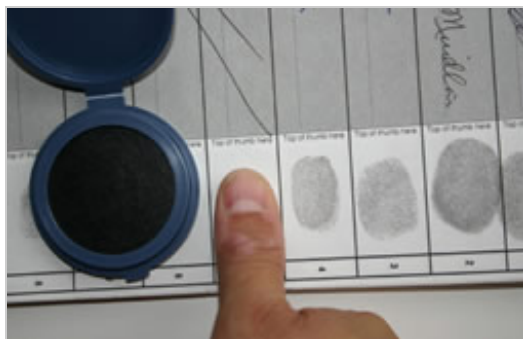


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European Court of Human Rights' Judgment on Expulsion of Asylum Seekers: *M.S.S. v. Belgium & Greece*

By Tom Syring



Introduction

On January 21, 2011, the European Court of Human Rights ("Court" or "Grand Chamber"), sitting as a Grand Chamber, delivered its judgment in the case of *M.S.S. v. Belgium & Greece*^[1] pertaining to the expulsion of asylum seekers in application of the Dublin Regulation.^[2] The decision comes on the

heels of a number of recent, related judgments before the Court and the European Court of Justice clarifying states' rights and obligations under the European Convention on Human Rights ("Convention")^[3] and the Common European Asylum System ("CEAS").^[4] Under the Dublin procedure, EU Member States and other cooperating European non-EU Member States^[5] are required to determine, based on a hierarchy of objective criteria,^[6] which state is responsible for examining an asylum application lodged on their territory.

Taking into account the distribution of responsibilities arising out of the Dublin Regulation, along with the individual's rights enshrined in the Convention, the Court found that Greece violated Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) for failing to provide adequate detention facilities and living conditions to the applicant; and Article 13 (right to an effective remedy) taken in conjunction with Article 3 of the Convention based on the deficiencies in the asylum procedure followed in the applicant's case and the inherent risk of expulsion to an unsafe country of origin. Furthermore, the Court found that Belgium violated Article 3 because, by sending the applicant back to Greece, Belgian authorities had exposed him to the risks linked to the deficiencies in the asylum procedure in that state and to detention and living conditions in Greece that were in breach of Article 3. Finally, the Grand Chamber ruled that Belgium violated Article 13 taken in conjunction with Article 3 because it failed to provide the applicant with an effective remedy against the expulsion order.

This *Insight* discusses the legal consequences of this decision on current and future

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developments in asylum and refugee law.

Background to the Case

The applicant, M.S.S., an Afghan national, left Kabul in 2008 and entered the European Union through Greece. In Greece, the applicant was fingerprinted and detained for a week and, after being released, was issued an order to leave the country. He left Greece, traveled through France, and entered Belgium, where he applied for asylum, basing his claim for protection on the risk of being murdered by the Taliban in reprisal for his work as an interpreter for the international air force troops stationed in Kabul. During the registration process, Belgian authorities discovered that M.S.S. had already been registered in Greece and, based on Article 10 § 1 of the Dublin Regulation, submitted a request to the Greek authorities to take charge of his asylum application as Greece was the applicant's first country of entry into the "Dublin area." When Greek authorities failed to respond within the two-month period provided for in Article 18 § 1 of the Regulation, Belgium, considering this to be a tacit acceptance of its request, transferred the applicant to Greece, where he was first detained and eventually released pending the outcome of his asylum application.

The Parties' Submissions

M.S.S. alleged that the conditions of his detention and the state of extreme poverty in which he lived since his arrival to Greece amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention.^[7] He further claimed that the lack of an effective remedy under Greek law to challenge his detention and living conditions, and the risk of being expelled to a country where his life might be endangered (Article 2) or where he would risk treatment contrary to Article 3, violated his Article 13 rights.

Article 13 of the Convention provides that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority" According to the applicant, the shortcomings in the asylum procedure in Greece were such that he faced a risk of being forcibly returned to Afghanistan, his (unsafe) country of origin ("*refoulement*"),^[8] without any real examination of the merits of his asylum application.

As to Belgium, the applicant alleged that by sending him to Greece under the Dublin Regulation, while aware of the deficiencies in the asylum procedures and the unsuitable living conditions^[9] in Greece, and without considering the risk he faced, including the risk of *refoulement* to Afghanistan, Belgium failed to fulfill its obligations under Articles 2 and 3 of the Convention.^[10] Furthermore, the applicant maintained that, contrary to Article 13, Belgian law provided no remedy allowing the applicant to complain about the alleged violations of Articles 2 and 3.^[11]

The Greek government disputed that the applicant had suffered inhuman or degrading treatment with respect to the conditions of detention, stressing the short duration of his detention.^[12] In regard to the living conditions, Greece submitted that

to find in favour of the applicant would be contrary to the provisions of the Convention, none of which guaranteed the right to accommodation or to political asylum. To rule otherwise would open the doors to countless

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similar applications from homeless persons and place an undue positive obligation on the States in terms of a welfare policy.[\[13\]](#)

As to the alleged failure to provide access to legal remedies, Greece maintained that its legislation was in conformity with EU and international asylum law, including the principle of *non-refoulement*, and pointed out that providing asylum seekers, whose application had been rejected at first instance (as in the applicant's case), with an appeal on the merits was not required by the Convention.[\[14\]](#)

Belgium submitted that the "Dublin Regulation had been drawn up with due regard for the principle of *non-refoulement* enshrined in the Geneva Convention[\[15\]](#) . . . and for the principle that the Member States were safe countries." Belgium acknowledged that in exceptional circumstances, a Member State could derogate from the principles provided for in Article 3 § 2 of the Regulation ("sovereignty clause") by, for example, examining an application for asylum lodged with it by a third-country national, even if such examination was not its responsibility under the criteria laid down in the Regulation. However, according to Belgium, the applicant's case did not trigger this exception. Thus, despite being aware of possible inadequacies within the Greek asylum system, Belgium was under no obligation to apply the sovereignty clause to the applicant.[\[16\]](#) Likewise, Belgium refused to recognize a violation of the Convention for exposing the applicant to detention and living conditions contrary to Article 3 by transferring him to Greece. As to the applicant's alleged lack of a right to an effective remedy against the expulsion order, Belgium disputed the applicant's argument that his request for a stay of execution had no chance of succeeding. However, Belgium submitted that "just as effectiveness of a remedy within the meaning of Article 13 did not depend on the certainty of it having a favourable outcome . . . the prospect of an unfavourable outcome on the merits should not be a consideration in evaluating the effectiveness of the remedy."[\[17\]](#)

The Court's Judgment

The Court, to a large extent, followed the applicant's arguments and found both Greece and Belgium in violation of Articles 3 and 13 of the Convention. As to Greece, the Grand Chamber acknowledged that states, which form the external borders of the European Union, currently experience considerable difficulties in coping with the increasing influx of migrants and refugees, a situation exacerbated by the transfers of asylum seekers by other Member States in application of the Dublin Regulation, especially in the present context of the economic crisis. However, the Court emphasized that "having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision."[\[18\]](#)

Article 3 enshrines one of the most fundamental values of democratic societies, prohibiting in absolute terms torture and inhuman or degrading treatment or punishment. The detention and living conditions experienced by the applicant and other asylum seekers in Greece amounted to prohibited conduct on the part of the Greek government.[\[19\]](#)

The Grand Chamber further accepted that the "effectiveness" of a remedy did not depend on the certainty of a favorable outcome, but stressed that such remedy must be available in practice. The Court noted that the Greek asylum legislation, in line with European Community law standards, contained a number of guarantees designed to protect asylum

seekers from removal to their countries of origin (*refoulement*) without first examining the merits of their fears. However, relying on documentation provided by, *inter alia*, the United Nations High Commissioner for Refugees ("UNHCR") and the European Commissioner of Human Rights (intervening as third parties), the Court observed that Greece's legislation was not being applied in practice, as further evidenced by the "extremely low rate of asylum or subsidiary protection granted by Greek authorities compared with other European Union member states."^[20]

As to Belgium, the Court held that it would be incompatible with the purpose and object of the Convention for States Parties to the Dublin Regulation to be absolved of all responsibility *vis-à-vis* the Convention within the "Dublin area." Accession to the Dublin Regulation and other international treaties is not in itself sufficient to ensure adequate protection against ill-treatment, especially where, as in the present case, reliable sources reported asylum practices that clearly violated principles of the Convention. In such circumstances, the transferring state (Belgium) should not merely assume that the applicant will be treated in conformity with the Convention standards, but should also verify how the receiving country (Greece) actually applies its asylum legislation and procedures in practice. In the instant case, Belgium should have applied the sovereignty clause. Furthermore, by expelling the applicant to Greece, Belgian authorities knowingly exposed him to detention and living conditions that amounted to degrading treatment. Finally, with respect to Belgium's precondition for a stay of execution of the expulsion order, the Grand Chamber ruled that the requirement that the applicant "produce[] *concrete* proof of the irreparable nature of the damage that *might* result from the alleged potential violation of Article 3"^[21] were he to be transferred to Greece unduly increased the burden of proof as to effectively hinder the examination of his alleged risk. Because the applicant's appeal thus lacked any prospect of success, Belgium violated its obligation to provide an effective remedy under the law.

Comments and Conclusion

Apart from criticizing Greece for the current conditions of detention and subsistence awaiting asylum seekers, and Belgium for "intentional blindness" for failing to properly scrutinize the adequacy of protection against *refoulement* in Greece, despite the fact that circumstances had called for application of the sovereignty clause, the Grand Chamber's judgment exposes flaws in the current European asylum regime. CEAS, including the Dublin Regulation, established to reduce "asylum shopping"^[22] and ensure minimum standards of protection to asylum seekers across the European Union, is based on a presumption of equality and cooperation among safe countries. For geopolitical reasons, South and Southeast European countries receive the greatest share of asylum seekers because these countries often represent the closest port of entry into Europe. This in turn leads to an unbalanced burden-sharing among the various European countries.

The judgment acknowledges those challenges, yet underlines that neither uneven burden-distribution (Greece) nor a state's minimalist reading of the Dublin Regulation (Belgium) absolves Member States of their responsibilities *vis-à-vis* the Convention or other applicable international treaties, including the 1951 Refugee Convention. As long as the EU and CEAS are comprised of individual Member States, as opposed to a "United States of Europe," individual states will be held responsible for independently assessing each case for the risk of direct or indirect *refoulement*.

While the Grand Chamber judgment uncovered a number of deficiencies in the current European asylum system, solutions to CEAS may have to be found outside the "Dublin world."^[23]

About the Author:

Tom Syring, an ASIL member and Co-chair of the ASIL International Refugee Law Interest Group, currently serves at the Norwegian Immigration Appeals Board. He has previously taught at the University of Oslo and at Boston University as a Lecturer in International Law and Visiting Fulbright Scholar. The views expressed in this article are those of the author alone and do not necessarily reflect the views of the Norwegian Immigration Appeals Board.

Endnotes:

[1] *M.S.S. v. Belgium & Greece*, App. No. 30696/09 (Eur. Ct. H.R. Jan. 21, 2011), *available at* <http://www.statewatch.org/news/2011/jan/echr-judgment-mss-v-belgium-greece.pdf>.

[2] Council Regulation 2003/343/EC of Feb. 18, 2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 2003 O.J. (L 50) 1, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:EN:NOT> [hereinafter Dublin Regulation].

[3] European Convention on Human Rights, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222, *available at* <http://www.hri.org/docs/ECHR50.html#Convention>.

[4] *See, e.g.*, *Joined Cases C-57/09 & C-101/09, Germany v. B, D* (Eur. Ct. Justice Nov. 9, 2010), *available at* <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-57/09> (exclusion from refugee status based on affiliation with terrorist organization); *Case C-31/09, Bolbol v. Bevándorlási és Állampolgársági Hivatal* (Eur. Ct. Justice June 17, 2010), *available at* <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4c1f62d42> (exclusion from refugee status based on protection or assistance received from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees); *Joined Cases C-175/08, C-176/08, C-178/08 & C-179/08, Abdulla et al. v. Germany* (Eur. Ct. Justice Mar. 2, 2010), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0175:EN:HTML> (exclusion from refugee status based on ceased circumstances in the applicant's country of origin); *K.R.S. v. United Kingdom*, App. No. 32733/08 (Eur. Ct. H.R. Dec. 2, 2008), *available at* <http://www.unhcr.org/refworld/publisher,ECHR,,IRN,49476fd72,0.html> (risk of *refoulement* and states' responsibility for examining asylum applications).

[5] *E.g.*, Iceland, Norway, and Switzerland.

[6] *Cf.* Dublin Regulation, *supra* note 2, arts. 5-14.

[7] *Cf. M.S.S.*, App. No. 30696/09, ¶ 235.

[8] *Refoulement* is the forced expulsion or return of a person to a country where he faces persecution, i.e. "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The principle of non-refoulement is enshrined in Article 33 of the 1951 Refugee

[9] *M.S.S.*, App. No. 30696/09, ¶ 362.

[10] *Id.* ¶ 323.

[11] *Id.* ¶ 369.

[12] *Id.* ¶ 211.

[13] *Id.* ¶ 243.

[14] *Id.* ¶¶ 274-76.

[15] Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 150, available at <http://www.unhcr.org/3b66c2aa10.html>.

[16] M.S.S., App. No. 30696/09, ¶¶ 326-28.

[17] *Id.* ¶ 383.

[18] *Id.* ¶ 223.

[19] The Court further underlined that the obligation to provide accommodation and decent material conditions to impoverished asylum seekers, as established in Directive 2003/9/EC of January 27, 2003, Laying Down Minimum Standards for the Reception of Asylum Seekers in the Member States, 2003 O.J. (L 31) 18 [hereinafter Reception Directive], now had entered into positive law obliging Greece.

[20] M.S.S., App. No. 30696/09, ¶ 313. According to information provided by the UNHCR, the success rate at first instance (proportion of positive decisions in relation to all decisions taken) was 0.04% for refugee status and 0.06% for humanitarian or subsidiary protection. *Observations on Greece as a Country of Asylum*, UN HIGH COMM'R FOR REFUGEES (Dec. 2009), available at http://www.unhcr.no/Pdf/Position_countryinfo_2010/GREECE%20final281209.pdf. Where appeals were concerned, the success rates in Greece were 2.87% and 1.26%, respectively. By comparison, the average success rate at first instance was 36.2% in five of the six countries which, along with Greece, received the largest number of applications (e.g., France, Germany, Italy, Sweden, and the UK). *2008 Global Trends, Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, UN High Comm'r for Refugees (June 16, 2009), available at <http://www.unhcr.org/4a375c426.html>.

[21] M.S.S., App. No. 30696/09, ¶ 389 (emphasis added).

[22] Referring to the activity of applying multiple times in different countries for asylum.

[23] The term "Dublin world" refers to the geographical area for which the Dublin Regulation applies, and could in that sense also be referred to as "Dublin area" or "Dublin Regulation." The author employs the term "Dublin world" intentionally to denote not only a geographical area, but, on a broader level, the idea that solutions may depend on looking outside the "Dublin box," i.e. that solutions may depend on revising the rules, assumptions etc. on which the Dublin Regulation is built, and will depend on progress in the countries people flee from and transit through on their way to Europe.