THE COURT OF APPEAL

Record No: 249/2022

Edwards J.
McCarthy J.
Kennedy J.

Between/

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

V

MOHAMED MORSY AHMED

APPELLANT

JUDGMENT of the Court delivered (*ex tempore*) by Mr. Justice Edwards on the 17th of April 2023.

Introduction

1. This is an appeal brought by Mr. Mohamed Morsy Ahmed (i.e. "the appellant") against the severity of the sentence imposed on him by the Circuit Criminal Court in respect of his conviction for six counts of trafficking in illegal immigrants contrary to s. 2 of the Illegal Immigrants (Trafficking) Act 2000 (i.e. "the Act of 2000") (specifically count nos. 2, 3, 4, 10, 11, and 14 on the indictment Bill 1167/2021).

2. The appellant had entered a guilty plea on count nos. 3 and 14 on the 4th of November 2011 prior to the conclusion of a three-day preliminary trial hearing (which hearing was requested by the appellant pursuant to s. 6(2) of the Criminal Procedure Act 2021), and the matter was adjourned until the 2nd of December 2022 on which date it was listed for sentencing. At the outset of this hearing, the appellant entered a guilty plea on count nos. 2, 4, 10 and 11. These pleas were offered and accepted on the basis that evidence would be received at sentencing concerning not just the six offences to which he had pleaded guilty on arraignment, but rather on a full facts basis embracing also the remaining eight counts on the indictment, consisting of seven counts of trafficking in illegal immigrants contrary to s. 2 of the Act of 2000, and one count of custody or control of a false

instrument, contrary to s. 29(2) and (6) of the Criminal Justice (Theft and Fraud) Offences Act 2001, and that those additional eight offences would be taken into consideration in any sentencing of the appellant.

3. On the 9th of December 2022, the Circuit Criminal Court passed sentence, ordering that the appellant serve a 5-year term of imprisonment on each of the six counts of trafficking in illegal immigrants, such sentences to run concurrently from the 20th of February 2021. No element of these custodial sentences was suspended.

Factual Background

4. At the sentencing hearing of the 2nd of December 2022, a Detective Garda Joseph Gavin of the Garda National Immigration Bureau (GNIB) gave evidence in relation to the factual background of the appellant's case.

5. On the 19th of February 2021 the appellant, a Spanish national of Egyptian origin, arrived at Dublin airport on a late inbound flight from Lisbon. Having disembarked the aircraft, the appellant was stopped by an officer of the Revenue Commissioners (a customs officer), as he was about to leave through the blue customs channel. The appellant had in his possession at the time two bags consisting of a backpack and a smaller shoulder bag. The customs officer had stopped the appellant as a person of interest. Due to national efforts to combat the spread of Covid-19, Ireland was in the midst of a Level 5 Lockdown, which resulted in travel to and from the country being restricted, save for essential travel. The customs officer noticed that the appellant did not have checked-in luggage with him, which piqued her attention.

6. The customs officer spoke to the appellant and established that he did not live in Ireland. Following this, she made inquiries about the purpose of his trip. The appellant, who spoke in a mix of broken English and Spanish, told the customs officer that he had come to Ireland for the purposes of buying and selling motor parts. The customs officer then informed the appellant of her intention to search his bags and brought him to a search bench for that purpose. The appellant then tried to make a phone call, notwithstanding being told by the customs officer that the use of phones was not permitted in the search area. The appellant attempted to put his mobile phone in his pocket while he was still on the call and the customs officer asked him for the phone and disconnected the call. The appellant told her that he had been trying to call his brother who was waiting outside for him.

7. The search of the appellant's bags yielded certain travel documents, none of which related to the appellant. They consisted in the first place of 12 refugee travel documents pertaining to 12 different persons. These travel documents were not national passports but rather consisted of a variety of travel documents granted to persons who had been afforded refugee/international protection status or subsidiary protection status. Five of these documents had been issued by German authorities, the remaining seven were issued in Greece. These travel documents were arranged in such a way inside the appellant's bags that there was a separate identity card inside each document which corresponded to the owner of the principal travel document. Garda Gavin averred that

this arrangement was done in a manner similar to what is done in Ireland, that when a person arrives in the State and are granted residence they are provided with a driver's license-style identity card that corresponds with the applicable travel document.

8. Additionally, one Yemini and one Polish passport were also found in the appellant's possession, both in different names but depicting the same person. It subsequently emerged in the course of an investigation that the Yemini passport was genuine but that the photograph in the Polish passport was a forgery; that it was a facsimile of the photograph found in the Yemini passport superimposed onto the so-called "bio-page" of the Polish passport. The Polish passport was otherwise a genuine passport assigned to a Polish national, save for the altering of the bio-page.

9. The customs officer questioned the appellant about these various travel documents. His initial reply was to suggest that they belonged to family members, but he subsequently changed his story and claimed that he had happened upon the documents on a chair in an airport (but did not specify which airport).

10. While the appellant was being questioned by the customs officer, a group of thirteen passengers, who had disembarked the same flight as the appellant, presented at immigration with no travel documents. These thirteen passengers comprised three distinct groups, specifically two families and a pair of single males. In total, there were nine adults and four children under the age of 18 years. On account of the absence of documentation, these passengers were dealt with my immigration authorities as undocumented persons arriving in the State. Quite shortly, a connection was made between these passengers and the documents found in the possession of the appellant, as each document matched one of this group of thirteen passengers:

    - Six of the seven Greek-issued travel documents pertained to a complete family of six, including the four children under the age of 18 years. This family comprised of Iraqi nationals.

    - The five German-issued travel documents related to the other complete family, comprising five adults. This family were believed to be Kuwaiti in origin, though this was unconfirmed.

    - One of the two single men corresponded with the remaining Greek-issued travel document. His nationality was not specified by Garda Gavin.

    - The other single man, a Yemini national, naturally corresponded with the genuine Yemini passport but also was a match for the altered Polish passport too.

11. Immigration officers were satisfied that based on the nationalities of the thirteen passengers they required a visa to enter Ireland but that they did not possess the requisite visas or permission. Garda Gavin confirmed that even with the travel documents in the appellant's possession, they ordinarily would not have been permitted entry to the State without the required visa. Accordingly, the thirteen passengers were refused leave

to land in Ireland and were thus treated as illegal entrants and subsequently were handed to the custody of the GNIB and taken to an accommodation centre where they claimed international protection.

12. While the immigration authorities tended to the illegal entry of these thirteen passengers, the appellant had been taken back to the immigration area near passport control. One of the immigration officers observed the appellant attempting to kick away his bag as if to, in his view, disassociate himself with it.

Garda Investigation

13. GNIB were contacted in relation to the events that had occurred and in the early hours of the 20th of February 2021, a Garda Martin Doran and a Detective Sergeant Patrick Whelan attended at the immigration area and spoke with the appellant. When questioned by Garda Doran as to why he had the travel documents in his possession, the appellant replied that he had found the documents on the aircraft he had arrived aboard from Lisbon. At approximately 2:00am, gardaí arrested the appellant for the proper investigation of an alleged offence contrary to s. 2 of the Act of 2000 and was detained pursuant to s. 4 of the Criminal Justice Act 1984, as amended, at Swords Garda Station. Prior to his arrival there, the appellant was attended to by a doctor on foot of complaints of certain medical issues. Following this examination, the doctor declared the appellant unfit for questioning until the following morning. The appellant presented with diabetes and hypertension, and over the course of the subsequent two and a half days he was attended to by three doctors in a mix of in-person and remote consultations.

14. It should be stated at this remove that at the sentencing hearing Garda Gavin confirmed that while the offences with which the appellant was charged included the word "*trafficking*" in the name, it was not the prosecution's case that the thirteen passengers were being moved against their will, rather that the appellant was involved in the "*facilitation of illegal immigration*".

The First Garda Interview

15. Garda Gavin, as the investigating member, conducted five interviews with the appellant in the company of a Garda Keith Cleary, a Spanish interpreter, and the appellant's solicitor. The first interview centred on the appellant's background details and how he arrived in the State. The appellant gave an address in Santander in Spain and informed gardaí that he had been born in Egypt and had moved to Spain some time in 1993. He is a Spanish national and had rights of residence in Portugal. At the time, he was in the process of obtaining residence or some other form of permission in the United Kingdom too. The appellant told gardaí that he was a "*market trader*" and that he dealt in second-hand clothes and motor parts. He described his journey to Dublin as having originated in Santander where he then travelled to Lisbon via Madrid, and then on to Ireland.

The Second Garda Interview

16. Gardaí's focus in the second interview centred on the purpose of the appellant's trip to Ireland. They were told by the appellant that he had arrived in Ireland for the purposes of sourcing replacement motor parts and clothes. When pressed by gardaí to specify business appointments he had in connection with such activity to support this claim, the appellant was unable to do so. Interviewing gardaí put to the appellant that his story was nonsensical as he had arrived in Dublin with no credit card, with only €400 in cash on his person, and at a time when Irish businesses were closed due to the Covid-19 pandemic. Nevertheless, the appellant persisted with his account of the nature of his trip. The appellant further denied receiving any documents from other passengers on his flight and claimed that he had happened upon the shoulder bag, in which the documents were found, between two seats while he was disembarking the aircraft. Garda Gavin confirmed at the sentencing hearing that gardaí were not satisfied with this story, as if true the appellant could not explain why he had not made any efforts to hand the bag over to the relevant airline/airport authorities.

The Third Garda Interview

17. The third interview featured certain admissions by the appellant. He informed interviewing gardaí that he was working on behalf of an unidentified man (otherwise known as "*the facilitator*") in charge of a "*system*", having previously been approached or threatened in order to coerce his involvement. This shadowy figure was supposedly aware that Lisbon airport authorities were unlikely to look for visas or stamps for people travelling to Ireland (notwithstanding Ireland's non-membership of the European free travel zone known as the Schengen Area). Garda Gavin confirmed at the sentencing hearing that investigative experience of the GNIB pointed to this as plausible on account of some European airports being "*more lax than others*". The appellant went on in interview to describe how one person from the group of thirteen passengers collected the travel documents from the whole group, which collection was subsequently handed over to the appellant. This would have been pre-arranged in advance of the flight, the lead passenger nominated for collection of these documents would have been sent a photograph of the appellant and would, on the basis of this depiction, approach the appellant at the airport with the collected travel documents in a bag for handover. The appellant thus would only have had contact with a single passenger from the group of thirteen. The logic for handing over the documents, as explained by Garda Gavin, is that this group of passengers could then present at Dublin immigration as persons without documents in circumstances where they would otherwise have been refused leave to land. The role of the appellant in this scheme, as an EU national, was instrumental inasmuch as he could freely enter Ireland with the transferred documents in his possession. He could subsequently return to Spain and from there send the transferred documents to an address in another EU country by way of couriered post.

18. The whole purpose of this illegal immigration scheme, as described by Garda Gavin on the basis of what the appellant had outlined to gardaí, involved "*circumventing the common travel area, abusing the common travel area as such, so entry into Ireland [the passengers] were then using the land border into Belfast and then onward travel to the*

UK." This onward travel would have also been pre-arranged as part of this scheme. While it should be stressed that there was no evidence that the appellant was involved in this onward travel aspect, nevertheless Garda Gavin would later state in cross-examination that the appellant's offending was part of "*an organised crime group involved in the wholesale facilitation of illegal immigration throughout Europe*".

19. At the sentencing hearing, Garda Gavin could not explain how this collection would have been pre-arranged in circumstances where the accommodation centre to which persons without documents are sent may vary, but nevertheless he averred "*this is obviously part of the crime network is that each person has their own role in this -- in this illegal activity I suppose and that's another person who we haven't identified. [...] Mr. Morsy's role was obviously on the aircraft but other people would have different roles within this network [....] that is essentially the network, how it operates [...]*".

20. In relation to the planned sending on of the transferred travel documents upon return to Spain, the appellant informed gardaí that he was to be paid €500 for the return trip to Dublin (in cross-examination, Garda Gavin stated that gardaí disputed this figure and believed that the appellant was due to receive a larger sum), that he was paid some of this sum up front (and that his flights were paid for him) and that he was to be paid the remainder once he had sent the documents on by way of couriered post. Garda Gavin informed the sentencing court that investigative experience has showed that travel documents including passports are then recirculated, and he pointed to the altered Polish passport as indicative of this practice.

21. The appellant further informed interviewing gardaí that each of the thirteen passengers would have paid the facilitator €1,500 to get entry into Ireland and that there may have been discount for some members of the group and families. The appellant described this as charge as a "*relatively cheap price*" in comparison to the fee for entry to other countries, and he cited a charge of €2,000 for entry into Germany. Gardaí disputed this account in the interview and Garda Gavin told the sentencing court that that account "*it's not what we believe knowing the investigation but that is what he said*". In cross-examination, Garda Gavin confirmed that gardaí did not believe that the appellant was the main profiteer from these proceeds but that he was nevertheless a "*vital cog*" to this organised crime.

The Fourth Garda Interview

22. In the fourth interview, the appellant was questioned in respect of each of the travel documents found in the shoulder bag. In respect of each such document, the appellant denied recognising the person connected with it save one, the lead passenger who had collected the documents on the group's behalf and transferred them to the appellant. He accepted that the documents had been in the bag in his possession upon arrival at Dublin airport, and he accepted that "*he had been a vital part of the entry into the state of each person*".

The Fifth Garda Interview

23. In the fifth and final interview, the appellant denied playing an organisational role in the scheme, reiterating his paid role was merely the collection of the travel documents and their subsequent sending on through the post upon his return to Spain. The appellant claimed he was motivated by his own financial pressures which drove him to involvement in the scheme. He detailed to gardaí certain information regarding the wider immigration scheme, which information Garda Gavin agreed was of some assistance to gardaí and international partners in their investigations into this activity.

Status of the Thirteen Passengers

24. In cross-examination, Garda Gavin confirmed that the day after the events of the night of the 19th of February 2020/morning of the 20th of February 2020, gardaí lost contact with the thirteen passengers and it is believed that they successfully made their way to the United Kingdom.

Personal Circumstances of the Appellant

25. Garda Gavin confirmed that the appellant had a date of birth of the 7th of June 1968, making him 54 years of age at the time of sentencing. Gardaí believed that the appellant had four children including one young child. The appellant had been in custody since his arrest on the 20th of February 2021.

26. As regards the appellant's conviction history, Garda Gavin handed into the sentencing court a copy of records of eight previous convictions in Spain as supplied by Europol. These comprised:

- Four previous convictions between the 9th of January 2017 and the 13th of January 2020 for what Garda Gavin described as the equivalent of a criminal damage-type offence in Ireland (described in the records as a "*non-aggravated offence against industrial property*"). In respect of each such conviction, he received a fine (the greatest of which was €420). Counsel on behalf of the defence indicated that these offences arose out of fines in respect of the appellant's street-market trading of clothes business. Garda Gavin was not in a position to gainsay this, as he was solely reliant on information supplied by Europol which suggested same.

- Two previous convictions (dated the 24th of September 2013 and the 21st of October 2013, respectively) for the Spanish offence of "*driving with loss of validity license or with permit due to loss of all points*". In respect of each, he was fined €1,440 (September 2013 offence) and €2,520 (October 2013 offence).

- One previous conviction (dated the 27th of June 2008) for "*the use of a forged document, public or business documents*" for which he was received a fine of €540 and some form of three months' sentence. The defence argued that the sentence received on this date did not involve an immediate custodial disposal, they pointed to the absence of a named prison on the records, and they emphasised that the forged documents in question concerned a motor vehicle. Garda Gavin could not

gainsay this and stated, "*we have nothing to say but it does say, "sentence three months, unknown prison,*" so again we have nothing further on that."

- One previous conviction (dated the 9th of July 2004) in relation to domestic and gender-based violence, injuries and family abuse. The appellant was sentenced to three months' imprisonment. Similarly, counsel on behalf of the defence disputed that an immediate custodial disposal was involved, and that the offence arose in the context of an argument the appellant had had with his first wife. Again, Garda Gavin could not gainsay this.

Submissions by the Prosecution

27. Counsel on behalf of the prosecution submitted to the sentencing court that the maximum custodial sentence for a s. 2 offence of trafficking in illegal immigrants is one of 10 years. While the majority of the other counts on the indictment which were being taken into consideration on a full-facts basis were counts of the same offence, count no. 1 was a count of custody or control of a false instrument, contrary to s. 29(2) and (6) of the Criminal Justice (Theft and Fraud) Offences Act 2001. In respect of this count, counsel submitted that the maximum custodial sentence is one of 5 years.

Plea in Mitigation

28. Counsel on behalf of the defence handed in a number of documents to the sentencing court in mitigation. These included: a translated document detailing the placement of the appellant's son in Spanish state care at an adolescent centre; a document indicating that the appellant's family had been served notice to quit their home because of non-payment of rent; a document indicating that the appellant's wife was suffering with cancer; a document indicating that whilst in prison the appellant had attained credits in craftwork and medical work; and an Irish Red Cross certificate from "*Iron Man Challenge 2022*".

29. Counsel submitted to the sentencing court that while the offence was of a serious nature, the appellant's role in it fell at the lower end. Counsel described the appellant as "*the person who is taking the risk but not getting huge financial reward for it*" and that while he was involved in the facilitation of illegal immigration, the thirteen passengers were not "*forcefully trafficked*" but rather, in counsel's submission, could be classified as "*economic migrants*". Counsel described the appellant's motive as being clearly "*profit*" but at "*a very minimal level*".

30. Counsel submitted that the appellant arrived in Spain in 1993 where he would later get married and obtain citizenship. This first marriage at some point broke up. The appellant had five children, including one who had attained majority, the rest were under the age of 18 years, the youngest was 4 years of age. Counsel submitted that due to the appellant's absence from the home, one his children, a teenage son, was taken into care. Counsel further submitted that the appellant's wife was ill with cancer and was being assisted by the appellant's brother who was tending to the appellant's family in his absence.

31. Counsel described the appellant's work history. He outlined that the appellant had worked as a street vendor, trading in second-hand clothes in Spanish markets but that he also dabbled in the sale of motor parts and cars. Counsel described the appellant as not "*a*

person of great means or great wealth". In this context, counsel submitted that the appellant was approached on a number of occasions, was offered a sum of money, and decided to take the risk. This, counsel described, was "*a huge mistake on his part*" and that "*he was aware of what he was doing*".

32. Turning to the appellant's detention since the 20th of February 2021, counsel submitted that the appellant's time in custody had been "*particularly hard*" on account of the Covid-19 pandemic which precluded visitations and thus limited contact to family to a quotidian telephone call. Counsel further submitted that the appellant's time in custody was all the harsher on account of his poor English. This language barrier further made his following of criminal proceedings, in particular the preliminary trial hearing at which he had entered guilty pleas, more difficult, notwithstanding the provision of an interpreter.

33. Lastly, counsel emphasised that the appellant's offending fell at the lower end of the scale, and he further pointed to the appellant's co-operation with gardaí as having been "*very helpful*" to the state.

Sentencing Judge's Remarks

34. In her remarks made on the date of sentencing, the 9th of December 2022, the sentencing judge noted the factual background of the case as described in evidence by Garda Gavin. She further acknowledged the appellant's conviction history, his good work record, his particular family situation, and that he had been in custody since the 20th of February 2021.

35. The sentencing judge identified as the relevant aggravating factor at play in this case the appellant's role as a "*vital cog in this operation*" insofar as that role was to collect travel documents from the passengers and to send those on by way of post upon his return to Spain.

36. The sentencing judge identified as mitigating factors: his guilty plea; his family situation; that he had never been in custody before; his good work record; the hardship of custody as a non-national, and; the absence of connections or friends in this jurisdiction.

37. The sentencing judge remarked that the court would attempt to adopt what is "*best practice*" based on guidance from the Court of Appeal, and in doing so would first set a headline sentence before discounting for mitigation. She went on to note the documents handed in on behalf of the appellant and that these had been taken into account.

38. Having regard to the maximum custodial sentence of 10 years, the sentencing judge nominated a headline sentence of 8 years as appropriate, having regard to the seriousness of the offence but also accounting for the personal circumstances of the appellant. Discounting for mitigation then, the sentencing judge deducted 3 years from the headline sentence, leaving a net custodial sentence of 5 years to be served on each count, each such sentence to run concurrently and backdated to the date on which the appellant entered custody, the 20th of February 2021.

Notice of Appeal

39. In Notice of Appeal lodged the 12th of December 2022, the appellant now appeals to this Court against the severity of the sentence imposed by the Circuit Criminal Court. In support of this application, the appellant has advanced ten grounds which have been helpfully grouped in his written submissions:

- Grounds 1, 7 and 8 – Duration of headline sentence and overall sentence: *"[...] that the learned trial judge erred in law and in principle in imposing a headline sentence of 8 years in all the circumstances, in failing to afford adequate weight to relevant factors of mitigation, in particular the placement of the offence at the lower end of the scale of seriousness and severity, and in imposing a sentence which is disproportionate when having regard to similar sentences imposed."*

- Grounds 2, 3, 4 and 5 – Mitigating factors: *"[...] that the learned trial judge erred in law and in principle in failing to afford adequate weight to relevant factors of mitigation [...]".*

- Grounds 6 and 9 – Guilty plea and previous convictions: *"[...] that the learned trial judge erred in law and in principle in failing to afford adequate weight to the plea of guilty entered by the Appellant prior to the commencement of any trial and prior to the empanelling of a jury. Furthermore, it is respectfully submitted that the learned trial judge erred in placing too much emphasis on the previous convictions of the Appellant."*

- Ground 10 – Excessive sentence overall: "*In the premise of the foregoing, and in all of the circumstances, it is respectfully submitted that the learned trial judge erred in law and in principle in imposing a sentence which is excessive and oppressive in all the circumstances.*"

Parties' Submissions to the Court of Appeal

Appellant's Submissions

40. The appellant is critical of the Circuit Court judge's methodology in sentencing in the present case. The appellant submits that the correct approach to sentencing generally is to first nominate a headline sentence and only thereafter apply mitigating factors to deduct from that sentence. In this regard, the appellant relies upon *DPP v. Stephen Kelly* [2005] 2 I.R. 321 as authority for this approach and as authority for the proposition that a sentence must be proportionate not only to the offence but to the individual offender. The appellant further relies upon *DPP v. Daly* [2011] IECCA 104 as authority for the proposition that failure by a sentencing judge to have adequate regard to any or all of the mitigating factors can constitute an error in principle. Also the appellant refers us to *DPP v. Hall* [2016] IECA 11 as requiring a sentencing judge to set out in "*sufficient detail*" the reasons for imposing a particular sentence "*such that the basis for same are apparent to all concerned*". The appellant submits that the above principles were recently affirmed in *DPP v. O'Loughlin* [2022] IECA 18.

41. The appellant puts forward in his written submissions a number of comparators to demonstrate the application of these principles to cases involving s. 2 trafficking in illegal immigrants offences, to which we have had regard. These comparators include *DPP v. Ilori* [2008] IECCA 181; *DPP v. Kernan* [2019] IECA 188, and; *DPP v. Jokhadze and Grdzelishili* (Unreported, Circuit Criminal Court, 18th of June 2021).

42. Turning to the various grounds upon which the appellant now appeals against the severity of his sentence, grounds 1, 7 and 8 relate to the duration of the headline and overall sentence. In essence, it is submitted that what was imposed on the 9th of December 2021 was a disproportionate sentence. Noting that the maximum term of imprisonment for an offence of this type is statutorily limited to 10 years, the appellant criticises the nomination of 8 years as the headline sentence on each count as not reflective of the true seriousness of the offence. The appellant submits that, in nominating such a headline, the sentencing court in effect determined that the appellant's offending was more severe than 80% of other instances of this type of offence. This, the appellant submits, cannot be so. It is stressed that the appellant was merely involved in a single aspect of an operation to facilitate illegal immigration but that his role was not organisational or co-ordinating in nature. The appellant was to travel to Dublin, collect the travel documents, and then return to Spain from where he was instructed to post these documents to an address provided. Referring to the evidence of Garda Gavin, it is submitted that the appellant's role was therefore relatively limited, did not actually involve the transportation of the passengers, was low-level within the wider criminal organisation, he was replaceable, and he was not the "*main profiteer*". Further, and in support of the contention that the seriousness of the offence was low, it is submitted that the passengers involved were "*economic migrants*" who had a form of residency permit for either Germany or Greece.

43. In relation to grounds 2, 3, 4 and 5, which concern the treatment of mitigating factors, the appellant submits that the sentencing judge stepped into error in failing to afford adequate weight to relevant mitigation, and in particular he identifies the following factors as having been inadequately considered:

> *"a. the material assistance and information provided to An Garda Síochána by the Appellant (Ground 2);*
>
> *b. the family circumstances of the Appellant, including the ill-health of his wife and the placement of his son in the care of the State (Ground 3);*
>
> *c. the socio-economic circumstances of the Appellant and the eviction notice received in respect of his home for non-payment of rent (Ground 4), and*
>
> *d. the significance of his time spent in custody since February 2021 as a non-national, with no relatives in the country, through the Covid-19 Coronavirus pandemic (Ground 5)."*

44. In relation to the first factor, material assistance to gardaí, the appellant's complaint is that while it is accepted that it is not necessary for the sentencing judge to have

discussed in detail each mitigating factor, the sentencing judge failed to even reference or consider this particular mitigating factor at all, notwithstanding that this co-operation by the appellant "*was material to furthering an international investigation into the criminal organisation facilitating illegal immigration in Europe*". As regards the other factors specified in the above list, the appellant submits that adequate weight was not afforded to these by the sentencing judge and it is stressed that the appellant is a man of limited means, of limited English and no connections to Ireland, whose son has been taken into care on account of his 2-year absence, and whose wife is suffering from cancer. The appellant submits that in such circumstances a greater discount in mitigation should have been afforded.

45. In respect of the third group of grounds (grounds 6 and 9), the appellant submits in the first place that the sentencing judge failed to afford adequate weight to the guilty plea he had entered into prior to the commencement of any trial/empanelling of a jury, and in the second place that too much emphasis was placed by the sentencing judge on his previous convictions. While the timing of the guilty plea was brought to the sentencing judge's attention after she had passed sentence, the appellant submits that it was not adequately afforded due weight in sentencing. In respect of the appellant's previous convictions, it is complained that the sentencing judge erred in attaching too much weight to them, notwithstanding that the appellant never served a custodial sentence, and that the sentencing judge erred in not having regard to the substance of those offences.

46. Finally, in relation to ground 10, the appellant submits that having regard to the foregoing the sentence imposed by the Circuit Criminal Court was excessive and oppressive in all the circumstances.

Respondent's Submissions

47. In the first place, it is submitted by the respondent that the appellant's argument that the headline sentence and overall sentence imposed was disproportionate is misconceived. The sentencing judge heard much evidence as to where the appellant's behaviour fell on the scale of the offending, the sophistication of the immigration scheme and the importance of the appellant's role. It is submitted that such evidence provided ample basis on which to properly and appropriately determine where the appellant's offending lay.

48. In relation to the argument that insufficient weight was afforded to mitigation, the respondent submits that this is also misconceived, particularly insofar as the appellant's co-operation with gardaí is concerned, as such matters were the subject of "*copious discourse*" at the sentencing hearing. Moreover, it is submitted that the sentencing court was not required to "*slavishly refer to and describe in detail every piece of evidence relied upon as a mitigating factor*" and the respondent relies upon *DPP v. Ouachek* [2015] IECA 221, para. 35, in this regard. The respondent further plays down the value of the assistance rendered by the appellant to gardaí, that it was "*somewhat*" detailed in contrast to the "*invaluable*" assistance provided in comparator case *DPP v. Kernan*, cited

above in the appellant's submissions, which led to tangible security updates in Dublin airport.

49. The respondent submits that the plea of guilty entered into by the appellant, while meriting some credit, did not merit such credit as might be afforded to an accused who enters a plea in early course. While the appellant stresses that the plea is of value insofar as it took place prior to the empanelling of a jury, the respondent notes that before the enactment of the Criminal Procedure Act 2021 it would have been the case that the preliminary trial hearing would have been conducted post the empanelling of a jury. It is thus submitted by the respondent that the degree of credit to be afforded to an accused in similar circumstances is yet to be explored by this Court.

50. As regards the appellant's submissions in relation to the treatment of his conviction history at sentencing, the respondent simply replies that he was not entitled to such credit as a person with an unblemished record would be.

51. Having regard to the foregoing, the respondent refutes the appellant's contention that the sentence imposed was excessive: The appellant voluntarily participated in a for profit organised criminal endeavour which involved the attempted surmounting of immigration systems by assisting the unlawful entry of thirteen individuals into the state. The sentence imposed was made within jurisdiction and within the level of appreciation of the sentencing judge. It further took account of all of the relevant aggravating factors and affording appropriate credit for mitigation. It is submitted that the sentence imposed was thus appropriate and within acceptable parameters.

The Court's Analysis and Decision

52. We have no hesitation in rejecting the first group of complaints which relate to the setting a headline sentence of eight years imprisonment. In our view this was really serious offending. It involved organised crime. It involved transnational criminal activity. The appellant entered the State specifically with a view to abusing this state's immigration laws and to facilitate the subsequent abusing by those who were entering the state illegally of the Common Travel Area between Ireland and the United Kingdom. While he may not have been a principal organiser of the criminal enterprise, and indeed may have been a relatively low-level operative, he became involved for profit, and he engaged in the criminal activity in question with his eyes open. He knew exactly what it was that he was getting involved in, and that it was illegal.

53. Much is made by counsel for the appellant of the fact that the thirteen persons whose illegal entry into the state was facilitated by the appellant were not being coerced. Rather, they were economic migrants who had entered into the arrangement willingly. It was suggested by counsel that the higher end of the sentencing range should be reserved for more serious cases involving the exploitation of, or coercion of, those who were illegally entering into the State. We are not impressed by this point. As counsel for the respondent rightly identified at the hearing of the appeal, Irish statute law provides in the Criminal Law (Human Trafficking) Act 2008 for various trafficking offences, carrying in some instances up to life imprisonment, which can be charged in circumstances which are

coercive of the person being trafficked. The offence contrary to s. 2 of the Act of 2000 is framed so as to embrace persons who were not being coerced. If a case of trafficking today involved coercion, one would expect to see charges contrary to the Act of 2008, rather than under s. 2 of the Act of 2000.

54. It seems to us that the gravity of the offending with which we are concerned in this case lies very much in the abuse of Irish immigration policy that it facilitates, and the potential for national embarrassment in this State's relationship with its nearest neighbour if, by dint of the frustration of, and the legal avoidance of, Ireland's border controls and immigration laws, the Common Travel Area with the United Kingdom were to be abused in the way that had been planned in this case. It is also the case that, while there may not have been coercion in the present case, the criminal organisation behind the appellant's crime was nevertheless cynically exploiting for profit the illegal migrant status, and consequent economic vulnerability, of the persons voluntarily submitting to being trafficked here. The number of persons whose illegal entry into the State was being facilitated in this particular instance was also a significant aggravating factor. Further, the premeditated nature of the appellant's involvement, the fact that he entered into it cynically for financial reward, and the obvious sophistication of the scheme in which he willingly participated, all speak to significant culpability on his part. It is also relevant that in addition to the six offences to which the appellant had pleaded guilty, the court was also taking into consideration another eight offences. The fact that a large number of offences were being taken into consideration would of itself have necessitated the setting of a higher headline sentence than would otherwise have been set, for otherwise the appellant would be getting a free ride in respect of the additional offences to be taken into consideration.

55. In our view, the headline sentence was set at an appropriate level having regard to the circumstances we have just outlined. The sentencing judge was required to appropriately censure the offender and communicate society's deprecation of such offending conduct. Further, in such a case there is a need to deter further offending, both specifically and generally. While the headline sentence nominated was perhaps at the severe end of the sentencing judge's margin of discretion, we are satisfied that it was within her margin of discretion. We find no error of principle with respect to the setting of the headline sentence.

56. Turning then to the mitigation that was afforded, once again we are not persuaded that there was any error of principle. It is true that the sentencing judge did not specifically reference the appellant's co-operation, but as we have held previously it is not essential that a sentencing judge should name check every relevant mitigating factor in the course of discounting for mitigation. It is clear to us that what occurred in this case was simply a listing oversight but that the sentencing judge undoubtedly appreciated, and can with confidence be said to have taken full account of, the fact that the appellant had been co-operative and had rendered some assistance in her instinctive synthesis of the mitigating factors. Extensive evidence had been received by her concerning the interviewing of the appellant and concerning the nature and level of assistance rendered by him. The

appellant was afforded a substantial, indeed generous, aggregate discount for the mitigating factors in his case and we have no reason to believe, having regard to the overall level of discount, that the sentencing judge did not take his cooperation and assistance into account. It seems to us that in explaining why she was disposed to afford a discount of three years (or 37.5%) from the headline sentence she may have simply overlooked including cooperation and assistance in the list of items she was name checking as having taken into account. The fact that she omitted them from the list does not mean that they were not taken into account.

57. We are satisfied that the overall level of discount was appropriate. The plea was not a particularly early plea. The pleas to the first two offences were only entered on the third day of a preliminary hearing, and the remaining pleas were only entered on the day of the sentencing hearing. The appellant was certainly entitled to some credit for his pleas but they was not the most valuable pleas, as he had little choice but to plead guilty in circumstances where there was very strong evidence against him. Further, given the lateness of the pleas the prosecution would have been spared little in terms of the preparatory work that needed to be undertaken in anticipation of a trial.

58. Much was also made of the fact that the appellant is a foreign national with no links to this jurisdiction, and with little English. It is true that it may be harder for him to have to serve a prison sentence in this jurisdiction in that situation but sight cannot be lost of the fact that he travelled to Ireland expressly for the purpose of committing the crimes for which he has been sentenced. It is not a situation of him having been a resident here for some time, or a visitor here for legitimate purposes, who had then while here become involved in some criminal activity. He travelled to Ireland specifically with the intention of committing the crimes for which he has been sentenced. Having done so, his complaint that it will be harder for him to have to serve a prison sentence here than it would be for an Irish national, and that he must on that account receive a lesser sentence, must be regarded as carrying little weight.

59. The sentencing judge properly took into account the appellant's personal circumstances including his wife's health difficulties and the eviction threat. These were part of her synthesis in affording the overall level of discount that she determined upon and which, as we have said, we consider was appropriate in the circumstances.

60. We have considered the comparator cases that have been put forward by the appellant. We do not find these to be of very great assistance as the circumstances in each case are readily distinguishable. In particular, with reference to the case of *The People (DPP) v. Kernan* [2019] IECA 188 on which much reliance was placed, two points must be made. Firstly, no headline sentence was identified in that case. The sentencing judge at first instance had simply indicated a post mitigation sentence based on instinctive synthesis. Secondly the point must be made that the level of material assistance afforded in that case was very much greater than was afforded in the present case. As counsel for the respondent put it in oral argument before us, "*there were immediate tangible benefits in that case*". The same cannot be said here.

61. In conclusion, we are not persuaded that the sentence imposed in this case was too severe. We are not persuaded that it was in any way disproportionate. We find no errors of principle on the part of the sentencing judge.

62. The appeal is accordingly dismissed.