



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
BOT  
delivered on 26 May 2016\*

**Case C-218/15**

**Criminal proceedings  
against  
Gianpaolo Paoletti and Others**  
(Request for a preliminary ruling)

from the Tribunale ordinario di Campobasso (District Court, Campobasso, Italy))

(Reference for a preliminary ruling — Fundamental rights — Retroactive application of the more lenient criminal law — Effect of Romania's accession to the European Union on the criminal offence of facilitation of illegal immigration into Italian territory committed before accession))

1. In the present case the Court is required to examine the effect of Romania's accession to the European Union on the criminal offence of facilitation of unauthorised entry and residence of Romanian nationals in Italian territory where such an offence was committed before that accession. In particular, the Tribunale ordinario di Campobasso (District Court, Campobasso, Italy) is uncertain whether that accession, after the offence was committed and before the offender was tried, has the effect of nullifying the criminal offence of facilitation of unauthorised entry and residence in Italian territory.

2. In this Opinion I will explain why I think that a State's accession to the European Union, after the criminal offence of facilitation of unauthorised entry and residence of nationals of that State in the territory of a Member State has been committed and before the offender has been tried, does not have the effect of nullifying that offence.

### **I – Legislative framework**

#### *A – EU law*

3. Article 49(1) of the Charter of Fundamental Rights of the European Union\*\* provides:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

\* Original language: French.

\*\* 'the Charter'.

4. Article 1(1) of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence<sup>\*\*\*</sup> provides that each Member State must adopt appropriate sanctions on ‘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’ and ‘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 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence<sup>\*\*\*\*</sup> provides, in Article 1(1), that ‘[e]ach Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive 2002/90 ... are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition’. Article 1(2) of that Framework Decision also states that, where appropriate, those criminal penalties may be accompanied, inter alia, by a deportation measure.

## B – Italian law

6. The second paragraph of Article 25 of the Constitution states that no person may be punished except under a law already in force before the offence was committed.

7. The first paragraph of Article 2 of the Codice penale (Criminal Code) provides that no person may be punished for an act which, under the legislation in force when it was committed, was not a criminal offence. Under the second paragraph of Article 2 of the Codice penale, no person may be punished for an act which, under later legislation, is not a criminal offence. If a person is found guilty, the punishment is not to be enforced and there are no criminal-law consequences.

8. Article 12(3)(a) and (d) of Decreto legislativo n. 286 — Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero (Legislative Decree No 286 consolidating the provisions regulating immigration and the rules relating to the status of foreign nationals) of 25 July 1998,<sup>\*\*\*\*\*</sup> as amended by Law No 94 of 15 July 2009,<sup>\*\*\*\*\*</sup> provides that unless the acts constitute a more serious criminal offence, any person who, in breach of the provisions of that consolidated text, promotes, directs, organises, finances or carries out the transportation of foreign nationals into Italy or carries out other acts intended to procure their illegal entry into Italy or into the territory of another State of which they are not nationals or in which they are not entitled to permanent residence may be punished by a term of imprisonment from 5 to 15 years and a fine of EUR 15 000 for each individual, where the acts relate to the illegal entry into or stay in Italy of five or more individuals or where the acts are committed by three or more individuals acting together or using international transport services or counterfeit, forged or, in any event, unlawfully obtained documents.

9. Article 12(3a) of Legislative Decree No 286/1998 states that if the acts mentioned in paragraph 3 of that article are committed on the basis of two or more of the situations referred to in points (a) to (e) of paragraph 3, the penalty provided for therein is to be increased.

<sup>\*\*\*</sup> OJ 2002 L 328, p. 17.

<sup>\*\*\*\*</sup> OJ 2002 L 328, p. 1.

<sup>\*\*\*\*\*</sup> Ordinary Supplement to GURI No 191 of 18 August 1998.

<sup>\*\*\*\*\*</sup> GURI No 170 of 24 July 2009; ‘Legislative Decree No 286/1998’.

## II – Facts

10. Proceedings have been brought against Gianpaolo Paoletti and a number of other individuals, inter alia, for facilitating the illegal entry of 30 Romanian nationals at a time prior to Romania's accession to the European Union. They are specifically accused of having circumvented, in a premeditated and fraudulent manner, the provisions regulating the flow of foreign workers in order to benefit from intensive and ongoing exploitation of low-cost foreign labour, which are acts constituting the criminal offence referred to in Article 12(3) and (3a) of Legislative Decree No 286/1998.

11. The referring court thus states that the accused set up, in Pescara (Italy), Oma Srl, a fictitious branch of Api Construction SRL, which is established in Bucharest (Romania). They requested and obtained work permits and, subsequently, Italian residence permits from the Direzione Provinciale del Lavoro di Pescara (Pescara Provincial Labour Administration, Italy) for 30 Romanian workers on the basis of Article 27(1)(g) of Legislative Decree No 286/1998, which permits, at the request of the employer and outside the statutory quota of foreign workers, the temporary admission of workers employed by organisations or undertakings operating in Italy in order to perform specific functions or tasks for a limited or fixed period.

## III – The questions referred for a preliminary ruling

12. The Tribunale ordinario di Campobasso, which has doubts as to the interpretation to be given to EU law, decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

- '(1) Must Article 7 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 \*\*\*\*\*], Article 49 of the Charter ... and Article 6 TEU be interpreted as meaning that Romania's accession to the European Union on 1 January 2007 had the effect of abolishing the criminal offence provided for in and punishable under Article 12 of Legislative Decree No 286/1998 ... relating to the facilitating of the immigration and stay by Romanian nationals in the territory of the Italian State?
- (2) Must those provisions be interpreted as precluding a Member State from applying the principle of benign retroactivity (*in mitius*) in respect of persons who, before 1 January 2007 (or other subsequent date on which the treaty took full effect), the date on which Romania's accession to the European Union took effect, were responsible for breach of Article 12 of Legislative Decree No 286/1998 ... in that they facilitated the immigration of Romanian nationals, which ceased to be an offence as from 1 January 2007?'

## IV – My analysis

13. By its questions, the referring court is essentially seeking to ascertain whether Article 7 of the ECHR, Article 49 of the Charter and Article 6 TEU must be interpreted as meaning that Romania's accession to the European Union has the effect of nullifying the criminal offence of facilitation of unauthorised entry and residence of Romanian nationals in Italian territory where, after the offence was committed and before the offender was tried, those nationals acquired citizenship of the Union.

\*\*\*\*\* ECHR.

14. The Italian Government asserts that these questions are inadmissible in so far as the Italian criminal provisions in question, which define the criminal offence of facilitation of illegal entry of foreign nationals into Italian territory, do not fall within the scope of EU law. It claims that the criminal treatment of conduct intended to facilitate illegal immigration of foreign nationals is not regulated by EU law. Thus, the relevant Italian legislation in the present case does not constitute a transposition of EU law by the Italian Republic and the Charter is not therefore applicable.

15. As is rightly noted by the European Commission, Article 1(1) of Directive 2002/90 provides that each Member State must adopt appropriate sanctions on 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 and 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. Furthermore, under Article 1(1) of Framework Decision 2002/946, each Member State must take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of Directive 2002/90 are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.

16. It must therefore be stated that the relevant Italian legislation in the present case seeks precisely to fulfil obligations stemming from EU law and thus to transpose EU law.

17. Consequently, there is no doubt that the Charter is applicable in the main proceedings.

18. As regards the question asked by the referring court, it can, in my view, be answered by considering the constituent elements of the criminal offence and, in this specific case, two of those elements, namely the legal element and the material element.

19. As far the legal element is concerned, according to a generally recognised principle, the legitimacy of a criminal offence is based on its necessity. Once this precondition is met, the criminal offence, in order to be classified as such, must of course fulfil other conditions which are equally essential but merely follow on from the first. That is the case with the condition that penalties must have a proper legal basis, as expressed by Beccaria, and the requirement of the proportionality of the envisaged sanction. However, none of these latter conditions would merit examination if it were not necessary to adopt legislation.

20. The power to punish is vested in the State, which has the power to make laws. The State holds the latter power in order to prohibit behaviour which, in its view, undermines notions that it considers to be essential in the light of its social morality or its fundamental operating principles, that is to say, acts which impair what is commonly known as public policy.

21. On that basis, in view of the nature of the criminal offences committed by the accused, it must be determined which public policy has been impaired first and foremost by the criminal offence committed. Is it the public policy of the Italian State or the public policy of the European Union?

22. There is no doubt, in my view, that in this case it is the public policy of the European Union. The Italian criminal legislation exists only in pursuance of the requirements laid down by Article 1(1) of Directive 2002/90, under which each Member State must adopt appropriate sanctions on 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, supplemented by Article 1(1) of Framework Decision 2002/946, which requires Member States to impose penalties which may entail extradition.

23. In doing so, the Member States' criminal legislation merely supports a mandatory provision of a norm laying down rules which are themselves common to the Member States and enforces those rules.

24. What is the purpose of that norm? To offer protection, within the framework of the internal market, for the specific EU rules applicable exclusively to citizens of the Union, that is to say, to protect a system which combines such fundamental freedoms and notions as freedom of movement, freedom of establishment and citizenship, which are the very foundations for the construction of the European Union. We would readily agree on the necessity of such legislation providing for criminal penalties.

25. A clarification is provided by the legal element of the criminal offence as necessarily conceived by the Member States, thus allowing an assessment of the gravity, in the eyes of the Union legislature, of this impairment of public policy, in so far as in Framework Decision 2002/946 the criminal penalty imposed in the Member States must permit the extradition of offenders and may, where appropriate, be accompanied by a deportation measure. The desire to be able, depending on the situation encountered, either to try the guilty person who has remained abroad for the disruption caused to EU public policy or to deport him highlights the extent to which that public policy has been disrupted by this kind of criminal offence.

26. It is therefore the public policy of the European Union that is at issue. However, there is no apparent provision in Directive 2002/90 or in any other legislation which indicates that access to 'full' citizenship of the Union must, or even merely may, entail the disappearance of the impairment to that higher-ranking public policy and, therefore, the nullifying of the criminal offence committed by the accused, who were engaged in what is known in common parlance as labour trafficking.

27. In actual fact, to decide otherwise would effectively encourage this kind of trafficking once a State has initiated the final process of accession to the European Union, since traffickers would then be assured of benefiting from immunity. In that case the aim achieved would be exactly the opposite of the aim pursued by the Union legislature.

28. It should be noted, lastly, that the Italian criminal legislation, complying fully with the obligations laid down by the provisions of Directive 2002/90 and those of Framework Decision 2002/946, whose effective application it ensures, strictly speaking concerns only smugglers and not individuals who avail themselves of this method.

29. It is therefore irrelevant in this regard that, subsequent to their illegal entry into the territory of the Union, those individuals acquired the status of citizens of the Union or all the rights pertaining thereto.

30. Furthermore, the question arises of what the theoretical justification for such an effect would be.

31. It appears beyond question that there cannot be a situation in which an amendment of EU law paralysed a criminal offence under national law, for the simple and obvious reason, which has already been mentioned, that the national legislation stems from EU law and that only the amendment of EU law could have repercussions on the national law in question. Article 1(1) of Directive 2002/90 has not been amended at all and, as has been shown, is immaterial in respect of acquisition of citizenship of the Union after the criminal offence has been committed.

32. I also consider that it is not possible to invoke the principle of retroactivity *in mitius* to which the reference to Article 49 of the Charter seems to relate. That principle in fact establishes a rule for the successive application of laws in time, as can be seen from the actual wording of Article 49(1) of the Charter. There must also be a succession of laws concerning the same criminal offence, which is not the case here, as there has been no amendment as regards the definition of the criminal offence or the penalty for that offence.

33. Such an outcome could actually arise only if the criminal offence in question had lost its necessity. I explained above that this was certainly not the case with regard to smugglers.

34. Irrespective of considerations of public policy, other criteria relating to the legal structure of the criminal offence also suggest that the view put forward by the applicants in the main proceedings should be rejected.

35. This takes us to the examination of the second constituent element of the criminal offence, namely the material element.

36. The manner in which the material element of the criminal offence is carried out requires it to be categorised as a one-off offence. Facilitation of entry takes place in material terms when the individual who has recourse to ‘smugglers’ has crossed the external border of the European Union and facilitation of residence when he has been supplied with the fraudulently obtained documents which allow him to give the appearance that he is entitled to the benefits attached to citizenship of the Union or to status as a legally staying foreign worker.

37. In view of the dates mentioned in the decision referring the case, the criminal offences of which the applicants in the main proceedings are accused had been fully and definitively carried out on the date of entry into force of the act of accession of Romania to the European Union, which did not entail any amendment to the wording of Article 1(1) of Directive 2002/90, a provision having general application.

38. This argument seems to be reinforced by a comparison with the specific situation of a Romanian national who, when this momentous change in status took place, was himself committing a criminal offence, namely illegal residence. There is a major difference.

39. In this case, the criminal offence committed by the national of the former third country is a continuous offence whose material element, namely being in a territory where he should not be, is never completed while this situation continues. One of the most obvious consequences in the case of a continuous offence is that the limitation period starts to run only from the time the offence ends.

40. As nationality is acquired while the criminal offence is being committed, one of the elements of the specific definition of the offence of illegal residence applicable only to the person concerned disappears, as it is the (still ongoing and indivisible) material element of the criminal offence that is directly affected. On the date of acquisition of full rights of citizenship of the Union, one of the constituent elements of the continuous offence, namely not being a full citizen of the Union, disappears.

41. By the same event, moreover, the criminal offence, which applied only to third-country nationals, loses its necessity in respect of Romanian nationals, which justifies no longer bringing proceedings against those who, for example, would be returned to their State of origin, but in respect of whom the limitation period would not yet have expired.

42. In the light of all these considerations, I take the view that Article 1(1) of Directive 2002/90, Article 1(1) of Framework Decision 2002/946 and Article 49 of the Charter must be interpreted as meaning that a State’s accession to the European Union, after the criminal offence of facilitation of unauthorised entry and residence of nationals of that State into the territory of a Member State has been committed and before the offender has been tried, does not have the effect of nullifying that criminal offence.

## V – Conclusion

43. In view of the foregoing, I propose that the Court give the following answer to the Tribunale ordinario di Campobasso:

Article 1(1) of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, Article 1(1) of Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence and Article 49 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that a State's accession to the European Union, after the criminal offence of facilitation of unauthorised entry and residence of nationals of that State into the territory of a Member State has been committed and before the offender has been tried, does not have the effect of nullifying that criminal offence.