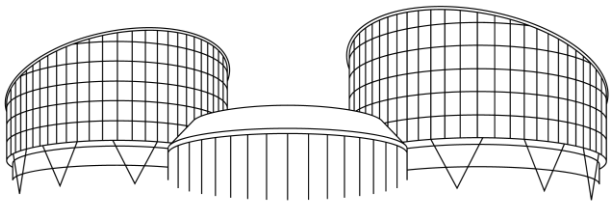

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF RIAD AND IDIAB v. BELGIUM

(Applications nos. 29787/03 and 29810/03)

JUDGMENT

STRASBOURG

24 January 2008

FINAL

24/04/2008

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

In the case of Riad and Idiab v. Belgium,

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

Loukis Loucaides, *President*,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges*,
Paul Martens, ad hoc *judge*,
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 30 November 2006 and on 3 January 2008,

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

PROCEDURE

1. The case originated in two applications (nos. 29787/03 and 29810/03) 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 certain Belgian associations and also by two Palestinian nationals, Mr Mohamad Riad and Mr Abdelhadi Idiab ("the applicants"), on 6 August 2003.

2. The applicants alleged, in particular, that the living conditions which they had experienced in the transit zone of Brussels National Airport, where they had been held between 30 January 2003 and 15 February 2003 and between 3 and 15 February 2003 respectively, had infringed Articles 3 and 8 of the Convention and that two decisions ordering their release had not been properly implemented, in violation of Article 5 of the Convention.

3. By a decision of 21 September 2006 the Chamber decided to join the applications (Rule 42 § 1 of the Rules of Court) and declared them partly admissible.

4. A hearing took place in public in the Human Rights Building, Strasbourg, on 30 November 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr C. DEBRULLE, Agent of the Belgian Government and Director General, Legislation and Fundamental Freedoms and Rights Directorate, Federal Justice Department, *Agent*,
Ms E. DERRIKS, lawyer of the Belgian Government, *Counsel*,
Ms V. ROLIN, *avocat*, assistant to Ms Derriks,

Ms C. GALLANT, Attaché, Human Rights Office, Legislation and Fundamental Freedoms and Rights Directorate, Federal Justice Department,
Ms N. BRACKE, Attaché, Head of Department, Border Inspection Department, Aliens Office, Federal Department of the Interior,
Ms T. MICHAUX, Adviser/Head of Department, Appeals Department, Aliens Office, Federal Department of the Interior, *Advisers*;

(b) *for the applicants*
Ms S. SAROLEA, *avocat*,
Ms M.-C. WARLOP, *avocat*, *Counsel*.

5. The Court heard addresses by Ms Sarolea and Ms Derriks.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1980 and 1981 respectively.

A. The applications for asylum and for residence and their outcome

1. The first applicant

7. The first applicant arrived in Belgium at Brussels National Airport on flight SN 211 from Freetown (Sierra Leone) on 27 December 2002, carrying a Lebanese travel document stating that he was a Palestinian refugee. He was refused entry to Belgium as he did not have the necessary visas. The carrier which had provided the flight was informed that, pursuant to section 74(4) of the Aliens (Entry, Residence, Settlement and Expulsion) Act of 15 December 1980, it was responsible for paying the costs of his return to his country of origin.

8. On the same date the first applicant requested recognition of his refugee status, maintaining that his life was in danger in Lebanon, and was issued with a document certifying that he had applied for asylum.

9. Also on the same date, 27 December 2002, a decision to keep the first applicant in a designated place at the border was taken on the basis of section 74/5(1)(2) of the Act of 15 December 1980. Pursuant to that decision, the first applicant was taken to Transit Centre no. 127 on the premises of Brussels National Airport.

10. A decision refusing asylum was taken on 31 December 2002 by the Aliens Office and served on the first applicant on the same date. The first

applicant lodged an appeal with the Office of the Commissioner General for Refugees and Stateless Persons.

11. On 21 January 2003 the Commissioner General's Office upheld the decision refusing asylum; it pointed out the inconsistencies between the various accounts given by the applicant in question and concluded that on the evidence he had no reason to fear that he was in personal danger in Lebanon.

12. An application for judicial review of the decision of 21 January 2003 of the Commissioner General's Office and an application to stay its execution were lodged with the *Conseil d'Etat* on 19 February 2003. At the hearing before the Court, the parties explained that those applications were declared inadmissible in 2005 on the ground that the first applicant was no longer on Belgian territory and the continued examination of his case was thus devoid of purpose.

2. The second applicant

13. This applicant arrived in Belgium at Brussels National Airport on a flight from Freetown on 24 December 2002 at 5.12 a.m. As he did not have a transit visa allowing him to travel onwards to London, steps were taken to refuse him entry to Belgian territory and the carrier which had provided the flight was requested to take him, or have him taken, back to the country of origin or to another State where he could be allowed entry. The second applicant was rerouted to Beirut, via Budapest.

14. When he underwent a check in the transit zone on the same date this applicant stated that he did not wish to go to Beirut and requested recognition of his refugee status, maintaining that his life was in danger in Lebanon. He was issued with a document certifying that he had applied for asylum.

15. Also on the same date, 24 December 2002, a decision to keep the second applicant in a designated place at the border was taken on the basis of section 74/5(1)(2) of the Act of 15 December 1980. Pursuant to that decision, the second applicant was taken to Transit Centre no. 127.

16. A decision refusing the application for asylum was taken by the Aliens Office on 6 January 2003. That decision was served on the same date on the second applicant, who lodged an appeal with the Office of the Commissioner General for Refugees and Stateless Persons.

17. On 21 January 2003 the Commissioner General's Office upheld the decision refusing asylum, as it was not familiar with the Palestinian organisation to which the second applicant claimed to belong. An application for judicial review and an application for a stay of execution were also lodged with the *Conseil d'Etat* on 19 February 2003. Like the applications lodged by the first applicant, these applications were dismissed in 2005 as they had become devoid of purpose.

B. Detention in Transit Centre no. 127 and in the closed centre in Bruges

18. The first applicant remained in Transit Centre no. 127 from 27 December 2002 pursuant to the decision to keep him in a designated place at the border (see above). The second applicant remained there, on the same basis, from 24 September 2002.

19. Following an attempted collective break-out from Transit Centre no. 127 during the night of 21 to 22 January 2003, the two applicants and three of their compatriots were transferred on 22 January 2002 to the Closed Centre for Illegal Aliens in Bruges (the Government explained that this institution was, by a legal fiction, treated as a centre at the border).

20. In January 2003 their lawyer lodged an application for release on behalf of each of them before the *chambre du conseil* of the Brussels Court of First Instance, by registered letter posted on 14 January 2003. The *chambre du conseil* allowed that application by an order of 20 January 2003, being of the view that the grounds put forward by the administrative authorities to justify the deprivation of liberty were not sufficient.

21. On the same day on which that order was made, State Counsel's Office notified the Aliens Office, by means of a form, that it had decided to lodge an appeal, which it did on the following day. On account of that appeal, the applicants remained in the closed centre, and any procedures for their repatriation were suspended pending the judgment of the Indictment Division.

22. On 24 January 2003 the authorities arranged for both applicants to be booked on a flight to Freetown on 6 February 2003.

23. By a judgment of 30 January 2003 the Brussels Indictment Division upheld the order made on 20 January for the first applicant's release, being of the view that the detention order did not contain "sufficient reasons *in concreto*".

24. Following that judgment, Principal State Counsel at the Brussels Court of Appeal ordered the first applicant's immediate release. As a result of that decision, the Aliens Office had him transferred to the transit zone at Brussels National Airport (see below).

25. On 3 February 2003 a similar judgment was delivered in respect of the second applicant. On the same date Principal State Counsel and the Aliens Office took decisions identical to those taken in respect of the first applicant, whom the first applicant rejoined in the transit zone at Brussels National Airport on 3 February 2003.

C. The stay in the transit zone in Brussels National Airport

26. On 30 January 2003 the first applicant, as explained below (see paragraph 28), was placed in the transit zone in Brussels National Airport.

He was taken there at 6.45 p.m., together with Ab., another Palestinian national who had arrived in Belgium on 25 December 2002 in the same circumstances as the first applicant.

27. They were informed that they were being released, their luggage was returned to them and they were each given an envelope containing their personal possessions, with the exception of their passports, which remained in the possession of the federal police at the airport, and were allowed to make a telephone call to a person of their choice. They stated that they wished to telephone their lawyer.

28. On 1 February 2003 at 1.30 p.m. they went to the federal police border inspection post and declared that they had no money or food. They were told that they could go on a voluntary basis to the "INADS Centre" at the airport and remain there pending their removal. They were taken to that centre, where the first applicant signed a statement, after the content thereof had been translated for him, agreeing to remain voluntarily at the centre and to observe its rules. According to a document from the centre, the first applicant arrived there on 1 February 2003 and left on 3 February 2003; in fact, an unsuccessful attempt to remove the applicant to Freetown was made on 3 February 2003, but he refused to board the aeroplane. Following his refusal to board, he was taken back to the transit zone.

29. Also on 3 February 2003, the lawyer acting for the first applicant and Ab. wrote to the Minister for the Interior, claiming that her clients had suffered degrading treatment by having to spend three days in the transit zone without food or drink. She explained that a few hours after arriving in the "INADS Centre" they had simply been returned to the transit zone and told to fend for themselves in order to obtain food, drink and a return ticket.

30. On the same date, 3 February 2003, at 6.40 p.m. the first applicant and Ab. were joined in the transit zone by the second applicant (see paragraph 28 above). Upon being transferred there he was given the same explanations as the two others and stated that he was "no longer happy with that decision" and wished to contact his lawyer. He also stated that he had no money and had only a telephone card. He again asked where the "other men" were.

31. On 4 February 2003 the applicants' counsel applied under the extremely urgent procedure to the President of the Brussels Court of First Instance, who dismissed the application on 9 February 2003 on the ground that the applicants did not have a personal right of access to the territory, as such a right was not conferred either by the submission of an application for asylum or by the orders for their release.

32. In the meantime a fresh attempt to remove the three persons to Freetown had been made on 6 February 2003. A further attempt to remove two of them was made on 8 February 2003. The first applicant refused to board the plane but Ab. did board it.

33. On 9 February 2003 the applicants' counsel lodged an application to shorten the period of notice of a hearing, arguing that keeping her clients in the transit zone constituted an illegal act that infringed their right to liberty, a right confirmed by the decisions delivered in respect of their detention in the transit centre. She further maintained that keeping them in the transit zone constituted a violation of Articles 3 and 8 of the Convention. By an order of 10 February 2003 the President of the Brussels Court of First Instance granted leave to summon the Belgian State to appear at a hearing on 12 February 2003.

34. On 11 February 2003 the applicants summoned the Belgian State, represented by the Minister for the Interior, to appear before the President of the Brussels Court of First Instance, sitting as the urgent applications judge, for the purpose of securing an order for the State to allow them to enter Belgian territory, together with a penalty of 1,000 euros (EUR) per hour from notification of the order in the event of failure to comply. The applicants submitted that by keeping them in a closed space, despite the fact that the *chambre du conseil* of the Indictment Division had ordered their release, the State was in breach of the domestic and international provisions guaranteeing the right of personal liberty. In addition, they were completely destitute, without lodging or resources and left to their own devices in the transit zone, where they had no proper facilities and for several days had had neither food nor drink, which constituted inhuman and degrading treatment. They further submitted that some members of the federal police had violently struck and beaten them inside the Muslim place of worship in the transit zone.

35. On 12 February 2003 the authorities arranged for the applicants to be booked on a flight to Beirut on 15 February 2003.

36. In submissions filed with the President of the Court of First Instance, counsel for the State objected, in particular, that the applicants had not applied for judicial review of the decisions of the Commissioner General's Office or for a stay of their execution.

37. By an order of 14 February 2003 the President of the Brussels Court of First Instance ordered the State to allow the applicants to leave the transit zone freely and without restriction, with a penalty of EUR 1,000 per hour with effect from notification of the order in the event of failure to comply.

The decision delivered in the context of application no. 29787/03 reads as follows:

> "It is common ground that the applicant is at present subject to a decision of 3 January 2003 to remove him from national territory, upheld on 21 January 2003.
>
> The time-limit for bringing an action for a stay of execution and for judicial review does not have suspensive effect; nor does the application for regularisation under section 9(3) of the Act of 15 December 1980 which the applicant submitted on 28 January 2003.

As the applicant's administrative status is binding on the court, it must take note of the fact that the applicant is therefore not entitled to remain on Belgian territory.

Nonetheless, the decision of the Indictment Division is also binding on the court and in the present case, that division ordered the applicant's immediate release.

It is also common ground that the Indictment Division was aware of the applicant's administrative status and in particular of the decision of the CGRA and therefore ordered his release with full knowledge of the facts.

It is not for this court to adjudicate on that status but, rather, on the way in which that decision to release the applicant is implemented by the Belgian State, all other things being equal.

The defendant maintains that, in view of the fact that the applicant has not been authorised to enter national territory as such, it was correct to take the view that the applicant's release should be effected in the transit zone, since that zone is not an area where the law does not apply but is in fact part of the Belgian Kingdom for persons in transit in Belgium and those who have not yet been authorised to enter the national territory as such.

The Court of Cassation has held that 'as regards the access, residence, establishment and removal of aliens, it does not follow from the legal distinction between the port area and the rest of the territory of the Kingdom that the transit zone is not part of the Kingdom and that the law referred to does not apply there' (Court of Cassation, 22 June 1999, Pas. 1999, 957).

The closed centres are in reality nothing more than extensions of the transit zones, antechambers to the territory of the Kingdom, the only difference being that, unlike the transit zone, they are designed to be capable of accommodating persons for a more or less long period in what are assumed to be decent conditions.

While the defendant's reasoning can therefore be followed in so far as it considers that by being present in the transit zone the applicant was in fact on Belgian territory, that reasoning cannot be followed where it considers that such presence amounts to 'release'.

It cannot be accepted that the legislature, by creating centres at the borders, specially equipped to accommodate persons who are being held pending leave to enter the Kingdom or pending deportation, and by providing that persons held in those centres have a right of appeal to the *chambre du conseil*, took the view that if their release was ordered by the *chambre du conseil* and then by the Indictment Division, those persons could be sent to the transit zone, which is wholly unequipped to receive them, since this would place them in an even more precarious and adverse situation.

If release limited to the transit centre were to be accepted, that would amount to allowing the Belgian State unilaterally to block a court decision ordering release on the basis of a person's administrative status, when that administrative status had been taken into consideration by that court and must have constituted a ground of its decision ordering release.

Since 21 January 2003 the parties have both known that the removal order is enforceable, since the applicant's appeal to the CGRA was rejected and no urgent application for a stay of its execution was made.

Since then the applicant has shown no intention of complying voluntarily with the removal order.

Nor has the Belgian State forcibly removed him since then.

Since the State is now required to comply with the decision ordering the applicant's release, there are two possibilities: either the defendant prefers to wait until the applicant decides to leave voluntarily, but in that case, while awaiting his departure, the State must allow him to move freely within the territory (in observance of *res judicata*), or the defendant assumes its responsibilities and provides itself with the means to enforce the order for the applicant's return in order to ensure compliance with its own administrative decisions.

In that regard, the Law allows the Belgian State to order the alien in question to reside in a specified place pending implementation of the order for his removal (section 73 of the Act of 15 December 1980).

What is unacceptable and contrary to the rule of law in the present case is that the Belgian State should place the applicant in another closed place (the transit zone) in which the living conditions are inhuman and degrading, in the hope that the applicant will then decide to implement the removal order 'voluntarily'.

In transferring the applicant from the closed centre at Melsbroek to the transit zone, the Belgian State committed an illegal act.

On the basis of the file as it currently stands, the release ordered by the Indictment Division necessarily means that, until such time as he is removed, the applicant is free to leave the transit zone, without prejudice to the Ministry's right to order the applicant to reside in a specific place (section 73).

That solution to a wholly contradictory situation is the only one possible if the procedure under section 71 of the Act of 15 December 1980 is not to be reduced to a farce.

In the light of the foregoing, the application must be allowed in accordance with the operative part of the present order."

The decision delivered in connection with application no. 29810/03 is based on the same reasoning.

38. The applicants' lawyer sent that decision by fax on 14 February 2003 to the Aliens Office, which cancelled the booking made for the flight on 15 February 2003. On 15 February 2003 the Office was instructed to allow the applicants to leave the transit zone, without restriction.

39. The orders of 14 February 2003 were served on the Belgian State, by bailiff, first on 17 February 2003 to the office of the Minister of Justice; the order made in favour of the first applicant was served for a second time, on 28 February 2003, on the federal police border inspection post at Brussels National Airport.

40. Both applicants left the transit zone on 15 February 2003, in the late morning; the precise time was not stated.

41. The parties differed as to the situation which the two applicants encountered in the transit zone.

42. The applicants stated that the transit zone had no bedrooms and, *a fortiori*, no beds, and that they were housed in the mosque located there. They were taken in by the Muslim counsellor, who took them in again after the various attempts to remove them. They remained for several days without food or drink, receiving food only irregularly from the cleaning

staff, the company running the airport, the Muslim counsellor or the lay counsellor at the airport. The two counsellors explained in their testimony that the applicants' situation was unbearable, mentioning that they had been abandoned or "deserted" by the authorities. The applicants were unable to wash themselves or to launder their clothes. They were often checked by the airport police; on several occasions they were placed in a cell and left there for several hours without food or drink, in an attempt to force them to agree to leave the country voluntarily, then taken back to the transit zone. They were also violently struck and beaten inside the mosque by certain members of the federal police.

43. The Government submitted that, following the criticisms in a report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment ("the CPT") in 1993, the situation in the transit zone at Brussels National Airport had been remedied by, *inter alia*, setting up the "INADS Centre" on the airport premises. The centre was able to take in, on a voluntary basis, persons staying in the transit zone and provide them with bed and board. In its 1997 report on its visit to Belgium, the CPT observed that the material conditions and the activities offered in the "INADS Centre" could generally be described as satisfactory for a stay of not more than a few days, with just one exception (the lack of provision for those staying in the centre to enjoy fresh air). In addition, persons in the transit zone awaiting a reservation on a flight for the purpose of their removal were able to receive meals via the control services. A federal police circular of 31 October 2003 confirmed that practice and reminded the various services of their obligations in that regard. It was apparent from that circular that the team dealing with the case of a particular alien was responsible for distributing meals to him or her and that upon arriving in the transit zone aliens were informed that they could go to the "arrivals" level three times a day to be given a meal. The team responsible ordered three meals per person per day at the "INADS Centre". Although that procedure had been properly confirmed only by the circular of 31 October 2003, the fact nonetheless remained that the first applicant had been informed on 1 February 2003 that he could be housed and fed on a voluntary basis in the "INADS Centre".

D. The applicants' detention in the Merksplas closed centre

44. On 15 February 2003 at 11.30 a.m. the applicants, after leaving the transit zone, were subjected to an identity check by officials of the federal police responsible for border control. After finding that the applicants were not in possession of a valid residence permit, the police drew up an administrative report for each of them. The reports stated that the applicants were travelling together and that they spoke English in addition to their mother tongue. The police contacted the Aliens Office at 12.30 p.m. and were instructed to detain the applicants so that they could be served with an

order to leave the territory together with a decision ordering their removal and a decision ordering their detention for that purpose. A decision to that effect was served on them on the same date, at an unspecified time, by an officer from the Aliens Office. Both applicants refused to sign.

45. The first applicant was informed of those measures and was told that, with a view to their implementation, he was being taken to the Merksplas centre for illegal aliens. He stated that he objected, on the advice of his counsel. During the journey to Merksplas this applicant complained that the handcuffs placed on him were too tight around his wrists. The journey was interrupted at 2.45 p.m. so that the handcuffs could be loosened.

46. The second applicant was informed of those measures and told that he would be taken to the centre for illegal aliens and he too stated that he objected, on the advice of his counsel, and resisted the police who were putting him in the van being used to transfer the two applicants. A few minutes after the van was closed, it was noted that, although he was handcuffed, the second applicant had intentionally injured himself by banging his head against the van window, which was protected by a grille. It was then decided to take him to Merksplas in a police vehicle and Velcro bands were placed round his arms and legs to prevent any mutilation. According to the report drawn up on that occasion, the applicant told the members of the escort that he would use his self-inflicted injuries as evidence to support a complaint against the police. Upon arriving at Merksplas he was examined by the doctor at the centre, who noted the presence of external injuries, namely a bruise and a small wound ("*klein wondje*") on his forehead.

47. On 19 February 2003 the lawyer representing the two applicants wrote to the Minister for the Interior to complain about his clients being placed in a closed centre in spite of the orders made on 14 February 2003. On the same date he had lodged an application with the *Conseil d'Etat* for judicial review of the decision of 21 January 2003 of the Commissioner General's Office and an application for a stay of its execution (see above).

E. The applicants' removal

1. The first applicant

48. On 20 February 2003, measures were taken to remove the first applicant to Beirut, but the order for his repatriation was subsequently set aside. On 24 February 2003 the Aliens Office instructed the Border Inspection Department to make arrangements for his removal as soon as possible. His repatriation was rearranged for 8 March 2003.

49. On 8 March 2003 the first applicant left Merksplas and his personal effects, his luggage and the sums of EUR 45, 250 United States dollars

(USD) and 1,000 Lebanese pounds which he had been carrying on his arrival were returned to him. He had previously been informed of the repatriation procedure that would be followed and of the measures of physical restraint that might be taken. Following a discussion, he stated that he no longer objected to being repatriated, but expressed the wish that certain conditions should be observed. He asked, in particular, that he should not be handcuffed and that he should carry his passport. He was told that those conditions could not be met, in view of the circumstances.

50. The applicant was repatriated on a flight to Beirut, via Moscow, escorted by three police officers. The first applicant was placed in fabric handcuffs before being taken on board. The handcuffs were removed after take-off. During the flights and while waiting in the transit zone at Moscow Airport he was given food and drink. The members of the escort reported no incident.

2. The second applicant

51. On 21 February 2003, measures were taken to remove the second applicant to Beirut, but the order for his repatriation was subsequently set aside.

52. The second applicant was repatriated on 5 March 2003. Upon his departure from Merksplas, his personal effects, his luggage and a sum of EUR 150 were returned to him. According to the report drawn up in connection with his removal, he arrived at the airport at 4.45 p.m. He was searched and placed in a cell. At 8.35 p.m. the officials in charge of his repatriation questioned him in order to determine the extent of his cooperation with the removal order. During that interview, he indicated that he had realised that he had to return to Beirut. He allegedly added that he had not been happy with his situation for two months and that he had the impression that he had been a pawn in a game between his lawyer and the Ministry officials. He was allowed to telephone his family and contacted his sister, who was informed of the precise details of the flight and of the scheduled time of arrival. In order to prevent any attempt at resistance, the members of the escort decided, in view of the information in their possession and the circumstances of the transfer on 15 February 2003, to use measures of physical restraint. The applicant was wearing fabric handcuffs and had Velcro around his ankles when he boarded the flight to Beirut via Moscow. The boarding of the plane, the flight and the transit passed without incident. The applicant was released from his restraints as soon as the plane reached cruising altitude and he was given food, drink and cigarettes during the journey. Upon his arrival in Beirut his passport was returned to him. Members of his family were waiting for him there. The Belgian consul in Beirut was also present at the airport.

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

58. The applicants maintained that the fact that they had been placed in the transit zone following their respective arrests on 30 January 2003 and 3 February 2003 and then placed in Merksplas following the order of 14 February 2003 infringed Article 5 of the Convention, since those measures had been applied in breach of the court decisions ordering their release, which had not been executed with the diligence, promptness and good faith which that provision required in guaranteeing strict judicial supervision of any deprivation of liberty.

The relevant provisions of Article 5 of the Convention read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

...

B. Merits

64. The applicants submitted that as regards their transfer to the transit zone, the Government were playing with words in regarding the transfer as a release. All the independent bodies which had visited the transit zone spoke of detention. Furthermore, what would be the point of judicial review of the lawfulness of an alien's detention "at the border" on his or her arrival on Belgian territory if the Aliens Office's practice of subsequently placing aliens in the transit zone were accepted? The orders of 14 February 2003 had answered that question by making clear that, in those circumstances, such judicial review would be reduced to a mockery; the orders used the word "farce". In using such a stratagem, the State had not complied specifically and effectively with the decisions of the investigating courts but had embarked upon a parody which rendered nugatory the guarantee which it had put in place. The same applied to the circumstances leading to the applicants' detention at Merksplas. The applicants, who noted that their "review" was concomitant with their leaving the transit zone, observed that

the use of ruses by the authorities had been firmly condemned by the Court (citing *Čonka v. Belgium*, no. 51564/99, §§ 42-44, ECHR 2002-I). They also observed that deprivation of liberty was merely an option in Belgian law and was not automatic, as the decisions adopted by the *chambre du conseil*, the Indictment Division and the President of the Brussels Court of First Instance showed. However, the Aliens Office's position consisted in making deprivation of liberty the rule for every alien not authorised to enter the territory, without any consideration as to whether the measure was appropriate or proportionate.

65. The technique of placing persons in the transit zone in order to circumvent decisions ordering their release had been denounced in an opinion of the Federal Ombudsman of 14 September 2004 and its consequences had been emphasised in the final observations of the United Nations Human Rights Committee of 30 July 2004 concerning Belgium. The applicants also noted the criticisms expressed in 2003 and 2004 by the European Union and the relevant conclusions in the Committee against Torture's Report of 25 May 2003 concerning Belgium, and referred to other recent texts issued by institutions of the Council of Europe – the Committee of Ministers, the Commissioner for Human Rights and the Parliamentary Assembly – which supported their analysis. In the report on the visit carried out in April 2005, the CPT had once again recommended that the Belgian authorities should end the impugned practice for good. In a judgment of 29 September 2005 the Brussels Court of Appeal, upholding an order of the *chambre du conseil* of the Brussels Court of First Instance of 28 January 2004, had held that transfer to the transit zone had not amounted to the implementation in good faith of a decision ordering the release of an alien held in the detention centre and had constituted an illegal act.

66. The Government observed that, following the judgments of 30 January and 3 February 2003, the applicants had been immediately released and had left the centre for illegal aliens in Bruges. However, as they had not been allowed to enter the territory owing to the decisions refusing them entry, which were still in force, they had been taken to the transit zone. That measure had implemented the above-mentioned decisions in accordance with domestic law and with the domestic courts' interpretation of it. The investigating courts had no jurisdiction to set aside or stay the execution of decisions refusing entry or ordering removal. Under section 72, subsection 2, of the Act of 15 December 1980, their role was limited to ascertaining whether administrative decisions depriving individuals of their liberty were in accordance with the law. In any event, the applicants' transfer to the transit zone could not be regarded as deprivation of liberty. The order of 14 February 2003 had departed from domestic and international case-law in considering that the transit zone was a "closed place". The only restriction placed on the applicants' freedom was that they had been prohibited from entering Belgian territory. Furthermore,

the applicants had been duly informed of their situation in English, a language which they knew, and their luggage, money and personal effects had been returned to them. They had been free to move and, in particular, to leave Belgian territory. The authorities had also given them the opportunity to do so by taking a flight on which seats had been booked in their names, but the applicants had refused these opportunities on three occasions and one occasion respectively. In those circumstances, the applicants must be considered to have been at the origin of the complaint which they had put forward and the State was therefore not responsible for the situation created (citing *Mogoş v. Romania*, no. 20420/02, 13 October 2005).

67. As regards the detention in Merksplas, the Government stated that, following the orders of 14 February 2003, the applicants had been authorised to leave the transit zone on 15 February 2003 and to have access to Belgian territory. However, they had not had leave to remain there. In the course of checks carried out on 15 February 2003 at 11.30 a.m. it had been found that they were in Belgian territory without being in possession of the necessary documents, and orders to leave the territory, together with a decision to expel them and a decision to deprive them of their liberty for that purpose, had been served on them, on the basis of section 7 of the Act of 15 December 1980. Noting that the words "in accordance with a procedure prescribed by law" essentially referred back to domestic law (citing *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33; *Steel and Others v. the United Kingdom*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VII; and *Shamsa v. Poland*, nos. 45355/99 and 45357/99, 27 November 2003), the Government explained that the deprivation of liberty in question was governed by the above-mentioned provision, which was extremely precise in that regard. The measures taken on 15 February 2003 to deprive the applicants of their liberty had satisfied the relevant criteria set by the Administrative Jurisdiction and Procedure Court (*Cour d'arbitrage*) and had been wholly necessary and proportionate. As the impugned decisions stated, various attempts had already been made to remove the applicants and on each occasion they had refused to comply. The competent authorities had therefore been entitled to take the view that there was little prospect that the applicants would voluntarily comply with the new decisions taken against them. The Government further observed that although the applicants had had the opportunity to appeal against these decisions to the *chambre du conseil* and had been informed of their right of appeal, they had failed to do so although their detention had begun on 15 February 2003 and ended on 8 March 2003. Nor could such a period of detention be considered excessive, according to the case-law (they cited *Singh v. the Czech Republic*, no. 60538/00, 25 January 2005, and *Chahal v. the United Kingdom*, 15 November 1996, *Reports* 1996-V), and their removal had taken place within the period of two months provided for in section 7 of the Act of 15 December 1980.

68. The Court must determine in the first place whether the placing of the applicants in the transit zone constituted a deprivation of liberty within the meaning of Article 5 of the Convention; the question of their stay in Merksplas does not give rise to any dispute in that regard. The Court observes that it has already found that holding aliens in an international zone involves a restriction upon liberty which is not in every respect comparable to that which obtains in detention centres. However, such confinement is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively. Otherwise, a mere restriction on liberty is turned into a deprivation of liberty (see *Amuur v. France*, 25 June 1996, § 43, *Reports* 1996-III). However, the applicants in the present case were confined in the transit zone not upon their arrival in the country but more than one month later, after decisions had been given ordering their release. In addition, their confinement was ordered for an indefinite period and eventually lasted fifteen days and eleven days respectively. Furthermore, the mere fact that it was possible for the applicants to leave voluntarily cannot rule out an infringement of the right to liberty (ibid., § 48). The Court concludes that the applicants' confinement in the transit zone of the airport amounted to a *de facto* deprivation of liberty.

69. The Court must therefore examine the compatibility of the deprivations of liberty found in the present case with paragraph 1 of Article 5 of the Convention.

70. The Court reiterates that in order for detention to be in keeping with Article 5 § 1 (f) of the Convention it is sufficient that an expulsion procedure is in progress and that the person concerned has been detained with a view to deportation; it is therefore unnecessary to consider whether the underlying decision to expel him could be justified under national law or Convention law or whether the detention could be considered reasonably necessary, for example to prevent his fleeing or committing an offence (see *Chahal*, cited above, § 112). The Court has, more specifically, held that it is normal that States, in the exercise of their "undeniable ... right to control aliens' entry into and residence in their territory" (see *Amuur*, cited above, § 41), have the right to detain would-be immigrants who – whether or not by applying for asylum – have sought permission to enter the territory. However, the detention of a person constitutes a major interference with individual freedom and must always be subject to rigorous scrutiny. The question also remains whether the detention was effected "in accordance with a procedure prescribed by law", within the meaning of Article 5 § 1.

71. The Court reiterates that in relation to whether a detention was "lawful", including whether it was in accordance with "a procedure prescribed by law", the Convention refers essentially to national law and establishes the need to apply its rules, but it also requires that any deprivation of liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Dougoz v. Greece*,

no. 40907/98, § 54, ECHR 2001-II; *Markert-Davies v. France* (dec.), no. 43180/98, 29 June 1999; *Amuur*, cited above, § 50; *Wassink v. the Netherlands*, 27 September 1990, § 24, Series A no. 185; and *Bozano v. France*, 18 December 1986, § 54, Series A no. 111).

72. Article 5 § 1 thus primarily requires any arrest or detention to have a legal basis in domestic law (see *Bozano*, cited above). However, the "lawfulness" of detention under domestic law is not always the decisive element. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires any law to be sufficiently precise to avoid all risk of arbitrariness (see *Nasrulloyev v. Russia*, no. 656/06, § 71, 1 October 2007; *Khudoyorov v. Russia*, no. 6847/02, § 125, ECHR 2005-X; *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX; *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; and *Amuur*, cited above). The standard of "lawfulness" established in the Convention requires that all law be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Shamsa*, cited above, § 40, and *Steel and Others*, cited above, § 54).

73. The Court must therefore ascertain whether the deprivation of liberty to which the applicants were subjected after the Indictment Division's judgments of 30 January and 3 February 2003 ordering their immediate release, and the orders subsequently made on 14 February 2003, came within the exception permitted by Article 5 § 1 (f) and, in particular, whether it satisfied the condition of "lawfulness".

74. The Court observes at the outset that a situation in which the Aliens Office was able, on two occasions, to keep the applicants in detention despite the fact that their previous detention order had been set aside and their release ordered in clear terms by decisions which had become final in the absence of an appeal raises serious doubts in relation to the principle of lawfulness and the proper enforcement of judicial decisions.

75. As regards the placing and confinement of the applicants in the airport transit zone, the Court observes that in the present case the President of the Brussels Court of First Instance found that those measures were unlawful, stating that they were not permissible and were contrary to the rule of law. In the President's opinion, to accept that placing the persons concerned in that zone was equivalent to release would be tantamount to allowing the State "unilaterally to block a court decision ordering release on

the basis of a person's administrative status, when that administrative status had been taken into consideration by that court and must have constituted a ground of its decision ordering release". Admittedly, the Government appear to be suggesting that the two orders made on 14 February 2003 were not in accordance with domestic law and its interpretation by the domestic courts. If that was the case, it is difficult to understand why no appeal was lodged against those decisions, which described the Aliens Office's approach as an "illegal act". The Court also observes that the same finding of illegality had already been made previously by the President of the Nivelles Court of First Instance (see paragraph 54 above). As the applicants submitted, such a finding was also subsequently made expressly by the Brussels Court of Appeal and the United Nations Human Rights Committee and, in substance, by the Federal Ombudsmen.

76. The transfer to and confinement in the transit zone cannot therefore be regarded as the application in good faith of the immigration legislation. As the Court emphasised in the *Bozano* judgment (cited above), it may happen that a Contracting State's agents conduct themselves unlawfully in good faith; in such cases, a subsequent finding by the courts that there has been a failure to comply with domestic law may not necessarily retrospectively affect the validity, under domestic law, of any implementing measures taken in the meantime. Matters would be different if the authorities at the outset knowingly contravened the legislation in force and, in particular, if their original decision was an abuse of powers (ibid.; see also *Gebremedhin [Gaberamadhian] v. France* (dec.), no. 25389/05, § 56, 10 October 2006). In the present case it is apparent that the decision to place the applicants in the transit zone was manifestly contrary to the judgments of 30 January and 3 February 2003 and that the Aliens Office had knowingly exceeded its powers.

77. The Court also reiterates that according to its case-law, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 53, ECHR 2006-XI, and also, *mutatis mutandis*, *Aerts v. Belgium*, 30 July 1998, § 46, *Reports* 1998-V, and other authorities cited therein). The Court notes in that regard that it has been clear, since the first reports of the CPT – to which the Government referred in order to explain the creation of the "INADS Centre" – and the interlocutory order of the Brussels Court of First Instance of 25 June 2003 – referred to in the CPT's 1994 report (see paragraph 55 above) – that the transit zone is not an appropriate place of residence, with the exception of the "INADS Centre", which appears suitable only for a stay not exceeding "a few days" (see paragraph 66 of the CPT's 1997 report). However, from 3 February 2003 the applicants were left to their own devices in the transit zone, without humanitarian or social support of any kind. The second applicant was placed in the transit zone, without any

explanation of the existence, functioning and location of the "INADS Centre", where he might have been given a more appropriate reception. The first applicant, who had initially been placed in the same situation, was given no information about the existence of the centre and was taken there only after he had described his situation to the officials at the border inspection post. Although the first applicant maintained that a few hours after being taken in at that centre he had been taken back to the transit zone and told to fend for himself, the Government stated that he had remained at the centre until 3 February 2003. Even if the Government's version is accepted, the fact remains that after the attempted removal on 3 February 2003 the first applicant was returned to the transit zone without anyone being concerned as to his subsequent fate. The Court will consider that situation in greater detail when it examines the complaint alleging a violation of Article 3 of the Convention. It is also necessary, in that regard, to take account of the fact that those detention measures were applied to foreign nationals who, in some cases, had committed no offences other than those connected with their residence.

78. The Court also observes that the Government failed to explain on what legal basis the applicants had been transferred to and confined in the transit zone. The Court considers that the fact of "detaining" a person in that zone for an indefinite and unforeseeable period without that detention being based on a specific legal provision or a valid decision of a court and with limited possibilities of judicial review on account of the difficulties of contact enabling practical legal assistance, is in itself contrary to the principle of legal certainty, which is implicit in the Convention and is one of the fundamental elements of a State governed by the rule of law (see, *mutatis mutandis*, *Shamsa*, cited above, § 58; *Ječius*, cited above, § 62; and *Baranowski*, cited above, §§ 54-57).

79. As regards the placing of the applicants in Merksplas, serious doubts as to the lawfulness of this third period of detention may in the Court's view be inferred from the domestic courts' finding that the second period of detention was unlawful. Furthermore, the orders of 14 February 2003 clearly indicated, relying on *res judicata* and the provisions of the Act of 15 December 1980, that until such time as the applicants were deported, the State must allow them to move freely within the territory, unless the Ministry decided to order them to reside in a designated place. Since the State clearly refused to enforce the repatriation decisions and hoped that the applicants would leave voluntarily, in spite of the previous setbacks, it continued to detain them on other grounds, without making use of the possibility offered by section 73 of the Act of 15 December 1980 to which the orders referred. Accordingly, their detention in Merksplas wholly failed to comply with the above-mentioned orders, against which no appeals were lodged. The Court has pointed out on many occasions that the implementation of final judicial decisions is essential in a State that accepts

the rule of law (see *Pedovič v. the Czech Republic*, no. 27145/03, § 112, 18 July 2006).

80. In conclusion, the Court considers that the applicants' detention, in the form in which it continued after 3 February 2003, was not "lawful" within the meaning of Article 5 § 1 of the Convention. Accordingly, there has been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

81. The applicants alleged that they had suffered inhuman and degrading treatment, contrary to Article 3 of the Convention, at the hands of the Belgian authorities. They explained, firstly, that they had been left for more than ten days in the transit zone without any legal or social assistance, without any means of subsistence, without accommodation or washing or sleeping facilities, without any place to enjoy a private life, without access to means of communication, without being able to receive visits and without any possibility of having the conditions of their detention reviewed by external independent authorities. Secondly, they had been beaten several times and insulted. They relied on Article 3, which provides:

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

...

B. Merits

88. The applicants submitted that in the transit zone they had been the victims of physical and psychological ill-treatment, remaining there without legal and social assistance, without any means of subsistence (food or drink), and without accommodation, toilets or anywhere to sleep. They had had nowhere to wash other than the public conveniences in the airport, no change of clothes, no toiletries and nowhere to enjoy a private life. Nor had they had access to communication facilities or any means of contacting the outside world, in particular their lawyer, a non-governmental organisation, an international organisation or a doctor. They had also been unable to receive visits or to have the conditions of their detention reviewed by external independent authorities. That situation contrasted with the situation at the closed centres, where a whole range of rights were afforded to aliens by a royal decree of 2 August 2002 which guaranteed them individual medical, psychological and social assistance. The physical conditions in the transit zone were used in order to bring psychological pressure to bear on those concerned with the aim of encouraging them to leave. The decisions delivered on 14 February 2003 and various reports had noted that in the transit zone, the living conditions were demeaning to the persons concerned

and caused them to experience feelings of inferiority and anxiety capable of weakening and overcoming their physical and mental resistance, thus constituting inhuman and degrading treatment.

89. The Government noted, first of all, that the time spent in the transit zone, a period limited to fifteen days in the first applicant's case and eleven days in the second applicant's case, was wholly attributable to the applicants. They had refused on several occasions to board the planes on which seats had been booked for them. Ab., on the other hand, who had arrived at the same time as the fist applicant, had left Belgium on 8 February 2003. By refusing to comply with the deportation orders upheld by the Commissioner General's Office, the applicants alone were responsible for the duration of their stay in the transit zone and for the alleged uncertainty connected with their situation (they cited *Mogoş*, cited above; *Ghiban v. Germany* (dec.), no. 20420/02, 16 September 2004; and *Matencio v. France*, no. 58749/00, 15 January 2004).

90. The Government also maintained that the applicants had not been without resources in the transit zone, since their luggage and personal effects had been returned to them when they had left the Bruges Closed Centre. As regards the first applicant, a report by the Bruges Centre relating to the sums of money deposited by him stated that on leaving he had been given the sum of USD 250 and 1,000 Lebanese pounds. The second applicant had been given the sum of EUR 15.20, according to the Bruges Centre's report on the sums of money deposited. The movements of money mentioned in the various reports in that applicant's file showed that he had certainly had more means at his disposal: on arriving in Belgium he had stated that he had EUR 45; on entering the Bruges Centre he had deposited EUR 81.94 and when he left Belgian territory he had had EUR 150. Nor had the second applicant been alone in the transit zone, since he had joined the two other Palestinian nationals who had been transferred there on 30 January 2003 (the first applicant and Ab.), about whom he had immediately enquired. That amount must be considered to be the minimum amount in their possession: residents were under no obligation to hand over all the money in their possession, although they were advised to do so in order to protect against theft.

91. Furthermore, persons in the transit zone pending deportation could also receive meals via the control services, a practice confirmed by a circular of 31 October 2003. On 1 February 2003 the first applicant had been informed that he could be housed and fed on a voluntary basis at the “INADS Centre”, and he had stayed there from 1 to 3 February 2003, according to the centre's report (the Government also observed that Ab. had stayed at the “INADS Centre” from his arrival in the transit zone, at the same time as the first applicant, until he had voluntarily left the country on 8 February 2003). In the Government's view, the applicants were therefore responsible for the situation of which they complained and they could not

take issue with the Belgian State for their own failure to make use of the opportunities offered to them.

92. The Government further observed that, as regards the checks carried out by the police in the transit zone, the applicants had adduced no evidence on which it could be considered that those checks had been excessive, or indeed that the applicants themselves had been specifically targeted by those checks. The transit zone at Brussels National Airport was undeniably a high-risk zone, especially in view of the increased risk of attacks in recent years, which meant that regular checks were carried out there and that safeguards were put in place with respect to access to Belgian territory, in accordance with Belgium's commitments to the Schengen States and the member States of the European Union. There was no evidence that the applicants had been systematically targeted during those checks or that any violence had been used on such occasions. Nor had the first applicant lodged a complaint with the competent authorities or submitted any medical certificates confirming the blows or injuries allegedly inflicted on him.

93. As regards the second applicant, the Government also contended that the letter of 19 February 2003 from the lawyer representing both applicants made no mention of the blows and injuries allegedly inflicted on him while he was being transferred on 15 February 2003.

94. The Court reiterates, first of all, that the Contracting States have, under a firmly established principle of international law and without prejudice to their commitments under international treaties, including the Convention, the right to control the entry, residence and expulsion of non-nationals. However, where they exercise their right to expel such persons, they must have regard to Article 3 of the Convention, which enshrines one of the fundamental values of any democratic society.

95. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, for example, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). In ascertaining whether a particular form of treatment is "degrading" within the meaning of Article 3, the Court will consider whether the objet was to humiliate and debase the person concerned and whether, as far as its consequences are concerned, the measure did or did not affect his personality in a manner incompatible with Article 3 (see *Albert and Le Compte v. Belgium*, 10 February 1983, § 22, Series A no. 58). However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (see, for example, *Peers v. Greece*, no. 28524/95, § 74, ECHR 2001-III, and *Kalashnikov v. Russia*, no. 47095/99, § 101, ECHR 2002-VI). The suffering and humiliation inflicted must in any event go beyond that inevitable element of suffering

and humiliation connected with a given form of legitimate treatment or punishment. In this connection, the public nature of the punishment or treatment may be a relevant and aggravating factor (see, for example, *Raninen v. Finland*, 16 December 1997, § 55, *Reports* 1997-VIII). However, it may well suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others (see *Tyrer v. the United Kingdom*, 25 April 1978, § 32, Series A no. 26; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 120, ECHR 1999-VI; and *Erdoğan Yağız v. Turkey*, no. 27473/02, § 37, 6 March 2007).

96. The Court further reiterates that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. 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 or mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25).

97. In order to carry out this assessment, regard must be had to "the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' [and] that the increasingly high standard being required in the area of the protection of human rights and fundamental freedoms correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (see *Mubilanzila Mayeka and Kaniki Mitunga*, cited above, § 48, and, *mutatis mutandis*, *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V).

98. The Court observes that the placing of the applicants in the transit zone constituted detention within the meaning of Article 5 of the Convention. The Court's task is limited to examining the personal situation of the applicants who were deprived of their liberty (see *Aerts*, cited above, §§ 34-37). In assessing whether such measures may fall within the ambit of Article 3 in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned (see *Van der Ven v. the Netherlands*, no. 50901/99, § 51, ECHR 2003-II; see also *Dhoest v. Belgium*, application no. 10448/83, Commission's report of 14 May 1987, Decisions and Reports 55, pp. 20-21, §§ 117-118).

99. Measures depriving persons of their liberty inevitably involve an element of suffering and humiliation. Although this is an unavoidable state of affairs which, in itself as such, does not infringe Article 3, that provision nevertheless requires the State to ensure that all prisoners are detained in conditions which are compatible with respect for their human dignity, that the manner of their detention does not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in such a measure and that, given the practical demands of imprisonment, their health and well-being are adequately secured (see, for example, *Poltoratskiy*

v. Ukraine, no. 38812/97, § 132, ECHR 2003-V; *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX; and *Kudła*, cited above, §§ 92-94); furthermore, the measures taken in connection with the detention must also be necessary to attain the legitimate aim pursued (see *Frérot v. France*, no. 70204/01, § 37, 12 June 2007, and *Ramirez Sanchez v. France* [GC], no. 59450/00, § 119, ECHR 2006-IX).

100. In this connection, the Court observes that the applicants' deprivation of liberty was based on the sole fact that they were not in possession of a lawful residence permit. While States are entitled to detain would-be immigrants under their "undeniable ... right to control aliens' entry into and residence in their territory" (see *Amuur*, cited above, § 41), this right must be exercised in accordance with the provisions of the Convention (see *Mahdid and Haddar v. Austria* (dec.), no. 74762/01, 8 December 2005). The Court must have regard to the particular situation of these persons when reviewing the manner in which the detention order was implemented against the yardstick of the Convention provisions. At the same time, the Court would emphasise that Article 3 prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's circumstances or conduct (see, for example, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

101. The Court observes at the outset that in the present case the applicants were taken to the transit zone with a view to implementing judgments ordering their release delivered on 30 January and 3 February 2003, yet the Aliens Office, which was responsible for their transfer to the transit zone, showed no concern as to whether they would have adequate support there (see paragraph 77 above). The Court notes that the second applicant maintained, and this was not contested by the Government, that he was placed in the transit zone without being given any explanation about the existence, functioning and location of the "INADS Centre", which might have been a more suitable place for him to stay for a certain time. The first applicant, who had initially been placed in the same situation, was given no information about the possibility of going to the "INADS Centre" and was taken there only after he reported his situation to the officials of the border inspection post. After having stayed there for several hours or several days, he again found himself back in the transit zone, at the latest after the attempt to deport him on 3 February 2003, without anyone being concerned about his subsequent fate. Nor did the letter which the first applicant's lawyer sent to the Minister of the Interior complaining about his client's situation provoke any reaction on the part of that authority. Lastly, while it is clear that the applicants were regularly checked while staying in the transit zone, it appears that the persons who carried out those checks never showed any concern about their situation.

102. The Court does not subscribe to the Government's argument that the applicants had the opportunity to be accommodated on a voluntary basis

at the “INADS Centre”. First of all, that possibility was never raised in the proceedings before the President of the Court of First Instance, who examined the applicants' situation by reference to Article 3. Nor was there any reference to it in the judgment of 29 September 2005 or in the reports and observations referred to in the preceding paragraph, although those documents were drawn up only after adversarial proceedings had taken place. The Court, moreover, is surprised at the attitude of the Aliens Office during the transfer to the transit zone. Although the Aliens Office was behind the transfer and although, according to the CPT's 1997 report, the “INADS Centre” is administered by that office, it did not place the applicants in that centre, or arrange for them to be placed there, but placed them in another part of the transit zone. However, it is apparent from the explanations provided by the parties that while that centre is within the transit zone of Brussels National Airport, it is situated, more specifically, on a lower level, at the end of “Pier B” of the new terminal. It therefore does not appear that it is easily accessible, especially for an alien newly arrived in the country and ill prepared to find his way around an international airport. The reports and observations referred to above show that these were not isolated acts on the part of the authority in question and give credence to the applicants' assertion that the Aliens Office's purpose in abandoning them in the transit zone was to compel them to leave the country voluntarily.

103. It is true that the first applicant stayed at the “INADS Centre” shortly after arriving in the transit zone, and remained there for several hours or several days, depending on the version. He therefore had the option, according to the Government, of returning there and taking the second applicant with him. The Court cannot accept that argument. Having taken it upon itself to deprive the applicants of their liberty, the State was under a duty to ensure that they were detained in conditions compatible with respect for human dignity. It could not merely expect the applicants themselves to take the initiative in approaching the centre in order to provide for their essential needs. The Court finds that that was not of the slightest concern to the authorities in the present case (see paragraph 101 above). The order of 30 November 2002, the judgment of 29 September 2005, the observations of the United Nations Human Rights Committee, the Federal Ombudsmen's annual report for 2004 and the CPT's 2005 report show that, far from being confined to the present case, that mode of conduct was reproduced on sufficient occasions to be characterised as a “practice” in the three last-mentioned documents.

104. The transit zone was not an appropriate place in which to detain the applicants. By its very nature it is a place designed to accommodate people for very short periods. With characteristics liable to give those detained there a feeling of solitude, with no access outside to take a walk or have physical exercise, without internal catering arrangements or contact with the outside world, the transit zone is wholly inappropriate to the needs of a stay

of more than ten days. The Government accepted, moreover, that the recommendations made in that regard by the CPT had led to the establishment of the "INADS Centre" in order to make up for those shortcomings. An interlocutory order of the President of the Brussels Court of First Instance of 25 June 1993 had already found that a placement without any support in the transit zone, "taken as a whole, has the characteristics of degrading and inhuman treatment". On that occasion the State had been ordered to put the persons placed in the transit zone "out of sight of the public" and to provide them with bedding, meals and sanitary facilities and to ensure that they received essential medical care. The conclusion that that situation constituted inhuman and degrading treatment was also reached in the order of the President of the Nivelles Court of First Instance of 30 November 2002, the orders made in the present case and the judgment of 29 September 2005.

105. The Court also emphasises, as a subsidiary consideration, that even if it had been possible for the applicants to be taken in at the "INADS Centre", the findings of the CPT's 1997 report, confirmed in the 2005 report, indicate that that centre is not appropriate for stays of more than a few days, whereas the applicants were detained for more than ten days in the transit zone, which they were able to leave only after the orders of 14 February 2003. In making those findings, the CPT noted, in particular, the limited opportunities for visits and the lack of facilities for the persons detained in the centre to have access to fresh air (see, *mutatis mutandis*, *Poltoratskiy*, cited above, § 146).

106. The Court considers it unacceptable that anyone might be detained in conditions in which there is a complete failure to take care of his or her essential needs. The fact that certain persons working in the transit zone provided for some of the applicants' needs does not in any way alter the wholly unacceptable situation which they had to endure.

107. It has not been established that there was a genuine intention to humiliate or debase the applicants. However, the absence of any such purpose cannot rule out a finding of a violation of Article 3 (see *Peers*, cited above). The Court considers that the conditions which the applicants were required to endure while being detained for more than ten days caused them considerable mental suffering, undermined their dignity and made them feel humiliated and debased. On the assumption that it is true, and in so far as the applicants were given the relevant information, the mere possibility that they could be given three meals a day cannot alter that finding.

108. In addition, the humiliation which the applicants felt was exacerbated by the fact that, after obtaining a decision ordering their release, they were deprived of their liberty in a different place. In the Court's view, the feelings of arbitrariness, inferiority and anguish which must have been associated with that state of affairs compounded the degree of humiliation occasioned by the obligation to live in a public place without any support.

109. In the light of that finding, the Court does not consider it necessary to examine the brutality and insults to which the applicants claim to have been subjected by the police while they were in the transit zone. The Court notes, moreover, that at the hearing on 30 November 2006 the applicants complained of the excessive humiliation caused to them by the attitude of the police during the overly frequent checks and the attempts to deport them. They did not mention any insults or physical violence, except in connection with one particular incident, in respect of which they were very imprecise. The applicants also made allegations in their application to the Court about the attitude of the police during their transfer to Merksplas and their removal on 5 and 8 March 2003. The Court finds, however, that they did not pursue those complaints either in their written observations or at the hearing and therefore sees no reason to examine them of its own motion.

110. In the light of the foregoing, the Court considers that the fact that the applicants were detained for more than ten days in the location in issue amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention (see, *mutatis mutandis*, *Kaja v. Greece*, no. 32927/03, 27 July 2006, and *Dougoz*, cited above, § 48).

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

...

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. 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

115. The applicants claimed to have sustained non-pecuniary damage, which they assessed at EUR 15,000 each.

116. The Government contended that by refusing to comply with the enforceable decisions ordering them to leave the territory the applicants were responsible for the duration of the situation of which they complained under Articles 3 and 8 of the Convention. In the alternative, the Government maintained that the evaluation of the non-pecuniary damage should be based on that made in similar cases concerning similar facts, including the *Amuur* case (cited above), where the finding of a violation had been considered to constitute sufficient redress for non-pecuniary damage, and the *Shamsa* case (cited above), where a sum of only EUR 4,000 had been awarded under that head on account of events taking place over a longer period.

117. The Court considers that both applicants undoubtedly experienced distress which cannot be made good solely by its finding of a violation. Having regard to the nature of the violations found in the present case, and ruling on an equitable basis, the Court awards EUR 15,000 to each of the applicants by way of compensation for non-pecuniary damage.

B. Costs and expenses

118. The applicants sought reimbursement of the costs and expenses incurred in the proceedings before the Court. In that connection they submitted a "fee note" in which the costs and expenses calculated on 29 October 2006 came to EUR 18,064 and the subsequent costs and expenses were assessed at EUR 4,700.

119. The Government, who observed that the applicants had provided no documentary evidence to support their claims, maintained that sums relating to costs and expenses incurred by or on behalf of the various associations could not be taken into account. While those associations were initially among the applicants, an inadmissibility decision, on the ground of incompatibility *ratione personae* with the provisions of the Convention, was delivered in respect of them by the Court on 21 September 2006. The Government further submitted that the amount claimed in respect of the other costs and expenses was manifestly excessive.

120. According to the Court's settled case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002). The Court is of the view that, in certain respects, the claims submitted are not substantiated or are excessive. Making its assessment on an equitable basis, the Court awards EUR 15,000 for costs and expenses. That sum is to be reduced by the amount awarded by the Court by way of legal aid (EUR 1,625.40).

C. Default interest

121. 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

...

2. *Holds* that there has been a violation of Article 5 of the Convention;

3. *Holds* that there has been a violation of Article 3 of the Convention on account of the conditions of the applicants' stay in the transit zone;

...

5. *Holds*
(a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) to each of the applicants in respect of non-pecuniary damage and an aggregate sum of EUR 13,374.60 (thirteen thousand three hundred and seventy-four euros and sixty cents) in respect of costs and expenses, plus any tax that may be chargeable;
(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 claim for just satisfaction.

Done in French, and notified in writing on 24 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Loukis Loucaides
President