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JUDGMENT OF THE COURT (Fifth Chamber)

6 October 2016 (*)

(Reference for a preliminary ruling — Article 6 TEU — Article 49 of the Charter of Fundamental Rights of the European Union — Principle of retroactivity of the more lenient criminal law — Italian nationals having organised the illegal entry into Italy of Romanian nationals — Acts carried out before the accession of Romania to the European Union — Effect of Romania's accession on the criminal offence of facilitation of illegal immigration — Implementation of EU law — Jurisdiction of the Court)

In Case C-218/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale ordinario di Campobasso (District Court, Campobasso, Italy), made by decision of 29 April 2015, received at the Court on 11 May 2015, in the criminal proceedings against

Gianpaolo Paoletti,

Umberto Castaldi,

Domenico Faricelli,

Antonio Angelucci,

Mauro Angelucci,

Antonio D'Ovidio,

Camillo Volpe,

Giampaolo Canzano,

Raffaele Di Giovanni,

Antonio Della Valle,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça (Rapporteur), President of the Chamber, F. Biltgen, A. Borg Barthet, E. Levits and M. Berger, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

- Mr Paoletti, by G. Milia, avvocato,
- Mr Canzano, by P. Di Giovanni, avvocato,
- the Italian Government, by G. Palmieri, acting as Agent, and L. D’Ascia, avvocato dello Stato,
- the Austrian Government, by G. Eberhard, acting as Agent,
- the European Commission, by H. Krämer and D. Nardi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6 TEU, Article 49 of the Charter of Fundamental Rights of the European Union (‘the Charter’) and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’).

2 The request has been made in criminal proceedings brought against Mr Gianpaolo Paoletti and other Italian nationals charged with having facilitated illegal immigration into Italy for Romanian nationals before the accession of Romania to the European Union.

Legal context

EU law

3 Recital 2 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 17), states:

‘... measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings.’

4 Article 1(1) of that directive provides:

‘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 In accordance with Article 3 of that directive, each Member State is to take the measures necessary to ensure that the infringements referred to in Articles 1 and 2 thereof are subject to effective, proportionate and dissuasive sanctions.

6 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 (OJ 2002 L 328, p. 1) reads as follows:

‘Each 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.’

Italian law

7 Article 12(3) and (3a) 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 (Ordinary Supplement to GURI No 191 of 18 August 1998), as amended by legge n. 94 (Law No 94) of 15 July 2009 (‘Legislative Decree No 286/1998’), provides:

‘3. Save where the act constitutes a more serious criminal offence, any person who, in breach of the provisions of the present consolidated law, 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 shall be liable to a term of imprisonment from 5 to 15 years and a fine of EUR 15 000 for each individual, where:

(a) the act relates to the illegal entry into or stay in Italy of five or more persons;

- (b) the life or safety of the person transported has been put at risk to procure his illegal entry into or illegal residence within the territory;
- (c) the person transported has been subject to inhuman or degrading treatment to procure his illegal entry into or illegal residence within the territory;
- (d) the act is committed by three or more persons acting together or using international transport services or counterfeit, forged or, in any event, unlawfully obtained documents;
- (e) the perpetrators have weapons or explosive materials.

3a. If the act mentioned in paragraph 3 is committed on the basis of two or more of the situations referred to in points (a), (b), (c), (d) and (e) of paragraph 3, the penalty provided for therein shall be increased.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 It is apparent from the order for reference that the accused in the main proceedings obtained in 2004 and 2005, by setting up in Italy a company which was a fictitious branch of Api Construction SRL, a company incorporated under Romanian law, from the direzione provinciale del lavoro di Pescara (Pescara Provincial Labour Administration, Italy), work permits and, subsequently, Italian residence permits for 30 Romanian nationals. Those permits were granted on the basis of Article 27(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 undertakings operating in Italy.

9 It is also apparent from the order for reference that the accused in the main proceedings are charged with having organised the illegal entry of those Romanian nationals, at a time prior to Romania’s accession to the European Union, ‘in order to benefit from intensive and ongoing exploitation of low-cost foreign labour’.

10 The referring court questions whether, first, having regard to Article 6 TEU, Article 49 of the Charter and Article 7 of the ECHR, Romania’s accession to the European Union had the effect of abolishing the offence of facilitating the illegal immigration of Romanian nationals committed by Italian nationals before that accession, and, second, whether the principle of the retroactive application of the more lenient criminal law is to apply to the accused in the main proceedings.

11 In those circumstances, the Tribunale ordinario di Campobasso (District Court, Campobasso, Italy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 7 of the ECHR, 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 guilty of 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?

The jurisdiction of the Court

12 The Italian Government disputes the admissibility of the questions referred for a preliminary ruling on the ground that the rules of EU law referred to do not apply in a case such as that in the main proceedings. According to the Italian Government, the national provisions relating to the criminal offence of facilitating illegal immigration, including where the offence has been committed for the benefit of Romanian nationals prior to Romania's accession to the European Union, falls outside the scope of EU law.

13 It is to be recalled in respect of those submissions that the Charter's field of application so far as concerns action by the Member States is defined in Article 51(1) thereof, according to which the provisions of the Charter are addressed to the Member States only when they are implementing European Union law (judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 17).

14 It follows from the Court's case-law that the concept of 'implementing Union law', as referred to in Article 51 of the Charter, assumes a degree of connection between an EU legal measure and the national measure in question, above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other (see, to that effect, judgment of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraph 24).

15 These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties (judgment of 8 May 2014, *Pelckmans Turnhout*, C-483/12, EU:C:2014:304, paragraph 21).

16 Admittedly, the order for reference does not specifically mention the provisions of EU law which were implemented by the national legislation at issue in the main proceedings.

17 However, Directive 2002/90 has the objective, according to recital 2 thereof, of reducing the aiding of illegal immigration. Article 1(1) of Framework Decision 2002/946 provides that each Member State is to take the measures necessary to ensure that the

infringements defined in Articles 1 and 2 of that directive are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.

18 Irrespective of whether Legislative Decree No 286/1998 was adopted in order to transpose into Italian law the provisions of Directive 2002/90 and Framework Decision 2002/946, criminal proceedings to curb facilitation of illegal immigration, such as those at issue in the main proceedings, are intended to ensure the implementation of that directive and of that framework decision (see, by analogy, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 27 and 28).

19 Furthermore, it should be noted that, in the present case, the questions referred relate to the question of the effect of the acquisition of the status of EU citizens by Romanian nationals, as a consequence of the accession of Romania, on the application of that national legislation, thus involving the interpretation of EU law.

20 It follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred for a preliminary ruling by the referring court.

Substance

Preliminary observation

21 As provided for in Article 6(3) TEU, fundamental rights recognised by the ECHR constitute general principles of EU law. Article 52(3) of the Charter provides, moreover, that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR. The latter does not, nonetheless, constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44, and of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 45).

22 Therefore, reference should be made solely to Article 6 TEU and to Article 49 of the Charter (see, to that effect, judgments of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 47, and of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 46).

Consideration of the questions referred

23 By its questions, which should be answered together, the referring court asks, in essence, whether Article 6 TEU and Article 49 of the Charter must be interpreted as meaning that the accession of a State to the European Union does not preclude another Member State imposing a criminal penalty on persons who committed, before the accession, the offence of facilitation of illegal immigration for nationals of the first State.

24 In that context, the referring court also questions the application to those charged with organising the illegal immigration of the principle of retroactivity of the more lenient criminal law.

25 In that regard, it should be noted that that principle, as enshrined in Article 49(1) of the Charter, is part of primary EU law. Even before the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal value as the treaties, the Court held that that principle followed from the constitutional traditions common to the Member States and, therefore, had to be regarded as forming part of the general principles of EU law, which national courts must respect when applying national law (see, to that effect, judgment of 29 May 1997, *Kremzow*, C-299/95, EU:C:1997:254, paragraph 14).

26 The mere fact that the acts in the main proceedings took place during 2004 and 2005, that is to say before the entry into force of the Treaty of Lisbon on 1 December 2009, therefore does not preclude the application, in the present case, of Article 49(1) of the Charter.

27 The application of the more lenient criminal law necessarily involves a succession of laws over time and is based on the conclusion that the legislature changed its position either on the criminal classification of the act or the penalty to be applied to an offence.

28 In the present case, it is apparent from the file submitted to the Court that the criminal legislation at issue in the main proceedings, namely Article 12(3) and (3a) of Legislative Decree No 286/1998, has not been amended since the commission of the offences with which the accused in the main proceedings are charged. Facilitation of illegal immigration into Italy may still be punished by a term of imprisonment from 5 to 15 years.

29 However, the referring court observes that the legislative change to be taken into consideration took place in the context of a ‘non-criminal’ law, namely the Act of Accession of Romania to the European Union. The referring court states that the acquisition, by Romanian nationals, of the status of EU citizens after the accession, on 1 January 2007, and the lifting, on 1 January 2014, of the remaining restrictions on the free movement of workers have rendered the grounds — on which the persons who organised the immigration of those nationals were subject to criminal law sanctions in an earlier period — inoperative.

30 That court adds that, in a judgment of 10 January 2008, the Corte suprema di cassazione (Supreme Court of Cassation, Italy), ruling as combined chambers, did not accept that the accession of Romania to the European Union meant that the act of facilitating illegal immigration committed before that accession no longer constituted a criminal offence, and that that case-law was confirmed during the period 2011 to 2015. Nevertheless, in the order of 8 May 2007, by which it referred that case to the combined chambers, the first chamber of the Corte suprema di Cassazione (Supreme Court of Cassation) had supported the opposite view.

31 The question thus arises as to whether the acquisition of EU citizenship by Romanian nationals has an effect on the constituent elements of the criminal offence of facilitation of illegal immigration and, consequently, on the application of the criminal legislation at issue in the main proceedings.

32 Article 12(3) and (3a) of Legislative Decree No 286/1998 is not directed at third-country nationals who illegally enter Italy and reside there without a residence permit, but at persons who facilitate the unlawful entry and residence of those nationals in the territory of that State. The mere fact that, after their illegal entry, those nationals have become EU citizens because of the accession of their State of origin to the European Union has no bearing on the course of the criminal proceedings brought against those persons who facilitate illegal immigration.

33 That acquisition of EU citizenship constitutes a factual situation which is not capable of changing the constituent elements of the offence of facilitation of illegal immigration.

34 As stated in paragraph 28 of the present judgment, the criminal legislation at issue in the main proceedings, that is to say Article 12(3) and (3a) of Legislative Decree No 286/1998, makes the facilitation of illegal immigration in Italy subject to a term of imprisonment, in accordance with Article 3 of Directive 2002/90 and Article 1 of Framework Decision 2002/946, which provide that such an offence is to be punishable by effective, proportionate and dissuasive penalties.

35 The constituent elements of the criminal offence of facilitation of illegal immigration in the Italian legal system therefore remain unchanged, Romania's accession to the European Union having no effect on the classification of that offence.

36 As the Advocate General noted in points 26 and 27 of his Opinion, no provision of Directive 2002/90 or of another EU legislation indicates that the acquisition of EU citizenship ought to entail the disappearance of the criminal offence committed by accused persons, such as those in the main proceedings, who engaged in labour trafficking. To decide otherwise would encourage such trafficking once a State has initiated the 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 EU legislature.

37 In addition, the Court has repeatedly held that the provisions on EU citizenship are applicable as soon as they enter into force and must therefore be applied to the present effects of situations arising previously (judgments of 11 July 2002, *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 25, and of 21 December 2011, *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 58).

38 It follows unambiguously from the order for reference that the criminal offence with which the accused in the main proceedings are charged was committed during 2004 and 2005.

39 As the Advocate General stated in points 36 and 37 of his Opinion, the manner in which the material element of that 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 third-country national 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 EU citizenship or to status as a legally staying foreign worker.

40 The criminal offence with which the accused in the main proceedings were charged had therefore been fully and definitively carried out before the accession, on 1 January 2007, of Romania to the European Union and, *a fortiori*, before the lifting, on 1 January 2014, of the last restrictions on the free movement of workers who are nationals of that State.

41 It follows that, in the present case, that criminal offence does not constitute a situation arising before the accession of Romania to the European Union which had not produced all its effects before that accession (see, to that effect, judgment of 3 September 2014, *X*, C-318/13, EU:C:2014:2133, paragraphs 22 and 23).

42 Therefore, having regard to all of the foregoing considerations, the answer to the questions referred is that Article 6 TEU and Article 49 of the Charter must be interpreted as meaning that the accession of a State to the European Union does not preclude another Member State imposing a criminal penalty on persons who committed, before the accession, the offence of facilitation of illegal immigration for nationals of the first State.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 6 TEU and Article 49 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the accession of a State to the European Union does not preclude another Member State imposing a criminal penalty on persons who committed, before the accession, the offence of facilitation of illegal immigration for nationals of the first State.

[Signatures]

* Language of the case: Italian.

