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The Legacy of Kinsa

Using Proportionality to Limit the Criminalisation of Solidarity

Stefano Zirulia

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On 3 June 2025, the Grand Chamber of the Court of Justice of the European Union (CJEU) delivered a long-awaited judgment in *Kinsa*, holding that a third-country national who enters the EU irregularly with a minor in their actual care does not, by that act alone, facilitate unauthorised entry. The case originated from a preliminary reference by the Tribunal of Bologna, raising fundamental questions about the scope and validity of the EU's so-called Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/GAI), a key instrument in the fight against migrant smuggling, as well as on the interpretation of the implementing Italian legislation.

The *Kinsa* judgment is therefore groundbreaking in two respects. First, it directly confronts the legal foundations of a framework long criticised for fuelling the "criminalisation of solidarity" in Europe. Second, it affirms that criminal law in this domain is not immune from fundamental rights scrutiny.

Background of the case

The *Kinsa* case arose from criminal proceedings before the Tribunal of Bologna against a Congolese asylum seeker who attempted to leave Italy using false documents, accompanied by her daughter and niece, both minors. She was charged with facilitating unauthorised entry under Italian immigration law, which transposes the EU's Facilitators Package.

At the request of the defence, the Tribunal referred questions to the CJEU concerning the compatibility of this legal framework with the principle of proportionality as enshrined in Article 52(1) of the Charter of Fundamental Rights. Echoing concerns raised in legal scholarship (Zirulia, 2022; Zirulia, 2023), the court warned that the absence of humanitarian exemptions could lead to disproportionate restrictions on the rights of those prosecuted and on fundamental rights of migrants themselves.

Between recognition and evasion: the Advocate General's opinion

In his opinion of 7 November 2024, Advocate General (AG) de la Tour acknowledged that the scope of the Facilitators Package extends to conduct such as that of the defendant, including actions of humanitarian nature. He did not, however, derive from this observation any doubt about the legitimacy of the Facilitation Directive itself. Instead, he argued that it falls to national legislators to implement the directive in a way that enables domestic courts to distinguish between financially motivated smuggling and facilitation based on humanitarian need or necessity (§ 114).

The opinion is praiseworthy to the extent that it reflects a long-standing consensus in legal scholarship (Landry, 2016; Mitsilegas, 2019), namely that the Facilitators Package is not limited to targeting migrant smugglers, but also covers acts of solidarity or humanitarian assistance – ostensibly in the name of strengthening border protection.

At the same time, the opinion is disappointing in that it largely sidesteps the proportionality concerns raised by the Tribunal of Bologna (Zirulia, 2024; Grossio, 2025). Rather than addressing Article 52(1) of the Charter, which governs the proportionality of interferences with fundamental rights, the AG reframed the reference in terms of Article 49(3), which concerns the proportionality of penalties. On this basis, he concluded that allowing judges to reduce penalties for humanitarian facilitators would suffice to prevent overcriminalisation.

The line of reasoning, however, overlooks the core of the preliminary reference: not the proportionality of

sanction, but the proportionality of *criminalisation itself*. By failing to engage with this dimension, the opinion arguably misreads the nature of the question – and thereby narrows the scope of its analysis.

The CJEU's judgment

The Court of Justice rephrased the question referred by the Tribunal of Bologna, narrowing its scope to the specific situation of individuals who enter the EU irregularly while exercising actual care over a minor. The broader issue of the criminalisation of solidarity was left aside.

That said, the Court held that criminalising such conduct would disproportionally interfere with the rights to family life and the right of the child, thereby violating the principle of proportionality under Article 52(1) of the Charter. Rather than declaring the Facilitators Package invalid, however, the Court interpreted the Facilitation Directive as excluding such cases from its scope. In doing so, it avoided a direct conflict with EU law while effectively shielding humanitarian conduct from criminal liability.

As for the national legislation implementing the Facilitators Package, the Court stated that Member States are likewise precluded from criminalising conduct of this nature, since doing so would undermine the essence of the rights at stake. Where necessary, domestic courts must disapply national provisions incompatible with the Charter.

Finally, the Court recalled that measures against migrant smuggling must not compromise the right to seek asylum. Excessive criminalisation, it warned, could deter individuals from applying for international protection, thereby jeopardising the effectiveness of Article 18 of the Charter.

Proportionality as a tool against overcriminalisation

One of the first commentators described the *Kinsa* judgment as "a candle in the dark" (Peers, 2025). The metaphor aptly reflects the spirit of the ruling: it is guided by the protection of fundamental rights, yet stops short of fully confronting the criminalisation of solidarity.

However, *Kinsa* may also be read differently. Unlike the AG, who focused on the proportionality of punishment under Article 49(3) of the Charter and concluded that a reduced penalty for humanitarian conduct would suffice, the Court drew on Article 52(1). This provision requires that any limitation of Charter rights be proportionate to the aim pursued and not compromise the essence of the right concerned. In other words, the Court implicitly acknowledged a distinction well established in legal scholarship (Duff, 2021; Poscher, 2021): the proportionality of punishment (retrospective) versus the proportionality of criminalisation itself (prospective). The Charter reflects this dual structure in Article 49(3) and Article 52(1), respectively.

Given that Article 52(1) permits the Court to scrutinise the legitimacy of a criminal law provision in light of all fundamental rights potentially affected, the significance of *Kinsa* extends well beyond the case at hand. This prospective proportionality test could be applied to other rights and thus further narrow the scope of criminalisation.

Consider, for instance, a case involving ship crew members prosecuted for migrant smuggling after disembarking rescued individuals without documents. A domestic court might ask whether such acts fall outside the scope of the Facilitation Directive, viewed through the lens of Article 52(1) in conjunction with the right to life (Article 2) or the right to physical integrity (Article 3). Likewise, criminalising sea rescue operations or assistance to those fleeing persecution could be challenged on the basis of Article 52(1), read together with the right to asylum (Article 18).

Where the Charter rights are sufficiently precise, clear and unconditional – as the Court found in *Kinsa* with respect to the rights to family life and the right of the child – they may produce direct effect. In such cases, national judges could disapply conflicting domestic law which can be done without referring the matter to the CJEU.

Seen in this light, *Kinsa* marks a turning point. It establishes a framework for assessing and limiting both EU and national criminalisation measures. Against the backdrop of restrictive enforcement prac-

tices in recent years, it opens the possibility that the criminalisation of solidarity may itself violate the Charter.

Implications for EU legislation: reforming the Facilitators Package

The *Kinsa* judgment may also serve to keep in check the ongoing reform of the Facilitators Package (Mitsilegas, 2024). The European Commission's proposal for a new directive would require Member States to criminalise the facilitation of irregular entry only when it is carried out for profit or in a way that endangers the lives of migrants. However, the proposal omits any clause explicitly excluding liability for humanitarian assistance. The underlying assumption is that this narrower definition will suffice to prevent overcriminalisation – an assumption that has drawn criticism (UN Special Rapporteur, 2024; Alagna-Sanchez, 2024).

More fundamentally, because the directive would only lay down minimum rules, Member States would remain free to maintain or adopt broader provisions, including those already in force under the current Facilitators Package. Unless the reform introduces a binding humanitarian exemption – as proposed by the LIBE Committee – national laws allowing the prosecution of humanitarian actors could persist.

Regardless of the final outcome of the legislative process, the Charter may again serve as a reference point for interpreting the new directive. Following the logic adopted by the Court in *Kinsa*, Article 52(1) could be invoked to exclude from the scope of criminalisation any conduct that imposes a disproportionate restriction on substantive fundamental rights guaranteed by the Charter.

Towards a rights-conscious criminal policy

By rephrasing the question submitted by the Italian Tribunal, the Court of Justice narrowed the scope of its ruling and ultimately refrained from offering a definitive solution to the broader issue of the criminalisation of solidarity. However, the judgment's legacy may well extend beyond the specific protection of the rights to family life and the right of the child. It introduces an innovative framework for tackling the overcriminalisation of migrant smuggling and has the potential to recalibrate the relationship between criminal law and fundamental rights in EU law.

ABOUT THE AUTHOR

Stefano Zirulia

Stefano Zirulia is an associate professor of criminal law at the University of Milan. His main area of research is in the relationship between criminal law and fundamental rights, with a special focus on immigration criminal law and environmental criminal law.

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