EUROPEAN COURT OF HUMAN RI
COUR EUROPÉENNE DES DROITS DE I

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Belgian authorities should not have expelled asylum seeker to Greece

In today's Grand Chamber judgment in the case M.S.S. v. Belgium and Greece (application no. 30696/09), which is final[1], the European Court of Human Rights held, by a majority, that there had been:

A violation of Article 3 (prohibition of inhuman or degrading treatment or punishment) of the European Convention on Human Rights by Greece both because of the applicant's detention conditions and because of his living conditions in Greece;

A violation of Article 13 (right to an effective remedy) taken together with Article 3 by Greece because of the deficiencies in the asylum procedure followed in the applicant's case;

A violation of Article 3 by Belgium both because of having exposed the applicant to risks linked to the deficiencies in the asylum procedure in Greece and because of having exposed him to detention and living conditions in Greece that were in breach of Article 3;

A violation of Article 13 taken together with Article 3 by Belgium because of the lack of an effective remedy against the applicant's expulsion order.

The case concerned the expulsion of an asylum seeker to Greece by the Belgian authorities in application of the EU Dublin II Regulation.

Principal facts

The applicant, M.S.S., an Afghan national, left Kabul early in 2008 and, travelling via Iran and Turkey, entered the European Union (EU) through Greece.

On 10 February 2009, he arrived in Belgium, where he applied for asylum. By virtue of the "Dublin II" Regulation[2], the Belgian Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. While the case was pending, the UNHCR sent a letter to the Belgian Minister for Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece. In late May 2009, the Aliens Office nevertheless ordered the applicant to leave the country for Greece, where he would be able to submit an application for asylum. The Aliens Office received no answer from the Greek authorities within the two-month period provided for by the Regulation, which it treated as a tacit acceptance of its request. It argued that Belgium was not the country responsible for examining the asylum application under the Dublin II Regulation and that there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters.

1 Grand Chamber judgments are final (Article 44 of the Convention). All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

2 An EC regulation under which EU Member States are required to determine, based on a hierarchy of criteria, which Member State is responsible for examining an asylum application lodged on their territory.

The applicant lodged an appeal with the Aliens Appeals Board, arguing that he ran the risk of detention in Greece in appalling conditions, that there were deficiencies in the asylum system in Greece and that he feared ultimately being sent back to Afghanistan without any examination of the reasons why he had fled that country, where he claimed he had escaped a murder attempt by the Taliban in reprisal for his having worked as an interpreter for the air force troops stationed in Kabul.

His application for a stay of execution having been rejected, the applicant was transferred to Greece on 15 June 2009. On arriving at Athens airport, he was immediately placed in detention in an adjacent building, where, according to his reports, he was locked up in a small space with 20 other detainees, access to the toilets was restricted, detainees were not allowed out into the open air, were given very little to eat and had to sleep on dirty mattresses or on the bare floor. Following his release and issuance of an asylum seeker's card on 18 June 2009, he lived in the street, with no means of subsistence.

Having subsequently attempted to leave Greece with a false identity card, the applicant was arrested and again placed in the detention facility next to the airport for one week, where he alleges he was beaten by the police. After his release, he continued to live in the street, occasionally receiving aid from local residents and the church. On renewal of his asylum seeker's card in December 2009, steps were taken to find him accommodation, but according to his submissions no housing was ever offered to him.

Complaints, procedure and composition of the Court

The applicant alleged that the conditions of his detention and his living conditions in Greece amounted to inhuman and degrading treatment in violation of Article 3, and that he had no effective remedy in Greek law in respect of his complaints under Articles 2 (right to life) and 3, in violation of Article 13. He further complained that Belgium had exposed him to the risks arising from the deficiencies in the asylum procedure in Greece, in violation of Articles 2 and 3, and to the poor detention and living conditions to which asylum seekers were subjected there, in violation of Article 3. He further maintained that there was no effective remedy under Belgian law in respect of those complaints, in violation of Article 13.

The application was lodged with the European Court of Human Rights on 11 June 2009. On 12 June 2009, the applicant's request for an interim measure under Rule 39 of the Rules of Court to have his transfer to Greece suspended was rejected. On 2 July 2009 it was decided to apply Rule 39 against Greece, to the effect that he would not be deported to Afghanistan pending the outcome of the proceedings before the Court.

On 16 March 2010 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber and on 1 September 2010 a public hearing was held. The Governments of the Netherlands and the United Kingdom, the Council of Europe Commissioner for Human Rights and the UNHCR were given leave to intervene in the oral proceedings as third parties. Written observations were also received from those parties and from the Centre for Advice on Individual Rights in Europe ("the Aire Centre"), Amnesty International and the Greek Helsinki Monitor.

Judgment was given by the Grand Chamber of 17, composed as follows:

Jean-Paul **Costa** (France), *President*,
Christos **Rozakis** (Greece),
Nicolas **Bratza** (the United Kingdom),
Peer **Lorenzen** (Denmark),
Françoise **Tulkens** (Belgium),

Josep **Casadevall** (Andorra),
Ireneu **Cabral Barreto** (Portugal),
Elisabet **Fura** (Sweden),
Khanlar **Hajiyev** (Azerbaijan),
Danutė **Jočienė** (Lithuania),
Dragoljub **Popović** (Serbia),
Mark **Villiger** (Liechtenstein),
András **Sajó** (Hungary),
Ledi **Bianku** (Albania),
Ann **Power** (Ireland),
Işıl **Karakaş** (Turkey),
Nebojša **Vučinić** (Montenegro)*, Judges*,

and also Michael **O'Boyle**, *Deputy Registrar.*

Decision of the Court

Article 3: detention conditions in Greece

While the Court did not underestimate the burden currently placed on the States forming the external borders of the EU by the increasing influx of migrants and asylum seekers and the difficulties involved in receiving them at major international airports, that situation could not absolve Greece of its obligations under Article 3, given the absolute character of that provision.

When the applicant arrived in Athens from Belgium, the Greek authorities had been aware of his identity and of the fact that he was a potential asylum seeker. In spite of that, he was immediately placed in detention, without any explanation being given. The Court noted that various reports by international bodies and non-governmental organisations of recent years confirmed that the systematic placement of asylum seekers in detention without informing them of the reasons was a widespread practice of the Greek authorities. The applicant's allegations that he was subjected to brutality by the police during his second period of detention were equally consistent with numerous accounts collected from witnesses by international organisations, in particular the European Committee for the Prevention of Torture (CPT). Findings by the CPT and the UNHCR also confirmed the applicant's allegations about the unsanitary conditions and the overcrowding in the detention centre next to Athens international airport.

Despite the fact that he was kept in detention for a relatively short period of time, the Court considered that the conditions of detention experienced by the applicant in the holding centre had been unacceptable. It found that, taken together, the feeling of arbitrariness, inferiority and anxiety he must have experienced, as well as the profound effect such detention conditions indubitably had on a person's dignity, constituted degrading treatment. In addition, as an asylum seeker he was particularly vulnerable, because of his migration and the traumatic experiences he was likely to have endured. The Court concluded that there had been a violation of Article 3.

Article 3: living conditions in Greece

Article 3 did not generally oblige Member States to give refugees financial assistance to secure for them a certain standard of living. However, the Court considered that the situation in which the applicant had found himself was particularly serious. In spite of the obligations incumbent on the Greek authorities under their own legislation and the EU Reception Directive, he spent months living in extreme poverty, unable to cater for his most basic needs - food, hygiene and a place to live - while in fear of being attacked and robbed. The applicant's account was supported by the reports of a number of

international bodies and organisations, in particular the Council of Europe Commissioner for Human Rights and the UNHCR.

The authorities had not duly informed the applicant of any accommodation possibilities. A document notifying him of the obligation to go to the police headquarters to register his address could not reasonably be understood as an instruction to let the authorities know that he had nowhere to stay. In any event, the Court did not see how the authorities could have failed to assume that the applicant was homeless. The Government themselves acknowledged that there were fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum seekers. That data considerably reduced the weight of the Greek Government's argument that the applicant's situation was a consequence of his inaction.

The situation of which the applicant complained had lasted since his transfer to Greece in June 2009 and was linked to his status as an asylum seeker. Had the authorities examined his asylum request promptly, they could have substantially alleviated his suffering. It followed that through their fault he had found himself in a situation incompatible with Article 3. There had accordingly been a violation of that provision.

Article 13 taken together with Article 2 and 3 (Greece)

It was undisputed between the parties that the situation in Afghanistan had posed and continued to pose a widespread problem of insecurity. As regards the risks to which the applicant would be exposed in that country, it was in the first place for the Greek authorities to examine his request. The Court's primary concern was whether effective guarantees existed to protect him against arbitrary removal.

While Greek legislation contained a number of such guarantees, for a few years the UNHCR, the European Commissioner for Human Rights and other organisations had repeatedly and consistently revealed that the relevant legislation was not being applied in practice and that the asylum procedure was marked by major structural deficiencies. They included: insufficient information about the procedures to be followed, the lack of a reliable system of communication between authorities and asylum seekers, the lack of training of the staff responsible for conducting interviews with them, a shortage of interpreters and a lack of legal aid effectively depriving asylum seekers of legal counsel. As a result, asylum seekers had very little chance of having their applications seriously examined. Indeed, a 2008 UNHCR report showed a success rate at first instance of less than 0.1%, compared to the average success rate of 36.2% in five of the six EU countries which, along with Greece, received the largest number of applications. The organisations intervening as third parties had regularly denounced forced returns of asylum seekers by Greece to high-risk countries.

The Court was not convinced by the Greek Government's argument that the applicant was responsible for the inaction of the authorities because he had not reported to the police headquarters within a three-day time-limit as prescribed in a document he had received. Like many other asylum-seekers, as revealed by the reports, he had misinterpreted that convocation to the effect that its only purpose was to declare an address, which he did not have. To date, the authorities had not offered the applicant a real and adequate opportunity to defend his application for asylum.

As regards the applicant's opportunity of applying to the Greek Supreme Administrative Court for judicial review of a potential rejection of his asylum request, the Court considered that the authorities' failure to ensure communication with him and the difficulty in contacting a person without a known address made it very uncertain whether he would learn the outcome of his asylum application in time to react within the prescribed time-limit. In addition, although the applicant clearly could not pay for a lawyer, he had received no information concerning access to organisations offering legal advice. Added to that was the shortage of lawyers in the list drawn up for the legal aid system which rendered the system ineffective in practice. Moreover, according to information supplied by the Commissioner for Human Rights, uncontested by the Greek Government, the average duration of appeals to the Supreme Administrative Court was more than five years, which was additional evidence that such an appeal was not accessible enough and did not remedy the lack of guarantees in the asylum procedure.

In view of those deficiencies, the Court concluded that there had been a violation of Article 13 taken in conjunction with Article 3. In view of that finding it further considered that there was no need for it to examine the complaints lodged under Article 13 taken in conjunction with Article 2.

Article 2 and 3: The Belgian authorities' decision to expose the applicant to the asylum procedure in Greece

The Court considered that the deficiencies of the asylum procedure in Greece must have been known to the Belgian authorities when they issued the expulsion order against the applicant and he should therefore not have been expected to bear the entire burden of proof as regards the risks he faced by being exposed to that procedure. The UNHCR had alerted the Belgian Government to that situation while the applicant's case was pending. While the Court in 2008 had found in another case that removing an asylum seeker to Greece under the Dublin II Regulation did not violate the Convention,[3] numerous reports and materials had been compiled by international bodies and organisations since then which agreed as to the practical difficulties involved in the application of the Dublin system in Greece. Belgium had initially issued the expulsion order solely on the basis of a tacit agreement by the Greek authorities and had proceeded to execute that order without any individual guarantee given by those authorities at a later stage, although under the Regulation Belgium could have made an exception and refused the applicant's transfer.

Against that background, it had been up to the Belgian authorities not merely to assume that the applicant would be treated in conformity with the Convention standards but to verify how the Greek authorities applied their legislation on asylum in practice, which they had failed to do. The applicant's transfer by Belgium to Greece had thus given rise to a violation of Article 3. Having regard to that conclusion the Court found that there was no need to examine the complaints under Article 2.

Article 3: The Belgian authorities' decision to expose the applicant to the detention and living conditions in Greece

The Court had already found the applicant's conditions of detention and living conditions in Greece to be degrading. These facts had been well known and freely ascertainable from a wide number of sources before the transfer of the applicant. In that view, the Court considered that by transferring the applicant to Greece, the Belgian authorities knowingly exposed him to detention and living conditions that amounted to degrading treatment, in violation of Article 3.

[3] *K.R.S. v. the United Kingdom* (decision) (32733/08) of 2 December 2008

Article 13 taken together with Article 2 and 3 (Belgium)

As regards the complaint that there was no effective remedy under Belgian law by which the applicant could have complained against the expulsion order, the Belgian Government had argued that a request for a stay of execution could be lodged before the Aliens Appeals Board "under the extremely urgent procedure". That procedure suspended the execution of an expulsion measure for a maximum of 72 hours until the Board had reached a decision.

However, the Court found that the procedure did not meet the requirements of the Court's case-law that any complaint that expulsion to another country would expose an individual to treatment prohibited by Article 3 be closely and rigorously scrutinised, and that the competent body had to be able to examine the substance of the complaint and afford proper redress. Having regard to the Aliens Appeals Board's examination of cases, which was mostly limited to verifying whether those concerned had produced concrete proof of the damage that might result from the alleged potential violation of Article 3, the applicant would have had no chance of success. There had accordingly been a violation of Article 13 taken in conjunction with Article 3. The Court further considered that there was no need to examine the complaints under Article 13 taken in conjunction with Article 2.

Article 46 (Binding force and execution of judgments)

The Court considered it necessary to indicate some individual measures required for the execution of the judgment in respect of the applicant, without prejudice to the general measures required to prevent other similar violations in the future. It was incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that met the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that Greece was to pay the applicant 1,000 euros (EUR) in respect of non-pecuniary damage and EUR 4,725 in respect of costs and expenses. It further held that Belgium was to pay the applicant EUR 24,900 in respect of non-pecuniary damage and EUR 7,350 in respect of costs and expenses.

Separate opinions

Judges Rozakis and Villiger each expressed a concurring opinion. Judge Sajó expressed a partly concurring and partly dissenting opinion. Judge Bratza expressed a partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.