

THE HIGH COURT

[2022] IEHC 382
[No. 2021/083/EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

SAID MOHAMMED EBAID

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 5th day of April, 2022

1. By this application, the applicant seeks an order for the surrender of the respondent to The Kingdom of Spain pursuant to a European Arrest Warrant dated 31st of July 2014 (“the EAW”). The EAW was issued by Ms. Concepcion Espejel Jorquera, Judge of the National High Court, as the issuing judicial authority.
2. The EAW seeks the surrender of the respondent in order to prosecute him in respect of alleged drug trafficking-type offences.
3. The respondent was arrested on the 14th day of April 2021, on foot of a Schengen Information System II alert, and brought before the High Court on that date. The EAW was produced to the High Court on 26th day of April 2021.
4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended (“the Act of 2003”), arise for consideration

in this application and surrender of the respondent is not precluded for any of the reasons set forth in any of those sections.

6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The offence in respect of which surrender of the respondent is sought carries a maximum penalty in excess of twelve months' imprisonment.

7. Section 38(1)(b) of the 2003 Act provides that it is not necessary for the applicant to establish correspondence between the offences to which the EAW relates and offences under the law of the State where the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies and carry a maximum penalty in the issuing state of at least three years' imprisonment. In this instance, the issuing judicial authority has certified that the offences referred to in the EAW are offences to which Article 2.2 of the Framework Decision applies, are punishable by a maximum penalty of at least three years' imprisonment, and has indicated the appropriate box for "Illicit trafficking in narcotic drugs and psychotropic substances". There is no manifest error or ambiguity in respect of the aforesaid certification such as would justify this court in looking beyond same.

8. As surrender is sought to prosecute the respondent, no issue arises under s. 45 of the Act of 2003.

9. The description of the circumstances in which the offence was committed including time place and degree of participation in the offences by the respondent is set out at part (e) of the warrant which states:

"The warrant relates to a total of one offence. Description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person:

Said Mohmed Ebied belonged to an international network engaged in large-scale drug-trafficking and operating from Morocco. The said organization planned in May

2013 to bring a large consignment of hashish into the European market. For this purpose, they used a “pirate” ship, which was seen together with the mother ship which had set sail from Morocco. On the 31st of May 2013 the plane “Alción IV” of the Customs Surveillance Service noticed that they were adrift stern with stern in the position N 35°40’ and W 004°30’ and that a transfer of goods had taken place. Once this took place, at 3.35pm on the 31st of May, the suspicious ship was boarded in the position N35°53’ and W 003° 38’. It was a fishing boat with blue hull, white bridge and white strip and approximately 20 m in length, with no flag, name or registration number. The fishing boat was boarded and inspected, and hashish was found in the holds, amounting to 654 bales with a weight of 16,057 kg and 71 g, with an average purity between 6.8 and 12.6% and a value in the illegal market of €24,969,739.05.”

10. The respondent objected to surrender on the following grounds:

- The respondent has already been tried for this offence and his surrender is prohibited by s. 41(2) of the 2003 Act.
- The offence is extra-territorial and surrender is prohibited by s. 44 of the Act. Counsel for the respondent indicated in Court on the 25th of February 2022 that this point of objection is not being pursued by the Respondent. This is confirmed by way of written submission dated the 3rd of March 2022.
- The surrender of the respondent would be an abuse of process, in light of the relevant factors when viewed cumulatively.

11. **Is surrender prohibited by Section 41 (2) – double jeopardy?**

Section 41(2) of the European Arrest Warrant Act provides in essence that a person shall not be surrendered if they have already been charged and acquitted of an offence. Section 41(2) states:

“A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of the act or omission that constitutes an offence in respect of which final judgment has been given in a third country, provided that where a sentence of imprisonment or detention was imposed on the person in the third country in respect of the second-mentioned offence—

(a) the person has completed serving the sentence, or

(b) the person is otherwise no longer liable under the law of the third country to serve any period of imprisonment or detention in respect of the offence.”

Article 4 (5) of the Framework Decision states:

“The executing judicial authority may refuse to execute the European arrest warrant:

[...]

5. If the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country.”

12. Chronology of events prior to the respondent’s arrest on the EAW:

Date	Event
31/05/2013	Alleged offence date
31/05/2013	From this date to 28 April 2014 Said Mohamed Ebaid was in custody on this offence in Spain, however, the preventative detention is stated to have commenced on the 20 December 2013 in the information provided on the 10 June 2021
03/06/2013	Court of Investigation Provisional custody ordered
20/12/2013	Central Court of Investigation Request to open an Oral Trial and granting of same against 13 accused including Said Mohamed Ebied, who identified himself as Said Mohamed Ahmed.
26/03/2014	An application was made to request a ruling from Criminal Chamber of the National High Court, with regard to closure of the proceedings.
28/04/2014	National High Court Order the release of Said Mohamed Ebied (Said Mohamed Ebied)
01/04/2014	Approximate date Respondent travelled to Ireland
06/05/2014	Spanish National High Court ruled that Spain had no jurisdiction to prosecute the offence.

- 24/07/2014 Decision of the Spanish Supreme Court which ruled that Spain had jurisdiction to try this offence based on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done in Vienna on the 20 December 1988. The court order reflecting same was is dated the 31 July 2014.
- 31/07/2014 Decision on which the warrant is based
- 31/07/2014 Date of the European Arrest Warrant
- 31/07/2014 Date of creation of Interpol Red Notice in the name Said Mohamed Ebaid at the request of Spanish authorities
- 01/08/2014 SIS Alert in the name "Said Mohmed Ebied"
- 01/05/2019 Approximate date on which the Respondent returns to Egypt on a passport issued by the Egyptian embassy in Ireland.
- 01/05/2019 Respondent is detained in Egypt for approximately 4 months
- 23/06/2019 Said Ebaid Mohammed Ebaid along with others was found not guilty of the charge (date of offence 31 May 2013).
- 14/04/2021 Respondent is arrested on the on foot of the SIS Alert he indicates to the court that the correct spelling of his name is "Said Mohamed Ebaid". No issue is raised re identity.

13. Additional information and evidence in relation to the issue of double jeopardy

In an affidavit sworn by the respondent's solicitor dated the 15th of April 2021 at paragraph five therein it stated:

"I understand that the respondent was incarcerated in Spain. However, the respondent instructs that he was released at the end of this period of detention and informed that he was free to go. The respondent instructs that he is a stranger to any other court proceedings in Spain"

14. In light of this averment in a Section 20 letter dated the 27th April 2021, this Court asked:

"The requested person contends that he was arrested in relation to the sole offence contained in the European Arrest Warrant and was detained in custody for a period of 10 months. He further contends that he was released from custody after the 10-month period and was informed that the matter was finalised and/or no longer being pursued by Spanish Authorities.

In light of these contentions, please provide the following additional information:

1. Please indicate whether the requested person was arrested and detained in custody in respect of the offence referred to in the EAW and if so:
 - (a) set out the dates upon which he was in such custody;
 - (b) Indicate why he was released from custody;
 2. Please confirm that there is still an intention to prosecute the requested person for the offences described in the warrant and that his surrender is still sought?"
- 15.** The issuing judicial authority indicated by way of letter dated the 5th of May 2021 as follows:
- “[A]fter examining the proceedings and in accordance with the data recorded in the case file, the citizen Mr Said Mohmd Ebied born in Egypt was imprisoned in connection with Case File Number PA 1/2014 from the 31.05.13 when he was arrested to 28.04.2014 when the Section 2 of the Criminal Division of the National High Court issued a court order decreeing the release of the Mohamed Ebied so the Criminal Division could deliberate on the dismissal and staying of the proceedings due to the fact that Spain might lack jurisdiction to try the facts. The Decision of the Supreme Court 592/2014 dated the 24.07.14 established that Spain had jurisdiction. This decision, establishing jurisdiction for Spain in the case of crimes of illegal drug trafficking at sea, was attached to the proceedings. This was decided by means of a court order dated the 30.7.2014 and the corresponding EAW was issued. Indeed, a trial against this person must still be held in connection with the crimes listed in the EAW, and therefore his responsibilities have not been discharged and we still request his surrender.”
- 16.** I have reviewed the Spanish Court orders of the 20th December 2013, 3rd June 2013, 28th April 2014 and the 31st July 2014, and the letter from the issuing judicial authority accurately summarises same.

17. Solicitor for the respondent Ms. Karen Ruane swore an affidavit dated the 4th of June 2021 wherein she states:

“The Respondent was on board a vessel which was stopped by the Spanish Authorities in May 2013. He was subsequently detained in Spain for almost one year. After the Respondent was released from custody in Spain in April 2014 he ultimately travelled to Ireland.”

She further states:

“His wife and family reside in Egypt. The Respondent wanted to see his family, so he returned to Egypt in or about early May 2019. He attended at the Egyptian embassy in Ireland and before returning to Egypt for the purposes of allowing him to travel.”

She continues:

“He was detained by the Egyptian authorities. The Respondent estimates he was detained for approximately 4 months. While the Respondent’s understanding of the Egyptian legal process is limited, he believes and informs me that during this time there was a court hearing relating to the offence of importing cannabis into Spain in 2013 and that he was acquitted of same”.

These averments were confirmed by the respondent in his affidavit dated 4th of April 2022.

18. Ms Ruane also indicates in her affidavit that she has been in contact with the Egyptian lawyer who represented the respondent, she indicates by way of caveat that the communication is limited due to language differences, however she understands that Ms. Abdel Aziz (the respondent’s lawyer) indicates that the respondent was acquitted and furnished a document in Arabic confirming purportedly confirming same.

19. Ms Ruane engaged Word Perfect Translation Agency to prepare a translation of the

document she received from Ms Abdel Aziz, Ms Ruane exhibited this document in her affidavit.

- (i) The first part of this document appears to be a Certificate Extracted from a Court Record, indicating that “the respondent on the 31.5.2013 outside the Egyptian country particularly in Spain illegally transported the Cannabis drug from Morocco to the border of Spain, outside the country they were involved in a trafficking drug gang. They were arrested for their illegal act of drug trafficking, the defendant were then referred to the Court of Kafr el-Cheik on the 16th of November 2016 whereas on the 23rd of June 2019 Said Ebaid was proved innocent of the charges against him”
- (ii) The second part of this document appears to be a summary of the court’s determination, and importantly states:

“Whereas the defendants had pleaded not guilty because of the absence of confusion and the invalidity of arrest and search, since the crime had occurred in international borders, the failure to respect the Egyptian flag and the competence is given to the latter in accordance with the Geneva Convention on the High Seas.

Whereas the criminal judgment must be based on the evidence that the judge is convinced of whether the defendant is guilty or innocent based on a doctrine which he or she receives from his or her independent investigation, without the involvement of anyone, and it is not correct in the law to enter into the formation of judge’s belief in the validity of the incident on which he/she based the ruling. Whereas the Court has taken into account the circumstances of the incident and the evidence on which the accusation was based, the Court doubts the validity of

the evidence, it favoured the prosecutors statements and considered that the incident had a form other than that of the evidence.

Whereas this led to the Court to question the veracity of the facts, and considered that the evidence of the indictment is insufficient to reach what was intended there, and was not sure if the incident took place according to the form described by the witness...

A matter where the Court is not assured of the conviction and rules ‘innocent’ by virtue of Article 304 (1) [of] the Criminal Code, and the sources of the seizure pursuant to Article 30 of the Penal Code. The court ruled in presence [of Said Ebaid Mohammed] & others are innocent of the all the convictions”

20. On the 18th of May 2021 a Section 20 request was issued which raised a number of issues, but of importance to this issue the letter stated;

“The requested person claims that he was arrested and detained in Egypt in respect of his matter. Can the Spanish authorities confirm if this was so and furnish any details in respect of same?”

21. On the 14th of June 2021 Ms Rose Mariá Tomé García, Clerk of the Court of the Second Criminal Division of the High Court in Spain, answered Section 20 request by stating:

“Mr Said Mohamed Ebied was in preventative detention in connection with this case from 20 December 2013 to 28 April 2014. There is no evidence that he was in prison in Egypt in connection with this case. The arrest warrant was issued on the 31st of July 2021, and there is no evidence of any other arrest warrant against him”.

This letter enclosed the judgment of the Supreme Court of the 23th of July 2021.

22. In a second Affidavit Ms Ruane indicated that again with the assistance of Word

Perfect Translations she asked Ms Abdel Aziz Abdel Aal 17 questions. The important answers confirm that the judgment of the Kafr el-Cheik Criminal Court is final and cannot be appealed. She confirms that Egypt had the jurisdiction to try the case and that if convicted, the respondent would have faced a penalty of imprisonment of 15 to 25 years, or death. She confirms that the prosecution commenced as a result of an Interpol enquiry to Egypt, and attaches the request in this regard dated the 14th of June 2021. Ms Ruane has asked Interpol to confirm this request from Spain to Interpol, but was advised that it could take four months to respond to the request. In addition, she exhibits Ms Abdel Aziz Abdel Aal's Bar Association Membership Card. This information is confirmed by way of an affidavit of Ms Sheryn Mohammed Abdel Aziz Abdel Aal. The affidavit was appropriately translated by Ms. Samira Hassan and Ms. Hassan swore an Affidavit to that effect on the 4th of April 2022.

23. As a consequence of this further information and as a result of a lack of a meaningful response to the previous Section 20 request, a further Section 20 request was sent to the issuing judicial authority. This request was dated the 1st of July 2021 and enclosed all of the above mentioned documents & information, and referred the issuing judicial authority to Section 41 (2) of the 2003 Act. This Court drew the attention of the issuing judicial authority to the assertion of the Egyptian lawyer that there were interactions between Spain and Egypt through Interpol prior to the trial in Egypt. This Court asked:

“Please furnish any comments or observations you have in respect of the contents of the affidavits and exhibits enclosed herewith. In particular please indicate whether you accept that the respondent was tried for the same matter in Egypt. If you do not accept that, please set out your reasons for doing so.”

24. The answer from the issuing judicial authority stated:

“..we have no knowledge of his allegations... The person sought was never surrendered to Egypt to be tried for the same facts, but he simply left Spain without

judicial authorisation to do so. No other Spanish court sent the file to Egypt, neither the Spanish police delegated the investigation to Egyptian authorities, but the whole investigation was conducted by the Spanish Police and the Prosecution Service, without any intervention of Egyptian Authorities.”

25. In a third affidavit dated the 9th of September 2021, Ms Ruane states that she received a letter dated the 20th of August 2021 in which Interpol stated that the respondent is the subject of a red notice issued from Spain relating to a warrant dated the 31st of July 2014, the same date as the warrant in the instant case.

26. In addition to the multiple Section 20 requests sent to Spain, the applicant ensured that the Embassy of Ireland in Egypt wrote to the Ministry of Foreign Affairs, Arab Republic of Egypt. Letters were sent seeking confirmation of the documents dated the 22nd April 2021 and the 23rd of June 2019 seeking confirmation that the respondent has been finally judged by the Arab Republic of Egypt in respect of the same acts which constitute the offences for which his surrender to Spain is sought. Letters were sent on the 25th of August 2021, the 25th of November 2021, the 21st of December 2021 and the 24th of January 2021. No response has been received to any of these letters.

27. **Double Jeopardy**

The central question for the Court to determine is whether or not the Spanish authorities are seeking to proceed against the respondent for an offence consisting of acts that constitute an offence where final judgment has been given in a third country in respect of the respondent.

- (i) Interpretation of Article (5) (4) of the Framework Decision 2002/584/JHA of the 13th of June 2002 as amended

This Court has had regard to the case of CJEU *Case C-436/04 Van Esbroeck* a sentence of imprisonment was imposed on Mr. Van Esbroeck in Norway for importation of drugs.

Subsequently, following his return to Belgium, the authorities there sought to prosecute him

for exportation of the same drugs. The Court regarded this as a breach of the *ne bis in idem* principle, holding that punishable acts consisting of exporting and importing the same narcotic drugs are, in principle, to be regarded as the same acts for the purposes of Article 54 of the CISA, the definitive assessment being for the competent national courts.” The Court in this case considered Article 54 of the Convention on the Implementation the Schengen Agreement which states;-

“A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”

Similar wording is utilised in Article 4(5) of the Framework Decision, which states;-

“If the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country.”

The critical words in both Article 54 of the of the CISA and Article 4(5) of the Framework Decision are that a person may not be prosecuted for the “same acts”. The concept of “same acts” was considered by the Court and the Court stated;-

“Article 54 of the CISA must be interpreted as meaning that: the relevant criterion for the purposes of the application of that article of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together irrespective of the legal classification given to them or the legal interest protected”

In addition, the Court stated;-

“Punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different contracting states to the CISA are, in principle, to be regarded as ‘the same acts’ for the purposes of Article 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts”

(ii) Interpretation of Section 41 of the Act of 2003

The interpretation of s.41 was considered by the High Court in *Minister for Justice v. Herman* [2014] IEHC 251 (“Herman”). In that case, the respondent sought to rely on Section 41 as a bar to surrender. Therein, Mr. Justice Edwards held at para. 134;-

“It has been held by the Supreme Court in Minister for Justice, Equality and Law Reform v. Renner-Dillon [2011] IESC 5 (Unreported, Supreme Court, Finnegan J. nem diss, 2nd November, 2011) that that “finally judged” in the Framework Decision has an autonomous meaning in the law of the European Union. Where under the law of the issuing Member State a judgment does not definitively bar further prosecution or as stated by the European Court of Justice in Mantello (Case C- 261/09) (16th November, 2010), “constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person”, then that person has not been finally judged. A judgment which does not definitively bar further prosecution does not constitute a ground for mandatory non-execution of a European arrest warrant.”

28. In summary

The respondent asserts that he returned to Egypt in or about early May 2019, having obtained an Egyptian passport through the Egyptian Embassy in Dublin. He asserts that criminal proceedings were commenced against him in Egypt following a request sent to Egypt by the Spanish authorities via Interpol and that, upon arrival in Egypt, he was detained for a period of approximately four months.

The respondent further asserts that he was tried in Egypt for an offence outside the Egyptian country, particularly in Spain, in which subjects illegally transported the cannabis drug from Morocco to the borders of Spain, an offence which carried a penalty of life imprisonment (15 or 25 years) and/or death. By judgment delivered on 23rd June 2019, he was determined to be not guilty. The respondent's lawyer in Egypt has confirmed that the respondent;-

“was tried and finally acquitted”

She has described how;-

“The judgment cannot be appealed in any form of appeal. The judgment is final and the judgment has been approved by the first attorney general”. She further confirmed that “importing narcotics in Egyptian law is a crime punishable by life imprisonment of 15 or 25 or death.”

A copy of the judgment acquitting the respondent has been exhibited. The *bona fides* of the Egyptian lawyer is not in dispute and the authenticity of the documents she has furnished are not capable of being disputed. The Spanish issuing judicial authority has no further information to assist in one way or the other and the Egyptian authorities have not engaged.

29. In the case of *Case C-665/20 PPU X* the CJEU stated that Article 4(5) of the Council Framework Decision as amended must be interpreted as meaning that, where a member state chooses to transpose that provision into its domestic law, the executing judicial authority must have a margin of discretion in order to determine whether or not it is appropriate to refuse to execute a European arrest warrant on the grounds referred to in that provision. Notwithstanding this judgment, Counsel for the applicant has indicated that his client does not suggest that this Court has any discretion if the Court finds that the respondent is being proceeded against in the issuing state for an offence consisting of an act or omission that constitutes an offence in respect of which final judgment has been given in a third country.

In this Court's view and solely by way of comment, if the Applicant submitted otherwise, such a submission would be difficult to reconcile with the wording of Section 41 of the 2003 Act.

30. On a plain reading of the judgment from the Court of Assizes in Kafr el-Cheik dated the 23rd of June 2019, it seems that the respondent was charged in relation to the same offences for which he is being sought for surrender, i.e. illegal trafficking of narcotics, the available evidence was adduced and was considered by a trier of facts and the respondent was acquitted. The characterisation of the judgment made by the respondent's Egyptian lawyer as being "final" and incapable of being appealed, is not capable of being refuted.

31. In these circumstances, the surrender is prohibited by 41(2) of the 2003 Act. The Court therefore refuses to surrender the respondent to the Kingdom of Spain.

32. The Court has indicted for the purposes of this judgment that the submissions being made on behalf of the respondent in relation to the issue of abuse of process. The Court has not received written submissions from the applicant in relation to same and no oral submissions were made by the respective parties on this issue. Therefore the Court has not adjudicated upon the issue of abuse of process.