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Date:

Thursday, April 19, 2018

Introduction

The Court's judgment in [A.E.A. v. Greece](#) [1] serves as a welcome and timely reminder that it is axiomatic that the substantive and procedural effectiveness of Article 3 and 13 [ECHR](#) [2] within the domain of asylum matters relies on a State making available effective asylum procedures for those wishing to apply for asylum. Several important conclusions are made by the Court in this respect, namely: the right to seek asylum and the right to apply for asylum, which both rely on an effective access to the procedure, correlate with the principle of *non-refoulement*, that both rights are human rights which individuals are entitled to and which States have specific obligations to adhere to and that, as a consequence, these rights are to be positively guaranteed at the formal level and can be relied upon by persons in need of protection. However, whilst the Court cites from international and European law as well as its own case law to reify the above conclusions, it appears to make somewhat of a departure from the same authoritative sources when it comes to asylum seekers reception rights. The implications of all of these points are worth exploring in detail and are better assessed by mapping the Court's trajectory in its decision.

I. The right to seek asylum and have physical and effective access to an asylum procedure as components of Article 13 read in conjunction with Article 3 ECHR

In line with the applicant's submissions, a principal point of focus for the Court was the content of an effective remedy when read alongside the duty of Greece to refrain from acts and omissions which had the foreseeable consequence of exposing A.E.A. to a serious risk of torture or inhuman or degrading treatment. Recalling its well-known case law in [M.S.S v. Belgium and Greece](#) [3], the Court reiterated that the effective guarantees which protect an individual against direct or indirect torture or ill-treatment rely on national authorities independently and rigorously scrutinising a claim where there is a real risk of treatment contrary to Article 3 ECHR. This claim is to be responded to promptly and an appeal against a decision must have automatic suspensive effect (para 69). By relying on its own mantra of Convention rights being practical and effective not theoretical and illusory, the Court further notes that effective guarantees are put in peril where linguistic, informative, legalistic and material assistance are lacking (para 71).

It is with this framework established that the Court is able to elaborate upon further obstacles to the effective application of Article 13 ECHR for an individual (in this case A.E.A.), who has *prima facie* established a risk of inhuman treatment contrary to Article 3 ECHR upon return to a country of origin. By citing international and domestic sources, the Court outlines the ongoing structural

shortcomings for individuals to receive information on their rights and to directly access the relevant Greek authorities (and the building in which they work) in order to apply for asylum (paras 77-78). According to the Court these physical and procedural obstructions, which prevented A.E.A. from making his intention to apply for asylum known for several years, amount to a violation of the explicit obligations laid out in the [Universal Declaration of Human Rights](#) [4] and the [Asylum Procedures Directive](#) [5] of the right to seek asylum and the right to apply for asylum (paras 83-84). It is through the use of these international instruments and a harking back to foundational principles of Article 3 and 13 rights as espoused in M.S.S. and [Sharifi and Others v. Italy and Greece](#) [6], that the Court finds actual physical access to asylum authorities and to an asylum procedure to be a pre-requisite to the effective application of Article 13 read in conjunction with Article 3 ECHR. As such, the Court has reiterated and, arguably made crystal clear, what the adequate safeguards capable of protecting A.E.A from arbitrary removal to treatment contrary to Article 3 concretely are (see [Kebe and Others v Ukraine](#) [7]). Moreover, by bringing international and European law within the realm of Article 13 read in conjunction with Article 3 ECHR, the Court has effectively cross-fertilised international norms to firmly establish a right of access to a procedure for asylum applicants within the corpus of human rights law.

What exactly this procedure and the access to it should look like is also elaborated upon by the Court as being a procedure which is effective, reliable and serious and an access which is unhindered or unfettered. Implicitly the judgment, therefore, indicates that there is a positive obligation on States to ensure that access is unimpeded. Applied to the reality of today, reports of physical and ?invisible? queues of persons attempting to apply for asylum through [regular appointments](#) [8], [Skype appointments](#) [9] and [phone appointments](#) [10], or appointments on the basis of [domiciliation or nationality](#) [11] continue to exist as do practices of [refusing entry to persons at the border](#) [12] time and time again despite their continuously expressed intention to apply for asylum. These practices, and by extension, [the construction of fences](#) [13], [criminalisation of entry](#) [14], [direct or participatory extra-territorial activities with a certain aim to prevent movement to territories](#) [15], detention without [access to legal assistance or information](#) [16] or, in fact, any State act or omission which prevents the person from expressing his wish to apply for asylum all arguably fall foul of the requirements of positively ensuring that access to a procedure is unhindered or unfettered and that such procedure, in itself, is effective, reliable and serious for the purposes of Article 13 read in conjunction with Article 3 ECHR.

II. A weakening of the ECHR as an instrument for migrants? reception rights?

As much as the Court was steadfast in bringing back to the forefront the requirements of Article 13 ECHR for asylum applicants in a way which is informed both by its previous case law and international and European legislation, the Court has arguably done, in equal measures, the same to weaken the authoritative value of both sources in respect of asylum seekers reception rights. In a grand total of two paragraphs on whether the applicant had been subjected to treatment contrary to Article 3 ECHR due to his living conditions both before being able to apply for asylum and after having applied for asylum, the Court found that A.E.A. had not declared himself to be in need of reception or material or financial help after his application had been made. The proceedings under Article 3 ECHR were, therefore, held to be inadmissible on grounds that the claim was manifestly ill-founded.

The brevity in the Court's finding is shocking especially since the Court does not address the conditions that A.E.A lived in for three years whilst attempting to apply for asylum. This is even more disconcerting since the same sources relied upon by the Court in relation to the impossibility to access the procedure were also those that provided information on the squalid, impoverished and violent conditions which persons had to wait in day and night in order to attempt to apply for asylum. Moreover, A.E.A's position for the three years was akin to those of M.S.S. in *M.S.S v*

Belgium and Greece: homeless, without any access to food, drinkable water or toilets. Through its silence, the Court entirely ignores the fact that Article 3 ECHR claims rest on what the authorities knew or **ought to have known** at the time of the existence of a real and immediate risk of a breach of Article 3 ECHR and that a risk is not any less individual if it is sufficiently real and probable, even if a large number of persons find themselves in the same position (M.S.S. para 359). The Court also fails to mention that at the heart of Article 3 ECHR is a person's human dignity ([V.M. and others v. Belgium](#) [17]) which in A.E.A.'s case had arguably been violated on account of the impoverishment that he had lived in for several years. Indeed, by focusing on what the applicant later specifies in a first interview, the Court pursues a line of argumentation which renders an Article 3 ECHR claim contingent on the applicant making the authorities aware of the absence of or deficiencies in accommodation. This obscures entirely from the complementary application of instruments which the Court advocates for when examining Article 13 ECHR. Nothing is said on the positive obligations of Greece under the [Reception Conditions Directive](#) [18] to ensure that reception conditions for asylum applicants ensure an 'adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health', neither on the right to human dignity under the [Charter of Fundamental Rights](#) [19] nor on the adequate standard of living for the health and well-being of persons under the International Bill of Rights or the right to adequate housing under the [Revised European Social Charter](#) [20]. By pursuing a course of argumentation which relies on the enjoyment of guarantees only where an applicant has expressed his need, the content and protection of Article 3 ECHR in respect of material reception rights is arguably diminished and its enforcement, in a domestic system such as that described in Greece for A.E.A. and others, incredibly difficult.

Conclusion

A.E.A. is a partially successful attempt to reify the Convention as a human rights instrument for asylum seekers. Through the lens of Article 13 read in conjunction with 3 ECHR it confirms its case law on effective access to an asylum procedure and with the help of other instruments of international and EU law it hones in on the actual physical access to responsible authorities so as to incorporate the right to seek asylum and apply for asylum as part of the Convention make-up. Therefore, where State acts or omissions substantially delay or hinder a person from expressing their intention to apply for asylum or applying full stop, individuals are able to claim a right to access an asylum procedure under the Convention's provisions. This is extremely important in a context where States attempt to sever territorial or procedural access to asylum procedures for individuals. Nonetheless, representatives should take note of the Court's inconsistent use of European law and its own case law in respect of material conditions falling within the scope of Article 3. Whilst the Court confirms that material conditions can hinder procedural access the reverse is not taken into account. In other words, no link is made by the Court between obstacles to procedural access and destitution. The applicant's refusal of accommodation during a first interview appears to prime over the applicant's lack of State subsistence over several years. In respect of Article 3 ECHR then, evidence showing repeated requests for accommodation and State indifference to these requests appears to be an important take away from A.E.A.

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The views expressed herein are the author's own and do not represent the views of ECRE or EDAL.

Keywords:

Effective access to procedures

Material reception conditions

Reception conditions

Legal assistance / Legal representation / Legal aid

Links:

- [1] <http://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-aea-v-greece-application-no-3903412-15-march-2018#content>
- [2] https://www.echr.coe.int/Documents/Convention_ENG.pdf
- [3] <http://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>
- [4] http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf
- [5] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>
- [6] <http://www.asylumlawdatabase.eu/en/content/ecthr-sharifi-and-others-v-italy-and-greece-application-no-1664309#content>
- [7] <http://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-kebe-and-others-v-ukraine-application-no-1255212-12-january-2017>
- [8] http://asylumineurope.org/sites/default/files/report-download/aida_es_2017update.pdf
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