The Undermining of Fair Trial Safeguards in the Trial of Homayoun Sabetara





Border Violence Monitoring Network





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A collaborative Trial Monitoring Report by: Border Violence Monitoring Network (BVMN), European Lawyers for Democracy and Human Rights (ELDH), Feminist Autonomous Centre for Research (FAC), the Legal Centre Lesvos (LCL)

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1. Introduction

This present report examines the trial of Mr. Homayoun Sabetara, an Iranian asylum seeker arrested and tried in Greece on charges of facilitation while attempting to reach Germany to reunite with his children. Following his conviction on 26 September 2022, he was sentenced to 18 years' imprisonment. His sentence was later reduced to 7 years and 4 months on appeal in September 2024, allowing for his release on 17 December 2024, **almost three months after the appeal trial, and over three years after his initial arrest.**

The report reflects the findings of trial monitoring conducted by Border Violence Monitoring Network (BVMN), European Lawyers for Democracy and Human Rights (ELDH), Feminist Autonomous Centre for Research (FAC), the Legal Centre Lesvos (LCL), and other contributors. Observers attended Mr. Sabetara's appeal hearings in April and September 2024, providing a detailed analysis of the proceedings through the lens of national and international legal standards, procedural safeguards, and relevant case law. This trial monitoring forms part of a larger effort to examine the systemic criminalisation of migration and to critically assess how judicial systems apply facilitation charges in these contexts.

Mr. Sabetara's case is emblematic of a broader pattern in Greece, where people on the move are routinely criminalised under a harsh anti-smuggling framework. For every boat or car arriving at Greek borders, one or more individuals are arbitrarily arrested, charged with smuggling, and subjected to disproportionate sentences. These policies fail to account for the complexities inherent in migration, disregarding the fact that people who flee often have no alternatives. In the absence of safe and legal routes, individuals are forced into exploitative and life-threatening situations, compelled to act out of necessity.

The report sheds light on systemic violations of fair trial standards in Greece and highlights the consequences of Europe's deterrence-based border policies. These policies not only criminalise individuals for actions taken under necessity but also perpetuate cycles of injustice that undermine fundamental human rights.

In documenting Mr. Sabetara's trial, the report not only seeks to expose the procedural shortcomings in this specific case but also to contribute to the broader discourse on the criminalisation of migration in Europe.

2. General Information and Background

2.1 The defendant

Mr. Homayoun Sabetara, the defendant in the monitored trial, is an Iranian asylum seeker in Greece who left his home country due to political, economic and personal challenges. A former resident of Tehran, he worked in various professions, including running a computer company, a small vehicle trading company and a partnership with a major petrochemical company. Despite his financial stability, several factors including the loss of his wife, the political conditions in Iran, the effect these conditions had on his financial stability and his need to reunite with his children led him to flee the country.

In addition to these pressures, Mr. Sabetara's health became a critical issue. He suffers from prostate cancer and cardiovascular problems, both requiring ongoing medical care, which was inaccessible within Iran due to political barriers. As he described, healthcare was limited to those with connections to the government, prompting him to seek better medical care abroad.

Mr. Sabetara has two children, both of whom have been living in Germany for several years. His children had left Iran to continue their studies and work. They have both obtained student visas and are studying in Berlin, one has been studying for five years, while the other has been studying fashion design for a year. Both have secured scholarships and are working while studying. The defendant was the sole provider for his children, sending them money from Iran to cover their living and educational expenses.

Mr. Sabetara's ultimate goal was to reach Germany to reunite with his children and seek necessary medical treatment. His children have testified on his behalf, confirming their father's health issues and his role as their financial provider.

On 17 August 2021, Mr. Sabetara was arrested in Thessaloniki for driving a vehicle with seven other passengers and was taken to the respective police station. He was placed in pre-trial detention following his arrest and remained detained from August 2021 to 17 December 2024.

3. The Prosecution of Mr. Sabetara

3.1. The Criminal Acts and Attributed Criminal Charges

The criminal acts ascribed to Mr. Sabetara, as described to the Court of First Instance, are:

Receiving third country citizens who do not have the right to enter the country, from an internal border entry point, in order to forward them within the country, from which a danger to human life may arise and by a perpetrator acting out of speculation, compulsively.

According to the indictment: "in Thessaloniki and in Mouschounti Square, on 17/08/2021 and around 23:30, driving a private car, the defendant was arrested by police officers of the D.A.TH./Y.E.E.D.E./T.P.K.E.¹ to transport seven (7) foreigners, citizens of third countries, who do not have the right to enter Greek territory, who were in the passenger and rear seats as well as in the luggage compartment (trunk), and had illegally entered the country on 08/08/2021 from an undefined point of the Greek–Turkish border of Evros and remained at an indicated point until the evening hours of 17/08/2021, when they were picked up by the above-described vehicle to Thessaloniki".

This act is considered as a criminal offence under Article 30(1) a, b and c of Law 4251/2014, according to which:

"(1) Captains of ships, vessels or aircraft and **drivers** of any kind of means of transport who transport to Greece from abroad citizens of third countries who do not have the right to enter Greek territory or who have been denied entry for any reason, as well as those who pick them up at entry points, external or internal borders, in order to move them to the interior of the country or to the territory of an EU Member State or third country, or facilitate their transport or provide them with accommodation for concealment, shall be punishable:

a) with imprisonment of up to ten (10) years and a fine of ten thousand (10,000) to thirty thousand (30,000) euros for each transported person,

b) to a term of imprisonment of at least ten (10) years and a fine of between thirty thousand (30,000) and sixty thousand (60,000) euros for each person carried, if the offender acts for profit, by profession or habit, or is a follower or has the status of a

¹ Security Department of Thessaloniki/ Research and Public Revenue Protection Service of Thessaloniki

public official or a tourist, shipping or travel agent, or if two or more persons act in concert,

c) with imprisonment of at least fifteen (15) years and a fine of at least two hundred thousand (200,000) euros for each person transported, if the act may result in danger to a person.

3.2. Arrest

Mr. Sabetara was arrested by patrolling officers serving at the department of Crime Prevention and Suppression teams of Thessaloniki on 17 August 2021 around 23:30 in Mouschundi square, in Thessaloniki. The vehicle in which Mr. Sabetara was traveling, was spotted as it was moving in the opposite direction. The car was instructed to stop by the police. The police conducted an inspection of the vehicle, arrested Mr. Sabetara, and accompanied him to the responsible Immigration Department. One of the passengers in the car gave testimony to the police on 18 August 2021.

3.3. First Degree trial

The first-degree trial was heard before the Single-Judge Court of Appeal of Thessaloniki on 26 September 2022. The information presented below is derived from the records and Decision No. 1492/2022, following the hearing held on that date. Mr. Sabetara's defence handed in writing and presented orally before the Court the following arguments in order to request the dismissal of charges:

1. Absence of the components of the subjective and objective existence of Article 30(1) b, c - a of Law 4251/2014: According to the defence, this is a case of "self-transit", where the smuggler provides the means of transport to the foreigner, who then transports themselves across the border. It should be noted that transportation has not only become a crime in its own right, but is also punished far more severely than the crime of irregular entry into Greek territory. The justification for the increased criminal liability of the above act is justified by the intent of the person who commits the act. According to the defence lawyers, Mr. Sabetara's background and his purpose of reaching Germany to reunite with his family, the joint travel of all the passengers in the vehicle toward Thessaloniki, his coerced role as driver under the smugglers' threat, and his willingness to cooperate with authorities upon arrest indicated that Mr. Sabetara did not have the required intent to fulfill the heightened criminal liability under Article 30. The following cases have established indicators demonstrating the driver's intent:

a) the development of breakneck speed (Supreme Court 1006/2004);

b) the rearward movement of the car by the perpetrator with the aim to avoid police control (Supreme Court 2350/2002);

c) cooperation with a driver as an informant in a vehicle moving ahead (SC 2167/2008, SC 1717/2001); and

d) planning of the operation and in particular the organisation of the transport (CP 524/2011 PRAXLUPIA 2011.396).

The defence therefore claimed that because all of the above were absent, the subjective element of the crime in question is not met as the joint travel of all the passengers in the same vehicle to Thessaloniki does not imply commission of the act.

2. Absence of the aggravating circumstance of committing the offence for profit: The defence lawyers claimed that there was no evidence in the case file that shows intention to earn income or to derive any monetary or other material gain by Mr. Sabetra, nor was it described in the indictment. They claimed that it was clear from all the circumstances that Mr. Sabetara was on his way to reach his children in Germany and never thought of earning money. Further, one of the witnesses who was a passenger in the car does not mention anything about paying any money to Mr. Sabetara or having entered into any contract or agreement with him. Therefore, the specific aggravating circumstance of receiving profit is not met. Additionally, evidence indicates that the other passengers in the car agreed to pay someone who had no connection to the defendant after their arrival to Thessaloniki. Furthermore, neither was there any evidence that the defendant was a member of a criminal organisation, nor even that he conspired with any other person for the purpose of receiving a profit for driving the car across the border.

3. Absence of the aggravating circumstance of endangering the life of a person: According to the indictment, "three (3) of these foreigners were riding in the aforementioned car in the luggage compartment, running the risk of suffocation due to insufficient ventilation of the space." As the defence lawyers claimed, Mr Sabetara had no responsibility regarding the transport of these three people, since he was unaware of their presence in the trunk. The element of danger from suffocation is also not fulfilled, since the specific type of car provided adequate air vents, which ensured the entry of sufficient air.

4. Subsidiary argument for evaluation of the acts under Article 29 of Law 4251/2014 and imposition of one single penalty: The subsidiary argument presented by the defence was that Article 30 was irrelevant, and instead Article 29(5) Law 4251/2014 should apply in this case, according to which:

"[w]hoever facilitates the entry into or exit from Greek territory of a citizen of a third country, without undergoing the control provided for Article 5, shall be punished with imprisonment of up to ten (10) years and a fine of at least twenty thousand (20,000) euros. If the above-mentioned person has acted for profit or on a professional or habitual basis, or the crime is committed by two (2) or more persons acting jointly, shall be punishable by a term of imprisonment of at least ten (10) years and a fine of not less than fifty thousand (50,000) euros [...].

According to the defence, because the individuals in the car were apprehended within the interior of the country—not at external borders—and had been travelling within the country for five days, Article 30 should not apply. The application of Article 30 requires that third-country nationals are apprehended at entry points, either external or internal borders, for the purpose of transportation within the country.

3.3.1. Witnesses

Prosecution witness:

1. The first witness, a Sergeant in the Crime Prevention and Suppression Teams of the Thessaloniki Security Directorate, arrested Mr. Sabetara in Mouschounti Square. He testified that he saw the defendant driving the car and described the arrest proceedings and the subsequent transfer to the relevant police unit.

2. The second witness, who was a passenger in the car driven by Mr. Sabetara was not called to testify before the First Instance Court. However, his testimony given on 18/8/2021 during the pre-trial stage was read and considered by the First Instance Court, despite the absence of the witness.

<u>Defence Witness</u>: Mr. Sabetara's daughter Mahtab Sabetara, was born in Tehran in 1994 and now lives in Berlin. She confirmed in her testimony the background details provided by Mr. Sabetara, including the reasons for his flight and the information available to her regarding his journey to Greece. Ms. Sabetara also stated that Mr. Sabetara's sole purpose was to reach Germany and reunite with his children (herself and her sibling).

3.3.2. Objections

<u>Objection regarding absent witness</u>: The defence for Mr. Sabetara argued that the Court should not consider the pre-trial testimony of a witness who was not summoned to testify in Court, as the defendant did not have the opportunity to cross-examine this witness. This individual is the only witness who was arrested in the vehicle Mr. Sabetara was driving. Additionally, the defence presented a subsidiary objection, requesting that this testimony be declared invalid on the grounds that the interpreter's appointment was improper, as he was a police officer not listed in the official catalogue of interpreters (explained further below).

Decision on Objections: The Court rejected both the main and the subsidiary objections of Mr. Sabetara. The objection was rejected on the basis that, according to the new provision of Article 363 Criminal Procedures Code (CPC) (Law 4620/2019), no invalidity is created when the Court, on its own motion or upon request, reads and takes into account the sworn testimony of a witness whose testimony was taken during the pre-trial, if it confirms in its decision that the witness is unable to appear at the trial.

According to this provision, this is particularly true when the witness is deceased, or when it is impossible or particularly difficult to locate them or summon them to attend the hearing, and when their testimony taken at the pre-trial stage is absolutely necessary for the discovery of the truth. According to the Court, the objection to the reading of such a statement is contrary to the provisions of Articles 6 and 18 European Convention on Human Rights (ECHR), because it amounts to obstructing the conduct of a fair and meaningful trial.

In this case, the Court determined that it was impossible to verify the residence status of this allegedly transferred foreign national, as it was unclear whether he remained in Greece or had already been deported.

Regarding the subsidiary objection, although an interpreter who was not listed in the official catalogues of the Court of First Instance of Thessaloniki was unlawfully appointed during the pre-trial stage, the Court held that this did not invalidate the related actions of the pre-trial process. The Court justified this decision by stating that the invalidity was not raised by the defence until after the defendant's referral to trial, and as stipulated by Article 174(2) of the CPC, was therefore addressed under Article 175(2) of the same code. Consequently, as noted by the Court in accepting the prosecution's proposal, the pre-trial

witness testimony report, dated 18 August 2021, was read into the record, and the defense's objection was dismissed as unfounded.

Defendant's testimony: Mr. Sabetara was called to testify and was questioned extensively about the travel and financial arrangements related to his trip to Thessaloniki (and onward to Germany); the payments he made to the smugglers, the circumstances under which he was found driving the car, as well as information about the smugglers and, finally, the passengers in the car.

Decision of the Court of First Instance: After evaluating the defendant's arguments, the Court of First Instance rejected all the defence's claims and found Mr. Sabetara guilty of acting as the driver of a private vehicle to intentionally transport seven third-country nationals from internal entry points. These individuals, defined under Article 20(1) of the Treaty on the Functioning of the European Union as persons without Greek or EU citizenship, lacked the legal right to enter Greek territory. The Court further held that the actions of Mr. Sabetara posed a significant risk of harm to the individuals transported, and that Mr. Sabetara aimed to profit from their "illegal entry".

According to the first instance decision, the attribution of a profit motive is justified by the fact that each of the aforementioned foreigners paid 3,500 euro to the representative of the smuggling operation operative in their respective country of origin/transit. Furthermore, the Court found there was a high likelihood of causing harm because three of the transported foreigners were riding in the trunk of the car, running the risk of suffocation due to insufficient ventilation of the area.

On this basis, Mr. Sabetara was sentenced to 18 years of imprisonment.

3.4. Appeal Trial

The Appeal Trial was heard by the Three-Member Felony Court of Appeal of Thessaloniki. According to Article 111(7) of the CPC, the Three-Member Court of Appeals shall hear "[a]ppeals against the decisions of the single-judge court of appeal and the three-judge court of appeal."

According to Article 110 b-c of the CPC (Law 4620/2019), the aforementioned Court's jurisdiction includes:

"b) The trial of the restrictedly listed felonies of aggravated theft (Article 374 Criminal Code (CC), robbery (Article 380 CC), **illegal immigration (Law 4251/2014)**, the Drug Law (Law 4139/2013), b. to e. 1 and 3 of Article 268 of Law 86/1969 'Forest Code' (A' 7), and (1) of Article 71 of Decree No. 998/1979 'On forest protection' (A 289), unless the law threatens them with life imprisonment, in which case they shall be subject to the jurisdiction of the Three-member Court of Appeal.

c) The hearing of cases of merging of sentences with the determination of a total sentence in the cases provided for in Article 551.

Regarding territorial jurisdiction, Article 122 of the CPC provides that:

"(1) Local jurisdiction shall be determined by the place where the crime was committed or where the accused resides or temporarily resides when the criminal prosecution is commenced.[...]"

Pursuant to the above, the Three-Member Felony Court of Appeal of Thessaloniki was the competent court to hear the case against Mr. Sabetara, as it is the competent Court to adjudicate on appeals filed against decisions issued by the Felony Court of Appeal of Thessaloniki. It is also the competent regional Court to hear the case as the arrest of Mr. Sabetara took place in Thessaloniki area.

3.4.1. April 2024

3.4.1.1. 22 April 2024

The Appeal Court hearing was scheduled for 22 April 2024. In Greece, each Court lists the number of cases that will be potentially heard during a day. Outside the Courtroom, catalogues with a total list of 25 cases are posted. The Court proceeds in this order until closure (15:00). Greek courts usually prioritise hearings where defendants are imprisoned to ensure timely execution of justice. However, Mr. Sabetara's case was listed as number 22 out of 25 and was therefore not prioritised. Being one of the last cases to be heard, it was predictable that Mr. Sabetara's case would not be examined in a timely manner on 22 April 2024 and would potentially be heard the next day. The hearing was indeed postponed for the following day, 23 April 2024, on which it was heard and decided.

Interpretation: On 22 April 2024, the Interpreter who was appointed by the Court according to Article 233 of the CPC was absent and was therefore unavailable to conduct interpretation and facilitate the communication between Mr. Sabetara and his lawyers.

3.4.1.2. 23 April 2024

Prosecution Witnesses

On 23 April 2024, the hearing began with the testimony of one of the two prosecution witnesses on which the first instance conviction was based.

The first witness was the **Police Officer** who arrested Mr. Sabetara; with his testimony, he repeated and verified the information he had given in the previous stages of the trial. When asked, he added that Mr. Sabetara showed willingness to cooperate with the authorities who performed the vehicle inspection; without showing any resistance, and when instructed to do so, Mr. Sabetara followed them to the police station.

The second witness was the **passenger in the car** who had given a pre-trial testimony on 18 August 2021, confirming that Mr. Sabetara was the driver of the car; testimony which largely defined the First Degree conviction with a profit motive. However, this witness was absent in the Appeal Trial (as he had been during the First Degree trial).

Objections

1. Objection against taking into account the pre-trial witness testimony, from a witness who was not called to testify before the Court.

Mr. Sabetara's defence raised an objection regarding the use of the testimony of an absent witness by the Court of First Instance, on the basis of which the Court partly formed its legal opinion and convicted Mr. Sabetara. The witness was never examined by the defence, despite being the only witness who was arrested in the vehicle Mr. Sabetara was driving.

According to the provision of Article 365 of the CPC, if the accused submits a request to summon and examine the absent witness, the court cannot reject the request, even if it considers that summoning the witness is difficult but not impossible. It has been held (SC 1286/1999) that it is particularly difficult but not impossible to summon a witness when he resides in a very distant State even if there is no confirmed address of residence.

The defence claimed that according to Article 213(1) of the CPC:

"In pre-trial and in the hearing, witnesses shall be summoned in writing on a certain

day and at a certain time. [...]. The summons shall be served on the witness in accordance with Articles 155-162 [...] ".

According to Article 157 of the CPC:

"[i]f the person to be served is absent from their place of residence and their residence is reportedly unknown or place of residence or domicile is unknown from the outset, the person making the service shall search the phone directory, business directories, the data of the same judicial or tax authority, which is obliged to disclose them, the family and professional environment of the addressee of the service, in order to establish his residence. If the residence remains unknown as a result of this investigation, the document is served on the spouse or, if there is no spouse, on one of the parents, children or brothers."

According to Article 157(2) of the CPC:

"[i]f none of the above relatives can be found at the place of residence of the addressee of the service, it shall be served on the clerk of the prosecutor's office of the district court in whose district the interrogation or preliminary inquiry or preliminary examination is being or has been conducted."

Therefore, a combined reading of Articles 213 and 157 of the CPC shows that, in order to determine whether the summoning of a witness is not possible and in order to proceed with permitting the reading of the testimony given during the pre-trial proceedings before the Court, it is necessary, if the witness cannot be found at their last known address or domicile, to attempt to locate them through their relatives, as referred to inArticle 157(1) of the CPC. If no such relatives are found, the summons must be served on the registrar.

In Mr. Sabetara's case, the witness provided testimony at the pre-trial stage, stating that they lacked permanent accommodation. However, as the defence claimed, the Public Prosecutor's Office never attempted to locate the witness in any of the ways prescribed in Article 157 of the CPC, yet his pre- trial statement was still deemed admissible. **The use of this statement in forming a conviction violates fundamental procedural principles, including those of promptness and orality, as well as the principle of trial publicity (Article 329 CPC). Furthermore, the infringement of the defendant's right to directly question witnesses before the Court constitutes a violation of their right to cross-examine witnesses.**

2. Subsidiary claim regarding the invalidity of the oath of the interpreter and non-inclusion in the interpreter catalogues

The defence lawyers of Mr. Sabetara invoked Article 236 of the CPC, regarding the oath given by the interpreter and his identity as a police officer, both of which affect the validity of the contested testimony. The status of the interpreter as a police officer - a colleague of the arresting officers - inevitably gives rise to many doubts as to his reliability and objectivity, according to the defence of Mr. Sabetara.

According to Article 236 of the CPC, before taking up his duties, the interpreter must swear before the person who appointed them in accordance with Article 219 that they will "translate accurately and faithfully all that is said during the hearing or, in the case referred to in Article 238, the documents, in full confidentiality as to what the accused has entrusted to them."

Article 219(1) of the CPC also states that:

"[e]very witness shall, before being examined in court, take the following oath: 'I declare, on my honour and conscience, that I will tell the whole truth and nothing but the truth, without adding or withholding anything."

The above oath is a solemn one; therefore, no alteration or change in the form or content of the oath is permitted. Otherwise it will be considered as if the oath had not been taken. Failure to take such an oath entails the relative invalidity of the testimony. If this invalidity is raised in due time, the procedure must be repeated if deemed necessary. In this particular case, the interpreter-police officer who served at the Police Station, on the one hand, swore invalidly with the religious oath and not on his honour and conscience, as required by law, as is evident from the "Report of the sworn examination with an interpreter".

With regards to interpretation, according to Article 233(2) of the Code of Civil Procedure:

"at any stage of criminal proceedings, when a suspect, accused person or witness who does not speak or does not understand Greek adequately is to be examined, they shall be provided with interpretation without delay. Where necessary, interpretation shall be provided for communication between the accused and their counsel at all stages of the criminal proceedings. The interpreter shall be appointed from a list drawn up by the Chamber of Public Prosecutors. In cases of extreme urgency, and where it is not possible to appoint an interpreter from among those on the list, a person not on the list may be appointed as an interpreter. In any event, the court may also appoint an interpreter chosen by the accused person from outside the list."

According to the defence, the invalidity in the translation selection can be invoked in the Appeal Court, due to the important effect it has in the formation of the final decision. Secondly, nowhere does it appear that the interpreter in question is registered on the relevant list of interpreters kept at the Court of First Instance of Thessaloniki.

For these reasons, the defence's objection concluded that the interpreter's appointment suffers from nullity, which renders the use of the evidence in question unlawful. The prosecutor recommended the rejection of this objection. According to him, invalidities which occurred during the pre-trial stage cannot be projected in the main hearings before the Court. The prosecutor further argued that such unraised procedural invalidities cannot affect the proceedings and cannot be presented at a later stage.

3. Defence's objection that the defendant meets the criteria of an asylum seeker and cannot be charged with the criminal offence

The defence argued that the basis of the accusation against Mr. Sabetara is invalid, by claiming that he is exempted from the commission of the act in question, since he meets the criteria of an asylum seeker. According to Article 2(1) Law 4251/2014 (Article 3 of the new Law 5038/2023 (Migration Code)):

"1) The provisions of this Code shall not apply to the following categories of persons, unless otherwise specified in individual provisions: [...] c) To beneficiaries of international protection, as well as to applicants for international protection within the meaning of the 1951 Geneva Convention and in accordance with national law."

The defence presented the documents of Mr. Sabetara's registration of an asylum claim to demonstrate that Mr. Sabetara should not be prosecuted under this provision of the law.

Decision: Following the Court's recess, the judges decided to postpone the trial to 24 September 2024 and proceeded to try locating the second witness, as Article 349 CPC allows. The defence argued that due to Mr. Sabetara's good behaviour in prison and due to

his health conditions, including medical issues that cannot be treated while inside the Greek prison system, he should be released while awaiting the appeal trial. Mr. Sabetara himself declared that if released, he would stay in Thessaloniki and abide by the terms of his conditional release. The Court, however, decided not to allow the conditional release of Mr. Sabetara while awaiting trial.

The decision upon the objections presented by the defence was set to be ruled upon in the next hearing in September 2024, after the decision upon the testimony of the absent witness is issued.

3.4.2. Appeal Trial

3.4.2.1. 24 September 2024

At the rescheduled Appeal Court hearing on 24 September 2024, Mr. Sabetara's case was again listed as number 22 out of 25 cases scheduled, despite the usual practice mentioned above. Given the Court closure at 15:00, the case was introduced for a hearing quite late during the day, but within the designated timeframe of the Court's operation.

Interpretation: On 24 September 2024, the interpreter who was appointed by the Court, according to Article 233 of the CPC, was absent and was therefore unavailable to conduct interpretation and facilitate communication between Mr. Sabetara, his lawyers, the prosecution, and the judges. Hence, Mr. Sabetara's defence requested the admission of an interpreter selected by the defence under Article 233(2) CPC, according to which:

" [i]n cases of extreme urgency and where it is not possible to appoint an interpreter from among those on the list, a person not on the list may be appointed as interpreter. In any case, the court may also appoint an interpreter chosen by the accused from outside the list."

Decision: The Court rejected the argument of the defence that the case constitutes an extreme emergency where a defence–appointed interpreter can be admitted by the Court and therefore postponed the hearing for the next day.

3.4.2.2. 25 September 2024

Arguments and Objections

The defence handed in writing and presented orally before the Court the following claims and objections:

1. <u>Absence of Subjective and Objective Elements Under Article 30(1). b, c, and a' of Law</u> <u>4251/2014</u>: The defence argued that the elements required under Article 30(1) of Law 4251/2014 are not met in the defendant's case. They asserted that this case clearly constitutes self-transportation, where the means of transport are provided for the foreigner's own use, rather than constituting "facilitation" as defined by the law. Mr. Sabetara stated that his primary aim was to reach Berlin, where his children reside. He further claimed that while travelling towards Greek territory with passengers in the car, he was compelled to drive under threat from the smuggler.

2. Permissible change of the category to that of Article 29(6) of Law 4251/2014: Under Article 30(1) of Law 4251/2014 it is a crime to transport/facilitate the entry of third country nationals into Greece. However, this requirement is not met in Mr. Sabetara's case, as proven by the testimony of the other car passenger, which indicates that the car passengers had been within Greek territory for a period of five days prior to Mr Sabetara's arrest.

According to the police report (dated 18 August 2021), the following information arises:

1) The car was stopped and checked randomly;

2) The arrest was made at the centre of Thessaloniki and not in a remote location close to the border;

3) When the police conducted the arrest Mr. Sabetara had already stopped driving. This behaviour was not consistent with being a professional driver.

4) In terms of age, he was the oldest of the passengers;

5) The entry into Greek territory took place on 13 August 2021. This means that when the arrest took place on 18 August 2021, the passengers' purpose was to establish their residence.

6) Despite the fact that there was an interpreter to take the statement from the other passenger, who speaks the same language with the defendant, it was noted that no pre-trial statement was taken from Mr. Sabetara due to the purported lack of an interpreter.

Therefore, the defence argued that Article 29(6) rather than Article 30 of Law 4251/2014 is applicable in the present case, since the act in question is not related to the transport or

facilitation of individuals into Greece; rather, if any criminal act could be attributed to the defendant, it would be the facilitated *stay* of individuals who had already entered Greek territory, *after* their transport across the border had been already facilitated.

3. Lack of the aggravating circumstance of facilitating for a profit: In arguing that the aggravating circumstance of facilitating the transfer of foreign nationals for profit was not proven, the defence referred to Supreme Court case law (SC 570/2018), which found the decision of the Appeal Court unjustified when it failed to include facts establishing the existence of a profit motive. As mentioned above (see Section 3.3) in order to establish the existence of this aggravating circumstance, there must be evidence that there was at least an intention to receive a profit. The defence argued that the facts and evidence of the case do not, in any instance, indicate that Mr. Sabetara committed the act for profit, nor that he received any specific material benefit. As such, the aggravating circumstance cannot be applied.

4. Lack of the aggravating circumstance of serious likelihood of causing harm or endangering the life of a person: According to Article 30(1). c, under which the defendant was convicted and the reasoning of the decision, the aggravating circumstance of a serious likelihood of causing harm was deemed to exist because three people were found in the luggage compartment of the car. The reasoning cited that the compartment was not suitable for transporting people due to insufficient air ventilation.

The defence, however, presented settled case law from the Supreme Court (SC 5867/2006), which clarifies that this aggravating circumstance is primarily foreseen for cases involving vessels that depart without authorisation from the port authority or without proper rescue means. The defence argued that the concept of "risk of causing harm" requires an assessment based not only on the specific incidents constituting the criminal conduct, but also on the likelihood that such incidents could reasonably lead to harm.

Risk, as required by law, refers to conduct that is inherently dangerous, but it must also be shown that, in the specific case, this conduct created an actual danger. For the aggravating circumstance to apply, there must be a causal link between the mode of transport and the alleged harm. If harm arises from unrelated factors, such as driver negligence, it does not fulfill the requirement of risk linked to the transport mode.

In this case, the defence argued that no causal link was demonstrated between the mode of transport and any risk to life. The harm cited by the prosecution was not shown to be related to the manner of transport, and no evidence established that the mode of transport resulted in any actual danger to the individuals involved.

Furthermore, the defence referred to additional case law (SC 878/2033) emphasising that the aggravating circumstance requires a danger that specifically threatens the life or physical integrity of persons under exceptional circumstances, not the ordinary risks of transportation, such as sharp turns or turbulence. Established jurisprudence (SC 5022/2015) further specifies that a causal link must exist between the transporter's act and the risk to life. For example, a car accident unrelated to the mode of transport would not suffice to establish the aggravating circumstance.

Lastly, the defence argued that intent is required to establish this aggravating circumstance. The perpetrator must know or at least accept that their actions might endanger the life or physical integrity of the persons transported. Based on the above analysis, the defence concluded that the aggravating circumstance of causing serious harm is not met. No evidence demonstrated that the act could cause danger, nor did the transported individuals report any fear or concern for their safety. Furthermore, the type of car used was shown to have adequate air ventilation, eliminating any potential risk.

Finally, the defence argued that because the three persons found in the luggage compartment were placed there without the defendant's knowledge, there could be no intent.

5. <u>Objection regarding the absent witness</u>: On the second day of the appeal proceedings, the Judges addressed the defence's objection from the previous hearing regarding the reliance on pre-trial testimony from a witness who had not been called to testify in court.

The defence argued against the use of said testimony, deeming it essential to verify the Court's attempts to secure the witness's presence. However, despite repeated inquiries and personal visits to the courthouse, the defence lawyers did not receive any information regarding the efforts to locate the missing witness prior to the trial. The reluctance of the Court to share this information until the trial date added to the defence's difficulty in preparing their case.

The obstruction faced by the lawyers in obtaining relevant information from the Court about the whereabouts of the witness highlights a possible lack of transparency in the process, which further compromised their ability to ensure procedural fairness. This issue became a significant point of contention during the trial, as it reflected broader concerns about the Court's commitment to upholding the defendant's rights. The defence argued that the witness no longer lived at the address registered with the police, so Law 4251/2014, which the prosecutor invoked to claim an exhaustive search, does not apply because it refers to *temporary* absence of domicile.

The defence objected to the reading and use of the absent witness's pre-trial testimony, arguing that its admission violated fundamental principles of immediacy, orality, and the adversarial nature of the trial, as well as the principle of publicity enshrined in Article 329 of the CPC, which applies in the case of paper witnesses. However, as the defence claimed, at no stage of the pre-trial or trial at first instance was the defendant granted such an opportunity. The Court had acknowledged this right when it granted the request of the defence and postponed the hearing of the case through Order No. 371/2024, so that the witness could be sought through the competent authorities.

The defence invoked settled case law of the European Court of Human Right (ECtHR), according to which when a statement of a witness constitutes the sole or decisive evidence against the accused, its admission does not automatically lead to a violation of the of Article 6§1, but when a conviction is based solely or exclusively on the testimony of an absent witness, the Court must subject the proceedings to the most thorough scrutiny, otherwise the right to a fair trial is violated. The question that arises is whether there are sufficient counterbalancing factors, including measures that allow for a fair and proper assessment of the credibility of the evidence in question.

In the more recent *Schatschaschwili v. Germany*² judgment, the ECtHR identified that the key element that can act as a countervailing factor is to allow the defence to question the witness at the pre-trial stage. These pre-trial stages constitute an important procedural safeguard that can compensate for the disadvantage faced due to the absence of a witness from the trial.

In particular, the ECtHR developed in *Al-khawala and Tahery v. United Kingdom*³, the three-steps test:⁴ namely, the requirement that there must be a good reason for not attending the trial (first step), the subsequent requirement of whether this evidence was the only or most decisive one for the conviction (second step). Only when the testimony of that witness is admitted, at the end of the trial and after taking into account all the evidence proposed, the Court may assess the importance of the testimony of the absent

² ECtHR, *Schatschaschwili v. Germany*, 15 December 2015, Application no. 9154/10.

³ ECtHR, *Al-khawala and Tahery v. United Kingdom*, 15 December 2011, Applications nos. 26766/05 and 22228/06.

⁴ Further analysed in Chapter 3.3.

witness, and especially when the testimony of the absent witness is the sole decisive basis for the conviction of a defendant. It will then depend on the gravity of the evidence provided by the absent witness and the gravity of the counterbalancing factors (the third step), to ensure that the overall fairness of the evidence is not compromised.

The defence claimed that it is evident that given this analysis, even if the Court allows the introduction of the absent witnesses testimony after conducting a thorough investigation and then finding his absence justified, it will not be able to convict Mr. Sabetara with a profit motive by taking into account this decisive testimony, particularly since no measures for the absence of the witness were taken at earlier stages of the trial.

Request to recognise the application of certain mitigating circumstances for the defendant

After submitting the above claims, the defence requested the Court to recognise the following mitigating circumstances in case of the defendant's conviction:

- Being led into committing the act through honest motives, (Article 84(2).b of the CC): The defendant invoked this mitigating circumstance because he has no previous criminal record and that his sole purpose while committing the act was to join his family in Germany.
- 2. <u>Sincere regret (Article 84(2).d of the CC)</u>
- 3. <u>Good behavior (Article 84(2).e of the CC)</u>: The defendant claimed that his behavior during detention has been exemplary. He has consistently worked and contributed to the operation of the prison and has not received a single disciplinary penalty throughout his imprisonment. The defendant willingly cooperated with the authorities and has had good behavior for an extended period following his arrest and imprisonment.

Subsidiary claim regarding the invalidity of pre-trial witness statement on the grounds of failure to provide an authorised interpreter (Articles 233 and 219 of the CPC)

As provided for in Article 2 of the CPC:

"[i]n cases of extreme urgency and where it is not possible to appoint an interpreter from among those on the list, a person not on the list may be appointed as interpreter."

As in the first instance trial, the defence argued that the 18 August 2021 witness testimony is invalid due to lack of proper interpretation. As mentioned above (see Section 3.4.1.2), the interpreter provided to the witness was not listed in the official register of interpreters at the Court of First Instance of Thessaloniki, and his position as a police officer, especially a colleague of the arresting officers, casts serious doubts on his credibility and objectivity. At no point is it mentioned whether an English interpreter was sought from the relevant list, nor whether any such interpreters were available.

For the appointment of an interpreter outside the list of interpreters to be permissible, the following conditions must cumulatively exist: (a) it is not possible at the time of the trial or the interrogation to appoint an interpreter from the list; and (b) there is extreme urgency. The defence presented case law which showcases that a case of *extreme* urgency (not simply urgency) exists when the postponement of the trial would create an immediate risk of the crime being statute-limited or if the maximum limit of pre-trial detention is reached (SC 371/1999).

As it was ruled by the Supreme Court (SC 242/2006) absolute invalidity was found by the reading of the testimony of a witness who did not know Greek, despite the fact that this testimony was made with the help of an interpreter, because with this testimony the witness simply referred to earlier pre-trial testimonies obtained without an interpreter. The fact that without the existence of any exceptionally—or even *simply* urgent—circumstances and without examining whether it was possible to appoint an English-language interpreter from the list, renders this statement completely invalid, and any use of it before the hearing court also establishes the relevant appellate ground of absolute invalidity under Article 171(1).d of the CPC.

The defence lawyers noted the double standards followed by the Court in certain aspects of the case, one of them being the postponement of the trial on the previous day due to the absence of the Court–appointed interpreter and the refusal to accept the defence–proposed interpreter; whilst, rather, taking into account and largely basing the conviction on a witness statement that has been taken using a police officer as interpreter, in breach of the procedural rules. The defence concluded that the violation of all the provisions of the CPC that led to the reading of the testimony of the witness in question with an interpreter from the police station that carried out the arrest, combined with the absence of that witness from the trial and the inability of Mr. Sabetara to examine him in person, would certainly lead to a finding of a violation of the fairness of the trial by the ECtHR, especially given that this witness was arbitrarily chosen among the seven—of equal evidentiary value—passengers in the car.

Denial of charges: Exemption from the scope of Law 4251/2014 as a beneficiary of international protection

The defence disputed the legitimacy of the charges, arguing that Mr. Sabetara should be exempt from prosecution under the criteria outlined in Greek migration law, specifically Article 2(6) of Law 4251/2014, as he is an asylum seeker. They emphasised that refugee status for asylum seekers is not static and that an asylum interview is required to determine Mr. Sabetara's status.

The defence reiterated its previous position, as argued during the initial appeal hearing in April 2024, that Mr. Sabetara qualifies as an asylum seeker under Greek law and therefore should not be subject to criminal charges. Article 30(1) of the law describes the subject of the offence as the captain of a ship, floating vessel, airplane, or driver of any kind of transport. However, the defence asserted that it is legally untenable to consider one of the transported individuals as the subject of the offence, when they only assist in their own unauthorised entry with the sole purpose of applying for international protection, due to the absence of legal and safe routes. Furthermore, the asylum case cannot advance until the criminal case is resolved.

The defence highlighted that Law 4251/2014 when interpreted in the light of Article 31 of the Geneva Convention, exempts refugees and asylum seekers from prosecution. This exemption is reiterated in the recently revised Immigration Code under Law 5038/2023 (Article 3(3)(2).e-f), which preserves the clear exemption of refugees and asylum seekers from such criminal liability.

The defence further referred to established case law recognising this exemption. They also argued that since the so-called migration/refugee "crisis" in 2015, the passing of Law 4251/2014 and the EU-Turkey deal in 2016, smuggling networks have adopted new tactics due to the large number of people crossing the border into Greece and in order to evade harsh penalties for themselves. These include not accompanying transported people in

their journey, but forcing one of the transported people to take over driving, or abandoning them in the middle of the route, so that one of them would out of necessity take over the handling of the transport in order to avoid the perils of the journey. This tactic has resulted in thousands of refugees being imprisoned under smuggling charges — a fact well known to Greek authorities and legislators. The defence contended that the legislator's explicit wording in both Law 4251/2014 and its updated version, Law 5038/2023, underscores a deliberate intent to exempt asylum seekers from criminal liability. This approach aligns with international legal standards and the Geneva Convention, which prohibits penalising asylum seekers for actions aimed to seek protection.

People who are transporting themselves in order to seek asylum in Greece must therefore be excluded from prosecution for the crime of transportation, as the subjective element required for this offence is not established. This interpretation has recently been affirmed by the Single Judge Aegean Court of Appeal in its 51/2022 Decision.

The defence emphasised that the recognition of refugee status is declaratory, not constitutive in nature, meaning that individuals fall within the scope of the Geneva Convention from the moment they meet its criteria, including at the time of their entry or facilitation thereof, regardless of when their status is officially recognised by the state they are entering. Therefore, the defence argued, this is not a matter of retroactively reversing the criminal nature of the act but rather an assessment that, at the time the act was committed, the legal conditions for the application of the law were not met.

In the present case, as evidenced by the facts and the records of the first-instance decision, Mr. Sabetara declared that he is an asylum seeker and one of the transported individuals. He fled Iran because his life was in danger, and leaving the country was his only option. Due to the absence of legal and safe routes, he was forced to seek unauthorised entry into Greek territory solely for his safety and protection. He explicitly stated that he had no intent to transport the other passengers in the car and was solely focused on securing his own entry.

As the defence concluded, Mr. Sabetara's status as an Iranian refugee and asylum seeker precludes him from being prosecuted for the crime of which he was accused. Instead, his actions must be assessed within the framework of international protection standards, thereby exempting him from liability under Law 4251/2014.

The Prosecutor's Opinion: The Prosecutor contested the argument of the defence with regard to use of a non-registered interpreter in taking the witness' statement, and

explained that in exceptional circumstances, another non-registered interpreter can be used. In fact, according to the prosecutor this constitutes a common practice followed in interrogation procedures in police stations and Courts. Therefore, the prosecution argued that the witness' testimony should be read, as the defence's claim about the illegality of the testimony is invalid. The Prosecutor concluded that since the search for the witness was exhaustive and the witness was not found in his home, the statement should be read and taken into consideration by the Court.

Decision of the Court on reading the absent witness testimony:

When postponing the appeal trial, the Court had followed the request of the defence according to Article 365 CPC, to summon and examine the absent witness since doing so was not deemed impossible. The Court explained the procedure of their search for an address, naming the places where the search was conducted and the fact that the respective authority hung the call for the witness on the door of the house address that was found by the Court. Yet, since the witness was not living in this address, he did not respond to this call, despite all the means of search having been exhausted by the searching authorities, according to the law (Article 155 CPC). After listening to the Prosecutor's observations, the Court decided to proceed with the reading of the absent witness statement.

The read witness' statement: The witness stated in his testimony that had been taken 18 August 2021, that he was uncertain if he could recognise Mr. Sabetara's face, and said he hadn't seen Mr. Sabetara before. The witness confirmed that he was a passenger in the car trunk, having paid 2.500 or 3.500 euros for the transport.

Prosecution Witnesses

Police Officer: The police officer who had arrested Mr. Sabetara and was present in the previous hearings, was called to testify again. He confirmed the presence of 5 people in the cabin of the car including the driver, Mr. Sabetara, in addition to 3 people in the trunk, i.e. a total of 8 occupants. He testified that two cell phones were found with the driver. As the police officer stated, everyone in the car collaborated with the police and nobody tried to flee the search. On being questioned by the defence as to whether the driver seemed to be performing a professional task, the witness replied "no," since there were neither radiofrequence communications, nor arms or weapons found in the car.

Defence Witness:

Mahtab Sabetara: Mahtab Sabetara, daughter of the defendant Mr. Sabetara, was called to the stand to testify regarding her father's background, financial situation, decision to leave Iran and trip to Greece. In response to the judge's questions about the family's financial history in Iran, Ms. Sabetara testified that her father previously enjoyed financial stability, which, however, was also affected over time due to increasing pressures and political issues, which ultimately influenced his decision to leave the country. She further clarified that Mr. Sabetara's decision to travel through Greece was motivated by his desire to seek asylum and reunite with his children in Germany, who had already relocated there for their studies.

When asked about the circumstances of her and her sibling's move to Germany, Ms. Sabetara explained that both had received student visas and enrolled in programs of study there. Ms Sabetara has been studying and working in Germany; she testified that her father initially provided financial support, covering her and her sibling's expenses in Germany for the first two years after their departure from Iran.

Addressing Mr. Sabetara's decision to travel to Greece and then on to Germany and the financial arrangements to undertake it, the judge questioned whether the children were aware of their father's plans, of how he arrived in Greece, and whether they remained in contact until his arrest. The judge persistently questioned whether Mr. Sabetara's decision was to go illegally to Greece or Germany: that is, which country was his final destination. When asked about the financial arrangements for the journey, Ms. Sabetara explained that Mr. Sabetara had initially paid €500 to a smuggler. It had been agreed that the remaining balance of €2,500 would be sent by Ms. Sabetara once Mr. Sabetara reached Greece. The witness confirmed that her father explained the need for this arrangement, since at the time he did not have the requested amount and wanted to avoid carrying a large sum of money during the dangerous journey.

When further questioned about her father's whereabouts after he left Istanbul, Ms. Sabetara stated that she had some knowledge of his general plans but did not receive regular updates from her father. Responding to the judge's inquiry into why Mr. Sabetara chose to leave what appeared to be a "relatively comfortable life" in Iran, the witness explained that there was nothing left for him in Iran. His deteriorating health and barriers to access to adequate medical care, along with the oppressive political climate compelled him to make the journey. Finally, when asked whether Mr. Sabetara had left any property

or possessions in Iran upon his departure, Mahtab Sabetara confirmed that he had left everything behind, as his primary focus was to join his children in Germany.

Mr. Sabetara's testimony: During his testimony, Mr. Sabetara addressed the reasons for leaving Iran, explaining that his decision was primarily driven by the political situation and pressures from the Iranian regime. When asked if emotional or psychological stress played a role and if he was aware that leaving a stable life involved significant risks, he replied that he had indeed been experiencing intense psychological pressure, which contributed to his decision to leave. However, his deteriorating health and lack of safety in Iran ultimately outweighed any risks. He also confirmed that he had never been to Greece before and that he carefully weighed his options before deciding to leave.

When asked about the financial aspect of his journey, Mr. Sabetara explained that he had limited funds when he left Iran and stayed with a friend in Istanbul for three days. He described how he initially paid \leq 500 of the agreed \leq 3,000 to the smugglers, with the remaining amount due upon reaching Thessaloniki. He recounted that the smugglers arranged for him and a group of others to travel by van from Istanbul to the Evros/Meriç region.

Mr. Sabetara also provided a description of the journey through Turkey. Upon reaching the forested area near the Evros/Meriç River, he explained that the smugglers instructed them to cross the river and then run for a minimum of five minutes, cross railway tracks, and hide in a wooded area. He described how groups of approximately 20 people were organised and further divided, with each subgroup given specific instructions and orders from the same man.

According to Mr. Sabetara, after crossing the Evros/Meriç River, he and his group walked primarily at night. They subsisted on canned food and drank water from the river. At one point, his group merged with another group of around 60 people. Mr. Sabetara observed that vehicles arrived to transport some of the individuals; he noticed that one person directed the groups, giving instructions and managing their movements.

The judge questioned Mr. Sabetara about the circumstances that led to him driving one of the vehicles. He explained that the smuggler unexpectedly demanded immediate payment of the remaining balance, despite their prior agreement. When Mr. Sabetara expressed his inability to pay at that moment, he was informed that he would have to drive as a means of repayment. He reported that he was coerced into driving under the threat that he would otherwise be abandoned to die in the woods.

Mr. Sabetara further clarified that he was taken to a vehicle at night and shown how to operate it. He was also provided with a mobile phone equipped with GPS coordinates to guide him to Thessaloniki. He understood that he would drive with other passengers to reach the city, where he intended to seek asylum. The judge inquired if Mr. Sabetara was aware of the specific destination beforehand, and Mr. Sabetara confirmed that he learned of the route through the GPS instructions provided by the smugglers. Finally, Mr. Sabetara expressed his commitment to reunite his family while highlighting the urgency of his situation due to his health concerns and the pressures he faced in Iran.

Prosecutors' Opinion: The Prosecutor began by questioning Mr. Sabetara's decision to enter Greece illegally without first applying for asylum. In response, Mr. Sabetara explained that his intent had been to follow the legal route and initiate asylum proceedings once he arrived in Thessaloniki. However, the Prosecutor expressed that this rationale reflects a misinterpretation of the legal framework for international protection. He clarified that the law distinguishes between those who have been granted international protection and the asylum seekers, namely between beneficiaries of international protection and those merely applying for it, underscoring that the protections do not extend to actions taken before the asylum application is filed.

The Prosecutor stated that, under the penal system, a crime is assessed on the basis of whether an illegal act occurred, rather than the motives or intentions behind it. While such motives may provide grounds for mitigating circumstances, they do not exonerate a defendant from culpability and lead to acquittal. In Mr. Sabetara's case, the Prosecutor noted that the asylum application was only submitted after he had already committed an offence, and thus, the defence's claim that his actions fall outside the scope of Article 30 of Law 4252/2014 shouldn't be taken into consideration. The motive of Mr. Sabetara to reunite with his family cannot be taken into consideration for committing the crime, but can potentially constitute a mitigating circumstance.

The primary offence, according to the Prosecutor, is the act of driving the car, which was objectively committed, regardless of whether he did so following the pressure by the smugglers or because he was acting as part of an organised group. The Prosecutor concluded that the act of driving has been proven, noting that while a financial motive may not be conclusively proven, the transport of seven individuals, creating a potential risk to life, indicates intent on Mr. Sabetara's part.

Objections

Objection of lack of intent on the commission of the act

The defence objected to the Prosecutor's interpretation regarding Mr. Sabetara's intent, arguing that intent is a critical element in criminal cases in Greece. Greek criminal law considers motive alongside objective evidence, and intent can impact the outcome, including leading to acquittal. While the defence acknowledged the objective fact that Mr. Sabetara was driving the car when arrested, it argued that intent must be evaluated and that the three years served in prison lead to the conclusion that Mr. Sabetara should at the very least be eligible for release.

The defence highlighted that the legal framework on smuggling has changed over time. Prior to 2009, when smuggling was considered a misdemeanour, numerous Greek citizens were convicted for similar activities. However, the reclassification of smuggling as a felony offence has primarily targeted individuals transporting themselves (self-transit) or others under circumstances of coercion.

Furthermore, the defence argued that because the individuals Mr. Sabetara drove had already been within Greek borders for five days, the charge should more accurately align with Article 29 (6), of Law 4251/2014. Under this provision, according to which:

"[a]ny person who facilitates the illegal stay of a third-country national or impedes the investigations of the police authorities for the purpose of tracing, arresting and deportation, shall be punished by imprisonment for at least one (1) year and by a fine of at least five thousand (5,000) euros. If the above-mentioned acted with intent to profit, they shall be liable to a term of imprisonment of at least two (2) years and a fine of at least ten thousand euros."

Regarding the identity of the defendant, the defence argued that Mr. Sabetara's case does not align with the typical figure of a smuggler, as evidenced by his motives, his family ties and the willingness of his family members to testify on his behalf. The defence further added that Mr. Sabetara's actions did not demonstrate any criminal intent, as evidenced by the lack of resistance or flight when he was apprehended by the police. The latter is further proven by the officer's testimony. According to the defence, criminal intent in such cases typically implies a stance against state mechanisms and institutions, which is absent here. Instead, Mr. Sabetara's actions were consistent with a lack of intent to evade or defy the law, as he complied fully with law enforcement.

The defence also contended that the element of financial gain is unsupported. They argued that even if there were an exchange involving transportation, the profit motive required by law is not fulfilled. Mr. Sabetara's agreement to defer payment until arrival in Thessaloniki suggests a lack of profit-oriented intent, as he did not stand to benefit financially from the arrangement in any meaningful way.

On the issue of alleged risk to life, the defence cited prior Greek Supreme Court case law, which does not equate transportation in a car trunk with life-threatening danger. This provision was originally introduced to address risks associated with unsafe sea crossings, particularly in unseaworthy boats in the Aegean Sea, where passengers' lives were at significant risk. The defence emphasised that these cases of high-sea transportation, rather than car transport, formed the basis for the risk-to-life provision. They argued that the car trunk in question had air circulation, making it materially different from situations posing actual life-threatening conditions.

In conclusion, the defence argued that, without clear evidence of intent to commit the crime, profit motive, or risk to life, Mr. Sabetara should not be convicted on these grounds. They called upon the Court to adhere to relevant ECtHR case law in its consideration of the absent witness' testimony, and ensure a fair and comprehensive evaluation consistent with international legal standards.

Decision: The Court found Mr. Sabetara guilty of Article 30, illegal transport of foreigners into Greece. Compared to the decision of the first degree, the Court dropped the aggravating circumstance of deriving profit from the commission of the act. However, the Court did find that Mr. Sabetara's actions caused endangerment of human life (as in the first instance trial). The Court accepted the mitigating circumstance of no petty motives (Article 84(b) CC). With the pronouncement of the verdict, the judges also recognised the defence's argument that Mr. Sabetara acted neither for profit nor for petty motives. The sentencing was determined as follows: 2 years imprisonment for each of the 4 passengers seated in the car and 3 years imprisonment for the 3 people who were in the trunk of the car, sentencing Mr. Sabetara to a total of 17 years imprisonment. Considering time already served, and good behavior and work record in prison, Mr. Sabetara would be eligible to apply for release on parole (Article 105B CC).

4. Evaluation of the Trial

4.1. Overview

The right to a fair trial is at the heart of the protection of human rights, since without its protection, other rights are at risk. This right is enshrined in Article 6 of the ECHR and Article 14 of the International Covenant on Civil and Political Rights (ICCPR), guaranteeing a fair and public hearing by an independent and impartial tribunal established by law. These provisions aim to safeguard the integrity of legal proceedings, ensuring procedural and substantive fairness in both civil and criminal matters. The ECtHR has interpreted this provision broadly, on the grounds that it is of fundamental importance to the operation of democracy.⁵

The right to a fair trial includes several core guarantees. Primarily, it ensures access to court, requiring that all individuals can bring claims or respond to charges before an independent and impartial tribunal free from interference by external authorities. The fair, public, and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.⁶ This expression incorporates many aspects of the due process of the law, such as the right of access to court, a hearing in the presence of the accused, freedom from self-incrimination, equality of arms, the right to adversarial proceedings and a reasoned judgement. Trials and judgements must be public to ensure transparency and accountability.

Judicial proceedings must also ensure a reasonable timeframe to avoid undue delays that may compromise access to justice. The fair trial guarantees extend to specific rights of the accused in criminal proceedings, including the right to information about charges, freedom from self-incrimination, access to legal representation, and the right to interpretation. These rights are critical to enabling the accused to understand and participate effectively in the proceedings. The Court has stated⁷ that the reasonable time guarantee starts running from when a charge comes into being, and that other requirements of Article 6—especially of paragraph 3—may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.

⁵ ECtHR, *Delcourt v. Belgium*, 17 January 1970, Application no. Application No. 2689/65, para. 25.

⁶ ECtHR, *Golder v. The United Kingdom*, 21 February 1975, Application no. 4451/70, para. 35.

⁷ ECtHR, *Imbroscia v. Switzerland*, 24 November 1993, Application no. 13972/88, para. 36.

The assessment of whether a trial was conducted in accordance with fair trial standards requires a thorough review of procedural compliance and the implementation of safeguards designed to protect the rights of all parties involved in the legal process.

While the trial monitoring identified multiple procedural violations of fair trial standards, the fundamental unfairness of this case lies in the fact that Mr. Sabetara should not have faced criminal charges in the first place. As mentioned above (Section 3.5.2.2), Mr. Sabetara meets the criteria of an asylum seeker and should therefore have been exempted from prosecution under Greek and international law. Article 31 of the Geneva Convention, prohibits penalising asylum seekers for unauthorised entry undertaken to seek protection. Greek law reflects this principle, with Article 2 of Law 4251/2014 and Article 3 of Law 5038/2023 explicitly exempting asylum seekers and beneficiaries of international protection from criminal liability for acts related to their unauthorised entry.

Criminalising Mr. Sabetara under anti-smuggling laws disregards the clear exemptions provided by Greek and international law. These frameworks recognise that acts committed in pursuit of safety and protection are not crimes but rather an exercise of the right to seek asylum. In Mr. Sabetara's case, the absence of legal and safe migration routes forced him to rely on smuggling networks to flee, where he was coerced into driving a vehicle. This constitutes a case of self-transportation with the sole purpose of reaching his children in Germany, meaning that the subjective elements required to establish the criminal offence are not met. Refugee status, and the protections that accompany it, is not dependent upon formal recognition but applies from the moment the criteria for it to be established are met.

In conclusion, the fact that Mr. Sabetara was prosecuted for transportation in the first place, despite meeting the criteria of an asylum seeker, constitutes a violation of International law, including the Geneva Refugee Convention and the United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air, which explicitly prohibit the criminal prosecution of smuggled individuals. As such, the trial was fundamentally unfair in principle.

4.2. Access to Interpretation

The right to interpretation is a fundamental prerequisite of a fair trial and is linked to two key aspects of the rule of law: access to courts and the fairness of the proceedings, both of which are intrinsically interconnected. Access to courts is ineffective if the accused person cannot fully understand or participate in the proceedings. The ECtHR has emphasised that restrictions on the right to interpretation weaken access to justice, and effective access requires that the accused person must understand the proceedings sufficiently to communicate effectively with counsel and actively participate in their defence. Notably, the Court has acknowledged that "Court interpreters play a major role in guaranteeing access to justice for court users"⁸, and any violation of the right to interpretation directly affects the overall fairness of proceedings.

The ECtHR has further established that the right to interpretation extends beyond oral statements made during a trial hearing, and the right to understand the proceedings also applies to "documentary material and pre-trial proceedings".⁹

According to Article 6(3).e of the ECHR:

"[e]veryone charged with a criminal offence has the following minimum rights: (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

To uphold this right, the defendant must be capable of comprehending the proceedings as well as effectively communicating pertinent information to their lawyer to adequately inform their defence.¹⁰ In cases where interpretation is lacking, the ECtHR has found a violation of Article 6(1) in conjunction with Article 6(3)(e), particularly if there is an absence of an interpreter during questioning by the police or if domestic authorities fail to provide remedies for this shortfall.¹¹

As mentioned above (Section 3.5.2.1), on 22/04/2024, Mr. Sabetara's right to interpretation was compromised due to the absence of the court-appointed interpreter, causing communication difficulties between the defendant and his counsel. Additionally, during Mr. Sabetara's arrest, the witness's testimony had not been taken with proper interpretation on the day of the arrest; instead, the interpretation was performed by one of the police officers- not a qualified and impartial interpreter, further undermining the reliability and accuracy of the statement collected by the police officers.

⁸ European Commission for the Efficiency of Justice (CEPEJ), *'Report on European judicial systems'*, edition 2014: efficiency and quality of justice' at 452.

⁹ ECtHR, *Kamasinski v. Austria*, 19 December 1989, Application, No 9783/82, para. 74.

¹⁰ Ibid; ECtHR, *Cuscani v. The United Kingdom*, 24 September 2002, No. 32771/96, para. 38.

¹¹ ECtHR, *Amer v Turkey*, 13 January 2009, Application 25,720/02, paras 83-4.

Further issues arose on 24 September 2024, when the trial was postponed to the following day, due to the absence of a registered interpreter in the Court Catalogues. The Court justified the delay by noting the unavailability of a registered court interpreter on that date. The absence of a registered interpreter, combined with the refusal of the Court to accept a defence-appointed interpreter, despite the urgency of the circumstances, breaches Mr. Sabetara's right to interpretation under both Greek Criminal Procedures Code and the ECHR. Moreover, during the Court on 25 of September 2024, the court-appointed interpreter was only translating the judge's questions to Mr. Sabetara but none of the other statements in the proceedings, preventing Mr. Sabetara's full understanding of the trial, and therefore preventing his effective participation in the proceedings.

The Court's inconsistent rulings in rejecting the defence's objection regarding the reliance on the absent witness's testimony taken with a police interpreter, alongside the denial of a defence-appointed interpreter and the issues regarding the translation throughout the trial, raises significant concerns regarding the overall fairness of the proceedings.

By violating Mr. Sabetara's right to interpretation and preventing his effective participation in the proceedings, these actions constitute a breach of Article 6(3) of the ECHR and Article 14(3) of the ICCPR. This infringement undermines the fairness of the trial and contravenes the principles of due process, calling into question the overall integrity and legality of the proceedings.

4.3. Right to cross examination

According to Articles 6(3).d ECHR and 14(3).e ICCPR, the right to cross-examination establishes the right of the accused to review all evidence against them in their presence at a public hearing, with a view to adversarial argument, before said accused can be convicted.

Exceptions to this principle are possible but must not infringe the rights of the defendant, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness who is testifying against them, either when that witness makes a statement or at a later stage of the proceedings. As mentioned above (see Section 3.4.2.2), the ECtHR has established in its case law the so-called Al-Khawaja and Tahery test, containing three steps: first, whether there is a 'good reason' for the non-attendance of a witness at the trial; second, whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction; third, whether there

were sufficient counterbalancing factors to compensate for the weaknesses under which the defence laboured.¹²

The ECtHR in its case law does not consider "that the absence of good reason for the non-attendance of a witness [can] of itself be conclusive of the unfairness of a trial".¹³ Rather, "the lack of a good reason for a prosecution witness's absence is a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which may tip the balance in favour of finding a breach of Article 6(18) and 3(d)".¹⁴

While the ECtHR doesn't categorically prohibit the admission of incriminating testimony provided by a witness whom the defendant never had the opportunity to examine or to have it examined, the ECtHR has held that where a "conviction is based solely or to a decisive degree" ¹⁵ on such a witness testimony, "the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6".¹⁶ Based on the information obtained during the first stages of the trial, the witness statement by the individual present in the car was decisive in convicting Mr. Sabetara with a profit motive, because it was the only evidence that any money had been exchanged for the transport. Therefore, the Al-Khawaja and Tahery test's third step, in the present case, is of particular relevance: whether there were sufficient counterbalancing factors which permitted "a fair and proper assessment of the reliability"¹⁷ of the written witness statement.

Additionally, the difficulties faced by the defence in accessing information regarding the Court's efforts to locate the absent witness further compounded this violation. Despite repeated inquiries and personal visits to the courthouse, the defence lawyers were unable to obtain details on the search for the witness before the trial began. This lack of transparency not only obstructed the defence's ability to prepare for trial but also violated the defendant's right to cross-examine witnesses, as it deprived him of the opportunity to meaningfully challenge the evidence presented against him.

Furthermore, in line with the recent trend of the Supreme Court which marks a shift in jurisprudence under Article 6(1).d of the ECHR, the admission into evidence of a witness'

¹² ECtHR, *Al-khawala and Tahery v. United Kingdom*, 15 December 2011, Applications nos. 26766/05 and 22228/06.

¹³ECtHR, *Schatschaschwili v. Germany*, 15 December 2015, Application no. 9154/10, para. 113.

¹⁴ Ibid.

¹⁵ ECtHR, *Hümmer v. Germany*, 19 July 2012, No. 26171/07, para. 42

¹⁶ Ibid.

¹⁷ ECtHR, *Schatschaschwili v. Germany*, 15 December 2015, Application no. <u>9154/10</u>, para. 125.

testimony that was taken at the pre-trial stage violates the right of every accused to examine prosecution witnesses (ECHR Article 6(3)). Absolute invalidity is created if the reading was done despite the defendant's opposition (Supr. Court Decision 2326 /2008 and SC 650/2001).

The provisions of the ECHR, of the ICCPR, and of Law 2462/1997 Article 14(3).e, recognise the right of the accused to cross-examine the prosecution witnesses in court and in person as a fundamental right of defence and a constituent element of a fair trial. In that sense, the court must create the conditions for its exercise, meaning, it must make the witnesses available to the defendant in order to examine them. It follows from that provision that the reading of the statements of witnesses not present in the courtroom is permitted over the objections of the defendant only if the opportunity to examine them has been provided at an earlier stage of the hearing (Articles 328, 354 of the CPC). On the contrary, the reading of the defence. As mentioned above, it applies in particular to cases where the witness statements in question constitute essential evidence in support of the defendant's guilt on which the judgement will necessarily be based.

In conclusion, the decision of the the Appeals Court, by rejecting the defence's objections regarding the decision of the First Instance Court to use the testimony of an absent witness and to largely base the conviction with aggravating factor of profit on it, proceeded to further violate the right enshrined in Article 6 ECHR and 14 ICCPR. The latter **deprived the defendant of the procedural fairness necessary to effectively contest the evidence against him.**

4.4. Right to a decision in due time

The right to a fair trial (Article 6 ECHR) establishes the right to be tried without undue delay. The speed of a trial affects the overall fairness of the proceedings. The Court has established in its case-law that when assessing whether a length of time can be considered reasonable, the following factors should be taken into account: the complexity of the case, the conduct of the applicant, the conduct of the judicial and administrative authorities of the State, and what is at stake for the applicant.¹⁸

The lengthy wait of the defendant for 576 days in prison prior to the appeal trial followed by the postponement of the trial another five months until September 2024,

¹⁸ ECtHR, *Buchholz v. the Federal Republic of Germany*, 6 May 1981, Application no. 7759/77, para. 49.

constitutes a violation of the right of the defendant to a decision in due time, which had a really negative impact on M. Sabetara's psychological state. Indeed, the postponement of the hearing and the fact that he was not released while awaiting the postponed appeal, without proper consideration of his health conditions and the time spent in inhumane detention conditions, constitutes an outrageous delay and a breach of the rights of the defendant to a trial within a reasonable time under international law. The decision of the Court to search and try to locate the witness, does not justify the postponement of the trial for such a long period.

On 24 September 2024, the case was listed 22nd out of 25, resulting in yet another postponement to the following day. The court justified the postponement due to the above mentioned absence of the registered court interpreter.

The disregarding of the urgency of the circumstances in an appeal trial that involves a defendant who is imprisoned and has pressing health issues, and the decision to postpone the trial, breaches Mr. Sabetara's right to receive a decision in due time under both Greek Criminal Procedures Code and the ECHR. Since his conviction by the Court of First Instance, Mr. Sabetara had spent 730 days in prison. These delays therefore violate the principle to hold the hearings within a reasonable time.

5. Conclusion

The legal framework governing smuggling in Greece leads to the systematic criminalisation of individuals seeking asylum, in violation of international law. The Geneva Refugee Convention, to which Greece is a signatory party, **guarantees the right to enter a country without prior authorization for those intending to seek asylum, thus prohibiting the criminalisation of asylum seekers for their unauthorised entry, which undermines their right to seek asylum.**

Similarly, Article 5 of the United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air, ratified by Greece in 2004, explicitly prohibits criminal prosecution of smuggled people on the move, while stating as its explicit purpose the aim to protect people on the move and exempt from criminalisation humanitarian aid and family assistance. The EU's "Facilitation Package" directive, which was in place from 2002 and is currently under proposed amendment, lacks clear definitions of smuggling or financial gain and leaves implementation largely to member states; it has further enabled Greece's broad and punitive interpretation of "anti-smuggling" laws. This approach not only contravenes international standards, such as the UN Protocol's requirement that criminalisation be contingent on material or financial benefit, but also undermines the protocol's mandate to safeguard the rights of smuggled migrants.

Greece has adopted one of the harshest anti-smuggling regimes in the EU that contradicts these obligations. The country's national anti-smuggling framework imposes severe penalties on individuals who perform operational tasks that are considered as facilitating unauthorized entry, such as steering a boat or driving a car, without even assessing whether the act was profit-driven or coerced. The upgrading under national law of facilitation from a misdemeanor to a felony offence led to the disproportionate toughening of penalties regarding imprisonment time and fines. These laws apply uniformly without exemptions for smuggled people on the move or without specific safeguards, thus creating a system of indiscriminate criminalisation.

Research into the prosecution of individuals accused of smuggling in Greece has consistently revealed systemic patterns of violations that undermine fair trial rights. Procedural violations appear in all stages, from arbitrary arrests to pre-trial conditions; they extend to sentences appointed by the First-Instance and by the Appeals Court.

Interpretation services are frequently inadequate, with unqualified individuals providing translation or interpreters entirely absent during critical stages of the proceedings. Hearings are notably brief, sometimes lasting only a few minutes, and rely heavily on limited evidence—typically the testimony of a single police or coast guard officer, which is rarely subject to cross-examination. Written testimonies from passengers, often obtained under questionable circumstances, are also commonly admitted without scrutiny. In several circumstances defendants, due to lack of financial resources, are represented by state-appointed lawyers, appointed on the day of the trial, leaving no time for proper preparation of the case. These lawyers, frequently inexperienced in cases of facilitation, face additional structural barriers, such as low compensation, lack of interpretation, and delayed payments, which undermine their capacity to provide effective defense.

Mr. Sabetara's trial exemplifies these patterns. His case was marked by the use of an absent witness's pre-trial testimony as decisive evidence, admitted without any opportunity for cross-examination. The absence of adequate interpretation during key phases, including his arrest and trial proceedings, significantly hindered his ability to communicate with counsel and effectively participate in his defense. The hearing of his appeal was delayed for months due to procedural and administrative issues, compounding the harm caused by nearly three years of detention under degrading conditions. The combination of these factors also undermined Mr. Sabetara's right to seek asylum, as guaranteed under

international law. These failings are emblematic of broader procedural deficiencies in Greece's handling of cases of facilitation charges.

Such trials highlight the impact of policies and narratives that link migration with criminality, framing migrants as "smugglers" while ignoring the complexities of migration and the factors that force people into taking up roles steering boats or driving cars. The Greek justice system frequently fails to distinguish between individuals coerced into these roles or forced by necessity and those who carry out the act for personal gain, and conflates people on the move themselves with organised criminal networks, which derive profit from their movement. The application of the harsh anti-smuggling provisions in such cases not only criminalises individuals seeking safety but also disregards Greece's obligations under international law, including the Geneva Refugee Convention, which prohibits penalising asylum seekers for their unauthorized entry. These policies effectively punish the very individuals they claim to protect, perpetuating systemic violations of their fundamental rights.

If safe and legal pathways for movement were available, individuals would not have to undertake perilous crossings and, in many cases, assume responsibility for the journey under coercion or desperation. Until this reality is acknowledged, the so-called declared "fight against migrant smuggling" constitutes a fight against migration itself. These practices, justified under the pretext of combating crime, result in systematic and grave violations of human rights, stripping individuals of their dignity and their access to justice. In Mr. Sabetara's case, as in many others, this approach criminalises the very act of seeking safety, reuniting with family while at the same time undermining the principles of justice, the ensurement of a fair and transparent procedure, the upholding of human rights, and the rule of law.