Udlændinge- og Integrationsministeriet

6 marts 2018

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Til: UIM Ministersekretariatet
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Til: Udlændinge- og integrationsministeren

Dato: 5. april 2017

Udvalget udbeder sig ministerens besvarelse af følgende spørgsmål:

UUI alm. del

Spørgsmål 665

Vil ministeren kommentere Den Europæiske Menneskerettighedsdomstols dom i sagen Paposhvili mod Belgien af 13. december 2016 samt seniorforsker, ph.d. Peter Vedel Kessings artikel om dommen i "EU-ret og Menneskeret" nr. 1, 2017 og redegøre for, om dommen får konsekvenser for den danske praksis med hensyn til tildeling af humanitære opholdstilladelser efter udlændingelovens § 9 b?

Spørgsmål 666

Det fremgår af bemærkningerne til L 188 (2009-10), punkt 8.4.2., at regeringen (den daværende VK regering) "finder, at den danske praksis for vurdering af tilgængeligheden af behandlingsmuligheder i hjemlandet bør indrettes i overensstemmelse med praksis fra Den Europæiske Menneskerettighedsdomstol". Er dette også den nuværende regerings opfattelse, og vil ministeren redegøre for, hvordan regeringen vil bringe den danske praksis i overensstemmelse med menneskerettighedsdomstolens praksis, som den er udtrykt i dommen i sagen Paposhvili mod Belgien af 13. december 2016?

Spørgsmål 667

Har ministeriet i 2016 givet afslag på ansøgninger om opholdstilladelse efter udlændingelovens § 9 b, som er i strid med den praksis, der udtrykkes i Den Europæiske Menneskerettighedsdomstols dom i sagen Paposhvili mod Belgien af 13. december 2016?

Spørgsmål 668

Hvilke forpligtelser til en undersøgelse af behandlingsmulighederne i det modtagende land giver det de danske myndigheder i sager om opholdstilladelse efter udlændingelovens § 9 b, at Den Europæiske Menneskerettighedsdomstol i afsnit 189 i dommen Paposhvili mod Belgien af 13. december 2016 slår fast, at den tilbagesendende stat er forpligtet til i hver enkelt sag ("on a case-by-case basis") at undersøge, om den behandling, der generelt er til stede i

modtagerlandet, er tilstrækkelig og passende for at sikre, at ansøgeren ikke ved tilbagesendelse udsættes for en krænkelse af EMRK's artikel 3?

Spørgsmålene er stillet efter ønske fra Johanne Schmidt-Nielsen (EL).

Svarene bedes sendt elektronisk til spørgeren på Johanne.Schmidt-Nielsen@ft.dk og til lov@ft.dk.

På udvalgets vegne

Martin Henriksen (DF)

formand

Udlændinge- og Integrationsministeriet

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

Information Note on the Court's case-law 202

December 2016

Paposhvili v. Belgium [GC] - 41738/10

Judgment 13.12.2016 [GC]

Article 3

Expulsion

Proposed deportation of person suffering from serious illness to his country of origin in face of doubts as to the availability of appropriate medical treatment there: *expulsion would have constituted a violation*

Article 8

Expulsion

Proposed deportation of person suffering from serious illness to his country of origin in face of doubts as to the availability of appropriate medical treatment there: *expulsion would have constituted a violation*

Facts – The applicant, a Georgian national, arrived in Belgium via Italy in November 1998, accompanied by his wife and the latter's six-year-old child. The couple subsequently had two children. The applicant received several prison sentences for robbery. He suffered from tuberculosis, hepatitis C and chronic lymphocytic leukaemia (CLL). An asylum request by the applicant and his wife was refused in June 1999. The applicant then submitted a number of requests for regularisation of his residence status, but these were rejected by the Aliens Office. The applicant and his wife were subsequently issued with several orders to leave the country, including one in July 2010.

On 23 July 2010, relying on Articles 2, 3 and 8 of the Convention, the applicant applied to the European Court for an interim measure under Rule 39 of the Rules of Court, arguing 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. On 28 July 2010 the Court granted his request.

The order to leave Belgian territory was extended until 28 February 2011. 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.

A medical certificate issued in September 2012 stated that failure to treat the applicant for his hepatitis and his lung disease could lead to organ damage and significant disability and that failure to treat his leukaemia (CLL) could result in death. A return to Georgia would expose the patient to inhuman and degrading treatment. 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". Referring to the Court's judgment in *N. v. the United Kingdom* ([GC], 26565/05, 27 May 2008, Information Note 108), the Aliens Office found in its report that

the applicant's medical records did not warrant the conclusion that the threshold of gravity required by Article 3 of the Convention had been reached. The applicant's life was not directly threatened and no ongoing medical supervision was necessary in order to ensure his survival. Furthermore, his disease could not be considered to be in the terminal stages at that time.

On 29 July 2010 the applicant's wife and her three children were granted indefinite leave to remain. The applicant died in June 2016.

Law – Preliminary issue: Following the applicant's death his relatives had expressed the wish to pursue the proceedings. The Court noted that there were important issues at stake in the present case, notably concerning the interpretation of the case-law in relation to the expulsion of seriously ill aliens. The impact of this case therefore went beyond the particular situation of the applicant. Accordingly, special circumstances relating to respect for human rights as defined in the Convention and the Protocols thereto required the Court to continue the examination of the application in accordance with Article 37 § 1 *in fine* of the Convention.

Article 3: In the case of *N. v. the United Kingdom* the Court had stated that, in addition to situations of the kind addressed in *D. v. the United Kingdom* (30240/96, 2 May 1997) in which death was imminent, there might be other very exceptional cases where the humanitarian considerations weighing against removal were equally compelling. An examination of the case-law subsequent to *N. v. the United Kingdom* had not revealed any such examples. The application of Article 3 of the Convention only in cases where the person facing expulsion was close to death had deprived aliens who were seriously ill, but whose condition was less critical, of the benefit of that provision.

The Grand Chamber found in the present case that the "other very exceptional cases" which might 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 had 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. These situations corresponded to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.

It was for the applicants to adduce evidence capable of demonstrating that there were 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.

Where such evidence was adduced it was for the authorities of the returning State, in the context of domestic procedures, to dispel any doubts raised by it. The risk alleged had to be subjected to close scrutiny in the course of which the authorities in the returning State had to 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.

The impact of removal on the person concerned had to be assessed by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State.

It was necessary to verify on a case-by-case basis whether the care generally available in the receiving State was 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.

The authorities were also required to consider the extent to which the individual in question would actually have access to that care and those facilities in the receiving State.

Where, after the relevant information had been examined, serious doubts persisted regarding the impact of removal on the persons concerned, it was for the returning State to obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment would be available and accessible to the persons concerned so that they did not find themselves in a situation contrary to Article 3.

The applicant had been suffering from a very serious illness and his condition had been life- threatening. However, his condition had become stable as a result of the treatment he had been receiving in Belgium, aimed at enabling him to undergo a donor transplant. 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.

Neither the treatment the applicant had been receiving in Belgium nor the donor transplant had been available in Georgia. As to the other forms of leukaemia treatment available in that country, there was no guarantee that the applicant would have had access to them, on account of the shortcomings in the Georgian social insurance system.

The opinions issued by the Aliens Office's medical adviser regarding the applicant's state of health, based on the medical certificates he had provided, had not been 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.

Likewise, the applicant's medical situation had not been examined in the context of the proceedings concerning his removal.

The fact that an assessment of this kind could have been carried out immediately before the removal measure was to be enforced did 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.

In conclusion, 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 had been 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.

Conclusion: The applicant's expulsion would have entailed a violation (unanimously).

Article 8: It was not disputed that family life had existed between the applicant, his wife and the children born in Belgium. The case was therefore examined from the perspective of "family life" and the complaint was considered from the standpoint of the Belgian authorities' positive obligations.

Having observed that the Belgian authorities had not examined 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 had 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.

A fortiori, the Belgian authorities had likewise not examined, under Article 8, the degree to which the applicant had been 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, had 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.

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, 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.

Conclusion: The applicant's expulsion would have entailed a violation (unanimously).

Article 41: Claim for pecuniary damage dismissed; findings of a violation sufficient in respect of non- pecuniary damage.

(See also *Saadi v. Italy* [GC], 37201/06, 28 February 2008, Information Note 105)

Ny dom fra Den Europæiske Menneskerettighedsdomstol kræver ændring af humanitær opholdstilladelse

(1. 2017 side 3)

Af Peter Vedel Kessing, seniorforsker, ph.d.

Den Europæiske Menneskerettighedsdomstol (EMD) har med en ny storkammerdom i *Paposhvili-sagen* fra december 2016 præciseret, under hvilke betingelser en deltagerstat kan udsende udlændinge med alvorlige behandlingskrævende helbredsproblemer. Dommen er på flere måder et opgør med Domstolens tidligere yderst restriktive praksis på området og bør føre til ændring af Udlændinge- og Integrationsministeriets (UIM) praksis for at meddele humanitær opholdstilladelse efter § 9 b, stk. 1, i udlændingeloven.[1],[2]

1. INDLEDNING – DANSK PRAKSIS: FRA UNDTAGELSE TIL UMULIGHED?

UIM kan efter udlændingelovens § 9 b meddele humanitær opholdstilladelse til en udlænding, der opholder sig i Danmark og har fået afslag på asyl, »hvis væsentlige hensyn af humanitær karakter afgørende taler for at imødekomme ansøgningen«.

Bestemmelsen, der blev indsat i udlændingeloven i 1985, var ifølge de almindelige bemærkninger til bestemmelsen tiltænkt et snævert anvendelsesområde. Der skulle kun undtagelsesvist meddeles humanitær opholdstilladelse til udlændinge med alvorlige behandlingskrævende helbredsproblemer.[3]

Det til enhver tid ansvarlige ministerium har løbende informeret Folketinget om udviklingen af praksis. Det er sket ved oversendelse af praksisnotater og besvarelse af Folketingsspørgsmål,[4] ligesom ministeriet siden 1993 hvert kvartal har tilsendt Folketinget et resumé af de sager, hvor der er meddelt humanitær opholdstilladelse.

UIM's seneste praksisnotat er fra 1. august 2010. Ministeriet udstedte notatet i forbindelse med en ændring af udlændingeloven i 2010 på baggrund af en nærmere analyse af EMD's daværende praksis. Praksisnotatet strammede praksis for at meddele humanitær opholdstilladelse, således at der kun skulle meddeles humanitært ophold, hvis Danmarks internationale forpligtelser krævede det, jf. nærmere afsnit 3.2.1. nedenfor.

Der er siden praksisændringen i 2010 sket et markant fald i antallet af meddelte humanitære opholdstilladelser. I de seks år fra 2004 til 2009 før praksisændringen blev der i gennemsnit meddelt 198 humanitære opholdstilladelser pr. år.[5] I de seneste seks år fra 2011-2016 efter praksisændringen blev der i gennemsnit meddelt 55 humanitære opholdstilladelser pr. år.[6] Særligt i de sidste par år er der givet yderst få humanitære opholdstilladelser, nemlig: 46 i 2014; 25 i 2015; og kun 3 i 2016.

Mens det tidligere havde undtagelsens karakter at få humanitær opholdstilladelse, får man indtryk af, at det nu nærmest er umuligt. Årsagerne til denne udvikling kan være mange, herunder at de udlændinge, der ansøger om humanitær opholdstilladelse, ikke har været så syge som tidligere. Men der kan næppe være tvivl om, at UIM's praksisændring i 2010 har været en væsentligt medvirkende faktor til faldet i humanitære opholdstilladelser, jf. nærmere afsnit 3.2 nedenfor.

I afsnit 2 nedenfor redegøres for EMD's praksis og den nye storkammerdom. I afsnit 3 drøftes de danske regler og retningslinjer for humanitær opholdstilladelse samt konsekvenserne af den nye EMD-dom.

2. EMD'S PRAKSIS OM TILBAGESENDELSE AF ALVORLIGT SYGE UDLÆNDINGE

Ved afgørelsen af, om alvorligt syge udlændinge kan tilbagesendes til deres hjemland, lægger EMD afgørende vægt på to kriterier: Sygdommens alvor og behandlingsmulighederne i hjemlandet.

2.1. Sygdomskriteriet

EMD har igennem årene behandlet en række sager om udsendelse af alvorligt syge udlændinge, men Domstolen har hidtil kun i én enkelt sag fundet, at en udsendelse ville være en krænkelse af forbuddet mod tortur, umenneskelig og nedværdigende behandling i art. 3 i Den Europæiske Menneskerettighedskonvention (EMRK).[7]

Det drejer sig om *D mod UK* fra 1997, hvor Domstolen for første gang udtalte, at det i »helt exceptionelle situationer«, hvor der foreligger tvingende humanitære hensyn, kan være i strid med art. 3 at udsende en alvorligt syg udlænding til et hjemland uden behandlingsmuligheder.[8] Sagen vedrørte en mand fra St. Kitts, der led af AIDS i terminalstadiet, for hvilken sygdom han modtog intensiv behandling i Storbritannien. Den type medicinsk behandling, som muligvis var tilgængelig i St. Kitts, ville ikke kunne dæmme op for de infektioner, som han måtte forventes at kunne få i St. Kitts. Derudover havde manden ingen familiemedlemmer eller andet netværk i hjemlandet. EMD fandt på den baggrund, at der var tale om en »helt exceptionel situation«, hvor det ville være i strid med art. 3 at udsende den pågældende udlænding til St. Kitts.

Modsat fastslog EMD i *N mod UK* fra 2008, at en alvorligt AIDS-syg kvinde godt kunne udsendes til Uganda, selvom det var uvist, om hun dér ville kunne få adgang til den nødvendige behandling.[9] EMD lagde vægt på, at kvinden ikke var kritisk/terminalt syg, og at hendes sygdom var stabiliseret. EMD anførte (pr. 42), at det forhold at en ansøgers levetid (»life expectancy«) ville blive markant (»significantly«) forkortet ved en udsendelse til hjemlandet, ikke var tilstrækkeligt til at udgøre en krænkelse af EMRK art. 3.

EMD har siden fastholdt denne restriktive praksis. Det kan være i strid med art. 3 at udsende alvorligt *terminalt* syge udlændinge med forventet kort levetid til et hjemland uden de nødvendige behandlingsmuligheder. Andre alvorligt, men ikke terminalt syge udlændige kan godt udsendes, hvis deres tilstand er stabiliseret, og de er »fit to travel«.[10]

Domstolen har dog i flere domme gentaget, at der kan være andre »helt exceptionelle situationer« (end terminalt syge som i *D mod UK*), hvor en udsendelse vil være i strid med art. 3. Men Domstolen har ikke præciseret, hvornår det er tilfældet.[11]

Denne meget restriktive praksis gør EMD eksplicit op med i den nye storkammerdom fra december 2016 i *Paposhvili*. Domstolen anfører:

> »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.«

Domstolen anfører derefter, at EMRK skal fortolkes og anvendes på en måde, så rettighederne er praktiske og effektive, og ikke teoretiske og illusoriske, og præciserer, hvad den mener med andre »helt exceptionelle situationer«:

> »183. The Court considers that the 'other very exceptional cases' [ud over terminalt syge] within the meaning of the judgment in N. v. the United Kingdom 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.*« (kursiv tilføjet).

Sammenfattende vil det således kunne være i strid med art. 3 at udsende en alvorligt syg udlænding til et hjemland uden adgang til de nødvendige behandlingsmuligheder, såfremt den pågældende:

- Lider af en uhelbredelig sygdom i terminalstadiet med forventet kort levetid (hidtil praksis)
- Risikerer at blive udsat for en alvorlig, hurtig og irreversibel forværring af sit helbred, der fører enten til intens lidelse eller til en væsentligt kortere levetid (ny praksis).

Den nye storkammerdom er et udtrykkeligt opgør med Domstolens tidligere meget restriktive praksis i forhold til sygdomskriteriet. Ikke mindst i forhold til udsendelse til en »signifikant reduktion af levetid«, som Domstolen tidligere i *N mod UK* fra 2008 eksplicit afviste var i strid med art. 3.

Man kan lidt firkantet sige, at EMD med den nye praksis ikke alene lægger vægt på sygdommens terminale karakter (bullet nr. 1), men også – og i højere grad – på de konkrete overlevelsesmuligheder i hjemlandet (bullet nr. 2).

Denne ændrede materielle vurdering får i sagens natur også en afsmittende virkning for den udsendende stats undersøgelsespligt. Mens det i vidt omfang kan vurderes i den udsendende stat/Danmark, om en udlænding lider af en meget alvorlig terminal sygdom med forventet kort levetid (bullet nr. 1), så kan de konkrete overlevelsesmuligheder i hjemlandet, herunder om der er risiko for en »alvorlig forværring af helbred« eller en »væsentlig reduktion af levetid« (bullet nr. 2), kun vurderes ud fra de konkrete forhold i hjemlandet. Det skal nærmere belyses nedenfor.

2.2. Behandlingskriteriet

Ud over sygdomskriteriet lægger EMD også vægt på behandlingsmulighederne i hjemlandet.

EMD fastslog i 2001, at det ikke er i strid med art. 3 at udsende alvorligt syge udlændinge, såfremt de kan modtage den nødvendige behandling og pleje i hjemlandet. Det skete i *Bensaid*-sagen, hvor Storbritannien godt kunne sende en alvorligt psykisk syg skizofren udlænding retur til Algeriet under henvisning til, at den nødvendige behandling var tilgængelig.[12] Det forhold, at behandlingen i Storbritannien var mere favorabel, kunne ikke føre til et andet resultat.

Men EMD gik videre i 2004 i *Amegnigan*-sagen og fastslog, at det var tilstrækkeligt, at den nødvendige behandling generelt (principielt) var tilgængelig i hjemlandet. Det forhold, at en behandling i den pågældende udlændings hjemland alene var tilgængelig mod en betragtelig egenbetaling, som det var usikkert, om udlændingen havde råd til, udgjorde således ikke en krænkelse af art. 3:

> »Whilst acknowledging the assessment of the applicant's treating specialist doctor that the applicant's health condition would relapse if treatment would be discontinued, the Court notes that adequate treatment is in principle available in Togo, albeit at a possibly considerable cost.«[13] (kursiv tilføjet).

Det er således ikke nødvendigt at undersøge, om udlændingen også konkret vil have *adgang* til behandlingen i hjemlandet. Det fastslog EMD også i *N v UK*, hvor Domstolen ligeledes ikke tillagde det betydning, at ansøgeren ikke havde mulighed for at betale for den fornødne behandling i hjemlandet.[14]

I den nye storkammerdom gør EMD op med denne praksis. Domstolen drøfter for første gang mere indgående spørgsmålet om, hvilke undersøgelsesskridt den udsendende stat skal gennemføre inden udsendelsen af en alvorligt syg udlænding.

2.3. Undersøgelsespligten

Den udsendende stat skal for det første – som efter hidtidig praksis – vurdere, om de *generelle behandlingsmuligheder* i hjemlandet for den pågældende sygdom er tilstrækkelige og passende:

> »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.«[15]

Dernæst skal staten vurdere, om den pågældende udlænding konkret vil have *adgang* til den nødvendige behandling og pleje, herunder i forhold til pris og distance til behandling og familie- og socialt netværk:

> »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 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.«[16]

I tilfælde, hvor der eksisterer alvorlig tvivl om, hvilke konsekvenser udsendelsen vil få for den pågældende udlænding, herunder i forhold til at kunne modtage den nødvendige behandling, skal den udsendende stat indhente en *individuel og tilstrækkelig garanti* fra modtagerstaten om, at passende behandling generelt er til rådighed og konkret tilgængelig for den pågældende udlænding:

> »Where, after the relevant information has been examined, serious doubts persist regarding *Supra* note 1, 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.«[17]

Sammenfattende lægger *Paposhvili*-dommen op til en betydelig udvidelse af undersøgelsespligten både i forhold til undersøgelsestemaet og i forhold til, hvilke konkrete undersøgelsesskridt der skal foretages af den udsendende stat.

EMD's ændrede fokus smitter som nævnt i afsnit 2.1 naturligvis af på *undersøgelsestemaet*. Det er ikke længere tilstrækkeligt blot at undersøge sygdommens terminale karakter. Udlændingens reelle overlevelsesmuligheder (signifikant forværring af helbred eller levetid) i hjemlandet må også undersøges.

Ligesom Domstolen nu har fastslået, at den udsendende stat skal gennemføre en række *undersøgelsesskridt* inden udsendelse af en alvorligt syg udlænding. Det skal undersøges:

- Om de generelle behandlingsmuligheder i hjemlandet for den pågældende sygdom er tilstrækkelige og passende (som efter hidtidig praksis)
- Om den pågældende udlænding konkret vil have adgang til behandlingen, herunder i forhold til økonomi, sociale- og familiemæssige netværk og afstand til behandling (ny praksis)
- Hvis ikke – skal der indhentes individuel behandlingsgaranti (ny praksis).

3. ER DANSK PRAKSIS I OVERENSSTEMMELSE MED EMD'S NYE PRAKSIS?

UIM kan som nævnt meddele humanitær opholdstilladelse efter udlændingelovens § 9 b, stk. 1. UIM lægger – ligesom EMD – navnlig vægt på sygdoms- og behandlingskriterierne.

3.1. Sygdomskriteriet

3.1.1. Dansk regulering og praksis

Efter UIM's gældende praksisnotat af 1. august 2010 kan der gives humanitær opholdstilladelse til udlændinge, der lider af en »sygdom af meget alvorlig karakter«, såfremt sygdommen aktuelt er behandlingskrævende.[18]

Der kan både være tale om fysiske og psykiske sygdomme. Som eksempler på meget alvorlige fysiske sygdomme nævner praksisnotatet AIDS og kræft i terminalstadiet samt visse meget alvorlige hjertesygdomme, nyresygdomme, tarmsygdomme samt blodsygdomme. For at psykisk sygdom kan begrunde humanitær opholdstilladelse, skal der være tale om en egentlig sindssygdom. Som eksempler nævnes psykose, skizofreni og visse former for depressive tilstande. Derimod opfattes posttraumatisk belastningsreaktion (PTSD) og andre sorg- og krisereaktioner ikke som en sindssygdom.[19]

At der skal være tale om sygdom af »meget alvorlig karakter«, illustreres af de tre humanitære opholdstilladelser, som UIM meddelte i 2016. Den første sag vedrørte en 77-årig ukrainsk statsborger, der led af »flere alvorlige sygdomme, herunder demens, atrieflimmer, hjerneinfarkt, åndedragsbesvær og højst sandsynligt kræft, enten lungekræft eller metastaser fra anden kræftsygdom«.[20]

Den anden tilladelse angik en 75-årig afghansk kvinde, som led af »Alzheimer demens, [og var] massivt præget af sin sygdom og [havde] mistet forståelsen for det basale«.[21]

Den tredje og sidste tilladelse i 2016 vedrørte en statsborger fra Tanzania, der led af flere alvorlige sygdomme. UIM lagde vægt på, at han led af »en meget alvorlig lungesygdom med begrænset lungefunktion, at han [var] helt afhængig af ilttilskud døgnet rundt, at han [sad] i kørestol med iltbombe uden at kunne klare sig selv, at lungesygdommen [belastede] hans hjerte med risiko for hjertesvigt, at han [havde] nogle blærer i lungerne, der [kunne] briste ved belastning eller ændrede trykforhold og medføre, at lungerne [klappede] sammen, og at han [led] af Hepatitis C i et meget fremskredent stadie kompliceret med skrumpelever«.[22]

3.1.2. Vurdering

Denne beskrevne praksis synes ikke at være fuldt på linje med den nye EMD-praksis efter *Paposhvili*. For det *første* skal der efter EMD-praksis »alene« være tale om en »alvorlig sygdom«, ikke som efter dansk praksis en sygdom af »meget alvorlig karakter«. Uden nærmere kendskab til praksis er det svært at vurdere, om der er tale om en reel uoverensstemmelse, men den danske formulering kan indikere en mere snæver dansk praksis.

For det *andet* synes der i dansk praksis at være stor fokus på, hvilken sygdom der er tale om og sygdommens karakter; og mindre fokus på de reelle overlevelsesmuligheder i hjemlandet (behandlingskriteriet). Den nye EMD-praksis lægger som nævnt ovenfor ikke alene vægt på sygdommens karakter, men også på de konkrete overlevelsesmuligheder i hjemlandet.

3.2. Behandlingskriteriet og undersøgelsespligten

3.2.1. Dansk regulering og praksis

Såfremt sygdomskriteriet er opfyldt, undersøger UIM som udgangspunkt, om behandlingsmulighederne er til stede i ansøgerens hjemland. Det sker normalt via en dansk repræsentation i det pågældende land eller via andre kilder. Er det tilfældet, gives der normalt afslag på humanitær opholdstilladelse.[23]

Før 1. august 2010 – og det nugældende praksisnotat – vurderede de danske udlændingemyndigheder både, om den pågældende behandling generelt var tilgængelig i hjemlandet, *og* om den pågældende udlænding konkret ville have adgang til behandlingen. Det anføres i UIM's tidligere gældende praksisnotat af 2. september 2008:

> »Hvis den nødvendige sundhedsbehandling for ansøgerens meget alvorlige behandlingskrævende sygdom er tilgængelig i hjemlandet, men alene mod en egenbetaling af en størrelse, som ansøgeren ikke kan forventes at have en reel økonomisk mulighed for at udrede, kan der efter omstændighederne ligeledes gives humanitær opholdstilladelse. I sådanne tilfælde af en (uforholdsmæssig) høj egenbetaling foretages der i hver enkelt sag en vurdering af den pågældendes økonomiske og sociale situation. I vurderingen indgår den *pågældendes erhverv og uddannelse, formueforhold, indtægtsmuligheder og familiemæssige eller sociale netværk m.v.*«[24] (kursiv tilføjet).

I forbindelse med en ændring af udlændingeloven i 2010[25] gennemførte UIM (det daværende Integrationsministerium) som nævnt – på baggrund af en nærmere undersøgelse af EMDs praksis på området – en praksisændring i forhold til, hvilke undersøgelsesskridt ministeriet fremover ville gennemføre i sager om humanitær opholdstilladelse. Det anføres i bemærkningerne til lovforslaget:

> »*Regeringen finder, at den danske praksis for vurdering af tilgængeligheden af behandlingsmuligheder i hjemlandet bør indrettes i overensstemmelse med praksis fra Den Europæiske Menneskerettighedsdomstol. Integrationsministeriet vil derfor ændre sin nuværende praksis.* Integrationsministeriet vil som hidtil i sager, hvor ansøgeren opfylder sygdomskriteriet og modtager behandling for sin lidelse, undersøge, om den nødvendige behandling er tilgængelig i offentligt eller privat regi i ansøgerens hjemland. Viser undersøgelsen, at den nødvendige behandling er tilgængelig i hjemlandet, vil betingelserne for humanitær opholdstilladelse som udgangspunkt ikke være opfyldt. Det vil normalt være uden betydning, om et givent præparat er tilgængeligt f.eks. i privat regi mod egenbetaling, uanset egenbetalingens størrelse. Praksisændringen er dermed i overensstemmelse med praksis fra Den Europæiske Menneskerettighedsdomstol, som bl.a. udtalte i sagen *Amegnigan mod Holland*, at medicinsk behandling i princippet er tilgængelig, uanset om medicinen er meget dyr (…). Integrationsministeriet vil fortsat i helt ekstraordinære tilfælde – i overensstemmelse med Den Europæiske Menneskerettighedsdomstols praksis – meddele humanitær opholdstilladelse på trods af oplysninger om, at der er behandlingsmuligheder i ansøgerens hjemland. Dette vil f.eks. være tilfældet, når behandlingsmulighederne og/eller forholdene i hjemlandet generelt er så usikre og uforudsigelige, at en ansøger – som lider af en *uhelbredelig sygdom i terminalstadiet* – vil komme i en situation, der kan sidestilles med umenneskelig behandling.«[26] (kursiv tilføjet).

Det fremhæves i overensstemmelse hermed i UIM's gældende praksisnotat af 1. august 2010, at der ikke længere foretages en beregning af udgifterne til behandlingen i hjemlandet, idet ansøgerens udgifter til den nødvendige behandling anses for at være uden betydning for ministeriets afgørelse.[27] UIM skal heller ikke længere konkret vurdere udlændingens økonomiske og sociale situation, herunder den pågældendes »erhverv og uddannelse, formueforhold, indtægtsmuligheder og familiemæssige eller sociale netværk m.v.« i hjemlandet. Den nævnte passus fra det tidligere praksisnotat af 2. september 2008, jf. citat ovenfor, er slettet fra det gældende praksisnotat af 1. august 2010.

Nuværende dansk praksis synes således at være, at der meddeles afslag på humanitær opholdstilladelse til alvorligt syge udlændinge, hvis det vurderes, at der generelt findes den nødvendige behandling i hjemlandet. Det undersøges ikke, om den pågældende udlænding konkret vil have adgang til behandlingen, herunder den pågældendes økonomiske, familiemæssige- og sociale forhold.[28]

En gennemgang af praksis i 2008 og 2009 før praksisændringen viser, at der begge år blevet givet flere humanitære opholdstilladelser under henvisning til, at de pågældende alvorligt syge udlændinge konkret ikke ville have adgang/råd

til at købe den nødvendige medicin i hjemlandet. I 2008 blev der under henvisning til manglende konkret adgang/råd til medicinen givet 19 humanitære opholdstilladelser svarende til 12 % af de meddelte tilladelser i 2008,[29] og i 2009 blev givet 11 tilladelser svarende til 20 % af de meddelte tilladelser i 2009,[30]. En række sager vedrører dyr antipsykotisk medicin (flere tusind kroner pr. måned) til psykisk syge fra Kosovo og Bosnien. Men der er også tilladelser vedrørende udlændinge fra Libanon, Serbien og Iran.

3.2.2. Vurdering

Den beskrevne danske undersøgelsespraksis synes at være i overensstemmelse med EMD's *tidligere* praksis om staters undersøgelsespligt, hvorefter det ansås for tilstrækkeligt at vurdere de generelle behandlingsmuligheder i hjemlandet. Højesteret fandt således i 2011 ikke grundlag for at kritisere, at Integrationsministeriet ved vurderingen af en ansøgning om humanitær opholdstilladelse ikke havde taget stilling til, om udlændingen konkret ville have adgang til den nødvendige behandling i Kosovo, herunder undersøgt den pågældende udlændings erhvervs- og indkomstmæssige forhold i hjemlandet Kosovo.[31]

Det er imidlertid ikke længere tilstrækkeligt blot at undersøge sygdommens terminale karakter. Udlændingens reelle behandlings muligheder (signifikant forværring af helbred eller levetid) i hjemlandet må også undersøges.

Der må desuden foretages en konkret og individuel vurdering af, om udlændingen vil have adgang til den nødvendige behandling og pleje i hjemlandet, herunder i forhold til økonomi, sociale- og familiemæssige netværk og afstand til behandling, ligesom der efter omstændighederne må indhentes de krævede garantier.

4. KONKLUSION

EMD har med den nye storkammerdom gjort op med Domstolens tidligere meget restriktive praksis på området. Sygdomskriteriet er lempet, og undersøgelseskravet skærpet. EMD har ikke længere alene fokus på sygdommens karakter, men snarere på udlændingens reelle behandlings- og overlevelsesmuligheder i hjemlandet. Alvorlige sygdomme, som ikke er terminale, skal også kunne føre til opholdstilladelse, hvis de reelle overlevelsesmuligheder i hjemlandet er så begrænsede, at der er risiko for alvorlig forværring af helbred eller levetid som nærmere beskrevet i dommen.

Den udsendende stats undersøgelsespligt er tilsvarende betydeligt udvidet.

Da integrationsminister Birthe Rønn Hornbech (V) i den daværende VK-regering i 2010 skærpede praksis for humanitære opholdstilladelse, skete det under henvisning til EMD's daværende restriktive praksis:

> »Regeringen finder, at den danske praksis for vurdering af tilgængeligheden af behandlingsmuligheder i hjemlandet bør indrettes i overensstemmelse med praksis fra Den Europæiske Menneskerettighedsdomstol.«[32]

Det er muligvis nogens opfattelse, herunder måske regeringens, at EMD med den nye dom er gået for langt i en dynamisk fortolkning af EMRK og (endnu engang) på udlændingeområdet blander sig for meget i nationale danske anliggender og suverænitet.[33] Andre vil givet hylde EMD's nye praksis på området.[34]

Jeg hælder personligt til at hylde dommen. Der er tale om en meget lille gruppe alvorligt syge, yderst sårbare og traumatiserede udlændinge, og der er de sidste par år meddelt meget få humanitære opholdstilladelse i Danmark (25 tilladelser i 2015; 3 tilladelser i 2016). Det vil - selv med en vis mere lempelig praksis svarende nogenlunde til forholdene inden praksisændringen i 2010 – fortsat have *undtagelsens karakter*, at en alvorlig syg udlænding uden behandlings-muligheder i hjemlandet meddeles humanitær opholdstilladelse i Danmark.

Uanset personlige, retspolitiske vurderinger har de danske myndigheder, herunder Udlændinge-og Integrationsministeriet, ligesom de danske domstole pligt til at indrette praksis efter EMD-praksis, der så vidt ses i meget vidt omfang svarer til dansk praksis før praksisændringen i 2010. Det må også gælde i sager, hvor borgerne under henvisning til EMD-praksis anmoder om genoptagelse af afgjorte sager.

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[1]. Tak til stud.jur. Simone Hein Nielsen for forskningsbistand.

[2]. Jf. EMD, Paposhvili v. Belgium 13/12 2016.

[3]. Jf. lovforslag nr. L. 201 af 19. marts 1985.

[4]. For et overblik over praksisnotater og svar på Folketingsspørgsmål se UIM's seneste praksisnotat af 1. august 2010. Kan ses her: https://www.nyidanmark.dk/NR/rdonlyres/15C768D0-A3C3-47ED-AA6A-2F319973174D/0/notat_om_praksis_for_humanitaer_opholdstilladelse_2010.pdf

[5]. Der blev meddelt følgende opholdstilladelser i perioden: 351 (2004); 186 (2005); 216 (2006); 223 (2007); 157 (2008); 55 (2009), Jf. https://www.nyidanmark.dk/NR/rdonlyres/FE564B43-5F00-4796-B041-59794779B147/0/tal_og_fakta_paa_udlaendingeomraadet_2009.pdf, s. 6.

[6]. Der blev meddelt følgende opholdstilladelser: 121 (2011); 76 (21012); 65 (2013); 46 (2014); 25 (2015); 3 (2016), jf. https://www.nyidanmark.dk/NR/rdonlyres/EBDF83E7-B151-4B3B-A87C-CC291B29CF14/0/tal_og_fakta_2015.pdf, s.69.

[7]. Om EMD's tidligere praksis se endvidere Louise Halleskov Storgaard, Artikel3 i Den Europæiske Menneskerettighedskonvention om udsendelse af udlændinge med helbredsproblemer, EU-ret og Menneskeret 2008, nr. 4.

[8]. Jf. EMD, D v. UK 2/5 1997.

[9]. Jf. N v. UK 27/5 2008.

[10]. Jf. endvidere for samme resultat Yoh-Ekale Mwanje 20/12 2011; S.H.H. 29/1 2013; og A.S. 30/6 2015. Se også følgende afvisningsafgørelser: E.O. v. Italy (dec.) 10/5 2012; V.S. v. France (dec) 25/11 2014 og Kolcheiva v. Sweden (dec.) 30/3 2013.

[11]. Jf. bl.a. N v. UK, supra note 7, pr. 43.

[12]. Jf. EMD, Bensaid v. UK 6/2 2001, pr. 38.

[13]. Jf. Amegnigan v. Holland (dec.) 25/11 2004.

[14]. Supra note 7, pr. 48. Se tilsvarende resultat i Arcila Henao v. the Netherlands (dec.) 24/6 2003 og Ndangoya v. Sweden (dec.) 22/6 2004.

[15]. Supra note 1, pr. 189.

[16]. Supra note 1, pr. 190.

[17]. Supra note 1, pr. 191.

[18]. Jf. UIM's praksisnotatet af 1. august 2010, supra note 3. Generel information om humanitær opholdstilladelse kan ses her: https://www.nyidanmark.dk/da-dk/Ophold/humanitaert_ophold/

[19]. Jf. UIM's praksisnotat af 1. august 2010, ibid., s. 7.

[20]. Jf. UIM, Notat om meddelelse af humanitær opholdstilladelse i medfør af udlændingelovens § 9 b, stk. 1, i 1. kvartal 2016, 20. april 2016.

[21]. Ibid.

[22]. Jf. UIM, Notat om meddelelse af humanitær opholdstilladelse i medfør af udlændingelovens § 9 b, stk. 1, i 2. kvartal 2016, 17. oktober 2016.

[23]. Jf. UIM's praksisnotat af 1. august 2010.

[24]. Det tidligere gældende praksisnotat af 2. september 2008 kan ses her: https://www.nyidanmark.dk/NR/rdonlyres/0E3CDADF-77AC-41B8-A7AC-4477E207AB0D/0/praksisnotat_hum_tilladelse_9b_2008.pdf

[25]. Jf. LF 188, Skærpede udvisningsregler mv., fremsat d. 26. marts 2010.

[26]. Lovforslaget, ibid., s. 68.

[27]. Jf. også UIM's praksisnotat af 1. august 2010, supra note 1, s. 7

[28]. Bortset fra terminalt syge udlændinge, der som oplyst i UIM's praksisnotat af 1. august 2010 kan meddeles opholdstilladelse, når behandlingsmulighederne og/eller forholdene i hjemlandet generelt er usikre og uforudsigelige.

[29]. 1. kvartal: 6 tilladelser; 2. kvartal: 3 tilladelser; 3. kvartal: 1 tilladelse; 4. kvartal: 9 tilladelser pga. manglende konkret adgang/råd til behandling/medicin. UIM's notater for alle kvartaler kan findes på Folketingets hjemmeside.

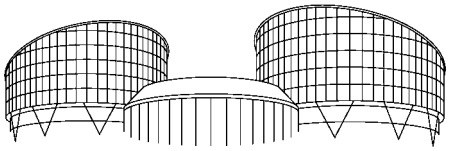
[30]. 1. kvartal: 2 tilladelser; 2. kvartal: 5 tilladelser; 3. kvartal: 3 tilladelser; 4. kvartal: 1 tilladelse pga. manglende konkret adgang/råd til behandling/medicin. UIM's notater for alle kvartaler kan findes på Folketingets hjemmeside.

[31]. Jf. U 2011.1762 H. Højesteret tillagde det også vægt, at egenbetalingen for medicinen i hjemlandet alene udgjorde 552 kr. pr. måned. For en tilsvarende vurdering af at dansk praksis var i overensstemmelse med EMD's daværende praksis se Institut for Menneskerettigheders høringssvar af 12. maj 2010, s. 27. Kan ses her: http://www.ft.dk/samling/20091/lovforslag/l188/bilag/21/847511/index.htm

[32]. Jf. citat fra LF 188, gengivet supra note 24.

[33]. Jf. regeringens initiativ om at se kritisk på EMD's dynamiske fortolkning af EMRK, og den internationale konference regeringen vil afholde i 2017 som led i formandskabet for Europarådet. Se regeringsgrundlaget 2016, s. 55-56.

[34]. Forskerbloggen Strasbourg Observers, som følger EMD's praksis, afholder hvert år afstemning om den bedste og værste EMD-dom. Paposhvili-dommen rangerer indtil videre som den bedste dom i 2016, jf. https://strasbourgobservers.com/2017/01/31/poll-best-and-worst-ecthr-judgment-of-2016/



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'État*. 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.

Udlændinge- og Integrationsministeriet

6 marts 2018

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Sags nr. 2017 - 5755
Akt-id 290662

Udlændinge- og Integrationsudvalget har den 5. april 2017 stillet følgende spørgsmål nr. 665 (alm. del) efter ønske fra Johanne Schmidt-Nielsen (EL) til udlændinge- og integrationsministeren, som hermed besvares foreløbigt.

Spørgsmål nr. 665:

Vil ministeren kommentere Den Europæiske Menneskerettighedsdomstols dom i sagen Paposhvili mod Belgien af 13. december 2016 samt seniorforsker, ph.d. Peter Vedel Kessings artikel om dommen i "EU-ret og Menneskeret" nr. 1, 2017 og redegøre for, om dommen får konsekvenser for den danske praksis med hensyn til tildeling af humanitære opholdstilladelser efter udlændingelovens § 9 b?

Foreløbigt svar:

Det kan oplyses, at dommens betydning for praksis for meddelelse af humanitære opholdstilladelse efter udlændingelovens § 9 b fortsat er under overvejelse i ministeriet.

Det bemærkes, at ministeriet havde forventet at kunne besvare spørgsmålet tidligere, men dommen rejser en række spørgsmål, som kræver nærmere overvejelse.

Jeg vil, når ministeriet har afsluttet sine overvejelser, besvare spørgsmålet endeligt og i den forbindelse nærmere redegøre for dommens konsekvenser for dansk praksis for meddelelse af humanitær opholdstilladelse.

Inger Støjberg

/

Frederik Gammeltoft

Udlændinge- og
Integrationsministeriet

6 marts 2018

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Udlændinge- og Integrationsudvalget har den 5. april 2017 stillet følgende spørgsmål nr. 665 (Alm. del) efter ønske fra Johanne Schmidt-Nielsen (EL) til udlændinge- og integrationsministeren, som hermed besvares endeligt.

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Svar:

1. Den Europæiske Menneskerettighedsdomstol afsagde den 13. december 2016 dom i sagen *Paposhvili mod Belgien*. Dommen vedrører udsendelse af alvorligt syge personer.

Den Europæiske Menneskerettighedsdomstol gennemgår således i *præmis 172-181* sin hidtidige praksis for udsendelse af personer, der er alvorligt syge. Domstolen opsummerer bl.a. sin hidtidige praksis, hvorefter udlændinge, der står over for udvisning, som udgangspunkt ikke har ret til ophold i en konventionsstat for dér at fortsætte med at modtage medicinsk, social eller anden form for bistand, og at det forhold, at den pågældendes vilkår, herunder den forventede levetid, vil blive væsentligt forringet eller forkortet i tilfælde af udsendelse, ikke i sig selv kan medføre en krænkelse af artikel 3. Kun i meget ekstraordinære tilfælde, hvor der er tvingende humanitære modhensyn, kan det være i strid med artikel 3 at udsende en udlænding, der lider af en alvorlig fysisk eller psykisk sygdom, til et land, hvor der ikke er adgang til behandling.

I praksis har domstolen fortolket begrebet *meget ekstraordinære tilfælde* i overensstemmelse med sin dom af 2. maj 1997 i sagen *D mod Storbritannien* således, at meget ekstraordinære tilfælde (very exceptionel cases) foreligger i en situation, hvor en udlænding er kritisk syg og døden nær (terminalstadiet).

Dato

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Akt-id 221627

Domstolen slår i *præmis 178* fast, at der også kan være andre ekstraordinære tilfælde (”other very exceptional cases”). Domstolen har dog ikke tidligere forholdt sig til, hvori disse andre ekstraordinære tilfælde består.

Domstolen bemærker herefter i *præmis 181,* at den ved sin fortolkning af, at det kun er i situationer, hvor en person er i terminalstadiet, at en udvisning vil stride mod artikel 3, har frataget udlændinge, som er alvorligt syge, men hvis tilstand er mindre kritisk end udlændinge i terminalstadiet, muligheden for beskyttelsen i artikel 3.

I *præmis 182* markerer domstolen, at retstilstanden nu ændres. Domstolen vil således afklare praksis og redegøre nærmere for, hvornår der kan foreligge ”andre meget ekstraordinære sager”.

Præmis 183 er herefter den centrale præmis i dommen. Domstolen udtaler således, at der ved ”meget ekstraordinære tilfælde” forstås situationer, hvor der er vægtige grunde til at antage, at den pågældende, selvom døden ikke er nært forestående, vil blive udsat for en virkelig risiko, som følge af mangel på passende behandling i modtagerstaten eller manglende adgang til sådan behandling, for at blive udsat for en alvorlig, hurtig og uoprettelig forværring (”serious, rapid and irreversible decline”) i vedkommendes helbredstilstand, der vil resultere i intens lidelse eller i en væsentlig reduktion i forventet restlevetid. Domstolen understreger at dette er i overensstemmelse med den høje tærskel for anvendelse af artikel 3 i sager om udsendelse af alvorligt syge udlændinge.

Herefter indfører domstolen i *præmis 185* en sagsbehandlingspligt for de nationale myndigheder.

Det er i første omgang op til udlændingen at føre bevis for den påståede risiko. Udlændingen skal således fremlægge beviser, der godtgør, at der er vægtige grunde til at tro, at der kan være tale om en artikel 3-situation (*præmis 186)*. Hvis udlændingen kan føre bevis for den påståede risiko, er det op til staten at afkræfte tvivlen. Det forudsætter en indgående prøvelse af de forudsigelige konsekvenser af en udsendelse, hvor der lægges vægt på de generelle oplysninger om modtagerstaten og oplysningerne om den individuelle udlænding, hvilket omfatter en sammenligning af udlændingens helbredstilstand henholdsvis før og efter udsendelse (*præmis 187)*.

Domstolen bemærker, at der ved vurderingen lægges vægt på, om den behandling, der er generelt tilstrækkelig i modtagerstaten, er tilstrækkelig og passende til at sikre, at udlændingen ikke udsættes for en behandling i strid med artikel 3, og det afgørende er således ikke behandlingsniveauet i den udvisende stat, eller om behandlingen i modtagerstaten er på et sammenligneligt niveau, ligesom artikel 3 ikke sikrer ret til en behandling i modtagerstaten, der ikke er generelt tilgængelig (*præmis 188-189)*.

Myndighederne skal undersøge, om behandlingen generelt er tilgængelig i hjemlandet.

Det følger herefter af *præmis 190*, at myndighederne også skal overveje, om udlændingen rent faktisk har adgang til at modtage behandlingen i hjemlandet, hvilket omfatter spørgsmål om tilgængelig både med hensyn til afstand og omkostninger. Domstolen henviser i den forbindelse til sin hidtidige praksis på området.

Hvis der herefter foreligger alvorlig tvivl med hensyn til konsekvenserne for den syge udlænding i tilfælde af udsendelse, kan den udvisende stat have pligt til at opnå en individuel og tilstrækkelig garanti fra modtagerstaten om, at behandlingen eksisterer og vil være tilgængelig for udlændingen, inden en udsendelse gennemføres (*præmis 191)*.

Det forhold, at modtagerstaten er en medlemsstat, der også er bundet af konventionen, er ikke i sig selv afgørende for, om udsendelse vil være i strid med konventionen (*præmis 192).*

[redacted]

2. I forhold til den konkrete sag, som dommen vedrører, var der tale om en georgisk statsborger (Georgie Paposhvili), som kom til Belgien i 1998 med sin kone og et barn. Han fik sidenhen to børn mere. Han fik afslag på asyl og på opholdstilladelse på andet grundlag. Fra 1999 og frem til 2005 blev Paposhvili dømt for adskillige lovovertrædelser, og han blev derfor udvist på grund af den begåede kriminalitet.

Under afsoning af en fængselsstraf i 2006 fik han konstateret bl.a. leukæmi. Han modtog forskellig behandling, og hans forventede levetid blev i 2008 vurderet til at være 3-5 år. Sygdommen forværredes, og i 2012 vurderede en læge, at ophør af behandlingen ville føre til Paposhvilis død. I 2015 vurderede en læge, at ophør af behandling ville medføre en forventet levetid på tre måneder, samt at Paposhvili ikke havde adgang til behandlingen i Georgien.

Paposhvili søgte flere gange om opholdstilladelse af humanitære årsager under henvisning til, at det ikke var muligt at få behandling for hans leukæmi i Georgien. Han fik imidlertid afslag med henvisning til, at han var udelukket fra at få opholdstilladelse efter belgisk lovgivning på grund af den begåede kriminalitet. De belgiske myndigheder foretog derfor ikke yderligere undersøgelser i sagen i forhold til Belgiens internationale forpligtelser.

Paposhvili indbragte herefter sagen for Den Europæiske Menneskerettighedsdomstol med påstand om, at hans udvisning til Georgien ville sætte ham i fare for umenneskelig behandling og en tidligere død på grund af, at behandlingen, som han havde modtaget i Belgien, ikke var tilgængelig i Georgien. I 2016 døde Paposhvili i Belgien, men menneskerettighedsdomstolen valgte at behandle sagen alligevel.

Menneskerettighedsdomstolen fastslog i sin dom, at Belgien ville have krænket den Europæiske Menneskeretskonvention (EMRK) artikel 3 (om forbud mod tortur og umenneskelig eller nedværdigende behandling eller straf) og artikel 8 (om ret til privat- og familieliv), hvis Paposhvili var blevet udsendt af Belgien til Georgien, idet Belgien i den konkrete sag ikke havde overholdt sin undersøgelsespligt.

3. I den artikel, der henvises til i spørgsmålet, anfører forfatteren, at han mener, at Den Europæiske Menneskerettighedsdomstols dom i *Paposhvili mod Belgien* bør føre til, at Udlændinge- og Integrationsministeriet ændrer sin praksis for meddelelse af humanitær opholdstilladelse.

Forfatteren anfører, at Domstolen i Paposhvili har lempet sygdomskriteriet og skærpet undersøgelseskravet. Forfatteren anfører således, at det ikke længere er tilstrækkeligt blot at undersøge, om en udlænding lider af en terminal sygdom. Der bør herudover foretages en konkret og individuel vurdering af, om udlændingen vil have adgang til den nødvendige behandling og pleje i hjemlandet, herunder i forhold til økonomi, sociale og familiemæssige netværk og afstand til behandling.

Forfatteren anfører endvidere, at den danske praksis for meddelelse af humanitær opholdstilladelse synes at være i overensstemmelse med Den Europæiske Menneskerettighedsdomstols tidligere praksis om staters undersøgelsespligt, hvorefter det ansås for tilstrækkeligt at vurdere de generelle behandlingsmuligheder i hjemlandet.

Forfatteren finder imidlertid, at Udlændinge- og Integrationsministeriet på baggrund af dommen bør ændre praksis, så udlændingens reelle behandlingsmuligheder i hjemlandet undersøges, og der foretages en konkret og individuel vurdering af, om udlændingen vil have adgang til den nødvendige behandling og pleje i hjemlandet, herunder i forhold til økonomi, sociale- og familiemæssigt netværk og afstand til behandling.

Forfatteren finder på den baggrund, at ministeriet er forpligtet til at indrette sin praksis efter EMD-praksis, der efter forfatterens opfattelse i meget vidt omfang svarer til dansk praksis før praksisændringen i 2010.

[redacted]

Hidtil har Domstolen i sin praksis antaget, at personer, der lider af en alvorlig sygdom i terminalstadiet, er omfattet af beskyttelsen i artikel 3. Men Domstolen har også anført, at der kunne være andre "meget ekstraordinære tilfælde", hvor en alvorligt syg person er omfattet af denne beskyttelse.

I dommen finder Domstolen så for <u>første</u> gang anledning til at præcisere, hvad der nærmere ligger i disse andre "meget ekstraordinære tilfælde", hvor udsendelse af en alvorligt syg udlænding vil rejse spørgsmål i forhold til Den Europæiske Menneskerettighedskonventions artikel 3, selvom døden ikke er nært forestående.

Der er også efter Den Europæiske Menneskerettighedsdomstols dom i *Paposhvili mod Belgien* en meget høj tærskel, før et forhold er omfattet af EMRK artikel 3. Bestemmelsen vil således fortsat kun blive krænket, hvis der foreligger meget ekstraordinære omstændigheder. Det drejer sig om de grupper af alvorligt syge udlændinge, for hvem det må antages, at udlændingen uden behandling i hjemlandet er i reel risiko for at blive udsat for en alvorlig, hurtig og uoprettelig forværring i vedkommendes helbredstilstand, der vil resultere i intens lidelse eller i en væsentlig reduktion i forventet restlevetid (*præmis 183*).

Der kan efter udlændingelovens § 9 b, stk. 1, meddeles humanitær opholdstilladelse, hvis "væsentlige hensyn af humanitær karakter afgørende taler for at imødekomme ansøgningen". Afgørelsen af, om der foreligger sådanne særlige humanitære hensyn, som kan begrunde opholdstilladelse efter den nævnte bestemmelse, beror på et skøn.

I praksis er udlændingens helbredsforhold et kerneområde for bestemmelsens anvendelse. Helbredsbetinget humanitær opholdstilladelse forudsætter, at udlændingen lider af en meget alvorlig behandlingskrævende sygdom (sygdomskriteriet). Derudover stilles der som altovervejende udgangspunkt krav om, at behandling ikke er tilgængelig i ansøgerens hjemland (kriteriet om fravær af behandlingsmuligheder i hjemlandet).

Efter Udlændinge- og Integrationsministeriets praksis anses sygdomskriteriet for opfyldt, hvis der er tale om en meget alvorlig fysisk eller psykisk sygdom. Det kan f.eks. være tilfældet, hvis en ansøger lider af meget alvorlige hjertesygdomme, nyresygdomme, tarmsygdomme, blodsygdomme, insulinkrævende diabetes samt egentlige sindssygdomme, hvor den pågældende lider af en psykose f.eks. paranoid psykose og skizofreni. Opremsningen er ikke udtømmende.

Sygdomskriteriet vil efter Udlændinge- og Integrationsministeriets praksis kunne være opfyldt i sager, hvor en udlænding lider af en sygdom, hvor en manglende behandling ikke vil medføre en alvorlig, hurtig og uoprettelig forværring i vedkommendes helbredstilstand med intens lidelse eller væsentlig reduktion i den forventede restlevetid til følge.

[redacted]

For det andet medfører dommen en udvidet undersøgelsespligt i de særlige sager, som er omfattet af dommen.

Det fremgår af dommen, at myndighederne fra sag til sag skal overveje, om den behandling, der generelt er tilgængelig i modtagerstaten, er tilstrækkelig og pas-

sende til den pågældendes sygdom, således at vedkommende ikke udsættes for behandling i strid med artikel 3 (*præmis 189)*.

Det er i første omgang op til udlændingen at føre bevis for den påståede risiko. Hvis udlændingen fremlægge beviser, så der er vægtige grunde til at antage, at det vil kunne stride mod artikel 3 at udsende den pågældende, vil det være op til staten at afkræfte tvivlen.

Det er en betingelse for at meddele helbredsbetinget humanitær opholdstilladelse til en ansøger, der lider af en meget alvorlig fysisk eller psykisk sygdom, at ansøgeren ikke har adgang til den nødvendige behandling i sit hjemland (kriteriet om fravær af behandlingsmuligheder i hjemlandet).

Efter gældende praksis er det op til udlændingen at fremlægge oplysninger om, at vedkommende lider af en alvorlig sygdom og modtager behandling herfor.

Udlændinge- og Integrationsministeriet foretager herefter efter praksis allerede en vurdering af, hvorvidt den pågældende har adgang til medicin i de sager, hvor ministeriet har fundet, at den pågældende lider af en meget alvorlig sygdom.

[redacted]

Domstolen anfører herudover, at myndighederne skal overveje, i hvilken udstrækning den pågældende *faktisk* vil have adgang til behandling i modtagerstaten (*præmis 190)*. Domstolen bemærker i den forbindelse (i overensstemmelse med dens tidligere afsagte domme), at staterne bl.a. skal overveje omkostninger ved medicinering og behandling, om der er et tilgængeligt socialt og familiemæssigt netværk, og den distance, der skal rejses for at få adgang til den nødvendige pleje.

Domstolen har ikke i dommen udtalt sig om, hvornår undersøgelsespligten indtræder, udover at der skal foreligge vægtige grunde. Det følger dog heraf, at der skal noget til.

Efter Udlændinge- og Integrationsministeriets gældende praksis vil det normalt være uden betydning for meddelelse af en helbredsbetinget opholdstilladelse, om en given behandling alene er tilgængelig i f.eks. privat regi mod egenbetaling, ligesom egenbetalingens størrelse som udgangspunkt er uden betydning. Det er endvidere ikke en betingelse, at den behandling, som er tilgængelig i hjemlandet, er af samme karakter som den behandling, der tilbydes i det danske sundhedsvæsen, så længe der foreligger oplysninger fra hjemlandets sundhedsmyndigheder eller andre relevante aktører om, at den pågældende sygdom rent faktisk kan behandles i hjemlandet.

Det er desuden normalt uden betydning, at den nødvendige behandling er tilgængelig på apoteker med videre i hele hjemlandet. Såfremt det pågældende land asylretligt anses for ét land, vil en ansøger således kunne henvises til at modtage den foreskrevne behandling i en anden del af landet også, selvom den pågældende var bosiddende et andet sted i hjemlandet inden sin udrejse.

Udlændinge- og Integrationsministeriet har hidtil alene undersøgt spørgsmål om f.eks. omkostninger ved medicin og afstand til behandling i de sager, hvor det på baggrund af sagens oplysninger umiddelbart blev skønnet, at ansøgeren opfylder den høje tærskel for meddelelse af humanitær opholdstilladelse.

Ministeriet har således kun lagt vægt på prisen af behandlingen, hvis der er konkrete holdepunkter for, at der er tale om en meget dyr behandling. Justitsministeriet har således f.eks. behandlet en sag, hvor der var oplysninger om, at en ansøger led af en meget alvorlig fysisk sygdom, hvor den livsnødvendige medicin her i landet kostede mere end 80.000 kr. om måneden. På den baggrund blev det besluttet at undersøge, hvad behandlingen i hjemlandet ville koste. Ministeriets undersøgelse af prisen på medicinen i hjemlandet blev imidlertid ikke tilendebragt, da den nødvendige behandling efterfølgende viste sig ikke at være tilgængelig.

Der har endvidere som efter hidtidig praksis i ekstraordinære tilfælde kunne meddele humanitær opholdstilladelse, hvis det vil være farefuldt for en ansøger at nå frem til behandlingsstedet, og den pågældende f.eks. på grund af sin sygdom ikke vil være i stand til at bosætte sig i den del af landet, hvor behandlingen er tilgængelig.

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[redacted]

[redacted]

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For det tredje åbner Domstolen også op for, at man i sager, hvor der efter den udvidede undersøgelse er alvorlig tvivl om konsekvenserne af en udsendelse, alligevel har mulighed for at udsende den pågældende ved brug af en individuel og tilstrækkelig garanti fra modtagerstaten.

Udlændinge- og Integrationsministeriet har ikke hidtil overvejet at anvende garantier i sager om humanitær opholdstilladelse.

5. I den konkrete sag *Paposhvili mod Belgien* var Paposhvili udelukket fra at blive meddelt opholdstilladelse som følge af, at han havde begået kriminalitet i Belgien. De belgiske myndigheder undersøgte på den baggrund ikke, om den behandling, som Paposhvili havde brug for, var tilgængelig i hjemlandet.

Der er ligeledes efter dansk ret mulighed for at udelukke en udlænding fra opholdstilladelse, hvis pågældende har begået kriminalitet.

Det følger således af udlændingelovens § 10, stk. 4, at en udlænding, der har indrejseforbud, ikke kan gives opholdstilladelse efter udlændingelovens §§ 9-9 f, §§ 9 i-9 n eller 9 p, medmindre ganske særlige grunde taler derfor, dog tidligst to år efter udrejsen, jf. udlændingelovens § 10, stk. 4. Kravet om, at der skal være forløbet to år fra udrejsen, gælder dog ikke for en udlænding, som ikke er EU-borger, og som er udvist efter udlændingelovens § 25 b (om ulovligt ophold), jf. § 10, stk. 4, 2. pkt.

Efter praksis vil en udlænding, som er udvist af Danmark ved dom med et indrejseforbud, således være udelukket fra at blive meddelt humanitær opholdstilladelse, hvis vedkommende ikke har været udrejst i to år.

Det følger af udlændingelovens § 50, stk. 1, at en udlænding, der er udvist ved dom, som ikke har været udrejst af Danmark, og som påberåber sig, at der er indtrådt væsentlige ændringer i udlændingens forhold, jf. udlændingelovens § 26, kan begære spørgsmålet om udvisningens ophævelse indbragt for retten. Hvis retten ophæver udvisningen, vil udlændingen kunne meddeles humanitær opholdstilladelse efter § 9 b, stk. 1, hvis den pågældende i øvrigt opfylder betingelserne herfor.

Efter praksis har Udlændinge- og Integrationsministeriet hidtil som udgangspunkt ikke nærmere undersøgt sygdommens karakter samt tilgængeligheden af medicin i hjemlandet i de sager, hvor udlændingen er udelukket efter udlændingelovens § 10, stk. 4.

Selvom Paposhvili var udelukket fra opholdstilladelse, på grund af at han havde begået kriminalitet, fandt domstolen i *Paposhvili mod Belgien,* at det ville have udgjort en krænkelse af EMRK artikel 3, hvis Paposhvili var blevet udsendt af Belgien, da de belgiske myndigheder ikke havde undersøgt, om der var medicin tilgængeligt i hjemlandet.

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Såfremt udlændingen ikke ønsker at indbringe spørgsmålet om ophævelse af udvisningen for retten, eller retten ikke har fundet anledning til at ophæve udvisningen, jf. udlændingelovens § 50, men ministeriet vurderer, at den pågældende vil være i en situation, som vil stride mod artikel 3, vil ministeriet således fremadrettet henvise den pågældende til tålt ophold, indtil vedkommende kan udsendes af landet. Det skyldes, at udlændingelovens § 10 udtømmende regulerer adgangen til at meddele opholdstilladelse til udlændinge med indrejseforbud. En udlænding med et indrejseforbud, der har fået afslag på asyl, vil derfor ikke kunne meddeles humanitær opholdstilladelse efter udlændingelovens § 9 b, stk. 1, selv om den pågældende ikke for tiden kan udsendes.

[redacted]

[redacted]

[redacted]

I henhold til Den Europæiske Menneskerettighedskonventions artikel 3 må ingen underkastes tortur og ej heller umenneskelig eller nedværdigende behandling eller straf. [redacted]

Den Europæiske Menneskerettighedsdomstol har i *Paposhvili mod Belgien* redegjort for, hvad der skal forstås ved andre meget ekstraordinære tilfælde. [redacted]

Udlændinge- og Integrationsministeriet

6 marts 2018

Udlændinge og Integrationsministeriet

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CVR nr 36 97 71 91

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CVR-nr. 36977191

Sags nr. 2017 - 5755
Akt-id 221627

Udlændinge- og Integrationsudvalget har den 5. april 2017 stillet følgende spørgsmål nr. 665 (Alm. del) efter ønske fra Johanne Schmidt-Nielsen (EL) til udlændinge- og integrationsministeren, som hermed besvares endeligt.

Spørgsmål nr. 665:

Vil ministeren kommentere Den Europæiske Menneskerettighedsdomstols dom i sagen Paposhvili mod Belgien af 13. december 2016 samt seniorforsker, ph.d. Peter Vedel Kessings artikel om dommen i "EU-ret og Menneskeret" nr. 1, 2017 og redegøre for, om dommen får konsekvenser for den danske praksis med hensyn til tildeling af humanitære opholdstilladelser efter udlændingelovens § 9 b?

Svar:

1. Den Europæiske Menneskerettighedsdomstol afsagde den 13. december 2016 dom i sagen *Paposhvili mod Belgien*. Dommen vedrører udsendelse af alvorligt syge personer.

Den Europæiske Menneskerettighedsdomstol gennemgår i *præmis 172-181* sin hidtidige praksis for udsendelse af personer, der er alvorligt syge. Domstolen opsummerer bl.a. sin hidtidige praksis, hvorefter udlændinge, der står over for udvisning, som udgangspunkt ikke har ret til ophold i en konventionsstat for dér at fortsætte med at modtage medicinsk, social eller anden form for bistand, og at det forhold, at den pågældendes vilkår, herunder den forventede levetid, vil blive væsentligt forringet eller forkortet i tilfælde af udsendelse, ikke i sig selv kan medføre en krænkelse af artikel 3. Kun i meget ekstraordinære tilfælde, hvor der er tvingende humanitære modhensyn, kan det være i strid med artikel 3 at udsende en udlænding, der lider af en alvorlig fysisk eller psykisk sygdom, til et land, hvor der ikke er adgang til behandling.

I praksis har Domstolen fortolket begrebet *meget ekstraordinære tilfælde* i overensstemmelse med sin dom af 2. maj 1997 i sagen *D mod Storbritannien* således, at meget ekstraordinære tilfælde ("very exceptionel cases") foreligger i en situation, hvor en udlænding er kritisk syg og døden nær (terminalstadiet). I en dom af 27. maj 2008 i sagen *N mod Storbritannien* anførte Domstolen dog, at den ikke ville udelukke, at der kunne foreligge andre meget ekstraordinære tilfælde end

situationen, som forelå i sagen *D mod Storbritannien*. Domstolen anførte imidlertid ikke, hvori disse andre ekstraordinære tilfælde består.

I Paposhvili-dommens *præmis 182* markerer Domstolen, at retstilstanden præciseres. Domstolen vil således afklare praksis og redegøre nærmere for, hvornår der kan foreligge "andre meget ekstraordinære tilfælde".

Præmis 183 er herefter den centrale præmis i dommen. Domstolen udtaler således, at der ved "meget ekstraordinære tilfælde" forstås situationer, hvor der er vægtige grunde til at antage, at den pågældende, selvom døden ikke er nært forestående, vil blive udsat for en virkelig risiko, som følge af mangel på passende behandling i modtagerstaten eller manglende adgang til sådan behandling, for at blive udsat for en alvorlig, hurtig og uoprettelig forværring ("serious, rapid and irreversible decline") i vedkommendes helbredstilstand, der vil resultere i intens lidelse eller i en væsentlig reduktion i forventet restlevetid. Domstolen understreger, at dette er i overensstemmelse med den høje tærskel for anvendelse af artikel 3 i sager om udsendelse af alvorligt syge udlændinge.

Herefter indfører Domstolen i *præmis 185* en sagsbehandlingspligt for de nationale myndigheder.

Det er i første omgang op til udlændingen at føre bevis ("adduce evidence") for den påståede risiko. Udlændingen skal således fremlægge beviser, der godtgør, at der er vægtige grunde til at tro, at der kan være tale om en artikel 3-situation (*præmis 186)*. Hvis udlændingen kan føre bevis for den påståede risiko, er det op til staten at afkræfte tvivlen. Det forudsætter en indgående prøvelse af de forudsigelige konsekvenser af en udsendelse, hvor der lægges vægt på de generelle oplysninger om modtagerstaten og oplysningerne om den individuelle udlænding, hvilket omfatter en sammenligning af udlændingens helbredstilstand henholdsvis før og efter udsendelse (*præmis 187)*.

Domstolen bemærker, at der ved vurderingen lægges vægt på, om den behandling, der er generelt tilgængelig i modtagerstaten, er tilstrækkelig og passende til at sikre, at udlændingen ikke udsættes for en behandling i strid med artikel 3, og det afgørende er således ikke behandlingsniveauet i den udvisende stat, eller om behandlingen i modtagerstaten er på et sammenligneligt niveau, ligesom artikel 3 ikke sikrer ret til en behandling i modtagerstaten, der ikke er tilgængelig for resten af befolkningen (*præmis 188-189)*.

Myndighederne skal undersøge, om behandlingen generelt er tilgængelig i hjemlandet.

Det følger herefter af *præmis 190*, at myndighederne også skal overveje, om udlændingen rent faktisk har adgang til at modtage behandlingen i hjemlandet, hvilket omfatter spørgsmål om tilgængelighed både med hensyn til afstand og omkostninger. Domstolen henviser i den forbindelse til sin hidtidige praksis på området.

Hvis der herefter foreligger alvorlig tvivl med hensyn til konsekvenserne for den syge udlænding i tilfælde af udsendelse, kan den udvisende stat have pligt til at opnå en individuel og tilstrækkelig garanti fra modtagerstaten om, at behandlingen eksisterer og vil være tilgængelig for udlændingen, inden en udsendelse gennemføres (*præmis 191)*.

Det forhold, at modtagerstaten er en medlemsstat, der også er bundet af konventionen, er ikke i sig selv afgørende for, om udsendelse vil være i strid med konventionen (*præmis 193).*

2. I forhold til den konkrete sag, som dommen vedrører, var der tale om en georgisk statsborger (Georgie Paposhvili), som kom til Belgien i 1998 med sin kone og et barn. Han fik sidenhen to børn mere. Han fik afslag på asyl og på opholdstilladelse på andet grundlag. Fra 1999 og frem til 2005 blev Paposhvili dømt for adskillige lovovertrædelser, og han blev derfor udvist på grund af den begåede kriminalitet.

Under afsoning af en fængselsstraf i 2006 fik han konstateret bl.a. leukæmi. Han modtog forskellig behandling, og hans forventede levetid blev i 2008 vurderet til at være 3-5 år. Sygdommen forværredes, og i 2012 vurderede en læge, at ophør af behandlingen kunne føre til Paposhvilis død. I 2015 vurderede en læge, at ophør af behandling ville medføre en forventet levetid på tre måneder, samt at Paposhvili ikke havde adgang til behandlingen i Georgien.

Paposhvili søgte flere gange om opholdstilladelse af humanitære årsager under henvisning til, at det ikke var muligt at få behandling for hans leukæmi i Georgien. Han fik imidlertid afslag med henvisning til, at han var udelukket fra at få opholdstilladelse efter belgisk lovgivning på grund af den begåede kriminalitet. De belgiske myndigheder foretog derfor ikke yderligere undersøgelser i sagen i forhold til Belgiens internationale forpligtelser.

Paposhvili indbragte herefter sagen for Den Europæiske Menneskerettighedsdomstol med påstand om, at hans udvisning til Georgien ville sætte ham i fare for umenneskelig behandling og en tidligere død på grund af, at behandlingen, som han havde modtaget i Belgien, ikke var tilgængelig i Georgien. I 2016 døde Paposhvili i Belgien, men da de efterladte ønskede at fortsætte sagen, fortsatte Menneskerettighedsdomstolen behandlingen.

Menneskerettighedsdomstolen fastslog i sin dom, at Belgien ville have krænket Den Europæiske Menneskeretskonventions (EMRK) artikel 3 (om forbud mod tortur og umenneskelig eller nedværdigende behandling eller straf) og artikel 8 (om ret til privat- og familieliv), hvis Paposhvili var blevet udsendt af Belgien til Georgien, idet Belgien i den konkrete sag ikke havde overholdt sin undersøgelsespligt.

3. I den artikel, der henvises til i spørgsmålet, anfører forfatteren, at han mener, at Den Europæiske Menneskerettighedsdomstols dom i Paposhvili-sagen bør føre til, at Udlændinge- og Integrationsministeriet ændrer sin praksis for meddelelse af humanitær opholdstilladelse.

Forfatteren anfører, at Domstolen med Paposhvili-dommen har lempet sygdomskriteriet og skærpet undersøgelseskravet. Forfatteren anfører således, at det ikke længere er tilstrækkeligt blot at undersøge, om en udlænding lider af en terminal sygdom. Der bør herudover foretages en konkret og individuel vurdering af, om udlændingen vil have adgang til den nødvendige behandling og pleje i hjemlandet, herunder i forhold til økonomi, sociale og familiemæssige netværk og afstand til behandling.

Forfatteren anfører endvidere, at den danske praksis for meddelelse af humanitær opholdstilladelse synes at være i overensstemmelse med Den Europæiske Menneskerettighedsdomstols tidligere praksis om staters undersøgelsespligt, hvorefter det ansås for tilstrækkeligt at vurdere de generelle behandlingsmuligheder i hjemlandet.

Forfatteren finder imidlertid, at Udlændinge- og Integrationsministeriet på baggrund af dommen bør ændre praksis, så udlændingens reelle behandlingsmuligheder i hjemlandet undersøges, og der foretages en konkret og individuel vurdering af, om udlændingen vil have adgang til den nødvendige behandling og pleje i hjemlandet, herunder i forhold til økonomi, sociale og familiemæssige netværk og afstand til behandling.

Forfatteren finder på den baggrund, at ministeriet er forpligtet til at indrette sin praksis efter EMD-praksis, der efter forfatterens opfattelse i meget vidt omfang svarer til dansk praksis før praksisændringen i 2010.

4. Det er Udlændinge- og Integrationsministeriet opfattelse, at Paposhvili-dommen grundlæggende handler om tre ting.

Hidtil har Domstolen i sin praksis antaget, at personer, der lider af en alvorlig sygdom i terminalstadiet, er omfattet af beskyttelsen i artikel 3. Men Domstolen har som nævnt i 2008 anført, at der kunne være andre "meget ekstraordinære tilfælde", hvor en alvorligt syg person er omfattet af denne beskyttelse.

I Paposhvili-dommen finder Domstolen så for <u>første</u> gang anledning til at præcisere, hvad der nærmere ligger i disse andre "meget ekstraordinære tilfælde", hvor udsendelse af en alvorligt syg udlænding vil rejse spørgsmål i forhold til EMRK artikel 3, selvom døden ikke er nært forestående.

Der er også efter Paposhvili-dommen en meget høj tærskel, før et forhold er omfattet af EMRK artikel 3. Bestemmelsen vil således fortsat kun blive krænket, hvis der foreligger meget ekstraordinære tilfælde. Det drejer sig om de grupper af alvorligt syge udlændinge, for hvem det må antages, at udlændingen uden behandling i hjemlandet er i reel risiko for at blive udsat for en alvorlig, hurtig og uoprettelig forværring i vedkommendes helbredstilstand, der vil resultere i intens lidelse eller i en væsentlig reduktion i forventet restlevetid (*præmis 183*).

Der kan efter udlændingelovens § 9 b, stk. 1, meddeles humanitær opholdstilladelse, hvis "væsentlige hensyn af humanitær karakter afgørende taler for at imø-

dekomme ansøgningen". Afgørelsen af, om der foreligger sådanne særlige humanitære hensyn, som kan begrunde opholdstilladelse efter den nævnte bestemmelse, beror på et skøn.

I praksis er udlændingens helbredsforhold et kerneområde for bestemmelsens anvendelse. Helbredsbetinget humanitær opholdstilladelse forudsætter, at udlændingen lider af en meget alvorlig behandlingskrævende sygdom (sygdomskriteriet). Derudover stilles der som altovervejende udgangspunkt krav om, at behandling ikke er tilgængelig i ansøgerens hjemland (kriteriet om fravær af behandlingsmuligheder i hjemlandet).

Efter Udlændinge- og Integrationsministeriets praksis anses sygdomskriteriet for opfyldt, hvis der er tale om en meget alvorlig fysisk eller psykisk sygdom. Det kan f.eks. være tilfældet, hvis en ansøger lider af meget alvorlige hjertesygdomme, nyresygdomme, tarmsygdomme, blodsygdomme, insulinkrævende diabetes samt egentlige sindssygdomme, hvor den pågældende lider af en psykose f.eks. paranoid psykose og skizofreni. Opremsningen er ikke udtømmende.

Sygdomskriteriet vil efter Udlændinge- og Integrationsministeriets praksis kunne være opfyldt selv i sager, hvor en udlænding lider af en sygdom, hvor en manglende behandling ikke vil medføre en alvorlig, hurtig og uoprettelig forværring i vedkommendes helbredstilstand med intens lidelse eller væsentlig reduktion i den forventede restlevetid til følge.

På den baggrund finder Udlændinge- og Integrationsministeriet ikke på baggrund af dommen anledning til at ændre praksis for fortolkning af sygdomskriteriet, som allerede efter dansk praksis omfatter såvel uhelbredelige sygdomme i terminalstadiet som andre meget alvorlige sygdomme. Ministeriet har således ikke fundet holdepunkter i dommen for, at den danske fortolkning af sygdomskriteriet er for snæver.

For det andet medfører dommen en udvidet undersøgelsespligt i de særlige sager, som er omfattet af dommen.

Det fremgår af dommen, at myndighederne fra sag til sag skal overveje, om den behandling, der generelt er tilgængelig i modtagerstaten, er tilstrækkelig og passende til den pågældendes sygdom, således at vedkommende ikke udsættes for behandling i strid med artikel 3 (*præmis 189)*.

Det er i første omgang op til udlændingen at føre bevis for den påståede risiko. Hvis udlændingen fremlægger beviser, så der er vægtige grunde til at antage, at det vil kunne stride mod artikel 3 at udsende den pågældende, vil det være op til staten at afkræfte tvivlen.

Det er en betingelse for at meddele helbredsbetinget humanitær opholdstilladelse til en ansøger, der lider af en meget alvorlig fysisk eller psykisk sygdom, at an-

søgeren ikke har adgang til den nødvendige behandling i sit hjemland (kriteriet om fravær af behandlingsmuligheder i hjemlandet).

Efter gældende praksis er det op til udlændingen at fremlægge oplysninger om, at vedkommende lider af en alvorlig sygdom og modtager behandling herfor.

Udlændinge- og Integrationsministeriet foretager herefter efter praksis allerede en vurdering af, hvorvidt den pågældende har adgang til medicin i de sager, hvor ministeriet har fundet, at den pågældende lider af en meget alvorlig sygdom.

Udlændinge- og Integrationsministeriet vurderer på den baggrund ikke, at der er behov for at justere ministeriet fortolkning af, hvornår medicin og behandling generelt er tilgængeligt.

Domstolen anfører herudover, at myndighederne skal overveje, i hvilken udstrækning den pågældende *faktisk* vil have adgang til behandling i modtagerstaten (*præmis 190)*. Domstolen bemærker i den forbindelse (i overensstemmelse med dens tidligere afsagte domme), at staterne bl.a. skal overveje omkostninger ved medicinering og behandling, om der er et tilgængeligt socialt og familiemæssigt netværk, og den distance, der skal rejses for at få adgang til den nødvendige pleje.

Domstolen har ikke i dommen udtalt sig om, hvornår undersøgelsespligten indtræder, udover at der skal foreligge vægtige grunde. Det følger dog heraf, at der skal noget til.

Efter Udlændinge- og Integrationsministeriets gældende praksis vil det normalt være uden betydning for meddelelse af en helbredsbetinget opholdstilladelse, at en given behandling alene er tilgængelig i f.eks. privat regi mod egenbetaling, ligesom egenbetalingens størrelse som udgangspunkt er uden betydning. Det er endvidere ikke en betingelse, at den behandling, som er tilgængelig i hjemlandet, er af samme karakter som den behandling, der tilbydes i det danske sundhedsvæsen, så længe der foreligger oplysninger fra hjemlandets sundhedsmyndigheder eller andre relevante aktører om, at den pågældende sygdom rent faktisk kan behandles i hjemlandet.

Det er desuden normalt uden betydning, at den nødvendige behandling er tilgængelig på apoteker med videre i hele hjemlandet. Såfremt det pågældende land asylretligt anses for ét land, vil en ansøger således kunne henvises til at modtage den foreskrevne behandling i en anden del af landet også, selvom den pågældende var bosiddende et andet sted i hjemlandet inden sin udrejse.

Udlændinge- og Integrationsministeriet har hidtil alene undersøgt spørgsmål om f.eks. omkostninger ved medicin og afstand til behandling i de sager, hvor det på baggrund af sagens oplysninger umiddelbart blev skønnet, at ansøgeren opfylder den høje tærskel for meddelelse af humanitær opholdstilladelse.

Ministeriet har således kun lagt vægt på prisen af behandlingen, hvis der er konkrete holdepunkter for, at der er tale om en meget dyr behandling. Justitsministeriet har således f.eks. (på det tidspunkt, hvor udlændingeområdet hørte under Justitsministeriet) behandlet en sag, hvor der var oplysninger om, at en ansøger led af en meget alvorlig fysisk sygdom, hvor den livsnødvendige medicin her i landet kostede mere end 80.000 kr. om måneden. På den baggrund blev det besluttet at undersøge, hvad behandlingen i hjemlandet ville koste. Ministeriets undersøgelse af prisen på medicinen i hjemlandet blev imidlertid ikke tilendebragt, da den nødvendige behandling efterfølgende viste sig ikke at være tilgængelig.

Der har endvidere efter den hidtidige praksis i ekstraordinære tilfælde kunnet meddeles humanitær opholdstilladelse, hvis det ville være farefuldt for en ansøger at nå frem til behandlingsstedet, og den pågældende f.eks. på grund af sin sygdom ikke ville være i stand til at bosætte sig i den del af landet, hvor behandlingen var tilgængelig.

Det er Udlændinge- og Integrationsministeriets vurdering, at dommen medfører, at behandlingens faktiske tilgængelighed i de særlige sager, hvor der på baggrund af udlændingens egne forhold er væsentlig grund til at tro, at der ikke er faktisk adgang til en behandling i hjemlandet, nu skal undersøges nærmere.

Er der således på baggrund af ansøgerens personlige forhold vægtige grunde til at tro, at vedkommende ikke har faktisk adgang til at modtage behandling, vil Udlændinge- og Integrationsministeriet fremover skulle foretage yderligere sagsskridt med henblik på at undersøge dette nærmere.

Ved vurdering af spørgsmålet om faktisk adgang skal der bl.a. ses på spørgsmålet om omkostninger, socialt og familiært netværk og afstand.

Der vil som hidtil være en høj tærskel for, hvornår behandling ikke anses for faktisk tilgængeligt.

For det tredje åbner Domstolen også op for, at man i sager, hvor der efter den udvidede undersøgelse er alvorlig tvivl om konsekvenserne af en udsendelse, alligevel har mulighed for at udsende den pågældende ved brug af en individuel og tilstrækkelig garanti fra modtagerstaten.

Udlændinge- og Integrationsministeriet har ikke hidtil overvejet at anvende garantier i sager om humanitær opholdstilladelse.

5. I Paposhvili-sagen var Paposhvili udelukket fra at blive meddelt opholdstilladelse som følge af, at han havde begået kriminalitet i Belgien. De belgiske myndigheder undersøgte på den baggrund ikke, om den behandling, som Paposhvili havde brug for, var tilgængelig i hjemlandet.

Der er ligeledes efter dansk ret mulighed for at udelukke en udlænding fra opholdstilladelse, hvis pågældende har begået kriminalitet.

Det følger således af udlændingelovens § 10, stk. 4, at en udlænding, der har indrejseforbud, ikke kan gives opholdstilladelse efter udlændingelovens §§ 9-9 f, §§ 9 i-9 n eller 9 p, medmindre ganske særlige grunde taler derfor, dog tidligst to år efter udrejsen, jf. udlændingelovens § 10, stk. 4. Kravet om, at der skal være forløbet to år fra udrejsen, gælder dog ikke for en udlænding, som ikke er EU-borger, og som er udvist efter udlændingelovens § 25 b (om ulovligt ophold), jf. § 10, stk. 4, 2. pkt.

Efter praksis vil en udlænding, som er udvist af Danmark ved dom med et indrejseforbud, således være udelukket fra at blive meddelt humanitær opholdstilladelse, hvis vedkommende ikke har været udrejst i to år.

Det følger af udlændingelovens § 50, stk. 1, at en udlænding, der er udvist ved dom, som ikke har været udrejst af Danmark, og som påberåber sig, at der er indtrådt væsentlige ændringer i udlændingens forhold, jf. udlændingelovens § 26, kan begære spørgsmålet om udvisningens ophævelse indbragt for retten. Hvis retten ophæver udvisningen, vil udlændingen kunne meddeles humanitær opholdstilladelse efter § 9 b, stk. 1, hvis den pågældende i øvrigt opfylder betingelserne herfor.

Efter praksis har Udlændinge- og Integrationsministeriet hidtil som udgangspunkt ikke nærmere undersøgt sygdommens karakter samt tilgængeligheden af medicin i hjemlandet i de sager, hvor udlændingen er udelukket efter udlændingelovens § 10, stk. 4.

Selvom Paposhvili var udelukket fra opholdstilladelse på grund af, at han havde begået kriminalitet, fandt Domstolen i Paposhvili-dommen, at det ville have udgjort en krænkelse af EMRK artikel 3, hvis Paposhvili var blevet udsendt af Belgien, da de belgiske myndigheder ikke havde undersøgt, om der var medicin tilgængeligt i hjemlandet.

Udlændinge- og Integrationsministeriet har på den baggrund fundet anledning til at justere praksis i forbindelse med behandling af sager, hvor der meddeles afslag på humanitær opholdstilladelse som følge af, at udlændingen er udelukket efter udlændingelovens § 10, stk. 4.

Udlændinge- og Integrationsministeriet vil således fremover i sager, hvor der meddeles afslag på humanitær opholdstilladelse under henvisning til udlændingelovens § 10, stk. 4, 1. pkt., og hvor udlændingen fortsat opholder sig i Danmark, vejlede udlændingen om, at udlændingen i medfør af udlændingelovens § 50 har mulighed for at indbringe spørgsmålet om ophævelse af udvisningen for domstolene, hvis der er indtrådt væsentlige ændringer i den pågældendes forhold, jf. udlændingelovens § 26.

Såfremt udlændingen ikke ønsker at indbringe spørgsmålet om ophævelse af udvisningen for retten, eller retten ikke har fundet anledning til at ophæve udvisningen, jf. udlændingelovens § 50, men ministeriet vurderer, at den pågældende vil være i en situation, hvor det vil stride mod artikel 3 at udsende den pågældende, vil ministeriet således fremadrettet henvise den pågældende til tålt ophold,

indtil vedkommende kan udsendes af landet. Det skyldes, at udlændingelovens § 10 udtømmende regulerer adgangen til at meddele opholdstilladelse til udlændinge med indrejseforbud. En udlænding med et indrejseforbud, der har fået afslag på asyl, vil derfor ikke kunne meddeles humanitær opholdstilladelse efter udlændingelovens § 9 b, stk. 1, selv om den pågældende ikke for tiden kan udsendes.

6. Samlet er det Udlændinge- og Integrationsministeriets opfattelse, at der ikke efter de internationale konventioner og traktater eksisterer en ret for udlændinge til at opholde sig i et land, hvor de pågældende ikke er statsborgere, alene med henvisning til, at de pågældende modtager eller ønsker at modtage f.eks. medicinsk behandling i dette land.

Det er derfor Udlændinge- og Integrationsministeriets opfattelse, at praksis for meddelelse af humanitær opholdstilladelse fortsat – i overensstemmelse med bestemmelsens hidtidige formål – skal have undtagelsens karakter. Bestemmelsen har et snævert anvendelsesområde.

Det er endvidere ministeriets opfattelse, at praksis for meddelelse af humanitær opholdstilladelse skal administreres i overensstemmelse med Danmarks internationale forpligtelser.

I henhold til EMRK artikel 3 må ingen underkastes tortur og ej heller umenneskelig eller nedværdigende behandling eller straf. Det er Udlændinge- og Integrationsministeriets opfattelse, at det også efter Paposhvili-dommen følger, at EMRK artikel 3 ikke beskytter mod udsendelse af en udlænding med fysiske eller psykiske helbredsproblemer til et land med lavere behandlingsstandard og/eller begrænsede behandlingsmuligheder, medmindre der foreligger meget ekstraordinære tilfælde.

Den Europæiske Menneskerettighedsdomstol har i Paposhvili-dommen redegjort for, hvad der skal forstås ved andre meget ekstraordinære tilfælde. Det er Udlændinge- og Integrationsministeriets opfattelse, at der for at sikre, at afgørelser på det humanitære område træffes i overensstemmelse med Danmarks internationale forpligtelser, er behov for at indføre ekstra sagsbehandlingsskridt i visse særlige sager, således at ansøgerens faktiske adgang til behandling undersøges nærmere. Det er endvidere ministeriets opfattelse, at ministeriet bl.a. med den ovenfor beskrevne justering af praksis i forhold til behandling af sager, hvor udlændingen er udvist af Danmark som følge af, at den pågældende har begået kriminalitet, opfylder de nødvendige undersøgelseskrav af behandlingsmulighederne i hjemlandet.

Udlændinge- og Integrationsministeriet vil følge kommende domme fra Den Europæiske Menneskeretsdomstol tæt og justere den danske praksis, hvis der måtte blive behov derfor.

Inger Støjberg

/

Frederik Gammeltoft

Udlændinge- og Integrationsministeriet

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Udlændinge- og Integrationsudvalget har den 5. april 2017 stillet følgende spørgsmål nr. 665 (Alm. del) efter ønske fra Johanne Schmidt-Nielsen (EL) til udlændinge- og integrationsministeren, som hermed besvares endeligt.

Spørgsmål nr. 665:

Vil ministeren kommentere Den Europæiske Menneskerettighedsdomstols dom i sagen Paposhvili mod Belgien af 13. december 2016 samt seniorforsker, ph.d. Peter Vedel Kessings artikel om dommen i "EU-ret og Menneskeret" nr. 1, 2017 og redegøre for, om dommen får konsekvenser for den danske praksis med hensyn til tildeling af humanitære opholdstilladelser efter udlændingelovens § 9 b?

Svar:

1. Den Europæiske Menneskerettighedsdomstol afsagde den 13. december 2016 dom i sagen *Paposhvili mod Belgien*. Menneskerettighedsdomstolen fastslog bl.a., at Belgien ville have krænket den Europæiske Menneskeretskonvention (EMRK) artikel 3 (om forbud mod tortur og umenneskelig eller nedværdigende behandling eller straf) og artikel 8 (om ret til privat- og familieliv), hvis Paposhvili var blevet udsendt af Belgien til Georgien, idet Belgien i den konkrete sag ikke havde overholdt sin undersøgelsespligt.

I sagen var der tale om en georgisk statsborger (Georgie Paposhvili), som kom til Belgien i 1998 med sin kone og et barn. Han fik sidenhen to børn mere. Han fik afslag på asyl og på opholdstilladelse på andet grundlag. Fra 1999 og frem til 2005 blev Paposhvili dømt for adskillige lovovertrædelser, og han blev derfor udvist på grund af den begåede kriminalitet.

Under afsoning af en fængselsstraf i 2006 fik han konstateret bl.a. leukæmi. Han modtog forskellig behandling, og hans forventede levetid blev i 2008 vurderet til at være 3-5 år. Sygdommen forværredes, og i 2012 vurderede en læge, at ophør af behandlingen ville føre til Paposhvilis død. I 2015 vurderede en læge, at ophør af behandling ville medføre en forventet levetid på tre måneder, samt at Paposhvili ikke havde adgang til behandlingen i Georgien.

Paposhvili søgte flere gange om opholdstilladelse af humanitære årsager under henvisning til, at det ikke var muligt at få behandling for hans leukæmi i Georgien. Han fik imidlertid afslag med henvisning til, at han var udelukket fra at få opholdstilladelse efter belgisk lovgivning på grund af den begåede kriminalitet. De belgiske myndigheder foretog derfor ikke yderligere undersøgelser i sagen i forhold til Belgiens internationale forpligtelser.

Paposhvili indbragte herefter sagen for Den Europæiske Menneskerettighedsdomstol med påstand om, at hans udvisning til Georgien ville sætte ham i fare for umenneskelig behandling og en tidligere død på grund af, at behandlingen han havde modtaget i Belgien, ikke var tilgængelig i Georgien. I 2016 døde Paposhvili i Belgien, men menneskerettighedsdomstolen valgte at behandle sagen alligevel.

2. Den Europæiske Menneskerettighedsdomstol redegør i dommen generelt for sin praksis for udsendelse af personer, der er alvorligt syge.

Domstolen opsummerer bl.a. sin hidtidige praksis, hvorefter udlændinge, der står over for udvisning, som udgangspunkt ikke har ret til ophold i en konventionsstat for dér at fortsætte med at modtage medicinsk, social eller anden form for bistand, og at det forhold, at den pågældendes vilkår, herunder den forventede levetid, vil blive væsentligt forringet eller forkortet i tilfælde af udsendelse, ikke i sig selv kan medføre en krænkelse af artikel 3. Kun i meget ekstraordinære tilfælde, hvor der er tvingende humanitære modhensyn, kan det være i strid med artikel 3 at udsende en udlænding, der lider af en alvorlig fysisk eller psykisk sygdom, til et land, hvor der ikke er adgang til behandling.

I praksis har domstolen fortolket begrebet *meget ekstraordinære tilfælde* i overensstemmelse med sin dom af 2. maj 1997 i sagen *D mod Storbritannien* således, at meget ekstraordinære tilfælde foreligger i en situation, hvor en udlænding er kritisk syg og døden nær, men domstolen har dog i sagen *N mod Storbritannien* af 27. maj 2008 slået fast, at der også kan være andre meget ekstraordinære tilfælde.

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Domstolen udtaler herudover, at myndighederne også skal overveje, i hvilken udstrækning den pågældende faktisk vil have adgang til behandling i modtagerstaten. Domstolen henviser i den forbindelse til, at Domstolen tidligere har sat spørgsmålstegn ved adgangen til behandling og henvist til behovet for at tage hensyn til prisen på medicin og behandling, om pågældende har et socialt netværk, og hvor langt pågældende skal rejse for at få adgang til behandling (*præmis 190)*.

Endeligt udtaler domstolen, at hvis der på baggrund af den generelle situation i landet og den pågældendes individuelle situation består alvorlig tvivl om tilgængeligheden af behandlingen, skal det udsendende land indhente en garanti fra det modtagende land om, at behandlingen er tilgængelig (*præmis 191)*.

3. I den artikel, der henvises til i spørgsmålet, anfører forfatteren, at han mener, at Den Europæiske Menneskerettighedsdomstols dom i *Paposhvili mod Belgien* bør føre til, at Udlændinge- og Integrationsministeriet ændrer sin praksis for meddelelse af humanitær opholdstilladelse.

Forfatteren anfører, at Domstolen i Paposhvili har lempet sygdomskriteriet og skærpet undersøgelseskravet. Forfatteren anfører således, at det ikke længere er tilstrækkeligt blot at undersøge, om en udlænding lider af en terminal sygdom. Der bør herudover foretages en konkret og individuel vurdering af, om udlændingen vil have adgang til den nødvendige behandling og pleje i hjemlandet, herunder i forhold til økonomi, sociale og familiemæssige netværk og afstand til behandling.

Forfatteren anfører endvidere, at den danske praksis for meddelelse af humanitær opholdstilladelse synes at være i overensstemmelse med Den Europæiske Menneskerettighedsdomstols tidligere praksis om staters undersøgelsespligt, hvorefter det ansås for tilstrækkeligt at vurdere de generelle behandlingsmuligheder i hjemlandet.

Forfatteren finder imidlertid, at Udlændinge- og Integrationsministeriet på baggrund af dommen bør ændre praksis, så udlændingens reelle behandlingsmuligheder i hjemlandet undersøges, og der foretages en konkret og individuel vurdering af, om udlændingen vil have adgang til den nødvendige behandling og pleje i

hjemlandet, herunder i forhold til økonomi, sociale- og familiemæssigt netværk og afstand til behandling.

Forfatteren finder på den baggrund, at ministeriet er forpligtet til at indrette sin praksis efter EMD-praksis, der efter forfatterens opfattelse i meget vidt omfang svarer til dansk praksis før praksisændringen i 2010.

4. Efter EMRK artikel 3 må ingen underkastes tortur eller umenneskelig eller nedværdigende behandling eller straf.

Hvorvidt en handling er tortur eller anden umenneskelig eller nedværdigende behandling, afhænger bl.a. af offerets forhold, herunder offerets køn, alder og psykiske tilstand, og hvordan handlingen med rimelighed må opfattes af et sådant offer.

Artikel 3 udelukker, at en udlænding kan udsendes til et land, hvor der er vægtige grunde til at antage, at den pågældende løber en reel risiko for at blive udsat for en sådan behandling.

Derimod beskytter artikel 3 som udgangspunkt ikke mod udsendelse af en udlænding med fysiske eller psykiske helbredsproblemer til et land med en lavere behandlingsstandard og/eller begrænsede behandlingsmuligheder.

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Domstolen har således fremhævet i dommen, at der også fremover vil være en høj tærskel, før forholdet er omfattet af artikel 3 (*præmis 183)*.

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5. Efter udlændingelovens § 9 b, stk. 1, kan der gives opholdstilladelse til udlændinge, hvis "væsentlige hensyn af humanitær karakter afgørende taler for at imødekomme ansøgningen" (humanitær opholdstilladelse).

Bestemmelsen i § 9 b er tiltænkt et snævert anvendelsesområde, og det er således forudsat, at det skal have undtagelsens karakter, at der meddeles humanitær opholdstilladelse, idet de humanitære hensyn skal tale afgørende herfor. Humanitær opholdstilladelse gives derfor i praksis kun helt undtagelsesvis og kun efter en konkret vurdering af omstændighederne i den enkelte sag.

Afgørelsen af, om der foreligger sådanne særlige humanitære hensyn, som kan begrunde opholdstilladelse efter den nævnte bestemmelse, beror på et skøn.

I praksis er udlændingens helbredsforhold et kerneområde for bestemmelsens anvendelse. Helbredsbetinget humanitær opholdstilladelse forudsætter, at udlændingen lider af en meget alvorlig behandlingskrævende sygdom (sygdomskriteriet). Derudover stilles der som altovervejende udgangspunkt krav om, at behandling ikke er tilgængelig i ansøgerens hjemland (kriteriet om fravær af behandlingsmuligheder i hjemlandet).

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Det er en betingelse for meddeles af helbredsbetinget humanitær opholdstilladelse, at den meget alvorlige fysiske eller psykiske sygdom, ansøgeren lider af, aktuelt er behandlingskrævende. Hvis ansøgeren ikke modtager behandling for sin meget alvorlige sygdom, vil der som udgangspunkt blive meddelt afslag på helbredsbetinget humanitær opholdstilladelse. Tilsvarende gælder, hvis ansøgeren modtager behandling for sin meget alvorlige sygdom, men et eventuelt behandlingsophør ikke vil have negativ indvirkning på ansøgerens helbredsmæssige situation. Dette skyldes, at ansøgerens sygdom i sådanne tilfælde ikke anses for behandlingskrævende.

Er sygdomskriteriet opfyldt, og er sygdommen aktuelt behandlingskrævende, undersøger ministeriet, om den nødvendige behandling er tilgængelig. Hvis dette ikke er tilfældet, meddeles ansøgeren humanitær opholdstilladelse.

I ekstraordinære tilfælde meddeles der efter praksis humanitær opholdstilladelse på trods af oplysninger om, at behandlingsmuligheder er tilgængelige i ansøgerens hjemland. Det kan f.eks. være tilfældet, når behandlingsmulighederne og/eller forholdene i hjemlandet generelt er så usikre og uforudsigelige, at en ansøger – som lider af en uhelbredelig sygdom i terminalstadiet – vil komme i en situation, der kan sidestilles med umenneskelig behandling.

Fremgår det således af de lægelige oplysninger i en sag, at der er tale om en ansøger, som er døende med en kort forventet restlevetid, vil ministeriet normalt ikke undersøge behandlingsmulighederne i hjemlandet nærmere.

For en nærmere gennemgang af ministeriets praksis for meddelelse af humanitær opholdstilladelse henvises til redegørelse for praksis for meddelelse af humanitær opholdstilladelse af 24. marts 2015 og Notat om Integrationsministeriets praksis for meddelelse af humanitær opholdstilladelse efter udlændingelovens § 9 b, stk. 1, af 1. august 2010.

6. Det fremgår af afsnit 3.2.1.1 i Udlændinge- og Integrationsministeriets redegørelse for praksis for meddelelse af humanitær opholdstilladelse af 24. marts 2015 at:

> "Den nuværende praksis vedrørende helbredsbetinget humanitær opholdstilladelse blev indført af det tidligere Indenrigsministerium den 27. april 1993 bl.a. som følge af en nedgang i antallet af meddelte tilladelser i 1992. Før 1993 var det en betingelse for at meddele helbredsbetinget humanitær opholdstilladelse, at ansøgeren led af en akut eller livstruende fysisk sygdom eller af en så alvorlig psykisk sygdom, at den pågældende måtte anses for at være uhelbredeligt sindssyg.
>
> Ændringen indebar, at der fremover i videre omfang skulle meddeles opholdstilladelse til personer med fysiske og psykiske sygdomme af meget alvorlig karakter, uanset at den pågældende sygdom ikke kunne anses for værende akut eller direkte livstruende. Der skulle dog fortsat være tale om et snævert anvendelsesområde, og ansøgerens mulighed for at klare sig samt modtage kvalificeret lægehjælp i hjemlandet måtte ligeledes indgå i vurderingen."

Efter Udlændinge- og Integrationsministeriets praksis anses sygdomskriteriet således opfyldt, hvis der er tale om en meget alvorlig fysisk eller psykisk sygdom. Det kan f.eks. være tilfældet, hvis en ansøger lider af meget alvorlige hjertesygdomme, nyresygdomme, tarmsygdomme, blodsygdomme, insulinkrævende diabetes samt egentlige sindssygdomme, hvor den pågældende lider af en psykose f.eks. paranoid psykose og skizofreni. Opremsningen er ikke udtømmende.

Sygdomskriteriet er således bredere, end at den pågældende skal lide af en uhelbredelig sygdom i terminalstadiet.

Det bemærkes, at Udlændinge- og Integrationsministeriet træffer afgørelse om meddelelse af helbredsbetinget humanitær opholdstilladelse på baggrund af lægelige oplysninger, som ministeriet har modtaget fra ansøgeren. De lægelige oplysninger i sagen lægges uprøvet til grund. Det indebærer bl.a., at Udlændinge- og Integrationsministeriet ikke sætter spørgsmålstegn ved f.eks. ansøgernes diagnose. Ministeriet foretager således alene en juridisk bedømmelse af sagen, hvor ministeriet på baggrund af de lægefaglige erklæringer vurderer, om den pågældende inden for rammerne af udlændingelovens § 9 b, stk. 1, herunder bestem-

melsens forarbejder og praksis på området, vil kunne meddeles helbredsbetinget humanitær opholdstilladelse.

Der er også efter Den Europæiske Menneskerettighedsdomstols dom i *Paposhvili mod Belgien* en meget høj tærskel, før et forhold er omfattet af EMRK artikel 3. Bestemmelsen vil således fortsat kun blive krænket, hvis der foreligger meget ekstraordinære omstændigheder.

[redacted] praksis for fortolkning af sygdomskriteriet, som allerede efter dansk praksis omfatter såvel uhelbredelige sygdomme i terminalstadiet som andre meget alvorlige sygdomme. [redacted]

7. Det fremgår herudover af dommen, at myndighederne fra sag-til-sag skal overveje, om den behandling, der generelt er tilgængelig i modtagerstaten, er tilstrækkelig og passende til den pågældendes sygdom, således at vedkommende ikke udsættes for behandling i strid med artikel 3 (*præmis 189)*.

Det er som nævnt ovenfor under pkt. 5 en betingelse for at meddele helbredsbetinget humanitær opholdstilladelse til en ansøger, der lider af en meget alvorlig fysisk eller psykisk sygdom, at ansøgeren ikke har adgang til den nødvendige behandling i sit hjemland (kriteriet om fravær af behandlingsmuligheder i hjemlandet).

Udlændinge- og Integrationsministeriet foretager således allerede efter gældende praksis en vurdering af, hvorvidt den pågældende har adgang til medicin i de sager, hvor ministeriet har fundet, at den pågældende lider af en meget alvorlig sygdom.

Det gøres ved, at Udlændinge- og Integrationsministeriet, i de sager hvor sygdomskriteriet er opfyldt, gennem MedCOI (Medical Country of Origin Information) eller en dansk repræsentation i det pågældende land, undersøger om den nødvendige behandling er tilgængelig.

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Udlændinge- og Integrationsministeriet kan endvidere inddrage oplysninger fra både det pågældende lands myndigheder og internationale organisationer som WHO og UNHCR. Herudover kan Udlændingestyrelsen på fact-finding missioner ligeledes indhente oplysninger om behandlingsmuligheder i hjemlandet.

Det bemærkes, at det efter praksis – i overensstemmelse med domstolens praksis jf. præmis 189 – ikke er en betingelse, at behandlingen i hjemlandet er af samme karakter som den behandlingen, der tilbydes i det danske sundhedsvæsen, så længe der foreligger oplysninger fra hjemlandets sundhedsmyndigheder eller andre relevante aktører om, at den pågældende sygdom rent faktisk kan behandles i hjemlandet.

Det betyder f.eks. at der ikke kan stilles krav om at modtage behandling med et specifikt præparat, som ikke er tilgængeligt, hvis et andet præparat, der er tilgængeligt, vil kunne opfylde behandlingsbehovet. Det vil i den forbindelse normalt være uden betydning, at et eventuelt erstatningspræparat har en anden bivirkningsprofil end det præparat, ansøgeren er i behandling med, medmindre der konkret er tale om meget alvorlige bivirkninger.

[redacted]

8. Den Europæiske Menneskerettighedsdomstol bemærker i *Paposhvili mod Belgien*, at myndighederne skal overveje, i hvilken udstrækning den pågældende faktisk vil have adgang til behandling i modtagerstaten (*præmis 190)*.

Domstolen bemærker i den henseende, at den tidligere har stillet spørgsmålstegn ved tilgængeligheden af pleje og henvist til behovet for at overveje omkostningerne ved medicinering og behandling, om der er et tilgængeligt socialt- og familiemæssigt netværk, og den distance, der skal rejses for at få adgang til den nødvendige pleje. Domstolen henviser i den forbindelse til en række af sine tidligere domme.

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Efter Udlændinge- og Integrationsministeriets gældende praksis vil det normalt være uden betydning for meddelelse af en helbredsbetinget opholdstilladelse, om en given behandling alene er tilgængelig i f.eks. privat regi mod egenbetaling, ligesom egenbetalingens størrelse som udgangspunkt er uden betydning. Det er endvidere ikke en betingelse, at den behandling, som er tilgængelig i hjemlandet, er af samme karakter som den behandling, der tilbydes i det danske sundhedsvæsen, så længe der foreligger oplysninger fra hjemlandets sundhedsmyndigheder eller andre relevante aktører om, at den pågældende sygdom rent faktisk kan behandles i hjemlandet.

Det er desuden normalt uden betydning, at den nødvendige behandling er tilgængelig på apoteker med videre i hele hjemlandet. Såfremt det pågældende land asylretligt anses for ét land, vil en ansøger således kunne henvises til at modtage den foreskrevne behandling i en anden del af landet også, selvom den pågældende var bosiddende et andet sted i hjemlandet inden sin udrejse.

Som anført af forfatteren blev ministeriets praksis vedrørende kriteriet om fravær af behandlingsmuligheder i hjemlandet ændret pr. 1. august 2010. Efter den tidligere praksis, der fortsat er gældende for så vidt angår forlængelsesager, hvor den oprindelige ansøgning er indgivet før denne dato, kunne der efter omstændighederne gives humanitær opholdstilladelse, selvom den nødvendige behandling var tilgængelig i hjemlandet, hvis behandlingen alene var tilgængelig mod en egenbetaling af en størrelse, som ansøgeren ikke kunne forventes at have en reel økonomisk mulighed for at udrede. Ministeriet inddrog i vurderingen af, om ansøgerende havde en reel økonomisk mulighed for at afholde omkostninger til behandlingen, oplysninger om den pågældendes økonomiske og sociale situation baseret på ansøgerens oplysninger om bl.a. tidligere erhverv, uddannelse, formueforhold og familiemæssige eller sociale netværk m.v.

Praksisændringen skete på baggrund af, at Danmark i en årrække oplevede en stigning af antallet af asylansøgere fra Balkan-landene, hvis eneste formål med at komme til Danmark tilsyneladende var at søge humanitær opholdstilladelse. Med henblik på at beskytte mod, at det danske asylsystem bliver udnyttet af udlændinge, som ikke har et asylretligt beskyttelsesbehov, men som ønsker at modtage en bedre – eller billigere – behandling, end deres hjemland kan tilbyde, blev det besluttet inden for rammerne af Danmarks internationale forpligtelser at ændre praksis. For en nærmere beskrivelse af praksisændringen henvises til de almindelige bemærkninger i lovforslag nr. L 188 af 26. marts 2010 (Folketingstiden 2009-10, tillæg A, s. 52-54).

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[redacted] Justitsministeriet har således f.eks. behandlet en sag, hvor der var oplysninger om, at en ansøger led af en meget alvorlig fysisk

sygdom, hvor den livsnødvendige medicin her i landet kostede mere end 80.000 kr. om måneden. På den baggrund blev det besluttet at undersøge, hvad behandlingen i hjemlandet ville koste. Ministeriets undersøgelse af prisen på medicinen i hjemlandet blev imidlertid ikke tilendebragt, da den nødvendige behandling efterfølgende viste sig ikke at være tilgængelig.

[redacted]

[redacted]

9. I den konkrete sag *Paposhvili mod Belgien* var Paposhvili udelukket fra at blive meddelt opholdstilladelse som følge af, at han havde begået kriminalitet i Belgien. De belgiske myndigheder undersøgte på den baggrund ikke, om den behandling, som Paposhvili havde brug for, var tilgængelig i hjemlandet.

Der er ligeledes efter dansk ret mulighed for at udelukke en udlænding fra opholdstilladelse, hvis pågældende har begået kriminalitet.

Det følger således af udlændingelovens § 10, stk. 4, at en udlænding, der har indrejseforbud, ikke kan gives opholdstilladelse efter udlændingelovens §§ 9-9 f, §§ 9 i-9 n eller 9 p, medmindre ganske særlige grunde taler derfor, dog tidligst to år efter udrejsen, jf. udlændingelovens § 10, stk. 4. Kravet om, at der skal være forløbet to år fra udrejsen, gælder dog ikke for en udlænding, som ikke er EU-borger, og som er udvist efter udlændingelovens § 25 b (om ulovligt ophold), jf. § 10, stk. 4, 2. pkt.

Efter praksis vil en udlænding, som er udvist af Danmark ved dom med et indrejseforbud, således være udelukket fra at blive meddelt humanitær opholdstilladelse, hvis vedkommende ikke har været udrejst i to år.

Det følger af udlændingelovens § 50, stk. 1, at en udlænding, der er udvist ved dom, som ikke har været udrejst af Danmark, og som påberåber sig, at der er indtrådt væsentlige ændringer i udlændingens forhold, jf. udlændingelovens § 26, kan begære spørgsmålet om udvisningens ophævelse indbragt for retten. Hvis retten ophæver udvisningen, vil udlændingen kunne meddeles humanitær opholdstilladelse efter § 9 b, stk. 1, hvis den pågældende i øvrigt opfylder betingelserne herfor.

Efter praksis har Udlændinge- og Integrationsministeriet hidtil som udgangspunkt ikke nærmere undersøgt sygdommens karakter samt tilgængeligheden af medicin

i hjemlandet i de sager, hvor udlændingen er udelukket efter udlændingelovens § 10, stk. 4.

Selvom Paposhvili var udelukket fra opholdstilladelse, på grund af at han havde begået kriminalitet, fandt domstolen i *Paposhvili mod Belgien,* at det ville have udgjort en krænkelse af EMRK artikel 3, hvis Paposhvili var blevet udsendt af Belgien, da de belgiske myndigheder ikke havde undersøgt, om der var medicin tilgængeligt i hjemlandet.

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I henhold til Den Europæiske Menneskerettighedskonventions artikel 3 må ingen underkastes tortur og ej heller umenneskelig eller nedværdigende behandling eller straf. [redacted]

Den Europæiske Menneskerettighedsdomstol har i *Paposhvili mod Belgien* redegjort for, hvad der skal forstås ved meget ekstraordinære tilfælde. [redacted]

[redacted]

[redacted]

[redacted]

Justits og Sikkerheds Ministeriet

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Asyl, Modtagelse og
Tilbagevenden

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Vores kendetegn
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Ved svar bedes dato og vores kendetegn oplyst. Venligst behandl kun én sag i Deres brev.

Dato den 11. april 2017
Emne EHRM kendelse i sagen Paposhvili v. Belgien

Den 13. december 2016 har den Europæiske Menneskerettighedsdomstol (EHRM) afsagt en dom i sagen af den georgiske udlænding Paposhvili mod Belgien.[1] Pågældende påstod – kort sagt – at han på grund af sin medicinske tilstand ikke var i stand til at vende tilbage til Georgien, og at en tvungen tilbagevenden til dette land skulle være i strid med Belgiens forpligtelser under artikel 3 af den Europæiske Menneskerettighedskonvention (EVRM). Da Domstolen i kendelsen går ind på beskyttelsesniveauet af artikel 3 EVRM i relation til udvisning af alvorligt syge udlændinge, har jeg set på hvad kendelsen betyder for den hollandske politik og praksis. Herunder skitserer jeg retspraksis af EHMR og derpå mine konklusioner for hvad dette betyder for de nationale politiske rammer.

Jurisprudens af EHRM
Set ud fra fast jurisprudens af EHRM kan en udlænding, som modtager medicinsk, social eller anden omsorg i princippet ikke forlange på grund af artikel 3 EVRM ret at fortsætte sit ophold i et land.[2] Kun i usædvanlige omstændigheder kan udvisning i lyset af tvingende humanitære omstændigheder medføre krænkelse af artikel 3 EVRM. Undtagen i sagen St. Kitts har EHRM ikke i en eneste dom antaget at udvisning i forbindelse med (undertiden meget alvorlige) medicinske problemer skulle medføre strid med artikel 3 EVRM.[3] I sagen St. Kitts lå de usædvanlige omstændigheder i den kendsgerning at udlændingen allerede var i en kritisk fase af sin sygdom og "appeared to be close to death", dette i kombination med kendsgerningen at pleje og medicinsk omsorg ikke var garanteret og at der ikke var nogen familie, som ville sørge for modtagelse og omsorg. Ud fra dommen viste det sig godt nok at EHRM holdt muligheden åben at der også i andre tilfælde kunne være tale om meget usædvanlige omstændigheder, men at Domstolen tog som udgangspunkt at tærsklen skulle forblive høj. I den hollandske gennemførelses praksis blev normen "appeared to be close to death"
i rammerne af asyl, forstået som død inden for en uge.

Den 13. december 2016 har den højeste Ret af EHRM afgivet domsafsigelse i sagen af den georgiske udlænding Paposhvili mod Belgien. Pågældende havde kronisk lymfatisk leukæmi og

[1] nr. 41738/10

[2] EHRM 24. juni 2003, Henao mod Holland, nr.13669/03
[3] EHRM 2. maj 1997, D. mod United Kingdom (ST. Kitts), nr.30240/96
behandledes bl. a. med kemoterapi og medicin. I denne kendelse giver EHRM for første gang navn til de "andre usædvanlige omstændigheder" som under artikel 3 EVRM kunne være i vejen for udvisning af alvorlig syge udlændinge. EHRM overvejer at disse "andre usædvanlige omstændigheder" indebærer at udlændingen *lider af en alvorlig sygdom, som har nået et sådant stadium at han ved udvisning og ved mangel på medicinske forsyninger, kommer i en situation af seriøs, hurtig og uigenkaldelig forværring af hans helbred, som resulterer i en intens lidelse eller en signifikant tilbagegang af hans forventede levetid.* Derved betoner Domstolen stadig og eksplicit at tærsklen må forblive høj, at indflydelsen af udvisningen på helbredssituationen en vis omfang af spekulation har og at en udlænding ikke kan forlange på grund af artikel 3 retten til en specifik medicinsk behandling i hans oprindelsesland, som ikke er til rådighed for resten af befolkningen.

Endvidere har EHRM enkelte overvejelser til vurderingen, som burde finde sted på national niveau vedrørende rådighed og tilgængelighed af medicinsk behandling ved tilbagevenden. EHRM angiver at det burde vurderes om en eventuel nødvendig behandling er til rådighed for udlændingen. For at opnå dette kriterium henviser EHRM til de sædvanlige passager med hensyn til fordelingen af bevisbyrden; i princippet ligger bevisbyrden, også ved medicinske aspekter ved udlændingen. Også henviser EHRM til tidligere udtalelser hvori bland andet de geografiske omstændigheder, omkostning af pleje og tilstedeværende af social netværk er indraget i vurderingen. I de tidligere kendelser har den enkelte omstændighed at omkostning for behandling er meget høj eller at der skal køres en længere afstand ikke været en grund for EHRM at antage at der er tale om en krænkelse af artikel 3 EVRM. Hvis der, udgående fra den nævnte bevisbyrdefordeling og vurderingsrammer, er seriøs tvivl om udlændingen virkelig har tilgang til den nødvendige omsorg i oprindelseslandet, skal der indhentes individuelle garantier fra oprindelseslandet af den Stat som udviser.

Politiske rammer
I Holland er det allerede igangværende praksis at ved en afvisning af en forespørgsel om opholds-tilladelse for asyl i den mere omfattende beslutning af IND bliver vurderet om de (underbyggede) medicinske omstændigheder er grund til – midlertidig – at undlade udvisningen (anvendelse af artikel 64 Udlændingeloven 2000 (Vw)). En udlænding kan også, uden asylprocedure, foretage en ansøgning om anvendelse af artikel 64 Vw. En udlænding, som lider af en sygdom, hvor der er bevist at den ved undladelse af behandling indenfor tre måneder skulle være årsag til dennes død, invaliditet eller en anden form for alvorlige legemlige eller psykiske skade, bliver allerede nu ikke udvist på grund af artikel 64 Vw.

Ved vurdering ser IND om den (nødvendige) medicinske pleje er til rådighed i oprindelseslandet. Hvis den medicinske tilstand af udlændingen falder under rækkevidde af den ovennævnte norm (lider af en sygdom, hvor der er bevist at den ved undladelse af behandling indenfor tre måneder skulle være årsag til dennes død, invaliditet eller en anden form for alvorlig legemlig eller psykisk skade) og det er evident at den nødvendige medicinske pleje ved tilbagevenden til oprindelsesland ikke er til rådighed eller tilgængelig, vil udvisning af udlændingen ikke finde sted på grund af artikel 64 Vw. Efter et år af uafbrudt ophold på grund af artikel 64 Vw, kan udlændingen ansøge om en regulær tilladelse på midlertidige humanitære grunde. For ansøgning af denne tilladelse skal udlændingen ikke betale gebyr. Fremskaffelsen af disse opholdstitler til alvorligt syge udlændinge i relation til artikel 3 EVRM i stedet for en asyltilladelse, tilslutter sig til den kendelse af EU Justits-domstolen (HvJEU) i sagen M'Bodj mod den belgiske stat.[4] I denne domsafsigelse har HvJEU nemlig dømt at en ansøgning om tilladelse på grund af medicinske årsager ikke kan betragtes som en ansøgning om asylbeskyttelse og derfor ikke falder under den rækkevide af EU-Procedure-retningslinie (2013/32/EU).

Hvis en udlænding har gjort det troværdig at den nødvendige medicinske pleje i oprindelseslandet ikke er tilgængelig for ham og derfor, som ment i dommen Paposhvili, er grund til at antage at udlændingen uden individuelle garantier ikke har adgang dertil, skal IND optage i beslutningen hvilke betingelser burde realiseres af DT&V inden man kan overgå til udvisning. I afventning af opstilling af disse betingelser skal man give udlændingen midlertidig retmæssig ophold og modtagelse på grund af artikel 64 Vw.

Med disse afprøvningsrammer giver jeg min fortolkning af det af EHRM identificerede "særlige omstændigheder" ved udvisning af alvorligt syge udlændinge, herved tages den tilbageholdenhed af EHRM i betragtning. Ved at undlade udvisning ved sådanne medicinske omstændigheder, forebygges det at en alvorligt syg udlænding udsættes til en stridig situation med artikel 3 EVRM.

Sikkerheds og Justits Departementsschef,

K.H.D.M. Dijkhoff

[4] HvJEU 18. december 2014, M'Bodj mod Belgien, C542/13

Ministerie van Veiligheid en Justitie

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Bij beantwoording de datum en ons kenmerk vermelden. Wilt u slechts één zaak in uw brief behandelen.

Datum 11 april 2017
Onderwerp EHRM uitspraak in de zaak Paposhvili v. België

Op 13 december 2016 heeft het Europees Hof voor de Rechten van de Mens (EHRM) uitspraak gedaan in de zaak van de Georgische vreemdeling Paposhvili tegen België.[1] Betrokkene stelde - kort gezegd - dat hij vanwege zijn medische toestand niet naar Georgië kon terugkeren, en dat een gedwongen terugkeer naar dat land in strijd zou zijn met de verplichtingen van België onder artikel 3 Europees Verdrag voor de Rechten van de Mens (EVRM). Omdat het Hof in de uitspraak ingaat op het beschermingsniveau van artikel 3 EVRM in relatie tot de uitzetting van ernstig zieke vreemdelingen, heb ik bezien wat de uitspraak betekent voor het Nederlandse beleid en praktijk. Hieronder schets ik de rechtspraak van het EHRM en vervolgens mijn conclusies voor hetgeen dit betekent voor het nationale beleidskader.

Jurisprudentie van het EHRM
Blijkens vaste jurisprudentie van het EHRM kan een vreemdeling die medische, sociale of andere zorg ontvangt in beginsel aan artikel 3 EVRM geen recht ontlenen zijn verblijf in een land voort te zetten.[2] Alleen in uitzonderlijke omstandigheden kan uitzetting in het licht van dwingende humanitaire omstandigheden schending van artikel 3 EVRM opleveren. Behoudens in de zaak St. Kitts heeft het EHRM in geen enkele uitspraak aangenomen dat uitzetting in verband met de (somtijds zeer ernstige) medische problemen strijd zou opleveren met artikel 3 EVRM.[3] In de St.Kitts-zaak waren die bijzondere omstandigheden gelegen in het feit dat de vreemdeling al in een kritieke fase van zijn ziekte was en *"appeared to be close to death"*, dit gecombineerd met het feit dat verpleging en medische zorg niet was gegarandeerd en er geen familie was die voor opvang of zorg wilde zorgdragen. Uit het arrest bleek weliswaar dat het EHRM de mogelijkheid openhield dat ook in andere gevallen sprake zou kunnen zijn van zeer uitzonderlijke omstandigheden, maar dat het Hof tot uitgangspunt nam dat de drempel hoog moest blijven. In de Nederlandse uitvoeringspraktijk werd de norm "appeared to be close to death", in het kader van asiel, ingevuld met een overlijden binnen een week.

Op 13 december 2016 heeft de Grote Kamer van het EHRM uitspraak gedaan in de zaak van de Georgische vreemdeling Paposhvili tegen België. Betrokkene leed

[1] nr. 41738/10
[2] EHRM 24 juni 2003, Henao tegen Nederland, nr. 13669/03
[3] EHRM 2 mei 1997, D. tegen Verenigd Koninkrijk (St. Kitts), nr. 30240/96

aan chronische lymfatische leukemie en ontving ter behandeling onder andere chemotherapie en medicijnen. In deze uitspraak geeft het EHRM voor het eerst invulling aan de "andere uitzonderlijke omstandigheden" die onder artikel 3 EVRM in de weg kunnen staan aan uitzetting van ernstig zieke vreemdelingen. Het EHRM overweegt dat deze "andere uitzonderlijke omstandigheden" inhouden dat de vreemdeling *lijdt aan een ernstige ziekte die een dusdanig stadium heeft bereikt dat hij door de uitzetting, bij een gebrek aan medische voorzieningen, komt te verkeren in een situatie van serieuze, snelle en onomkeerbare verslechtering van zijn gezondheid resulterend in een intens lijden of een significante afname van zijn levensverwachting.* Daarbij benadrukt het Hof nog immer en expliciet dat de drempel hoog moet blijven, dat de impact van de uitzetting op de gezondheidssituatie een zekere mate van speculatie in zich heeft, en dat een vreemdeling aan artikel 3 EVRM niet het recht kan ontlenen op een specifieke medische behandeling in zijn land van herkomst die niet beschikbaar is voor de rest van de bevolking.

Vervolgens wijdt het EHRM enkele overwegingen aan de beoordeling die op nationaal niveau plaats dient te vinden over de beschikbaarheid en toegankelijkheid van de medische behandeling bij terugkeer. Het EHRM geeft aan dat beoordeeld dient te worden of een eventueel benodigde behandeling voor de vreemdeling beschikbaar is. Voor de invulling van deze toets verwijst het EHRM naar de gebruikelijke passages met betrekking tot de bewijslastverdeling; in beginsel ligt de bewijslast, ook bij medische aspecten bij de vreemdeling. Ook verwijst het EHRM naar eerdere uitspraken waarin onder meer de geografische omstandigheden, kosten van de zorg en aanwezigheid van een sociaal netwerk bij de beoordeling zijn betrokken. In die eerdere uitspraken is de enkele omstandigheid dat de kosten voor de behandeling erg hoog zijn of dat er een grote afstand moet worden afgelegd voor het EHRM géén reden geweest om aan te nemen dat sprake is van schending van artikel 3 EVRM. Indien er, uitgaande van genoemde bewijslastverdeling en beoordelingskader, serieuze twijfels zijn of de vreemdeling daadwerkelijk toegang krijgt tot benodigde zorg in het land van herkomst, zullen echter individuele garanties in het land van herkomst door de uitzettende Staat moeten worden verkregen.

Beleidskader
In Nederland is reeds staande praktijk dat bij een afwijzing van de aanvraag voor een verblijfsvergunning asiel in de meeromvattende beschikking door de IND beoordeeld wordt of de (onderbouwde) medische omstandigheden grond zijn voor het - tijdelijk - achterwege laten van de uitzetting (toepassing van artikel 64 van de Vreemdelingenwet 2000 (Vw)). Een vreemdeling kan ook, los van een asielprocedure, een verzoek doen om toepassing van artikel 64 Vw. Bij een vreemdeling die lijdt aan een ziekte waarvan vaststaat dat het achterwege blijven van behandeling binnen drie maanden zou leiden tot overlijden, invaliditeit of een andere vorm van ernstige geestelijke of lichamelijke schade, wordt reeds thans uitzetting achterwege gelaten op grond van artikel 64 Vw.

Bij de beoordeling wordt door de IND gekeken of de (noodzakelijke) medische zorg in het herkomstland beschikbaar is. Indien de medische toestand van de vreemdeling valt onder de reikwijdte van de hierboven beschreven norm (lijdt aan een ziekte waarvan vaststaat dat het achterwege blijven van behandeling binnen drie maanden zou leiden tot overlijden, invaliditeit of een andere vorm van ernstige geestelijke of lichamelijke schade) én evident is dat de noodzakelijk medische zorg bij terugkeer in het land van herkomst niet beschikbaar of toegankelijk is, wordt de uitzetting van de vreemdeling achterwege gelaten op

grond van artikel 64 Vw. Na een jaar onafgebroken verblijf op grond van artikel 64 Vw kan de vreemdeling een reguliere vergunning op tijdelijke humanitaire gronden aanvragen. Voor het aanvragen van deze vergunning zullen geen leges worden gevraagd van de vreemdeling. Het verstrekken van deze verblijfstitels aan ernstig zieke vreemdelingen in relatie tot artikel 3 EVRM, in plaats van een asielvergunning, sluit aan bij het arrest van het Hof van Justitie van de EU (HvJEU) in de zaak M'Bodj tegen de Belgische staat.[4] In die uitspraak heeft het HvJEU namelijk geoordeeld dat een verzoek om toelating op medische gronden niet is te zien als een verzoek om asielbescherming en daarom niet valt onder de werkingssfeer van de EU-Procedurerichtlijn (2013/32/EU).

Indien een vreemdeling aannemelijk heeft gemaakt dat noodzakelijk geachte medische zorg in zijn het land van herkomst voor hem niet toegankelijk is en er derhalve, zoals bedoeld in de uitspraak Paposhvili, reden is om aan te nemen dat de vreemdeling zonder individuele garanties hier geen toegang toe heeft, zal de IND in het besluit opnemen welke voorwaarden door DT&V gerealiseerd dienen te worden alvorens tot uitzetting kan worden overgegaan. In afwachting van de invulling van deze voorwaarden zal dan aan de vreemdeling tijdelijk rechtmatig verblijf en opvang kunnen worden gebonden op grond van artikel 64 Vw.

Met dit toetsingskader geef ik invulling aan de door het EHRM geïdentificeerde "uitzonderlijke omstandigheden" bij uitzetting van ernstig zieke vreemdelingen, daarbij de terughoudendheid van het EHRM in acht nemend. Door uitzetting achterwege te laten bij dergelijke medische omstandigheden, wordt voorkomen dat een ernstig zieke vreemdeling aan een met artikel 3 EVRM strijdige situatie wordt blootgesteld.

De Staatssecretaris van Veiligheid en Justitie,

K.H.D.M. Dijkhoff

[4] HvJEU 18 december 2014, M'Bodj tegen België, C 542/13

Udlændinge- og Integrationsministeriet

6 marts 2018

Udlændinge og Integrationsministeriet

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CVR nr 36 97 71 91

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Akttitel: Vs: (20161) UUI alm. del - foreløbigt svar på spm. 665
Aktnummer:

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Udlændinge- og Integrationsministeriet

6 marts 2018

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CVR nr 36 97 71 91

Aktdetaljer

Akttitel: Brev om besvarelse af spørgsmål nr. 665, 666 og 668
Aktnummer:

Ministeren

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Udlændinge- og Integrationsudvalget
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Udlændinge- og Integrationsministeriet

Til Udlændinge- og Integrationsudvalget

Udvalget har kaldt mig i samråd (samråd M) den 11. januar 2018 om humanitære opholdstilladelser og Den Europæiske Menneskerettighedsdomstols dom af 13. december 2016 i Paposhvili mod Belgien.

Som det fremgik af Udlændinge- og Integrationsministeriets nyhed af 6. januar 2018, som jeg tidligere har oversendt til udvalgets orientering, har Udlændinge- og Integrationsministeriet vurderet, at der på baggrund af Paposhvili-dommen er behov for at justere den hidtidige praksis for behandlingen af sager om humanitært ophold, således at ministeriet i højere grad end i dag i sager, hvor en udlænding lider af en meget alvorlig sygdom, og hvor der er væsentlig grund til at tro, at der ikke er faktisk adgang til en behandling i hjemlandet, undersøger dette spørgsmål nærmere, inden der træffes afgørelse om humanitær opholdstilladelse.

Ministeriet tilkendegav endvidere, at det nærmere indhold af denne justering af ministeriets praksis og den praktiske udmøntning heraf vil blive fastlagt i et notat, der offentliggøres på www.nyidanmark.dk snarest.

Indholdet af et sådant notat vil i al væsentlighed skulle være overensstemmende med det, der vil udgøre en fyldestgørende besvarelse af spørgsmål UUI nr. 665, 666 og 668.

Notatet vil skulle afspejle Danmarks forpligtelser som medlem af Europarådet og den Europæiske Menneskerettighedskonvention, og notatet skal således afstemmes med Justitsministeriet, inden det kan offentliggøres.

Det har meget beklageligt ikke været muligt for Udlændinge- og Integrationsministeriet at forelægge udkast til besvarelse af de nævnte spørgsmål for Justitsministeriet tids nok til, at Justitsministeriet inden samrådet har kunnet vurdere udkastet.

Den endelige besvarelse af UUI 665, 666 og 668 er derfor ikke oversendt til udvalget inden samrådet, men det forventes oversendt snarest.

Udlændinge- og
Integrationsudvalget
10. januar 2018

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CVR-nr. 36977191

Sags nr. 2017 - 5755
Akt-id 351090

Udlændinge- og Integrationsministeren vil dog – uanset dette – på samrådet kunne redegøre for Udlændinge- og Integrationsministeriets hidtidige håndtering af dommen og således besvare spørgsmål M.

Med venlig hilsen

Inger Støjberg