

## ARRÊT N° 05/00769

### Facts

The defendant was accused of having facilitated, from April 2004 to 1 August 2004, the irregular stay of an irregular migrant in Avignon (France). Specifically, the defendant provided accommodation and financial means to the said migrant. The defendant justified his conduct with having a marital relationship with the migrant. Upon questioning, the migrant declared that his stay at the defendant's residence was occasional. He made no reference to any sentimental relationship between him and the defendant. During appeal proceedings, the defendant declared the love relationship with migrant was to be kept secret.

The defendant was charged with migrant smuggling. The Court of First instance acquitted the defendant. The Prosecution appealed the decision.

### Elements of success

- Contextual interpretation of 'marital relationship' as cause of exemption from criminal prosecution
- Teleological interpretation of 'financial or other material benefit'

### Challenges

- Assistance and support to smuggled migrants

### Background

The Court of First Instance acquitted the defendant by applying the cause of exclusion of criminal prosecution then established in Article 21-III-2 of *Ordonnance* 45-2658 of 2 November 1945, according to which those living in a marital relationship with the irregular migrant were not subject to criminal prosecution.

### Key issues

- ❖ Financial or other material benefit
- ❖ Exemption from criminal prosecution (marital relationship with irregular migrant)

### Investigation

In ascertaining the facts, authorities relied much on testimonial evidence, notably from both the defendant and the irregular migrant. The defendant confessed to be aware of the irregular situation of the migrant in France.

### Reasoning

The Court of First Instance wrongly applied the exemption from criminal prosecution arising out of a marital relationship between the irregular migrant and the person aiding to his or her illegal entry, transit or stay in France. A notorious marital relationship, as enshrined in the law, presupposed the existence of a common life as that shared by married couples. This implies that such relationship be public, with no doubts concerning a minimum of reciprocal feelings of love. The relationship also entails an expectation of durability. These characteristics may

be evident – though not exclusively - through (i) the sharing of tasks, commitments, and responsibilities of a life in the same house, (ii) a social life that mirrors those concerned as a stable couple, (iii) the existence of common commitments, e.g. shared purchases, co-rental of accommodation, electricity and telephone contracts taken on by both members of the couple.

A ‘marital life’ may not be subsumed to an ephemeral relationship under the same roof, even if the host pretends to nurture a feeling of love towards the guest. The defendant holds the onus of proof. He was unable to prove that he entertained a marital relationship with the irregular migrant.

The short period the defendant lived with the migrant - together with the available testimonial evidence - shows that it was out of opportunism that he offered accommodation and financial means to the irregular migrant, in exchange for occasional sexual favours.

There was no proven intent of a lovable and durable relationship between the defendant and the irregular migrant.

## **Verdict/Decision**

The Court of Appeal overturned the decision of the Court of First Instance. It convicted the defendant of migrant smuggling in the modality of facilitation of illegal stay. It sentenced the defendant to the payment of a fine.

## **Opinion**

In similar cases, where a person offered temporary accommodation to an irregular migrant, courts often suspended

the penalty applied. In the instant case, the Court of Appeal did not do so. It remains an open question whether it followed a different path by considering the defendant’s acts were aimed at obtaining an advantage or benefit (i.e., sexual favours). In any event, the reasoning of the Court appears to support the inference that sexual favours could be subsumed under the scope of ‘financial or other material benefit’.