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AUTHORITIES MUST QUASH THE CONVICTION OF THE BRIANÇON 7 AS IT CONTRAVENES THE RIGHTS TO FREEDOM OF EXPRESSION AND PEACEFUL ASSEMBLY

On 13 December 2018, the Criminal Court of Gap convicted Benoit Ducos, Lisa Malapert, Mathieu Burellier, Jean-Luc Jalmain, Bastien Stauffer, Elenonora Laterza and Théo Buckmaster, known as the Briançon 7, accused of “facilitating the irregular entry of foreign nationals” into France. On 22 April that same year, they had participated in a peaceful demonstration, marching from the ski town of Clavière in Italy towards France, crossing the border and reaching the French town of Briançon. They were part of a protest against the group *Génération Identitaire*, an anti-human rights group that, the day before, staged a stunt to block the border and whose presence in the area had sparked fear among refugees, migrants and volunteers defending their rights.

Amnesty International considers that the conviction of the Briançon 7 for facilitation of irregular entry must be quashed, as it contravenes the rights to freedom of expression and peaceful assembly.

BACKGROUND

On 21 April 2018, the anti-migrant group *Génération Identitaire* launched the operation “Defend Europe” in the area near Briançon, in the French department of the Haute-Alpes near the Italian border. Equipped with an aircraft, two helicopters and 100 individuals dressed in blue uniform-like jackets, members of *Génération Identitaire* placed signs and a giant banner in the snowy slope of the mountain pass of l’Echelle, a pass transited by refugees, migrants and asylum-seekers to attempt the crossing into France from Italy. Claiming to defend France against “illegal mass immigration” and usurping border police functions, they blocked the passage of refugees and migrants into France to show that the border could be shut down if there was enough political will by the authorities.

Members of *Génération Identitaire* were convicted in 2019 for the events of April 2018.¹ In March 2021, French authorities banned and dissolved the organization for incitement to discrimination, hatred, and violence.²

The presence of *Génération Identitaire* in Briançon in April 2018 ignited fears in the area. Volunteers rushed to protect the places where refugees and undocumented migrants were being hosted, including the self-organized centre “Le Refuge” in the city of Briançon.

A group of about 200 people, who had gathered that same weekend in Clavière for a conference against the “militarization” of the border, decided to turn their gathering into a spontaneous protest against the actions of *Génération Identitaire*. On 22 April over 100 protesters, including both volunteers and refugees and migrants, marched towards the French border and reached Briançon, undeterred by the presence of border officials who, at any rate, did not stop them.

On 7 July 2018, seven protesters -Benoit Ducos, Lisa Malapert, Mathieu Burellier, Jean-Luc Jalmain, Bastien Stauffer, Eleonora Laterza and Théo Buckmaster-, who became known as the Briançon 7, were formally charged with “facilitation of irregular entry” into France. They were tried in November 2018 and convicted in December 2018. Benoit Ducos, Bastien Stauffer, Eleonora Laterza, Lisa Malapert and Théo Buckmaster were each sentenced to a suspended six-month prison term. Mathieu Burellier and Jean-Luc Jalman were both sentenced to one year of imprisonment, of which eight months were suspended.

¹ In July 2019, the Hautes-Alpes tribunal in Gap handed down a 75,000 EUR fine to the organization and sentenced three of the organizers to six months suspended prison terms and a fine of 2,000 EUR each for their activities during “Operation Defend Europe” which were carried out with the intent to create confusion in the public by performing functions that are to be carried out solely by law enforcement officials (art. 433-13 of the French Criminal Code). See “Opération anti-migrants au col de l’Échelle : prison ferme requise contre des membres de Génération identitaire” <https://www.france24.com/fr/20190712-france-operation-anti-migrants-prison-ferme-requise-contre-membres-generation-identitaire>; and <https://it.euronews.com/2019/08/30/generation-identitaire-condannato-il-gruppo-di-estrema-destra-per-l-iniziativa-sulle-alpi>

² See “France bans far-right anti-migrant group Generation Identity” www.france24.com/en/france/20210303-france-bans-far-right-anti-migrant-group-generation-identity

THE OFFENCE OF “FACILITATION OF IRREGULAR ENTRY” MISUSED TO CRIMINALIZE SOLIDARITY WITH REFUGEES AND MIGRANTS

The Briançon 7 were convicted for “facilitation of irregular entry” into the French territory, an offence whose definition in French law is at odds with international law and lends itself to be misused.

THE OFFENCE OF “FACILITATION OF IRREGULAR ENTRY” IN FRENCH LAW

Article L622 of the Code on foreigners punishes anyone who, directly or indirectly, facilitates or attempts to facilitate the illegal entry, circulation or stay of a foreign national in France. The offence is punished with up to five years of imprisonment and a maximum fine of 30,000 EUR. Individuals are exempted from prosecution if they assist the irregular circulation or stay of a foreign national in the country, as long as there is no direct or indirect compensation and the act of assistance consists in providing legal, linguistic or social advice or support, or any other aid offered for an “exclusively humanitarian purpose”. However, there is no exemption from prosecution for facilitating the irregular entry of a foreign national into French territory.³

Amnesty International considers that French legislation on the facilitation of irregular entry, stay and circulation is not in line with international law and standards.⁴ The organization has also documented how the vague definition and scope of the offence has led to the criminalization of human rights defenders and others showing solidarity with migrants, asylum-seekers and refugees in France.⁵

The offence of facilitation in French legislation departs from the international definition of smuggling in the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air (UN Smuggling Protocol), which requires a financial or material benefit as a constitutive element of the offence.⁶ The law also criminalizes direct and indirect facilitation without defining the behaviours that constitute facilitation, allowing for an expansive interpretation of the offence.

Furthermore, the humanitarian exemption from prosecution does not apply to cases of “facilitation of irregular entry” and it is narrowly defined for cases of “facilitation of irregular stay and circulation”, as it requires individuals to assist for an “exclusively” humanitarian purpose. This provision has allowed for a distinction between actions perceived as purely humanitarian and altruistic, which are exempted from prosecution, and forms of assistance and solidarity perceived as political. In this regard, already in 2018 the French Ombudsperson expressed concern, fearing that the requirement of acting for an “exclusively” humanitarian purpose would lead to the consolidation of an offence based on opinion and beliefs.⁷

Lastly, as the conviction of the Briançon 7 demonstrates, the lack of material gain combined with the criminalization of indirect actions of facilitation can lead to punishing individuals for their political beliefs.

THE CONVICTION OF THE BRIANÇON 7

³ See article L622-1 and article L622-4 of the Code of entry and residence of foreigners and the right to asylum. The law was amended following the ruling issued by the Constitutional Council in France on 6 July 2018. Until then, the law included a humanitarian exemption applicable in cases of facilitation of irregular stay. The Constitutional Council, however, considered that the French principle of fraternité protected the freedom to help others, and required the application of humanitarian exemptions to cases of irregular stay and circulation. Nevertheless, cases of facilitation of irregular entry were excluded. See French Constitutional Council, Ruling n° 2018-717/718 QPC, 6 July 2018 https://www.conseilconstitutionnel.fr/decision/2018/2018717_718QPC.htm

⁴ For an in-depth analysis of facilitation laws in several European countries and the European Union (EU) framework on facilitation, see Amnesty International, *Punishing compassion: solidarity on trial in Fortress Europe*, 3 March 2020, Index: EUR 01/1828/2020. The misuse of facilitation laws to restrict the work of human rights defenders have resulted in violations of states’ obligations under international and refugee law, including the prohibition of the penalization of asylum-seekers’ and refugees for irregular entry or presence on a territory, the right to seek asylum, the principle of non-refoulement, and the right to life

⁵ Amnesty International, *Punishing compassion: solidarity on trial in Fortress Europe*

⁶ Protocol against the Smuggling of Migrants by Land, sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, see https://treaties.un.org/doc/Treaties/2000/11/20001115%2011-21%20AM/Ch_XVIII_12_bp.pdf

⁷ The French Ombudsman warned about the dangers of convicting some individuals, based on their activism and beliefs, while others, for similar actions that didn’t entail any financial gain, could benefit from the humanitarian exemption from prosecution. See Défenseur des droits, *Rapport on the rights of refugees and migrants*, 14 December 2018 https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapport_calais-num-14.12.18_0.pdf

The conviction of the Briançon 7 and the reasoning of the court in applying the offence of facilitation to protesters raise a number of concerns, primarily about the misuse of this offence, broadly defined, to punish the expression of solidarity with asylum-seekers, refugees and migrants.

1. Concerns around indirect facilitation

In the conviction of the Briançon 7, the court deemed that the protest at the border was a means to facilitate the unlawful entry of foreign nationals into France that resulted in the irregular entry of at least one person, Ousmane Conde, a Guinean national.⁸

According to the ruling, “the offence of indirect aid to entry is a punishable act per se, requiring evidence of irregular entry of at least one foreign national, [...] as well as acts qualifying as indirect aid”.⁹ The authorities assumed that foreign nationals had entered France irregularly, relying on the presence in the protest of “individuals of black skin colour” that were wearing winter outfits despite the warm weather.¹⁰ On the basis of this observation of the physical appearance of some protesters, on 23 April, a day after the march, the Prosecutor of Gap ordered a house search in the youth and cultural centre of Briançon “to look for foreigners who could have been present during the protest”.¹¹ Ousman Conde, a Guinean national, was found by the police in the centre and found without a residence permit in France. He told the police that he had reached France from Italy in the context of the protest.

Notwithstanding the determination of the irregular status of Ousman Conde, the ruling does not establish a connection between the individual actions of the Briançon 7 and Ousman Conde’s alleged irregular crossing into France. Since the offence of facilitation allows for the punishment of “indirect aid to irregular entry”, the court deemed there was no need to establish that the individuals helped Ousman Conde directly.¹² Regardless of any intent from the Briançon 7 or direct connection with the Guinean national, the protest resulted in the irregular entry of a foreign national which, in the view of the court, constitutes the offence of “indirect facilitation” in French law.

One of the accused, Benoit Ducos, expressly denied any intent or plan to facilitate the irregular entry of people, and stressed that the demonstration had been spontaneous: “the protesters did not plan that they would go up to Briançon, they thought they would be stopped before”.¹³ According to Benoit, “refugees wanted to participate in the march with us. They were protesters among protesters. They were there to defend their fundamental rights”.¹⁴ Indeed, Amnesty International has documented numerous instances of police violence at the borders and in settlements and camps, and barriers to access asylum in France – a context which can well explain migrants and refugees’ desire to protest for the respect of their human rights.

2. The relevance of political and ideological beliefs in the criminalization of the Briançon 7

The ruling, while acknowledging that “activists (*militants* in French) wanted to help foreign nationals”, considered that the protesters’ “hostile chants” directed against law enforcement officials (“everyone hates the police”) indicated the will of the Briançon 7 to facilitate the crossing of foreign nationals.¹⁵ The slogans and chants, as well as communication on a Facebook page, led the court to conclude that the protesters did not only want to respond to *Generation Identitaire*’s actions, but also demonstrate that the border could be crossed irregularly.¹⁶

Different authorities confirmed this view to Amnesty International. The President of Gap Tribunal stated that “the protest served as a mean to allow the entry of people in an irregular situation, [...] the case is political”.¹⁷ The Prosecutor of Gap

⁸ Ruling, Tribunal correctionnel de Gap, 13 December 2018

⁹ Ruling, Tribunal correctionnel de Gap, 13 December 2018

¹⁰ Ruling, Tribunal correctionnel de Gap, 13 December 2018

¹¹ Ruling, Tribunal correctionnel de Gap, 13 December 2018

¹² This view was expressed by the President of the Gap Tribunal in an interview with Amnesty International.

¹³ Interview with Benoit Ducos, 1 April 2019

¹⁴ Le Dauphiné Libéré, Montgenèvre/Briançon : “Après la manifestation de dimanche, en réaction à l’action de Génération Identitaire”, 27 April 2018

¹⁵ Ruling, Tribunal correctionnel de Gap, 13 December 2018

¹⁶ Ruling, Tribunal correctionnel de Gap, 13 December 2018

¹⁷ Interview with the President of the Tribunal of Gap, 5 April 2019

drew a distinction between “mafia smugglers and ‘activist smugglers’”,¹⁸ saying that “[the demonstrators] cannot provide assistance by going against the law. I cannot accept arguments that people are prosecuted for solidarity. To offer help is something different. Here there was no financial gain but an ‘activist’ [type of] gain.”¹⁹

Amnesty International considers that it is the lack of material gain or benefit as a constitutive element of the offence of “facilitation of irregular entry” that allows French authorities to draw an arbitrary distinction between what they regard as “real” humanitarian assistance, and expressions of solidarity and protest which they regard as ideological or political, and as such deserving of prosecution. Moreover, the authorities’ assessment that chanting songs against the police deems the acts of solidarity political in a way that loses its humanitarian purpose is irrelevant, as such expressions are protected under the right to freedom of expression, even if authorities may find them to be deeply offensive. Therefore, the chants against the police should not be used as an indication or evidence of intent to commit a criminal offence.

RECENT JUDICIAL DECISIONS AND JURISPRUDENCE

Recent judicial decisions have shed light on the interpretation of the offence of facilitation, including the scope of the humanitarian exemption and the material evidence required to prosecute under this offence. In February 2020, the Court of Cassation set jurisprudence clarifying that “the situation of distress of migrants is not an element of article L622 of the Code of foreigners.”²⁰ It also interpreted the humanitarian exemption affirming that the exemption foreseen in the law is not limited to individual actions nor does it exclude spontaneous and *militant* actions carried out in the context of an association’s activities.²¹

Court of Appeal decisions issued after the ruling of the Briançon 7 have acquitted individuals accused of “facilitation of irregular entry” and have challenged the grounds for prosecution and the evidence relied upon by lower courts. On 13 May 2020, Cédric Herrou, a farmer of the valley of Roya, was acquitted by the Court of Appeal of Lyon of charges of “facilitation of irregular entry and circulation”. The court concluded there was a lack of factual evidence of punishable conduct and there was no evidence either of Cédric Herrou’s intent to facilitate irregular entry. It noted that no police records or testimonies were filed proving that Cédric Herrou directly or indirectly aided the irregular crossing of the border.²² In its ruling, the court also referred to the Constitutional Council decision on the principle of *fraternité* to acquit Cédric Herrou.²³ The acquittal was confirmed by the Court of Cassation.²⁴

The standards set by the courts in the case of Cédric Herrou similarly apply to the case of the Briançon 7 since there is no direct link between the seven protesters with Ousman Conde. Their participation in a cross-border protest cannot constitute a factual basis nor prove any intent of aiding a person to cross the border irregularly. Not only did the Court of Appeal of Lyon challenge the lack of evidence to convict and prosecute Cédric Herrou, but it also affirmed that the “humanitarian purpose” that exempts from prosecution cannot imply the suppression of personal beliefs and freedom of expression.²⁵

Similarly, in the case of Pierre-Alain Mannoni, a university lecturer who helped three exhausted women he found by the road near the Italian border, the Court of Appeal of Lyon acquitted him of the offence of “facilitation of irregular

¹⁸ This same distinction was made as well by the then Minister of Interior, who in April 2018, stated that anti-smuggling laws were applicable to a dangerous category of people who called for the removal of borders in the name of their convictions. See Hearing of the Ministry of Interior, Parliament http://www.assembleenationale.fr/dyn/15/dossiers/immigration_maitrisee_droit_asile_effectif?etape=15-AN1

¹⁹ Interview with the President of the Tribunal of Gap, 5 April 2019.

²⁰ Arrêt n°33 du 26 février 2020 (19-81.561) - Cour de cassation - Chambre criminelle. See https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/33_26_44476.html

²¹ Arrêt n°33 du 26 février 2020 (19-81.561) - Cour de cassation - Chambre criminelle. See https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/33_26_44476.html

²² Cour d’Apel de Lyon, 13 May 2020. Document on file with Amnesty International

²³ The principle of *fraternité* was referred by the Court of Appeal of Lyon, despite the decision of the Constitutional Council, which had excluded the application of the humanitarian exemption to the “facilitation of irregular entry”. See foot note 3

²⁴ See “Victoire judiciaire définitive pour le militant Cédric Herrou, après plus de quatre ans de procédures” www.lemonde.fr/societe/article/2021/03/31/le-principe-de-fraternite-trouve-aujourd-hui-sa-pleine-application-Cedric-herrou-symbole-de-l-aide-aux-migrants-relaxe-definitivement_6075158_3224.html

²⁵ The Court of Appeal of Lyon stated “*Le but exclusivement humanitaire prévu a l'article L622-4 du CEDA ne prive pas ses auteurs de la liberté constitutionnelle de penser et exprimer ses opinions.* » In other words, the “exclusive humanitarian purpose” should not be used to curtail the right to freedom of expression.

circulation” in October 2020, arguing that “the fact that Pierre-Alain Mannoni could have acted as an activist did not deprive him of the benefit of the humanitarian exemption of article L622-4”.²⁶

In this sense, recent French jurisprudence appears therefore consistent in protecting individuals, who alone or in association with others, help and express their solidarity with others either for reasons of conscience and belief.

THE CONVICTION OF THE BRIANÇON 7 AS A VIOLATION OF THE RIGHTS TO FREEDOM OF EXPRESSION AND PEACEFUL ASSEMBLY

The conviction of the Briançon 7 for “facilitation of irregular entry” and the sanctions imposed on them constitute an undue restriction on the rights to freedom of expression and peaceful assembly. While some restrictions of these rights can be permissible under international human rights law, they must meet the principles of legality, legitimacy, and necessity and proportionality. Yet, the way in which this offence is prescribed in French law and the way in which it has been implemented by the authorities fails to meet this test.

The rights to freedom of expression and peaceful assembly are human rights enshrined in different treaties ratified by France.²⁷ They can be limited under very narrow circumstances in the interest of national security or public order, among other limited situations, but such restrictions must be necessary and proportionate to such legitimate aim.²⁸ For any restriction to be lawful, states must show “in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat”.²⁹ “Restrictions must be appropriate responses to a pressing social need. They must also be the least intrusive among the measures that might serve the relevant protective function. Moreover, they must be proportionate, which requires a value assessment, weighing the nature and detrimental impact of the interference on the exercise of the right against the resultant benefit to one of the grounds for interfering. If the detriment outweighs the benefit, the restriction is disproportionate and thus not permissible”.³⁰ These assessments must be supported by evidence and should not be speculative.³¹ Law enforcement and judiciary authorities should consider the different elements of a protest on a case-by case basis, including its intent.³²

Assemblies should be presumed lawful and not constituting a threat to public order.³³ According to the Independent Expert on human rights and international solidarity, “the prosecution or intimidation of humanitarians who participate in or support street protests in solidarity with irregular migrants or refugees are prima facie violations of this right”.³⁴ The Independent Expert has further expressed that “criminalization or suppression of protests in solidarity with irregular migrants and refugees is manifestly unjustifiable, even under any of these permissible limitations [national security or public order].”³⁵

²⁶ Arrêt, Court of Appeal of Lyon, 28 May 2020.

²⁷ Articles 19 and 21 ICCPR; Article 10 ECHR

²⁸ Human Rights Committee, *General Comment 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, paras 21-22 and *General comment 37, On the right to freedom of association, Article 21*. UN Commission on Human Rights, CCPR/C/GC/37. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, para. 22, UN Doc. E/CN.4/1985/4

²⁹ Human Rights Committee, *General Comment 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, para. 35

³⁰ Human Rights Committee, *General comment 37, On the right to freedom of association, Article 21*. UN Commission on Human Rights, CCPR/C/GC/37, para. 40

³¹ *Alekseyev v. Russia*, European Court of Human Rights (2010), para. 86

³² Council of Europe MSI-INT, “Report on Freedom of Assembly and Association on the Internet”, 10 December 2015, para. 60

³³ *General comment 37, On the right to freedom of association, Article 21*. UN Commission on Human Rights, CCPR/C/GC/37, para 17. See the Report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, 2013, UN Doc. A/HRC/23/29 para 50. In the cases of solidarity with people on the move, the right to freedom of peaceful assembly has particular relevance to the right to defend human rights. As recognized by the UN Declaration on Human Rights Defenders everyone has the right to, individually and in association with others, participate in peaceful activities against violations of human rights

³⁴ Report of the Independent Expert on human rights and international solidarity, A/HRC/41/44, point 38 p.12, 16 April 2019
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/44

³⁵ Report of the Independent Expert on human rights and international solidarity, A/HRC/41/44, point 38 p.12, 16 April 2019
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/44

Solidarity with refugees and migrants can take many forms, including public expression of opinions and peaceful demonstrations. As stated above, any limitations on these rights need to pursue a legitimate aim and be necessary and proportionate to such aim. However, French authorities have failed to establish specifically what were the concrete risks for public order. The demonstrators in the Briançon march wanted to express their rejection of the xenophobic actions of *Generation Identitaire* which would later trigger the conviction of its leaders in court. Marching towards the border was a symbolic way of expressing their opposition to this anti-human rights group that was directly targeting and threatening the safety and rights of migrants and refugees. However, the irregular crossing by one foreign national enabled the authorities to repress a demonstration in solidarity with refugees and migrants. Charges of “facilitation of irregular entry” were then misused to punish individuals who were peacefully expressing their views without any evidence of their intentions or of any individual and specific connection to the person found to be in an irregular situation. In the absence of evidence presented that shows this link, the convictions of the Briançon 7 constitute an undue interference with the rights to freedom of expression and peaceful assembly.

In light of the above, Amnesty International urges the authorities to ensure that the conviction of the Briançon 7 for “facilitation of irregular entry” into France is quashed to remedy the undue interference with their rights to freedom of expression and assembly. Moreover, France must take immediate action to ensure a safe and enabling environment in which human rights defenders working to protect the rights of migrants and refugees can work without fear of reprisals.