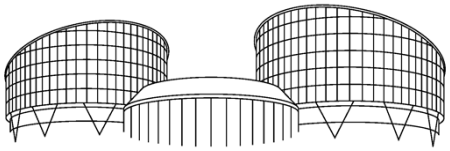

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF PAPOSHVILI v. BELGIUM

(Application no. 41738/10)

JUDGMENT

STRASBOURG

13 December 2016

This judgment is final but it may be subject to editorial revision.

In the case of Paposhvili v. Belgium,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
Luis López Guerra,
Khanlar Hajiyev,
Nebojša Vučinić,
Kristina Pardalos,
Julia Laffranque,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Valeriu Griţco,
Faris Vehabović,
Ksenija Turković,
Dmitry Dedov,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 16 September 2015 and on 20 June, 22 September and 17 November 2016,

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

PROCEDURE

1. The case originated in an application (no. 41738/10) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Mr Georgie Paposhvili ("the applicant"), on 23 July 2010. The applicant died on 7 June 2016. On 20 June 2016 the applicant's family, namely his wife, Ms Nino Kraveishvili, and their three children, Ms Ziala Kraveishvili, Ms Sophie Paposhvili and Mr Giorgi Paposhvili, expressed the wish to pursue the proceedings before the Court.

2. The applicant, who had been granted legal aid, was represented by Ms J. Kern, a lawyer practising in Antwerp, and Ms C. Verbrouck, a lawyer practising in Brussels. The Belgian Government ("the Government") were represented by their Agent, Mr M. Tysebaert, Senior Adviser, Federal Justice Department.

3. On 23 July 2010 the applicant applied to the Court requesting interim measures under Rule 39 of the Rules of Court, with a view to staying execution of the order to leave the country. Alleging that his removal to Georgia would expose him to risks to his life and physical well-being and would infringe his right to respect for his family life, the applicant claimed to be a victim of a potential violation of Articles 2, 3 and 8 of the Convention. Although the domestic proceedings had not yet been concluded at the time the application was lodged, the applicant nevertheless argued that the remedies in question would not have the effect of staying execution of his removal. On 28 July 2010, under Rule 39 of the Rules of Court, the Court requested the Government not to remove the applicant pending the outcome of the proceedings before the Aliens Appeals Board.

4. The application was assigned to the Fifth Section of the Court (Rule 52 § 1). A Chamber of that Section composed of Mark Villiger, President, Angelika Nußberger, Boštjan M. Zupančič, Ann Power-Forde, Ganna Yudkivska, Paul Lemmens and Aleš Pejchal, judges, and Claudia Westerdiek, Section Registrar, delivered a judgment on 17 April 2014. The Chamber unanimously declared the application admissible and held that the enforcement of the decision to remove the applicant to Georgia would not entail a violation of Articles 2 and 3 of the Convention. It held by a majority that there had been no violation of Article 8 of the Convention. A dissenting opinion by Judge Pejchal was annexed to the judgment. On 14 July 2014, in accordance with Article 43 of the Convention, the applicant requested the referral of the case to the Grand Chamber. The panel of the Grand Chamber granted the request on 20 April 2015.

5. The composition of the Grand Chamber was determined in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. From the deliberations of 21 June 2016 onwards, Guido Raimondi, the newly elected President of the Court, replaced Dean Spielmann. From the deliberations of 22 September 2016 onwards, Nebojša Vučinić, substitute judge, replaced Johannes Silvis, who was prevented from sitting (Rule 24 § 3).

7. The applicant and the Government each filed further written observations on the merits (Rule 59 § 1).

8. The Georgian Government exercised their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (a)). The Human Rights Centre of Ghent University, a non-governmental organisation, was granted leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 September 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms I. NIEDLISPACHER, *Co-Agent,*
Mr F. MOTULSKY, Lawyer, *Counsel*;

(b) *for the applicant*
Ms C. VERBROUCK, Lawyer,
Ms J. KERN, Lawyer, *Counsel*;

(c) *for the Georgian Government, third-party intervener*
Mr A. BARAMIDZE, First Deputy to the Minister of Justice.

The Court heard addresses by Ms Verbrouck, Ms Kern, Mr Motulsky, Ms Niedlispacher and Mr Baramidze, and their replies to the questions asked by one of the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1958. He lived in Brussels and died there on 7 June 2016.

11. He arrived in Belgium via Italy on 25 November 1998, accompanied by his wife and a six-year-old child. The applicant claimed to be the father of the child, an assertion which the Government contested. The couple subsequently had a child together in August 1999 and another in July 2006.

A. Criminal proceedings

12. On 29 December 1998 the applicant was arrested and taken into custody on charges of theft. On 14 April 1999 he received a sentence of seven months' imprisonment, which was suspended except for the period of pre-trial detention.

13. In 1999 and 2000 the applicant and his wife were arrested on several occasions in connection with theft offences.

14. On 28 April 2000 the applicant's wife was sentenced to four months' imprisonment for theft.

15. On 18 December 2001 the applicant was convicted of a number of offences including robbery with violence and threats, and received a sentence of fourteen months' imprisonment, which was suspended except for the period of pre-trial detention.

16. On 9 November 2005 the applicant was sentenced by the Ghent Court of Appeal to three years' imprisonment for involvement in a criminal organisation with a view to securing pecuniary advantage using intimidation, deception or corruption.

17. Having already spent time in pre-trial detention, he was subsequently detained in Forest Prison and then in Merksplas Prison, where he continued to serve his sentence.

B. Asylum proceedings

18. On 26 November 1998, the day after their arrival, the applicant and his wife lodged an asylum application.

19. As the applicant's wife stated that she had travelled through Germany, a request to take back the applicant and his family was sent to the German authorities under the Dublin Convention of 15 June 1990 determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities ("the Dublin Convention").

20. After the German authorities had refused the request, it transpired that the applicant and his family were in possession of a Schengen visa issued by the Italian authorities. A request to take charge of them was therefore sent to the Italian authorities and was accepted on 4 June 1999.

21. On 22 September 1999 the applicant lodged a further asylum application, using a false identity. It was immediately rejected after his fingerprints had been checked.

22. On 23 October 2000 the Aliens Office informed the applicant's lawyer that the proceedings concerning the asylum application of 26 November 1998 had been concluded on 11 June 1999 with the refusal of the application.

C. Requests for leave to remain on exceptional grounds

1. First request for regularisation on exceptional grounds

23. On 20 March 2000 the applicant lodged a first request for regularisation for a period of more than three months, on the basis of section 9(3) (since 1 June 2007, section 9*bis*) of the Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980 ("the Aliens Act"). In support of his request the applicant stated that he and his wife had a daughter born in Georgia before their arrival in Belgium and another daughter born in Belgium in 1999.

24. On 30 March 2004 the Aliens Office declared the request devoid of purpose as the applicant had left the country and been intercepted in Germany. It found that the request was in any case unfounded in view of the

fact that the applicant's medical treatment for tuberculosis had ended (see paragraph 49 below). The Aliens Office also referred to the applicant's lack of integration in Belgium and the numerous breaches of public order he had committed.

2. Second request for regularisation on exceptional grounds

25. On 28 April 2004 the applicant lodged a second request for regularisation of his residence status on the basis of section 9(3) of the Aliens Act. He cited as exceptional circumstances the duration of his residence in Belgium and his integration into Belgian society, the risks that a return to Georgia would entail for his children's schooling, the fact that he had been the victim of persecution and his state of health.

26. The Aliens Office declared the request inadmissible on 5 April 2007 on the ground that the evidence adduced did not amount to exceptional circumstances for the purposes of section 9(3) of the Act such as to warrant the lodging of the request in Belgium rather than with the competent diplomatic mission or consulate, as was the rule. The Aliens Office noted that the applicant had been allowed to remain in the country for the sole purpose of the asylum proceedings, which had been concluded by a final decision. It also cited as reasons the lack of any need for medical supervision, the applicant's precarious and unlawful residence status, the absence of a risk of persecution in Georgia and the possibility for the children to continue their schooling in that country.

27. In a judgment of 29 February 2008 the Aliens Appeals Board rejected an application by the applicant to set aside the Aliens Office's decision. It noted in particular that, since the decision complained of had not been accompanied as such by a removal measure, it could not give rise to a risk of violation of Article 3 of the Convention.

3. Third request for regularisation on exceptional grounds

28. On 10 September 2007, relying on the same grounds as those invoked under section 9*ter* of the Aliens Act (see paragraph 54 below) and on his family situation, the applicant lodged a request for regularisation on exceptional grounds under section 9*bis* of the Aliens Act.

29. On 7 July 2010 the Aliens Office refused the request for regularisation, taking the view that the protection of the State's best interests took precedence over the applicant's social and family interests and that by committing serious punishable acts the applicant himself had placed his family's unity in jeopardy. That decision was served on the applicant on 11 July 2010.

30. On 26 July 2010 the applicant lodged a request with the Aliens Appeals Board under the ordinary procedure for a stay of execution of the decision of 7 July 2010 rejecting his request for regularisation of his status,

together with an application to have that decision set aside. In so far as necessary, the application also related to the order to leave the country issued on the same date (see paragraph 78 below). The applicant alleged a violation of Articles 2 and 3 of the Convention and argued that his serious health problems amounted to exceptional humanitarian circumstances as defined by the Court in *D. v. the United Kingdom* (2 May 1997, *Reports of Judgments and Decisions* 1997-III), that he would not have access to treatment in Georgia and that the discontinuation of treatment would lead to his premature death. He further alleged an infringement of Article 8 of the Convention and of the International Convention on the Rights of the Child, on the ground that if he were returned to Georgia he would be separated from his family permanently.

31. The request and application were refused by the Aliens Appeals Board in a judgment of 16 March 2015 on the ground that the applicant had not attended the hearing or been represented.

4. Regularisation of the residence status of the applicant's family

32. On 5 November 2009 the applicant's wife lodged a request for regularisation on exceptional grounds under section 9*bis* of the Aliens Act, relying on her family situation and the duration of her residence in Belgium.

33. On 29 July 2010 she and her three children were granted indefinite leave to remain.

D. The applicant's state of health

1. Chronic lymphocytic leukaemia

34. In 2006, while the applicant was in prison (see paragraph 17 above), he was diagnosed with chronic lymphocytic leukaemia in Binet stage B, with a very high level of CD38 expression. No treatment was commenced.

35. As his health had deteriorated, the applicant was admitted to the Bruges prison hospital complex from 14 August to 23 October 2007 in order to receive a course of chemotherapy.

36. A report prepared on 11 February 2008 by Antwerp University Hospital, where the applicant was being treated, stated that his condition was life-threatening and that, on the basis of the averages observed in 2007, his life expectancy was between three and five years. The report stated that, following treatment, his white blood cell count had fallen significantly.

37. From 8 to 14 May 2010 the applicant was confined to hospital in Turnhout with respiratory problems. The medical report concerning his stay recommended that the applicant be treated as an outpatient by a lung specialist and a haematologist. This treatment did not materialise on his return to Merksplas Prison, where he was being held.

38. On 22 July 2010 a doctor from Antwerp University Hospital visited the applicant in the Merksplas closed facility for illegal aliens (see paragraph 79 below), to which he had been transferred in the meantime, in order to carry out a full medical check-up. The doctor's report noted that the applicant's leukaemia, which was progressing rapidly towards Binet stage C, had not been monitored sufficiently and that a different course of chemotherapy was required.

39. In August 2011 the applicant's condition worsened and the doctors observed that his leukaemia had progressed to Binet stage C, with anaemia and widespread enlargement of the lymph nodes (life expectancy of twenty-four months). It was decided to switch to a different course of chemotherapy.

40. On 12 September 2012 a doctor from the haematology department of St Pierre University Hospital in Brussels, where the applicant was being treated following his release (see paragraph 82 below), drew up a certificate which stated as follows:

> "...
>
> D. Possible complications if treatment is discontinued. Failure to treat the liver and lung disease could result in organ damage and consequent disorders (respiratory insufficiency, cirrhosis and/or liver cancer). Without treatment, the [chronic lymphocytic leukaemia] could lead to the patient's death as a result of the disease itself or the effects of serious infections.
>
> A return to Georgia would expose the patient to inhuman and degrading treatment.
>
> E. Progression and prognosis. Chronic lymphocytic leukaemia (CLL): good if treated, but the risk of relapse is real, so that close monitoring is required even during remission. ..."

41. After a relapse diagnosed in 2013, the doctors in St Pierre University Hospital observed in March 2014 that the applicant's leukaemia had developed into lymphocytic lymphoma, and his chemotherapy was adjusted accordingly. A positron-emission tomography (PET) scan performed on 22 September 2014 showed a lack of response to the chemotherapy, a progression of the disease in the lymph nodes and the liver, and a pulmonary infection.

42. The applicant's treatment was handed over to the Institut Bordet in Brussels, a hospital devoted exclusively to the treatment of cancer patients.

43. In December 2014 the applicant began to receive a new course of treatment as part of a study. He was given Ibrutinib, designed in particular to improve his overall condition, which had been compromised by complications arising out of the treatment (fungaemia, pulmonary infections, septicaemia and cholecystitis, resulting in his being admitted to hospital on several occasions). The treatment was prescribed in order to improve the applicant's overall condition in preparation for a donor stem cell transplant.

44. A medical certificate issued on 25 May 2015 by the specialist treating the applicant, Dr L., head of the experimental haematology laboratory at the Institut Bordet, stated that the patient's viral load was stable. The doctor stressed that discontinuing treatment would result in the patient's death. Because of the patient's immunosuppression and the aggressive nature of the leukaemia, treatment in a specialised haematology unit was necessary, as was a donor stem cell transplant, which offered the only remaining prospect of a cure provided that it was performed during the two-year "window of response" to Ibrutinib.

45. The applicant stated that the stem cell transplant, originally scheduled to take place in April 2015, had not been performed to date because he did not have a residence permit in Belgium as required by the Organ Removal and Transplant Act of 13 June 1986.

46. On 14 July 2015 a new medical report was prepared by Dr L. which read as follows:

> "The patient's CLL [chronic lymphocytic leukaemia]
>
> ...
>
> The patient has been suffering from CLL for nine years (diagnosed in 2006), and by 2011 had already reached stage C and Rai IV [stage IV according to the Rai criteria]. He had already had three lines of treatment prior to Ibrutinib, which he is currently taking, and was refractory to the third line of treatment (R-CVP chemotherapy).
>
> It is clear from the medical literature that if Ibrutinib is discontinued in such a situation, the average life expectancy is three months. ...
>
> The literature also shows that only 7% of patients being treated with Ibrutinib achieve complete remission. Mr Paposhvili is currently in partial remission and is thus wholly dependent on the treatment. This is a new targeted therapy to which he would have no access in his country of origin. With continuous treatment the patient's prognosis is more favourable, with an 87% survival rate after three years. ...
>
> CLL and especially treatment with Ibrutinib can give rise to serious complications which fully justify regular supervision in a specialised setting. This is particularly true since the patient is in a weak state and has a serious medical history (tuberculosis and stroke) and significant comorbidities (active chronic hepatitis and COPD [chronic obstructive pulmonary disease]). ...
>
> In the case of a young person – Mr Paposhvili is only 57 – the current guidelines advocate using Ibrutinib in order to obtain the best possible response, followed by a donor peripheral blood stem cell transplant. A HLA [human leukocyte antigen] matched donor has been identified for the patient.
>
> Although risky, a donor transplant offers the only prospect of a cure for the patient; he would be unable to have such a transplant in his country of origin.
>
> ...
>
> Conclusions
>
> The [Aliens Office's medical adviser] concludes ... [that] the condition of the patient's vital organs is not directly life-threatening. That all depends on what is meant by 'directly'. The patient is suffering from a cancer that is potentially fatal in

> the short term (median survival time nineteen months) ... and most likely within six months without appropriate treatment.
>
> Moreover, if the treatment is not tailored to the patient's overall immunosuppression, there is a serious risk of death caused by infection, especially in a Gold stage II COPD patient with a history of tuberculosis. ..."

47. On 1 August 2015 treatment with Ibrutinib became eligible for reimbursement in Belgium.

48. Because of the side-effects of this treatment, which might compromise the donor transplant, the dose of Ibrutinib was reduced from three doses to one dose per day.

2. Other illnesses

49. In 2000 the applicant was diagnosed with active pulmonary tuberculosis. He was treated for that condition under the emergency medical assistance and social welfare assistance schemes.

50. During 2008 the applicant's tuberculosis was found to have become active again.

51. As a result of that disease the applicant developed chronic obstructive pulmonary disease, for which he received treatment.

52. In addition, the applicant suffered from hepatitis C, which was also diagnosed in 2006 and was probably linked to a history of drug abuse. It was accompanied by liver fibrosis. According to a medical report dated 24 April 2015 his hepatitis, which had been treated effectively in 2012 and 2013, had become stable.

53. A magnetic resonance imaging scan carried out in March 2015 showed that the applicant had suffered a stroke, resulting in permanent paralysis of the left arm. The effects of the stroke were managed with an anti-epilepsy drug.

E. Requests for regularisation on medical grounds

1. First request for regularisation on medical grounds

54. On 10 September 2007, relying on Articles 3 and 8 of the Convention and alleging, in particular, that he would be unable to obtain treatment for his leukaemia (see paragraph 34 above) if he were sent back to Georgia, the applicant lodged a first request for regularisation on medical grounds on the basis of section 9*ter* of the Aliens Act.

55. On 26 September 2007 the Aliens Office refused the request on the ground that, under section 9*ter*(4) of the Act, the applicant was excluded from its scope on account of the serious crimes which had given rise in the meantime to a ministerial deportation order issued on 16 August 2007 (see paragraph 73 below).

56. On 17 December 2007 the applicant lodged a request for a stay of execution of that decision under the ordinary procedure, together with an application to set aside. He alleged in particular that the Aliens Office had relied exclusively on the ministerial deportation order in excluding him from the scope of section 9*ter* of the Aliens Act, without investigating his state of health or the risk he ran of being subjected to treatment contrary to Article 3 of the Convention, and without weighing up the interests at stake as required by Article 8 of the Convention.

57. In a judgment of 20 August 2008 the Aliens Appeals Board dismissed the applicant's claims in the following terms:

> "It is clear from the wording of [section 9*ter*] that there is nothing to prevent the administrative authority, when dealing with a request for leave to remain on the basis of the above-mentioned section 9*ter*, from ruling immediately on the exclusion of the person concerned from the scope of the said section 9*ter* without first being required to take a decision on the medical evidence submitted to it, if it considers at the outset that there are substantial grounds for believing that the person concerned has committed any of the acts referred to in section 55/4, cited above. Indeed, the examination of that evidence is superfluous in such a situation since the person responsible for taking the decision has in any event already decided that the individual is excluded from the scope [of section 9*ter*].
>
> ...
>
> As regards the alleged violation of Article 3 of the Convention, it should be observed that the decision complained of in the present application is not accompanied by any removal measure, with the result that the alleged risk of discontinuation of treatment in the event of the applicant's return to Georgia is hypothetical."

58. The Aliens Appeals Board also dismissed the complaint under Article 8 of the Convention in view of the fact that the impugned decision had not been accompanied by any removal measure.

2. Second request for regularisation on medical grounds

59. In the meantime, on 3 April 2008, the applicant had lodged a second request for regularisation on medical grounds on the basis of section 9*ter* of the Aliens Act. In addition to his various health problems he referred to the fact that he had been continuously resident in Belgium for eleven years and had lasting social ties in that country, and to his family situation. He also argued that if he was sent back he would be left to fend for himself while ill in a country in which he no longer had any family ties and where the medical facilities were unsuitable and expensive.

60. The request was refused by the Aliens Office on 4 June 2008 for the same reason it had cited previously (see paragraph 55 above).

61. On 16 July 2008 the applicant lodged an application with the Aliens Appeals Board to have that decision set aside.

62. In a judgment of 21 May 2015 the Aliens Appeals Board rejected the application to set aside. It held that, where the above-mentioned exclusion

clause was applied, the Aliens Office was not required to rule on the medical and other evidence contained in the request for regularisation. According to the Aliens Appeals Board, such examination was superfluous by virtue of the exclusion clause alone. The Board pointed out that its task was to review the lawfulness of the measure. This review did not permit it to substitute its own assessment of the facts that were deemed to have been established and were not apparent from the administrative file; rather, its task was confined to ensuring that the formal requirement to provide reasons had been complied with and that the reasoning was not based on a manifest error of assessment. As to the complaints alleging a violation of Articles 2 and 3 of the Convention, the Aliens Appeals Board stated that the assessment of the medical situation of an alien facing removal whose request for regularisation had been rejected should be carried out, as applicable, at the time of enforcement of the removal measure.

63. On 22 June 2015 the applicant lodged an appeal on points of law against that judgment with the *Conseil d'État*. One of the grounds of appeal was based on Articles 2 and 3 of the Convention. The applicant submitted that the Aliens Appeals Board could not have been unaware that several orders to leave the country had already been issued against him prior to the decision not to examine his request for leave to remain, and that his expulsion had been suspended only as a result of the interim measure applied by the Court (see paragraph 87 below). The applicant further argued that the Aliens Appeals Board had breached the provisions of the Convention by postponing until the date of enforcement of the removal measure the examination of the medical situation of an alien suffering from a serious illness who had requested leave to remain on medical grounds, without studying the specific risks.

64. In an order of 9 July 2015 the appeal on points of law was declared inadmissible. The *Conseil d'État* held that, contrary to the applicant's assertion, the grounds for setting aside advanced before the Aliens Appeals Board had simply stressed, in a theoretical and general manner, that section 9*ter* of the Act encompassed the application in domestic law of the obligation under Articles 2 and 3 of the Convention prohibiting the removal of a seriously ill person if such a measure was liable to result in death or inhuman and degrading treatment; no specific explanation had been given, however, as to how the applicant himself risked facing that situation. The *Conseil d'État* also observed that the applicant had not argued before the Aliens Appeals Board that orders to leave the country had been issued against him, or that a removal measure could be revived; he was therefore unable to rely on those arguments in his appeal on points of law. In any event, the *Conseil d'État* held that the Aliens Appeals Board had in no way erred in finding that the examination of the medical situation of an alien facing removal whose request for leave to remain had been rejected should be carried out, as applicable, at the time of enforcement of the measure.

3. Review of the applicant's situation in connection with the proceedings before the Court

65. The applicant was requested to report to the Aliens Office's medical service on 24 September 2012 for a medical check-up and to enable the Belgian authorities to reply to the Court's questions.

66. The report prepared by the medical adviser on that occasion listed the consultations held and the treatment that had been administered to the applicant. It stated that his leukaemia had stabilised after several cycles of chemotherapy and was being monitored closely, and that the applicant was under medical supervision for his lung disease.

67. Referring to the Court's judgment in the case of *N. v. the United Kingdom* ([GC], no. 26565/05, ECHR 2008), the report concluded as follows:

> "On the basis of this medical file it cannot ... be concluded that the threshold of severity required by Article 3 of the Convention, as interpreted by the Court, has been reached ...
>
> It appears from the medical file that the diseases to which the medical certificates refer ... do not disclose a direct threat to the patient's life. The conditions from which the applicant suffers are serious and potentially fatal but are currently under control.
>
> None of the patient's vital organs is in a condition that is directly life-threatening. His hepatitis C is not currently causing any cirrhosis. The pulmonary disease is being controlled by treatment consisting solely of an inhaled corticosteroid. The patient's haematological disorder is currently stable. The lymph nodes are no longer swollen and the patient's haemolytic anaemia is resolved. Chemotherapy has been discontinued for the time being.
>
> ... Neither monitoring of the patient's vital parameters nor ongoing medical supervision is necessary in order to ensure the patient's survival.
>
> The disease cannot be considered at present to be in the terminal stages. ... The patient is close to Binet stage A at present. His chronic obstructive pulmonary disease is also currently under control."

68. A medical report drawn up on 23 June 2015 by the medical adviser to the Aliens Office provided a detailed review of the applicant's clinical history and current state of health and the treatment being administered. It concluded as follows:

> "On the basis of [the] medical file it cannot therefore be concluded that the threshold of severity set by Article 3 of the Convention, which requires a risk to life on account of the applicant's critical condition or the very advanced stage of his or her illness, has been reached (*N. v. the United Kingdom* [GC], no. 26565/05, ECHR 2008, and *D. v. the United Kingdom*, 2 May 1997, *Reports of Judgments and Decisions* 1997-III).
>
> The diseases referred to in the most recent update to the medical file ([Dr L.], 25 May 2015) ... do not disclose:
>
> – a direct threat to the life of the patient. The illnesses from which the applicant suffers are serious and potentially fatal but are currently under control. ...

– that the condition of the patient's vital organs is directly life-threatening. ...

– a critical state of health. Neither monitoring of the patient's vital parameters nor ongoing medical supervision is necessary in order to ensure the patient's survival. The disease cannot be said to be in the terminal stages at present ..."

F. Removal proceedings and the Court's intervention

1. Order to leave the country under the Dublin Convention

69. On 10 June 1999, on the grounds that the Belgian authorities did not have responsibility under the Dublin Convention for examining the asylum application, the Aliens Office issued an order for the applicant and his wife to leave the country with a view to their transfer to Italy. However, their departure was postponed because the applicant's wife was pregnant.

70. After the birth, the family was granted leave to remain until 14 October 1999 because the new-born baby was in hospital. Their leave to remain was subsequently extended until 15 March 2000 on the ground that the child needed regular supervision by a paediatric gastroenterologist.

71. The time-limit for enforcement of the order for the family to leave the country was extended several times during the first half of 2000 because of the need to treat the applicant's tuberculosis (see paragraph 49 above) and the six-month course of anti-tubercular treatment required by the whole family.

72. On 23 October 2000 the Aliens Office informed the applicant's lawyer that the time-limit had been extended until such time as the applicant and his child were fully recovered.

2. Ministerial deportation order

73. On 16 August 2007, while the applicant was serving a prison sentence (see paragraph 17 above), the Minister of the Interior, in a deportation order issued under section 20 of the Aliens Act, directed the applicant to leave the country and barred him from re-entering Belgium for ten years. The order referred to the applicant's extensive criminal record, allied to the fact that "the pecuniary nature of the offences demonstrate[d] the serious and ongoing risk of further breaches of public order".

74. The order became enforceable on the date of the applicant's release but was not in fact enforced because the applicant was undergoing medical treatment at the time.

75. The applicant, who was in hospital, did not contact his lawyer in order to lodge an application to have the ministerial order set aside. However, on 15 November 2007 the lawyer lodged an application on his own initiative. In a judgment of 27 February 2008 the Aliens Appeals Board rejected the application as being out of time.

76. In the meantime, as the applicant was about to finish serving the prison sentence imposed in 2005, he was transferred on 14 August 2007 to Bruges Prison with a view to implementation of the ministerial deportation order. He remained there until 27 March 2010, when he was transferred to Merksplas Prison.

77. During his time in Bruges Prison the applicant was visited on an almost daily basis by his wife and/or his children. The authorities of Merksplas Prison, to which he was subsequently transferred and where he remained until 11 July 2010, informed the applicant that they did not have a record of the number of visits he had received.

3. Orders to leave the country following refusal of the regularisation request

78. In parallel with its decision of 7 July 2010 refusing the applicant's request for regularisation on exceptional grounds (see paragraph 29 above), the Aliens Office on 7 July 2010 issued an order for him to leave the country, together with an order for his detention. These orders, made on the basis of section 7(1)(1) of the Aliens Act, were served on the applicant on 11 July 2010.

79. Also on 7 July 2010 it was decided that the applicant should be transferred on 13 July to the Merksplas closed facility for illegal aliens with a view to his removal to Georgia.

80. On 16 July 2010 the Georgian embassy in Brussels issued a travel document valid until 16 August 2010.

81. On the same day the applicant lodged a request for a stay of execution under the ordinary procedure, together with an application to set aside, directed specifically against the above-mentioned order to leave the country of 7 July 2010.

82. On 30 July 2010, two days after the indication by the Court of an interim measure (see paragraph 87 below), an order was made for the applicant's release and he was given until 30 August 2010 to leave the country voluntarily.

83. In a letter dated 30 August 2010 counsel for the applicant applied for an extension of the time-limit for enforcement of the order to leave the country. The time-limit was initially extended until 13 November 2010 and was subsequently extended several times until 19 February 2011.

84. On 18 February 2012 the Aliens Office issued an order to leave the country "with immediate effect" pursuant to the ministerial deportation order of 16 August 2007.

85. The above-mentioned request and application were rejected by the Aliens Appeals Board in a judgment of 29 May 2015 on the ground that the applicant had not attended the hearing or been represented.

4. Indication of an interim measure under Rule 39 of the Rules of Court

86. In the meantime, on 23 July 2010, the applicant applied to the Court for interim measures under Rule 39 of the Rules of Court. Relying on Articles 2, 3 and 8 of the Convention, he alleged that if he were removed to Georgia he would no longer have access to the health care he required and that, in view of his very short life expectancy, he would die even sooner, far away from his family.

87. On 28 July 2010 the Court indicated to the Belgian Government that it was desirable, in the interests of the parties and the proper conduct of the proceedings before the Court, to suspend enforcement of the order for the applicant to leave the country issued on 7 July 2010 "pending the outcome of the proceedings before the Aliens Appeals Board".

G. Other events

88. The applicant was arrested on several occasions between 2012 and 2015 for shoplifting.

89. In addition, in July 2013 the Aliens Office was contacted by the Luxembourg police and customs cooperation centre, which reported that the applicant was in detention in the Grand Duchy of Luxembourg.

90. In May 2014 a warrant was issued for the applicant's arrest for theft. The applicant was detained in Bruges Prison and released a few days later.

91. Two notarised deeds of sale dated 24 March and 5 August 2015 record the transfer by the applicant, represented by E.B., to a certain Aleksandre Paposhvili, of a plot of building land for a sum of 30,000 euros (EUR) and a plot of farmland for a sum of EUR 5,000. Both plots are located in the village of Kalauri in the Gurjaani region of Georgia.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Regularisation procedures

1. Regularisation on exceptional grounds

92. In order to be allowed to remain in Belgium for more than three months, aliens must normally obtain permission before arriving in the country. Section 9(2) of the Aliens Act provides:

> "... Except where an international treaty, statute or royal decree otherwise provides, such permission [to remain in the Kingdom beyond the period laid down in section 6, namely for more than three months] shall be requested by the aliens concerned at the Belgian diplomatic mission or consulate responsible for their place of permanent residence or their temporary residence abroad."

93. Aliens whose residence status in Belgium is unlawful or precarious, and who wish to obtain long-term leave to remain without having to return to their country of origin, may apply directly in Belgium if they can claim exceptional circumstances. According to established case-law and practice, regularisation of residence status may be granted on a case-by-case basis under section 9*bis* (former section 9(3)) of the Aliens Act. Section 9*bis*(1) reads as follows:

> "In exceptional circumstances, and provided that the alien concerned is in possession of identity papers, leave to remain may be requested from the mayor of the municipality in which he or she is resident, who forwards the request to the Minister or his or her representative. Where the Minister or his or her representative grants leave to remain, the residence permit shall be issued in Belgium.
>
> ..."

94. The Act does not specify either the exceptional circumstances on the basis of which the request may be made from within Belgium or the substantive grounds on which leave to remain may be granted. It is for the Aliens Office to assess the circumstances alleged by the alien concerned in each individual case. It begins by examining the exceptional circumstances invoked, in order to determine whether the request is admissible. If this is the case, it rules subsequently on the substantive grounds relied on by the alien concerned in support of the request for leave to remain.

2. Regularisation on medical grounds

(a) Section 9*ter* of the Aliens Act

95. Section 9*ter* of the Aliens Act provides for the possibility of granting leave to remain on medical grounds. The first paragraph, as inserted by the Act of 15 September 2006, amended by the Act of 7 June 2009 and replaced by the Act of 29 December 2010, provided as follows at the material time:

> "1. Aliens resident in Belgium who provide proof of identity in accordance with paragraph 2 and who are suffering from an illness entailing a real risk to their life or physical well-being or a real risk of inhuman or degrading treatment if no appropriate treatment exists in their country of origin or previous country of residence may apply to the Minister or his or her representative for leave to remain in the Kingdom.
>
> The request must be made by registered letter to the Minister or his or her representative and must include the actual address of the alien concerned in Belgium.
>
> The alien concerned must submit the request together with all the relevant information concerning his or her illness and the availability and accessibility of appropriate treatment in the country of origin or the previous country of residence.
>
> He or she shall submit a standard medical certificate as provided for by royal decree approved by the Cabinet. The medical certificate shall indicate the illness, its degree of seriousness and the treatment considered necessary.

> The assessment of the risk referred to in the first sub-paragraph, the possibilities for treatment, the accessibility of such treatment in the country of origin or of previous residence, together with the assessment of the illness, its seriousness and the treatment considered necessary, as indicated in the medical certificate, shall be carried out by a medical officer or a doctor appointed by the Minister or his or her representative, who shall issue an opinion in this regard. The doctor in question may, if he or she deems necessary, examine the individual concerned and seek additional expert opinions."

96. The procedure for examining requests for regularisation takes place in two stages. The first stage involves an examination by an official of the Aliens Office of the admissibility of the request, with particular regard to the information that must be included on the medical certificate (indication of the illness, its seriousness and the treatment considered necessary). In that connection the Aliens Appeals Board has stated that "[the legislature's] aim of clarifying the procedure would be thwarted if [the Aliens Office] were required to carry out an in-depth examination of each medical certificate produced and the accompanying documents in order to ascertain the nature of the illness, its seriousness and the treatment considered necessary, given that the [official responsible] is neither a medical officer nor another doctor appointed for the purpose" (see, in particular, Aliens Appeals Board, judgment no. 69.508 of 28 October 2011). The second stage, which concerns only those requests deemed to be admissible, consists of a comprehensive review by the Aliens Office of the individual's state of health and a substantive assessment of the factors enumerated in the legislation, on the basis of the opinion of a medical officer or another doctor appointed for the purpose.

97. It is clear from the drafting history of section 9*ter* that the question whether appropriate and sufficiently accessible treatment exists in the receiving country is examined on a case-by-case basis, taking into account the requesting party's individual situation, assessed within the confines of the Court's case-law (explanatory report, *Doc. Parl.*, 2005-06, no. 51 2478/1, p. 35).

98. If the request is held to be well-founded a one-year residence permit is issued to the person concerned. The residence permit must be renewed each year. Five years after the lodging of the request, the person concerned acquires permanent residence status and is issued with a residence permit of unlimited duration.

99. Under paragraph 4 of section 9*ter* of the Aliens Act, aliens are excluded from the scope of that section where there are substantial grounds for believing that they have committed any of the acts referred to in section 55/4 of the Act, which provides:

> "An alien shall be excluded from the scope of subsidiary protection where there are substantial reasons for believing:

(a) that he or she has committed a crime against peace, a war crime or a crime against humanity as defined in the international instruments on the punishment of such crimes;

(b) that he or she has committed acts contrary to the purposes and principles of the United Nations as set forth in the Preamble and in Articles 1 and 2 of the Charter of the United Nations;

(c) that he or she has committed a serious crime.

The first sub-paragraph shall apply to persons who instigate the aforementioned crimes or acts or participate in them in any other manner."

100. It emerges from the drafting history of section 9*ter* that a seriously ill alien who is excluded from the scope of that section on one of the grounds referred to in section 55/4 will not be removed if his or her state of health is so serious that removal would constitute a breach of Article 3 of the Convention (explanatory report, cited above, p. 36).

(b) Recent developments in Belgian case-law

101. The case-law concerning the removal of seriously ill aliens has evolved recently. This case-law concerns the application of section 9*ter,* paragraph 1, to aliens who have not been excluded *a priori* from the scope of that provision. The change in the case-law occurred in response to a change in the practice of the Aliens Office following the introduction by an Act of 8 January 2012 of an admissibility filtering mechanism for "section 9*ter* requests", consisting in confining the application of section 9*ter* to situations falling within the ambit of Article 3 of the Convention as interpreted by the Court in its judgment in *N. v. the United Kingdom* (cited above).

102. The Aliens Appeals Board responded by observing that section 9*ter* of the Act was not limited to systematically requiring the existence of a risk "to the life" of the applicant, since it made provision, in addition to that risk, for two other situations, namely those entailing a real risk to physical well-being and those entailing a real risk of inhuman or degrading treatment (Aliens Appeals Board, judgments nos. 92.258, 92.308 and 92.309 of 27 November 2012). It further held that an immediate threat to life was likewise not an absolute precondition in the Court's case-law for a violation of Article 3, given that other "exceptional" humanitarian circumstances within the meaning of the Court's judgment in *D. v. the United Kingdom* (cited above) could act as a bar to removal (Aliens Appeals Board, judgments no. 92.393 of 29 November 2012 and no. 93.227 of 10 December 2012). Accordingly, all the circumstances of the case had to be taken into consideration.

103. On 19 June 2013 a Dutch-speaking Division of the *Conseil d'État* echoed this interpretation of section 9*ter*, paragraph 1. It held that, irrespective of the scope of application of Article 3 of the Convention, section 9*ter* was clear and applied to situations going beyond a direct threat

to the life of the applicant or the existence of a critical condition (*Conseil d'État*, judgment no. 223.961 of 19 June 2013). In judgments dated 28 November 2013 the same Division expressly found that the Aliens Appeals Board had erred in finding that Article 3 of the Convention could apply to situations other than those involving a serious, critical or terminal condition. However, that error did not mean that the Board's interpretation of section 9*ter*, paragraph 1, had been incorrect, as the provision in question went further than Article 3 of the Convention and covered a real risk of inhuman or degrading treatment on account of the absence of appropriate treatment in the country of origin (*Conseil d'État*, judgments nos. 225.632 and 225.633 of 28 November 2013). On 29 January 2014 the same Division specified that in so far as section 9*ter*, paragraph 1, referred to a real risk to life or physical well-being, it corresponded to Article 3 of the Convention (*Conseil d'État*, judgment no. 226.251 of 29 January 2014).

104. In the meantime, on 19 November 2013, a French-speaking Division of the *Conseil d'État* had adopted a completely different approach. According to that Division, the legislature had clearly sought to confine the benefit of section 9*ter* to aliens who were so "seriously ill" that their removal would amount to a violation of Article 3 of the Convention, and to ensure that the assessment in question was carried out in accordance with the Court's case-law as established in the case of *N. v. the United Kingdom*, cited above. The fact that section 9*ter* covered three specific situations did not mean that its scope of application differed from that of Article 3. The three categories of illness concerned, where they attained a minimum level of severity – which had to be high – were apt to satisfy the requirements of Article 3. The *Conseil d'État* went on to quash the Aliens Appeals Board's judgments of 27 November 2012 (see paragraph 102 above) on the grounds that they had unduly extended the scope of section 9*ter* (*Conseil d'État*, judgments nos. 225.522 and 225.523 of 19 November 2013).

105. The divergence in the case-law of the *Conseil d'État* was resolved on 16 October 2014 when the French-speaking Division adopted the same interpretation as the Dutch-speaking Division. Referring to the Opinion of Advocate General Bot of the Court of Justice of the European Union ("the CJEU") in the case of *M'Bodj* (C-542/13, see paragraph 121 below), which was pending at the time, to the effect that section 9*ter* of the Aliens Act afforded protection going beyond the subsidiary protection provided for by Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive"), the Division proposed an "autonomous" interpretation of section 9*ter*, paragraph 1, in so far as that provision concerned situations of inhuman or degrading treatment on account of the lack of appropriate treatment in the

receiving country (*Conseil d'État*, judgment no. 228.778 of 16 October 2014).

106. Following the clarification of the case-law of the *Conseil d'État*, the Aliens Appeals Board harmonised its own case-law in five judgments given by the full Board on 12 December 2014 (Aliens Appeals Board, judgments nos. 135.035, 135.037, 135.038, 135.039 and 135.041 of 12 December 2014).

107. This "autonomous" interpretation of section 9*ter* represents the current state of Belgian positive law. The above-mentioned judgments of the Aliens Appeals Board (see paragraph 106 above) contemplate two scenarios in which the issuing of a residence permit may be justified because of illness. The first scenario concerns aliens who are currently suffering from a life-threatening illness or a condition posing a current threat to their physical integrity; the alleged risk to life or physical integrity must be imminent and the alien concerned must be unfit to travel as a result. The second concerns aliens who risk being subjected to inhuman and degrading treatment if no appropriate treatment for their illness or condition exists in the receiving country. In this case, although it does not pose an imminent threat to life, the illness or condition in question must nevertheless attain a certain degree of seriousness.

B. Removal measures and re-entry bans for breaches of public order

108. The removal of aliens from Belgium is governed primarily by the provisions of section 7 of the Aliens Act, which at the material time read as follows:

> "Without prejudice to more favourable provisions contained in an international treaty, the Minister or his or her representative may order an alien who is not authorised or has not been given permission to remain for more than three months or to settle in the Kingdom to leave the country by a set date:
>
> (1) if the person concerned is resident in the Kingdom without being in possession of the documents required under section 2;
>
> (2) if he or she has remained in the Kingdom beyond the time-limit laid down in accordance with section 6, or is unable to provide evidence that this time-limit has not been exceeded;
>
> (3) if his or her conduct is deemed to pose a potential threat to public order or national security; ...
>
> In such cases the Minister or his or her representative may remove the person concerned immediately if they deem it necessary.
>
> The alien concerned may be detained for this purpose for the time strictly necessary to enforce the measure. The length of such detention may not exceed two months.
>
> Nevertheless, the Minister or his or her representative may extend the period of detention by two months where the steps necessary to remove the alien have been taken within seven working days of his or her placement in detention and have been

prosecuted with all due diligence, and where the alien's physical removal within a reasonable period remains possible.

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

After five months in detention the alien concerned must be released.

Where the protection of public order or national security so requires, the period of detention may be extended by successive one-month periods after the time-limit referred to in the preceding paragraph has expired; however, the total period of detention may not on this account exceed eight months."

109. According to the case-law of the *Conseil d'État*, the examination of the medical situation of an alien facing removal whose request for leave to remain has been rejected should be carried out, as applicable, at the time of enforcement of the removal measure rather than at the time of its issuance (*Conseil d'État*, judgment no. 11.427 of 9 July 2015).

110. The provisions of the Aliens Act relating to the removal of aliens on account of their personal conduct, and to re-entry bans, read as follows:

Section 20

"Without prejudice to more favourable provisions laid down in an international treaty or to section 21, the Minister may deport aliens who are not settled in the Kingdom if they have breached public order or national security or have failed to comply with the statutory conditions of their residence. Where, under the terms of an international treaty, no such measure may be taken until the alien concerned has been questioned, the opinion of the Aliens Advisory Board must be sought before a deportation order is issued. The other cases in which a deportation order may be issued only after consultation of the Aliens Advisory Board shall be determined by royal decree approved by the Cabinet.

Without prejudice to section 21, paragraphs 1 and 2, aliens who are settled in the Kingdom or have long-term residence status and who have committed a serious breach of public order or national security may be expelled by the Crown, after consultation of the Aliens Advisory Board. The expulsion order must be discussed by the Cabinet if the measure is based on the individual's political activities.

Deportation and expulsion orders must be based exclusively on the personal conduct of the alien concerned. The fact that he or she has made lawful use of the freedom to manifest opinions or the freedom of peaceful assembly or of association cannot serve as grounds for such an order."

Section 74/11

"1. The duration of the re-entry ban shall be determined in the light of all the particular circumstances of each case.

The removal order shall be accompanied by a re-entry ban of no more than three years' duration, in the following cases:

(1) where no time has been allowed for voluntary departure; or

(2) where a previous removal order has not been enforced.

The maximum three-year period referred to in the second sub-paragraph shall be increased to a maximum of five years where the third-country national has used fraud or other unlawful means in order to obtain or preserve his or her right of residence.

The removal order may be accompanied by a re-entry ban of more than five years where the third-country national presents a serious threat to public order or national security.

2. The Minister or his or her representative shall refrain from imposing a re-entry ban where the residence of a third-country national is terminated in accordance with section 61/3, third paragraph, or 61/4, second paragraph, without prejudice to the second sub-paragraph of paragraph 1(2), provided that the person concerned does not pose a threat to public order or national security.

The Minister or his or her representative may decide not to impose a re-entry ban in individual cases on humanitarian grounds.

3. The re-entry ban shall enter into force on the date of notification. It must not infringe the right to international protection as defined in sections 9*ter*, 48/3 and 48/4."

C. Appeals against the decisions of the administrative authorities

111. The Aliens Appeals Board is an administrative court established by the Act of 15 September 2006 reforming the *Conseil d'État* and setting up an Aliens Appeals Board. The duties, jurisdiction, composition and functioning of the Aliens Appeals Board are governed by the provisions of Part I *bis* of the Aliens Act as inserted by the aforementioned Act of 15 September 2006. The procedure before the Aliens Appeals Board is laid down by a royal decree of 21 December 2006.

112. The jurisdiction of the Aliens Appeals Board is twofold. Firstly, in proceedings concerning decisions of the Commissioner General for Refugees and Stateless Persons relating to the granting of refugee status and the various categories of subsidiary protection, the Board has full jurisdiction and the appeal has automatic suspensive effect. The Aliens Appeals Board may admit new evidence and all the issues of fact and law are transferred to it. In such cases it may uphold, set aside or amend the decision. Secondly, the decisions of the Aliens Office concerning residence and removal may be appealed against by way of an application to set aside for failure to comply with essential procedural requirements or with statutory formalities required on pain of nullity, or on the grounds that the Aliens Office exceeded or abused its powers.

113. The application to set aside does not automatically suspend enforcement of the measure complained of. However, the Aliens Act provides that it may be accompanied by a request for a stay of execution of the measure, either under the extremely urgent procedure, which itself automatically suspends enforcement of the measure, or under the "ordinary" procedure.

114. At the time of the events in the present case, requests for a stay of execution were governed by the provisions of section 39/82 of the Aliens Act, which provided as follows:

> "1. Where a decision by an administrative authority is subject to an application to set aside under section 39/2, the Board shall have sole jurisdiction to order a stay of execution.
>
> A stay of execution shall be ordered, once evidence has been heard from the parties or they have been duly convened, by means of a reasoned decision of the President of the division hearing the application or the aliens appeals judge whom he or she designates for the purpose.
>
> In cases of extreme urgency a stay of execution may be ordered on an interim basis without evidence having been heard from some or any of the parties.
>
> Applicants who request a stay of execution must opt for either the extremely urgent procedure or the ordinary procedure. They may not, simultaneously or consecutively, either seek a second time to have the third sub-paragraph applied or re-apply for a stay of execution in the application referred to in paragraph 3, on pain of inadmissibility.
>
> By way of derogation from the fourth sub-paragraph and without prejudice to paragraph 3, the rejection of a request for a stay of execution under the extremely urgent procedure shall not prevent the applicant from subsequently requesting a stay of execution under the ordinary procedure, where the application under the extremely urgent procedure was rejected on the grounds that the extreme urgency of the situation was not sufficiently established.
>
> 2. A stay of execution may be ordered only if the grounds relied on are sufficiently serious to warrant setting aside the impugned decision, and if immediate enforcement of the decision is liable to cause serious, virtually irreparable damage.
>
> Judgments ordering a stay of execution may be recorded or amended at the request of the parties.
>
> 3. Except in cases of extreme urgency the request for a stay of execution and the application to set aside must be submitted in a single document.
>
> The title of the application should specify whether an application to set aside is being lodged or a request for a stay of execution together with an application to set aside. Failure to comply with this formality will result in the application being treated solely as an application to set aside.
>
> Once the application to set aside has been lodged any subsequent request for a stay of execution shall be inadmissible, without prejudice to the possibility for the applicant to lodge, in the manner referred to above, a fresh application to set aside accompanied by a request for a stay of execution, if the time-limit for appeals has not expired.
>
> The application shall include a statement of the grounds and facts which, in the applicant's view, justify a stay of execution or an order for interim measures, as applicable.
>
> Any order for a stay of execution or other interim measures issued prior to the lodging of the application to set aside the decision shall be immediately lifted by the Division President who issued it or by the aliens appeals judge designated by him or her, if the judge observes that no application to set aside setting out the grounds for

such measures has been lodged within the time-limit specified by the procedural regulations.

4. The Division President or the aliens appeals judge designated by him or her shall rule on the request for a stay of execution within thirty days. If a stay of execution is ordered a ruling shall be given on the application to set aside within four months of delivery of the judicial decision.

If the alien in question is the subject of a removal order or an order refusing admission which is to be enforced imminently, and has not yet lodged a request for a stay of execution, he or she may request a stay of execution of the decision under the extremely urgent procedure. If he or she lodged a request under the extremely urgent procedure in accordance with the present provision no later than five days, but no earlier than three working days, following notification of the decision, the request shall be examined within forty-eight hours of its receipt by the Board. If the Division President or the aliens appeals judge hearing the case does not give a decision within that time, the First President or the President shall be informed and shall take the necessary action to ensure that a decision is given within seventy-two hours of the request being received. He or she may also examine the case and take the decision. If no stay of execution is granted the measure shall again become enforceable.

..."

115. If the person concerned opted for the "ordinary" procedure in requesting a stay of execution, he or she could apply for interim measures during the proceedings, as a matter of extreme urgency if necessary, in accordance with section 39/84 of the Act.

116. For a request for a stay of execution or for interim measures to be granted as a matter of extreme urgency, the enforcement of the removal measure had to be imminent (section 39/82, paragraph 4, second sub-paragraph, and section 39/85, first sub-paragraph, of the Aliens Act). The Aliens Appeals Board took the view that, for the danger to be imminent, the alien in question had to be subject to a coercive measure aimed at securing his or her departure from the country, that is to say, to an order for his or her detention in a closed facility with a view to removal (see, among many other authorities, judgment no. 456 of 27 June 2007 and judgment no. 7512 of 20 February 2008).

117. The Aliens Act was amended by the Act of 10 April 2014 laying down miscellaneous provisions concerning the procedure before the Aliens Appeals Board and the *Conseil d'Ėtat*. In particular, this Act reforms the procedure governing requests for a stay of execution under the extremely urgent procedure in order to take account of the Court's judgment in *M.S.S. v. Belgium and Greece* ([GC], no. 30696/09, ECHR 2011) and the subsequent rulings of the Aliens Appeals Board (see, in particular, the seven judgments of the full Board of 17 February 2011 (nos. 56.201 to 56.205, 56.207 and 56.208) and of the Constitutional Court (judgment no. 1/2014 of 16 January 2014 setting aside part of the Act of 15 March 2012 amending the Aliens Act, which introduced a fast-track procedure for asylum seekers from "safe" third countries).

118. Under the new provisions of sections 39/82 and 39/85, a request for a stay of execution under the extremely urgent procedure must be submitted within ten days, or five days if the impugned removal order is not the first issued against the person concerned. The criteria for determining extreme urgency remain unchanged. Removal must be imminent, a situation which applies first and foremost to persons in detention. However, the Act does not rule out the possibility that other situations may justify recourse to the extremely urgent procedure. Under the reformed provisions a risk of serious and irreparable harm is presumed where the alleged violation concerns rights from which no derogation is possible, such as those provided for by Articles 2, 3 and 4 of the Convention.

119. An administrative appeal on points of law may be lodged with the *Conseil d'État* against a judgment of the Aliens Appeals Board dismissing an application to set aside. The appeal does not have suspensive effect.

III. EUROPEAN UNION LAW

120. The issue of the threshold of severity which an illness must attain in order to justify the granting of a residence permit on medical grounds was recently raised before the CJEU. In the context of two cases – *Mohamed M'Bodj v Belgian State* (18 December 2014, Case C‑542/13) and *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida* (18 December 2014, Case C-562/13) – the CJEU was called upon to address the relationship between section 9*ter* of the Aliens Act and European Union ("EU") law.

121. In *M'Bodj* (paragraphs 39-47), the CJEU held that the granting of leave to reside on medical grounds to persons who did not satisfy the essential requirements making them eligible for subsidiary protection under the Qualification Directive could not be regarded as a more favourable standard for the purposes of Article 3 of the Directive in the context of such subsidiary protection, and thus fell outside the scope of application of the Directive. Even taking into account the case-law established in *N. v. the United Kingdom*, according to which, in very exceptional cases concerning the expulsion of a seriously ill alien, humanitarian grounds could be invoked in order to trigger the protection of Article 3 of the Convention, the risk of deterioration in the health of a third-country national suffering from a serious illness as a result of the absence of appropriate treatment in the receiving country was not sufficient, according to the CJEU, to warrant that person being granted subsidiary protection unless the harm took the form of conduct on the part of a State or non-State third party.

122. In the case of *Abdida* (paragraphs 33 and 38-63), the CJEU held that while leave to reside on medical grounds did not come within the scope of the Qualification Directive, decisions refusing such leave were covered by Directive 2008/115/EC of the European Parliament and of the Council of

16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the "Return Directive"). As a return decision, a decision refusing leave to reside on medical grounds was subject to observance of the safeguards provided for by the Return Directive and by the Charter of Fundamental Rights of the EU. Article 19 § 2 of the Charter stated that no one could be removed to a State where there was a serious risk that he or she would be subjected to torture or other inhuman or degrading treatment or punishment. Bearing in mind that under Article 52 § 3 of the Charter, the rights enshrined therein had, as a minimum, the same meaning and scope as the equivalent rights guaranteed by the Convention, the CJEU inferred from the case-law established in *N. v. the United Kingdom* that the decision to remove an alien suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness were inferior to those available in the returning State might raise an issue under Article 3 of the Convention in very exceptional cases, where the humanitarian grounds against removal were compelling. Those very exceptional cases were characterised, in the CJEU's view, by the seriousness and the irreparable nature of the harm that might be caused by the removal of a third-country national to a country in which there was a serious risk that he or she would be subjected to inhuman or degrading treatment. The CJEU further held that remedies in respect of a decision refusing leave to reside on medical grounds must have suspensive effect, in accordance with the Strasbourg Court's case-law. This implied that provision had to be made for the applicant's basic needs to be met pending a ruling on his or her appeal in accordance with the Return Directive.

IV. OTHER RELEVANT MATERIALS

123. Basing its findings, *inter alia*, on the information referred to in the Chamber judgment (paragraphs 90-92), the European Committee of Social Rights assessed the conformity of the Georgian health-care system with Article 11 § 1 of the European Social Charter (Right to protection of health, Removal of the causes of ill-health) and adopted the following conclusions (Conclusions 2015, Georgia, Article 11 § 1):

> "...
>
> The Committee takes note of the information submitted by Georgia in response to the conclusion that it had not been established that there was a public health system providing universal coverage (Conclusions 2013, Georgia).
>
> The Committee recalls that the health care system must be accessible to everyone. The right of access to care requires *inter alia* that the cost of health care should be borne, at least in part, by the community as a whole (Conclusions I (1969), Statement of Interpretation on Article 11) and the cost of health care must not represent an

excessively heavy burden for the individual. Out-of-pocket payments should not be the main source of funding of the health system (Conclusions 2013, Georgia).

The report states that on 28 February 2013 a Universal Health Care Programme was launched for persons without medical insurance. The first phase of the programme ensured citizens with a basic medical package, including primary health care and emergency hospitalisation. Since 1 July 2013 the programme has been expanded to include more services of primary health care and emergency hospitalisation, emergency outpatient care, planned surgeries, treatment of oncological diseases and child delivery. According to recent data (April 2014), all citizens of Georgia are now provided with basic healthcare, approximately 3.4 million people in the framework of the Universal Health Care Programme, 560,000 people are beneficiaries of the State Health Insurance Programme and about 546,000 people have a private or corporate insurance.

The Committee notes that the Government has declared health care as a priority field, resulting in funding for state health care programmes almost doubling: from 365 million GEL in 2012 (€ 139 million) to 634 million GEL in 2013 (€ 241 million). State spending as a share of GDP has increased from 1.7% to 2.7% and as a share of the state budget from 5% to 9%.

However, the Government acknowledges that despite improvements the cost of medication remains high amounting to 35% of state expenditure on health care. The report does not provide information on out-of-pocket payments as a share of total spending on health care, but according to WHO data it was still between 60% and 70% in 2011 (compared to about 16% on average for EU-27). Very limited coverage of medication costs is now provided under the Universal Health Care Programme, for example for emergency care, chemotherapy and radiotherapy, but the general lack of coverage of medication costs is a major point of dissatisfaction among beneficiaries of the programme according to a recent evaluation (Universal Healthcare (UHC) Program Evaluation by the USAID Health System Strengthening Project, April 2014). The Committee notes the examples provided by the Government of coverage of certain medication costs under the State Health Insurance Programme.

The report states that as a result of deregulation measures the pharmaceutical market has become free and competitive, however no evidence is provided to show that the price of medication has become generally more accessible, especially for vulnerable groups and those with chronic conditions.

While the Committee considers that the Universal Health Care Programme is a positive step forward and that the role of out-of-pocket payments as a source of funding of the health system may have been reduced somewhat, it still considers that the high proportion of out-of-pocket payments for health care, and in particular the high medication costs, represent too high a burden for the individual effectively being an obstacle to universal access to health care. The situation is therefore not in conformity with the Charter.

Conclusion

The Committee concludes that the situation in Georgia is not in conformity with Article 11§1 of the Charter on the ground that out-of-pocket payments in general and medication costs in particular represent too high a burden for the individual effectively being an obstacle to universal access to health care."

THE LAW

I. PRELIMINARY ISSUES

124. Following the applicant's death, his relatives expressed the wish to pursue the proceedings (see paragraph 1 above).

125. The respondent Government did not submit any observations on this issue.

126. The Court normally permits the next-of-kin to pursue an application, provided he or she has a legitimate interest, where the original applicant has died after lodging the application with the Court (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000‑XII, and *Murray v. the Netherlands* [GC], no. 10511/10, § 79, ECHR 2016). In the present case, the Court takes note of the wish expressed by the applicant's family (see paragraph 1, above) to pursue the proceedings. Having regard to its conclusion in paragraph 133 below, however, it considers that it is unnecessary to determine whether the family have a legitimate interest in that regard.

127. The Court must nevertheless ascertain whether, in view of the applicant's death and the nature of the alleged violations, the application should be struck out of the list of cases or whether, on the contrary, there are special circumstances requiring its continued examination pursuant to Article 37 § 1 *in fine.*

128. In that connection, Article 37 § 1 of the Convention provides:

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

129. The Court reiterates that the human rights cases before it generally also have a moral dimension, which must be taken into account when considering whether the examination of an application after the applicant's death should be continued (see *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX, and *Malhous* (dec.), cited above).

130. The Court has repeatedly stated that its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the States' observance of the engagements undertaken by them. Although the primary purpose of the Convention system is to provide

individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States (see *Karner,* cited above, § 26).

131. The Court notes that the present case was referred to the Grand Chamber on 20 April 2015 in accordance with Article 43 of the Convention, which provides that cases can be referred if they raise "a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance".

132. The Court observes that there are important issues at stake in the present case, notably concerning the expulsion of aliens who are seriously ill. Thus, the impact of this case goes beyond the particular situation of the applicant, unlike most of the similar cases on expulsion decided by a Chamber (compare *F.G. v. Sweden* [GC], no. 43611/11, § 82, ECHR 2016).

133. Having regard to the foregoing, the Court finds that special circumstances relating to respect for human rights as defined in the Convention and the Protocols thereto require it to continue the examination of the application in accordance with Article 37 § 1 *in fine* of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

134. The applicant alleged that substantial grounds had been shown for believing that if he had been expelled to Georgia he would have faced a real risk there of inhuman and degrading treatment contrary to Article 3 of the Convention and of a premature death in breach of Article 2. Those Articles provide:

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.

..."

Article 3

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

A. The Chamber judgment

135. The Chamber began by examining whether the applicant's removal to Georgia would breach Article 3 of the Convention (see paragraphs 117-26 of the Chamber judgment).

136. It observed that, according to the case-law established in *N. v. the United Kingdom* ([GC], no. 26565/05, ECHR 2008), Article 3 protected aliens suffering from an illness against removal only in very exceptional cases, where the humanitarian grounds against the removal were compelling. The fact that the individual's circumstances, including his life expectancy, would be significantly reduced if he were to be removed did not constitute such grounds. In the instant case, the illnesses from which the applicant suffered were all stable and under control as a result of the treatment received in Belgium; he was fit to travel and his life was not in imminent danger.

137. The Chamber noted that medication to treat the applicant's illnesses existed in Georgia. It acknowledged that its accessibility was not guaranteed and that, owing to a shortage of resources, not all the persons concerned received all the medicines and treatment they required. Nevertheless, in view of the fact that the applicant would not be left wholly without resources if he were to return, the fact that the Belgian authorities had been providing him with medical assistance while the case was pending before the Court and the fact that Georgia was a Contracting Party to the Convention, the Court held that, as matters stood, there were no exceptional circumstances precluding the applicant's removal.

138. The Chamber considered that the examination of the applicant's complaints from the standpoint of Article 2 did not lead to a different conclusion (see paragraph 127 of the Chamber judgment).

B. The parties' observations before the Grand Chamber

1. The applicant

139. The applicant submitted that, in keeping with the Court's case-law as established in the judgments in *M.S.S. v. Belgium and Greece* ([GC], no. 30696/09, ECHR 2011) and *Tarakhel v. Switzerland* ([GC], no. 29217/12, ECHR 2014 (extracts)), the alleged violation of Article 3 of the Convention had to be examined *in concreto* and in the light of all the facts of the case, taking into consideration the accessibility of treatment in the country of destination and the particular vulnerability of the person concerned.

140. The applicant's particular vulnerability resulted primarily from his state of health. His leukaemia had reached the most serious stage, Binet stage C. He had already undergone numerous courses of chemotherapy and the illness put him at risk of severe complications which called for regular

monitoring in a specialised setting. He was being treated with a drug – Ibrutinib – which was very expensive, costing around EUR 6,000 per month, and the dosage of which had to be continually adjusted to his treatment for hepatitis C. The latter had recently become active again following a relapse in 2012 and 2013 and also required very expensive treatment costing EUR 700 per day. As soon as his overall condition permitted, it was planned to treat him by means of a donor transplant, at an estimated cost of EUR 150,000. This was his only hope of a cure, and the search was under way for a compatible unrelated donor. The applicant's condition was further weakened by the repeated secondary infections caused by his chronic obstructive pulmonary disease, which had become severe and was not being monitored. In addition, the applicant had had three fingers amputated and his left arm was paralysed.

141. Besides the fact that, according to his doctor, neither Ibrutinib nor a donor transplant would have been available in Georgia, the applicant had had no guarantee that he would have had access in practice to life-saving treatment, given the proven shortcomings of the Georgian health-care system. In 2008 the Law on compulsory health insurance had been replaced by a two-tier system. People who could afford it were encouraged to take out private insurance and to avail themselves of the care provided by the hospitals that had gradually been privatised. Meanwhile, the least well-off (estimated at 20% of the population) were eligible in principle for free basic health care under a special universal insurance scheme. However, in practice, owing to an ineffective system for determining eligibility, the health-care costs of around half of the least well-off were still not covered. In addition, the provision of care and infrastructure to the least well-off was very limited.

142. Moreover, in the applicant's submission, the burden of proving the existence of real and practical access to health care in Georgia lay with the Belgian authorities, who had greater investigative resources.

143. More specifically, it was for the Belgian authorities, in the context of the request for regularisation based on section 9*ter* of the Aliens Act, to assess the risk of a breach of Article 3 of the Convention in the light of the information available to them on the applicant's personal, family and medical situation and the shortcomings of the Georgian health-care system, and not to deprive the applicant as a matter of principle of the only possibility open to him of asserting a fundamental right.

144. *A fortiori*, even assuming that the Belgian State had examined the request for leave to remain on the merits, it could not simply have presumed that the applicant would be treated in accordance with the requirements of the Convention. As made clear by the judgment in *M.S.S. v. Belgium and Greece*, the fact that Georgia was a Contracting Party to the Convention did not mean that it could be presumed *ipso facto* that Georgia could not be held responsible for breaches of the Convention. Acceptance of the treaties

guaranteeing respect for fundamental rights was not sufficient to afford adequate protection against the risk of ill-treatment where, as in the present case, reliable sources reported practices on the part of the authorities, or tolerated by them, that were manifestly in breach of the Convention.

145. On the contrary, it was for the Belgian authorities to make enquiries and to satisfy themselves in advance that the Georgian authorities could actually guarantee in practical terms that the applicant would receive the health care he needed in order to survive and that his illness would be treated in a manner compatible with human dignity. Access to medical care must not be theoretical but must be real and guaranteed.

146. Since the Belgian State had failed to contribute, at the time of the refusal of the applicant's request for leave to remain, to verifying the accessibility in Georgia, in real and practical terms, of the treatment which the applicant needed, and in the absence of guarantees in that regard, its responsibility under Article 3 of the Convention would have been engaged if it had proceeded with the applicant's removal to Georgia. If removed he would have been exposed to a risk of inhuman or degrading treatment and an earlier death owing to the withdrawal of the intensive and specialised treatment he had been receiving in Belgium, and to the end of any hope of receiving a donor transplant. In addition, there was the impact which his removal would have had on his family. All of these circumstances could be regarded by the Court as "exceptional" within the meaning of *D. v. the United Kingdom* (2 May 1997, *Reports of Judgments and Decisions* 1997−III) and *N. v. the United Kingdom* (cited above).

147. The applicant further submitted that the fact that his irregular residence status had continued for over seven years after he had requested leave to remain on medical grounds, without his request having been examined on the merits, had played a major part in placing him in a precarious and vulnerable situation.

148. In sum, the applicant had been in greater need of protection owing to his particular vulnerability linked to his state of health, the stakes in terms of his life and physical well-being, his emotional and financial dependency and the existence of his family ties in Belgium. The Belgian State's responsibility under Article 3 of the Convention stemmed from the fact that it was proceeding with the applicant's removal without taking these factors into account, thereby demonstrating a lack of respect for his dignity and placing him at serious risk, in the event of his return to Georgia, of a severe and rapid deterioration in his state of health leading to his swift and certain death.

149. The applicant requested the Court to go beyond its findings in *N. v. the United Kingdom* and to define, in the light of these considerations, a realistic threshold of severity that was no longer confined to securing a "right to die with dignity". He relied in that connection on the recent developments in the case-law of the Belgian courts, which had distanced

themselves from the findings in *N. v. the United Kingdom* and now afforded more extensive protection than that provided for under Article 3 of the Convention (see paragraphs 101 et seq. above).

2. The Belgian Government

150. The Government submitted that, although it was acknowledged in the Court's case-law that the responsibility of a Contracting Party could be engaged under Article 3 on account of the expulsion of an alien and his exposure to a risk of a breach of his economic and social rights, it nevertheless had to be taken into consideration that, where the person concerned suffered from an illness, neither the returning State nor the receiving State could be held directly responsible for the shortcomings of the health-care system and the repercussions on the health of the individual concerned. The case-law demonstrated that in order for the threshold of severity required by Article 3 to be attained in such cases the extreme nature of the applicant's living conditions or his or her extreme vulnerability had to be established. The circumstances contrary to human dignity had to be exceptional to such a degree that the person concerned, owing to his or her critical condition prior to removal, would inevitably be placed in a situation of intense suffering solely on account of the removal procedure and the complete absence of care and treatment in the receiving country. Human rights were not synonymous with compelling humanitarian considerations and a general obligation to provide social welfare assistance could not be inferred from Article 3 even in the name of human dignity.

151. In view of this case-law it could not be concluded that the criteria for engaging the responsibility of the Belgian State had been met in the present case.

152. With reference, firstly, to developments in the applicant's state of health, the Government argued that while his overall condition had deteriorated since the time of the Chamber judgment, mainly as a result of collateral diseases, and his condition was still life-threatening, the illnesses from which the applicant suffered had been kept under control for a long time by the medicines being administered to him in Belgium. According to the report of the Aliens Office's medical officer of 23 June 2015, the applicant's condition could not be regarded as critical, he was fit to travel, his illnesses were not directly life-threatening and none of his vital organs was in a condition that placed his life in immediate danger.

153. Furthermore, since the applicant had failed to provide more detailed information concerning the content of the study in the context of which his leukaemia was being treated, it was difficult to establish any objective basis for his general practitioner's assertion that the only option at this stage had been the administration of Ibrutinib followed by a donor transplant and that in the absence of that treatment the applicant's life expectancy would have been three months. Other factors entered into the equation, such as the

increase in life expectancy as a result of the medication, the feasibility of the operation, which itself depended on how the applicant's general condition evolved, and the low success rate of the operation. In sum, this was a private initiative on the part of the applicant's general practitioner and appeared to be a hypothetical, strategic choice linked to research considerations. It was questionable whether there was a need to ensure its continuation. As to the applicant's other illnesses, it had not been possible to assess their state of advancement on the basis of the medical information provided.

154. The Government submitted that, in view of this lack of clarity and of the complex and risky nature of the transplant procedure, consideration might have been given, on the basis of the information in the medical file, to abandoning the idea of a donor transplant and instead continuing to treat the applicant with Ibrutinib in Georgia under the supervision of a haematology department.

155. The next issue was whether there had been reason to believe that, following his removal, the applicant would have faced a serious risk of inhuman and degrading treatment. The Government argued that the burden of proof in that regard depended on whether the threshold of severity defined in *D. v. the United Kingdom* and *N. v. the United Kingdom* (both cited above) was changed. If the current case-law was maintained, the disparity in the level of care between the returning State and the receiving State was relevant only if the person's condition was critical at the time of his or her expulsion. If, on the other hand, it was now a question of providing evidence, not of the conditions in which the person concerned would die but of the conditions in which he or she should be kept alive, the burden of proof shifted to the living conditions in the receiving State. This shift raised a number of issues.

156. One of the factors to be taken into consideration was the exact personal situation of the individual concerned and in particular the ties he or she had maintained with his or her country of origin and the resources available to him or her in order to continue treatment. The applicant had not provided any detailed information on that subject. Another factor was the situation of the social welfare system in the receiving State. The assessment of that situation was, by definition, complex and general and would not allow a specific treatment to be identified. Furthermore, if the sole criterion was the prospect of survival, it had to be ascertained at what stage in the applicant's treatment his expulsion should be deemed contrary to Article 3. Bearing in mind the evolving and multi-faceted nature of medical techniques, this decision was largely arbitrary. If, as the applicant had suggested, he should have been considered vulnerable and thus recognised as having victim status on account of the deterioration of his state of health, the question then arose as to what differentiated him from other Georgian nationals suffering from illness who were reliant on the Georgian health-care system. It would be difficult to argue that the difference lay in

his unlawful residence and his medical treatment in Belgium. Instead of producing clear answers, these questions gave rise to general assumptions based on speculation which were insufficient to establish the State's international responsibility beyond any reasonable doubt.

157. In the Government's view, even if this speculative aspect could have been overcome by obtaining assurances from the receiving State, as mentioned by the Court in *Tatar v. Switzerland* (no. 65692/12, 14 April 2015), such assurances should be deemed to have existed in the present case and to have been sufficient. The applicant had been medically fit to travel and the local authorities would have been informed of the specific nature of his condition or would have received a list of the medication needed. No more specific guarantees had been required in the absence of any indication that the Georgian authorities would have treated the applicant less favourably than the rest of the Georgian population or that he would have been unable to obtain medical treatment that took account of the specific features of his illness. In that connection, it might have been possible to continue to treat the applicant with Ibrutinib by having his medication sent through the post under the supervision of his doctor and with the assistance of doctors in Georgia. The Government added that if a donor transplant had proved possible they would not have taken any steps to prevent it or to secure the applicant's removal while he was in hospital.

158. Lastly, account had to be taken of the fact that the applicant would have been removed to Georgia, a Contracting Party to the Convention, and that if he had been shown to be particularly vulnerable, Belgium's responsibility could have been engaged only if it had been established that the Georgian State would manifestly fail to comply with its Convention obligations, for instance if it had been shown that the applicant would be entirely dependent on public assistance and would be in a state of deprivation contrary to human dignity. In the absence of any indication to that effect it should have been presumed that the Georgian authorities would comply with the requirements of the Convention. Should that have proved not to be the case, it would have been up to the applicant to apply to the Court under Article 34 of the Convention.

C. Observations of the third-party interveners

1. The Georgian Government

159. The Georgian Government submitted that, since 2012, they had implemented an extensive programme of universal medical cover which had resulted to date in 90% of the population being covered in terms of primary health care. If the applicant had returned to Georgia he would have had access to that universal cover in the same way as the local residents.

160. Furthermore, the Georgian health-care system could have provided appropriate treatment for the illnesses from which the applicant had suffered, in terms of both medical infrastructure and health-care personnel. The health care provided conformed to international standards and was approved by the domestic rules.

161. With regard to the treatment of tuberculosis, a State tuberculosis management programme had been approved by Decree no. 650 of 2 December 2014, which provided for free TB examinations and medication for Georgian citizens, stateless persons resident in Georgia, prisoners and any person in the country identified as a TB carrier. New experimental treatments for tuberculosis had been introduced in Georgia over the past several years and were available on the market in sufficient quantities. The applicant would be able to take advantage of them.

162. With regard to leukaemia, the Georgian Government submitted that the programme of universal medical cover covered diagnosis, treatment (including chemotherapy and radiotherapy), medical examinations and medication for persons living below the poverty threshold who were suffering from oncological diseases. Between 2013 and 2015, 859 patients with chronic lymphocytic leukaemia had received specialised chemotherapy. This was administered in five clinics in Georgia which were equipped with all modern medical facilities.

163. The main improvements made since the information provided at the Chamber stage concerned hepatitis C. Whereas, previously, hospital treatment for patients presenting with a significant viral load and/or cirrhosis had only been covered at 50% of an amount fixed by the Government, and medicines had not been reimbursed at all, since 20 April 2015 socially vulnerable families were entitled to 70% of the diagnostic costs and other patients to 30% of the costs. Under a special programme for residents of the city of Tbilisi, 100% cover was provided. Furthermore, access to medicines was free of charge "for all patients involved in the treatment protocol on the basis of a decision by a special commission". Finally, a pharmaceutical company had supplied Georgia with doses of a new antiretroviral treatment involving the drugs Solvadi and Harvoni, which could have been administered to the applicant if he had returned.

164. Lastly, with regard to chronic obstructive pulmonary disease, the Georgian Government stated that all modern forms of basic treatment were available in Georgia. There were also several hospitals in Tbilisi which treated this illness. Any surgery that might be needed would be covered by the programme of universal medical cover.

2. The Human Rights Centre of Ghent University

165. According to the Human Rights Centre, the present case afforded a unique opportunity to depart from the excessively restrictive approach

adopted by the Court in *N. v. the United Kingdom* with regard to the expulsion of persons suffering from serious illness.

166. The intervener began by arguing that this approach contrasted with the general case-law concerning potential violations of Article 3 of the Convention.

167. Hence, in the judgment in *Pretty v. the United Kingdom* (no. 2346/02, § 52, ECHR 2002-III), the Court had indicated on what grounds and to what extent the responsibility of the Contracting State could be engaged. The Court had observed the connection between a naturally occurring illness and its exacerbation by the measure for which the authorities could be held responsible. However, in *N. v. the United Kingdom*, while the Court had still referred to naturally occurring illness, it had not linked it to the measure taken by the authorities that would exacerbate the illness, but to the lack of sufficient resources to deal with it in the receiving country, from which it had inferred that the alleged future harm did not engage the direct responsibility of the Contracting State.

168. However, in cases concerning the expulsion of persons suffering from serious illness, the event that triggered the inhuman and degrading treatment was the intentional removal of the persons concerned from a place where they could obtain life-saving treatment to a place where they could not, thereby exposing them to a near-certain but avoidable risk of suffering and death that engaged the State's responsibility. The Court had consistently acknowledged that in cases where there were serious reasons for believing that the person concerned, if removed, faced a risk of being subjected to treatment contrary to Article 3, the absolute nature of that provision prohibited the Contracting Parties from proceeding with the person's removal.

169. In *N. v. the United Kingdom* the Court had also based its reasoning on the "search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" and on the observation that a finding of a violation "would place too great a burden on the Contracting States". Such an approach was in glaring contradiction with the case-law arising out of the judgment in *Saadi v. Italy* ([GC], no. 37201/06, ECHR 2008), in which the Court had clearly rejected the idea of conducting a balancing exercise or applying a test of proportionality in order to assess whether an applicant's removal was compatible with Article 3.

170. The intervener therefore suggested opting for an alternative to the criteria established in *N. v. the United Kingdom*, one that would be compatible with the absolute nature of the prohibition contained in Article 3. This would entail examining carefully all the foreseeable consequences of removal in order to determine whether the reduction in the life expectancy of the persons concerned and the deterioration in their quality of life would be such that the threshold of severity required by

Article 3 was attained. The parameters to be taken into consideration would be, in addition to the state of health of the persons concerned, the appropriateness or otherwise, in terms of quality and promptness, of the medical treatment available in the receiving State and whether it was actually accessible to the individuals concerned. This last criterion could be assessed taking into account the actual cost of treatment, the level of family support available to the persons concerned, the distance they would have to travel in order to have access to the treatment and specific factors linked to their state of health that would heighten their vulnerability.

171. Lastly, the intervener proposed that Article 3 of the Convention be found to impose a procedural obligation on the domestic authorities in the expelling State requiring them to seek or obtain assurances from the receiving State that the persons concerned would actually have access to the treatment they needed and thus be protected against treatment contrary to Article 3.

D. The Court's assessment

1. General principles

172. The Court reiterates that Contracting States have the right as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens (see *N. v. the United Kingdom*, cited above, § 30). In the context of Article 3, this line of authority began with the case of *Vilvarajah and Others v. the United Kingdom* (30 October 1991, § 102, Series A no. 215).

173. Nevertheless, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3 of 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 *Saadi*, cited above, § 125; *M.S.S. v. Belgium and Greece*, cited above, § 365; *Tarakhel*, cited above, § 93; and *F.G. v. Sweden,* cited above, § 111).

174. The prohibition under Article 3 of the Convention does not relate to all instances of ill-treatment. Such treatment has to attain a minimum level of severity if it is to fall within the scope of that Article. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *N. v. the United Kingdom*, cited above, § 29; see also *M.S.S. v. Belgium and Greece*, cited above, § 219; *Tarakhel*, cited above, § 94; and *Bouyid v. Belgium* [GC], no. 23380/09, § 86, ECHR 2015).

175. The Court further observes that it has held that the suffering which flows from naturally occurring illness may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see *Pretty*, cited above, § 52). However, it is not prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country (see *D. v. the United Kingdom*, cited above, § 49).

176. In two cases concerning the expulsion by the United Kingdom of aliens who were seriously ill, the Court based its findings on the general principles outlined above (see paragraphs 172-74 above). In both cases the Court proceeded on the premise that aliens who were subject to expulsion could not in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the returning State (see *D. v. the United Kingdom*, cited above, § 54, and *N. v. the United Kingdom*, cited above, § 42).

177. In *D. v. the United Kingdom* (cited above), which concerned the decision taken by the United Kingdom authorities to expel to St Kitts an alien who was suffering from Aids, the Court considered that the applicant's removal would expose him to a real risk of dying under most distressing circumstances and would amount to inhuman treatment (see *D. v. the United Kingdom*, cited above, § 53). It found that the case was characterised by "very exceptional circumstances", owing to the fact that the applicant suffered from an incurable illness and was in the terminal stages, that there was no guarantee that he would be able to obtain any nursing or medical care in St Kitts or that he had family there willing or able to care for him, or that he had any other form of moral or social support (ibid., §§ 52-53). Taking the view that, in those circumstances, his suffering would attain the minimum level of severity required by Article 3, the Court held that compelling humanitarian considerations weighed against the applicant's expulsion (ibid., § 54).

178. In the case of *N. v. the United Kingdom*, which concerned the removal of a Ugandan national who was suffering from Aids to her country of origin, the Court, in examining whether the circumstances of the case attained the level of severity required by Article 3 of the Convention, observed that neither the decision to remove an alien who was suffering from a serious illness to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State, nor the fact that the individual's circumstances, including his or her life expectancy, would be significantly reduced, constituted in themselves "exceptional" circumstances sufficient to give rise to a breach of Article 3 (see *N. v. the*

United Kingdom, cited above, § 42). In the Court's view, it was important to avoid upsetting the fair balance inherent in the whole of the Convention between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. A finding to the contrary would place too great a burden on States by obliging them to alleviate the disparities between their health-care system and the level of treatment available in the third country concerned through the provision of free and unlimited health care to all aliens without a right to stay within their jurisdiction (ibid., § 44). Rather, regard should be had to the fact that the applicant's condition was not critical and was stable as a result of the antiretroviral treatment she had received in the United Kingdom, that she was fit to travel and that her condition was not expected to deteriorate as long as she continued to take the treatment she needed (ibid., § 47). The Court also deemed it necessary to take account of the fact that the rapidity of the deterioration which the applicant would suffer in the receiving country, and the extent to which she would be able to obtain access to medical treatment, support and care there, including help from relatives, necessarily involved a certain degree of speculation, particularly in view of the constantly evolving situation with regard to the treatment of Aids worldwide (ibid., § 50). The Court concluded that the implementation of the decision to remove the applicant would not give rise to a violation of Article 3 of the Convention (ibid., § 51). Nevertheless, it specified that, in addition to situations of the kind addressed in *D. v. the United Kingdom* in which death was imminent, there might be other very exceptional cases where the humanitarian considerations weighing against removal were equally compelling (see *D. v. the United Kingdom*, cited above, § 43). An examination of the case-law subsequent to *N. v. the United Kingdom* has not revealed any such examples.

179. The Court has applied the case-law established in *N. v. the United Kingdom* in declaring inadmissible, as being manifestly ill-founded, numerous applications raising similar issues, concerning aliens who were HIV positive (see, among other authorities, *E.O. v. Italy* (dec.), no. 34724/10, 10 May 2012) or who suffered from other serious physical illnesses (see, among other authorities, *V.S. and Others v. France* (dec.), no. 35226/11, 25 November 2014) or mental illnesses (see, among other authorities, *Kochieva and Others v. Sweden* (dec.), no. 75203/12, 30 April 2013, and *Khachatryan v. Belgium* (dec.), no. 72597/10, 7 April 2015). Several judgments have applied this case-law to the removal of seriously ill persons whose condition was under control as the result of medication administered in the Contracting State concerned, and who were fit to travel (see *Yoh-Ekale Mwanje v. Belgium*, no. 10486/10, 20 December 2011; *S.H.H. v. the United Kingdom*, no. 60367/10, 29 January 2013; *Tatar*, cited above; and *A.S. v. Switzerland*, no. 39350/13, 30 June 2015).

180. However, in its judgment in *Aswat v. the United Kingdom* (no. 17299/12, § 49, 16 April 2013), the Court reached a different conclusion, finding that the applicant's extradition to the United States, where he was being prosecuted for terrorist activities, would entail ill-treatment, in particular because the conditions of detention in the maximum security prison where he would be placed were liable to aggravate his paranoid schizophrenia. The Court held that the risk of significant deterioration in the applicant's mental and physical health was sufficient to give rise to a breach of Article 3 of the Convention (ibid., § 57).

181. The Court concludes from this recapitulation of the case-law that the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in *N. v. the United Kingdom*, has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that provision. As a corollary to this, the case-law subsequent to *N. v. the United Kingdom* has not provided more detailed guidance regarding the "very exceptional cases" referred to in *N. v. the United Kingdom*, other than the case contemplated in *D. v. the United Kingdom*.

182. In the light of the foregoing, and reiterating that it is essential that the Convention is interpreted and applied in a manner which renders its rights practical and effective and not theoretical and illusory (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I; and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 175, ECHR 2012), the Court is of the view that the approach adopted hitherto should be clarified.

183. The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

184. As to whether the above conditions are satisfied in a given situation, the Court observes that in cases involving the expulsion of aliens, the Court does not itself examine the applications for international protection or verify how States control the entry, residence and expulsion of aliens. By virtue of Article 1 of the Convention the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid

on the national authorities, who are thus required to examine the applicants' fears and to assess the risks they would face if removed to the receiving country, from the standpoint of Article 3. The machinery of complaint to the Court is subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention (see *M.S.S. v. Belgium and Greece*, cited above, §§ 286-87, and *F.G. v. Sweden*, cited above, §§ 117-18).

185. Accordingly, in cases of this kind, the authorities' obligation under Article 3 to protect the integrity of the persons concerned is fulfilled primarily through appropriate procedures allowing such examination to be carried out (see, *mutatis mutandis*, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 182, ECHR 2012; *Tarakhel*, cited above, § 104; and *F.G. v. Sweden*, cited above, § 117).

186. In the context of these procedures, it is for the applicants to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (see *Saadi*, cited above, § 129, and *F.G. v. Sweden*, cited above, § 120). In this connection it should be observed that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment (see, in particular, *Trabelsi v. Belgium*, no. 140/10, § 130, ECHR 2014 (extracts)).

187. Where such evidence is adduced, it is for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it (see *Saadi*, cited above, § 129, and *F.G. v. Sweden*, cited above, § 120). The risk alleged must be subjected to close scrutiny (see *Saadi,* cited above, § 128; *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 214, 28 June 2011; *Hirsi Jamaa and Others*, cited above, § 116; and *Tarakhel*, cited above, § 104) in the course of which the authorities in the returning State must consider the foreseeable consequences of removal for the individual concerned in the receiving State, in the light of the general situation there and the individual's personal circumstances (see *Vilvarajah and Others*, cited above, § 108; *El-Masri*, cited above, § 213; and *Tarakhel*, cited above, § 105). The assessment of the risk as defined above (see paragraphs 183-84) must therefore take into consideration general sources such as reports of the World Health Organisation or of reputable non-governmental organisations and the medical certificates concerning the person in question.

188. As the Court has observed above (see paragraph 173), what is in issue here is the negative obligation not to expose persons to a risk of ill-treatment proscribed by Article 3. It follows that the impact of removal on the person concerned must be assessed by comparing his or her state of

health prior to removal and how it would evolve after transfer to the receiving State.

189. As regards the factors to be taken into consideration, the authorities in the returning State must verify on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3 (see paragraph 183 above). The benchmark is not the level of care existing in the returning State; it is not a question of ascertaining whether the care in the receiving State would be equivalent or inferior to that provided by the health-care system in the returning State. Nor is it possible to derive from Article 3 a right to receive specific treatment in the receiving State which is not available to the rest of the population.

190. The authorities must also consider the extent to which the individual in question will actually have access to this care and these facilities in the receiving State. The Court observes in that regard that it has previously questioned the accessibility of care (see *Aswat*, cited above, § 55, and *Tatar*, cited above, §§ 47-49) and referred to the need to consider the cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care (see *Karagoz v. France* (dec.), no. 47531/99, 15 November 2001; *N. v. the United Kingdom*, cited above, §§ 34-41, and the references cited therein; and *E.O. v. Italy* (dec.), cited above).

191. Where, after the relevant information has been examined, serious doubts persist regarding the impact of removal on the persons concerned – on account of the general situation in the receiving country and/or their individual situation – the returning State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3 (on the subject of individual assurances, see *Tarakhel*, cited above, § 120).

192. The Court emphasises that, in cases concerning the removal of seriously ill persons, the event which triggers the inhuman and degrading treatment, and which engages the responsibility of the returning State under Article 3, is not the lack of medical infrastructure in the receiving State. Likewise, the issue is not one of any obligation for the returning State to alleviate the disparities between its health-care system and the level of treatment existing in the receiving State through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. The responsibility that is engaged under the Convention in cases of this type is that of the returning State, on account of an act – in this instance, expulsion – which would result in an individual being exposed to a risk of treatment prohibited by Article 3.

193. Lastly, the fact that the third country concerned is a Contracting Party to the Convention is not decisive. While the Court agrees with the Government that the possibility for the applicant to initiate proceedings on his return to Georgia was, in principle, the most natural remedy under the Convention system, it observes that the authorities in the returning State are not exempted on that account from their duty of prevention under Article 3 of the Convention (see, among other authorities, *M.S.S. v. Belgium and Greece*, cited above, §§ 357-59, and *Tarakhel*, cited above, §§ 104-05).

2. Application of the general principles to the present case

194. It is not disputed that the applicant was suffering from a very serious illness, chronic lymphocytic leukaemia, and that his condition was life-threatening.

195. The applicant provided detailed medical information obtained from Dr L., a doctor specialising in the treatment of leukaemia and head of the haematology department in a hospital devoted entirely to the treatment of cancer. According to this information, the applicant's condition had become stable as a result of the treatment he was receiving in Belgium. This was a highly targeted treatment aimed at enabling him to undergo a donor transplant, which offered the last remaining prospect of a cure provided it was carried out within a fairly short timeframe. If the treatment being administered to the applicant had had to be discontinued, his life expectancy, based on the average, would have been less than six months (see paragraph 46 above).

196. In a report of 23 June 2015 the medical adviser of the Aliens Office stressed that the medical information concerning the applicant did not disclose a direct threat to his life or indicate that his state of health was critical (see paragraph 68 above).

197. The applicant submitted that, according to the information available to Dr L., neither the treatment he was receiving in Belgium nor the donor transplant was available in Georgia. As to the other forms of leukaemia treatment available in that country, he argued that there was no guarantee that he would have access to them, on account of the shortcomings in the Georgian social insurance system (see paragraph 141 above). In the Court's view, these assertions are not without some credibility.

198. The Court notes that on 10 September 2007 and 2 April 2008 the applicant made two requests for regularisation of his residence status in Belgium on medical grounds, on the basis of section 9*ter* of the Aliens Act (see paragraphs 54 and 59 above). His requests were based primarily on the need to obtain appropriate treatment for his leukaemia and on the premise that he would have been unable to receive suitable care for his condition in Georgia.

199. On 26 September 2007 and 4 June 2008 the applicant's requests for regularisation were refused by the Aliens Office on the grounds that he was

excluded from the scope of section 9*ter* of the Act because of the serious crimes he had committed (see paragraphs 55 and 60 above). The Aliens Appeals Board, called upon to examine the applicant's requests for a stay of execution of these decisions and his applications to set them aside, held in judgments dated 28 August 2008 and 21 May 2015 that, where the administrative authority advanced grounds for exclusion, it was not necessary for it to examine the medical evidence submitted to it. With regard to the complaints based on Article 3 of the Convention, the Aliens Appeals Board further noted that the decision refusing leave to remain had not been accompanied by a removal measure, with the result that the risk of the applicant's medical treatment being discontinued in the event of his return to Georgia was purely hypothetical (see paragraphs 57 and 62 above). The *Conseil d'État,* to which the applicant appealed on points of law, upheld the reasoning of the Aliens Appeals Board and specified that the medical situation of an alien who faced removal from the country and whose request for leave to remain had been refused should be assessed at the time of enforcement of the removal measure rather than at the time of its adoption (see paragraph 64 above).

200. The Court concludes from the above that, although the Aliens Office's medical adviser had issued several opinions regarding the applicant's state of health based on the medical certificates provided by the applicant (see paragraphs 67-68 above), these were not examined either by the Aliens Office or by the Aliens Appeals Board from the perspective of Article 3 of the Convention in the course of the proceedings concerning regularisation on medical grounds.

201. Nor was the applicant's medical situation examined in the context of the proceedings concerning his removal (see paragraphs 73, 78 and 84 above).

202. The fact that an assessment of this kind could have been carried out immediately before the removal measure was to be enforced (see paragraph 199 *in fine* above) does not address these concerns in itself, in the absence of any indication of the extent of such an assessment and its effect on the binding nature of the order to leave the country.

203. It is true that at the hearing on 15 September 2015 the Belgian Government gave assurances that, should it ultimately be decided to perform a donor transplant in Belgium, the Belgian authorities would not take any steps to prevent it or to secure the applicant's removal while he was in hospital. The Court takes note of that statement.

204. The Government further submitted that it might have been possible to continue the applicant's treatment by having his medication sent through the post under the supervision of his doctor and with the assistance of doctors in Georgia. However, the Government did not provide any specific information regarding the practical feasibility of such a solution.

205. In conclusion, the Court considers that in the absence of any assessment by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities was insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention (see paragraph 183 above).

206. It follows that, if the applicant had been returned to Georgia without these factors being assessed, there would have been a violation of Article 3.

207. In view of this finding the Court considers that it is not necessary to examine the complaint under Article 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

208. The applicant complained that his removal to Georgia, ordered together with a ten-year ban on re-entering Belgium, would have resulted in his separation from his family, who had been granted leave to remain in Belgium and constituted his sole source of moral support. He alleged a violation of Article 8 of the Convention, which provides:

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

A. The Chamber judgment

209. Under Article 8 of the Convention viewed from the standpoint of the State's positive obligations (see the Chamber judgment, § 138), the Chamber considered that the applicant's convictions weighed heavily with regard to both the number and seriousness of the offences and the nature of the last penalty imposed (ibid., §§ 145-47).

210. It also noted that at no point during his fifteen-year stay in Belgium had the applicant been in possession of a valid residence permit and that, despite the applicant's repeated convictions, the Belgian authorities had displayed remarkable tolerance (ibid., §§ 149-50). It further took account of the fact that the members of the family were Georgian nationals and that, as they had Belgian residence permits, his wife and children could leave and re-enter the country lawfully (ibid., §§ 151-53).

211. Lastly, taking into consideration the medical aspect of the case and the fact that the family could decide to leave Belgium temporarily for Georgia, the Chamber stressed that it did not discern any exceptional circumstances that would require the Belgian authorities to refrain from removing the applicant or to grant him leave to remain (ibid., § 154).

212. Accordingly, it held that there had been no violation of Article 8 of the Convention (ibid., § 156).

B. The parties' observations before the Grand Chamber

1. The applicant

213. The applicant maintained that the Belgian authorities' refusal to regularise his residence status on humanitarian grounds or to examine his request for regularisation on medical grounds amounted to interference with his private and family life in breach of Article 8.

214. He argued that the Belgian authorities had been under a duty to carry out a balanced and reasonable assessment of all the interests at stake. They should have applied the rules taking into consideration the children's best interests and the requirement to afford them special protection on account of their vulnerability. Although the applicant's children had Georgian nationality, from a "sociological" perspective they were Belgian, and they spoke only French. They had been given leave to remain in Belgium in 2010 and two of them had been born in Belgium. They had no ties in Georgia, did not speak Georgian or Russian and would be eligible to become fully fledged Belgian citizens in the medium term.

215. In addition, the couple's eldest daughter, with whom his wife had arrived in Belgium in 1998, was now an adult and lived in Belgium with her two children.

216. The refusal to regularise the applicant's status had left the family in a state of economic and social vulnerability which had had a major psychological impact and had hindered the development of their daily life. The practical implications of this situation for the applicant – the fact that he was barred from working and could not contribute to the household expenses, the constant fear of arrest, the negative effect on his self-esteem, and so forth – had affected the relationship between the children and their father. The applicant's criminal behaviour, which had been motivated largely by the need to survive financially, belonged to the past. The applicant was in a very weak state and stayed mostly at home, venturing out only to collect his children from school.

217. The worsening of the applicant's condition, coupled with the impossibility of maintaining his state of health in Georgia and with the length of his residence and that of his family in Belgium, should have prompted the Court to reconsider the approach taken in the Chamber

judgment, to assess the situation in its entirety and to find that the applicant's family had specific needs linked to their integration in Belgium. The solution advocated by the Chamber, which would have entailed the family moving to Georgia for long enough to take care of the applicant until his death, would not have been feasible as it would have meant taking the children out of school in Belgium and taking them to a country they did not know and where they did not speak the language. Their mother would have been unable to ensure the family's upkeep in Georgia in view of the applicant's condition, and the applicant would have died in particularly distressing circumstances. Furthermore, if they had had to remain in Georgia for more than one year, the applicant's wife and children would have forfeited the right to return to Belgium. Such a solution would have been, to say the least, disproportionate when weighed against the interests of the Belgian State.

2. The Government

218. The Government stressed the significance that should be attached to the applicant's criminal record and the fact that he had persisted in his criminal conduct despite his illness.

219. As to the children's best interests, the Government considered that these were difficult to determine because the children were not applicants and especially because there was nothing to indicate that they would have been unable to follow their father to Georgia for a time and attend school there. Furthermore, as the applicant had not provided detailed information regarding the extent of his family in Georgia and the persons with whom he was in contact, it was difficult to make an overall assessment of the situation.

220. The Government further submitted that residence permits had been issued by a decision of 29 July 2010 to the applicant's wife and their children, granting them indefinite leave to remain under sections 9 and 13 of the Aliens Act. The permit in question was a "type B", in other words, a certificate of entry in the aliens' register which was valid for five years and could be renewed for the same period – in advance, if necessary – by the municipal authorities in the place of residence. This residence permit entitled the members of the applicant's family to leave Belgium for one year or more and return to the country, provided that they had complied with the requisite formalities in the municipality of residence and had ensured that they had a valid permit. The formalities varied according to the length of the stay outside the country: in the case of stays of three months to a year, the aliens concerned had to report to the municipal authorities before leaving and within fifteen days of returning or risk automatic removal from the municipality's register. In the case of stays of over one year, they forfeited their right to remain unless they could demonstrate before their departure that their centre of interests still lay in Belgium and they informed the

municipal authorities in their habitual place of residence of their intention to leave the country and return. The persons concerned also had to be in possession of a valid residence permit on their return and to report to the municipal authorities within fifteen days of returning.

C. The Court's assessment

221. As regards the applicability of Article 8 and the standpoint from which the complaints should be examined, the Grand Chamber will proceed on the same premises as the Chamber (see the Chamber judgment, §§ 136-38). Firstly, it is not disputed that family life existed between the applicant, his wife and the children born in Belgium. This renders irrelevant the disagreement as to whether the applicant was the father of the child born before their arrival in Belgium, who is now an adult (ibid., § 136). Furthermore, assuming that the removal measure could have been examined from the standpoint of the applicant's private life, the "family life" aspect should take precedence in view of the specific issues raised by the present case and the parties' submissions. Secondly, while the case concerns both the domestic authorities' refusal to grant the applicant leave to remain in Belgium and the threat of his removal to Georgia, in view of the specific features of the case and recent developments the Chamber found that the key question was whether the Belgian authorities were under a duty to allow the applicant to reside in Belgium so that he could remain with his family (ibid., § 138). The Grand Chamber considers that examining the complaint alleging a violation of Article 8 in this way from the standpoint of the Belgian authorities' positive obligations is made all the more necessary by the developments in the case, in particular the deterioration of the applicant's health and his eventual death. Lastly, the Grand Chamber reiterates that in the context of both its positive and its negative obligations, the State must strike a fair balance between the competing interests of the individual and of society as a whole, and that the extent of the State's obligations will vary according to the particular circumstances of the persons involved and the general interest (ibid., § 140, and the references cited therein).

222. However, unlike the Chamber, having observed that the Belgian authorities did not examine the applicant's medical data and the impact of his removal on his state of health in any of the proceedings brought before them, the Grand Chamber has concluded that there would have been a violation of Article 3 of the Convention if the applicant had been removed to Georgia without such an assessment being carried out (see paragraph 206 above).

223. *A fortiori*, the Court observes that the Belgian authorities likewise did not examine, under Article 8, the degree to which the applicant was dependent on his family as a result of the deterioration of his state of health.

In the context of the proceedings for regularisation on medical grounds the Aliens Appeals Board, indeed, dismissed the applicant's complaint under Article 8 on the ground that the decision refusing him leave to remain had not been accompanied by a removal measure (see paragraph 58 above).

224. Nevertheless, just as in the case of Article 3, it is not for the Court to conduct an assessment, from the perspective of Article 8 of the Convention, of the impact of removal on the applicant's family life in the light of his state of health. In that connection the Court considers that this task not only falls to the domestic authorities, which are competent in the matter, but also constitutes a procedural obligation with which they must comply in order to ensure the effectiveness of the right to respect for family life. As the Court has observed above (see paragraph 184), the machinery of complaint to the Court is subsidiary to national systems safeguarding human rights.

225. Accordingly, if the Belgian authorities had ultimately concluded that Article 3 of the Convention as interpreted above did not act as a bar to the applicant's removal to Georgia, they would have been required, in order to comply with Article 8, to examine in addition whether, in the light of the applicant's specific situation at the time of removal (see, *mutatis mutandis*, *Maslov v. Austria* [GC], no. 1638/03, § 93, ECHR 2008), the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of the applicant's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live.

226. It follows that, if the applicant had been removed to Georgia without these factors having been assessed, there would also have been a violation of Article 8 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

227. Article 41 of the Convention provides:

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

A. Damage

228. The applicant claimed EUR 10,434 in respect of pecuniary damage. This amount corresponded to his out-of-pocket expenses for treatment in Belgium which had not been covered owing to his irregular residence status in the country.

229. The Court does not discern any causal link between the violation found and the pecuniary damage alleged, and dismisses this claim.

230. The applicant also claimed EUR 5,000 in respect of non-pecuniary damage resulting from his precarious socio-economic situation.

231. The Court considers that, having regard to the circumstances of the case, the conclusion it has reached under Articles 3 and 8 of the Convention (see paragraphs 206 and 226 above) constitutes sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant. It therefore makes no award under this head.

B. Costs and expenses

232. The applicant further claimed EUR 9,411 in respect of the fees payable to his lawyers for the preparation of the written observations they had submitted to the Court prior to the request for referral to the Grand Chamber. He submitted copies of the relevant invoices in support of his claim, and stated that he had already paid approximately half of the fees, that is, EUR 4,668, and was unable to pay the remainder.

233. In their observations before the Chamber the Government argued that the applicant, as an alien, was presumed under domestic law to be in financial need and thus eligible for legal aid, including for the expenses linked to the proceedings before the Court.

234. Making its assessment on an equitable basis, the Court decides that the sum of EUR 5,000 is to be paid to the applicant's family in respect of costs and expenses, plus any tax that may be chargeable to them (see, *mutatis mutandis*, *Karner*, cited above, § 50).

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that there would have been a violation of Article 3 of the Convention if the applicant had been removed to Georgia without the Belgian authorities having assessed, in accordance with that provision, the risk faced by him in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia;

2. *Holds* that it is not necessary to examine the complaint under Article 2 of the Convention;

3. *Holds* that there would have been a violation of Article 8 of the Convention if the applicant had been removed to Georgia without the Belgian authorities having assessed, in accordance with that provision, the impact of removal on the applicant's right to respect for his family life in view of his state of health;

4. *Holds* that the Court's findings at points 1 and 3 above constitute in themselves sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant;

5. *Holds*,
(a) that the respondent State is to pay the applicant's family, within three months, EUR 5,000 (five thousand euros), plus any tax that may be chargeable to them, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 December 2016.

Johan Callewaert
Deputy to the Registrar

Guido Raimondi
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

G.R.
J.C.

CONCURRING OPINION OF JUDGE LEMMENS

(Translation)

1. I voted like my colleagues in the Grand Chamber in favour of the (retroactive) finding of a procedural and conditional violation of both Article 3 and Article 8 of the Convention. As I was a member of the Chamber and voted then for finding no violation of those two Articles, I would like to explain briefly why I changed my mind.

2. During the Chamber's examination of the case I took the view that we should follow the strict interpretation of Article 3 of the Convention applied by the Court since the Grand Chamber judgment in *N. v. the United Kingdom* ([GC], no. 26565/05, ECHR 2008). On the basis of the strict interpretation of the threshold of severity, I concluded with the majority of the Chamber that the applicant's removal would not entail a violation of Article 3 (see paragraph 126 of the Chamber judgment of 17 April 2014). Likewise, with regard to the refusal of the applicant's request for regularisation of his residence status, I agreed with the majority of the Chamber that the State had not failed to comply with its positive obligations under Article 8 of the Convention (see paragraph 155 of the Chamber judgment).

3. With the referral of the present case to the Grand Chamber the question arose whether strict application of the criterion established in *N. v. the United Kingdom*, without taking into consideration circumstances other than the fact that the person concerned was "close to death" (see paragraph 181 of the present judgment), did not create a gap in the protection against inhuman treatment. I have no difficulty finding, like my colleagues in the Grand Chamber, that such a gap exists, and in clarifying our case-law in order to fill that gap while at the same time maintaining a high threshold for the application of Article 3 of the Convention (see, in particular, paragraph 183 of the present judgment).

I also subscribe fully to the different manner in which the Grand Chamber approaches the applicant's complaint. Whereas the Chamber examined whether the applicant's removal would be compatible with the prohibition of inhuman and degrading treatment, the Grand Chamber stresses the primary responsibility of the national authorities when it comes to examining the arguments advanced by aliens under Article 3 of the Convention (see, in particular, paragraph 184 of the present judgment, which highlights the fact that the machinery of application to the Court is subsidiary to national systems safeguarding human rights).

From this fresh perspective I agree with my colleagues that the domestic authorities did not have sufficient information in the present case for them to conclude that, if the applicant were returned to Georgia, he would not face a real and concrete risk of treatment contrary to Article 3, regard being

had to the criterion established in *N. v. the United Kingdom* as clarified in the present judgment.

4. As to the complaint under Article 8 of the Convention, the Grand Chamber also takes a different approach from the Chamber. Whereas the Chamber examined the refusal to regularise the applicant's residence status from the standpoint of proportionality, the Grand Chamber, here too, focuses on the procedural obligations of the respondent State (see, in particular, paragraph 224 of the present judgment, which again emphasises that the machinery of application to the Court is subsidiary to national systems safeguarding human rights).

On the basis of this new approach I cannot but agree with my Grand Chamber colleagues that the domestic authorities' assessment as to whether the refusal of a residence permit was compatible with Article 8 of the Convention was not based on all the relevant information in the present case.

5. I would like to take this opportunity to draw attention to the fact that the present judgment is not unrelated to developments occurring within Belgium.

At the time of the Chamber judgment some formations of the Aliens Appeals Board had already shown reluctance to apply strictly the criterion established in *N. v. the United Kingdom* (see paragraph 102 of the present judgment). Since then, the *Conseil d'État* has endorsed their approach (see paragraphs 103-05 of the present judgment) and the Aliens Appeals Board has consolidated this line of case-law in a number of judgments given by the full Board. Admittedly, this case-law relates to the interpretation of a rule of domestic law (section 9*ter* of the Aliens Act, concerning the possibility of granting a residence permit on medical grounds), but it is also relevant to the interpretation of Article 3 of the Convention. It emerges from the judgments of the full Aliens Appeals Board that an obstacle to the removal of an alien who is ill may arise not only where there is an imminent threat to his or her life or physical integrity (a situation in which removal would be contrary to Article 3 of the Convention according to the Court's case-law since *N. v. the United Kingdom*), but also where there is a risk of inhuman or degrading treatment if no appropriate treatment exists in the receiving country (see paragraphs 106-07 of the present judgment).

To my mind, by emphasising that, in addition to the risk to life (a real and present danger to life or physical integrity), there is also a risk of inhuman or degrading treatment, the Aliens Appeals Board was able to draw the Court's attention to the issue raised by its case-law. The present judgment may be seen as the Court's response to the concerns expressed by the Aliens Appeals Board.