On a positive note: B.A.C. v. Greece

November 21, 2016 Guest Blogger Asylum Seekers, B.A.C. v. Greece, Migration, Right to Private Life

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On 13 October 2016, the European Court of Human Rights unanimously found in *B.A.C. v. Greece* that the Greek state's omission to decide on an asylum application during more than twelve years violated Article 8 as well as Article 13 in conjunction with Article 8. The Court also considered that there would be a violation of Article 3 in conjunction with Article 13, if the applicant would be returned to Turkey without an assessment *ex nunc* by the Greek authorities of his personal situation.

This is the first time that the Court finds that an asylum seeker's prolonged precarious and uncertain situation, due to an unjustified lack of action by the government as regards his asylum request, constitutes a violation of the right to respect for private life as guaranteed by Article 8 ECHR.

The judgment (only in French) has been discussed by Markos Karavias on EJIL: *Talk!*, and was mentioned by Benoit Dhondt on this blog in a comparative perspective, namely as a promising decision standing in contrast to the striking out of *Khan v. Germany* by the Grand Chamber. This post provides a complementary analysis of the Court's considerations under Article 8 ECHR.

Facts of the case

The applicant, a Turkish national, was arrested in 2000 by the Turkish authorities on account of his pro-Communist and pro-Kurdish political activism. Charged with an offence against the constitutional order, he was placed in solitary confinement. He went on hunger strike for 171 days, and was released due to the life threatening nature of the situation.

The applicant fled to Greece and lodged an asylum request in January 2002, which was rejected. Following his appeal, the Consultative Asylum Committee issued a favourable opinion as regards his application in January 2003. Notwithstanding the obligation for the Minister for Public Order to decide about the granting of asylum within 90 days after the adoption of the Committee's opinion, at the moment the Court was seized (4 March 2015), thus twelve years later, the Minister had still not done so.

During this long period, the applicant lived in Athens and presented himself every six months to the authorities for a renewal of his asylum seeker's card. According to Greek law, this card does not constitute a residence title; it only allows the asylum seeker to remain within the territory with a 'tolerated status' pending the examination of his request. This meant concretely that the applicant could not exercise any liberal professional activity, access vocational training, obtain a driving licence, open a bank account or request for family reunion.

In 2013, the Court of Appeal of Patras unanimously rejected an extradition request by the Turkish authorities, based on the risk that the applicant would suffer maltreatment upon his

extradition because of his political opinions, and on the fact that the offences allegedly justifying the extradition were only vaguely described.

Reasoning of the Court with respect to Article 8

A positive obligation to examine asylum applications within a short/reasonable time

The Court commences its assessment by reiterating the right of states to control, on the basis of a "well-established principle of international law", the entry, residence and removal of non-nationals. It goes on to recall that Article 8 does not guarantee a right to a particular type of residence permit, on the condition that the solution proposed by the authorities allows the person concerned to exercise freely her right to respect for her private and family life (§ 35).

Thereinafter, the Court stresses the positive obligation of States to establish an effective and accessible procedure aimed at protecting the right to private life (§ 36). The next paragraph, which specifies one of these positive obligations, is particularly remarkable:

These positive obligations include the one of the competent authorities *to examine the asylum requests* of the persons concerned *within a short time in order to keep the precarious and uncertain situation* in which these persons find themselves *to a minimum* (*M.S.S. v. Belgium and Greece* [GC] (n° 30696/09, § 262, 21 January 2011).[1]

The Court's reference to its Grand Chamber judgment in *M.S.S. v. Belgium and Greece* to support the existence of this positive obligation is noteworthy. When comparing the respective paragraphs of *B.A.C.* and *M.S.S.*, the latter paragraph is framed in more conditional and careful terms, and avoids the language of positive obligations in relation to the timeframe within which to examine an asylum application:

[T]he Court notes that the situation the applicant complains of has lasted since his transfer to Greece in June 2009. It is linked to his status as an asylum-seeker and to the fact that his asylum application has not yet been examined by the Greek authorities. In other words, *the Court is of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering.*[2]

The Court thus seems to take a qualitative leap forward in *B.A.C.*, by explicitly recognizing a positive obligation for states to examine asylum applications within a short time in order to keep applicants' precarious and uncertain situation to a minimum. This is confirmed by § 46, which finds a violation of Article 8 because of the authorities' failure to ensure the examination of the applicant's asylum request "within a reasonable time". Note that § 46 speaks of a "reasonable time" (*dans des délais raisonnables*) whereas § 37 employs the wording "a short time" (*dans de brefs délais*). Given these conclusions, the Court also finds a violation of Article 13 in conjunction with Article 8.

In *M.S.S.*, the reference to the prolonged uncertainty regarding the applicant's asylum request formed part of the Court's reasoning with respect to the alleged violation by Greece of Article 3 (prohibition of torture and inhuman or degrading treatment or punishment). It was the combination of (i) the applicant's (appalling) living conditions, (ii) the prolonged uncertainty in which he had remained, and (iii) the lack of any prospect of improvement, which led the Court to find that the level of severity required to fall within the scope of Article 3 was attained (§ 263) and that this provision had been violated (§ 264).

In *B.A.C.*, the aspect of uncertainty is invoked not in relation to a possible violation of Article 3, but with respect to Article 8. This may turn out to be an important shift, as it opens up the possibility for finding violations caused by situations of prolonged uncertainty in asylum proceedings that would not amount to a breach of Article 3, but could be considered an unjustified interference with the right to respect for private and family life.

The finding of a violation of Article 8 in *B.A.C.* then seems to flow from the combined presence of four elements: (i) the state's omission to decide on the asylum request; (ii) during a lengthy period; (iii) which cannot be justified; (iv) and has put the applicant in a precarious and uncertain situation, constituting an interference with his private life. The unjustified nature of the State's omission to decide on the asylum application is substantiated by referring to the favourable opinion of the Consultative Asylum Committee and to the dismissal of the Turkish extradition request (§ 45).

A key factor in finding a violation of Article 8 concerns the "precarious and uncertain situation" (*la situation de précarité et d'incertitude*) in which the applicant found himself (§ 37 and § 40). On the basis of the text of the judgment, it is difficult to ascertain whether the notions of 'precariousness' and 'uncertainty' have a similar or different meaning. In the hypothesis that each notion carries a distinct meaning, the term 'uncertainty' would then refer to uncertainty as regards legal status (§ 39), whereas 'precariousness' would denote the restrictions faced by the applicant when living during this period in Greece (§ 43). An argument against attaching a different meaning to both notions is found in § 46, where the Court only refers to the applicant's "precarious situation" to find a violation of Article 8.

Distinguishing from other judgments

The Court is eager to set *B.A.C.* apart from other case law, probably so as not to trigger the submission of similar applications. First, it distinguishes *B.A.C.* from *M.E. v. Sweden* [GC]. In the Chamber judgment on this case, the Court decided that the fact that a homosexual had to return to Libya to apply for family reunion did not constitute a violation of Article 3. Because of the subsequent deterioration of the security situation in Libya, which implied a risk for the applicant of being subjected to persecution on account of his sexual orientation, the Swedish authorities decided afterwards to grant the applicant a permanent residence permit, which effectively repealed the expulsion order. This led the Grand Chamber to strike out the application, since the situation had been "resolved" within the meaning of Article 37 § 1 (b) (§ 35). The applicant's allegation that the permanent residence permit "did not offer full redress, considering the worry, stress and uncertainty caused to him by the domestic authorities' initial decisions" (§ 30), was not followed by the Court. Leaving aside here more general reflections on the (un)desirability of the striking out practice, the distinguishing factor between *B.A.C.* and *M.E.* seems to be that in *B.A.C.*, the uncertainty resulted from the protracted absence of a decision about an asylum request (a decision to which one is entitled), whereas in *M.E.* the uncertainty stemmed from the rejection of an asylum application and the issuance of an expulsion order to a country in which the applicant claimed to be at risk of a treatment contrary to Article 3 (see also § 40 *B.A.C.*).

The second line of jurisprudence that the Court distinguishes *B.A.C.* from are residence permit cases where persons in an irregular situation started a family life in the host country, in this way presenting the Court with a 'fait accompli' (for findings of violations, see e.g. *Rodrigues da Silva and Hoogkamer v. the Netherlands*; *Jeunesse v. The Netherlands* [GC]). Here, the difference is that the applicant in *B.A.C.* is legally present in the country, as he is exercising

his right to seek asylum. Nevertheless, if one accepts that the right to respect for private life should not exclusively depend on one's regular or irregular situation, the *B.A.C.* judgment could pave a way for finding a violation of the Convention in cases where the omission to decide does not relate to an asylum request, but to one's legal status or right to reside within a country more generally. This would imply extending the first criterion mentioned above towards "the state's omission to decide on the right to reside within a territory". When the other three criteria are fulfilled (unjustified character of the omission to decide, during a lengthy period, leading to a precarious and uncertain situation of the applicant), this could lead to finding a violation of Article 8 in cases regarding the denial of residence permits.

On vulnerability and discrimination: two final reflections

The applicant in *B.A.C.* invoked the fact that he found himself in a vulnerable situation (§ 32). It is therefore interesting to note that the Court in its assessment of the merits does not explicitly refer to the issue of vulnerability,[3] neither of asylum seekers in general (as recognised in § 251 *M.S.S.* [GC]) nor of the applicant in particular, but emphasises the applicant's "precarious and uncertain situation" during a lengthy period.

Finally, it is a pity that the Court finds it unnecessary to pronounce itself on the alleged violation of the prohibition of discrimination on grounds of nationality (Article 8 in conjunction with Article 14) (§ 48). Such an approach of 'absorption' can only be justified when the issues raised under Article 14 are already incorporated in the reasoning on Article 8 separately,[4] which is not the case here. This again illustrates how, as Marie-Bénédicte Dembour has eloquently pointed out,[5] the Court is reluctant to tackle allegations of discrimination on grounds of nationality in migrant case law.

[1] § 37. Own translation; emphasis added.

[2] § 262. Emphasis added.

[3] For posts on vulnerability on this blog, see here.

[4] See Lieselot Verdonck & Ellen Desmet, "Moving Human Rights Jurisprudence to a Higher Gear: Rewriting the Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador* (Inter-Am. Ct HR)" in Eva Brems & Ellen Desmet, *Integrated Human Rights in Practice. Rewriting Human Rights Decisions* (Edward Elgar Publishing, forthcoming).

[5] Marie-Bénédicte Dembour, *When Humans become Migrants. Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press, 2015).