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The European Court of Human Rights vindicates the rights of asylum-seekers in the EU

Joint statement by the AIRE Centre (Advice on Individual Rights in Europe) and Amnesty International

Today, the Grand Chamber of the European Court of Human Rights¹ (ECtHR), by a majority, ruled in the case of *M.S.S. v. Belgium and Greece* (application no. 30696/09) that Belgium and Greece had each violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The AIRE Centre and Amnesty International consider that today's landmark ruling will have a lasting impact by enhancing the protection of human rights of asylum-seekers in the European Union (EU).

EU Member States are bound by minimum requirements set out in EU law and by fundamental human rights guaranteed by the ECHR. In the light of those, today's judgment confirms that states must ensure access to effective asylum procedures and adequate reception conditions for asylum-seekers. They must also ensure effective remedies against human rights violations.

The Court concluded that Greece did not have an effective asylum system in operation. It also ruled that, by detaining M.S.S., an Afghan asylum-seeker, in degrading conditions and because of the living conditions he had to endure following his release were also degrading, Greece had violated the ECHR.² The Court also considered that, as a result of the major structural deficiencies in the Greek asylum process, Greece had denied M.S.S. the opportunity to an effective determination of his asylum claim. The Court considered the fact that there was no effective mechanism to raise M.S.S.'s human rights claims in Greece as a separate violation of the country's obligations under the European Convention on Human Rights. It thus found that Greece had violated M.S.S.'s right to an effective remedy.³

As far as Belgium is concerned, given the well-known deficiencies of the asylum system in Greece, the Court held that, at the time of M.S.S.'s expulsion to Greece, "the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined" by their Greek counterparts. In the circumstances, the Court found that the Belgian authorities had a duty to verify how the Greek authorities applied their asylum legislation *in practice*. This, the Court ruled, the Belgian authorities had failed to do. Since M.S.S. could arguably claim that his removal to Afghanistan would expose him to a real risk of torture or other ill-treatment or even death, the Court found that Belgium's transfer of

¹ The ECtHR is an international judicial organ based in Strasbourg; it rules on complaints alleging violations of the European Convention on Human Rights by the 47 Member States of the Council of Europe. Rulings of the Grand Chamber of the Court are delivered by 17 judges of the Court. The Grand Chamber's rulings are final upon delivery. Under Article 46 of the ECHR, the final judgments of the Court are binding on the state(s) that is (are) party(ies) to the case.

² Violation of Article 3 of the ECHR prohibiting torture or inhuman or degrading treatment found both in connection with degrading detention and living conditions.

³ Violation of Article 13 of the ECHR, taken together with Article 3.

M.S.S. to Greece violated the prohibition of removing anyone to a country or territory where they would be exposed to a real risk of torture (the principle of *non-refoulement*).⁴

Further, the Court found that the procedure available to M.S.S. in Belgium to contest his transfer to Greece did not meet the requirements set out in the Court's own case-law that any complaint that removal may result in the individual concerned being tortured should be rigorously scrutinised. As a result, the Court ruled that Belgium had violated M.S.S.'s right to an effective remedy because the procedure available to him in Belgium to contest his transfer to Greece on the grounds that he would be subjected to treatment prohibited by Article 3 of the Convention would have had no chances of success.⁵

M.S.S. v Belgium and Greece is the lead case before the ECtHR concerning the compliance of the return of asylum-seekers to Greece under the Dublin II Regulation⁶ with the ECHR. The Court's judgment confirms that the underlying assumption on which the Dublin II Regulation is based is a fiction: the treatment of asylum-seekers, including their access to asylum-determination procedures, varies across the EU.

The AIRE Centre and Amnesty International consider that, despite promised and planned improvements, Greece continues to fail to protect fundamental rights of asylum-seekers. In the light of the European Court of Human Rights' judgment, this means that the return of asylum-seekers to that country under the Dublin II Regulation would – at present – violate the sending states' obligations under the ECHR. The Dublin II Regulation, however, provides states with a mechanism to ensure respect for the rights of individuals: states can exercise their discretionary power to process the claims for international protection themselves.

The AIRE Centre and Amnesty International participated in the case of *M.S.S. v Belgium and Greece* with a joint third-party intervention⁷ out of profound concern for the plight of thousands of asylum-seekers in Europe caused by the failures of the Greek authorities and other governments in Europe to respect and protect their fundamental human rights.

Greece – the first EU country of entry for many thousands of asylum-seekers fleeing from countries including Afghanistan, Iran, Iraq and Somalia – does not have – and has not had for several years – asylum-determination procedures or adequate reception conditions in line with international law, including the minimum requirements under EU law. It has also not ensured that such asylum-seekers are treated with respect for their dignity on arrival. Like M.S.S, many of those seeking international protection have been detained in horrendous conditions, then released and left to live destitute on the streets. Some have been removed from Greece despite the fact that such removal placed them at real risk of further grave human rights violations.

Despite all of this, several EU member states and other countries participating in the Dublin II system have been exacerbating the situation by insisting on returning asylum-seekers to Greece, rather than opting – as they may under the Dublin II system – to take responsibility for processing claims for international protection. By resorting to expediency in their interpretation of the Dublin II Regulation, and insisting on returning asylum-seekers to Greece,

⁴ Violation of Article 3 of the ECHR, which enshrines the principle that no-one should be removed to a country or territory if there are substantial grounds for believing that upon removal they will face a real risk of torture or other prohibited treatment (inhuman or degrading treatment). The Court found that, in the circumstances of the case, there was no need to examine M.S.S.'s analogous complaint against Belgium that his transfer to Greece had exposed him to a real risk of a violation of Article 2 of the ECHR, which protects the right to life.

⁵ Violation of Article 13 of the ECHR, taken together with Article 3.

⁶ The Dublin II Regulation (Council Regulation 343/2003) is European Union secondary legislation, which three non-Member States, namely, Iceland, Norway and Switzerland are also applying. Among other things, it establishes the criteria and mechanisms for determining which state is responsible for examining an asylum application in cases where the asylum-seeker has entered more than one Dublin II participating state.

⁷ The AIRE Centre and Amnesty International submitted two sets of written comments to the ECtHR having been granted permission to intervene in the case, as well as to submit similar interventions in 15 other similar cases pending before the Court. Their written submissions focussed on the EU and ECHR law applicable to returns of asylum-seekers to Greece under the 'Dublin system' and the legal consequences arising from the circumstances in which asylum-seekers transferred to Greece under the Dublin II Regulation would find themselves once in that country.

European states have acted duplicitously. They have knowingly circumvented their international legal obligations, including under the ECHR and the EU Charter of Fundamental Rights. They have caused untold suffering as a result; and have violated the rights of asylum-seekers and refugees, including by exposing them to *refoulement*.

Following today's landmark ruling, the AIRE Centre and Amnesty International urge European governments to significantly improve the treatment of asylum-seekers across Europe in line with their obligations under international refugee and human rights law. In particular, the organizations call on European states purporting to act pursuant to the Dublin II Regulation to:

- halt all Dublin II transfers to Greece and any other Dublin II country where there is credible evidence that the rights of asylum-seekers and refugees are not respected, including as a result of lack of compliance with the minimum requirements under EU law;
- accept responsibility for and process the international protection claims of those who would otherwise be transferred to Greece or such other state under the Dublin II Regulation;
- comply with their international obligations under human rights and refugee law to uphold the rights of asylum-seekers and refugees in good faith, including by respecting the principles at the core of the international protection system, namely, humanitarianism and responsibility-sharing; and
- ensure that any revision of the Dublin II system is consistent with the rights of asylum-seekers and refugees and these principles.

The compatibility of returning asylum-seekers to Greece with their fundamental human rights guaranteed by EU law, and in particular in the EU Charter of Fundamental Rights, is also being considered by the Court of Justice of the European Union (CJEU) in Luxembourg following recent references from domestic courts in the UK and in Ireland. The AIRE Centre and Amnesty International, who have jointly intervened in the cases that led to the references to the CJEU, will be the first human rights NGOs to be interveners in a case before the EU Court in Luxembourg.

Background

M.S.S., an asylum-seeker from Afghanistan, had initially reached the EU via Greece and had eventually made his way to Belgium where he applied for asylum. However, the Belgian authorities decided to return him to Greece despite his objections based on the well-known evidence that Greece lacked a functioning asylum system and that he risked onward removal to Afghanistan. Once in Greece, the Greek authorities detained him twice in appalling conditions, and on release from detention, left him destitute and homeless on the streets to fend for himself. As of 1 September 2010, when the Grand Chamber of the ECtHR heard the case, M.S.S. was still waiting for his first asylum interview in Greece.

Greece has been facing large and mixed flows of irregular migrants and asylum-seekers. Many of those seeking international protection in Greece are forced to live on the streets without any documentation and several have been expelled without their claims being properly processed.

In 2010, citing large numbers of arrivals, the Greek authorities acknowledged that Greece would continue to violate the human rights of asylum-seekers, even if its asylum system were completely overhauled. In July 2010, the Greek Deputy Minister for Citizens' Protection Spyros Vougiaris acknowledged these failures and urged EU member states to stop returning asylum-seekers to Greece for the time being.

Recently introduced legislation seeks to reform the asylum system in Greece.⁸ However, only careful monitoring will be able to demonstrate that the implementation of current reforms

⁸ A Presidential Decree in November 2010 reintroduced first-instance appeals in asylum and other international protection cases, and made provisions seeking to deal with the heavy backlog of pending appeals. Further, in January

protects, promotes, respects and fulfils the rights of asylum-seekers in Greece *in law and practice*.

The chance of being granted international protection in Greece continues to be very small because of the lack of a functioning asylum system. Asylum-seekers, including women and children, have been forced to live on the streets without any assistance. Several asylum-seekers have been expelled without their claims being fully and fairly assessed, in violation of the principle of *non-refoulement*. Amnesty International, the UN Refugee Agency (UNHCR), the Commissioner for Human Rights of the Council of Europe and others have documented routine detention of asylum-seekers, including unaccompanied children. Detention of asylum-seekers is often prolonged and in appalling conditions. In September 2010, UNHCR described the situation facing those seeking international protection in Greece as a “humanitarian crisis”.

2011, legislation was adopted establishing the basis for a reformed asylum system, and making provisions for the management of mixed migration flows entering the country irregularly. For more information, please see “Greece: Preliminary Comments on the Asylum-Determination Procedure Reforms” (AI Index: EUR 25/009/2010) issued by Amnesty International on 10 December 2010 and available at <http://www.amnesty.org/en/library/asset/EUR25/009/2010/en/82150ee5-98c9-4b67-a8fa-e660717eb7bb/eur250092010en.pdf>, and “Greece: Briefing on the Draft Law on Asylum. Migration-related detention and Returns of Third Country Nationals” (AI Index: EUR 25/002/2011) issued by Amnesty International on 10 January 2011 and available at <http://www.amnesty.org/en/library/asset/EUR25/002/2011/en/46ced4fd-3cc0-44e5-a227-3b1e4a2cb891/eur250022011en.pdf>