



Reports of Cases

VIEW OF ADVOCATE GENERAL
SHARPSTON
delivered on 26 March 2012 ¹

Case C-83/12 PPU

Minh Khoa Vo

(Reference for a preliminary ruling from the Bundesgerichtshof (Germany))

(Urgent preliminary ruling procedure — Articles 21 and 34 of the ‘Visa Code’ — Criminal liability of a smuggler facilitating the illegal immigration of third-country nationals who hold visas fraudulently obtained but not yet annulled)

1. The question raised in this reference for a preliminary ruling from the Bundesgerichtshof (Germany) is essentially whether European Union (EU) law,² in particular Articles 21 and 34 of Regulation (EC) No 810/2009 (the ‘Visa Code’),³ precludes a Member State from imposing criminal penalties on a person for facilitating illegal immigration where the immigrants concerned held uniform visas⁴ which were apparently still valid and which, although fraudulently obtained, had not yet been annulled.

2. The order for reference indicates that Mr Vo, the defendant in the main criminal proceedings, was a member of two organised gangs which, in June and July 2010, helped Vietnamese nationals to enter and settle in the Schengen area, in particular in Germany, in return for considerable sums of money. The methods used by those gangs were based on obtaining uniform visas by fraudulent means. In one case, they persuaded the Hungarian Embassy in Vietnam that the Vietnamese nationals were tourists planning to travel within the European Union. In the other case, the Vietnamese nationals were declared to the Swedish Embassy as seasonal workers who would be employed as berry pickers.

3. Once they had entered the Schengen area, the Vietnamese nationals in question completed part of the tourist programme or initially took part in the berry picking before being transported, sometimes with the assistance of Mr Vo, who was paid for his services, to various countries of destination, principally to Germany, where they were housed, again in some cases with Mr Vo’s assistance, before going into hiding.

4. On the evidence produced, Mr Vo was found guilty of four counts of the offence of facilitating as a member of an organised gang illegal immigration for financial gain, notwithstanding that the persons smuggled formally held visas which had not been annulled. He was sentenced to a term of imprisonment of four years and three months. He has been remanded in custody since 1 January 2011.

¹ — Original language: French.

² — It must be noted that the EU legislation set out below applies only to a very limited degree in Denmark, Ireland and the United Kingdom.

³ — Regulation of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243, p. 1), as amended.

⁴ — For the definition of a uniform visa, see point 17 of this View.

5. By an appeal on a point of law against his conviction, Mr Vo took his case to the Fifth Criminal Chamber of the Bundesgerichtshof (Federal Court of Justice) (Germany), which has referred the following question to the Court:

‘Are Articles 21 and 34 of the [Visa Code], which regulate the issue and annulment of a uniform visa, to be interpreted as precluding criminal liability, resulting from the application of national legislation, for the smuggling of foreign nationals in cases where, although they hold visas, the persons smuggled obtained those visas by deceiving the competent authorities of another Member State as to the true purpose of their journey?’

6. In the present case, that question must be understood as referring to the possibility that, under EU law, a criminal penalty may not be imposed on a person in a situation like that of Mr Vo where the third-country nationals concerned each hold a visa which is still formally valid despite having been obtained by fraud. In order to deal with that question, it is important to bear in mind the wording of the relevant provisions of national and EU law.

Legal framework

EU law

Framework Decision 2002/946/JHA

7. Under Article 1(1) of Framework Decision 2002/946/JHA:⁵

‘Each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive 2002/90/EC are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.’

Directive 2002/90

8. In accordance with recital 4 in the preamble to Directive 2002/90, the purpose of that directive is to define ‘the facilitation of illegal immigration and consequently to render more effective the implementation of [the] Framework Decision [2002/946] in order to prevent that offence’.

9. Article 1 of that directive reads as follows:

‘1. Each Member State shall adopt appropriate sanctions on:

- (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
- (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

⁵ — Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1). That Framework Decision was adopted on the same day as Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17), which explains the cross-references between those two legislative instruments.

2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.’

10. Article 2 of that directive provides:

‘Each Member State shall take the measures necessary to ensure that the sanctions referred to in Article 1 are also applicable to any person who:

...

(b) is an accomplice in ...

an infringement as referred to in Article 1(1)(a) or (b)

...’

11. Article 3 of the same directive provides:

‘Each Member State shall take the measures necessary to ensure that the infringements referred to in Articles 1 and 2 are subject to effective, proportionate and dissuasive sanctions.’

Directive 2008/115/EC

12. Directive 2008/115/EC⁶ sets out the common standards and procedures applicable to the return of illegally staying third-country nationals.

13. Pursuant to Article 3(2) of that directive, “illegal stay” means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils [,] the conditions of entry as set out in Article 5 of the Schengen Borders Code [7] or other conditions for entry, stay or residence in that Member State’.

The Visa Code

14. Recital 3 in the preamble to the Visa Code indicates that ‘the common visa policy ... [forms] part of a multi-layer system aimed at ... tackling illegal immigration through further harmonisation of national legislation and handling practices ...’

15. According to recital 29 the Visa Code ‘respects fundamental rights and observes the principles recognised in particular by the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950,] and by the Charter of Fundamental Rights of the European Union’.

6 — Directive of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348 p. 98). In accordance with Article 22, that directive entered into force on 13 January 2009.

7 — Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1), as amended (the ‘Schengen Borders Code’). The Schengen Borders Code establishes common measures on the crossing of internal borders by persons and border controls at external borders, and develops the ‘Schengen acquis’, that is to say all the measures intended to abolish checks at internal borders and to reinforce checks at external borders. It applies in conjunction with the Visa Code, which supplements it by laying down in greater detail the procedures and conditions for issuing visas.

16. In accordance with Article 1(1) of the Visa Code, that code ‘establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period’. According to subparagraph 2 of the same provision, it applies ‘to any third-country national who must be in possession of a visa when crossing the external borders of the Member States’.

17. A uniform visa enables nationals of certain third countries⁸ to gain entry to the territory of all the Member States within the Schengen area and to remain there, while the visa remains valid, for a period up to the maximum duration of the authorised stay. In accordance with Article 2(2) of the Code, a visa is an authorisation issued by a Member State with a view to, inter alia, an intended stay in the territory of the Member States of a duration or no more than three months in any six-month period from the date of first entry to the territory of the Member States. In accordance with paragraph 3 of that provision, a ‘uniform visa’ is a ‘visa valid for the entire territory of the Member States’.

18. The visa is obtained by submitting an application and a series of supplementary documents to the competent authorities of a Member State.⁹ Once all the documents have been received, the consulate of the Member State to which the application has been made verifies its competence to rule on the admissibility of the application and, where appropriate, to decide whether the application satisfies the entry requirements.¹⁰

19. Article 21 of the Visa Code, entitled ‘Verification of entry conditions and risk assessment’, provides:

‘1. In the examination of an application for a uniform visa, it shall be ascertained whether the applicant fulfils the entry conditions set out in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code [11], and particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory of the Member States before the expiry of the visa applied for.

2. In respect of each application, the VIS [12] shall be consulted in accordance with Articles 8(2) and 15 of the VIS Regulation. Member States shall ensure that full use is made of all search criteria pursuant to Article 15 of the VIS Regulation in order to avoid false rejections and identifications.

3. While checking whether the applicant fulfils the entry conditions, the consulate shall verify:

- (a) that the travel document presented is not false, counterfeit or forged;
- (b) the applicant’s justification for the purpose and conditions of the intended stay, and that he has sufficient means of subsistence, both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or is in a position to acquire such means lawfully;
- (c) whether the applicant is a person for whom an alert has been issued in the Schengen Information System (SIS) for the purpose of refusing entry;

8 — The list of countries concerned can be found in Annex I to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), as amended.

9 — Article 5 of the Visa Code defines the Member State competent to decide on such an application.

10 — Articles 18 to 21 of the Visa Code.

11 — See also footnote 7 of this View. These conditions are in essence the same as those contained in Article 21(3)(a) to (d) of the Visa Code.

12 — The VIS is a system for the exchange of visa data between Member States. It was established by Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) (OJ 2008 L 218, p. 60). Its purpose is, inter alia, to assist in the identification of any person who may not, or may no longer, fulfil the conditions for entry to, stay or residence on the territory of the Member States.

- (d) that the applicant is not considered to be a threat to public policy, internal security or public health as defined in Article 2(19) of the Schengen Borders Code or to the international relations of any of the Member States, in particular where no alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds;
- (e) that the applicant is in possession of adequate and valid travel medical insurance, where applicable.

4. The consulate shall, where applicable, verify the length of previous and intended stays in order to verify that the applicant has not exceeded the maximum duration of authorised stay in the territory of the Member States, irrespective of possible stays authorised under a national long-stay visa or a residence permit issued by another Member State.

...

7. The examination of an application shall be based notably on the authenticity and reliability of the documents submitted and on the veracity and reliability of the statements made by the applicant.

...'

20. If those conditions are met, the competent authority issues the visa.

21. However, Article 30 of the Visa Code provides that such a visa 'shall not confer an automatic right of entry' to the entire territory of the Member States. A person holding a uniform visa may be refused access to the territory of a Member State if the border control authorities are of the opinion that the entry conditions are not (or are no longer) met.¹³

22. Article 34 of the Visa Code, entitled 'Annulment and revocation', provides:

'1. A visa shall be annulled where it becomes evident that the conditions for issuing it were not met at the time when it was issued, in particular if there are serious grounds for believing that the visa was fraudulently obtained. A visa shall in principle be annulled by the competent authorities of the Member State which issued it. A visa may be annulled by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa shall be informed of such annulment.

2. A visa shall be revoked where it becomes evident that the conditions for issuing it are no longer met. A visa shall in principle be revoked by the competent authorities of the Member State which issued it. A visa may be revoked by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa shall be informed of such revocation.

3. A visa may be revoked at the request of the visa holder. The competent authorities of the Member States that issued the visa shall be informed of such revocation.

4. Failure of the visa holder to produce, at the border, one or more of the supporting documents referred to in Article 14(3), shall not automatically lead to a decision to annul or revoke the visa.

5. If a visa is annulled or revoked, a stamp stating "ANNULLED" or "REVOKED" shall be affixed to it and the optically variable feature of the visa sticker, the security feature "latent image effect" as well as the term "visa" shall be invalidated by being crossed out.

¹³ — See also Article 13(1) of the Schengen Borders Code.

6. A decision on annulment or revocation of a visa and the reasons on which it is based shall be notified to the applicant by means of the standard form set out in Annex VI.

7. A visa holder whose visa has been annulled or revoked shall have the right to appeal, unless the visa was revoked at his request in accordance with paragraph 3. Appeals shall be conducted against the Member State that has taken the decision on the annulment or revocation and in accordance with the national law of that Member State. Member States shall provide applicants with information regarding the procedure to be followed in the event of an appeal, as specified in Annex VI.

8. Information on an annulled or a revoked visa shall be entered into the VIS in accordance with Article 13 of the VIS Regulation.'

23. The Visa Code has applied since 5 April 2010,¹⁴ but Article 34(6) and (7) of that Code have applied only since 5 April 2011.¹⁵

24. Prior to the entry into force of the Visa Code, annulment (or 'cancellation') was governed by a Decision of the Executive Committee of 14 December 1993 on the common principles for cancelling, rescinding or shortening the length of validity of the uniform visa.¹⁶ That decision defined 'cancellation' as having 'the purpose [of] prevent[ing] access to the territory of the Signatory States to the Schengen Convention, notably where a visa has been issued in error to an alien who [was] the subject of an alert refusing entry as an undesirable person'.¹⁷ It was expressly provided, in such circumstances, that '[the] visa [was] considered as never having existed'.¹⁸ The Common Consular Instructions confirmed those explanations.¹⁹

German law

25. The relevant national legislation is the Law on the residence, employment and integration of aliens in the Federal territory ('the Aufenthaltsgesetz').²⁰

26. In accordance with Paragraph 4(1) of the Aufenthaltsgesetz, aliens wishing to enter and reside in the Federal territory require a residence permit, in particular a visa, unless EU law or a regulatory provision provides otherwise.

27. Paragraph 95(1) of the Aufenthaltsgesetz prescribes a custodial sentence of up to one year or a fine, inter alia, for anyone entering Federal territory who does not hold a permit which is formally valid. Pursuant to subparagraph 6 of that paragraph, 'acting on the basis of a residence permit obtained by way of incorrect or incomplete information shall be treated in the same way as acting without the necessary residence permit'. The equivalence (or legal fiction) provided for in that provision affects neither the position of the visa holder under administrative law nor the remedies available to him for the purpose of challenging any decision to annul his visa. It applies solely in criminal matters.

14 — Article 58(2) of the Visa Code.

15 — Article 58(5) of the Visa Code.

16 — SCH/Com-ex (93) 24 (OJ 2000 L 239, p. 154) ('Decision SCH/Com-ex (93) 24'). That decision was repealed by the Visa Code: See Article 56(2)(b) of the Visa Code. For an explanation of the relationship between the Schengen Agreement, the Convention implementing the Schengen Agreement, the Common Manual, the Common Consular Instructions and the decisions of the Executive Committee set up by the Convention implementing the Schengen Agreement, see Case C-257/01 *Commission v Council* [2005] ECR I-345, paragraphs 7 to 14.

17 — First paragraph of Article 1 of Decision SCH/Com-ex (93) 24.

18 — First paragraph of Article 1 of Decision SCH/Com-ex (93) 24. '[R]escission' (or 'revocation'), on the other hand, made it possible to 'cancel the remaining period of validity of a uniform visa after the holder ha[d] entered the territory' and '[did] not have retroactive effect' (second paragraph of Article 2 of Decision SCH/Com-ex (93) 24).

19 — Common consular instructions on visas for diplomatic missions and consular posts (OJ 2005 C 326, p. 1), as amended (Annex 14).

20 — Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet.

28. Paragraph 96(1) of the Aufenthaltsgesetz prescribes a custodial sentence of up to five years or a fine, inter alia, for anyone who aids or abets another to commit an act punishable under Paragraph 95(1) of the Aufenthaltsgesetz and derives or secures the promise of an advantage from so doing or so acts repeatedly or for the benefit of more than one alien. Pursuant to Paragraph 96(4) of the Aufenthaltsgesetz, the same provisions apply to the infringement of provisions relating to the entry and residence of aliens in the territory of the Member States of the European Union or of a Schengen State where the latter correspond to the acts defined in national law and where the perpetrator of the act aids an alien who does not hold the nationality of a Member State of the European Union or of another State party to the Agreement on the European Economic Area.

29. In accordance with Paragraph 97(2) of the Aufenthaltsgesetz, a custodial sentence of up to 10 years may be imposed on anyone acting for financial gain as a member of a gang formed for the purpose of committing such acts.

The procedure before the Court

30. Since Mr Vo is a person in custody within the meaning of the fourth paragraph of Article 267 TFEU, the Court, on application by the Bundesgerichtshof, decided to deal with the reference for a preliminary ruling under the urgent preliminary ruling procedure. Written observations were lodged by Mr Vo's representative, the Generalbundesanwalt (Federal Public Prosecutor), the German Government and the European Commission. Those four parties, and the Greek Government, were represented at the hearing on 22 March 2012.

Analysis

Preliminary remarks

31. The question raised by this case is essentially whether EU law, in particular Articles 21 and 34 of the Visa Code, precludes a national court from deciding, in criminal proceedings, on the guilt of a person accused of facilitating illegal immigration without requiring that proof of the illegal immigration be furnished by demonstrating that the uniform visas fraudulently obtained and granted to the third-country nationals whom that person is said to have helped enter and/or reside in the territory of the Member State in question have previously been annulled.

32. Such a question rests on the relationship that might exist between, on the one hand, the administrative procedure for the annulment of a visa (which involves the holder of that visa) and, on the other hand, the criminal procedure aimed at ensuring that facilitating illegal immigration is penalised (which involves the 'smuggler').

33. It is, in principle, for national law to determine the division of powers, both between the judiciary and the executive and between the jurisdiction of the criminal courts and that of the administrative courts, as well as the effects of an administrative decision on criminal proceedings and the effects of a criminal decision on an administrative procedure. In a European Union of 27 Member States, each with its own legal system, that division of powers and its consequences are also likely to be characterised by diversity.

34. National law thus governs the relationship between administrative law and criminal law, unless, and in so far as, the European Union has exercised its powers in a specific area. If that is the case, it becomes necessary to examine the relevant content of the EU law in that area. In this instance, it must be determined whether EU law precludes a smuggler accused of facilitating illegal immigration being convicted without proof that the visas held by the immigrants concerned have previously been annulled.

35. The European Union has indeed exercised its powers in the areas concerned, but to a limited extent.

36. First, since the creation of the Schengen area the participating States have agreed to harmonise the conditions and procedures for issuing visas for intended stays in their territory. Those conditions and procedures are now to be found in the Visa Code.

37. It is therefore necessary to analyse the Visa Code further in order to ascertain to what extent the European Union has harmonised the conditions and procedure for annulling a visa, and in particular whether that procedure includes provisions governing the probative value of such an annulment in criminal proceedings relating to a third party accused of facilitating illegal immigration.

38. Second, in accordance with Framework Decision 2002/946 and Directive 2002/90, a Member State has an obligation to prescribe penalties for facilitating the illegal immigration of third-country nationals who enter and transit across or reside in its territory in breach of the laws of that Member State on the entry, transit and residence of aliens.²¹ Since the question referred by the Bundesgerichtshof concerns whether or not proof that a visa has been annulled is an evidential requirement in criminal proceedings brought against a smuggler accused of facilitating illegal immigration, it is also necessary to examine whether Directive 2002/90 and Framework Decision 2002/946 limit the powers of Member States as regards both the criminal proceedings and the relationship between administrative law and criminal law in this regard.

The Visa Code and the consequences, if any, of the absence of a decision annulling a visa held by an alleged illegal immigrant for the criminal liability of a third party accused of facilitating illegal immigration

39. First of all, I would point out that neither Article 21 nor Article 34 of the Visa Code refers either to the criminal liability of a person who has facilitated illegal immigration or to the procedural or evidential rules that apply in criminal proceedings.

40. Mr Vo's representative none the less contends that, on the basis of the Visa Code, the visas of the Vietnamese nationals whom Mr Vo is said to have helped immigrate to the Schengen area must be annulled, in principle by the Hungarian and Swedish authorities, before the criminal court can find that the charge against him is well-founded. In this connection, Mr Vo's representative submits that the criminal court cannot convict Mr Vo of facilitating illegal immigration unless it is established that a competent authority has issued an administrative decision annulling those visas and communicated that annulment to other Member States.

41. In my opinion, that position is based on an incorrect interpretation of the Visa Code.

42. The Visa Code does not purport to effect an exhaustive harmonisation of the administrative procedure for annulling a uniform visa. Still less does it govern the criminal procedure applicable to cases involving facilitating illegal immigration or the relationship between the two procedures with respect to the point at issue. Its scope is significantly more limited.

43. That said, what does the harmonisation thus established affect?

44. First, the first sentence of Article 34(1) of the Visa Code establishes the grounds for annulment.

²¹ — Article 1(1) of Framework Decision 2002/946 and Article 1(1) of Directive 2002/90, subject to the right provided for in subparagraph 2 of the latter provision in the case of conduct with a humanitarian aim (see point 9 of this View).

45. The annulment of a visa is dependent upon whether or not the conditions for issuing that visa were *met at the time when it was issued*.²² If they were not, met, Article 34(1) of the Visa Code provides that the ‘visa *shall be* annulled’. A visa must therefore be annulled if it was obtained fraudulently.

46. Where the *ground* for the annulment relates only to the facts obtaining at the time of issue, the *finding* that that ground exists may be made at any time, that is to say before, during or after the visa’s use.²³

47. Second, the second and third sentences of Article 34(1) of the Visa Code define the competence, and even the duty, of Member States to annul a visa.

48. The competent authorities of the Member State which issued the visa have the relevant documentation and are familiar with the circumstances at issue. For that reason, they are in principle best placed to find, in some cases before the visa has even been used, that they should not have issued it. It is therefore that Member State which is responsible in the first place for annulling the visa. That is why Article 34(1) of the Visa Code states that a visa ‘*shall in principle be* annulled by the competent authorities of the Member State which issued it’.

49. It may be, however, that the circumstances indicating that the visa should not have been issued are not discovered until the holder has already started his journey to the Schengen area, presents himself for entry into the territory of a Member State or is later residing in that Member State. Logically, it is from that point onwards that the Member State at whose borders or in whose territory the visa holder is situated also may and must annul the visa and, where appropriate, so inform the authorities of the Member State which issued the visa. That is why the last sentence of Article 34(1) of the Visa Code provides that a visa ‘*may be* annulled by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa shall be informed of such annulment’.²⁴

50. The annulment of a visa is not therefore a power held exclusively by the Member State which issued the visa, but rather a shared power. This reflects the full mutual respect between Member States that must inform the issue, acceptance and use of the uniform visas and the spirit of loyal cooperation and mutual recognition that must govern decisions to annul a visa within the Schengen area.²⁵

51. Third, Article 34 of the Visa Code sets out the general consequence of annulling a visa. If the administrative decision stems from the finding that the visa should never have been granted, the annulment will accordingly have retroactive effect.

52. At the hearing, the German Government argued that it is for each Member State to determine the consequences of annulment.

53. I do not share that view.

22 — Article 34(1) of the Visa Code. It therefore also follows that a Member State is not entitled to annul a visa in cases in which the conditions for its issue were indeed met at that time.

23 — In this regard, I do not exclude the possibility that the annulment of a visa which has expired may still be of practical effect. It appears to me that, in such circumstances, the annulment of the visa and its notification to the holder would enable the consequences of invalidity in relation to the period of the visa’s validity to be enforced against the visa holder with retroactive effect.

24 — Other language versions of this provision also use different verbs in order to distinguish between the obligation on the Member State which issued the visa and the power enjoyed by the other Member States.

25 — In this context, I would also point to the Court’s observation in Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 42, to the effect that ‘[i]t would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions’.

54. With regard to the effect of annulling a visa on the administrative position of the holder, Article 34 of the Visa Code distinguishes between annulment and revocation by reference to the point in time at which the conditions of issue are not met. The annulment of a visa follows from the fact that those conditions *were not met* at the time when the visa was issued, whereas the revocation of a visa follows from the fact that those conditions *are no longer met*, although they were met at the time when the visa was granted.²⁶

55. I find it difficult to imagine that the legislator made that distinction intending that annulment and revocation could potentially have the same effect. It is clear from Article 32(1)(b) of the Visa Code that a visa ‘*shall be refused*’ where ‘there are reasonable doubts as to the authenticity of the supporting documents submitted ..., the veracity of their contents, the reliability of the statements made ... or [the applicant’s] intention to leave the territory of the Member States before the expiry of the visa applied for’. If it is found, after the visa has been issued, that those circumstances existed at the time of its issue (but were not detected in time by the competent authorities), it seems to me essential that the consequence should be the same as it would have been if those authorities had applied Article 32(1)(b) of the Visa Code. This therefore means that the visa was invalid from the outset (annulment *ex tunc*).

56. It also follows that, in the absence of any circumstances that would have led to the visa being refused under Article 32 of the Visa Code, a visa which has been issued remains valid until its expiry or until it is revoked, and that it, therefore, covers previous residence in one or more Member States. However, from the moment that it is revoked, the visa is no longer a valid residence permit (revocation *ex nunc*).

57. Fourth, Article 34(5) to (7) of the Visa Code lays down a number of different steps that must be followed in order to execute the annulment decision and enforce its effects against the holder.

58. Of course, as the Generalbundesanwalt points out, a visa is not annulled automatically.

59. The annulment of a visa is an administrative decision that depends on an examination of evidence showing that its issue was unjustified. That decision is then notified to the holder.²⁷ Indeed, the requirements of legal certainty mean that such an assessment and any administrative decision formulating it cannot be enforced against the visa holder unless he has been formally notified.

60. The reasoned decision is notified using the form set out in Annex VI to the Visa Code.²⁸ The visa is stamped ‘ANNULLED’ and there are other markings to indicate that the visa is invalid — these also inform the holder of the visa.²⁹

61. The purpose of the notification is, in particular, to ensure that the visa holder is aware, first, that he is no longer, and has never been, authorised by his visa to enter the Schengen area in order to reside there; secondly, that the authorities have reached their conclusion on the basis of evidence about which he has been informed; and, thirdly, that he has the right to appeal against that decision in accordance with Article 34(7) of the Visa Code. The decision must be explained in such a way as to enable the holder to exercise his rights under that provision and under the administrative law of the Member State adopting the decision.³⁰ Clearly, if the decision is to be notified to the person concerned and his visa is to be stamped ‘ANNULLED’, it must be possible to locate that person.

26 — Article 34(2) of the Visa Code.

27 — The obligation to notify the holder of the annulment of his visa by means of the standard form set out in Annex VI has applied only since 5 April 2011 (see point 23 of this View). Up until then, national law governed the statement of reasons for, and the notification of, a decision of this kind.

28 — Article 34(1) and (6) of the Visa Code.

29 — Article 34(5) of the Visa Code.

30 — Article 34(7) of the Visa Code, which is concerned with the right of appeal against an annulment decision, has applied only since 5 April 2011 (see point 23 of this View). Up until then, national law governed the possibility of lodging an appeal of this kind.

62. Finally, Article 34(8) of the Visa Code provides that the competent authorities are to enter information relating to annulled visas into the VIS.³¹ In this way, other Member States are alerted to the fact that the annulled visa does not confer, and has never conferred, upon the holder a valid permit to reside in the Schengen area.

63. As I have just stated, Article 34 of the Visa Code identifies a number of successive steps in the administrative procedure for ensuring that the consequences of annulment are enforceable against the visa holder. It does not, however, lay down detailed rules for enforcement.

64. It also seems clear to me that nothing in Article 34 of the Visa Code suggests that the provision is concerned with the situation of a third party appearing as the defendant in criminal proceedings concerning facilitating illegal immigration. Furthermore, I observe in this regard that Article 34 of the Visa Code does not provide that a person other than the visa holder may bring an administrative appeal against any decision to annul that visa. Nor does it provide that a third party may intervene in such an appeal.

65. I therefore take the view that the scope of Article 34 of the Visa Code cannot encompass criminal proceedings relating to the offence of facilitating the illegal immigration of third-country nationals who held uniform visas which were apparently still valid and which, although fraudulently obtained, had not yet been annulled.

EU law (other than the Visa Code) and the consequences, if any, of the absence of a decision annulling a visa held by an alleged illegal immigrant for the criminal liability of a third party accused of facilitating illegal immigration

66. Even if the Visa Code goes only so far in harmonising administrative law concerning the annulment of a visa, it remains to be seen whether EU law other than the Visa Code precludes a person in Mr Vo's situation from being sentenced to a criminal penalty while the immigrants concerned hold visas which are still formally valid but were fraudulently obtained.

67. In this regard, I emphasise that a Member State is obliged to prescribe penalties for facilitating the illegal immigration of third-country nationals who enter and reside in its territory in breach of the laws of that Member State on the entry and residence of aliens.³² A constituent element of that criminal offence is therefore the unlawfulness of the entry and residence of such persons. Under Directive 2002/90, that unlawfulness is determined in accordance with national law. National law must obviously be in conformity with the applicable EU legislation that is applicable, including the conditions and procedures for issuing and annulling a visa, and must respect the objectives pursued by Directive 2002/90 and Framework Decision 2002/946, in particular as regards combating and penalising of illegal immigration.

68. Do Directive 2002/90 and Framework Decision 2002/946 preclude, in the absence of an annulment decision, the entry and residence of aliens from being found to be unlawful in criminal proceedings?

69. No.

70. Neither Directive 2002/90 nor Framework Decision 2002/946 seeks to approximate the Member States' laws of evidence in criminal matters. Indeed, the purpose of that legislation is confined to defining the offence of facilitating unauthorised residence, transit and entry, the exceptions to that definition and the fundamental rules relating to penalties, liability and jurisdiction.³³

31 — Article 34(8) of the Visa Code.

32 — Article 1(1) of Framework Decision 2002/946 and Article 1(1) of Directive 2002/90, subject to the right provided for in subparagraph 2 of the latter provision in the case of conduct with a humanitarian aim (see point 9 of this View).

33 — See recital 3 in the preamble to Directive 2002/90 and Framework Decision 2002/946.

71. Consequently, EU law does not preclude the possibility that under the criminal law of a Member State the *legal characterisation* of obtaining a visa by fraudulent means may be based on a body of evidence which does not include the adoption of an earlier administrative decision annulling the visa at issue.

72. As the German Government rightly pointed out at the hearing, a criminal court naturally cannot apply national law in such a way as to jeopardise the objectives of the European Union or to affect adversely the fundamental rights which EU law grants to a defendant in criminal proceedings.³⁴

73. I am therefore of the view that, from the point of view of EU law, the absence of an earlier administrative decision relating to the annulment of a visa does not prevent a person in Mr Vo's situation from being sentenced to a criminal penalty.

EU law and the consequences, if any, of the absence of any notification to the visa holder of a decision annulling a visa held by an alleged illegal immigrant for the criminal liability of a third party accused of facilitating illegal immigration

74. If the Court were none the less to hold that, under EU law, an earlier annulment decision is necessary, it would remain to be established whether EU law precludes a criminal penalty being imposed on a person in Mr Vo's situation where the immigrants concerned have not been notified of that decision and the annulment has not been communicated to the other Member States.

75. I do not consider that to be the case. My position is based on the self-same line of reasoning that led me to the conclusion that EU law does not preclude a Member State from imposing a criminal penalty on a person for facilitating illegal immigration where the immigrants concerned hold uniform visas which are apparently still valid and which, although fraudulently obtained, have not yet been annulled.³⁵

76. Furthermore, a different interpretation would frustrate the objective of combating illegal immigration. A person involved in the organisation of illegal immigration would be rewarded for having assisted immigrants to reside illegally and without a valid permit within the Schengen area. After all, as most of the parties which have submitted observations argue, the authorities' task of formally notifying an annulment decision to the persons illegally brought into the territory of a Member State would be all the more complex if the smuggler had a greater interest in helping them to conceal their whereabouts. In that event, it would probably be correspondingly easier for the smuggler to escape any criminal liability for facilitating illegal immigration.

Conclusion

77. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the question referred as follows:

Articles 21 and 34 of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), as amended, must be interpreted as not precluding a Member State from imposing criminal penalties for facilitating illegal immigration of aliens who are in possession of a uniform visa obtained by fraud which has not yet been annulled.

34 — Here, I am mindful of Article 48 of the Charter of Fundamental Rights of the European Union and of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

35 — I would none the less add that, given their role, it is not apparent to me that notification to the visa holder and communication to the Member States are capable of having any probative value additional to that of the annulment decision in criminal proceedings instituted not against the visa holder, but against a third party.