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Advocate General's Opinion in Case C-460/23 | [Kinsa] ¹

Facilitation of unauthorised entry carried out for a humanitarian purpose: Advocate General Richard de la Tour finds Directive 2002/90 valid and clarifies the conditions for the criminalisation of that offence in EU law and national law

Directive 2002/90 is consistent with the principle of the legality and proportionality of criminal offences and penalties. It is for the national court to ensure that the penalties applicable to persons who have acted in a disinterested manner are proportionate, if those persons are not exonerated from criminal liability

Directive 2002/90 ² requires Member States to adopt appropriate penalties against any person who intentionally assists a third-country national unlawfully to enter the territory of a Member State. ³ That directive provides, however, that Member States may refrain from imposing penalties where such assistance is provided for a humanitarian purpose. ⁴

Pursuant to that directive, Italian law criminalises the facilitation of unauthorised entry, irrespective of whether there is financial gain. It provides for a sentence of between two and six years' imprisonment, a fine of a fixed amount of f €15 000 per person concerned, and appears to allow those penalties to be cumulated.

The Bologna District Court (Italy) must rule on the criminal liability of a third-country national who contributed to the unauthorised entry into Italian territory of her daughter and niece, using false identity documents. It entertains doubts as to the validity of Directive 2002/90 on the ground that it disproportionately infringes the fundamental rights of the persons concerned. In particular, it considers that that measure is contrary to the principle of proportionality in so far as the EU legislature criminalises the facilitation of unauthorised entry irrespective of the existence of financial gain, without requiring Member States to exonerate from criminal liability persons acting for a humanitarian purpose or because of family obligations.

In today's Opinion, Advocate General Jean Richard de la Tour states, in the first place, that the criminalisation of the facilitation of unauthorised entry covers all acts by which a person assists, consciously and deliberately, in the unauthorised crossing of the border of a Member State, irrespective of that person's motives.

In the second place, he considers that there is **nothing to affect the validity of Directive 2002/90 from the point of view of the principle of the legality of criminal offences and penalties**, enshrined in Article 49(1) of the Charter of Fundamental Rights of the European Union. The aforementioned criminalisation is based on shared criminal competence between the European Union and the Member States, and forms part of the harmonisation of existing national legislative provisions. Since that directive cannot, on its own, give rise to criminal liability for individuals, it is for the Member States to implement that criminalisation by national legislation which is proportionate and endowed with the specificity, precision and clarity required in order to satisfy the requirement of

legal certainty. It is also for the Member States to set out, in accordance with their own criteria for incurring criminal liability, the extent to which a person may, in the light of the circumstances of the case, benefit from an exoneration from criminal liability or a ground for exemption from, or reduction in, sentence.

In the third place, Advocate General Richard de la Tour considers that **the criminalisation of facilitating unauthorised immigration is not contrary to the principle of proportionality** enshrined in Article 49(3) of the Charter. First, it is essential to take into account not only the threat posed by that phenomenon to the preservation of public order and border management, but also the risks to which the persons concerned may be exposed, due to the illegal activities that may be connected thereto and the situation of great insecurity and dependence in which those persons may find themselves. Secondly, while the assistance provided is not necessarily a profit-making or criminal activity and does not systematically entail a serious risk to the lives of those persons, it is important to bring all acts contributing to the unauthorised entry of third-country nationals within the scope of action of the criminal authorities, so as to ensure greater surveillance of acts which, under the guise of being committed out of solidarity or because of family ties, could in reality pursue other aims. In that context, it is for the national court to determine the motives of the person committing the act and to assess the extent to which that act is required by the protection of an overriding interest and justifies, having regard to the provisions of its national law, exonerating the person concerned from criminal liability or granting him or her an exemption from, or a reduction in, sentence.

In the last place, Advocate General Richard de la Tour states that the Court does not have sufficient information concerning the scope of the grounds of exoneration from criminal liability or of exemption from, or reduction in, sentence which may be provided for by the Italian legislation. Nonetheless, he points out the principle of proportionality would preclude a national system that would not allow a court to balance the interests at stake and ensure that the sentence fits the specific case. In particular, **a national court must be able to differentiate between the criminalisation of a person who has acted out of humanity or necessity and that of a person who is motivated solely by the criminal intent to commit for financial gain the very act prohibited by law.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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 EU law or the validity of an EU 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.

Unofficial document for media use, not binding on the Court of Justice.

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

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¹ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

² [Council Directive 2002/90/EC](#) of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

³ See Article 1(1)(a) of that directive.

⁴ See Article 1(2) of that directive.