

# *Chapter I*

## *Human smuggling*

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### *1. Identification and translation of the most relevant rules and their evolution. Statistical data about the crime*

The crime of smuggling is regulated by Law 4251/2014 (“Code of Immigration and Social Inclusion and other provisions”) as amended by Law 4332/2015 (adaptation to the Directive 2011/98/EU), except from the offence of the illegal entry and exit from the country which is still regulated by Article 83 of Law 3386/2005.

Law 4251/2014 is divided into three parts and a total of 139 articles, the first part consisting of eight chapters specifying the scope of the law, the procedure for entering and leaving the country, the conditions for issuing residence permits and their withdrawal, whereas the eighth chapter includes provisions on the obligations of services, officials, notaries, employers, transporters etc. (Articles 27 to 31). The second part of the law includes provisions that harmonize Greek law with the EU Law through the incorporation of the relevant EU Directives on the rights of foreigners in the country, and finally, the third part includes social, organizational and transitional arrangements.

## *2. Comparison with the International and European law.*

As it was stated before Greece is party to a number of international treaties concerning transnational crime and the protection of victims of trafficking and smuggling, including the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, ratified by Greece on 11 January 2011. As a result, the international rules stemming from these treaties are incorporated in Greek national law, including the Code of Immigration and Social Inclusion. Moreover, as an EU member State, Greece implements the relevant rules of EU law.

## *3. Structure and purpose of the criminal offence.*

The offenses of Law 4251/2014 can be distinguished into two categories based on the main act and its supporting acts. The main offense is that of illegal entry and exit from the country, as provided by Article 83 of Law 3386/2005 and maintained by this law in force, according to which the third-country national and the citizen of the country EU, exiting or attempting to leave or enter the Greek territory or attempts to enter it without the legal formalities, shall be punished by imprisonment of at least three months and a pecuniary penalty of not less than one thousand five hundred (1,500) euro. An aggravating case occurs if the person attempting to leave illegally is wanted by the judicial or police authorities, is under tax or any other obligations towards the State or there is a bribe involved so the sentence is at least six months imprisonment and the money in at least three thousand (3,000) euros.

The second category, which qualifies as the crime of smuggling of migrants, includes the acts under Articles 27 to

30 of Law 4251/2014, where the organs of the state or the individuals either by action or omission assist in the commission the above-mentioned offense. The acts that lead to the illegal entry, exit and residence of the alien in the country are envisaged as self-standing crimes, without being limited to the rules on complicity under the Greek Penal Code.

#### *4. Conduct(s)*

Pursuant to Article 30, paragraph 1 of Law 4251/2014, Greece punishes the masters or commanders of a ship, a vessel or an airplane, and drivers of all means of transport who transport to Greece third country nationals having no right of entry or for whom such entry is prohibited, as well as those who receive third country nationals from the entry points, the external or internal borders, in order to promote their entry in the country or in the territory of a Member State of the EU or a third country or facilitate their transportation or provide shelter for them.

With regard to the transfer of refugees, just like the case of other persons which are excluded from the provisions of the Law 4251/2014, the actus reus of the offense cannot be established. However, it is not the same for those who have applied for recognition as refugees or persons in need of international protection after their transfer to the country took place. In this latter case, the transfer of persons constitutes the offense of Article 30.

What is of interest at this point is the provision of paragraph 6 of Article 30, as amended by Article 14, paragraph 2 of Law 4332/2015, which provides that sanctions of that Article are not imposed in cases of rescue of people at sea and transportation of people who need international protection

under international law, as well as in cases of promotion within the country or facilitating transportation. The transfer may be carried out by an individual or a police or port authority and the emergency situation is based on the risk of life and physical integrity of persons.

The *actus reus* of the crime of smuggling of paragraph 1 of Article 30 involves four alternative main acts: (i) the act of transferring from abroad to Greece a third-country national who does not have a legitimate right; (ii) the reception for the purpose of promotion from the entry points, the external or internal borders to the country, an EU Member State or a third country; (iii) facilitating transport; and (iv) providing accommodation.

In respect of transport *per se*, only the transfer from abroad to Greece is punished, and not the other way around. It is an instant crime, like the offense of illegal entry, and is completed at the time of removal from the checkpoint.

Regarding reception for the purposes of this Article, the third country national must be picked up at the points of entry at the border, and not from a city within the country for the purpose of transporting it to another. It includes both the transfer to the interior of the country and its crossing abroad. Thus reception at the border that is aimed at crossing the third country national from Greece to an EU country or third country is also included in the *ratione materiae* scope of the provision.

The third way of committing the crime of Article 30 is to facilitate the transportation of the third country national, for which a transportation vehicle is required. The facilitator of the transfer is the perpetrator who provides the means of transport to the third country national to enter he himself illegally in the country. Thus, the *actus reus* of the third

country national's transfer will be realized when the driver of the means of transport is the perpetrator or the facilitator of the transfer when the driver is the alien himself.

The act of providing accommodation is time-related to the act of the carrier and seeks to preserve its effect. The perpetrator undertakes to find the right accommodation, which is not necessarily a residential place, but rather any place where the third country national will remain for a short period of time.

##### *5. Defendant(s)*

Whoever commits the acts under Articles 28 to 30 of Law 4251/2014 is to be characterized as a defendant of the crime of smuggling of migrants, whether he/she acts as an organ of the State or acts as an individual, including those individuals who offer work (Art. 28) or residence (Art. 29) to migrants that have not legally entered in Greece. Those acts that lead to the illegal entry, exit and residence of the alien in the country are envisaged as self-standing crimes and the perpetrator can be prosecuted under the respective provisions too.

Importantly masters or commanders of ships, vessels or aircraft and drivers of any kind of means of transport transporting from abroad third country nationals who are not allowed to enter the Greek territory or who have been denied entry for any reason, as well as those who promote their entry from EU external or internal borders into the Greek Territory and vice versa to the territory of an EU Member State, or a third country or facilitate their transportation or promotion or provide them with accommodation for concealment are considered as perpetrators of the crime of migrant smuggling.

## 6. *Victim(s) of crime.*

The victims of the crime are the migrants that are smuggled into the Greek State, even if, in most cases, they are willing to do so and they pay the smuggler(s) to help them through their journey. However, if the means of transportation (ships, boats, trucks etc) are in bad condition, it can be argued that the smuggled migrants are in danger for their life, health and well-being, a fact that would render them victims of the crime of smuggling.

It can also be accepted that the crime of smuggling of migrants is committed against the Greek State and the European Union.

## 7. *Focus on specific issues.*

### 7.1. *Relation between the two criminal offences (trafficking and smuggling)*

Human trafficking differs from smuggling in two respects: First, trafficking entails coercion and exploitation, whereas smuggling does not. Second, trafficking does not necessarily involve migrants and border crossing. However, what starts as smuggling can develop into trafficking. The reasons behind the individual's departure in both cases are fleeing from violence and/or insecurity and the prospect of finding work. In cases of labour-trafficking, the two even seem to merge, at least up to the point of the migrant's arrival at the agreed destination.

As a result, very often the victims of smuggling qualify as victims of trafficking too. Generally, the applicable laws do not address these cases directly but it falls under the general Part of the Greek Penal Code regarding concurrence with other

crimes (Articles 94-98 of the Greek Penal Code), which were also amended by the Law 4619 / 2019, even though they remain largely the same. Specifically, in Art. 94, the Penal Code distinguishes between “real” and “ideal” concurrence of offences. The former could be defined as the commission of two or more offences which were perpetrated through two or more criminal acts. The latter refers to the situation whereby the offender, by perpetrating a single criminal act, commits two or more offences. Moreover, the Penal Code distinguishes between concurrence of custodial sentences (Art. 94) and concurrence of pecuniary sanctions (Art. 96). The distinction between “real” and “ideal” concurrence of offences applies to both.

On the other hand, as it was mentioned before, Art. 323A para. 3 (c) provides that “The act of the preceding paragraphs [i.e. paras. 1 and 2] shall be punishable by a sentence of imprisonment of up to twenty years and a fine **if it is linked to the illegal entry, stay or exit of the victim from the country**”. As a result, the Greek legal system treats the fact that a victim may be a migrant as an aggravating circumstance to the crime of human trafficking.

Finally, Articles 49 - 56 of the Law 4251 / 2014 refer to the “Entry of nationals from third countries - victims of human trafficking or smuggling in accordance with EU Directive 2004/81.

## *7.2. Does a criminal offence about irregular migration exist?*

As it is already mentioned, Article 83 of Law 3386/2005 third-country nationals exiting or attempting to leave or enter the Greek territory or attempt to enter it without the legal formalities, shall be punished by imprisonment of at least three

months and a pecuniary penalty of not less than one thousand five hundred (1,500) euro. An aggravating case occurs if the person attempting to leave illegally is wanted by the judicial or police authorities, has tax or any other obligations to the State or is a bribe, so the sentence is at least six months imprisonment and the money in at least three thousand (3,000) euros.

However, in cases the migrant is a victim of trafficking and / or smuggling and in accordance with paragraph 8 of Article 323A the public prosecutor may temporarily refrain from prosecution for breaches of the Code of immigration and other offences, if these offences were a direct consequence of the fact that the alleged perpetrator is indeed a victim of trafficking. If the complaint is found to be well founded, the abstention from the criminal prosecution becomes final.

## *8. Judicial decisions*

### *8.1. General Introduction*

Since Greece is a transit country, there are numerous cases in both Criminal and Administrative Courts concerned with the crime of smuggling of migrants. The number of these cases has been significantly increased since the Refugee Crisis of 2015. Unfortunately, due to structural problems that the greek judicial system faces there are even more cases that have to yet find their way to the court.

Most prominent cases are the following: Areios Pagos Cases 524/2018, 980/2017, 1691/2016, Three-member Court of Appeal upon Felonies 2602/2016.



## 8.2. *Conduct(s)*

According to Areios Pagos Case No. 524/2018 in order to assess the *mens rea* of the conduct of the crime of migrant smuggling there is need to take into account whether the perpetrator knew or could have known that the migrants are entering greek territory unlawfully. This decision builds upon previous decisions, including Areios Pagos Cases No. 1691/2016 and 980/2017. It also adds that an aggravating circumstance also occurs when the offender acts in a speculative manner, that is to say, the gain of income from his/her criminal behaviour.

## 8.3. *Defendant(s)*

Most of the relevant case-law concerns masters or commanders of ships, boats and drivers of trucks and cars that are used to transport migrants. Every decision uses the same wording, as it is referred to the relevant legislation: Masters or commanders of ships, vessels or aircraft and drivers of any kind of means of transport transporting from abroad third country nationals who are not allowed to enter the Greek territory or who have been denied entry for any reason, as well as those who promote from the points of entry, external or internal borders, into the Greek Territory and vice versa to the territory of an EU Member State, or a third country or facilitate their transportation or promotion or provide them with accommodation for concealment are considered as perpetrators of the crime of migrant smuggling.

## 8.4. *Victim(s) of crime*

According to Areios Pagos Case No. 980/2017, the means of transportation of smuggled migrants can be

considered as posing a threat to the life, health and well-being of the migrants. Areios Pagos has noted upon that instant that: “the court was satisfied that the defendants committed the act of illegal transfer from abroad to Greece of third-country nationals who are not allowed to enter the Greek territory, which could result in a risk of the migrants lives. The Court bases this judgment on the facts that emerged from the hearing. In particular it turned out that [...] their operation could pose a risk to those on board the inflatable boat, as the boat was sailing in full darkness, and the above vessel was unsuitable for this voyage, as it was traveling in the dark without navigational lights, lifejackets and fire extinguishers, nor telecommunications, and carried a larger number of passengers (i.e. 19 persons), that is designed to safely carry.”

#### *8.5. Most relevant decisions of The European Human Rights Court and of the Court of Justice of EU*

The European Court of Human Rights (ECtHR) has concerned itself with numerous cases regarding trafficking and smuggling. The most relevant ones are the following:

- B.A.C v. Greece, No. 11981/15, 13 October 2016;
- *Ha.A v. Greece*, No. 58387/11, Judgment of 21 April 2016;
- *H.A. v. Greece*, No. 58424/11, Judgment of 21 January 2016;
- *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment of 21 January 2011;
- *Ahmade v. Greece*, No. 50520/09, Judgment of 25 September 2012;
- *Rahimi v. Greece*, No. 8687/08, Judgment of 5 April 2011;

- *Saidoun v. Greece*, No. 40083/07, Judgment of 28 October 2010;
- *R.T. v. Greece*, No. 5124/11, Judgment of 11 February 2016;
- *L.E. v. Greece*, No. 71545/12, Judgment of 21 January 2016.

A critical ECHR decision, which also gained great publicity, was that of *Chowdury and others v. Greece*, No. 21884/15, Judgment of 30 March 2017.

The facts relate to 42 Bangladeshi nationals with undocumented status who worked in a strawberry farm in Manolada in Greece. The employers of the farm promised the workers' wages of 22 euros for seven hours labour and 3 euros for each overtime hour, less 3 euros for food. They worked in plastic greenhouses picking strawberries every day from 7 a.m. till 7 p.m. under the supervision of armed guards. They lived in makeshift tents of cardboard boxes and nylon without running water and toilets. They were warned by their employers that they would only receive their salaries if they kept on working for them.

After striking several times in order to receive their wages a further group of Bangladeshi nationals were recruited to work in the fields. Fearing that the wages of those recruited for the 2012-2013 season would not be paid 100-150 of the workers demanded their salaries from their employers. They were subsequently shot at by an armed guard, who seriously injured several of the workers.

After the hospitalization of many of the workers and a subsequent investigation by the Amaliada prosecutor, the Patras Criminal Court acquitted the four defendants of trafficking in human beings (Article 323A Greek Penal

Code) on the ground that the objective element of the crime had not been established in the case. They convicted one of the guards and one of the employers for grievous bodily harm and unlawful use of firearms, later commuted to a financial sum. The Court noted that the workers were fully aware of the conditions of living and the amount of salary and had freely accepted them. Moreover, during their free time they could move freely in the region and there had been no proof that the workers free consent had been taken away from them, that they had been trapped and their vulnerability exploited. Indeed, the workers had the possibility to negotiate their salaries and their illegal stay in Greece had not been used as a mechanism by which to force the workers to continue working for their employers. The Court's decision was later appealed by the defendants, which is still pending. The applicants in turn requested the Prosecutor of the Court of Cassation to quash the decision of the Criminal Court since said Court had not adequately examined the allegation of human trafficking and that a correct application of the Greek Penal Code requires examining whether third country nationals' vulnerabilities had been capitalised upon in order to exploit them. The Prosecutor denied such a request, indicating that the conditions to appeal had not been met.<sup>1</sup>

Before the ECtHR the applicants argued that they were subjected to forced labour and human trafficking and that Greece has failed to fulfil its positive obligation under Art. 4 of the European Convention on Human Rights to protect

<sup>1</sup> Case summary provided for in <<https://www.asylumlawdatabase.eu/en/content/ecthr-chowdury-and-others-v-greece-application-no-2188415-30-march-2017>>

them against these abuses, to conduct an effective investigation, and to prosecute the perpetrators.

The ECtHR found a violation of Art. 4 of the European Convention on Human Rights and it ruled that Greece failed to protect 42 Bangladeshi victims on a strawberry farm near the town of Manolada. The Court ordered Greece to pay each of the applicants who had participated in the proceedings between €16,360 and €20,360 (\$19,640 and \$24,440).

## 9. Literature

As with trafficking, the crime of smuggling is heavily discussed in relevant literature. However, the authors again concentrate on the factual aspects of the crime, i.e. the way the criminals operate, the implications upon the victims, the migrational routes that are used etc.

Essential bibliography on the crime of smuggling of migrants includes the following:

- Triandafyllidou A. and Maroukis T., *Migrant Smuggling* (Palgrave Macmillan 2012).
- Damanakis M., *New migration from and to Greece* (Cretan University 2014)
- Dimitriadi A., *Transit and immigration to Greece: the case of Afghans, Pakistanis and Bangladeshis* (Nisos 2013)
- Lakka L., *Control of irregular migration and restrictions of International Law* (2011)

- Chatzinikolaou N., *The criminal repression of illegal immigration: dogmatic approach and basic interpretation problems* (Nomiki Vivliothiki 2009)
- Chionatou E., *Greece, Italy, Spain: Mediterranean “gates” of illegal migration* (2011)
- *Legal Regime for alien women-victims of exploitation and illegal smuggling of migrants* (2008)

#### 10. Reform proposal(s)

As is the case with the legislation against trafficking, the relevant anti-smuggling legislation has not been perceived as successful, especially with regards to its implementation by the competent authorities. Below is a listing of reform proposals:

- Increase efforts to identify victims of smuggling among vulnerable populations and refer them to specialized services;
- impose heavier fines upon perpetrators of smuggling.
- provide advanced training to judges, prosecutors, and law enforcement on smuggling investigations and prosecutions;
- establish formal procedures for the national referral mechanism, including formalizing NGO and international organization services into the mechanism;
- train first responders on victim identification and the national referral mechanism;
- employ witness protection provisions already incorporated into law to further encourage victims' participation in investigations and prosecutions;

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- allocate adequate funds towards a compensation fund;
- inform victims of their right to compensation;
- enhance harmonization with relevant EU Law and international rules and standards against smuggling of people.