



WORKSHOP ON MIGRATION AND HUMAN RIGHTS IN EUROPE

International Commission of Jurists

July 2011

Non-refoulement in Europe after M.S.S. v. Belgium and Greece

Summary and Conclusions

On 18 April 2011, the International Commission of Jurists convened an expert workshop aimed at discussing the implications of the judgment of the European Court of Human Rights in the case *M.S.S. v. Belgium and Greece* for the Dublin system of transfers of asylum-seekers within the European Union & Associate States under the Regulation. The workshop aimed in particular to assess the consequences of the judgment for the legal regimes of international protection, expulsion and reception of asylum-seekers in certain European countries. The workshop was conducted under Chatham House rules. The following summary reflects opinions expressed in the workshop but does not necessarily reflect the view of particular participants, or of all or the majority of them.

A. General Framework

The participants analysed the different facets of the ruling of the Grand Chamber of the European Court of Human Rights in the case *M.S.S. v. Belgium and Greece*.

The judgment comes at a significant moment for the relationship between the EU and the ECHR system, as negotiations on EU accession to the ECHR are taking place, and as the EU Charter – which in some respects provides more extensive protection to asylum seekers than the ECHR, while in others it might provide less – gains in significance under the Lisbon Treaty. The Charter acquired, by virtue of Article 6(1) of the *Treaty on the European Union* (TEU), the same legal force as the Treaties, and has thus been formally added to the EU sources of fundamental rights. In this context, the Court pronounced a harsh judgment on the Dublin Regulation as an exacerbating factor in the inadequate reception conditions for asylum seekers in some EU Member States, while,

however, maintaining that this was no justification for Greece not to uphold its obligations under Article 3 ECHR. The CJEU will shortly reach its own judgment on the Dublin system, in the NS and NE cases now pending before it.

The Grand Chamber reached its decision in *MSS* relatively quickly, suggesting that it acted with certainty in making a series of significant findings, including on the application of the principle of *non-refoulement* to Dublin Regulation returns; the application of the Article 3 prohibition on inhuman and degrading treatment to poor living conditions; and the procedural obligations of States in asylum proceedings under Article 13 ECHR in conjunction with Article 3 ECHR.

Furthermore, it was noted that *MSS* is likely to have consequences beyond the Dublin system of processing asylum applications: including for returns of asylum seekers to intermediary States (which are not the country of origin of the asylum seeker) outside the EU; but also for cross-border criminal justice, and for mutual recognition of civil judgments and marriages.

A number of aspects of the judgment were highlighted:

- While extending the notion of inhuman and degrading treatment to living conditions of asylum-seekers, the Court stressed that it did not constitute *per se* an obligation to give financial assistance (the concurring and dissenting opinions of Judges Rozakis and Sajo are interesting on this point). To what extent this new scope of Article 3 depends on the Reception Directive remains to be tested in future litigation. It was also notable that no violation of Article 13 was found against Greece in regard to remedies for detention and living conditions.
- In *MSS*, the Court for the first time recognised asylum seekers themselves as a vulnerable group, in respect of whom States may have heightened positive obligations to protect (including against detention or living conditions in breach of Article 3). Specific, particularly vulnerable categories of asylum seekers, such as unaccompanied minors, have subsequently been recognised in the *Rahimi* case.
- In the finding of violation of Article 3 against Belgium, it is notable that the Court found the general country situation, rather than the individual circumstances of the asylum seeker, as most significant in assessing whether the Belgian authorities “knew or ought to have known” of the risk of ill-treatment in Greece. The Court’s application of this test in *MSS* has, however, been questioned (for example in the dissenting judgment of Judge Bratza) as in conflict with the Court’s own practice as regards interim measures in cases of transfers to Greece. The Court gave much weight and consideration to the wealth of NGOs and UNHCR reports on the situation in practice in Greece over a significant period of time.
- While the Court can be seen as rejecting the practice of transfers based on “inter-State confidence”, according to which there is a presumption of harmonisation of standards of treatment and respect for human rights and protection for asylum-seekers among EU Member States, this presumption may not have been entirely

done away with. It may simply be that, in certain circumstances, the burden of proof shifts to the State, to assess the risk of transfer having regard to the general situation in the country of transfer.

- The Court's expansion of the role of Article 13 remedies was also noted. The judgment stressed that to be effective, a remedy under Article 13 ECHR must not only be suspensive but must also provide rigorous scrutiny of the asylum-seeker's claim.

It was noted that the *MSS* case highlights how the Dublin Regulation system can aggravate disparities between EU Member States. A concern was raised that in some countries the Dublin Regulation is also used in cases of people already granted subsidiary protection.

On the specific issue of the recast proposal by the European Commission which aims at revising the Dublin Regulation, different views were expressed in the discussion. While some welcomed the introduction of a temporary suspension mechanism for Dublin transfers, concern was expressed that this might cause the European Court of Human Rights to return to its doctrine of "mutual inter-State confidence". At the same time, it was noted that, in certain situations, lawyers prefer not to ask for a suspension of the transfer, as national law does not provide the asylum-seeker with any particular form of protection during the period of suspension. The asylum seeker therefore risks being deprived of everything until the transfer is annulled or a contrary decision is reached. In discussion, it was noted that there were attempts by Member States in the Council of the European Union to resist certain improvements in the European Commission's recast proposal on the Dublin Regulation, such as the establishment of a temporary suspension mechanism for transfers, procedural safeguards for those detained and the obligation of personal interviews.

B. National Perspectives

1. The senders: Netherlands, United Kingdom, and Belgium

a) Netherlands

Before the *MSS* case, the Netherlands relied strongly on the principle of "inter-State confidence", following which EU Member States rely blindly on the assumption that a country, by virtue of being an EU Member State, will apply EU law and will respect the human rights of asylum-seekers. This approach has emerged discredited from the European Court's judgment in *MSS*. However, before the issuance of the *MSS* judgment, the Netherlands had temporarily stopped returning asylum-seekers to Greece, and, after the judgment, a policy was put in place not to return asylum-seekers there, but to deal with their applications in the Netherlands instead. This was also done in the hope of improvement in Greece so that transfers may be resumed as soon as possible. As for the internal system of the Netherlands, it was remarked that no automatic suspension of the execution of the expulsion or transfer exists in case of appeal against a negative decision of asylum. The asylum-seeker must, instead, ask for

the application of a provisional measure by the court of appeal and will not always be allowed to wait for its issuance.

b) United Kingdom

The United Kingdom has been highlighted as a “beneficiary” of the Dublin Regulation. The recast of the Dublin Regulation is the only piece of legislation of the “justice and home affairs” competence to which the UK has opted in, while it did not do so for the recast proposals of the EU Qualification and Reception Directives. Since September 2010, the United Kingdom has taken up many cases under the sovereignty clause of the Dublin Regulation, one of the reasons being to avoid litigation before the European Court of Human Rights. There are also other disturbing practices of the UK on the matter of asylum, although not directly related to the Dublin system. In one case, undocumented children have been resettled in their country of origin, Afghanistan, in an orphanage controlled by UK authorities. However, this excluded them from the possibility of requesting asylum, as they were no longer under UK “jurisdiction”. In the security field, there is also a practice of depriving dual nationals of their citizenship, or refugees of their refugee status when the person is out of the country to avoid him or her coming back. Finally, the use of diplomatic assurances in expulsion and extradition cases remains of great concern.

c) Belgium

Regarding the issue of appeal against denial of asylum and subsequent expulsion decisions, Belgium has two systems of appeal. The first is before the administrative court and has suspensive effect. However, in this system, the threshold to have the case admitted is very high as the tendency of jurisprudence is to establish that, even if you were ill-treated in the EU country from which you came (e.g. Greece), there is no evidence that that will occur again if transferred back. More recently, administrative courts have changed their attitude and tend not to transfer people to Greece, Italy or Poland.

For asylum-seekers in detention, there is also a possibility to appeal to the *Chambre du conseil*, but there the appeal is not suspensive. It was stressed that the courts and the administration have a tendency to take much more seriously issues regarding risk of torture and ill-treatment, and dedicate far less attention to issues arising from Article 8 ECHR, such as family reunification. Furthermore, Belgium recently changed the way of conducting personal interviews. While before interviews focussed merely on the reason for coming to the country, they now also extend to the past situation of the country from where the person comes or through which he or she passed.

2. The receiving end: Greece, Malta and Italy

a) Greece

The situation of migrants arriving in Greece amounts to a humanitarian crisis. The country has sustained around 90% of the irregular migration entering the European Union. The large majority of the migrants coming to Greece have no intention to remain there, but consider Greece as the main entry point to other countries of the European

Union. High numbers of undocumented migrants and asylum-seekers enter Greece through its islands, where local people react with great generosity in helping people coming by sea with clothes, blankets, etc. regardless of their number and status. However the official reception conditions are deeply problematic.

The Dublin Regulation represents a serious problem for Greece as it exacerbates the country's situation. Solidarity among EU Member States should not be limited to financial resources but also extend to sharing responsibility, by avoiding sending asylum-seekers back to Greece, until necessary amendments to the Dublin Regulation are made. The Greek Government and Parliament have recently carried out reforms to the asylum system, which are generally positive but are hampered by the lack of available resources. The second-instance administrative procedure for consideration of appeals against decisions on asylum applications has been re-established. Structural problems in the asylum system remain: in practice there is often no interpretation or legal aid available to asylum seekers; asylum seekers have to wait in long queues to access police stations where the asylum application must be made; the asylum application and the notifications linked with it require a postal address, but accommodation for asylum-seekers is insufficient. Many asylum seekers are left homeless, and without an address it is not possible to access the personal interview. Furthermore, for those migrants who are detained, the conditions of detention remain very bad.

New legislation, which will come into effect in one year, will aim at substituting the role of the police in examining first instance asylum application with committees which are relatively independent. The new law will provide for staff, administrators, interpreters, but no legal service or legal aid until the appeal stage.

There is a problem with the guardianship of undocumented children, which by law should be decided by the prosecutor, which assumes the role of *interim* guardian, but it has been signalled that in big cities prosecutors seem not to be willing to cooperate with this procedure. The backlog of cases related to asylum application is worrying: around 40,000 cases are pending before the committees which examine asylum applications, while the backlog in the Council of State (*Conseil d'Etat*), the highest administrative court, is also significant.

b) Malta

Malta is primarily a transit country towards other countries of the European Union. One of the major concerns relates to border management. On push-backs, the Italy-Libya Agreement had a direct impact in decreasing the number of arrivals of migrants and asylum-seekers to Malta. Malta directly operated one push-back in 2009.

Concern has been expressed regarding possible Frontex operations in the Mediterranean Sea, particularly in light of the record of push-backs during these operations off the Canary Islands and possibly off Northern Africa. There is a problem with the responsibility of rescue at sea between Malta and Italy, following which people are or risk being left on boats in dangerous situations without being rescued. Frontex appears to be unable to deal with these issues.

The *MSS* case may also have consequences for Malta in light of its serious problems with reception conditions. Detention centres or closed centres, where migrants are first hosted, present bad living conditions. However, in light of fewer arrivals by sea in recent years, open centres, where asylum-seekers, undocumented children and other vulnerable persons are also accommodated, are now very overcrowded, with worse conditions than detention centres, leading to the peculiar phenomenon that people are asking to stay in detention rather than be moved to open centres.

Appeals against negative decisions in asylum cases are suspensive. The reception system is tailored to asylum-seekers arriving by boat. Asylum-seekers entering Malta through different channels, such as visa-overstayers, have limited entitlements since they seem to be excluded from some of the rights afforded by the EU's Reception Directive.

It was noted that many migration policies implemented by the Government on detention and limited access to human rights remedies are strongly linked to public sentiment which leans towards a certain racism and xenophobia. An additional problem was signalled regarding employment and accommodation of asylum-seekers. Once asylum-seekers are accommodated in open centres, they are allowed to look for employment. But once they find other accommodation, they are not allowed to go back to the open centres. As a result, an asylum-seeker losing his or her job and the associated work permit encounter serious difficulties in finding accommodation.

c) Italy

The issues involving Lampedusa have received wide attention. Unlike Lampedusa or the push-backs in the Mid-Mediterranean Sea, there are other practices which raise concerns within the same European Union space. In the Adriatic Sea, which borders Italy and Greece, many migrants and asylum-seekers reach Italy through its border points where they are supposed to be screened for international protection. Many of them prefer not to declare their need for international protection because they do not want to stay in Italy but they are trying to reach other countries of the EU or trying to reunite with their families there. The main concern for asylum-seekers is to try and avoid being fingerprinted in the EURODAC system which will mean a risk to be sent back to Italy once they reach the destination country and apply for asylum there. They are then sent back to Greece with an "informal readmission" of which there are no traces and for which an established legal procedure does not exist. NGOs or legal services have no access to the asylum-seekers before they pass the border point and have no time to interview them, unless the police requires their help. With no access to the asylum-seekers, the risk that they would be sent back to Greece without proper assessment of their situation is high.

Concerning *MSS*, following the case, returns to Greece have been stopped. In addition, administrative courts are suspending removals to Greece. Finally, although there are generally good conditions in the centres of accommodation for asylum-seekers (CARA), most of the asylum-seekers have no place to go after the asylum procedure is concluded.

C. Strategy and Recommendations

Participants at the workshop suggested the following conclusions and recommendations. They are collected here in a summarised way, and they do not represent necessarily the view of all the experts or of the majority of them.

1. On the Dublin system

The Dublin system must be reconnected with its original objective, which was to reduce the harm to asylum-seekers and avoid uncertainty among EU Member States on responsibility for addressing asylum applications, resulting in a situation of lack of protection for asylum seekers. One recommendation within the existing legal framework was that the categories for assigning responsibility for asylum applications should all be used and the implementation of the Regulation should not focus primarily on the criterium of irregular entry. Finally, access to legal aid for migrants and asylum-seekers and to funding for NGOs protecting their rights has been found to be essential and it needs to be made effective.

2. On legal and political developments

The development of *non-refoulement* and of the right not to be subject to inhuman or degrading treatment, into the area of destitution and poverty, as highlighted in the *MSS* decision, is an interesting phenomenon. It is an area for development of further litigation on economic, social and cultural rights.

The importance of the EU Charter of Fundamental Rights was noted: the Charter should be looked to as much as the European Convention on Human Rights as a source of individual rights as well as a means of influencing legislation affecting human rights in Europe. In several areas, the CJEU is already using the Charter, along with general principles of EU law which it formulates and develops, as a yardstick for reviewing the conformity of both EU and Member States' action to human rights and as a source of individual rights. It was noted that States regard EU law as "more binding" than international human rights law. And, within international law, the decisions of the European Court of Human Rights are paid more attention than those of other bodies. In light of this, the accession of the EU to the ECHR is of particular importance. However, the specificities of EU law, as they result from the Charter and other EU sources of fundamental rights should also be duly taken into account, in particular when they afford greater protection to migrants.

Furthermore, participants noted the importance of solidarity (Article 80 TFEU), which must be taken into account for those countries that have to face an increased and disproportionate burden of migration flows as compared with other EU Member States.

However, participants considered that an amendment of the Dublin Regulation is necessary.

3. On information and awareness

For NGOs and practitioners, there is a need to monitor and report relevant national case-law from all EU Member States regarding challenges to the Dublin system transfers and the application of the principle of *non-refoulement*, as in the *MSS* case. The importance of having more national jurisprudence translated into English or in a language understandable across borders, and the need to disseminate good practices were emphasised in the discussion.

Training was stressed as an important way to give lawyers tools to implement human rights. It should not be confined to EU law obligations, but should also be expanded to international human rights law, with a particular eye on the EU Charter of Fundamental Rights, as a minimum standard, which cannot restrict rights deriving from other EU and international sources and allows their development and enhancement (see Article 53 of the Charter, which embodies the international law principle that the more favourable human rights norm prevails).

A need was identified for lawyers to have an overall picture of all human rights instruments which are interrelated, even when they do not concern the specific country or jurisdiction. It is also important to draw on the jurisprudence and solution of human rights protection systems outside Europe, for example the Inter-American system.

4. On advocacy and strategic litigation strategies

Strategic litigation plays an important role in addressing the human rights implications of the Dublin Regulation and for legislators who need it to guide their legislative activity, but it must go hand in hand with lobbying for political change.

The importance of third party interventions in strategic cases was highlighted by many of the participants. However, very few national jurisdictions have been identified as allowing this procedure for NGOs, and only a few more for the UNHCR. Of particular concern was the absence of third party intervention procedures for the Court of Justice of the European Union, before which it is possible to present submissions only if the NGO was a party or intervened in the national case. This is of particular concern, as the jurisprudence of the CJEU has direct impact on the case-law of the 27 EU Member States and might lead to radical changes of interpretation of the same definitions of refugee and/or of persecution.

Participants were made aware of the possibility to make use of the Racial Discrimination and the Gender Discrimination Directives to bring legal challenges as they can apply to all persons and not only EU citizens, provided that the ground of discrimination is not nationality.