

CASE N° 7786/08

Facts

A tailoring atelier in Buenos Aires (Argentina) was suspected of employed approximately 50 irregular migrants, mostly Bolivian. There would be at least 20 minors, aged 13-15, amongst the workers. The work schedule ranged from 7.00 to 23.00 on weekdays and 7-00 to 18.00 on Saturdays. Individuals occasionally worked on Sundays. Their salaries were inferior to those of workers employed legally. Migrants lived in the atelier. Approximately 30 women slept in one room and 20 men in another. There were only two bathrooms available. No migrant was allowed to leave the premises of the atelier. Migrants were yelled at. The youngest ones were beaten up. In order to force migrants to keep on working and not leave the atelier, they were threatened that otherwise - given their irregular situation in the country - they would be arrested by authorities.

The Prosecution accused the defendants of (i) enabling illegal stay with the purpose of obtaining, directly or indirectly, a benefit, and (ii) reduction of others to servitude.

Elements of success

- Contextual assessment of migrants' testimony
- 'Financial or other material benefit' as constituent element of migrant smuggling
- Follow-up strategies to improve migrant smuggling investigations and migrants' protection
- Confiscation

Challenges

- Assistance and support to victims
- Contradictions in testimonial evidence (relativised perception of migrants)

Defendant 1 was the owner of the atelier and the one “giving the orders”. Defendant 2 (sometimes using a false name) was the manager thereof. Defendant 2 was also alleged to act as an active recruiter, having addressed migrants in areas known for agglomerating individuals in irregular situation in search of work.

Key issues

- ❖ Evidence
- ❖ Migrants as witnesses
- ❖ Financial or other material benefit
- ❖ Confiscation

Investigation

The investigation was triggered by information provided by a woman to the president of a consumer's cooperative. The president of the cooperative informed authorities accordingly.

In ascertaining the facts, authorities resorted to (i) declarations of the defendants, (ii) declarations of witnesses and of more than 30 migrants, (iii) searches and seizures, including to the building where the atelier operated.

To a considerable extent, migrants' statements did not support the precarious conditions described above. They referred to salaries and work schedules

that would be standard in the labour market and in compliance with the law. They did not reproach any inappropriate conduct to the manager or owner of the atelier.

Both defendants denied most of the facts and claimed that: (i) no minors worked in the atelier, (ii) migrants were not underpaid nor were they subjected to demanding work schedules; (iii) no migrant lived in the atelier or had his or her meals therein. They admitted, however, that all workers were irregular migrants.

In searching the premises of the atelier, police found several mattresses on the floor, various cutlery and cooking items, and an extra-large pot with food for a significant number of persons.

Reasoning

Migrant smuggling in its modality of facilitation of illegal stay occurs *inter alia* by employing irregular migrants. It is further necessary that the perpetrator acted with the purpose of obtaining, directly or indirectly, an undue benefit. If this legal requirement is not verified, one will be facing an administrative offence. *

Important contradictions emerged between the statements of irregular migrants and the conditions of life and work they were being submitted to. This does not mean the migrants intended to lie. Rather, such disparities must be assessed in view of the personal situation of migrants. The latter may indeed consider the precarious conditions they were submitted to in Argentina as an improvement vis-à-vis life in their home country, from where they migrated in

search of a better life. Migrants would naturally feel restrained in detailing their true work conditions for they feared to lose their job. This is all more so the case given that, in view of their irregular situation, they would be unlikely to find other work shortly. This, however, does not mean such conditions were not abusive and it certainly did not exclude or attenuate the criminal responsibility of the defendants. The defendants were responsible for the operation of the atelier. The workers were submitted to precarious living and working conditions, incompatible with the human condition. Human dignity shall not be scrutinised according to the subjective conditions of each individual (notably vis-à-vis his or her prior living or work situation). Even where victims do not perceive it as such, it is the duty of the Court to ensure respect of the border between right and wrong, lawful and unlawful conduct.

The Court may determine the precautionary seizure of assets if there is a risk of delayed payment in case of civil liability. In determining the *quantum* of seizure, the following elements shall be taken into consideration: (i) number of victims; (ii) social impact/damage; (iii) seriousness of the conduct; (iv) responsibility of the defendant(s); (v) legal qualification of facts. To this must be added (a) civil compensation; (b) costs of procedure.

Verdict/Decision

Confirmation of the accusation lodged by the Prosecution. Precautionary seizure of assets for 1 000 000 USD. In addition, the Court:

- Notified a number of national institutes responsible for the

protection and implementation of human rights;

- Informed the Office of the National Attorney-General so that the Department of Assistance to Victims could take the appropriate measures in respect of the situation of the victims, announcing it would hear witnesses in order to assess the appropriateness of establishing a specific department to investigate situations alike;
- Determined that the textile machines in the atelier should be delivered to a social institution so that they could continue serving their social and economic function and thus allow individuals in need to work and provide for themselves and their families.

Opinion

The intent of obtaining a ‘financial or other material benefit’ played a critical role in confirming the accusation lodged by the Prosecution. This is so because - under Argentinean law and in line with the Protocol against the Smuggling of Migrants by Land, Sea and Air – the ‘financial or other material element’ is a constituent element of migrant smuggling. *In casu*, this benefit derived from the margin of profit made by the defendants through paying low salaries, increasing work schedules and avoiding social security contributions.

The evaluation of contradictions in migrants’ statements took into consideration precarious conditions they often escape from and the impact it may have on their perception of fairness and justice. Furthermore, fear of retaliation, sentiments of gratitude, desire to maintain low profile vis-à-vis

authorities, among other factors, may likely lead migrants not to testify against smugglers.

Notes

* See SHERLOC Case Law Database on Smuggling of Migrants, Case Expte. N° 10733/2007/6.