

ACÓRDÃO PROCESSO 294/07

Facts

From early 2005 to April 2006, the appellant was involved in a criminal plan intended to facilitate the illegal entry of Moldovan migrants in Portugal. The criminal plan was orchestrated by G.V. It lied on the following main vectors: (i) contact with, and recruitment of, interested migrants in Moldova; (ii) procurement of necessary documentation in Portugal (under the direct supervision of G.V.); (iii) supervision and coordination of the two afore-mentioned activities (also under supervision of G.V). G.V. followed closely the different “individual files” of migrants to be smuggled, from the compilation of relevant data and documents to referral to the consular services. Each migrant was initially charged 2000 Euro for the ‘services’. This amount increased to 2500 Euro in November 2005. The work permits were issued at the Embassy of Portugal in Romania, in the context of a procedure that initiated in Portugal and depended of fictitious offers of work in Portugal. G.V., together with her closest associates, recruited other individuals necessary for the successful pursuance of the criminal plan, notably businessmen (especially in the areas of construction and agriculture) willing to “sell” false offers of work. These businessmen perceived between 300 and 600 Euro for each fictitious job offer. They never intended to take on any migrant as worker.

The appellant – a businessman in the field of agriculture – was one of the

persons who agreed to issue false offers of work. He never admitted any migrants at his service.

The appellant was convicted of migrant smuggling. An appeal followed.

Elements of success

- Holistic investigative approach
- Electronic surveillance
- Assistance and support to victims

Challenges

- Evidence of migrants’ ‘actual entry’

Background

At a certain stage, the Embassy of Portugal in Bucharest became suspicious of the number of offers of work issued by the same individuals. It thus suspended the consular files relating thereto. In view of the delay in obtaining the work permits and after being informed by the Embassy of Portugal that the concerned files were under investigation, G.V. attempted to destroy all documents connecting her to the criminal plan.

The exact amount of the compensation received by the appellant for the job offers he issued was not determined.

Key issues

- ❖ Organised crime
- ❖ Consummated *versus* attempted migrant smuggling

Investigation

In ascertaining the facts, authorities relied on (i) interception of communications; (ii) documentary evidence (e.g. the investigation retrieved at least 6 offers of work issued by the appellant dated 1 September and 10 November 2005); and (iii) testimonial evidence (namely from the appellant and officers of the Service of Foreigners and Borders regarding the investigations carried out in this case).

In a search to G.V.'s rubbish containers, authorities found, *inter alia*, one offer of contract issued by the appellant.

Reasoning

On appeal, the Defence argued there was no proof that the migrants (related to the offers of work issued by the appellant) had ever entered Portugal, which would compromise the occurrence of the crime (i.e. facilitation of illegal entry).

The Court *ad quem* partially agreed. There was no evidence contesting the position of the Defence. This was an important issue that bore consequences on the legal qualification of the facts.

Documents issued by competent State institutions on the basis of false, erroneous or fraudulent information are illegal. Entry, transit and stay in Portugal on grounds of such documents will undoubtedly be illegal. The objective elements of migrant smuggling are enabling the illegal entry, transit or stay in the country. The means by which one favours or facilitates such purpose can vary and are not defined by law. They include procuring a fraudulent document, like the appellant did in the

instant case, hiding or providing accommodation to the irregular migrant. The subjective element amounts to the knowledge and willingness to take on an action that the perpetrator is aware will assist the potential migrant in entering, transiting or staying illegally in the country.

Migrant smuggling is a “*crime de perigo abstracto*”, that is the situation of favouring or facilitating irregular migration entails per se a risk to the fundamental rights of concerned foreign citizens, in addition to threatening the migration policy of the State, European Union and related interests of public order. Thus, the simple proof of the enabling conduct is enough to criminally punish the agent. This notwithstanding, while migrant smuggling is a crime of *perigo abstracto* in relation to the juridical assets protected, it is a crime of result regarding the object of the action. In other words, the crime will be deemed perpetrated only if the migrant actually entered, transited or stayed in Portugal in an illegal situation. It is not necessary that the migrant reaches a specific location in the country or that the country accepts him or her.

Only conduct aimed at facilitating the illegal entry of migrants in Portugal was proved but not the achievement of the ultimate goal, i.e. migrants' entry in irregular terms.

Verdict/Decision

Appeal partially upheld. The appellant was to be punished under the framework of attempted migrant smuggling because it was not proved that any of the migrants to whom he issued offers of work had actually entered the country.

The Court *ad quem* further reduced the penalty to 10 months' imprisonment suspended (rather than 15 months as determined in first instance), with the possibility of being replaced by a fine in the total amount of 1800 Euro. Were the appellant to choose the first option, the suspension of the penalty was conditioned to the payment of 2500 Euro to a determined legal person working for the support of migrants originating from Eastern Europe. * Proof of payment was to be submitted within six months.

conditioned to the payment of the said financial contribution to the legal person working with Eastern European migrants.

Opinion

The case provides detailed insight into the technical distinction between consummated and attempted migrant smuggling. Furthermore, it is worth noting the holistic approach followed in the investigation whereby the criminal police and the Service of Foreigners and Borders - *Serviço de Estrangeiros e Fronteiras (SEF)* – articulated efforts thus allowing the building up of the Prosecution's case.

Finally, it is noteworthy the determination of the Court *ad quem* that the suspension of the penalty was conditional to the payment of a financial contribution to a legal person dedicated to providing support to migrants originating from Eastern Europe. This demonstrates an underpinning concern for migrants' rights and well-being.

Notes

* In first instance, no possibility of replacement of the penalty of imprisonment for a fine was contemplated. Suspension of the 15 months' imprisonment had been