suffering could have been substantially alleviated. The applicant was the victim of humiliating treatment showing a lack of respect for his dignity of a level of severity sufficient to constitute a violation of Article 3 (paras. 249-50, 253-9 and 262-4).

(4) Article 13 guaranteed availability at the national level of a remedy, effective in law and practice, to enforce the substance of Convention rights and freedoms. The applicant had an arguable claim under Articles 2 and 3 in relation to his potential return to Afghanistan. Over a number of years, human rights agencies had consistently reported that the second respondent's asylum procedures were affected by major structural deficiencies, including lack of appropriate resources and staff, lack of information provided to applicants, and significant obstacles to applicants making and pursuing their claims. Almost all claims were rejected at first instance without detailed reasons.

Judicial review application to the Supreme Administrative Court did not provide adequate protection against *refoulement*, such applications having no automatic suspensive effect. Due to the second respondent's failure to communicate, the applicant was unlikely to learn of the outcome of his asylum claim in time to make such an application. The second respondent had violated Article 13 in conjunction with Article 3; the Article 13 claim in conjunction with Article 2 was not examined separately (paras. 265-6, 286-8, 296-7, 300-8 and 316-22).

(5) The applicant's claims that the first respondent had violated Articles 2 and 3 by exposing him to the risks arising from the deficiencies in the second respondent's asylum procedures; Article 3 by exposing him to inhuman conditions of detention and living conditions in Greece; and Article 13 in conjunction with Articles 2 and 3 by failing to provide an effective remedy were admissible (paras. 323-5, 337, 362, 364, 369-77 and 385).

(6) At the time of the applicant's removal from Belgium to Greece, numerous reports were available to the first respondent highlighting the second respondent's practical difficulties in applying the Dublin system, the deficiencies in its asylum procedure, and its practice of direct and indirect *refoulement*. These were expressly highlighted in UNHCR's letter of April 2009. The first respondent should have verified how the second respondent would have applied its asylum procedures in practice rather than assuming treatment compliant with the Convention. The first respondent's removal of the applicant to Greece violated Article 3; the Article 2 claim was not examined separately (paras. 344-61).

(7) The detention and living conditions faced by asylum seekers in Greece were well known before the applicant's transfer. By transferring him to Greece, the first respondent knowingly exposed the applicant to detention and living conditions that amounted to degrading treatment, in violation of Article 3 (paras. 366-8).

(8) Any complaint that expulsion to another State would have exposed an individual to treatment contrary to Article 3 required close and rigorous scrutiny. Subject to a certain margin of appreciation, in such cases, Article 13 required that a competent body examine the substance of complaints and afford proper reparation, and that the execution of impugned measures be stayed. The first respondent's mechanism for examining the applicant's complaint was not thorough, instead limited to verifying whether complainants had produced concrete proof that they would suffer irreparable damage if removed, increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of violation of Article 3. The first respondent had violated Article 13 in conjunction with Article 3; the Article 13 claim in conjunction with Article 2 was not examined separately (paras. 385-97).

(9) In accordance with Article 46,[7] it was incumbent on the second respondent to examine the merits of the applicant's claim without delay,

[7] For the text of Article 46, see para. 398 of the judgment.

and, pending that outcome, to refrain from deporting him. Under Article 41,[8] the second respondent was ordered to pay the applicant 1,000 euros in respect of non-pecuniary damages and 4,725 euros in costs. Under Article 41, the first respondent was ordered to pay the applicant 24,900 euros in respect of non-pecuniary damages and 7,350 euros in costs. From the expiry of three months after the date of judgment to the date of settlement simple interest was payable at a rate equal to the marginal lending rate of the European Central Bank, plus three percentage points (paras. 402, 406, 411, 414, 420 and 423-4).

Concurring Opinion of Judge Rozakis: (1) The States forming Europe's external borders were facing a great influx of migrants and asylum seekers. EU immigration policy, including the Dublin Regulation, required urgent reconsideration to reflect that reality and do justice to the disproportionate burden falling in particular on the second respondent (paras. 1-2).

(2) The Court was right to emphasize that Article 3 could not be interpreted as obliging Contracting States to provide everyone within their jurisdictions with a home, nor to give financial assistance to all refugees sufficient to meet a certain standard of living. The Court had held many times that to fall within the scope of Article 3, ill-treatment had to attain a minimum level of severity, dependent on all the circumstances. In this case, the combination of the long duration of the applicant's treatment and the second respondent's international obligation to treat asylum seekers in accordance with the current "positive law" principles justified the distinction made between treatment endured by other categories of people where Article 3 might not be breached, and the treatment of an asylum seeker, who enjoyed a particularly advanced level of protection (paras. 3-4).

Concurring Opinion of Judge Villiger: (1) The Court's examination of the applicant's claim that he faced a risk of *refoulement* by the second respondent, contrary to Article 3 only in conjunction with Article 13, was insufficient; the Article 3 claim warranted individual examination. The Court approached the issue by suggesting that the national authorities had first to examine the *refoulement* complaint under Article 3 before the Court could do so. However, the Court also stated that the claim was "arguable", indicating that it had considered the claim. There was, further, nothing new in the fact that the Court could, on its own, examine whether there was a risk of treatment in an applicant's home country that would be contrary to Article 3. The Court did just that in relation to the Article 3 claim against the first respondent (paras. 1-7 and 9-16).

[8] For the text of Article 41, see para. 403 of the judgment.

(2) The Court acknowledged the weaknesses in the second respondent's procedures by instructing it, *per* Article 46, not to deport the applicant without proper examination of his claim. However, Article 46 should only be applied where the Court had found a violation of the Convention, which it had not done in relation to Article 3. That created confusion as to the meaning and scope of Article 46, weakening its authority (paras. 23-4).

Partly Concurring and Partly Dissenting Opinion of Judge Sajó: (1) The conditions of the applicant's detention at Athens Airport amounted to inhuman and degrading treatment because detention of unaccused persons under deplorable conditions was inherently humiliating. Contrary to the Court's assessment, however, the applicant was not a member of a particularly underprivileged or vulnerable group in need of special protection due to his status as an asylum seeker. Although many asylum seekers were vulnerable, asylum seekers could not unconditionally be considered as a particularly vulnerable group, all of whom deserved special protection. Under the Dublin system, "particularly vulnerable persons" were specific categories within the broader category of refugees, such as victims of torture or unaccompanied children (paras. 3-7).

(2) Where treatment originating from a State or from private individuals overwhelmingly controlled by the State humiliated or debased a person, it could be characterized as degrading and falling within the scope of Article 3. However, in the present case, even if the authorities were careless and insensitive in applying their asylum procedure, there was no evidence of any intention to humiliate. While the Court's requirement that the second respondent handle applications with care and within a reasonably short period was supported, its implication that, if claims were not so dealt with, the second respondent should provide adequately for applicants' basic needs was not. States were obliged to provide for the basic needs of needy asylum seekers, but only because this was required under applicable EU law. There was a difference in this regard between EU law and the conventional obligations originating from the prohibition of inhuman and degrading treatment (paras. 8-16).

(3) The Court accepted the applicant's allegations as to his degrading treatment based on general assumptions and the generally negative picture of conditions in Greece. However, general assumptions alone were insufficient to establish the international law responsibility of a State beyond reasonable doubt. The applicant had sufficient means to be smuggled from Afghanistan to Greece, had managed to travel from Greece to Belgium, and later obtained a false Bulgarian identification document and a flight ticket out of Greece. He failed to cooperate with the second respondent's asylum procedure and did not allow the authorities to examine his claim. He therefore could not properly be classified as a victim for the purposes of Article 34 in relation to the second respondent. Although the information provided concerning forced *refoulement* from Greece to Afghanistan was not convincing, only a system of proper review of an asylum claim and/or deportation order with suspensive

effect satisfied the needs of legal certainty and protection. Because of the shortcomings identified in the second respondent's procedures, the applicant remained without adequate protection, irrespective of his non-cooperation with the asylum procedure (paras. 20-5).

(4) The first respondent had had enough information to foresee that the second respondent's asylum procedure did not offer the sufficient safeguards against humiliation inherent in that ineffective procedure. However, the first respondent could not have have foreseen that the applicant would be detained by the second respondent, or for how long. In particular, the first respondent could not have foreseen the applicant's second period of detention, which occurred after he tried to leave Greece using false identification. The sum the first respondent was ordered to pay the applicant in respect of non-pecuniary damages was therefore excessive. There was however a systemic problem in the Belgian deportation procedure that resulted in a violation of Article 13 (paras. 27-9).

Partly Dissenting Opinion of Judge Bratza: (1) The Court's finding that the first respondent's return of the applicant to Greece violated Article 3 was not supported. The situation in Greece and risks posed by return were not so clear at the relevant time as to justify such a serious finding when the Court had itself found insufficient grounds at that time to apply Rule 39 of the Rules of the Court[9] to implement an interim measure preventing the applicant's return. The Court paid insufficient regard to its own decision in *KRS* v. *United Kingdom*,[10] given some six months prior to the first respondent's relevant conduct, which held that the second respondent was indeed complying with the Dublin Regulation. Whether or not *KRS* was correctly decided, Contracting States were legitimately entitled to follow and apply that decision in the absence of any clear evidence of a change in the situation in Greece (paras. 1-7 and 13-14).

(2) The suggestion that developments had made it untenable for the first respondent to rely on *KRS* by June 2009 was unpersuasive. Reports of the potentially unsuitable conditions in Greece dated back to 2006; any developments between *KRS* and the applicant's return did not change the substantive content of the Court's reasoning. It could not be held against the first

[9] Rule 39 of the Rules of the Court provided that: "Interim Measures: 1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings. 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers. 3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated. 4. The President of the Court may appoint Vice Presidents of Sections as duty judges to decide on requests for interim measures."

[10] *KRS* v. *United Kingdom* (Application No 32733/08), decision of the Fourth Section of the European Court of Human Rights of 2 December 2008.

respondent that it apparently did not take into account reports that were also available at the time of the *KRS* judgment. As significant as the UNHCR letter might have been, it was not sufficient to displace the first respondent's entitlement to rely on *KRS* (paras. 8-12).

(3) The size of the award made against the first respondent was not justified (para. 16).

The following is the text of the judgment of the Court:

PROCEDURE

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

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

3. The applicant alleged in particular that his expulsion by the Belgian authorities had violated Articles 2 and 3 of the Convention and that he had been subjected in Greece to treatment prohibited by Article 3; he also complained of the lack of a remedy under Article 13 of the Convention that would enable him to have his complaints examined.

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

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

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

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

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

There appeared before the Court:

(a) *for the Belgian Government*,

Mr M. Tysebaert, *Agent*,
Ms I. Niedlispacher, *Co-Agent*,
Ms E. Materne, lawyer, *Counsel*,
Ms V. Demin, attachée, Aliens Office, *Adviser*;

(b) *for the Greek Government*,

Mr K. Georgiadis, Adviser,
State Legal Council, *Agent's delegate*,
Ms M. Germani, Legal Assistant, State Legal Council, *Counsel*;

(c) *for the applicant*,

Mr Z. Chihaoui, lawyer, *Counsel*;

(d) *for the United Kingdom Government, third-party intervener*,

Mr M. Kuzmicki, *Agent*,
Ms L. Giovanetti, *Counsel*;

(e) *for the Netherlands Government, third-party intervener*,

Mr R. Böcker, *Agent*,
Mr M. Kuijer, Ministry of Justice,

Ms C. Coert, Immigration and Naturalisation Department, *Advisers*;

(f) *for the Council of Europe Commissioner for Human Rights, third-party intervener*,

Mr T. Hammarberg, Commissioner,
Mr N. Sitaropoulos, Deputy Director,
Ms A. Weber, *Advisers*;

(g) *for the Office of the United Nations High Commissioner for Refugees, third-party intervener*,

Mr V. Türk, Director of the International Protection Division, *Counsel*,
Ms M. Garlick, Head of Unit, Policy and Legal Support, Europe Office,
Mr C. Wouters, Principal Adviser on the law of refugees, National Protection Division, *Advisers.*

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

FACTS

I. The circumstances of the case

A. Entry into the European Union

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

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

B. Asylum procedure and expulsion procedure in Belgium

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

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