

# MIGRANT SMUGGLING IN FOCUS



Issue 1

## Judicial use of information following the debriefing of migrants at external borders

### 1. Introduction

A survey among the members of the focus group of prosecutors and investigative judges fighting migrant smuggling (the focus group) and discussions during the Eurojust virtual meeting on migrant smuggling (12 November 2020) helped to identify several topics of relevance to practitioners active in this area. On this basis, the European Union Agency for Criminal Justice Cooperation (Eurojust) selected for further analysis the topic of *judicial use of information following debriefing of migrants at external borders*.

Newly arrived migrants at EU borders regularly provide valuable information – on smuggling routes, *modus operandi*, and roles and responsibilities within organised criminal groups – to different national authorities, such as asylum authorities, social workers, police and judicial officers, but also to EU agencies (e.g. the European Border and Coast Guard Agency (Frontex)), non-governmental organisations and other organisations. However, the legal validity and judicial use in criminal proceedings of the information obtained varies significantly across EU Member States, and practitioners are searching for creative yet reliable solutions.

The aim of this booklet is to present an overview of the legal frameworks in the different EU Member States and in countries with which Eurojust has a cooperation agreement. The focus is on the use and legal nature in judicial proceedings of statements obtained from debriefed migrants at EU external borders. Furthermore, this booklet sets out good practices and experiences in the field, with the aim of improving judicial cooperation in the fight against migrant smuggling.

Owing to the low number of cases opened at and/or referred to Eurojust containing information on this topic <sup>(1)</sup>, information was gathered through a strategic topic launched by the Eurojust College and a questionnaire distributed among the focus group members. Complementary information was obtained at the focus group's informal workshop, held on 19 April 2021, when the preliminary findings of this booklet were presented.

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<sup>1</sup> Only Italy, Slovenia and the Serbian liaison prosecutor confirmed having opened a few cases based on this kind of information.

## 2. Specific rules in criminal procedure law and the legal nature of statements

As a preliminary note, it is worth mentioning that several actors may take statements from migrants upon their arrival at external borders. In most countries, when a person is identified as illegally staying in a country, a police record is created along with an administrative report for the national immigration office. Other laws and regulations generally regulate asylum application procedures and related interviews with asylum applicants. In Malta, the armed forces usually conduct interviews with migrants arriving in hotspots.

### (a) Legal nature of statements

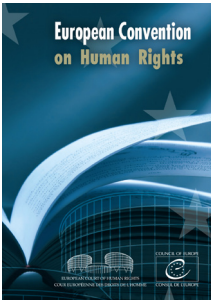
In terms of the legal nature of these statements, a few countries treat them as intelligence and, for others, statements are legally classified as either evidence or intelligence, depending on the circumstances:

- ▶ examples of countries treating statements as intelligence are Lithuania, Malta and Switzerland;
- ▶ examples of countries classifying statements as either evidence or intelligence are Denmark, Finland, Italy, Latvia, Norway, Portugal and Sweden.



Photos © Shutterstock. Clockwise from the top: Migrants risking a perilous journey across the Mediterranean; Frontex officer interviewing a newly arrived migrant; port authorities in Sicily undertaking security checks; tent camp in Lithuania being used to house migrants arriving from Belarus.

## (b) Influence of the European Convention on Human Rights



In most criminal justice systems, testimonies from migrants taken at borders need to be complemented with further evidence. This is consistent with Article 6(3)(d) of the European Convention on Human Rights and its jurisprudence, according to which, before an accused can be convicted, all evidence against them must normally be produced in their presence at a public hearing, with a view to adversarial argument. As a rule, this requires the accused to be given an adequate and proper opportunity to challenge and question a witness against them, either when that witness made the statement or at a later stage in the proceedings.

Settled case-law of the European Court of Human Rights confirms that the value of these statements in forensic practice would be lower than a statement made in the presence of the smuggler's lawyer (i.e. the defendant's lawyer) in the court itself. The European Court of Human Rights, in the case of *Al-Khawaja and Tahera v the United Kingdom*, set out three criteria, namely a three-stage test for assessing objections in the field of Article 6(3)(d) of the European Convention on Human Rights, concerning the absence of a witness in court proceedings (2):

1. whether it was necessary to admit the statements of the absent witnesses;
2. whether untested evidence of the absent witnesses was the sole or decisive basis for the conviction;
3. whether there were sufficient counterbalancing factors, including strong procedural safeguards, to ensure that each trial, judged as a whole, was fair.

## (c) National criminal procedure law

Most countries do not have specific rules to regulate the collection of statements from migrants at external borders (3) and they qualify these statements as **testimonial evidence** (4). Under special circumstances, the Bulgarian Penal Procedure Code

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<sup>2</sup> *Al-Khawaja and Tahery v the United Kingdom, judgment* of 15 December 2011

<sup>3</sup> The standard procedure is applied by the police or by the public prosecution office / investigating judge in Austria, Czechia, Denmark, Estonia, Germany, Greece, Hungary, Latvia, Romania, Serbia, Slovakia, Slovenia, Sweden and Switzerland.

<sup>4</sup> This is true of Austria, Belgium, Bulgaria, Croatia, Czechia, Estonia, France, Greece, Hungary, the Netherlands, Romania, Serbia, Slovakia, Slovenia and Spain.

provides for the interrogation to be carried out by a judge from the court of first instance or the court in the area where the action is taken (5).

The countries with **special criminal procedure rules** are France, Italy, Norway, Portugal and Spain.

The **Spanish** Criminal Procedure Code allows ‘pre-established pre-trial evidence’ (*prueba preconstituida*, Articles 448 and 777(2)) in cases when the witness states that they will be absent for the trial or when the judge considers that there are reasonable grounds to think this will be the case. This is especially applicable in migrant smuggling cases, as the witnesses in such cases (i.e. illegal immigrants who will be repatriated) will be absent from the Spanish territory for the trial. Consequently, the witnesses’ statements are taken in advance and can be read during the trial (Article 730 of the same code).

Following this procedure, in these cases the examining judge (6) orders the migrant’s statement to be taken immediately. To this end, the examining judge summons all the parties involved to a hearing with the migrant (witness), the prosecutor, the judge, the court clerk, the defendant and the defendant’s lawyer. The witness is questioned by the prosecutor and the defendant’s lawyer; the judge may also introduce questions or dismiss those that are manifestly irrelevant, inappropriate or not related to the criminal case. This pre-constituted evidence guarantees the defendant’s right to refute the incriminating evidence as a guarantee of the right of contradiction. The statement is documented in a reproducible medium for sound and images, validated by the court clerk and signed by all those present.

A similar procedural feature exists in **Portugal**, namely ‘statements for future memory’. Depending on the case, illegal immigrants’ statements can be given in their capacity as witnesses or defendants. When they are heard as defendants, their statements are made before the judge and are audio-recorded, and the presence of a prosecutor and a lawyer is mandatory. When they are heard as witnesses, they can be interrogated by a police officer or by a public prosecutor, and their statements are recorded in writing. It is also possible to read or reproduce in court testimony that was given before a prosecutor if it is not possible to ascertain the deponent’s whereabouts.

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<sup>5</sup> According to Article 223 of the Bulgarian Penal Procedure Code, if there is a risk of the witness failing to appear before court owing to serious illness, prolonged absence from the country or other reasons that make impossible their appearance at a court hearing, and when it is necessary to affix the testimony of a witness that is of exceptional importance for the discovery of the objective truth, the interrogation will be carried out by a judge from the court of first instance or the court in the area where the action is taken. In such cases, the file is not presented to the judge. This option is commonly used, as the abovementioned situations are covered in Article 281, ‘Depositions of witnesses given in the same case at the pre-trial proceedings by a judge or by another court panel’.

<sup>6</sup> In Spain, the examining judge is both guarantor of the parties’ rights and investigating judge for the criminal offences committed by adults.



In **France**, the police, the investigating judge and/or the court may hear a migrant who has been in contact with an illegal immigration network as a victim or a witness in the context of an investigation of aiding the illegal entry and residence of foreigners. A similar procedure is applied in Norway (7).

In **Italy**, specific rules govern the procedural role of migrants providing statements. If they are accused of a crime, the statement must be given in the presence of the defence counsel. In this regard, it is worth remembering that, in the Italian legal system, a foreigner illegally entering and staying in the territory of the state is committing a crime (Article 10*bis* of Legislative Decree No 286/1998). Otherwise, the border police, the public prosecutor and the judge may question migrants without a lawyer and without recording the declarations, namely in relation to crimes not committed by them. In such cases, it is sufficient to draft a report reproducing the declarations and have it signed by the migrant. These statements may be used as evidence in trial.

The Italian case-law applies these rules differently when statements are given immediately after disembarkation by migrants who have arrived on Italian territory on board a ship (military or civil) that was engaged in a rescue activity in international waters. According to some Italian courts (Palermo and Catania in particular), these statements can always be used as evidence, as they are assimilated to statements made by witnesses. In these cases, unless the migrant's complicity in the crime committed by the smugglers is proven, the offence of illegal entry into Italian territory cannot be charged against the migrant, as the entry did not depend on the migrant's own will but on the activity of the rescuers. The Italian Court of Cassation has also followed this approach. This interpretation has allowed judges to use the statements of migrants as testimonial evidence and to pass judgments against persons charged with crimes related to illegal immigration.

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<sup>7</sup> If there is information in the migrant's statement that might be of interest to the police investigating human trafficking or migrant smuggling, there are provisions in the Immigration Act regulating the exchange of this information. The exchange of information can take place if the information relates to criminal offences attracting a penalty of at least 6 months' imprisonment, (see Immigration Act, Article 84A, third subsection). The criminal case will be transferred to the responsible police district, where the immigrant will be qualified as a suspect or as a victim.



### 3. Migrants' legal status when giving statements on the spot

From different case examples and discussions among practitioners, it seems that the legal status of migrants giving statements on the spot immediately after disembarkation is not regulated in a uniform way across the EU (and in associated countries).

The main legal qualifications of such migrants are suspect or witness.

- ▶ Countries applying the status of suspect to such migrants: **Denmark** (with the exception of asylum seekers); **Germany**, which usually considers migrants illegally crossing the border to be suspects of a criminal offence (unauthorised entry); and **Latvia**, where the migrant is interrogated under the status of a person against whom criminal proceedings have been initiated.
- ▶ Countries applying the status of witness to such migrants: **Austria**, **Belgium** (if the migrant is a victim of human smuggling in aggravating circumstances, they will have the official status of both witness and victim), **Hungary**, **Malta** (where migrants reaching Maltese territory automatically apply for asylum), **Slovenia** and **Slovakia**.

Recent legislative developments in **Bulgaria** allocate the status of witness to migrants; they were previously considered suspects, under relevant legal provisions in the Bulgarian Penal Code.

In **Spain**, migrants are not charged with illegal entry unless falsified documentation was used, although they are still placed under administrative arrest during their detention in repatriation centres. In addition, the status of 'protected witness' is a possibility in some cases; this is granted, for example, in **Croatia**, if the information migrants provide is valuable for investigations against migrant smugglers (a simple statement with general information is not considered admissible testimony in court).

In many countries, a **mixed concept** is applied to migrants' legal status. This is true in **Albania** where, depending on the case and the statement given, a migrant can be considered a victim of, victim of /witness to or suspect of a crime. **Estonia** applies a similar concept (victim if the migrant was defrauded or forced, witness if the migrant did



not intentionally cross the border, or suspect if the border crossing constituted a crime). **France** and **Portugal** qualify migrants as witnesses, except if they are suspected of a crime (e.g. participation in organised migrant smuggling or the use of falsified documents). **The Netherlands** usually considers migrants witnesses but, depending on the circumstances, the migrant might also be heard as a suspect. **Norway** provides additional rights if migrants are granted victim status, except if they are suspected of a crime. In **Switzerland**, depending on the situation, the migrant might be heard as a witness (in proceedings against others) or as a suspect (if they are thought to have committed a crime).

The legislation of **Czechia** does not consider migrants to be perpetrators (except in aggravating circumstances and depending on the specific situation). In addition, special provisions exist for 'cooperating accused persons' and vulnerable victims. **Finland** applies a mainly administrative approach for border controls and asylum applications (with 'applicant' assigned as migrants' legal status). **Greece** considers migrants to be suspects unless a specific decision by the prosecutor (i.e. not to initiate criminal proceedings) has been taken, in which case they are considered witnesses (repatriation procedures, revoking of the decision and statutes of limitation may apply).

In **Italy**, the categorisation depends on different factors: witness, if the migrant gives a statement about criminal acts committed by others or if the migrant was rescued in international waters; suspect, if the migrant has committed a crime or if they arrived in Italian territory of their own accord. Usually migrants are considered suspects of a connected/linked crime because they arrived illegally in Italian territory.

**Lithuania** employs a third category of 'special witness' (which is defined as there being indications that a criminal offence has been committed, but insufficient evidence to grant the status of suspect). Migrants can be considered suspects, witnesses or special witnesses, depending on the circumstances.

In **Romania** and **Serbia**, depending on the case, migrants are considered either suspects or witnesses. In **Sweden**, migrants have no specific status when they make a statement. Their status will be evaluated depending on the content of the statement. This might lead to the initiation of a case or be regarded as intelligence. If a preliminary investigation is launched, the migrant's legal status can be witness, victim or suspect.

## 4. Relevant jurisprudence from the higher courts

It seems that this legal issue of collecting statements at borders, namely the admissibility of such statements in criminal investigations and their potential basis for a conviction, has not yet been brought to the level of higher courts in many EU Member States and those countries connected to Eurojust via cooperation agreements. Consequently, only a few respondents reported relevant jurisprudence.

In **Belgium** and **France**, courts recognise identified migrants as victims of migrant smuggling in accordance with standard procedure.

In **Spain**, in particular Gran Canaria, courts have provided migrants with the status of ‘protected witnesses’ for being potential targets of migrant smuggling by organised criminal groups (by means of threats towards the migrants but also their families in the country of origin). Furthermore, courts have repeatedly stressed the importance and legitimacy of constant statements without contradictions to be considered as incriminating evidence. The Spanish Supreme Court confirmed the legal validity of evidence existing before trial (*prueba preconstituída*) being used in the subsequent trial, as opposed to hearing from the migrant again in person. In this way, the migrant is protected as a victim – when applicable – avoiding their revictimisation. Finally, Spanish courts have issued several rulings on the legal issue of potentially false statements being given by witnesses/migrants with the intention to avoid repatriation and obtain a residence permit. Determining if a statement is false would need to be evaluated on a case-by-case basis but must not, *per se*, affect the credibility of the statement itself.

In **Italy**, the Court of Cassation has ruled on this issue several times and confirmed the principles set out in Section 2(c), whereby migrants who arrive in Italian territory via a ship that had engaged in a rescue activity in international waters are not considered responsible for illegal entry. Consequently, their statements can be used as evidence.

**Romania** has reported several proceedings and judgments in which migrants were initially considered suspects (owing to illegal border crossing), but ultimately were not prosecuted. During the subsequent trial, they could then be heard as witnesses.





In **Slovenia**, judicial authorities do not usually dispute the legality of statements obtained through a standard practice. When the prosecutor requests the interrogation of a suspect brought before the investigating judge, the prosecutor also requests hearing the witnesses – illegal immigrants. The practice makes it possible to obtain a witness statement that may be used in subsequent criminal proceedings, as the suspects are present and may ask questions or make comments.

## 5. Good practices and experiences at national level

- ✓ Create **special prosecution offices** equipped with sufficient resources and experience to prosecute migrant smuggling cases (e.g. Albania).
- ✓ Establish **uniform investigative practices** through special guidelines, for example by taking statements on board a ship before disembarkation (e.g. Italy). Apply a **special action protocol** and take a well-structured approach, consisting of several governmental and non-governmental actors and different phases, to illegal immigrants arriving at borders and coasts (e.g. Norway and Spain (Tenerife)).
- ✓ Institutionalise and improve **cooperation with administrative authorities, non-governmental organisations and international organisations** directly handling migrants after their arrival (e.g. Italy and Norway).
- ✓ Apply a **special procedure at borders** by questioning migrants during passport checks, which might lead to the identification of other suspects/organisers accompanying the migrants (e.g. Sweden).
- ✓ Schedule and conduct **hearings of migrants as early as possible** and before they are moved to asylum centres (e.g. Slovakia).
- ✓ Initiate a **proactive approach to the questioning of migrants**, outside standard police proceedings, by applying a less formal approach, in different settings that would resemble a real interview, by first creating trust between the interviewer and migrant, etc. This might have a positive impact on the quality and quantity of information given by migrants.
- ✓ Make use of **telephone surveillance, technical and police surveillance, and other (covert) investigative techniques**. In particular, valuable information can be obtained from data stored on mobile phones (telephone numbers, messages, pictures, videos, traffic data, GPS coordinates, etc.).
- ✓ Ensure assistance is provided to the migrants. Focus as early as possible on the **distinction between ‘ordinary’ migrants and individuals arriving in Europe to be exploited for labour and/or sexual purposes** (different approaches are required, taking into account each case individually). Focus on the identification of organisers as opposed to victims.

- ✓ Protect migrants against revictimisation (by avoiding requiring them to repeat their statements during the trial phase). Some countries adopted legal provisions that allowed the **reading out of the initial statement** instead, if the statement was given before a judge during the pre-trial phase (e.g. Bulgaria, Denmark, Romania, Serbia and Slovenia). For example, the Spanish Supreme Court has accepted the legality of evidence obtained before trial (*prueba preconstituida*) being used in subsequent trials, instead of hearing the migrant again in person. Allow **hearings of migrants by videoconference** before a court. To safeguard the migrant in this situation, provide a defence lawyer for the migrant in this preliminary phase. Hearings by videoconference or other audiovisual transmission are provided for in all EU Member States by the European Investigation Order in criminal matters (8) and for most of the European countries, parties to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (9) and parties to the United Nations Convention against Transnational Organized Crime (10).
- ✓ **Request the assistance of Eurojust** in, *inter alia*, setting up joint investigation teams between EU and non-EU countries. Owing to the cross-border dimension of such cases and the often dynamic investigations, opting for a joint investigation team renders multinational proceedings at the judicial level advantageous for operational, financial and legal reasons. Eurojust provides substantial support concerning joint investigation teams and provides expertise, particularly in migrant smuggling cases (11).
- ✓ Ensure **close cooperation between Schengen countries and those outside this area**.

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<sup>8</sup> Article 24 of [Directive 2014/41/EU](#) regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014

<sup>9</sup> Article 9 of the [Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters](#) of 8 November 2001. For the ratification status, see the Council of Europe's [chart of signatures and ratifications of Treaty 182](#).

<sup>10</sup> Article 18(18) (mutual legal assistance) and Article 24(2) (protection of witnesses) of UN General Assembly [Resolution 55/25](#) of 15 November 2000. This convention is supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and by the Protocol against the Smuggling of Migrants by Land, Sea and Air, both supplementing the United Nations Convention against Transnational Organized Crime, which allow the use of videoconferencing or other audiovisual transmission in cases of trafficking of human beings and migrant smuggling, respectively (Article 1 of each protocol).

<sup>11</sup> For more information on joint investigation teams, see [Eurojust's website](#).





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