

Radicación: **110013104017200900** **193 01**

Facts

The defendant published an advertisement in the Colombian newspaper *El Tiempo* announcing that she (together with other individuals) could ensure, within 15 days, work in the health sector in, and the issuing of necessary work visas for, the United States of America. Several individuals responded requesting assistance in obtaining the visas. The defendant and her associates required from the interested ‘clients’ a number of documents, including passport, criminal record, and work certificates. The defendant informed the ‘clients’ that she counted with the collaboration of a person in the Embassy of the United States in Colombia, who expedited proceedings, as well as good connections in the Embassy of the United States in Mexico. The defendant’s services were provided upon payment.

The defendant neither delivered the promised visas nor returned the sums advanced by the prospected migrants.

The Public Prosecutor charged the defendant with aggravated embezzlement. The deciding Judge considered there had been an erroneous legal qualification of the facts. Accordingly, it annulled the proceedings. The Public Prosecutor appealed against this decision.

Elements of success

- ‘Financial or other material benefit’ as constituent element of migrant smuggling
- Consistency with Protocol against the Smuggling of Migrants by Land, Sea and Air
- Complaint launched by victim/victims cooperation with authorities

Challenges

- Fragmented interpretation of ‘migrant smuggling’ by national courts

Background

In the course of the *audiencia preparatoria* (i.e. session related to the evidence presented, admissibility and submissions relating thereof), the competent judge declared null all proceedings posterior to the closure of investigation. She did so as she considered there had been an erroneous legal qualification of the facts; that is, the facts would be subsumed into the crime of smuggling of migrants while the Prosecution had filed for aggravated embezzlement. The Judge further considered the conditions allowing her to re-qualify were not fulfilled.

Investigations identified at least ten victims, amongst whom three females.

Key issues

- ❖ Financial or other material benefit
- ❖ Constituent element of ‘migrant smuggling’
- ❖ Aggravated embezzlement

Investigation

The conduct of the defendant and her accomplices was reported to law-enforcement by one of the victims.

In ascertaining the facts, authorities relied much on testimonial evidence.

Reasoning

On appeal, the Prosecution contended that the crime of migrant smuggling did not include the element of deception, which was proper of aggravated embezzlement. In the instant case, victims were convinced to be in the process of preparing a regular crossing of borders, as opposed to the circumstances of migrant smuggling whereby the persons that have been the object of smuggling are aware they do not fulfill the requirements to exit the country of origin and/or enter the country of destination.

In casu, the prospective migrants contacted the defendant as they wished to leave Colombia and legally enter and work in the United States. The defendant advertised her services as the lawful procurement/facilitation of the necessary legal formalities to do so.

The illicit gain obtained by the defendant resulted from not offering the services advertised (and not returning the sums paid in advance by victims), which – as per the evidence produced – she was not

indeed in the position of providing. She obtained such benefits by deceiving ‘clients’. In the crime of smuggling of migrants, the financial or other material benefit results from providing a service that is aimed at facilitating the illegal entry/exit of a person in/from a country. The migrant is aware of the “*rules of the game*” and there is no deception usually involved in this regard.

The defendant did not facilitate the illegal entry of migrants in the United States.

Verdict/Decision

Appeal granted. Case re-sent to the lower court for review accordingly.

Opinion

The case provides useful insight into the specificities of migrant smuggling vis-à-vis other crime-types (*in casu*, embezzlement). Importantly, the Court *ad quem* based the final decision much on the interpretation and practical realisation of the ‘financial or other material benefit’. This was so because the ‘financial or other material benefit’ is a constituent element of migrant smuggling under Colombian law, in line with the Protocol against the Smuggling of Migrants by Land, Sea and Air.