

El-Masri v. Macedonia

JUDGMENT OF 13 DECEMBER 2012

THE GRAND CHAMBER of the European Court of Human Rights finds that Khaled El-Masri was tortured by the CIA and disappeared

Khaled El-Masri was abducted by the Macedonian secret service on 31 December 2003 and secretly held for 23 days in a hotel in Skopje. A CIA rendition team then arrived to take him to Afghanistan, torturing him at Skopje airport to break him through “capture shock”. He was detained for four months in the Salt Pit near Kabul, even though senior officials in the US government knew he was an innocent man.

On December 13, 2012, the Grand Chamber of the European Court of Human Rights delivered judgment in the case, finding multiple violations of the European Convention.

Article 3 (prohibition of torture)

The Court found that the CIA rendition team had tortured Mr. El-Masri, and that Macedonia was responsible.

Ill-treatment at the Skopski Merak hotel. The solitary incarceration of Mr. El-Masri for 23 days caused him emotional and psychological distress, as he did not know what would happen to him next. This treatment was inflicted for the purpose of extracting a confession, and aggravated by the fact that he was kept incommunicado, outside any judicial framework. This was “inhuman and degrading treatment in breach of Article 3”.

Torture by the CIA at Skopje airport. The Court found that the use of “capture shock” techniques at Skopje airport by the CIA rendition team was of sufficient severity to amount to torture. None of the individual measures used was justified by the circumstances, and they were inflicted in combination and with pre-meditation, “the aim being to cause severe pain or suffering in order to obtain information, inflict punishment or intimidate the applicant”. The Macedonian authorities “must be considered directly responsible” for the torture “since its agents actively facilitated the treatment and then failed to take any measures that might have been necessary in the circumstances of the case to prevent it from occurring”.

Extraordinary Rendition. The unlawful transfer of Mr. El-Masri to the US authorities amounted to extraordinary rendition, “an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment.” The Court found that there had been no warrant for Mr. El-Masri’s arrest, and that the Macedonian authorities knew that the plane was going to Kabul. At the time there were many public reports that the US authorities were using or tolerating practices “manifestly contrary to the principles of the Convention”. El-Masri was thus exposed to “a real risk of ill-treatment and to conditions of detention contrary to Article 3 of the Convention”.

Article 5 (prohibition against arbitrary detention)

The Court found that Mr. El-Masri was held in the Skopski Merak hotel for 23 days “in complete disregard of the safeguards enshrined in Article 5, and that this constitutes a particularly grave violation ... of Article 5”. The



Macedonian authorities knew that El-Masri was to be subjected to “extraordinary rendition” and it should have been clear that in handing him over he “faced a real risk of a flagrant denial of his rights under Article 5”. Because they “actively facilitated his subsequent detention in Afghanistan,” Macedonia was responsible for the entirety of Mr. El-Masri’s detention, both in Skopje and then in Afghanistan. His abduction and detention amounted to “enforced disappearance”, even though temporary. The fact that he was suspected of terrorist offences was irrelevant: “Although the investigation of terrorist offences undoubtedly presents the authorities with special problems, that does not mean that the authorities have carte blanche ... to arrest suspects and detain them in police custody, free from effective control by the domestic courts” and the Strasbourg Court itself.

Failure to Investigate (Article 2, Article 3, Article 5)

The Court concluded that the investigation was insufficient. The prosecutor had not interviewed Mr. El-Masri, or the staff at the Skopski Merak hotel, or sought out further information about the CIA plane, particularly the identity of the passenger that boarded at Skopje airport that night. The prosecutor relied exclusively on information provided by the Ministry of Interior, whose agents were suspected of having been the perpetrators. The decision not to investigate further fell short of what was required.

Right to Truth

In its most extensive discussion of the issue to date, the Court referred to “the right to truth” in finding that Macedonia had failed adequately to investigate credible allegations of torture. In doing so, the Court underlined “the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.”

The Court rejected any attempt to rely on secrecy to evade redress in this and related cases, noting: “The concept of ‘state secrets’ has often been invoked to obstruct the search for the truth. State secret privilege was also asserted by the US government in the applicant’s case before the US courts.... The Court considers that ... an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts”.

Article 13 (right to an effective remedy)

The Court found a violation of Article 13. Mr. El-Masri should have been able to avail himself of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation. The criminal investigation was insufficient. There was no review of the decision to transfer him to the CIA, either by a judicial authority or any other authority.

Just Satisfaction

Due to the “extreme seriousness” of the violations of the Convention, the Court ordered that Macedonia pay Mr. El-Masri €60,000.

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