

Organisation for Security and Cooperation in Europe

**Alliance Against Trafficking in Persons - Preventing Trafficking in Human Beings for Labour
Exploitation: Decent Work and Social Justice**

20-21 June 2011

M.S.S. v Belgium and Greece and Its Significance for Anti-Trafficking

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[1] In January 2011 the European Court of Human Rights delivered a rare judgment in a case alleging violation of Article 4 of the European Convention on Human Rights: the prohibition of slavery, servitude and forced labour. Even more significantly, the case, *Rantsev v Cyprus and Russia*,¹ addressed the obligations of States to protect those vulnerable to the risk of being trafficked. The Court ruled that, in addition to an obligation to have in place criminal law measures to punish traffickers, Article 4 also requires States to adopt legislation "adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking".² Furthermore, in cases where an individual was at real and immediate risk of being trafficked, the obligation could extend to the taking of immediate practical measures of protection of that person.³

[2] This was a most welcome ruling. However, the point of this paper is to stress that States' obligations towards those who have been trafficked, or are at risk of being trafficked, extend beyond Article 4. In particular, Article 3 of the convention – the prohibition on torture and inhuman or degrading treatment or punishment – may raise significant obligations for States towards those at risk. In this context the decision of the Court in *M.S.S. v Belgium and Greece*⁴ (*MSS*) deserves close attention.

[3] *MSS* concerned an Afghan citizen who had entered the European Union through Greece in late 2008 and made his way to Belgium, where he arrived on 10 February 2009 and where he applied for asylum. The Belgian authorities found that he had already been registered in Greece. Accordingly, Belgium sought to transfer him to Greece, that country having responsibility under the terms of the Dublin II Regulation⁵ for consideration of the application as the country of first entry to the EU. After some legal challenges the applicant was transferred to Greece on 15 June 2009.

[4] The Court's assessment of the treatment of the applicant at the hands of Greece and Belgium clarifies the obligations of States under Article 3 of the convention, and not only with regard to asylum seekers; there are consequences also for the treatment of victims (or potential victims) of trafficking, whether or not they have applied for international protection.

[5] Article 3 ECHR prohibits expulsion of an alien where there is a real risk ("substantial grounds") of that person being exposed to torture or to inhuman degrading treatment or punishment in the

¹ Application No. 25965/04, 7 January 2010.

² Para 284.

³ Para 286.

⁴ Application No. 30696/09, 21 January 2011.

⁵ Regulation 2003/343/CE).

receiving country.⁶ Belgium was found to be in breach of Article 3 when it transferred the applicant to Greece, in that it “knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.”⁷ The degrading treatment consisted of the very poor living conditions endured by the applicant in detention in Greece as well as his general living conditions in Greece when not in detention. Greece was also found to be in breach of Article 3; so, Greece was responsible for the poor living conditions to which the applicant was exposed there while not in detention (in particular, enforced homelessness),⁸ as well as the poor conditions of detention,⁹ and Belgium for exposing the applicant to these conditions by forcibly sending him to Greece.

[6] The decision in *MSS* is long and complex. However, we can focus on the above findings and draw certain conclusions with regard to the treatment of victims, and potential victims, of trafficking. Two principal issues arise:

- the degrading treatment suffered by the applicant;
- the possibility of an international protection obligation; included within this is the possibility that potential victims of trafficking may be especially vulnerable and whether this gives rise to additional obligations.

Degrading Treatment

[7] Not all ill treatment falls within the scope of Article 3 ECHR: it must attain a “minimum level of severity”.¹⁰ This will depend on all the circumstances of the particular case, such as “the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim”.¹¹ While there was no suggestion of torture in this case, the Court outlined its construction of inhuman and degrading treatment. Treatment could be *inhuman* when it was “premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering”.¹² Treatment could be *degrading* when it “humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance... It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.”¹³

[8] If we take into consideration the kinds of treatment to which people are subjected when they are trafficked, it is evident that it may be both inhuman and degrading: victims are forced to work in very poor conditions, often with little or no regard for their dignity, privacy or physical well-being. Indeed the systematic humiliation and degradation of victims is one technique used to establish and maintain control over them. Victims’ freedom of movement is frequently restricted, or else they are confined altogether. Identity documents and passports are confiscated, further exerting control and making it harder for victims to establish their identities later. All of this is well known; the decision of the Court demonstrates that such treatment may easily be humiliating and degrading.

[9] Does this therefore mean that States are in breach of Article 3 when a person is trafficked, or when they fail to prevent trafficking? Not necessarily; it must be remembered that trafficking, in the absence of State complicity or active involvement, is primarily a private criminal enterprise. The State is not necessarily responsible for a violation of Article 3 every time a person is trafficked.

⁶ *MSS*, note 4 above, para 365, citing, amongst others, *Soering v United Kingdom*, 7 July 1989, Series A no.161, paras 90-91 (1989) and *Vilvarajah and Others v United Kingdom*, 30 October 1991, Series A no. 125, para 103.

⁷ Para 367.

⁸ Para 263.

⁹ Para 233.

¹⁰ Para 219.

¹¹ *Ibid.*

¹² Para 220.

¹³ *Ibid.*

Human rights obligations are owed by States; traffickers are criminals. But, as the *Rantsev* decision makes clear, States do have human rights obligations towards those at risk of being trafficked. First of all, States of course have the obligation, under Article 1, to “secure to everyone within their jurisdiction the rights and freedoms” defined in the convention. This requires States to take action not only to have in place appropriate laws aimed at the prevention and punishment of trafficking as well as the protection of victims, but also to ensure that these laws are actually applied. As the court noted in *Siliadin v France*, “States have positive obligations ... to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice...”.¹⁴ In *Rantsev*, the Court stressed that the obligation included victim-protection measures.¹⁵ This can be taken one step further: the existence of such measures will not suffice where the State in fact fails to implement them. As the Court stated in *MMS*, “... the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where ... reliable sources have reported practices resorted to *or tolerated by* the authorities which are manifestly contrary to the principles of the Convention” (emphasis added).¹⁶

[10] The Court’s reasoning in *Rantsev* applies just as much to Article 3 as to Article 4: States must not only avoid breaches themselves, they must also take effective steps to outlaw actions that amount to inhuman and degrading treatment by private citizens, including many of the exploitative, demeaning and abusive practices associated with trafficking; they must also adopt measures to help and protect those at risk. This does not necessarily mean that States have to adopt new laws; but they must at least take note of the findings of the Court in *MSS* and appreciate their relevance to the crime of trafficking. Failure to do so may give rise to responsibility for a breach of Article 3.

International Protection Obligation

[11] Given that individuals who are trafficked may be at risk of treatment amounting to humiliating and/or degrading treatment, albeit not at the hands of the State, the issue arises whether or not States have international protection obligations towards such individuals. This of course refers to the risk of future harm, although harm suffered in the past may be relevant to an assessment of the risk faced by the individual.

[12] It has been recognised that persons at risk of trafficking, or re-trafficking, in their State of nationality or permanent residence, who are in another country may have an entitlement to refugee status under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol.¹⁷ While not every such person may qualify for refugee status, they may nevertheless qualify for subsidiary, or complementary, protection.

[13] The risk of being subjected to inhuman or degrading treatment does not require any link to any of the bases for persecution listed in Article 1 of the Refugees Convention (race, religion, nationality, political opinion or membership of a particular social group). Nor does the threat to the individual have to come from the State: the threat may be posed by non-State actors, where the State is

¹⁴ Chamber Judgment, Application No. 73316/01, 26 October 2005, para 89.

¹⁵ Para 284.

¹⁶ Para 353.

¹⁷ UNHCR, Guidelines on International Protection No.7: *The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees to victims of trafficking and persons at risk of being trafficked* (2006); Group of Experts on Trafficking in Human Beings set up by the European Commission, Opinion No. 4/2009 of 16 June 2009, *On a possible revision of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities*, para 20.

unable or unwilling to prevent such a threat. In *HLR v France*, the Court held (where the applicant was challenging deportation to Colombia because of threats allegedly posed by drug traffickers there) that “where the danger emanates from persons or groups of persons who are not public officials”, deportation to the home State could breach Article 3 “where the risk is real and ... the authorities of the receiving State are not able to obviate the risk by providing appropriate protection”.¹⁸

[14] This interpretation has been codified in EU law. The Qualification Directive¹⁹ provides (Article 6(c)) that persecution can be at the hands of non-State actors where the State is failing to offer protection against that threat. Its impact on the protection obligations of States with regard to those at risk of being trafficked is clear. In fact, it is not even necessary for the applicant to demonstrate that there is a real risk of their being a victim of a breach of Article 4 in order to qualify for international protection: by showing that there is a real risk of being exposed, through being trafficked, to the type of ill-treatment recognised as amounting to inhuman or degrading treatment, a person at risk of trafficking would also be entitled to be protected from forced removal.

[15] Finally, it is of interest that the Court in *MSS* treated asylum seekers as a special case. It attached “considerable importance to the applicant’s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection”,²⁰ and asserted a broad consensus of opinion for its assessment. The idea that certain groups are entitled to special protection because of the risks they face is not so novel: children have long been recognised in many international instruments as in need of special protection. Similarly, the Geneva Conventions for the Protection of Victims of Armed Conflicts of 1949 acknowledge the particular risks faced by women in armed conflicts. That vulnerability may be significant in deciding how an asylum seeker is treated during the process of deciding their fate; I suggest that this can apply all the more strongly to those who are at risk of being trafficked, particularly if they have been trafficked already: such persons may need urgent and longer term medical, psychological and social assistance.

[16] The idea of being particularly vulnerable and therefore in need of special protection should be treated with caution. Anyone seeking asylum (assuming that they are telling the truth) is by definition vulnerable. The line between being a bit vulnerable and particularly vulnerable can be very hard to draw. Is trafficking a special case? In the context of international protection, it is difficult to argue that those at risk of being trafficked are a special case because anyone who qualifies is by definition at risk of a serious threat to their lives or their basic human rights. But during the application *process*, it can be argued, they often are: many of those seeking international protection will have been trafficked already and quite possibly have been the victims of very serious abuse. It is nevertheless difficult to argue that *all* such persons fall into this category.

Conclusion

[17] The *MSS* case is not about trafficking but it most certainly has ramifications for how States deal with those at risk of being trafficked. It is clear that States will be bound to treat at least some potential victims of trafficking as being at real risk of suffering a breach of Article 3 and this may, in turn, give rise to international protection obligations where the potential victim is a foreigner.

¹⁸ 26 EHRR 29, para 40; 11/1996/630/813, 22 April 1997.

¹⁹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal* L 304 , 30/09/2004.

²⁰ Para 251.