Published in EU Law Live
https://eulawlive.com/op-ed-facilitating-irregular-immigration-under-the-lens-of-the-proportionality-principle-brief-notes-on-the-advocate-generals-conclusions-in-the-kinsa-case-c-460-23/

Op-Ed: "Facilitating irregular Immigration under the Lens of the Proportionality Principle - Brief Notes on the Advocate General's Conclusions in the Kinsa Case (C-460/23)" - EU Law Live

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NOVEMBER 21, 2024

A question for preliminary ruling on the 'crime of solidarity'

On 7 November 2024, Advocate General De La Tour delivered his Opinion in the Kinsa case (C-460/23). The case stems from a request for a preliminary ruling by the Tribunal of Bologna, dealing with the validity and interpretation of the European and Italian rules criminalising facilitating irregular immigration. The Italian judge doubts, first of all, the compatibility of Directive 2002/90/EC (which, together with Framework Decision 2002/946/JHA, composes the 'Facilitators Package') with the principle of proportionality set out in Article 52(1) of the Charter of Fundamental Rights: according to the referring court, the obligation, imposed on the Member States by Article 1(1)(a) of the Directive, to penalise any person who intentionally 'assists' the irregular entry of a third-country national, coupled with the mere option to exclude liability for conduct carried out for humanitarian purposes, would entail a disproportionate limitation of fundamental rights belonging both to the facilitators (such as personal liberty and reputation) and to the facilitated foreigners (life, physical integrity, right to asylum, right to family unity). Secondly, the same disproportion would be found in the offence referred to in Article 12 of the Italian Consolidated Immigration Act, imposing on facilitators a custodial sentence from two up to six years and a financial penalty of EUR 15,000 for each facilitated foreigner, without providing a humanitarian clause.

The Advocate General's three main conclusions will be analysed below.

The acknowledgement that the Facilitators Package's scope reaches solidarity with migrants and asylum seekers.

The first conclusion reads as follows: 'Article 1(1)(a) of Council Directive 2002/90/EC (…), must be interpreted as meaning that the act by which a mother, a third-country national, intentionally contributes to the unauthorised entry into the territory of a Member State of two members of her family, namely her daughter

and niece –who are minors over whom she has custody– by using false identity documents, constitutes an offence'.

This statement recognises that the obligation of incrimination under Article 1(1)(a) of the Directive encompasses any form of assistance, including that performed by the parent for the benefit of the undocumented child (or by the adult for the benefit of an undocumented minor in his or her custody). This conclusion contradicts the main argument put forward by the European Commission at the hearing before the Grand Chamber, according to which the relationship of 'alterity' (or 'thirdness') required by the act of 'assisting' would be lacking between family members. The Commission's artificial reading of the Directive, which aimed to exclude from its scope the case pending before the Italian court, thus falls.

The Advocate General's argument goes even further, recognising that, with Article 1(1)(a) of the Directive, 'the EU legislature did indeed intend to define a general infringement, covering all actions intended to facilitate unauthorised entry into the territory of a Member State, including where such acts are committed disinterestedly, out of altruism, compassion or solidarity, for humanitarian reasons or because of the existence of family ties' (point 46). This is the first time, as far as we know, that an institutional act explicitly recognises that European law is formulated in order to punish all forms of assistance to the entry of an undocumented migrant, without any constraint for Member States to recognise, as an exempting factor, the altruistic, compassionate, or humanitarian purpose possibly pursued by the agent. In the light of these premises, it will be very difficult from now on to deny the existence, at least on paper, of the infamous 'crime of solidarity', which also includes aid given to persons in danger, in a state of need and asylum seekers.

The Facilitators Package's compatibility with the Charter and the missing 'proportionality in the strict sense' test

In his second conclusion the AG states: 'The assessment of the first question referred for a preliminary ruling has disclosed nothing to affect the validity of Article 1(1)(a) of Directive 2002/90 in the light of the principles of the legality and proportionality of criminal offences and penalties, enshrined in Article 49(1) and (3) of the Charter of Fundamental Rights of the European Union'.

The assertion that the Directive does not pose a problem in terms of the principle of legality is, at first sight, acceptable. It is true, in fact, that European norms which aim to approximate national norms, such as those dictated by directives, are by their very nature minimum norms. Therefore, they do not have to meet the same degree of precision required for criminal law rules directly imposing responsibility on the individuals; rather, they shall allow some room for manoeuvre to national legislators. However, this does not mean that minimum standards can be considered completely exempt from the requirements of legality. In this regard, leaving Member States free to decide whether or not to adopt humanitarian clauses, and what content to assign to them, risks generating situations of uncertainty that affect the fundamental rights of migrants and those who help them.

Even more problematic is the AG conclusion concerning the Directive's compatibility with the principle of proportionality. Quite apart from the explicit choice (point 55) to infer the proportionality test from Article 49 of the Charter, rather than, as argued by the national court, from Article 52(1), the point is that the Opinion completely disregards some of the arguments that were paramount to the request for a preliminary ruling.

According to the Advocate General, the proportionality test is satisfied because the broad notion of 'assisting' laid down in Article 1(1)(a) of the Directive is, on the one hand, appropriate to achieve the purpose for which it is intended, namely protecting European borders against (any) irregular entry (points 78-79); on the other hand, necessary for the same purpose, making it possible to repress pretended acts of solidarity, which in reality are aimed at other purposes, including exploitation (points 80-84). In any case, the Opinion adds, it is up to the Member States to introduce rules defining, for genuinely altruistic acts, the conditions for exemption from liability or reduction of punishment (points 85-87).

The Opinion, at this point, goes directly into examining the proportionality of the penalty (or 'retrospective proportionality', as e.g. Duff defines it) but in so doing it fails to make the third, and final, assessment concerning the proportionality of the offence (or 'prospective proportionality'). Indeed, it is not enough for the offence to be appropriate and necessary for the purpose; it is also necessary for it to be proportionate in the strict sense, that is, be the result of a reasonable balancing of all the interests at stake (see e.g. Poscher). As more extensively explained in previous contributions (see Zirulia 2024 and Costello-Zirulia 2024), proportionality in the strict sense is precisely the element that the Facilitators Package most clearly lacks. By imposing that all forms of facilitation shall be criminalised and, simultaneously, leaving Member States free to choose whether (and how) to provide for humanitarian clauses, the European legislator has unequivocally demonstrated that it only and exclusively takes into consideration the interest of border protection, even where this entails the sacrifice of fundamental rights. It is indeed undeniable that the criminalisation of rescue or humanitarian assistance activities may harm, in particular, the right to life, physical integrity, family unity and to seek asylum, if only because of the chilling effect it produces and spreads in civil society.

Not to mention that blanket criminalisation ends up harming the Directive's effet utile, because it leads to a waste of investigative resources among several minor cases, instead of concentrating them on the main criminal networks. Hence, even the outcome of the 'appropriateness' test is not as obvious as it appears in the AG opinion.

It seems quite surprising that the Advocate General did not address such crucial arguments. And, perhaps, the choice to focus on Article 49 of the Charter, instead of 52(1), i.e. the provision that expressly subordinates the limitation of fundamental rights under the Charter itself to the proportionality test, has also contributed to this shortcoming.

The principle of proportionality precludes a national system which does not allow for treating the different types of facilitators differently

The third conclusion begins with the following statement: 'The principle of the proportionality of criminal offences and penalties, enshrined in Article 49(3) of the Charter of Fundamental Rights, precludes a system which would not allow the national court, when criminal proceedings are brought against a mother, who is a third-country national and has intentionally facilitated the unauthorised entry into national territory of two minor children, members of her family, by using false identity documents, to balance the interests at stake and to differentiate between the criminalisation of a person who is shown to have acted out of humanity or necessity, in the sole interest of the minors, and that of a person who is motivated solely by the criminal intent to commit for financial gain the very act prohibited by law'.

This is the Opinion's most innovative conclusion, which, if upheld by the Court, is likely to lead to changes in national legislations on migrant smuggling. According to the Advocate General, the principle of proportionality precludes a national criminal law providing equal treatment for different situations, and in particular a law that does not allow a domestic court to differentiate the treatment applicable to the parent who has facilitated the entry of the minor child for humanitarian or necessity reasons, from that of the person who acts motivated solely by profit. Interestingly, such a conclusion is not limited to the family context, but extends beyond that, as the rest of the third conclusion shows.

Indeed, the third conclusion also contains the following statement: 'It is for the referring court to carry out a specific examination of the proportionality of national legislation which provides for the imposition, on anyone who facilitates unauthorised entry into national territory, of a custodial sentence of between two and six years and a financial penalty of EUR 15 000 per person concerned, having regard, in particular, to the possibility of exonerating from criminal liability persons whom are shown to have acted disinterestedly, out of altruism, compassion or solidarity, for humanitarian reasons or because of family ties, or of adapting the system of penalties applicable to them'.

The Advocate General entrusts the domestic court with a delicate task. That of checking the proportionality of the national laws implementing the Facilitators Package, with specific regard to the possibility of exonerating from liability those who have acted for altruistic, compassionate, solidarity, humanitarian, or family ties purposes; or at least of modulating the penalty in the light of the mild nature of the committed offence. Two possibilities seem to be emerging at this point: either the national judge considers that such mechanisms are available in the national legal system, as may be the case where humanitarian clauses actually exist; or – and this is a solution imposed by the use of the verb 'precludes' – she/he will have to disapply the domestic punitive legislation for incompatibility with the principle of proportionality.

Final remarks, waiting for the Court's judgment

Hopefully, the Court of Justice will extend its assessment, as put forward by the referring court, to the proportionality in the strict sense of the criminalisation. Indeed, case-law already exists in this respect. In 2018, the Conseil Constitutionnel ruled that, by providing a humanitarian clause only for the offence of facilitating irregular residence, and not also for that of facilitating irregular transit across the territory, the French legislator had failed to strike a reasonable balance between the principle of fraternité and the protection of public order. In the same occasion, however, the Conseil Constitutionnel did not consider unreasonable the exclusion from the humanitarian clause of the facilitation of irregular entry, given that in the latter case a new situation of irregularity is created. A few years earlier, the Supreme Court of Canada came to a different conclusion in the Appulonappa judgment, establishing the overbreadth of the Canadian offence of smuggling (which punishes precisely the facilitation of irregular entry) 'in relation to three categories of conduct: (1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents'. On this premise the Court established that the Canadian offence should be interpreted 'as not applicable to persons who give humanitarian, mutual or family assistance'.

Whatever decision the European Court will adopt, the expectation is that the judgment will thoroughly address the issue of the proportionality of the Facilitators Package and the implementing Italian legislation, not only in terms of the proportionality of the penalties (Art. 49 CFR), but also in terms of the limitations imposed by the offence on the exercise of fundamental rights (Art. 52(1) CFR).