JUDGMENT NO. 63 OF 2022

It is disproportionately harsh and therefore unconstitutional to punish the facilitation of illegal immigration by using international transport services or forged or unlawfully obtained documents with imprisonment from 5 to 15 years.

In the case at issue, a foreign woman who accompanied to Italy on a commercial international flight her young daughter and niece, who were respectively 13 and 8 at the time, using forged identity documents had been accused of the offence in question. The criminal court referred to the Constitutional Court a question on the compatibility of the provision at issue with the principle of proportionality of penalties, based on Articles 3 and 27(3) of the Constitution.

The Constitutional Court held that the dramatic increase in the ordinary penalty envisaged for the basic offence of facilitation of illegal immigration (imprisonment from 1 to 5 years) in the event of aggravating circumstances may be justified in other instances, e.g. when the migrant's life is endangered or the migrant is subjected to inhuman or degrading treatment during transportation, but is wholly unreasonable with respect to the circumstance at issue.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 12(3)(d) of Legislative Decree No 286 of 25 July 1998 (Consolidated law on immigration regulations and rules on the status of foreigners), initiated by the Ordinary Court of Bologna in the criminal proceedings against E. K. K., with the referral order of 1 December 2020, registered as No 92 in the Register of Referral Orders 2021 and published in Official Journal of the Republic No 26, first special series 2021.

Having regard to the entry of appearance of E. K. K. and the intervention filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Francesco Viganò at the public hearing of 8 February 2022;

after hearing Counsel Alessandro Gamberini for E. K. K. and State Counsel Maurizio Greco for the President of the Council of Ministers;

after deliberation in chambers on 8 February 2022.

[omitted]

Conclusions on points of law

1.- The Ordinary Court of Bologna has raised questions concerning the constitutionality of Article 12(3)(d) of Legislative Decree No 286 of 25 July 1998 (Consolidated law on immigration regulations and rules on the status of foreigners, hereinafter the "Immigration Law"), with regards to the aggravating circumstance of using international transport services or forged or unlawfully obtained documents, insofar as it provides for a harsher penalty compared to that applicable to the basic offence. Those questions are raised with reference to the principle of equality-reasonableness enshrined in Article 3 of the Constitution and to the principle of proportionality of criminal penalties enshrined in Articles 3 and 12(3) of the Constitution.

1.1.- The referring court must adjudicate on the criminal liability of a woman, accused of having accompanied to Italy on a commercial flight, using forged passports, two girls aged thirteen and eight. According to the reports of the social workers currently

taking care of them, exhibited by the woman's defence counsel, the girls are her daughter and niece respectively.

On the basis of the indictment, the conduct in question constitutes a criminal offence under Article 12(1) of the Immigration Law, with the aggravating circumstances under Article 12(3)(d), in conjunction with the offence of the possession and fabrication of forged documents under Article 497-*bis* of the Criminal Code.

According to the referring court, the legislative provision imposing a term of imprisonment of between five and fifteen years for the circumstances set forth in Article 12(3)(d) of the Immigration Law (respectively, use of international transport services and use of forged, altered or unlawfully obtained documents) is contrary to the principle of equality-reasonableness under Article 3 of the Constitution and the principle of the proportionality of criminal penalties stemming from the combined provisions of Articles 3 and 12(3) of the Constitution.

3.- Before examining the merits of the questions raised, it is appropriate to consider how the provision at issue has developed over time (paragraphs 3.1. to 3.5. *infra*), how it is interpreted by the criminal courts (paragraph 3.6. *infra*) and what the international obligations underlying the provision are (paragraph 3.7. *infra*).

[...]

3.5.- Article 12 of the Immigration Law was [...] recast by Law No 94 of 15 July 2009 (Provisions on public security), thereby taking on its current form.

In particular, Article 12(1) states: "Unless the act constitutes a more serious offence, whoever illegally promotes, directs, organises, finances or transports foreigners into the territory of the State, or commits other acts aimed at illegally procuring their entry into the territory of the State, or of another State of which the person is not a national or a permanent resident, shall be punished by a term of imprisonment from one to five years and a fine of € 15,000 for each person."

[...]

Article 12(3) is now worded as follows: "Unless the act constitutes a more serious offence, whoever illegally promotes, directs, organises, finances or transports foreigners into the territory of the State, or commits other acts aimed at illegally procuring their entry into the territory of the State, or of another State of which the person is not a national or a permanent resident, shall be punished by a term of imprisonment from five to fifteen years and a fine of € 15,000 for each person in the event that:

(a) the act relates to the unlawful entry or stay in the territory of the State of five or more persons;

(b) the life or safety of the transported person were endangered in order to procure his or her illegal entry or stay;

(c) the transported person was subjected to inhuman or degrading treatment in order to procure his or her illegal entry or stay;

(d) the act was carried out by three or more persons in complicity with one another or using international transport services or documents that have been forged, altered or otherwise unlawfully obtained;

(e) the perpetrators had weapons or explosives at their disposal."

[...]

The reworded Article 12(3-*bis*) provides that, in the event of the occurrence of two or more of the circumstances referred to in the preceding Article 12(3), the punishment laid down therein shall be increased.

The similarly reworded Article 12(3-*ter*) goes on to provide that "[t]he term of imprisonment shall be increased by between one third and one half and a fine of € 25,000 shall be imposed for each person if the acts referred to in paragraphs 1 and 3:

(a) are committed for the purpose of recruiting persons to be used for prostitution or otherwise for sexual or labour exploitation or concern the entry of minors to be used in unlawful activities in order to facilitate their exploitation;

(b) are committed for the purpose of profiting therefrom, including indirectly".

[...]

3.7.- Article 12 of the Immigration Law, and in particular paragraphs 1, 3, 3-*bis* and 3-*ter* thereof, concern a matter regulated by international and EU law.

3.7.1.- As far as international law is concerned, Article 6(1) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the so-called Palermo Protocol), requires States Parties to criminalise, inter alia, the "smuggling of migrants" ("*trafic illicite de migrants*", in the French version), when committed intentionally and for profit. Such offence is defined by Article 3(a) of the Protocol as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".

Article 6(3) of the Protocol requires each State Party to adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offence of, inter alia, smuggling of migrants, situations that amongst others endanger the lives or safety of the migrants concerned (subparagraph a) or entail their inhuman or degrading treatment, including their exploitation (subparagraph b).

The obligations to establish criminal offences laid down by the Protocol are thus limited to conduct engaged in for profit, consistent with the linguistic use of the terms "smuggling" and "*trafic illicite*", which immediately bring to mind activities of a criminal organisation. An obligation to provide for specific aggravating circumstances that attract a stiffer sentence exists solely for the circumstances currently covered in Italian law by Articles 12(3)(b) and (c) of the Immigration Law, relating respectively to endangering the migrant's life or safety and to subjecting the migrant to inhuman or degrading treatment.

3.7.2.- As far as EU law is concerned, the obligations to establish criminal offences in this field […] are essentially those laid down by the combined provisions 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 Council Directive 2002/90/EC, adopted on the same date, defining the facilitation of unauthorised entry, transit and residence (which together form the so-called "Facilitators Package").

Article 1(1) of the Framework Decision provides that each Member State must take the necessary measures to ensure that the infringements defined in particular in Article 1 of Directive 2002/90/EC are punishable by "effective, proportionate and dissuasive criminal penalties, which may entail extradition".

Article 1 of the Directive, for its part, provides that each Member State must adopt appropriate sanctions, inter alia, "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".

Article 1(3) of the Framework Decision goes on to provide that each Member State shall take the necessary measures to ensure that "when committed for financial gain" the

infringements defined in, inter alia, Article 1(1)(a) of Directive 2002/90/EC, "are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances:

- the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA;

- the offence was committed while endangering the lives of the persons who are the subject of the offence".

4.- In the light of the above, the questions must be held to be well-founded with reference to both Articles 3 and 27(3) of the Constitution.

4.1.- At the heart of the challenges, which have been extensively articulated by the party and the *amici curiae*, is the alleged manifest unreasonableness of the increase in the custodial sentence (in terms of a fivefold increase of the minimum, from one to five years, and a threefold increase of the maximum, from five to fifteen years) established for the two aggravated offences at issue, compared to that which can be imposed for the basic offence under Article 12(1) of the Immigration Law. In the referring court's view, that manifest unreasonableness leads to the legislative imposition of a penalty that is clearly disproportionate having regard to the intrinsic seriousness of the offence and to the penalty envisaged precisely for the basic offence referred to in Article 12(1).

In accordance with this Court's well-established case law (see Judgment No 112/2019 for a more extensive overview), pursuant to the combined provisions of Articles 3 and 27(3) of the Constitution, the wide margin of appreciation enjoyed by the legislator in quantifying penalties is limited by the principle that the punishment cannot be manifestly disproportionate, either in relation to the penalties provided for other offences (Judgments Nos 88/2019, 68/2012, 409/1989 and 218/1974) or in relation to the intrinsic seriousness of the single offence at issue (Judgments Nos 136/2020, 73/2020, 284/2019, 40/2019, 222/2018, 236/2016 and 341/1994). More specifically, the principle rules out that the severity of the penalty imposed by the legislator may be manifestly disproportionate to the seriousness of the offence in terms of *actus reus* and *mens rea*. This is the case, in particular, when the legislator sets a minimum penalty that is too high, thus binding the court to impose sentences that could well turn out in any given case to be clearly excessive compared to the gravity of the offence committed (most recently, Judgment No 28/2022).

In applying those principles, it is necessary to establish whether the increase in the penalty laid down for the two aggravated cases under consideration, as described above, is such as to bind the court to impose sentences that are manifestly disproportionate to the gravity of the criminalised conduct.

4.2.- In this regard, it should first be noted that the entire range of offences described by Article 12 of the Immigration Law has the common goal of protecting the orderly management of migration flows. This Court has long defined this interest as an "'instrumental' legal interest, through the safeguarding of which the legislator implements an advanced form of protection of the set of 'final' public interests likely to be negatively affected by uncontrolled immigration" (Judgment No 250/2010 and numerous precedents in that same vein cited therein), such as, in particular, the labour market, the (limited) resources of the social security system, public order and security.

It is precisely to safeguard such interests that the obligations established by the European Union in this field come into play, in particular those deriving from the "Facilitators Package" mentioned above (paragraph 3.7.2. *supra*). Those obligations include an obligation for Member States to provide for "effective, proportionate and

dissuasive criminal penalties" against, in particular, those who intentionally assist a third-country national to illegally enter or transit across the territory of a Member State.

4.3.- In implementing these European obligations, the Italian legislator decided to introduce a criminal penalty in the form of a custodial sentence, in particular by providing since 2004 (paragraph 3.4. *supra*) for a term of imprisonment of between one and five years for this conduct, constituting the basic offence under Article 12(1) of the Immigration Law.

However, the sentencing range is dramatically increased – from five to fifteen years of imprisonment – in the event of the aggravating circumstances set out in Article 12(3), or in those covered by Articles 12(3-*bis*) and 12(3-*ter*), which on their part carry even harsher sentences. These penalties – which in percentage terms are considerably higher than those that ordinarily characterise aggravated offences compared to the underlying basic offence – are clearly linked, in the legislator's mind, to the multi-offensive dimension of the situations contemplated therein, where much more than the orderly management of migratory flows is at stake. To the point that this Court has stated, in relation to the provisions of Articles 12(3-*bis*) and 12(3-*ter*) of the Immigration Law, that they "are aimed primarily, though not exclusively, at protecting the persons transported, who are often in a state of extreme need" (Judgment No 142/2017).

This is apparent with respect to the two sets of aggravating circumstances provided for in Articles 12(3)(b) and (c), consisting of endangering the life or safety of the transported person and subjecting him or her to inhuman or degrading treatment. Both cases bring to mind the dramatic images of journeys on makeshift and overcrowded boats, or in precarious hiding places in cold storage for the transport of goods, which often result in fatalities. Moreover, the two cases are catered for in international obligations that envisage harsher penalties: the Palermo Protocol requires stiffer sentences for both (paragraph 3.7.1. *supra*), while the "Facilitators Package" requires that the first case be punishable by "custodial sentences with a maximum sentence of not less than eight years" (paragraph 3.7.2. *supra*).

Similarly, the aggravating circumstance provided for in Article 12(3-*ter*)(a) – which are characterised by the purpose of recruiting persons to be used for prostitution or otherwise for sexual or labour exploitation and borders on the offence of trafficking in persons under Article 601 of the Criminal Code, which is punishable by a term of imprisonment of between eight and twenty years – clearly aim at protecting the migrants rather than at controlling migratory flows. The latter interest remains here in the background.

But also other aggravating circumstances provided for by Article 12 of the Immigration Law have a multi-offensive nature, albeit in a different direction. Those referred to in Articles 12(3)(a) (act relating to the unlawful entry or stay of five or more persons) and 12(3)(e) (weapons or explosives at the perpetrators' disposal) as well as in Article 12(3)(d) (the act is committed by three or more persons in complicity with one other) all appear to evoke, according to the likely intentions of the legislator, scenarios of involvement of criminal organisations active in the international trafficking of migrants. Precisely in these situations the Framework Decision 2002/946/JHA requires the Member State to punish by custodial sentences with a maximum sentence of not less than eight years (paragraph 3.7.2. *supra*).

4.4.- One should ask, then, whether such a reasonable justification can be found also for the stricter sentencing range laid down for the two manifestations of the offence covered by Article 12(3)(d) under the scrutiny of this Court.

[...]

4.4.1.- Identifying a rationale for such a harsher sentence is, quite frankly, particularly difficult as far as the use of international transport services is concerned.

There are no reasonable grounds for maintaining that the committing the offence through international transport services makes it more reprehensible. No legal interest in addition to that protected by Article 12(1) (the orderly management of migratory flows) is thereby endangered; nor is it conduct that is particularly difficult to detect for the border police.

In this regard, State Counsel argues that international transport carriers, for "obvious reasons of expeditiousness", cannot not be subjected to "lengthy and incisive checks". An easy reply to this argument is that passengers using international transport services (airlines, ferries, buses and trains), in the normal course of events, must necessarily undergo all the ordinary border controls aimed primarily at preventing unauthorised entry into the territory of the State. Those controls, on the contrary, are easily circumvented if the migrant uses other means to illegally cross borders.

4.4.2.- As for the use of forged, altered or otherwise unlawfully obtained documents, the matter is partly different.

There is no doubt, in fact, that the possession and use of documents that are totally or partially forged, or even only unlawfully obtained (presumably by means of actions that constitute other offences), makes the wrongdoing more serious than that required to commit the basic offence. The "public trust" identified by the Criminal Code as the legal interest underlying the entire category of offences of forgery effectively evokes a need to protect interests of great importance for the legal system and society as a whole, starting with public order and safety, which require the truthful identification of all persons present in the country.

What escapes any plausible justification, however, is the extent of the difference between the penalty laid down for the basic offence and the one now under consideration, which has, moreover, progressively increased since 1998 as a result of the many amendments made over time described in detail above (paragraphs 3.2. to 3.5. *supra*).

In fact, most of the offences of forgery of documents and personal papers provided for by Chapters III and IV of Title VII of Book II of the Criminal Code are punishable with sentences that, at the minimum, do not exceed one year of imprisonment. And Article 66-*bis* of the Immigration Law itself, which criminalises the forgery or alteration of residence permits or other documents related to the lawful presence of a foreigner in Italy, provides for a term of imprisonment ranging from one to three years. Solely the crime of possession and fabrication of forged documents valid for travelling abroad referred to in Article 497-*bis* of the Criminal Code – introduced by Law-Decree No 144 of 27 July 2005 (Urgent measures to combat international terrorism), converted by parliament, with amendments, into Law No 155 of 31 July 2005 in the aftermath of the London bombings of 7 and 21 July 2005 with the aim of hindering the cross-border movements of persons involved in terrorist activities – provides for a minimum of two years and a maximum of five years in prison. However, that provision is limited to the possession of "forged" documents: with the exclusion of authentic but "unlawfully obtained" documents, by contrast covered by the aggravated offence scrutinised by this Court.

Although the aggravating circumstances at issue give rise to a complex offence, the provision of a minimum custodial sentence of five years and a maximum of fifteen years for an offence that is ordinarily punishable with a term of imprisonment from one to five years, solely by reason of the use of forged, altered or even only unlawfully obtained

documents, amounts to an intra-systemic anomaly, compared to the sentencing range laid down by both the Criminal Code and the relevant legislation. Such an anomaly cannot but result in a finding that the penalties laid down for the aggravated offences under examination are manifestly disproportionate.

It was precisely those same considerations that led this Court, in Judgment No 236/2016, to consider manifestly disproportionate the identical sentencing framework of imprisonment from five to fifteen years provided for by Article 567(2) of the Criminal Code for the offence of altering the status of a person by means of "false certification, false statements or other falsehoods". Such conduct certainly damages public trust in such a sensitive area of the legal order like marital status, but cannot reasonably justify the drastic increase in the penalty compared to that applicable to the basic offence of altering status under Article 567(1) of the Criminal Code.

4.5.- The above conclusions are, moreover, supported by a further consideration.

From the "Martelli Law" onwards, the criminal provision on which the fight against illegal immigration has hinged (Article 6(8) of Law-Decree No 416 of 1989, and later Article 12 of the Immigration Law) has progressively and more sharply differentiated […] the punishment envisaged for two distinct categories of conduct: on the one hand, aiding the illegal entry of single migrants into Italy for altruistic motives and, on the other hand, the illegal transportation by organized criminal groups of large numbers of migrants into Italy for profit.

The harsher punishment that the second type of conduct attracts reflects the obvious distinction, on a criminological level, between two completely different situations, as this Court has already remarked in Judgment No 331/2011. In declaring that the mandatory pre-trial detention in prison for all cases covered by Article 12 of the Immigration Law was unconstitutional, the Court observed that "the criminal offences to which the provision refers can take on the most varied connotations: from conduct ascribable to international criminal organisations, rigidly structured and endowed with considerable means, which exploit the need of migrants, without any scruples when it comes to endangering their lives; to a one-off commission of an offence by individuals or groups of individuals, whose motives can vary greatly, including simply solidarity in light of their particular links with the migrants involved, since the profit-making purpose provided for by law is considered as a mere aggravating circumstance".

As recalled above (paragraph 3.7. *supra*), the two types of criminal conduct are kept quite distinct by the provisions of international law. The Palermo Protocol only targets international migrant smuggling, mostly carried out by large criminal organisations that make huge profits from it. Although the European Union's "Facilitators Package" aims to tackle both situations (with respect to the goal of controlling migratory flows, in particular within, the Schengen area), it calibrates the obligations of incrimination and punishment separately for the two types of conduct, with the requirement to impose custodial sentences solely with respect to behaviour involving international migrant smuggling.

The migrant's position in the two situations is totally different. As regards *individual* or *altruistic* aiding and abetting covered in Italian law by Article 12(1) of the Immigration Law, the foreigner whose illegal entry is facilitated is treated as a person who is in substance the *beneficiary* of the offence although the latter's interests remain outside the focus of the protection afforded by the provision, which is entirely centred on the legal interest of the orderly management of migratory flows. On the other hand, under the various aggravating circumstances provided for in Articles 12(3), 12(3-*bis*) and 12(3-

ter) of the Immigration Law, the migrant is generally the *victim* of the criminal conduct: exposed at times to danger to his or her life or safety, at times to inhuman and degrading treatment, at times to the risk of exploitation for prostitution or labour, and in any case – in the typical case in which the conduct is carried out with a view to making a profit – forced to shell out enormous sums of money in exchange for help in crossing the border.

Equating for sentencing purposes the two forms of conduct now before this Court – the use of international transport services and the use of forged, altered or unlawfully obtained documents – with numerous other forms of conduct involving the international smuggling of migrants constitutes a manifestly unreasonable legislative choice.

In fact, neither of the instances of the behaviour now under examination, when carried out for motives other than making a profit, are plausibly indicative of the offender's involvement in an international migrant smuggling business. On the contrary, the behaviour is, here, normally consistent with situations in which the migrant is helped to illegally enter Italy for purposes far removed from those of international trafficking, as already emphasised in Judgment No 311/2011. The main proceedings are a case in point: the defendant is a woman accused of having illegally accompanied to Italy her daughter and niece, both minors.

At the hearing, State Counsel argued that whoever procures a forged document, or unlawfully obtains an authentic document, necessarily comes into contact with criminal organisations capable of providing him or her with such a service. That argument, however, is unconvincing. Even assuming that the situation described by State Counsel is what happens in the normal course of events, the argument does not at all suggest that the offender is for that very reason permanently involved in the criminal organisation, as would be necessary to justify the drastic increase in punishment provided for in relation to the basic offence. Instead, the offender is likely to have occasionally approached the organisation with the sole aim of being helped to bring a relative or an acquaintance into Italy in breach of the applicable law, just as the offender himself or herself could have done if he or she had sought to achieve that same aim (in that case, he or she would just be liable for a misdemeanour under Article 10-*bis* of the Immigration Law, in conjunction with any crime of forgery that may have been committed).

[...]

5.- The constitutional violation so ascertained can be redressed by simply removing from Article 12(3)(d) of the Immigration Law the part of the provision challenged by the referring court.

As a result of that repeal, facilitation of illegal immigration committed through international transport services or documents that have been forged, altered or in any case unlawfully obtained, will naturally fall within the scope of Article 12(1). As a consequence, the penalties provided for therein will apply, unless other aggravating circumstances under Article 12 apply. This is without prejudice, of course, to the possible commission of any document forgery offences that may have occurred in any given case.

Consequently, the provision under examination must be declared to be unconstitutional limited to the words "or by using international transport services or documents that have been forged, altered or otherwise unlawfully obtained".

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 12(3)(d) of Legislative Decree No 286 of 25 July 1998 (Consolidated law on immigration regulations and rules on the status of foreigners) is

unconstitutional limited to the words “or by using international transport services or documents that have been forged, altered or otherwise unlawfully obtained”.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 8 February 2022.

Signed by: Giuliano AMATO, President

Francesco VIGANÒ, Author of the Judgment