Trinity Term
[2017] UKSC 44
On appeals from: [2016] HCJAC 83 and 117

JUDGMENT

Lord Advocate (representing the Taiwanese Judicial Authorities) (Appellant) *v* Dean (Respondent) (Scotland)

before

Lord Mance
Lord Sumption
Lord Reed
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

28 June 2017

Heard on 6 March 2017

Appellant	*Respondent*
Lord Advocate David J Dickson (Instructed by Crown Office)	Mungo Bovey QC Graeme R Brown (Instructed by GR Brown Solicitors)

LORD HODGE: (with whom Lord Mance, Lord Sumption, Lord Reed and Lord Hughes agree)

1. This is an appeal about an extradition order. The Lord Advocate appeals under paragraph 13 of Schedule 6 to the Scotland Act 1998 against the determination of a devolution issue by the Appeal Court of the High Court of Justiciary ("the Appeal Court") on 23 September 2016. That court, by majority, quashed an order for the extradition of the respondent ("Mr Dean") to Taiwan. The underlying question is whether his extradition to serve the residue of a prison sentence there would be compatible with his right under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), which, as is well known, provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The Appeal Court held that his extradition would not be compatible with that article of the Convention.

2. The appeal raises two principal questions, namely (a) the competence of the appeal and (b) whether the Appeal Court applied the correct legal test in assessing the risk of harm which Mr Dean might face in the requesting state from non-state actors. If the Appeal Court did not apply the correct legal test, it is for this court to apply that test to the factual findings of the Appeal Court.

3. It is important to make clear at the outset that the Lord Advocate argued the Crown's case in a way in which the solicitor advocate who appeared for him in the courts below had not. The Lord Advocate frankly conceded that his argument on what was the correct legal test had not been presented before the Appeal Court. It therefore involved criticising the judges of the Appeal Court for not giving effect to an argument which they did not hear.

Background facts

4. Mr Dean, a citizen of the United Kingdom, was born in Manchester. He grew up in Edinburgh but had lived and worked in Taiwan for about 19 years before he was involved in a road traffic accident on 25 March 2010. Following that accident, he was convicted after trial in the District Court of Taipei on 15 March 2011 of driving while under the influence of alcohol, negligent manslaughter and leaving the scene of an accident. The basis of his conviction was that, while under the influence of alcohol, he drove into and killed a man who was driving a motorcycle on a newspaper delivery round, that he did not stop, and that he did not report the accident. He was sentenced to imprisonment for two years and six months.

5. He appealed against his conviction and sentence to the High Court in Taipei, which, having heard further evidence, refused his appeal and increased his sentence of imprisonment to four years. He then appealed to the Supreme Court of Taiwan. He remained on bail before and during his trial and while his appeals were pending. Before the Supreme Court of Taiwan had heard his appeal, he fled Taiwan, using a friend's passport, and came to Scotland. The Supreme Court of Taiwan confirmed his conviction and sentence in his absence.

6. The authorities in Taiwan then applied for his extradition. On 9 October 2013 the Ministry of Justice of Taiwan sought a provisional arrest warrant under section 73 of the Extradition Act 2003 ("the 2003 Act"), which is available if a person is accused in a category 2 territory of the commission of an offence and he is alleged to be unlawfully at large after his conviction. Because there is no extradition treaty between the UK and Taiwan, the Home Office on behalf of the United Kingdom and the judicial authorities in Taiwan entered into a memorandum of understanding in relation to Mr Dean under section 194 of the 2003 Act dated 16 October 2013. This had the result that a certificate by the Scottish Ministers enabled the 2003 Act to apply in relation to Mr Dean's extradition as if Taiwan were a category 2 territory under that Act.

7. Mr Dean was arrested in Scotland on 17 October 2013 and remained in custody for almost three years. On 28 October 2013 the Ministry of Justice of Taiwan delivered a written request for Mr Dean's extradition to the Secretary of State for the Home Department. The Cabinet Secretary for Justice, Mr Kenny MacAskill, certified the request under section 70(1) of 2003 Act on 18 November 2013 and sent the request to Edinburgh Sheriff Court. An extradition hearing before Sheriff Kenneth Maciver was scheduled to commence in January 2014. Mr Dean mounted numerous challenges and lodged two devolution minutes. The completion of the hearing was delayed by his withdrawal of instructions from his legal representatives, the obtaining of an expert report and the engagement of replacement legal representatives. By Note of Decision dated 11 June 2014, the sheriff decided under section 87(1) of the 2003 Act that Mr Dean's extradition would be compatible with his Convention rights within the meaning of Human Rights Act 1998, and refused the two devolution minutes. The Scottish Ministers made the extradition order on 1 August 2014.

8. Mr Dean appealed under section 103 of the 2003 Act against Sheriff Maciver's decision and under section 108 of that Act against the extradition order of the Scottish Ministers. The Appeal Court (Lady Paton, Lord Drummond Young and Lady Clark of Calton) heard challenges as to whether Taiwan was a "territory" within the meaning of the 2003 Act, whether Mr Dean's article 6 right to a fair trial had been infringed, and whether, under section 81 of the 2003 Act, extraneous considerations barred extradition - in this case whether there was a serious possibility that the request to extradite was for the purpose of punishing him by

reason of his race or nationality. In its unanimous opinion dated 24 June 2015, the Appeal Court rejected those challenges. This appeal is not concerned with those issues. On the issue with which this court is concerned, namely the challenge under article 3 of the Convention concerning prison conditions in Taiwan, the Appeal Court ordered an evidential hearing. It reserved its opinion on the section 108 appeal until it had dealt with the article 3 challenge.

9. After hearing evidence on the article 3 challenge, the Appeal Court on 23 September 2016 by a majority (Lord Drummond Young dissenting) held that Mr Dean's extradition to Taiwan would not be compatible with his article 3 right and ordered his discharge. The Appeal Court, in assessing the compatibility of the extradition, applied the test set out in *Saadi v Italy* (2009) 49 EHRR 30, namely "whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with article 3". The majority (Lady Paton and Lady Clark of Calton) concluded that there was such a risk. Because I am satisfied that the Appeal Court applied the wrong legal test and that this court must therefore make its own assessment of the facts found by the Appeal Court, I mean no discourtesy in summarising the majority's reasoning briefly.

10. The Appeal Court heard evidence from Mr Dean and also two legal academics, Professor Mong Hwa Chin and Dr James McManus, who had been instructed on behalf of the Lord Advocate. That evidence vouched the conclusion that Taiwanese prisons were seriously overcrowded and that Taipei prison, where the Taiwanese authorities proposed to keep Mr Dean, was both overcrowded and understaffed. The Taiwanese authorities had given written assurances to the Lord Advocate in which they undertook that Mr Dean would not be housed in the overcrowded cells in the main prison block but would be housed in a separate building in an adequately sized cell, which had a lavatory and a shower and which he would share with only one other foreign prisoner. The majority of the Appeal Court held that, if the Taiwanese authorities fulfilled their undertakings to the letter, there was still a real risk of ill treatment in accordance with the *Saadi* test because (a) Mr Dean suffered from some notoriety in Taiwan, the other inmates and prison staff would view the arrangements made for him as wholly exceptional, and this would give rise to animosity from other prisoners, (b) the staffing levels were not sufficient to protect Mr Dean if he were to mix with other prisoners, (c) therefore he was likely to choose to stay in his cell for most of the time and would not be able to work to earn parole, (d) he would also have only limited opportunity for outdoor exercise or interaction with others and solitary confinement was generally harmful to health, (e) the ratio of medical and pharmaceutical staff to prisoners was too low and prisoners had to pay for non-emergency medical treatment and non-standard drugs, (f) there was no formal system for a UK body or an international body to inspect the prison, (g) United Kingdom consular staff, who visited UK prisoners in Taiwanese prisons, did not assess prison standards, and (h) there were no established procedures by which prisoners could enforce their rights in the Taiwanese courts.

Lady Clark also commented on the ad hoc nature of the assurances which the Taiwanese authorities had given and doubted the ability of the British consular staff to monitor those assurances.

11. Lord Drummond Young in his dissenting opinion emphasised the contribution which extradition makes to the rule of law both nationally and internationally. He pointed out that the European Court of Human Rights ("ECtHR") had held that article 3 was not a means by which contracting states might impose their own standards on other states: *Ahmad v United Kingdom* (2012) 56 EHRR 1, para 177. He argued that the court must proceed on the assumption that the Taiwanese authorities would observe in good faith the assurances they had given and he assessed the quality of those assurances against the criteria which the ECtHR set out in *Othman v United Kingdom* (2012) 55 EHRR 1, paras 177-190. Having assessed the evidence, Lord Drummond Young concluded that Mr Dean had failed to establish that there was any real risk of his being subject to treatment that would infringe article 3 of the Convention.

12. After the Appeal Court (again by majority) refused to give leave to appeal, a panel of this court granted the Lord Advocate permission to appeal on 21 December 2016.

Discussion

13. I consider, first, the challenge to the competency of this appeal before discussing the correct legal test for compatibility with article 3 of the ECHR when the threat comes from the acts of third parties and applying that test to the findings of the Appeal Court.

The competence of this appeal

14. Mr Bovey, who appears for Mr Dean, challenges the competence of this appeal on the ground that the Appeal Court has not determined a devolution issue. For the reasons set out below I consider that challenge to be misconceived.

15. The decision of the Appeal Court which the Lord Advocate has appealed is a decision "whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c 42)": section 87(1) of the 2003 Act. The decision was made in the context of an appeal under section 103 of the 2003 Act. There is no appeal to this court from a decision of a Scottish court under section 103 because the provision authorising an appeal to this court from decisions made under sections 103 and 108 (among others) does not

apply to Scotland: section 114(13) of the 2003 Act. But that is not the end of the matter because an appeal from a decision under section 87(1) of the 2003 Act, which was the subject of this part of Mr Dean's section 103 appeal, raises a question of the legal competence of the Scottish Government.

16. Section 57(2) of the Scotland Act 1998 provides

> "A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights …"

17. The functions carried out by the Lord Advocate and the Scottish Ministers under Part 2 of the 2003 Act are acts that they perform as members of the Scottish Government: *BH v Lord Advocate* 2012 SC (UKSC) 308, paras 33-34 per Lord Hope, and *Kapri v Lord Advocate* 2013 SC (UKSC) 311, paras 18-23 per Lord Hope.

18. In Schedule 6 to the Scotland Act 1998 paragraph 1(d) includes within the definition of a "devolution issue":

> "a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights …"

19. The question as to whether the Scottish Government's acts in seeking to extradite Mr Dean to Taiwan are compatible with Convention rights is thus a devolution issue: *BH* (above), para 34, *Kapri* (above), para 22. Section 116(1) of the 2003 Act provides the general rule that a decision under Part 2 of the Act by a judge or the Scottish Ministers may be questioned in legal proceedings only by means of an appeal under that Part, but subsection (2) to that section excludes from that limitation an appeal against the determination of a devolution issue.

20. When pursuing his appeal before the Appeal Court to challenge the sheriff's decision under section 87 of the 2003 Act Mr Dean had the option of proceeding either under section 103 of the 2003 Act or by means of raising a devolution issue under the Scotland Act 1998: *BH* (above), para 26; *Kapri* (above), para 19. He chose to proceed under section 103 of the 2003 Act and did not raise a devolution minute in relation to his challenge concerning prison conditions in the Appeal Court. The Lord Advocate was the respondent to Mr Dean's appeal before the Appeal Court. He therefore did not need to exercise his right under paragraph 4 of Schedule 6 to

the Scotland Act 1998 to institute proceedings to determine the devolution issue raised by Mr Dean's appeal.

21. Where a devolution issue arises in proceedings, intimation of the issue should be given to the Advocate General for Scotland and the Lord Advocate, unless they are already parties to the proceedings: paragraph 5 of Schedule 6 to the Scotland Act 1998. Neither Mr Dean's legal advisers nor the Lord Advocate intimated the issue to the Advocate General for Scotland in relation to the proceedings before the Appeal Court. The Advocate General was thus deprived of his right under paragraph 6 of Schedule 6 to take part in the proceedings in the Appeal Court. That omission, however, does not affect the competence of any appeal to this court.

22. Paragraph 13(a) of Schedule 6 to the Scotland Act 1998 confers a right of appeal to the Supreme Court against a determination of a devolution issue by a court of two or more judges of the High Court of Justiciary. The decision of the Appeal Court is such a determination. The Lord Advocate has informed this court that he had intimated the devolution issue, which he seeks to argue in this court, to the Advocate General for Scotland, who has indicated that he does not intend to take part in the proceedings. There is therefore no bar to this appeal.

23. It may be that the Appeal Court would have determined the other devolution issues, which Mr Dean has raised, if it had been aware that the Lord Advocate might seek to appeal its determination of the article 3 devolution issue to this court. It did not do so. That is unfortunate because it may cause further delay, but that cannot affect the competence of this appeal.

The merits of the appeal

Article 3 of the Convention: summary

24. The Lord Advocate concedes that, on the findings of fact by the Appeal Court, there are substantial grounds for believing that there is a risk that Mr Dean would suffer harm from other prisoners in Taipei prison if protective measures were not put in place. But, he submits, the ECtHR laid down the appropriate legal test in such a circumstance in *HLR v France* (1997) 26 EHRR 29, which the House of Lords applied in *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] 2 AC 668 ("*Bagdanavicius*"). As I set out below, the test is whether the state has failed to provide reasonable protection against harm inflicted by non-state agents. Mr Bovey acknowledges that test but submits that in substance the Appeal Court has addressed it. I do not accept that submission. In my view, the Appeal Court did not address that test. This is unsurprising, because, as Lady Paton recorded

at para 8 of her opinion, counsel were agreed that the correct test was set out in *Saadi*, to which I have referred in para 9 above. As a result no clear distinction was drawn in her opinion (paras 8, 45, and 50-58) between the underlying threat from other prisoners, which the Appeal Court found to exist, and conduct for which the state was responsible. It is therefore incumbent on this court to apply the correct legal test to the findings of fact of the Appeal Court. In short, the court must assess, first, whether the Taiwanese authorities are undertaking to provide Mr Dean with reasonable protection against violence by third parties while he is in prison, and, secondly, if they are, whether the conditions in which he is to have such protection themselves entail an infringement of article 3.

The correct legal test

25. Article 3 of the Convention enshrines one of the fundamental values of a democratic society. It is therefore incumbent on the court to be assiduous in its assessment of a challenge on this ground. A person asserting a breach of this article must show that there are substantial grounds for believing that he faces a real risk of being subjected to treatment contrary to article 3 if he is extradited: *Saadi v Italy* (above), para 125. In addressing that challenge, the court can have regard to assurances given by the receiving state: *Othman v United Kingdom* (above), paras 187-189. In particular, the court must assess not only the quality of the assurances given but also whether they can be relied on, having regard to the general situation in that country with regard to respect for human rights. In *Othman* (para 189) the ECtHR set out eleven factors which, among others, a court could take into account in making that assessment. I discuss several of those factors in para 38 below.

26. In *Bagdanavicius*, Lord Brown of Eaton-under-Heywood, who gave the leading speech in the House of Lords, observed (para 7) that it has long been established that article 3 imposes an obligation on the part of a contracting state not to expel someone from its territory where substantial grounds are shown for believing that he will face in the receiving country a real risk of being subjected to treatment contrary to that article. He cited *Soering v United Kingdom* (1989) 11 EHRR 439 as the initial authority for the principle that the act of expulsion in such a circumstance constitutes the proscribed ill-treatment. The expulsion itself breaches article 3 if such risk in the receiving country emanates either from acts of the public authorities of that state or from persons or groups of persons who are not public officials. In the latter circumstance, it is not sufficient to show that there is a real risk of suffering serious harm at the hands of non-state agents. In para 24 Lord Brown deprecated a failure in such cases to distinguish between the risk of serious harm on the one hand and the risk of treatment contrary to article 3 on the other. He said:

> "In cases where the risk 'emanates from intentionally inflicted acts of the public authorities in the receiving country' (the

> language of *D v United Kingdom* (1997) 24 EHRR 423, 447, para 49) one can use those terms interchangeably: the intentionally inflicted acts would without more constitute the proscribed treatment. Where, however, the risk emanates from non-state bodies, that is not so: any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection. … Non-state agents do not subject people to torture or to the other proscribed forms of ill-treatment, however violently they treat them: what, however, would transform such violent treatment into article 3 ill-treatment would be the state's failure to provide reasonable protection against it."

27. It is this test that the court must apply to the facts of this case in relation to the harm which non-state actors might inflict, before asking whether the circumstances of such protection are themselves compatible with article 3.

Applying the tests

28. The Appeal Court made findings that there were problems of over-crowding and under-staffing in the main detention building in Taipei prison which gave rise to uncontrolled bullying of weaker prisoners. There was also evidence, which the Appeal Court accepted, of inadequate ventilation and lavatory facilities which exacerbated the discomfort caused by the over-crowding, and inadequate opportunities for the prisoners to exercise in the open air (para 44). There was also a finding that Mr Dean was at particular risk of being the focus of hostility from prisoners within the prison (para 47). As against those findings, it is necessary to assess the undertakings which the Taiwanese authorities have made in support of their application for Mr Dean's extradition.

29. Lady Paton in para 10 of her opinion recorded in summary the various undertakings which the Taiwanese authorities have given. I summarise those which are most relevant to prison conditions.

30. First, in a letter dated 25 February 2014, Mrs Chen Wen-chi, the Director General of the Department of International and Cross-Strait Legal Affairs in the Ministry of Justice of Taiwan and signatory of the memorandum of understanding (para 6 above), undertook that Mr Dean would be supervised by English-speaking officers and that he would be housed in an appropriate cell with persons selected from among non-violent foreign inmates, to avoid bullying. The authorities would treat Mr Dean as a special assignment, take account of his concerns for his safety, and assess the level of protection which he needed. They would pre-screen inmates

with ill intent towards him to prevent them having contact with him. If necessary, they would separate Mr Dean from group activities and restrict his interaction with other inmates. By letter dated 14 November 2014, Mr Luo Ying-shay, the Minister of Justice of Taiwan, confirmed Mrs Chen Wen-chi's authority to give undertakings on behalf of his ministry, which supervised the Agency of Corrections which was responsible for managing prisons in Taiwan.

31. Secondly, on 19 August 2015 Mrs Chen Wen-chi described and sent photographs of the cell which she undertook to prepare for Mr Dean and which he would share with one other foreign prisoner. The cell was located on the second floor of the 11th disciplinary area in Taipei prison and had an area of 13.76 square metres. The cell was equipped with a desk, a chair, a four-shelf cupboard, a bunk bed, and a bathroom with a toilet, a sink, a shower and a shower curtain. There was good natural lighting through a large window, electric lighting, an exhaust fan and an electric fan on the ceiling. Prisoners had the opportunity to spend about nine hours per day out of their cells, which included working, exercise time, rests and meals. Assurances were also given about the quality of drinking water and diet. By letter of the same date Mr Wu Man-Ying, the Director General of the Agency of Corrections, confirmed that his agency would abide by those assurances. He confirmed this a second time in a letter dated 2 June 2016.

32. Thirdly, Mrs Chen Wen-chi by letter dated 25 December 2015 confirmed that if the United Kingdom consular staff raised an issue concerning a breach of an assurance about prison conditions, the Taiwanese authorities would respond to remedy any breach.

33. Finally, on 31 May 2016, the new Minister of Justice, Mr Chui Tai-san, re-affirmed Mrs Chen Wen-chi's authority to provide the assurances and to undertake to put them into practice.

34. Dr McManus's visit to Taipei prison in August 2015 provided further insight into the undertakings. The proposed cell measured 11.05 square metres, excluding the toilet and shower annex, giving 5.5 square metres to each of the proposed occupants. It was on the second floor of a reception area, where there were classrooms for the assessment of new arrivals. On the same floor there was an observation office and a 50-bed convalescent cell. The cell, which was proposed for Mr Dean, had been created in 2013 as a protected cell but had never been used. The proposed exercise area for Mr Dean was a tarmac basketball court adjacent to the building. The basketball court offered ample space for exercise and could be cleared of other prisoners when Mr Dean was using it. Dr McManus concluded that the accommodation met all the standards set by the Committee for the Prevention of Torture ("CPT") and the ECtHR in terms of space per prisoner, light, ventilation and toilet facilities. He also recorded that assurances had been given that Mr Dean could

have a minimum of one hour's outdoor exercise per day and that he would be entitled to access to newspapers, radio and television. There was a work regime in the prison which, if Mr Dean engaged with it, would allow him to mix with other prisoners and to be out of his cell from 8.30 am to 5.30 pm.

35. Understandably, it was not suggested on Mr Dean's behalf that the cell accommodation was inadequate or exposed him to overcrowding if he were to share it with one non-violent foreign prisoner. Nor was it suggested that he would not be reasonably safe when in that cell.

36. In agreement with the judges of the Appeal Court, I proceed on the basis that the judicial authorities of Taiwan are acting in good faith in entering into the memorandum of understanding and in giving the assurances which they have. I also agree with the judges of the Appeal Court in so far as they proceeded on the assumption that the Taiwanese authorities responsible for the management of Taipei prison would make every effort to fulfil those undertakings. As Lord Drummond Young observed in his dissenting opinion, extradition assists in maintaining the rule of law both nationally and internationally. The United Kingdom Government has chosen to enter into extradition treaties with friendly foreign states or territories giving rise to mutual obligations in international law. In *Gomes v Government of Trinidad and Tobago* [2009] 1 WLR 1038, Lord Brown stated (para 36):

> "The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multilateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations."

The Lord Advocate acknowledges that the memorandum of understanding does not have the status of a treaty enforceable in international law. That notwithstanding, there remains a strong public interest in promoting and maintaining the rule of law by means of extradition.

37. But that strong public interest, while carrying great weight, has no paramountcy in the face of an article 3 challenge. In *Othman v United Kingdom* (above) the ECtHR stated how it would assess the quality of the assurances given by a receiving country in the context of deportation. The existence of an extradition agreement - whether a treaty or a memorandum of understanding - does not obviate the need for such an assessment in the context of a human rights challenge. It is possible, for example, that adverse political developments in a friendly foreign state

might reduce the confidence which our courts could reasonably have about an extradited person's treatment in that country, notwithstanding the continued existence of an extradition treaty. In my view, it is incumbent on a court, which is addressing an article 3 challenge, to make such an assessment in the context of an extradition; and the existence of the extradition agreement is a factor in that assessment. This is consistent with the ECtHR's guidance in *Othman* which identified as relevant the length and strength of bilateral relations between the sending and receiving states.

38. In this case the assurances are given on behalf of the central government of Taiwan, which is a developed society with a tradition of respect for the rule of law. There is no suggestion that the Taiwanese authorities ill-treated Mr Dean before he fled the country. The assurances are given by a senior responsible official and have been confirmed by two Ministers of Justice and by the Director General of the agency with responsibility for managing prisons. The assurances, and in particular those about his accommodation and separating him from group activities with other prisoners if that is necessary for his safety, are specific rather than general. The assurances envisage that United Kingdom consular staff will have access to Mr Dean in prison and include an undertaking to remedy any breach of the assurances which the consular staff raise with the prison authorities. The memorandum of understanding and the assurances have given a role to the consular staff which they have not had in the past in relation to United Kingdom citizens imprisoned in Taiwan. There is no reason to think that the consular staff would not perform their obligations to monitor the assurances if Mr Dean were to request their help. While there appears to have been no examination of the access which Mr Dean might have to legal advice, Dr McManus recorded the apparently successful operation of a complaints system in the prison and that some prisoners had obtained access to the domestic courts. This is the first occasion on which Taiwan has sought to extradite a United Kingdom citizen and the memorandum of understanding and the assurances are therefore untested; but that novelty is significantly outweighed by the other factors which I have mentioned in this paragraph.

39. Mr Dean's case is both that he has gained notoriety in Taiwan as a foreign businessman who was convicted of killing a local man through driving while drunk and also that other prisoners would resent his privileged status in the prison and wish to harm him. As a result, he may not be able to mix with other prisoners and work to earn parole, which in Taiwan depends in part upon a prisoner's taking part in work activities in the prison. I cannot judge in advance the extent to which Mr Dean's fear of being harmed by other prisoners will prevent him from mixing with them. But there is no evidence to support an inference that the Taiwanese authorities will not give him reasonable protection against harm at the hands of other prisoners: the undertakings would allow him to elect to remain in his cell and exercise outdoors by himself. There is nothing to suggest that such a regime would fail to prevent third parties from harming him.

40. I turn then to the second question, which is whether the confinement which such a regime would entail would risk a breach of article 3. There is no issue about the quality of the cell accommodation or the fact that Mr Dean would share the cell with a non-violent foreign prisoner. But the majority of the Appeal Court expressed concern that Mr Dean might have to elect to stay in his cell and thus be subjected to a form of solitary confinement, which might be harmful to his health.

41. In Mr Dean's case we are not concerned with complete sensory isolation and total social isolation which the ECtHR has recognised as constituting a form of inhuman treatment. But the Convention looks beyond such isolation. In *Ahmad* at paras 207-210 the ECtHR stated:

> "207. Other forms of solitary confinement which fall short of complete sensory isolation may violate article 3. Solitary confinement is one of the most serious measures which can be imposed within a prison and, as the Committee for the Prevention of Torture has stated, all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities. Indeed, as the Committee's most recent report makes clear, the damaging effect of solitary confinement can be immediate and increases the longer the measure lasts and the more indeterminate it is.
>
> 208. At the same time, however, the Court has found that the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not itself amount to inhuman treatment or punishment. In many states parties to the Convention more stringent security measures, which are intended to prevent the risk of escape, attack or disturbance of the prison community, exist for dangerous prisoners.
>
> 209. Thus, whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of article 3 of the Convention depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.
>
> 210. In applying these criteria, the Court has never laid down precise rules governing the operation of solitary confinement. For example, it has never specified a period of time, beyond

> which solitary confinement will attain the minimum level of severity required for article 3. The Court has, however, emphasised that solitary confinement, even in cases entailing relative isolation, cannot be imposed on a prisoner indefinitely."

42. In Mr Dean's case, we are concerned with what the ECtHR has described as "relative isolation" as he would share his cell with a non-violent foreign prisoner and would have access to newspapers, radio and television. There would also be opportunities for people to visit him. That relative isolation would not be imposed on him by the prison authorities but would be at his option, if he were to take the view that the risk of harm at the hands of other prisoners required him to dissociate himself from contact with them. Thus, the objective which might give rise to his relative isolation would be his own protection.

43. Further, the period of Mr Dean's imprisonment resulting from his conviction is unlikely to exceed approximately 13 months because the Taiwanese authorities have undertaken to give him credit towards his four-year sentence for the period of almost three years which he has spent in prison in Scotland.

44. When one has regard to the decisions of the ECtHR in other cases concerning solitary confinement, such as *Öcalan v Turkey* (2004) 41 EHRR 45, *Ramirez Sanchez v France* (2007) 45 EHRR 49 and *Ahmad v United Kingdom* (above), and the decision of this court in *Shahid v Scottish Ministers* [2015] UKSC 58; 2016 SC (UKSC) 1; [2016] AC 429, the circumstances of Mr Dean's possible relative isolation do not come close to a breach of article 3 of the Convention and do not contribute significantly to his assertion of such a breach when other circumstances are considered. It is necessary, of course, to take a holistic view of the circumstances of his detention in reaching a view as to whether there is a real risk of his being subject to treatment that infringes article 3 of the Convention. But the other factors which influenced the majority of the Appeal Court do not materially advance his case.

45. First, the ratio of medical staff to prisoners, to which Lady Paton referred in para 33 of her opinion, was well below the standard advocated by the CPT, which is one doctor per 350 prisoners. But, as she also recorded, Dr McManus concluded that there appeared to be "no great problem for prisoners obtaining medical attention when needed". The fact that prisoners have to pay for non-emergency medical and dental treatment and also for non-generic drugs is of little significance. It is important to recall that the ECtHR has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other states: *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, para 141; *Ahmad v United Kingdom* (above), para 177.

46. Secondly, I do not infer from the past practice of United Kingdom consular staff of not pressing for the improvement of prison conditions for United Kingdom prisoners that they would not act to protect Mr Dean. As I have said, the existence of the memorandum of understanding and also the assurances by which the Taiwanese authorities have recognised the role of the consular staff in protecting Mr Dean's interests have given the consular staff a role which to date they have not had.

47. Thirdly, the majority of the Appeal Court was concerned both by the absence of an international system by which prison conditions in Taiwan were monitored and that "there is no established route within the Taiwanese courts whereby a prisoner can seek a remedy in respect of prison conditions" (paras 56 and 57). Those are among the factors which the ECtHR has identified as relevant considerations in assessing the quality of the assurances of the receiving state: *Othman v United Kingdom* (above) para 189. But in my view, those considerations do not outweigh the other factors which point towards accepting the assurances (para 38 above) and the role which the United Kingdom consular staff will undertake in monitoring the assurances.

48. I am therefore satisfied (a) that the assurances of the Taiwanese authorities offer Mr Dean reasonable protection against violence by non-state actors and (b) that the circumstances of his confinement, should he be unable to mix with the wider prison population, do not entail a real risk of his being subject to treatment that infringes article 3 of the Convention.

Articles 5 and 8 of the Convention

49. Mr Bovey also advances separate challenges under articles 5 and 8 of the Convention, which the Appeal Court did not need to decide. I am satisfied that those challenges are without substance and can deal with them briefly.

50. *Article 5*: Mr Bovey submits that Mr Dean's detention in prison would involve arbitrariness because the Taiwanese authorities would not give him credit for the time spent in custody in Scotland in the calculation of his entitlement to parole. One of the assurances which Mrs Chen Wen-chi gave (in a letter dated 23 December 2013) was that all periods of detention in Scotland arising from the extradition request would be deducted from the total period which he would have to serve in Taiwan. That undertaking did not include any reference to entitlement to parole and, contrary to counsel's submission, I detect nothing in it that was objectively misleading. In a later letter, dated 1 June 2016, Mrs Chen Wen-chi explained that only periods of imprisonment in Taiwan would count towards the service of a minimum part of the sentence for entitlement to parole. It appears therefore that Mr Dean would have to serve two-thirds of the residue of his sentence

in Taiwan before he would be eligible to be considered for parole. I detect nothing arbitrary in this regime. The Convention does not require United Kingdom courts to expect foreign states to have similar sentencing practices to ours or a particular form of parole system. Article 3 would be breached by extradition to serve a sentence, which the receiving state imposed, only if the sentence was grossly disproportionate: *Willcox v United Kingdom* (2013) 57 EHRR SE 16, para 74. Mr Dean's inability to obtain credit towards parole for the time he has spent in custody in Scotland is the result of his flight from justice in Taiwan. This involves no injustice.

51. *Article 8*: Counsel also argues that Mr Dean's extradition to and imprisonment in Taiwan would interfere with his right to respect for his private life. I agree that there would be such interference but am satisfied that it is justified because it is necessary in a democratic society both for the prevention of crime and for the protection of the rights and freedoms of others (article 8(2)). This court has recognised the strength of the public interest in extradition in the context of an article 8 challenge: *Norris v Government of the United States of America (No 2)* [2010] 2 AC 487; *H (H) v Deputy Prosecutor of the Italian Republic (Official Solicitor intervening)* [2013] 1 AC 338. Mr Dean has been convicted of a serious offence committed in Taiwan where he had resided for 19 years. A term of imprisonment for such an offence was clearly justified both as a punishment and to deter such behaviour by others. It may be that the special protective measures which are proposed will prevent Mr Dean from earning credit towards parole while serving the residue of his sentence. But that does not undermine the justification of the extradition.

Conclusion

52. I would allow the appeal on the devolution issue and remit the case to the Appeal Court to deal with Mr Dean's appeal under section 108 of the 2003 Act and his devolution minute in that appeal.