



ASK THE EXPERT
POLICY BRIEF

May **2019**

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Strategic litigation of criminalisation cases

MIGRATION



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LINGUISTIC VERSION

Original: EN

Manuscript completed in May 2019

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This project has received funding from the European Union's Horizon 2020 research and innovation program under the grant agreement 770730

Ask the Expert Policy Brief

Strategic litigation of criminalisation cases

By Magdalena Lesińska

Criminalization of assistance to migrants

Facilitators Package¹ adopted by the EU enables and instructs the member states to criminalize any person who intentionally assists unauthorized entry, transit, or residence of a non-UE national in the EU, unless they are doing so for humanitarian reasons. Despite the fact that EU law allows not to criminalise the facilitation of irregular entry when it is conducted on humanitarian grounds, in a half of the EU member states facilitation of entry is defined as a criminal offence which is punishable by either a prison sentence or a fine, even when assisting person does not obtain any financial benefit (Carrera et al. 2018, p.6). One of the critical remark about Facilitation Package was about lack of definition of the 'humanitarian assistance' and "smuggling activities" concepts, leaving considerable discretion to the member states. In this context, there is a high risk of criminalisation of humanitarian assistance provided by civil society organisations

working with irregular migrants at the member states territory and at the external borders, what takes place in practice.

There are some terms introduced by researchers directly related to the process of criminalization of solidarity in the EU. The notion of the "shrinking space of civil society" describes a situation in which the operational space for NGOs (understood as the capacity to function as an organization and perform their tasks) is being limited by the policies or legal amendments adopted by the government (EP 2017; Szuleka 2018; van der Borgh, Terwindt 2012). The concept of "policing the mobility society" refers to the "wider set of practices, mechanisms and tools driven by the logic of policing" which affects both those on the move and those who act on behalf of immigrants and asylum seekers (Carrera et al. 2018, p.3). The phrase has wider meaning and embodies various actions of EU and national authorities and institutions that impact the activities of var-

¹ Facilitators Package includes Directive 2002/90/EC according to which each EU member state is required to implement legislation introducing criminal sanctions against the

facilitation of irregular entry, transit and residence, and Framework Decision 2002/946/JHA which reinforced the penal framework by setting out minimum rules for sanctions.

ied civil society players such as traditional NGOs assisting migrants on regular basis as well as informal and loosely organized groups and individual activists.

The types and cases of criminalization of humanitarian assistance

Carrera et al. (2018, p. 3-4) distinguished three faces/stages of mobility society policing process, namely suspicion/intimidation, disciplining, and criminalization. In turn, authors of quantitative research (based on interviews with members of NGOs in Slovenia and neighbouring countries) identified five types of practices and approaches aimed at obstructing or precluding the work and activities of non-governmental organizations (labelled as "continuum of criminalization"), such as: 1) criticism and public attacks, discrediting of the work of NGOs in the media, disinformation, and harassment by right-wing politicians and their allies, 2) bureaucratic tightening of the space for civic action (organizations and volunteers are required to register and to cooperate with authorities), 3) banning access and prohibiting monitoring the detention centers or transit zones, 4) deterrence and marking of

"dangerous" organizations and persons, 5) direct criminalization of assistance (Jalušič 2019).

As a result of various jurisdictions, people offering humanitarian assistance or rescuing migrants in the EU cannot be sure whether their actions are legal or potentially criminal. There were court proceedings against the lifeguards, ship owners and NGO workers charged with human smuggling after intervening to save peoples' lives at sea or offer help at the border zone and against people who had helped their family members enter the EU for personal and other altruistic reasons. A recent studies on the criminalization of humanitarian assistance in Europe presents detailed examination of cases of individuals prosecuted under anti-smuggling and immigration laws in EU members states (Carrera et al. 2016; Fekete et al. 2017, FRA 2018). The overview of court cases shows that organizations and volunteers are accused of facilitating irregular entry of migrants by providing health care, food, shelter or other support, of colluding with smugglers and encouraging trafficking². The study based on interviews with practitioners and officials in the UK

² The media and human rights organizations inform regularly about persons arrested and accused of assisting the illegal migrants, e.g. the case of Sarah Mardini and Sean Binder, volunteers in search and rescue operations around Greek island Lesbos, were arrested in Greece and accused of facilitating people-smuggling

through membership of a criminal organization and money laundering in August 2018; captain of a German NGO ship *Lifeline* has been charged with entering Malta's waters illegally with 234 migrants, whom the ship's crew had picked up in waters off Libya in June 2018).

and analyses of court cases of immigration-crimes, including those of facilitation shows that in practice smugglers were rarely prosecuted, contrary to individuals helping a friend or relative to enter the state or stay on its territory (Aliverti 2012).

Recently, some of the countries implemented more radical measures against organizations engaged in assisting the migrants (Bajt, Frelih 2019; Kingsley 2018; Szuleka 2018). Hungary accepted a new legislation called "Stop Soros" bill making the aid of refugees in the country a punishable offense. The measures allow courts to pass criminal sentences including jail terms of up to one year on individuals for aiding asylum-seekers and illegal migrants. The bill introduces a new category of crime called "illicit assistance for immigration" meaning that a person cannot give any kind of assistance to people who entered the country illegally including offering assistance in applying for asylum to people not eligible for asylum. Additionally, the 25% "special tax on immigration" has to be paid by organisations that receive foreign funding and provide aid to migrants and refugees.

Strategic litigation and the role of European courts

The increasing number of cases of criminalization of migration and humanitarian assistance and questionable policies of many European countries have in turn led to a rise in litigation before European courts. The aim is to achieve strategic litigation precedents in the field of access to the asylum procedure, legality of detention decisions, identification of vulnerable asylum seekers, etc. Both European courts - the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) - which institutional position has been significantly reinforced in recent decades - have witnessed a notable rise in their case-loads relating to migrants and their rights, with a small but growing number of NGOs and specialized lawyers engaging in strategic litigation (Baumgärtel 2018).

A strategic litigation is different from normal litigation, since it combines legal and other tactics in order to change public and political opinions and ultimately reform legislation. The strategic litigation initiatives make a significant contribution to law, practice and procedures to uphold and promote the rights and protection of migrants and asylum seekers, provide the opportunity to test the actual scope of countries' protection obligations and to extend the currently prevailing restrictive interpretation of this scope. A strategic litigation offers also

the opportunity to raise public awareness and increases a political pressure on governments to focus on the migration and asylum issues (Scott 2015). The key factors contributing to successful strategic litigation are, among others, the effective cooperation among different actors (legal practitioners, NGOs and civil society) and adequate financial support; publicly funded legal aid and pro bono legal advice is critical important. It requires also combining a litigation strategy with advocacy work and a communication strategy including media and public opinion (PICUM 2017).

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ReSOMA

RESEARCH SOCIAL
PLATFORM ON MIGRATION
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ReSOMA - Research Social Platform on Migration and Asylum

is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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