



PRESS RELEASE No 62/25

Luxembourg, 3 June 2025

Judgment of the Court in Case C-460/23 | [Kinsa] ¹

A third-country national who enters the European Union in an unauthorised manner cannot be penalised for facilitation of unauthorised entry solely because he or she is accompanied by his or her minor child

Such a parent merely exercises his or her responsibility in respect of the child

An Italian court asked the Court of Justice about the scope of the general offence of facilitation of unauthorised entry, provided for by EU law. The Court answers that the conduct of a person who, in breach of the rules governing the movement of persons across borders, brings into the territory of a Member State minors who are third-country nationals and are accompanying him or her, and over whom he or she exercises actual care, does not fall within the scope of that offence. Indeed, such conduct does not constitute facilitation of illegal immigration, which EU law seeks to combat, but the exercise of that person's responsibility in respect of those minors, stemming from their family relationship. EU law therefore precludes national legislation criminalising that conduct.

In August 2019, a third-country national presented herself at the airport border of Bologna (Italy) on arrival of a flight from a third country, accompanied by her daughter and niece, both minors and having the same nationality as her, using false passports. She was arrested and is being prosecuted for the offence of facilitating unauthorised entry into the territory. She stated that she had fled her country of origin because she and her family were threatened with death by her former partner. Since she feared for the physical integrity of her daughter and her niece over whom she had actual care following the death of the niece's mother, she took those minors with her. Shortly afterwards, she submitted an application for international protection.

In the context of the criminal proceedings, the District Court of Bologna made a reference to the Court of Justice. The Court of Justice then examined whether the abovementioned conduct falls within the scope of the general offence of facilitation of unauthorised entry, within the meaning of EU law, ² and whether it may be punished by criminal penalties.

The Court answers, first, that **the conduct of a person who**, in breach of the rules governing the movement of persons across borders, **brings into the territory of a Member State minors who are third-country nationals and are accompanying him or her, and over whom he or she exercises actual care, does not fall within the scope of the general offence of facilitation of unauthorised entry within the meaning of EU law.**

Indeed, such conduct constitutes the exercise by that person of his or her responsibility stemming from the family relationship and the actual care over those minors. A contrary interpretation would entail a particularly serious interference with the fundamental right to respect for family life and the fundamental rights of the child, enshrined in Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, to such an extent that it would undermine the essence of those fundamental rights.

That interpretation is necessary, in the present case, also in the light of the fundamental right to asylum. Indeed, since the person concerned has made an application for international protection, she cannot, in principle, be

regarded as staying illegally on the territory, so long as no decision has been given on her application at first instance, nor be subject to criminal penalties either on account of her own unauthorised entry or on account of the fact that, at the time of that entry, she was accompanied by her daughter and her niece, over whom she exercises actual care.

The Court answers, second, that EU law precludes national legislation criminalising such conduct.

Member States cannot go beyond the scope of the general offence of facilitating unauthorised entry, as defined by EU law, by including therein conduct not covered by that law, in breach of the Charter.

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.

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The [full text and, as the case may be, an abstract](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Jacques René Zammit ☎ (+352) 4303 3355.

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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 of the parties to the proceedings.

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