

Case C-460/23 [Kinshasa] ⁱ**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

21 July 2023

Referring court:

Tribunale di Bologna (Italy)

Date of the decision to refer:

17 July 2023

Accused:

OB

Subject matter of the main proceedings

Criminal proceedings against OB, of Congolese origin, who is accused of having carried out acts intended to procure the unauthorised entry of two minors, who are also foreign nationals, into Italian territory, and also charged with the offence of holding false identification documents concerning herself and the two minors.

Subject matter and legal basis of the request

The referring court raises, pursuant to Article 267 TFEU, the issue of the compatibility with the Charter of Fundamental Rights of the European Union ('the Charter') of the EU legislation on facilitating illegal immigration and the related Italian implementing provisions, which, as regards the offence of facilitating the unauthorised entry of foreign nationals, do not provide that the purpose of humanitarian assistance can be regarded as a justificatory ground for excluding criminal liability.

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

Questions referred for a preliminary ruling

1. Does the Charter of Fundamental Rights, in particular the principle of proportionality referred to in Article 52(1), read in conjunction with the right to personal liberty and the right to property referred to in Articles 6 and 17, as well as the rights to life and physical integrity referred to in Articles 2 and 3, the right to asylum referred to in Article 18 and respect for family life referred to in Article 7, preclude the provisions of Directive 2002/90/EC and Framework Decision 2002/946/JHA (implemented in Italian law by the rules laid down in Article 12 of Legislative Decree No 286), in so far as they impose on Member States the obligation to provide for penalties of a criminal nature against any person who intentionally facilitates or engages in acts intended to facilitate the unauthorised entry of foreign nationals into the territory of the Union, even where the conduct is carried out on a non-profit-making basis, without providing, at the same time, an obligation on Member States to exclude from criminalisation conduct facilitating unauthorised entry aimed at providing humanitarian assistance to the foreign national?

2. Does the Charter of Fundamental Rights, in particular the principle of proportionality referred to in Article 52(1), read in conjunction with the right to personal liberty and the right to property referred to in Articles 6 and 17, as well as the rights to life and physical integrity referred to in Articles 2 and 3, the right to asylum referred to in Article 18 and respect for family life referred to in Article 7, preclude the criminal offence provisions laid down in Article 12 of Legislative Decree No 286, in so far as it penalises the conduct of a person who engages in acts intended to procure the unauthorised entry of a foreign national into the territory of the State, even where the conduct is carried out on a non-profit-making basis, without at the same time excluding from criminalisation conduct facilitating unauthorised entry aimed at providing humanitarian assistance to the foreign national?

Provisions of European Union law relied on

Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence; in particular, Article 1.

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; in particular, Article 1(1) [and] Article 6.

Charter of Fundamental Rights of the European Union; in particular, Article 52(1).

Provisions of national law relied on

Decreto legislativo n. 286 – Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (Legislative Decree No 286 consolidating the provisions regulating immigration and the rules relating to the status of foreign nationals) of 25 July 1998, ('Legislative Decree No 286'); in particular, Article 12:

1. *Save where the act constitutes a more serious criminal offence, any person who, in breach of the provisions of the present consolidated law, promotes, directs, organises, finances or carries out the transportation of foreign nationals into Italy or carries out other acts intended to procure their unauthorised entry into Italy or into the territory of another State of which they are not nationals or in which they are not entitled to permanent residence shall be liable to a term of imprisonment from 2 to 6 years and a fine of EUR 15000 for each individual.*
2. *Without prejudice to the provisions of Article 54 of the Criminal Code, activities of relief and humanitarian assistance provided in Italy in relation to foreign nationals in need, however present on the territory of the State, do not constitute a criminal offence.*

[...] [subsequent paragraphs relating to similar but more serious offences penalised by more severe penalties].

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 27 August 2019, OB, of Congolese origin, presented herself at the air border of Bologna on arrival on a flight from Casablanca, showed a false Senegalese passport and accompanied two girls aged 8 and 13 years old, for whom she presented two false passports. OB thus carried out acts aimed at procuring the unauthorised entry of the two minors into Italian territory and was charged with the offence of 'facilitating the unauthorised entry of foreign nationals' within the meaning of Article 12(1) of Legislative Decree No 286.
- 2 On 28 August 2019, OB was arrested and the two girls, by order of the Tribunale per i minorenni (Juvenile Court, Italy), were placed in a dedicated reception facility.
- 3 On 29 August 2019, OB was heard by the Giudice per le Indagini Preliminari (judge responsible for preliminary investigations) of the Tribunale di Bologna (District Court, Bologna), to whom she stated that she had fled the Democratic Republic of the Congo to escape the death threats made against her and her family by her partner, following the end of their relationship. She also stated that the minors travelling with her were her daughter and her niece (the daughter of her deceased sister who had been entrusted to her), respectively, and that she had

brought them with her because she feared for their physical integrity. The judge confirmed OB's arrest, but did not order her to remain in prison.

- 4 On 9 October 2019, the accused lodged an application for international protection. That procedure has not yet been completed.
- 5 Subsequently, the Juvenile Court, Italy, found that one of the two minors was the daughter of the accused and that, in all likelihood, the other girl was her niece.
- 6 On 29 May 2023, at the hearing before the referring court, counsel for the accused proposed that a request for a preliminary ruling be submitted to the Court of Justice; the referring court granted that request and stayed the national proceedings.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 7 The referring court is the court that must assess the criminal liability of the accused.
- 8 It explains, first of all, that the offence of facilitating the unauthorised entry of foreign nationals provided for in Article 12(1) of Legislative Decree No 286 is by its nature an offence of danger, in that the Italian legislature, in order to prevent in advance the infringement of a legal interest, already seeks to penalise the conduct in itself, on the sole ground that acts are carried out with the intention of procuring the unauthorised entry of non-EU nationals, irrespective of the reasons for those acts. Moreover, the need for a specific intention to make a profit from the offence is not foreseen (specific intent to make a profit is only considered as an aggravating circumstance).
- 9 Another aspect of that offence is that it is "*free-form*", in the sense that the offence may be committed in any way by the perpetrator, using any means. The conduct can therefore be in a remarkably wide variety of forms.
- 10 The only justificatory ground is provided for in Article 12(2) of Legislative Decree No 286, but it is not applicable in the present case, as it presupposes that the relief and humanitarian assistance activities are provided to a foreign national already present in Italian territory (cases of facilitating residence, or of facilitating travel abroad from Italy to other Member States).
- 11 It follows that the criminal penalty also applies to those who have facilitated the unauthorised entry of a foreign national for humanitarian assistance purposes and even if the foreign national is in need.
- 12 That said, the referring court notes that the Italian legislation complies with the regulatory framework of EU law, as set out in Directive 2002/90/EC and Framework Decision 2002/946/JHA ('the EU regulatory framework'), since, according to that regulatory framework, as regards facilitating entry, on the one

hand, there is no requirement for a profit-making basis and, on the other hand, there are no precise requirements for identifying the unlawful conduct, which can therefore be configured in various ways.

- 13 As regards excluding criminal liability, Article 1(2) of Directive 2002/90/EC merely provides for the option, and not the obligation, for Member States to exclude criminal liability in cases where the facilitation of unauthorised entry takes place for the aim of providing humanitarian assistance.
- 14 By providing for criminal liability for the conduct concerned, both the EU regulatory framework and the national legislation at issue seek to combat the smuggling of irregular migrants and their exploitation, including by criminal organisations which do not hesitate to endanger the lives of the migrants themselves. In addition, there is the objective of ensuring that migration flows take place in an orderly and controlled manner.
- 15 The referring court notes, however, a possible conflict with the criteria of Article 52(1) of the Charter from the point of view of necessity and proportionality, that is to say, the reasonable balancing of the conflicting interests involved.
- 16 That court raises the issue of the reasonableness of the failure to provide for excluding criminal liability in relation to cases in which the conduct of facilitating the unauthorised entry of foreign nationals is carried out for the purpose of humanitarian assistance, consisting of making it easier for the person concerned to exercise fundamental rights, such as the right to life and physical integrity, protected in Articles 2 and 3 of the Charter, the right to asylum, protected in Article 18 of the Charter, and the right to respect for family life, protected in Article 7 of the Charter.
- 17 In its view, the protection of those fundamental rights must be taken into account in the balancing exercise which must form the basis of the common immigration policy; it notes, however, that in both the EU regulatory framework and the Italian legislation, there is a lack of proportionality in favour of the protection of the interest in controlling migration flows, which also results in an unnecessary sacrifice of fundamental rights.
- 18 The referring court states that the European legislature itself, by providing in Article 1(2) of Directive 2002/90/EC that the Member States may introduce the humanitarian assistance justification, confirms that the introduction of that ground for exclusion of criminal liability is not an obstacle to the pursuit of the objectives of controlling migration flows. Moreover, that court notes that in some Member States (for example, Finland, Belgium and Spain) humanitarian purpose is already recognised in various ways as a ground for exclusion of criminal liability.
- 19 The referring court points out that, even if the objective of controlling migration flows is important and legitimate, the fact remains that the EU regulatory framework (like the Italian legislation that complies with it) achieves it in an

unreasonable manner because it does not exclude criminal liability for conduct (of facilitating unauthorised entry which is intended to provide humanitarian assistance) which actually seeks to safeguard fundamental rights worthy of protection.

- 20 Consequently, the regulatory framework adopted by the European legislature appears to infringe the criteria of reasonableness, since it allows it to sacrifice fundamental rights worthy of protection in cases in which that sacrifice is not necessary for the pursuit of the objectives that the legislature itself proposes.
- 21 The referring court reiterates that the criminal offence referred to in Article 12(1) of Legislative Decree No 286, applicable in the present case, appears to comply with the EU legal framework, but has doubts, for the reasons set out above, as to its compatibility with the overriding principles laid down in the Charter.
- 22 On the one hand, it is clear that the conduct of the accused objectively corresponds to conduct punishable for the offence provided for in Article 12(1) of Legislative Decree No 286.
- 23 On the other hand, however, according to the referring court, the same conduct may be regarded as being for the purpose of humanitarian assistance, in several respects: the right to life of the two minors, threatened in the country of origin; the right to asylum of the two minors, in relation to the application for international protection made by the accused (who has parental responsibility for one of the children, while the other had been entrusted to her guardianship); the right to family life, taking into account the parenthood and family relationship between the two minors whose entry into the national territory was facilitated and the accused herself (who is the mother and aunt, respectively).
- 24 However, even if the purpose of humanitarian assistance were to be established in the context of the national procedure, the referring court, on the basis of the Italian legislation, would still have to convict the accused, because the rules in Article 12 of Legislative Decree No 286 do not provide for a corresponding ground for exclusion of criminal liability.
- 25 Lastly, the referring court states that the accused is not currently subject to measures restricting her liberty, but it nevertheless requests that the case be determined pursuant to the expedited procedure provided for in Article 105 of the Rules of Procedure of the Court of Justice, in so far as it raises questions of interpretation and validity that could have an immediate effect on pending criminal proceedings, in similar cases, both under Italian law and under the laws of other Member States, in which accused persons may be subject to measures restricting their liberty.