



Press and Information

Court of Justice of the European Union

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Judgment in Case C-83/12

Minh Khoa Vo

A Member State may impose criminal penalties for aiding illegal immigration when the persons who have infiltrated Union territory, nationals of non-member countries, hold visas fraudulently obtained but not yet annulled

EU law¹ lays down measures on the crossing of external borders and on the procedures and conditions for the issuing of visas by Member States. The objective is to facilitate legitimate travel and tackle illegal immigration through further harmonisation of national legislation and handling practices at local consular missions.

Thus, the competent consulate examining an application for a visa must ascertain whether the conditions for the entry into EU territory of a national of a non-member country have been satisfied. Particular attention has to be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether he intends to leave the territory of the Member States before the date the visa expires.

If there are serious grounds for believing that a visa was obtained fraudulently, it must be annulled. It is, in principle, annulled by the competent authorities of the Member State of issue, but it may also be annulled by the competent authorities of another Member State, in which case they must inform the authorities of the State of issue.

Mr Vo, a Vietnamese national, was prosecuted in Germany in criminal proceedings in which he was charged with facilitating illegal immigration. He was a member of organised Vietnamese gangs that assisted other Vietnamese nationals to enter Germany illegally. Their *modus operandi* was to persuade the Hungarian consulate in Vietnam that those Vietnamese nationals were part of tourist groups whereas, in fact, the trips did not follow the programme except for the first few days. After that, the Vietnamese nationals, who had paid from USD 10 000 to USD 15 000, were transported to other countries, for the most part to Germany.

Another method involved making use of Sweden's allowing Vietnamese citizens to stay several months in the Schengen area if they held work visas permitting them to pick berries. Once the work visa had been obtained, and the sum of €500 to €2 000 had been paid to the 'couriers', the Vietnamese were sent on to Germany.

Some of those persons were found on German territory when they were seeking to settle and work there. Mr Vo, a member of those organised, clandestine immigration gangs, was arrested by the German authorities and sentenced to a term of imprisonment of four years and three months.

The Bundesgerichtshof (Federal Court of Justice, Germany) has, in essence, asked the Court of Justice whether, in such circumstances, it is contrary to EU law for provisions of national law to make aiding and abetting illegal immigration punishable by criminal penalties when nationals of non-member countries who have infiltrated EU territory hold visas obtained by fraud that have not yet been annulled.

¹ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1).

The Court allowed the German court's request for it to examine this matter under the urgent preliminary ruling procedure, Mr Vo being held in prison.

First of all, the Court observes that EU law governs the conditions for the issue, annulment or revocation of visas but does not lay down rules providing for criminal penalties if those conditions are breached. Nonetheless, the visa application form² contains a section informing the applicant that any false statement will lead, among other things, to the annulment of the visa and may also render him liable to prosecution.

In addition, EU legislation³ obliges every Member State to take the measures necessary to ensure that infringements in this field are punishable by effective, proportionate and dissuasive criminal penalties and to establish its jurisdiction with regard to infringements committed, in whole or in part, within its territory.

Thus, not only does Union law not prevent a Member State from prosecuting any person intentionally assisting a person who is not a national of a Member State to enter unlawfully the territory of that Member State, but it expressly obliges the Member State concerned to do so⁴.

Member States are, accordingly, faced with two duties. The first is not to act in such a way as to hinder the free movement of persons holding visas unless the visas have been duly and regularly annulled. The second is to provide for and enforce effective, proportionate and dissuasive criminal penalties for persons committing such infringements, particularly 'couriers'. Those obligations must be performed, giving the provisions of Union law their full effectiveness. If need be, national courts are bound to seek solutions achieving a proper balance in relation to provisions of law the application of which might well jeopardise the effectiveness or consistency of Union legislation.

Now, of its very nature, a prosecution – in which it may be necessary for the investigation to be secret or confidential and for urgent measures to be taken – will not always be able to satisfy a requirement of previous annulment of visas by the competent authorities.

The Court concludes that **it is not contrary to Union law for provisions of national law to make assisting illegal immigration punishable by criminal penalties when nationals of non-member countries who have infiltrated Union territory hold visas fraudulently obtained – by deceiving the competent authorities of the Member State issuing the visa about the true purpose of their travel – that have not previously been annulled.**

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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² The form appears in Annex 1 to the Visa Code.

³ Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1).

⁴ Council 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17).