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Meeting: 1294th meeting (September 2017) (DH)

Communication from a NGO (The Open Society Justice Initiative) (09/08/2017) in the case of M.S.S. v. Belgium and Greece (Application No. 30696/09)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1294^e réunion (septembre 2017) (DH)

Communication d'une ONG (The Open Society Justice Initiative) (09/08/2017) dans l'affaire M.S.S. c. Belgique et Grèce (Requête n° 30696/09) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

RULE 9 SUBMISSION TO THE COMMITTEE OF MINISTERS

MSS v. Belgium & Greece (application No. 30696/09)

DGI
09 AOÛT 2017

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

June 2017

Introduction and Recommendations

This submission concerns the implementation of the judgment in *MSS v. Belgium & Greece* (application No. 30696/09), which was delivered by the European Court of Human Rights on January 21, 2011.¹ In this case, an Afghan asylum seeker entered the European Union (EU) through Greece and subsequently made his way to Belgium, where he applied for asylum. Despite his stated concerns that the Greek asylum system would not be able to assist him, the Belgian authorities returned him to Greece. The Court held that the lack of an accessible and effective asylum reception and determination system, as well as the appalling conditions of detention, amounted to degrading treatment in violation of Article 3 of the Convention.² The Dublin system—according to which EU member states are permitted to transfer asylum seekers back to the first EU country they entered—was suspended following the judgment.³

¹ M.S.S. v. Belgium and Greece, Application no. 30696/09, European Court of Human Rights, 2011.

² *Ibid.*, para 259-264.

³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

Greece is set on a course toward humanitarian disaster. Increasingly demoralized migrants are losing hope that their cases will be resolved. Greece's citizens are also losing confidence in their government's willingness to address the situation. This needn't be the case, however. Greece has sufficient access to resources, the numbers of asylum-seekers are within Greece's capacity to manage (supported by the EU), and the Greek administration has skilled and efficient officials. The main problem is the lack of political will of both Greece and the EU.

In December 2016, the European Commission recommended a gradual resumption of returns to Greece "on the basis of individual assurances, taking account of the capacities for reception and treatment of applications in conformity with relevant EU legislation, and taking account of the currently inadequate treatment of certain categories of persons, in particular vulnerable applicants, including unaccompanied minors."⁴

The responsibility for failing to properly implement the *MSS* judgment, in truth, lies both with the EU and with Greece: the former, for developing and adhering to a deeply problematic asylum system for Europe, and for neglecting to provide the necessary support to Greece; and the latter, for its failure to adequately improve reception conditions, remove systematic obstacles in accessing the asylum system, and eliminate the risk of arbitrary detention. We are concerned that the latest decision of the CoM (CM/Del/Dec(2017)1288/H46-15) does not acknowledge that the systemic deficiencies of the Greek asylum system expose asylum seekers to a real risk of inhuman or degrading treatment.

With this in mind, we urge the CoM to:

- Debate the *MSS* judgment again by March 2018, at the latest;
- Request the Greek authorities to simplify and streamline its asylum procedure to allow in practice a regularized stay for third country nationals whose removal from the EU would be unjust or could not be achieved within a reasonable time, and to effect the speedy removal of other third country nationals, with appropriate legal guarantees.
- Encourage the Greek government to increase staffing of the Asylum Service to register and process applications for protection in a timely manner, and ensure that adequate funding is available for the provision of legal assistance and representation.

⁴ European Commission, Commission Recommendation of 8.12.2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No 604/2013, C(2016) 8524 final.

- Urge the Greek government to improve conditions of reception and detention for asylum-seekers to ensure that they are not subject to inhuman and degrading treatment.
- Take note of the Greek authorities' concerns regarding the European Commission's recommendation to resume gradual transfers to Greece.⁵

I. Serious flaws in the asylum system persist

Having amended its legal framework in response to the *MSS* judgment,⁶ Greece changed its laws again in 2016 as it adopted Law 4375/2016 to transpose EU Directive 2013/32/EU on Common Procedures for Granting and Withdrawing International Protection into Greek law.⁷ Law 4375/2016 set deadlines for government action for each step of the asylum process, including the requirement that all new asylum applications registered at the border or in a camp be processed within seven days normally,⁸ 28 days if in a hotspot,⁹ or 45 to 90 days if in detention.¹⁰ It also introduced, *inter alia*, a right to free legal assistance and representation in appeals procedures before the Appeals Committees¹¹ and restricted grounds for detention of asylum-seekers.¹² However, the Greek authorities have systemically failed to implement these laws in practice. Access to the asylum procedure remains obstructed and asylum decision-making is substantially lengthier than required by Greek law.

Systemic lack of access to the asylum system

The Greek government has repeatedly failed to provide third-country nationals staying outside of official migrant camps with ready access to the procedure for making an asylum claim. This is due in part to a lack of regional Asylum Service offices and shortages of staff for processing claims.¹³ In its 2017 Action Plan, the Greek

5 Communication from Greece (15/03/2017) in response to the decision of the CM at its 1222nd meeting (March 2015) concerning the cases of M.S.S v. Belgium and RAHIMI v. Greece (Applications No. 30696/09, 8687/08) (hereinafter the Action Plan), at pp. 1.

6 Law 3907/2011 "on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC on "common standards and procedures in Member States for returning illegally staying third country nationals" and other provisions."

7 Law 4375/2016, "Organisation and functioning of the Asylum Service, Appeals Authority, Reception and Identification Service, establishment of General Secretariat for Reception", transposition of Directive 2013/32/EU of the European Parliament and of the Council 'on common procedures for granting and withdrawing international protection (hereinafter Law 4375/2016). Law 4375/2016 was adopted in April 2016 and subsequently amended in June 2016 and in March 2017. A draft law transposing the recast Reception Conditions Directive is still to be adopted.

8 Article 60, "Border Procedures", Law 4375/2016.

9 Article 14, "Status of Residence and Procedures in the Reception and Identification Centres and in Mobile Units," Law 4375/2016.

10 Article 46, "Detention of applicants", Law 4375/2016.

11 Article 44 (3), "Provision of information - Legal representation and assistance", Law 4375/2016.

12 See supra note no 11, Article 46.

13 See Asylum Information Database (AIDA), 'Country report: Greece' (2016), at pp 31.

government stated that “during the years 2015-2016, the number of Regional Asylum Offices (RAOs) and Autonomous Asylum Units (AAUs) was significantly increased. Actually right now, seven RAOs and twelve AAUs of the Asylum Service are operating in the Greek territory, in the large urban centers and in the border areas of the country.”¹⁴

Despite this stated improvement, asylum seekers in Attica have no way to make an asylum claim by attending one of these autonomous offices in person. The sole mechanism provided by the government for asylum seekers who have not been preregistered is to seek an appointment through Skype with the Asylum Service to register their asylum applications.¹⁵ Skype appointments are only available for a limited number of hours per week for each language. According to the Asylum Information Database (AIDA), as of March 2017, the Skype line of the RAO in Attica is available only 20 hours per week and 18 hours for applicants living outside of the Attica region,¹⁶ and waiting times to book appointments by Skype are from 3 days to 8 months and from 10 days to 3 months for an interview, depending on language. Even with increased human resources, only 15 staff members work on the Skype procedures, clearly indicating a serious shortage of lawyers and qualified interpreters. Local NGOs report that detention continues to be used in breach of legal requirements limiting it to individual cases where necessary.

Delays in decision-making on asylum applications create hardship for those who wait

A significant backlog in pending asylum applications creates enormous hardship for applicants. As of February 28, 2017, 45,045 asylum applicants awaited a decision, the largest number of pending applications since the new Asylum Service was established.¹⁷ Despite the significant reduction in movements since March 2016, this figure is 16,000 more than in July 2016.¹⁸ In 2016, the Asylum Service made decisions at first instance in only 9,319 cases and decisions at second instance in 2,092 cases.¹⁹

Article 51(2) of Law 4375/2016 provides that “the examination of the applications shall be concluded the soonest possible and, in any case, within six months, where the regular procedure is applied, or three in the cases of an accelerated procedure.”²⁰ The time limit may be extended for another nine months under article 51(3), where complex issues of fact and/or law are involved, or a large number of third country

¹⁴ See Action Plan, *supra* note no 5, at pp 15-16.

¹⁵ *Ibid.*, at pp 17-18.

¹⁶ See AIDA, *supra* note no 15, at pp 32-33.

¹⁷ See Eurostat, <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/main-tables>.

¹⁸ *Ibid.*

¹⁹ “Statistical Data of the Greek Asylum Service (1.1.2016 – 31.12.2016),” Asylum Service, Hellenic Republic, accessed 14 Feb 2017, http://asylo.gov.gr/en/wp-content/uploads/2017/02/Greek-Asylum-Service-statistical-data_December2016_en.pdf.

²⁰ Article 51, “Examination Procedure,” Law 4375/2016.

nationals or stateless persons simultaneously apply for international protection. A further extension of three months is finally provided in article 51(4), “where necessary due to exceptional circumstances and in order to ensure an adequate and complete examination of the application for international protection.”²¹ Where no decision has been reached, the applicant has the right to request information on the timeframe within which the decision is expected to be issued.²²

The approach of the Greek authorities prevents speedy final asylum decision-making, causing tens of thousands to endure dangerously inadequate reception conditions for prolonged periods. Following the Turkey Statement of 18 March 2016—which aimed for all irregular migrants and asylum seekers whose applications are deemed inadmissible to be returned to Turkey—the Greek government adopted a policy to refuse asylum claims on the basis that Turkey is a “safe third country.”²³ Recognizing that such a policy could not legitimately be applied to all cases, Greece adopted a practice of distinguishing vulnerable from non-vulnerable persons. By aiming to expel as many migrants as possible to Turkey, while also ensuring that vulnerable persons were identified (and not expelled), the Greek government delayed decision-making for tens of thousands of asylum claims.

When independent appeal bodies consistently overturned this policy, the Greek government persisted, obtaining Parliamentary approval for the establishment of a new Appeals Committee, composed of two administrative judges and an independent expert.²⁴ The new Appeals Committee upheld most government decisions. The legality of this entity (as well as its decisions) is now under consideration by the Plenary of the Council of State.²⁵ In a public statement of July 17, 2016, Greece’s National Commission for Human Rights (NCHR) expressed concern about the composition of the Appeals Committee, questioning its constitutionality with respect to the independence of participating administrative judges.²⁶ According to the Asylum Information Database the new appeal body has upheld 99.6% of disputed Government asylum decisions.²⁷ This extraordinarily high proportion – far higher than of the previously constituted appeal bodies – raises serious questions about the effectiveness of the new appeal body.

No significant numbers of asylum-seekers have been legally returned to Turkey. The

²¹ *Ibid.*, Article 51(3).

²² *Ibid.*, Article 51(5).

²³ See Amnesty International’s submission to the Council of Europe Committee of Ministers: M.S.S.v. Belgium and Greece, application no 30696/09 (2017). According to Amnesty International: “Turkey cannot be considered a “safe third country” under the Asylum Procedure Directive for non-European asylum-seekers as it fails to provide them with effective protection- i.e. the full enjoyment of their rights as asylum-seekers and refugees.”

²⁴ The Parliament approved in June 2016 an amendment to Law 4375/2016 which established a new Appeals Committee.

²⁵ See AIDA *supra* note no 15, at pp 14-15.

²⁶ *Ibid.*, at pp 12.

²⁷ *Ibid.*, pp 15.

policy of aiming for these mass returns – which have not been achieved - has diverted resources from conclusive asylum-decision making.²⁸ The policy is furthermore unlawful since Turkey has not ratified the Refugee Convention in respect of refugees from outside Europe and does not, in practice, respect its standards.²⁹

II. The conditions of reception and detention expose asylum-seekers to inhuman and degrading treatment

Greece's changes to its formal framework and practice have not protected asylum seekers and refugees from inhuman and degrading treatment. According to official statistics, approximately 60,000 asylum-seekers and other non-EU country migrants without residence permits live in Greece. The majority of these survive in degrading and dangerous conditions. Greece's National Commission for Human Rights has acknowledged "huge problems" with living conditions in both hotspots (Greek islands) and camps (Greek mainland), stating that the "government appears to be absent [in this regard] and any special care provided [...] comes from NGOs and volunteers."³⁰ Many asylees have no access to basic healthcare, social services, or washing facilities. In January 2017, Greece's Migration Minister Yannis Mouzalas himself noted that conditions are "very bad" and "awful."³¹ In its Recommendation of 08 December 2016 on the resumption of transfers to Greece, the EC noted that:

In terms of quality, many of the reception facilities in Greece still fall short of the requirements stipulated in the Reception Conditions Directive 2013/33/EU for applicants for international protection, in particular on the islands and in some of the mainland temporary facilities. The 'Hotspot' facilities on the islands are not only overcrowded but have substantial material conditions in terms of sanitation and hygiene, access to essential services such as health care, in particular for vulnerable groups. Security is insufficient, and tensions persist between different nationalities. In the mainland, while the UNHRC accommodation scheme provides adequate conditions, much of the remaining reception capacity consists of encampments (currently 53 sites are being used) and emergency facilities with widely varying and often inadequate standards, both in terms of material conditions and security.³²

Furthermore, asylees continue to respond to these hazardous conditions by trying to leave Greece. Significant numbers expose themselves to risks of serious harm by hiring smugglers who help them to cross by land to other Balkan states, or by the sea passage to Italy.

²⁸ Correspondence with the director of the Greek Asylum Service.

²⁹ The Refugee Convention, 1951 available at: <http://www.unhcr.org/4ca34be29.pdf>.

³⁰ See Solidarity Now, Petition to the European Parliament (2017); Report by the Greek national commission on human rights on the EU-Turkey agreement of the 18th of March 2016 regarding the refugee/migration issue in Europe in light of Greek law no. 4375/2016 10, available at <http://bit.ly/2he1qau>.

³¹ Helen Smith, "Greece: Severe weather places refugees at risk and government under fire", The Guardian (10 Jan. 2017), available at <https://www.theguardian.com/world/2017/jan/10/greece-severe-weather-places-refugees-at-risk-and-government-under-fire>.

³² See European Commission, supra note No 4, at pp. 5-6

III. The resumption of returns to Greece is unlawful

Despite the EC's reservations about reception conditions in Greece, in December 2016, the Commission recommended a gradual resumption of returns "on the basis of individual assurances, taking account of the capacities for reception and treatment of applications in conformity with relevant EU legislation, and taking account of the currently inadequate treatment of certain categories of persons, in particular vulnerable applicants, including unaccompanied minors."³³

The EC's acknowledgement that the current reception and living conditions expose asylum seekers to inhuman and degrading treatment is clear evidence of the Greek authorities' failure to execute the *MSS v. Belgium and Greece* judgment adequately. Given that the execution of the *MSS* judgment is still under the supervision of the Committee of Ministers, and that Greece continues to be unable to guarantee basic human rights protections for asylum seekers, the effective protection of human rights requires the bar on any returns to continue. In its latest Updated Action Plan, the Greek government made it clear that the country is not in a position to accept transfers of asylum seekers, as their management would place further pressure on the asylum and reception system to the detriment of the applicants' right to international protection.³⁴

The Greek Government has recognized that it has been put in an impossible position, noting that:

Greece strives, to the extent possible, so that the asylum system properly meets the new exceptional and unexpected conditions arisen as a result of the refugee and migration crisis [...] The difficulty to meet complex needs due to the aforementioned reasons is also proven by the fact that other EU Member-States, including those with high level of know-how, sufficient resources and organised infrastructure, have failed to fully meet their obligations for the provision of assistance to Greece.³⁵

European states have the power to refrain from sending asylum-seekers currently on their own territory and at their own borders to Greece. Until the Committee of Ministers has determined that Greece's asylum system is functioning and compliant with Greece's obligations under the *MSS* judgment, all states should abstain from returns. At the same time, member states should provide additional support to Greece, which includes alleviating Greece's burden by admitting asylees from its territory to their own. States within the Common European Asylum System are legally bound to do so in cases falling within the family reunion provisions of the Dublin Regulation and under the European Union's relocation decisions. Other States may be required to do so by their obligations to respect family and private life.

³³ Ibid., para 34 at pp11

³⁴ See Action Plan, supra note no 5, at pp 1

³⁵ Ibid., at pp 31

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RULE 9 SUBMISSION TO THE COMMITTEE OF MINISTERS

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