

Case Expte. N° 10733/2007/6

Facts

The appellants ran three textile ateliers where several Bolivian migrants were employed. At least 12 were in Argentina in irregular situation. Some migrants lived with their families in the work place, where sanitary conditions were substandard. The ateliers were set in adjacent real estates. The appellants were alleged to engage in facilitation of illegal stay as a regular activity.

The Investigative Magistrate upheld the arguments of the Public Prosecutor and considered the appellants *prima facie* co-responsible for migrant smuggling, in the modality of “*facilitating illegal stay with the purpose of obtaining, directly or indirectly, a benefit*”. He further concluded for the existence of aggravating circumstances. The appellants were placed under precautionary detention. Three real estates were confiscated. An appeal followed.

Elements of success

- ‘Financial or other material benefit’ as constituent element of migrant smuggling
- Consideration of cultural practices and traditions

Challenges

- Inconsistent interpretation national law
- Prosecution’s erroneous evidence assessment

Background

There was a close relationship between the five appellants. Three of them were brothers.

The Investigative Magistrate considered that the following aggravating circumstances occurred: (i) engaging in migrant smuggling as a regular activity, (ii) endangering the life, health or integrity of migrants.

Key issues

- ❖ Financial or other material benefit
- ❖ Evidence
- ❖ Aggravating circumstances

Investigation

In ascertaining the facts, authorities resorted to (i) declarations of the appellants, (ii) declarations of witnesses and migrants, (iii) searches and seizures, including to the building where the textile ateliers operated.

In April 2006, during an inspection carried out to the ateliers, the General Directorate for the Protection of Work (*Dirección General para la Protección del Trabajo*) identified several workers/migrants. The latter were also present and identified during searches made in the investigative phase of criminal proceedings.

The ateliers were closed by the General Directorate for the Protection of Work.

Reasoning

The facts proven did not integrate the crime-type of migrant smuggling, in the modality of facilitation of illegal stay.

Migrant smuggling will occur only when those facilitating irregular migration (namely by offering work) acted with the purpose of obtaining, directly or indirectly, a benefit. If this legal requirement is not verified, one will be facing an administrative offence. The purpose of obtaining a benefit is a constitutive element of the crime of migrant smuggling. *In casu*, there was no evidence of the intent of obtaining a benefit. In this respect, the judgment underlined the customary and cultural practices of peoples originating from the Bolivian highlands, as the migrants were (including those in regular situation in Argentina). They usually live in large communal groups, sharing expenses and profits, as a cooperative of mutual assistance.

No evidence indicated that the ateliers operated on the basis of a scheme dedicated to procuring or enabling irregular migration. Most workers were relatives or acquaintances of the appellants. Indeed, the majority of workers employed in the ateliers were in Argentina in regular situation.

The premises of the alleged aggravating circumstances were not substantiated. One of the arguments used by the Prosecution to uphold that illegal activities were carried out on a regular basis was the fact that, in April 2006, during an inspection carried into the ateliers, the General Directorate for the Protection of Work identified several workers/migrants. The same individuals were also present and identified during searches made in the investigative phase of proceedings. However, they were regular migrants in Argentina. Moreover, the aggravating circumstance of endangering the life, health or

integrity of migrants, is a case of “*peligro concreto*”, that is, it requires evidence that the passive subject of the action was placed in actual danger in the individual case under analysis. There was no supporting evidence in this regard.

Verdict/Decision

Appeal granted. Reversal of the order of precautionary detention. Immediate release of the appellants ordered. Order of confiscation of the ateliers reversed.

Opinion

The intent of obtaining a ‘financial or other material benefit’ played a critical role in reversing the precautionary detention of the appellants. 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*, the lack of evidence re intent of obtaining such a benefit thwarted the alleged appearance of perpetration of migrant smuggling.

The contextualised assessment of the circumstances of the case is also to be noted. The Court grounded its decision on cultural practices and traditions thus endeavouring to make sure the judicial decision would not be detached from reality.