

ACÓRDÃO PROCESSO 104/10

Facts

In 2009, upon payment (between 300 and 600 Euro), the appellant procured falsified documents to at least three irregular migrants. She supplied to the latter false work contracts, certificates of employment and/or proof of social security contributions, on behalf of the company she was a manager of and partner to. These documents allowed the migrants to obtain a residence permit in Portugal. The appellant was fully aware that the migrants had never worked for her or her company. The appellant also issued new falsified documents in order to trigger the renewal of residence permits.

The appellant was convicted of migrant smuggling, falsification of documents as well as attempted migrant smuggling. An appeal followed.

Elements of success

- Migrants' cooperation with justice

Challenges

- Assistance (legal) and support to victims

Background

Since October 2004, the appellant was one of the managers and partners of the accounting and auditing company involved in the smuggling scheme. The company operated in the area of Lisbon (Portugal). In early February 2009, the appellant devised a plan to recruit foreigners in irregular situation in Portugal and supply to them falsified administrative documents in the terms explained.

Migrants were called to the instant proceedings as witnesses rather than defendants. When heard in trial, they were only adverted that if they failed to be truthful they would incur criminal liability for contempt to court. After the hearing, the court of first instance informed the witnesses they had committed a crime (falsification of documents). Their case was referred to the Public Prosecution Office for assessment.

Key issues

- ❖ Evidence
- ❖ Migrants as witnesses
- ❖ Legal assistance to irregular migrants

Investigation

In ascertaining the facts, authorities relied much on testimonial evidence, especially from the irregular migrants. The migrants admitted to participating in the scheme to obtain fraudulent documentation.

Reasoning

On appeal, the Defence requested the nullity of testimony given by the migrants for they had not been adverted that they were not required to provide

answers to questions that might lead to self-incrimination. Specifically, by admitting to participating in the scheme to obtain fraudulent documents, the migrants confessed to be co-authors in the crime of falsification of documents. By not adverting the witnesses accordingly, authorities would have obtained evidence by deceitful means. Such evidence was prohibited by law and should thus be declared null.

The Court *ad quem* did not agree. Nothing prevents a person that may incriminate him or herself from testifying. Once he or she is summoned to testify, he or she must be truthful under risk of contempt to court.

If summoned witnesses run the risk of incriminating themselves via testimony, two alternatives are available: (i) request to be ‘pronounced defendants’, thus benefiting from the legal impediment whereby a defendant may not be summoned as witness in cases referring to him or her; (ii) invoke the right not to answer to questions if doing so could lead to self-incrimination. The latter right may be invoked only by witnesses. However, nothing in the law requires witnesses to be warned of these rights or legal regime. Witnesses have the right to be accompanied by a lawyer, who has the duty to advise them on such facts. Witnesses may not refuse to testify in general, but only in relation to those questions whose answers may lead to self-incrimination. *In casu*, witnesses did not refuse answering to any questions.

Verdict/Decision

Appeal dismissed. Conviction confirmed.

Opinion

The case sheds clarity on the regime applicable to irregular migrants called as witnesses in migrant smuggling proceedings while they might be involved in other criminal conduct. It highlights the importance of ensuring effective legal assistance to irregular migrants so as to ensure full information and protection of their rights.