APPEAL COURT, HIGH COURT OF JUSTICIARY

[2016] HCJAC 83
HCA/2014/003519/XM
HCA/2014/0003518/XM

Lady Paton
Lord Drummond Young
Lady Clark of Calton

OPINION OF LADY PATON

in

APPEALS UNDER SECTIONS 103 AND 108 OF THE EXTRADITION ACT 2003

by

ZAIN TAJ DEAN

Appellant;

against

(FIRST) THE LORD ADVOCATE; (SECOND) THE SCOTTISH MINISTERS

Respondents:

Appellant: Bovey QC, Devlin; V Good & Co
First Respondent: D Dickson (sol adv); Crown Office
Second Respondents: Moynihan QC, Charteris; Scottish Government Legal Directorate

23 September 2016

Extradition to Taiwan: article 3 and prison conditions

[1] I refer to *Dean* v *Lord Advocate* 2015 SLT 419. As set out in paragraphs [71] to [75], it proved necessary to hold an evidential hearing in order to ascertain whether the conditions in which the appellant would be held in Taipei prison are article 3 (ECHR) compliant. The hearing took place on 27, 28, and 29 January 2016, 18 and19 May 2016, and 22 and 24 June 2016.

[2] The appellant gave evidence. Two witnesses, Professor Chin and Dr James McManus, were led on behalf of the first respondent. The witnesses referred to various productions. On 24 June 2016, a devolution minute (number 36 of process) was received, focusing on articles 5 and 8 of the ECHR and the fact that, contrary to the apparent meaning of an undertaking given by the Taiwanese authorities, custodial time served in Saughton prison, Edinburgh, might not count on a day-for-day basis towards the custodial Taiwanese sentence of 4 years (see paragraph [11] *et seq* below).

Joint minutes and section 202 of the Extradition Act 2003

[3] Joint minutes resolved many of the difficulties relating to the provenance and authenticity of productions. It was therefore unnecessary to decide the meaning and effect of section 202 of the 2003 Act ("received in evidence in proceedings under this Act if it is duly authenticated": see paragraph [74] of *Dean* v *Lord Advocate*).

Relevant legislation

[4] ***Scotland Act 1998***

Section 57 **Community law and Convention rights**

… (2) A member of the Scottish Executive 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 or with Community law …

[5] ***European Convention on Human Rights***

Article 3 **Prohibition of Torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[6] ***Extradition Act 2003***

Section 87 **Human rights**

(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited.

Section 103 **Appeal where case sent to Secretary of State**

1. If the judge sends a case to the Secretary of State under this Part for his decision whether a person is to be extradited, the person may appeal to the High Court against the relevant decision …

(4) An appeal under this section – (a) may be brought on a question of law or fact …

Section 104 **Court's powers on appeal under section 103**

1. On an appeal under section 103 the High Court may –

    a. allow the appeal; …

2. The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

3. The conditions are that –

    a. The judge ought to have decided a question before him at the extradition hearing differently;

    b. If he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

4. The conditions are that –

    a. … evidence is available that was not available at the extradition hearing;

    b. the … evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;

c. if he had decided the question in that way, he would have been required to order the person's discharge.

5. If the court allows the appeal it must –

a. order the person's discharge;

b. quash the order for his extradition.

Relevant tests

[7] I refer to paragraphs [7] to [11], and [71] to [75] of *Dean* v *Lord Advocate cit sup*. In my view, compliance with *Kapri* v *Lord Advocate* 2015 JC 30, 2014 SLT 557 requires the rules of criminal evidence and procedure to be applied to any facts which are to be established in relation to prison conditions.

[8] However, once those facts are proved, senior counsel and Mr Dickson were agreed that the test for compatibility with article 3 of the European Convention on Human Rights (ECHR) is as set out by the European Court of Human Rights at paragraphs 124-5, 128-9, and 140 of *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" (cf the "strong" grounds referred to in paragraph 24 of *R (Ullah)* v *Special Adjudicator* [2004] AC 323, [2004] 3 WLR 23). A real risk is "more than mere possibility but is something less than the balance of probabilities" (*Saadi* paragraph 147; *Aldhouse* v *Thailand* [2012] EWHC 2235, paragraph 26). As was said in *Florea* v *The Judicial Authority, Romania* [2015] 1 WLR 1953 paragraph 21, quoting *Torreggiani*: "The burden of proof is less than proof 'on the balance of probabilities', but the risk must be more than fanciful." The court's "examination of the existence of a real risk must necessarily be a rigorous one" (*Saadi*, paragraph 128). I should add that this court, in its previous opinion 2015 SLT 419 paragraph [73], made reference to *Gaefgen* v *Germany* (2010) 52 EHRR 1. However in the current evidential hearing, Mr Bovey submitted that *Gaefgen* applies to proof of *past violations* of article 3 (*Gaefgen,* paragraph 92), whereas assessment of the risk of future violations of article 3 is governed by *inter alia Saadi* and *Aldhouse*. I understood Mr Dickson to agree with that submission. I now also agree.

Taiwanese undertakings; official letters; and visit by Dr McManus to Taipei prison

[9] At various stages during the appeal hearing, undertakings were given by the Taiwanese authorities. Following upon this court's first opinion (*Dean* v *Lord Advocate cit sup,* issued on 24 June 2015), Dr James McManus was instructed on 14 August 2015 by the Lord Advocate on behalf of the Taiwanese authorities "… to carry out an assessment of the conditions of detention it is proposed by the Taiwanese authorities that [the appellant] will be held should his extradition to Taiwan be ordered."

[10] The sequence of undertakings was as follows:

- *16 October 2013:*the Memorandum of Understanding between the Home Office, United Kingdom, and the judicial authorities of Taiwan concerning the extradition of one individual only, namely the appellant.

- *23 December 2013* [13/5]:an undertaking that all periods of detention arising from the execution of the request in Scotland would be deducted from the total period of detention required to be served as a result of the appellant's conviction in Taiwan for the extradition offence.

- *23 December 2013* [13/5]*:* a certification that the 4-year sentence was not subject to further review, and that the death penalty would not be imposed.

- *25 February 2014* [13/11]:an undertaking that (1) appropriate correctional staff would be selected to supervise the appellant;(2) the appellant's safety would be ensured by assigning him an appropriate cell with fewer inmates, pre-screening inmates to select nonviolent foreign inmates convicted of relatively minor offences and unconnected to criminal organisations (thus eliminating concerns regarding bullying);(3) establishing clear channels of communication for any complaints or requests;(4) assessing public feelings about the appellant, pre-screening inmates with ill intent towards him (thus eliminating the possibility of any contact with the appellant), managing the appellant's care as a special case and if necessary separating him from group activities and interaction with other inmates, inspecting the appellant's food, transferring an inmate suspected of ill intent to a different cell, providing additional prison staff and surveillance equipment (thus ensuring his safety in the prison).

- *7 May 2014* [13/12]:an acknowledgment that overcrowding in Taipei prison was about 32% in January 2014 (about double the national average overcrowding rate of 16.7%), with an explanation that steps were planned, aiming to reduce the total overcrowding rate to less than 10%.

- *22 October 2014* [11/12]:a letter from the Home Office, International and Immigration Policy Group, London, addressed to a friend of the appellant, responding to a request for information as to whether expert reports regarding Taiwan were obtained prior to the decision whether to enter into the Memorandum of Understanding relating to the appellant.The letter stated *inter alia:*

  "I can confirm that no specific expert reports were commissioned prior to the Home Secretary making a decision on whether to enter into a Memorandum of Understanding with Taiwan, to give effect to the extradition request for [the appellant].

  However we are able to confirm that the Home Office sought advice from the Foreign and Commonwealth Office (FCO) with regard to human rights in Taiwan. The FCO provided the Home Office with a note summarising the human rights situation in Taiwan as well as a number of previously published country reports which are in the public domain …

  After careful consideration we have decided the country reports on Taiwan are exempt from disclosure … [the] information … is already in the public domain. [Reference is then made to relevant web-sites, and to an attached summary of the human rights position in Taiwan, provided by the FCO.]

  As a general point, please note that the decision of the Home Secretary to enter into a Memorandum of Understanding was made in order to facilitate the courts' consideration of Mr Dean's case under the Extradition Act 2003. The UK receives several extradition requests each year from territories with which it has no general extradition arrangements … Some of these requests involve very serious offences. In such cases, section 194 of the 2003 Act gives the Secretary of State the power to enter into … ad hoc arrangements …

  Under the 2003 Act, the question of whether a person's extradition would be compatible with their Convention rights within the meaning of the Human Rights Act 1998 is a matter for the courts to consider. The Secretary of State does not consider human rights issues [emphasis added] …

The Taiwan authorities have given assurances that Mr Dean will not be dealt with for any offence committed before extradition save for the offence in respect of which he is extradited. There is no evidence to suggest that the Taiwan authorities will not abide by this, and the assurance has been accepted by the Scottish Cabinet Secretary for Justice in making his decision to order extradition. If Mr Dean is extradited, the BTCO [the British Trade & Cultural Office] will monitor whether the Taiwanese authorities are fulfilling their assurances given to the Scottish court on the conditions under which he would be held."

- *14 November 2014* [13/10]:confirmation by Luo Ying-shay, the Minister of Justice, that Director General Chen Wen-Chi had authority to act on behalf of the Ministry of Justice in ensuring the terms of the assurances.

- *24 June 2015*:the issuing of the first opinion of this court, *Dean* v *Lord Advocate* 2015 SLT 419.

- *31 July 2015*:despite the apparent assurance recorded in the Home Office letter of 22 October 2014 [11/12], the Scottish Ministers received a second request from the Taiwanese authorities that the appellant be extradited for offences relating to absconding from Taiwan.(The Scottish Ministers ultimately refused that request, but did not advise the appellant or the first respondent of their refusal until 6 June 2016).

- *14 August 2015:*Dr McManus was instructed by the Lord Advocate on behalf of the Taiwanese authorities "to carry out an assessment of the conditions of detention it is proposed by the Taiwanese authorities that [the appellant] will be held should his extradition to Taiwan be ordered".

- *17 August 2015* [13/7]: the Taiwanese Agency of Corrections "Inmate Treatment Planning Report on an Individual Case" (relating to the appellant)noted that:

  "If Mr Dean disobeys disciplines after extradition, he will be punished depending on the severity of his offence. If his indiscipline is regarded as minor offences or mitigation, supervision in his cell or a deferred punishment will be ordered. However, if his behaviour is regarded as a serious offence, for example, assaulting prison officers or harming others, he will be punished by our criminal law and moved into the cell of rule breakers [i.e. the "punishment block" where ventilation was very poor [15/12] and there was no bedding or other facilities].

- *19 August 2015:*Dr McManus travelled to Taiwan.

- *19 August 2015* [10/1] and [13/1]:an undertaking –

  " … to prepare a cell whose conditions are consistent with Article 3 of European Convention on Human Rights. The relevant prison conditions are detailed as follows, and the pictures of the cell are attached.

1. The cell is located at the 2nd floor of the 11th disciplinary area in Taipei Prison, which is the main prison for foreign prisoners and is easy for consular access.

2. The cell is 13.76 square metres.2 inmates, Mr Dean and the other foreign prisoner, will be arranged in the cell shown in the pictures.

3. The cell is equipped with a desk, a chair, a 4-layer shelf, a bunk bed, a bathroom with a toilet, a sink, a shower and a shower curtain.Moreover, there are a big window with curtains, a spiral bulb, fluorescent lamps, an exhaust fan on the wall and an electric fan on the ceiling.Therefore, the natural and artificial lights of the cell are sufficient, and the ventilation is very good.

4. In relation to the regime, on working days, the average amount of time the prisoners have per day out of the cell is 9 hours from 8/8.30 am to 5/5.30 pm, including works, exercises, rests and meals.

5. Moreover, Taiwan has a very complete and advanced public water system.The water the prisoners drink and use is the same as the one the Taiwan citizens have.The drinking water is boiled.As to the food, the prisons provide 3 meals a day for the prisoners.Considering different religions and diet habits, special meals are designed for foreign prisoners.Taipei Prison prepares western food, such as hamburger and spaghetti, once a week.The prisoners in Taipei Prison also can buy various kinds of breads, snacks, fruits in the prison-running stores.Besides, the meal plans are public every day to the families paying visit.Moreover, Taipei Prison provides shopping lists in English for foreign prisoners to order what he needs and likes to eat every day.Taipei Prison will help them to buy the local and traditional groceries …

> … Again, I, on behalf of the Ministry of Justice, ensure that the conditions mentioned above will be put into practice once Mr Dean is extradited back to Taiwan."

- *19 August 2015* [10/2]:Wu Man-Ying, Director General of Agency of Corrections (AOC) certified that:

  " … regarding the prison conditions if [the appellant] is extradited, AOC understand and will respectfully abide by all the assurances given by the Director General Mrs Chen Wen-Chi, who is the point of contact authorized by Minister of Justice to deal with international legal affairs in Ministry of Justice …"

- *31 August 2015* [10/5] and [13/5]:Dr McManus issued his report, detailing additional assurances given by the Taiwanese authorities that (i) a member of staff will be seated immediately outside the appellant's cell;(ii) the proposed exercise area for the appellant could easily be cleared of other prisoners, during any time the appellant was using the area; (iii) the appellant could choose whether or not to apply for a place in a factory or an education group;(iv) if the appellant chose not to apply, he would be kept in his cell with one hour of exercise each day;(v) if he committed a serious offence, he would be kept in his own cell (and not the punishment block) with one hour's exercise each day;(vi) the appellant would be accompanied by staff during outside exercise;and (vii) the appellant would start at grade 3 for the purposes of parole.These assurances were not formally confirmed to this court by the Taiwanese authorities.

- *2 September 2015* [13/3] and [10/3]:information that prisoners were not normally kept in solitary confinement.While certain punishments might be imposed for violation of prison regulations, in order to avoid a breach of article 3 of the ECHR, the appellant would "be allowed to be supervised in the original cell" even if he had carried out a serious violation.

- *25 December 2015* [13/13]: certification that –

> " … regarding the prison conditions if [the appellant] is extradited, if the consular staff of the British Office have any reason to raise an issue about a perceived breach of an assurance raised by [the appellant], then when the consular staff raise that, the Taiwanese authorities will respond to ensure the alleged breach is remedied."

- *3 May 2016* [26/1]:an Arrangement between the authorities of the United Kingdom and the Taiwanese justice authorities on the Transfer of Sentenced Persons.

- *12 May 2016* [15/39]: a Next Magazine internet article dated 12 May 2016 noting explanations given by Chen Ming-tang, the Administrative Deputy Minister of Justice, namely that the Ministry of Justice showed the UK the newly-renovated prison cell facilities, to prove that the Taiwanese prison conditions were not poor.The authors of the article – The Social News Team – add their personal comments as follows:" … these facilities are scarce so they cannot be made available to all inmates.Therefore, even if Zain Dean comes to Taiwan, he may not be able to actually receive such treatment".

- *31 May 2016*:following upon the installation of the new Taiwanese government, a letter from the Minister of Justice dated 31 May 2016 (i) confirming the assurances given in the letters of 23 December 2013, 25 February 2014, 30 January 2015, 19 August 2015, 2 September 2015, and 25 December 2015;and (ii) explaining that under the Taiwanese parole system, the appellant's good behaviour would be considered and might allow him to start at grade 3, but otherwise he would start at grade 4;and that, if extradited, he would not qualify for parole until 2017.

Time served in custody in Scotland: whether relevant to the granting of parole in Taiwan

[11] The appellant's sentence has not been transferred to Scotland. The sentence is therefore governed by Taiwanese law, not Scots law. I understand that the appellant must, according to Taiwanese law, serve at least two-thirds of his 4-year sentence before being eligible for parole.

[12] The letter from the Taiwanese authorities dated 23 December 2013 [13/5] was understood by the appellant and his advisers to mean that time served by the appellant in a Scottish prison would count on a day-for-day basis towards his 4-year sentence and therefore towards his eligibility for parole. However Dr McManus's report dated 31 August 2015 [10/5] at pages 8-9 referred to a system of grades and points, with parole being earned to some extent by work and good behaviour *while physically in Taiwan*.
Dr McManus advised that:

> "The authorities have indicated that they will consider the time served in Edinburgh as part of the sentence; a way should now be found to ensure that Mr Dean's behaviour while in Edinburgh can be assessed in relation to the grade point system."

[13] In an endeavour to clarify Taiwan's position relating to time served in Scotland and parole in Taiwan, Director General Chen Wen-Chi sent a letter dated 1 June 2016 to the Lord Advocate [25/1].

[14] To assist the court further, Mr Dickson on 24 June 2016 provided a note concerning the effect of the Taiwanese parole system [43]. In that note, he explained *inter alia* that the appellant could not apply for parole unless he was in the jurisdiction of Taiwan. Only an "inmate" could qualify for parole, the necessary conditions being:

a. The minimum sentence term to be served.

b. An inmate had significant remorse and upward second grade under the Progressive Treatment System.

c. The scoring of at least 3 points in each of the 3 months before the parole qualifying date.

A parole board and the Ministry of Justice would consider any application and the above-mentioned conditions, and make a decision about parole. The undertaking given by the Taiwanese authorities dated 23 December 2013 (see paragraph [10] above):

> "7… was to give credit for the time served in Scotland. For the purposes of the domestic law of Taiwan on parole, *only* time served physically in Taiwan will count: in other words, on return to Taiwan it is *only* once the appellant reaches the two thirds point of the remainder of his sentence (credit having been given for time served in Scotland) that he would be eligible for parole in Taiwan …
> 9 … in the circumstances the appellant finds himself, having absconded from Taiwan, by way of example, if he were to be extradited in June 2016, the appellant would be eligible for parole in September 2017."

[15] In the Director General's letter dated 1 June 2016 [25/1] it is also noted in paragraph 5 that:

> " … The later Dean is extradited to Taiwan, the later he will be eligible for parole."

Summary of relevant evidence

Evidence for the appellant

[16] *The appellant* is a UK citizen, aged 44. He is a marketing consultant. He is currently in custody in Saughton Prison, where he has been since October 2013. He confirmed that he had lived and worked in Taiwan for 19 years before coming to Scotland in August 2012. Following upon the "one-off" extradition agreement between Taiwan and the UK, he was detained in Edinburgh in 2013. He had not previously visited a Taiwanese prison, but, assisted by productions (see paragraph [36] below), he described problems which he understood existed within Taipei prison. In particular:

- *Overcrowding:*Reports, articles, television programmes, and photographs demonstrated that the cells in Taipei prison were seriously overcrowded.The prisoners had to sleep side-by-side on mats on the floor, with scarcely room to turn over.Each cell had one open toilet with no privacy.Difficulties were caused at night when prisoners had to step over each other to use the toilet.Ventilation was poor:there was no air conditioning and often no fans.

- *Understaffing:*The staff-prisoner ratio was very low, resulting in difficulties with supervision and control of the prisoners.

- *Cell-captain culture:*A cell-captain culture prevailed:in other words, the strong ruled the weak.

- *Sexual abuse and violence:*There were documented incidents of violence and sexual abuse including rapes.

- *Suicides:*In 2015 six prisoners had carried out a protest concerning their detention and had ultimately committed suicide by shooting themselves.

- *Insufficient medical facilities:*There were insufficient doctors and medical facilities for the number of prisoners.

- *His personal notoriety:*An additional problem was the appellant's notoriety.He had become a well-known figure in Taiwan, his case and his flight to the United Kingdom having been broadcast on TV, in magazines, and on the radio.He was portrayed as a rich foreigner who had been found guilty of causing the death of a local newspaper delivery man when driving under the influence of drink, resulting in untold grief for the family and a high and sustained level of anger and resentment directed against him.A revenge ransom had been offered.The "special cell and conditions" being offered by the Taiwanese authorities to himself – a foreigner and an outsider who had been convicted of killing a Taiwanese man – had further enraged the deceased's family and the local people.The conditions were "three times what President Chen got" (when imprisoned for bribery) and "about five times what the other prisoners get".The appellant was afraid that there was a real risk that the grief, anger, and desire for revenge in respect of the victim of the road traffic accident, together with outrage about the special prison conditions, would result in a very dangerous situation for him in Taipei prison.Unless he existed in a form of segregation and isolation, he would have to leave the cell for exercise and meals:he would inevitably meet other prisoners in the corridors, yards, and dining-rooms.He was also concerned that, while the letter of undertaking dated 19 August 2015 [13/1] was no doubt written in good faith, there might be difficulties in ensuring that the conditions described were actually provided.Those conditions were so different from the conditions which the other prisoners had, with the cell captain culture, overcrowding, intolerable heat, and having to go to the toilet in front of each other.

[17] The appellant stated that the letter of undertaking dated 25 February 2014 [13/11] did not reassure him. First, the serious understaffing meant that what seemed "good on paper" was not in fact feasible. There had, for example, been a serious incident on 18 July 2015 when prison staff had been attacked with sharpened chop-sticks [11/7]: the press release noted that one injured administrator advised the minister of justice that:

> "the corrective institutions had been seriously understaffed for a long time, and the potential risks must be addressed … The minister emphasized that the corrective institutions had been facing increasingly stringent and dangerous working conditions and the issue of understaffing must be resolved as a matter of urgency by increasing the number of guard and control staff to a reasonable level. In response to this, the Ministry of Justice has proposed a plan to replenish the manpower at corrective institutions. The aim is to achieve a staff-to-inmates ratio of 1:8 so that the problems and difficulties caused by understaffing can be resolved as soon as possible …"

[18] Thus the appellant considered that Taipei prison had systemic problems. He was concerned that it would not be possible for the special measures promised by the authorities to be carried out such that he could safely serve his sentence in that prison. The appellant thought that none of the prisoners would own up to having any ill-will against him. Thus undertakings about screening and keeping apart potentially hostile prisoners would not be effective. The prisoners spent considerable time together, working, eating and so on (see, for example, the photograph of many prisoners working together, page 14 of the Taiwan MOJ

Agency of Corrections report on Prison Conditions, Chen Shui-bian [11/14]). While a letter to the Lord Advocate dated 5 January 2016 from the Foreign and Commonwealth Office [13/14] advised that the appellant would be "able to raise [any] concerns with the British Office staff whose details are contained in the attached Prisoner Pack", that did not provide reassurance for the appellant, as he considered that the British Office in Taiwan was in a very difficult situation. He explained that there was no "embassy" as such in Taipei, but a British Office, whose staff would try to do their best, but there was little they could do in law and in practice. While it might be possible to speak to the liaison officer, there was little that the British Office could do about problems in Taipei prison.

Evidence for the first respondent

[19] *Professor Mong-Hwa Chin* (aged 33; assistant professor at the University of Taiwan) stated that he had graduated in 2014. His professed expertise was criminal procedure and evidence, with a particular interest in wrongful convictions. He had a doctorate (the equivalent of a PhD) entitled "The decision-making process of trial judges in Taiwan". He taught criminal law and procedure on a regular basis. He had published two legal articles. He was a member of a non-governmental organisation assisting persons claiming that they had been wrongfully convicted (the Taiwanese Association for Innocence, established in 2012). He helped with the association's work by attending meetings and providing opinions. To date, the association had achieved one exoneration. Otherwise he was an academic lawyer who was not permitted to practice law. His limited experience of Taiwanese prisons came from a student Law Class tour, and from visits to clients in prison.

[20] Senior counsel for the appellant took an objection to the professor's status as an expert. After a debate, it was accepted that the professor's evidence should be allowed under reservation of competency and relevancy. Ultimately, in closing submissions, senior counsel submitted that little reliance could be placed upon the professor's evidence: he was inexperienced; his professed expertise was criminal procedure and evidence; and when giving evidence, he showed a lack of the impartiality to be expected of a court expert, as he had consistently given answers supportive of the Taiwanese state/legal system/penal system (some of his answers being demonstrably inaccurate). Thus, it was submitted, the professor's evidence could not be relied upon to satisfy the court that the Taiwanese assurances concerning the appellant's prison conditions would be fulfilled. I consider that there is some force in those submissions. I shall therefore be discriminating in my approach when assessing what weight to give to parts of his evidence (a brief outline of which follows).

[21] Taiwan had adopted the principle set out in article 3 of the ECHR ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"), although Professor Chin accepted that, given Taiwan's status (i.e. not recognised internationally as a "state", and not a member of the United Nations), Taiwan was unable to sign international treaties. Taiwan was trying very hard to conform to international human rights standards. Two covenants relating to civil rights were recognised as part of domestic law [18/1], although it was accepted that Taiwan still had capital punishment. An independent committee of human rights experts had visited Taiwan and produced a report dated 1 March 2013 [15/2], which had been a milestone document.

[22] The professor accepted that while Taiwan had entered into many treaties with many countries arranging, for example, for the transfer of prisoners, Taiwan had no extradition treaty with any country. The current request for the extradition of the appellant was the first time that the Taiwanese authorities had entered into an agreement with any state for the extradition of any person.

[23] In relation to prisoners' rights, Professor Chin explained that there were current proposals to amend the Prison Act to allow prisoners to seek a judicial remedy (paragraph 6 of his affidavit). Meantime, it was not clear what legal route should be adopted by a prisoner seeking a judicial remedy in respect of treatment in prison. In particular, it was not clear whether any application should proceed in the criminal courts or in the constitutional courts (paragraph 6 of his affidavit). In Professor Chin's opinion, if the appellant was not given the special cell and conditions promised, he could in theory raise an action in the criminal courts based on legitimate expectation. However such a claim was not a "tried and tested route"; also funding might or might not be available. Professor Chin confirmed that he was aware of one court action concerning parole,

but he was not aware of any prisoner having brought a court action to protest, for example, that he was not being given the government-approved minimum personal space (2.31 sq metres: [11/6] page 3).

[24] Professor Chin accepted that the subject of prisoners' rights was not a popular cause in Taiwan. Until about 2008, there had been a legislative ban preventing prisoners from taking cases to court, leaving them with only the internal complaints system. Further reforms were expected, but legislation had not yet been passed. A prisoner's court case might take 8 months to a year.

[25] *Dr James McManus, LLB (Hons), PhD* professor of law (2004-09, Glasgow Caledonian University) and a law lecturer (1976-2003, the University of Dundee), acted as an expert adviser to the Council of Europe Committee for the Prevention of Torture (the CPT) from 1992 to 2009. Other appointments included consultant to the English Prisons Inspectorate (1986-88); commissioner with the Scottish Prisons Complaints Commission (1994-99); working for the Northern Irish Human Rights Commission, and for the Republic of Ireland police and prison services on human rights awareness and monitoring; and membership (1988-94) and chair (2000-2005) of the Parole Board for Scotland. Currently Dr McManus is a member of the CPT elected in 2009 in respect of the UK.

[26] In connection with the Council of Europe, Dr McManus has carried out about 60 missions to many different countries, involving prisons and prison staff, NGOs, and human rights compliance issues. His publications include *Prisons, Prisoners and the Law* (1995, Greens Edinburgh). He has given expert evidence in several Scottish cases, including *Napier* v *Scottish Ministers* 2005 1 SC 229 concerning slopping-out, and *Shahid* v *Scottish Ministers* 2012 SLT 178 (subsequent reports 2014 SC 490 (IH), and [2016] AC 429 (Sup Ct)) concerning solitary confinement.

[27] Senior counsel for the appellant objected to certain passages in Dr McManus's report as hearsay. Evidence was allowed subject to competency and relevancy, and ultimately the objection was not insisted upon.

[28] On receiving the instructions noted in paragraph [9] above, Dr McManus read "what little information [was] available in the public domain on the prison system of Taiwan" (page 2 of his report dated 31 August 2015). Before and after his planned visit to Taiwan, he was given copies of most (but not all) of the Taiwanese authorities' undertakings: for example, he was apparently not provided with the letter dated 25 February 2014 [13/11], no copy being attached to his report. He travelled to Taiwan on 19 August 2015. He met with staff at the British Office in Taipei. He visited Taipei prison, spoke to staff, and was shown some areas of the prison, including the cell which the appellant would occupy, the outdoor exercise area to which it was stated he would have access, the factories (each with dining and recreation areas), and the punishment cells. Dr McManus did not see the prison conditions overnight. He examined some records, and met with four foreign prisoners selected by the prison authorities. He produced a report dated 31 August 2015 [10/5 and 13/5], which he adopted in his evidence.

[29] The introductory paragraph (page 1) sets out matters regarded as relevant by the CPT (cf their standards in [13/6] and [13/9]). He listed relevant matters as:

> **Cell**: size, occupation level, ventilation and heating, natural and artificial lighting, toilet facilities, general state of repair and cleanliness;
> **Relevant wing:** general conditions;
> **Regime:** total daily time out of cell and in association with other prisoners; availability of work, education, social and cultural activities, library, time in open air, gym and sports activities and religious activities;
> **Medical services:** availability of doctor, nurse, dentist, medicines and specialist services;
> **Complaints system:** operation, effectiveness, accessibility and fairness;
> **Discipline system:** offences, penalties, procedures;
> **Contact with outside world:** newspapers, radio, television, visits, phone calls, consular (or equivalent) access;
> **Staffing:** levels, training, specialists.

[30] When giving evidence, Dr McManus emphasised his restricted remit, namely to assess, in the context of article 3 of the ECHR, the conditions in which it was said *the appellant* would be held. He had no remit to assess the conditions in Taipei prison in general. He explained that a CPT mission assessing an entire prison normally consisted of a group of about six people, one being a qualified doctor. They would spend several

days inspecting a prison. By contrast, he had been acting alone, was not a qualified doctor, and had conducted a 2-day visit (not involving being in the prison overnight).

[31] At page 4 of his report, Dr McManus described the cell intended for the appellant. It was a room measuring 11.05 square metres (excluding the integral toilet and shower annex) in an entirely separate building some 50 metres distant from the main building containing all the prison cells. The room was situated on the second floor, near an observation office and a large convalescent cell with about 50 beds (page 4 of his report). The room had never previously been occupied. Dr McManus explained in evidence that the cell had been created two years previously as a "take-out" cell: either to give a prisoner a rest from the mainstream, or to give the mainstream a rest from that prisoner. The cell had excellent natural lighting and ventilation, with a window which could be opened and had a view of the gardens. Additional ventilation was provided by a ceiling fan and an exterior wall-fitted extractor fan, both controlled from inside the cell. There was no heating system. Within the cell was a double bunk-bed, a table, a chair, and a 4-shelf cupboard. There was a toilet and a shower. There were no electric sockets: thus any radio, television, or other electronic equipment would have to be battery-powered. The only access was by a stairway beside the reception: access was accordingly secure. There was a constantly-staffed observation room overlooking the convalescent cell. The cell would be shared with one other foreign prisoner, to avoid circumstances amounting to solitary confinement: thus each occupant would have 5.5 square metres. In relation to fears about the safety of the appellant in view of his notoriety and unpopularity, the staff, security guards and locked doors would ensure that other prisoners could not easily gain access to him. Contrary to the normal rule that prisoners had to work during the day, Dr McManus understood that the appellant would be permitted to choose whether or not to go to work. If he wished, (for example, to avoid confrontations with other prisoners), he could remain in his cell. Dr McManus further understood that the appellant would be permitted books, papers, and possibly a battery-operated TV. So far as exercise outside was concerned, Dr McManus understood that prison staff would clear the outside exercise area of other prisoners when the appellant was taking exercise outside. As for contact with the outside world, arrangements for visits, radio, television and letters met the CPT standards, although the 3-monthly access to telephone calls was "miserly" (page 11: cf paragraph 51 of the CPT standards [13/6]:

> "It is … very important for prisoners to maintain reasonably good contact with the outside world … The guiding principle should be the promotion of contact with the outside world.")

[32] Assessing the circumstances which would be applicable to the appellant, and assuming that all the assurances given by the Taiwanese authorities would be honoured, Dr McManus concluded that the conditions were safe and article 3 compliant. For example, to satisfy CPT standards, a minimum of 4 square metres per person in multiple occupancy cells was required (CPT "Living space per prisoner" [13/9], and page 5 of Dr McManus's report): the appellant would have 5.5 metres. If the appellant chose to go to work/education, he could be out of the cell from about 8.30 am to 5.30 pm (CPT standards [13/9] page 7). Of course, if he chose not to go, he would be locked in his cell all day. Dr McManus had spoken to the Director of the Prison, who had undertaken (verbally) that the appellant would be allowed to have outdoor exercise for a period of up to one hour per day (one hour per day being the minimum which the CPT considered necessary for every prisoner: [13/9] page 7). Admittedly that was not a written assurance. Also Dr McManus stated that short-term prisoners (serving a sentence of less than 6 months) were permitted outside exercise only two or three times per week, for about 20 minutes. Dr McManus noted at page 10 of his report:

> " … Other prisoners clearly do not receive the minimum of one hour outdoor exercise each day as required by the CPT standards, but assurances have been given that Mr Dean would be permitted this."

In relation to the disciplining of the appellant (if that proved necessary), page 11 of the report explains:

> " … It is understood that, should Mr Dean commit a serious disciplinary offence, any solitary confinement sentence would be served in his own cell. A minimum of one hour of outdoor exercise would be permitted."

When asked about any possible hostility from other prisoners towards the appellant, Dr McManus reiterated that he understood that the appellant would be able to choose whether to leave his cell to work with other prisoners, or whether to stay in his cell. Prisoners with whom Dr McManus had spoken simply made it clear that they did not wish to have anything to do with the special measures. When asked whether any particular measures would be put in place to guard or protect the appellant if he went out and mingled with other prisoners, Dr McManus said that he was not aware of any particular measures.

[33] As mentioned, Dr McManus's remit was restricted to the conditions in which the appellant was expected to be detained. Nevertheless he had walked through the rest of the prison. Most of the prisoners had been at work or exercise, with the exception of short-term prisoners who remained locked in their cells. Dr McManus noted the following:

> ***Overcrowding in the prison***: At the time of Dr McManus's visit, the prison held 3,877 male prisoners, approximately 300 being foreigners, 17 of whom were UK citizens. That represented an overcrowding rate of 41% (page 3 of the report). The prisoners had less than 1½ square metres per person, i.e. considerably less than the minimum of 2.31 square metres laid down by the Taiwanese Ministry of Justice statistics ([11/6] page 3) and much less than the minimum of 4 square metres space per prisoner in a multiple-occupancy cell as recommended by the CPT (CPT "Living space per prisoner in prison establishments" [13/9]). Dr McManus understood that the authorities were working hard to reduce overcrowding levels: a new secure prison was due to open on 1 September 2016, and a new open prison thereafter. But when shown the photograph at page 3 of the Taiwan MOJ Agency of Corrections report on prison conditions, prepared in the context of President Chen's detention [11/14] and depicting 18 to 20 prisoners sleeping side-by-side on the floor of a cell measuring 6.37 ping (i.e. about 15 feet by 15 feet), Dr McManus stated categorically that such conditions were "clearly unacceptable" and not article 3 compliant. His report also noted information from the four foreign prisoners selected to speak to him as follows:
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> > " … Their main complaint was about the lack of sleeping space – one of the prisoners … was serving a sentence of less than six months and thus spent the whole day in his cell apart from a few minutes exercise perhaps three times per week. The overcrowding problem was particularly bad at night time when it was necessary to step over people on the floor to get to the toilet. This sometimes caused aggression when someone was stood upon …"
>
> Dr McManus's ultimate conclusion was that the prison was "grossly overcrowded", and that, despite the efforts of the Taiwanese authorities, the overcrowding appeared to have increased from 32% overcrowding in May 2014 to 41% overcrowding at the time of his visit in August 2015. Although he was not referred to any text in the fuller version of the CPT standards (revised 2015) lodged on behalf of the Lord Advocate [13/6], it is noteworthy that those standards wholly endorse Dr McManus's view: for example, paragraphs 44 and 46 are in the following terms:
>
> > "44. … Ill-treatment can take numerous forms, many of which may not be deliberate but rather the result of organisational failings or inadequate resources …
> > 46. Overcrowding is an issue of direct relevance to the CPT's mandate. All the services and activities within a prison will be adversely affected if it is required to cater for more prisoners than it was designed to accommodate; the overall quality of life in the establishment will be lowered, perhaps significantly. Moreover, the level of overcrowding in a prison, or in a particular part of it, might be such as to be in itself inhuman or degrading from a physical standpoint."
>
> ***Restricted outdoor exercise:*** The CPT standard is a *minimum* of one hour's outdoor exercise each day. In Taipei prison, Dr McManus noted (pages 5 and 10), that, quite apart from the very restricted outdoor exercise permitted to short-term prisoners:
>
> > " [page 5] … prisoners spoken to indicated that they were not actually allowed much time in the open air each day, especially in the rainy season which it was at the time of the visit. As an alternative, they are offered exercise periods inside the corridors and the factories … [page 10] … Poor time in the open air was mentioned by [prisoners spoken to]. Those

employed in the factories indicated that they were allowed 45 minutes once per week when it was not raining."

Understaffing: Dr McManus notes at pages 2 and 5 of his report [10/5] that at the time of his visit to Taipei prison, there were 98 staff on duty during the day, and 46 at night. For a prison population of 3,877, that resulted in a staff-prisoner ratio of one staff-member to 39 prisoners (1:39) during the day, and one staff-member to 84 (1:84) prisoners at night. Accordingly, as Dr McManus noted at page 5 of his report:

> " … the numbers [of staff] on duty at any one time were lower than one would expect for the size of the prison population. Extensive use of CCTV cameras, including one in each cell, compensates for this, though does not allow of full interaction between staff and prisoners."

According to CPT standards [13/6] page 23 paragraph 27, understaffing may affect *inter alia* the ability to control inter-prisoner violence.

An unusually low number of prisoner complaints: The complaints system is described at page 6 of the report. In evidence, Dr McManus commented that the number of complaints from prisoners recorded in the Complaint Register was unusually low: the culture in the prison seemed to be "against making complaints". In relation to court actions, he notes (at page 7):

> "Prisoners also have access to the domestic courts and had raised some 62 lawsuits in the year to date (66 in 2014 and 82 in 2013). Many of these related to sentence calculation, parole and good time (remission), but others raised issues like moving cells. None, it seemed, related to prison conditions per se.
>
> … [The appellant] would also have access to the British Office staff in relation to any matter arising for him, and in particular to matters covered by the assurances given by the Taiwanese authorities."

A low medical staff-prisoner ratio: Medical services are covered at pages 6 and 10 of the report. At page 10, it is noted that:

> " … The *Medical Services* appear to produce roughly the equivalent of seven full-time doctors for the establishment [i.e. one doctor per 553 prisoners], well below the CPT standard of one doctor per 350 prisoners. However there seemed to be no great problem for prisoners obtaining medical attention when needed …"

In evidence, Dr McManus explained that the nurses were members of prison staff, but the doctors came from the local military hospital. Psychiatric cover seemed particularly scanty, considering the number of prisoners on psychotropic medication. The prisoner pack issued to UK citizens advised, at page 10:

> "You will be required to pay for medical, dental treatment and medication unless the matter is an emergency … Waiting times for dental treatment can be particularly long."

In cross-examination, Dr McManus emphasised the limited nature of his investigation into health care, in view of the nature of his remit and the fact that he had not been accompanied by a qualified doctor.

The possibility of solitary confinement: Disciplinary measures and restraints are discussed at pages 7 to 8 of the report. It is noted that:

> " … solitary confinement is not used as a punishment, but a prisoner can be kept alone in a cell if he persistently offends or threatens to offend in a very serious way."

There were two or three cells used when prisoners were segregated, one cell being padded and others with a concrete plinth on the floor, no bedding and no other facilities ("the punishment block"). A document headed "The Inmate Treatment Planning Report on an Individual Case" dated

17 August 2015 (produced about a week prior to Dr McManus's visit) relating to the appellant [13/7] stated at page 6 that:

> " … if [the appellant's] behaviour is regarded as a serious offence, for example, assaulting prison officers or harming others, he will be punished by our criminal laws and moved into the cell of rule breakers …"

However the possibility of the appellant's being segregated into the punishment block was ruled out by an undertaking given some two weeks later, in a letter dated 2 September 2015 (see paragraph [10] above). Dr McManus explained that this change was a direct result of his intervention and comments during his visit to Taiwan in August 2015.

***Violent incidents**:* The Inmate Treatment Planning Report [13/7] at page 8 noted:

> " … According to Taipei prison, from January 2011 to July 2015, there are 62 domestic prison violent incidents leading to injuries (57 minor injuries, 4 serious injuries, 9 deaths) … It is inferred that the violent incidents caused by the foreign inmates are much slighter than the ones caused by the domestic inmates, and no death has resulted for foreign inmates so far."

Dr McManus confirmed that he had taken account of those statistics, and commented that, in his view, the level of control in the prison was very good. However in cross-examination he conceded that he had been unaware of the incident of the stabbing of a prison officer with sharpened chopsticks [11/7], the incident involving 6 prisoner suicides [11/9], and the sexual attacks referred to in [15/8] and [15/13]. He also confirmed that a cell captain culture was clearly not a good thing.

***Cleanliness**:* Shown an Amnesty International Report 2014/15 concerning Taiwan [11/1] which stated:

> "Prison conditions: Overcrowding, unsanitary conditions and lack of adequate medical care remained serious problems in prisons and detention centres …"

Dr McManus agreed that he might have to reconsider his initial assessment of Taipei prison, which was that the prison appeared clean to his sight. In particular, he accepted that the level of humidity in Taiwan combined with dust and insects made sleeping on mats on the floor unacceptable.

***No international monitoring or control**:* Dr McManus confirmed that Taiwan was not a member of the Council of Europe or of the United Nations. There was no international monitoring of the Taiwanese prisons, although there were visits from Australians interested in the correctional field. Dr McManus confirmed that no-one had ever previously been extradited from abroad to Taiwan. There was the problem with Taiwan's status: many extradition treaties required a "state", not a "territory".

[34] Taking an overall view, Dr McManus's final conclusion (at page 11 of his report) on the very restricted question of *the article 3 compliance of the conditions in which the appellant would be kept* was that:

> "Given the assurances of the Taiwanese Authorities, the expert would conclude that the deficiencies identified [in the report] would not reach the minimum level of severity required to constitute a breach of article 3 of the European Convention on Human Rights".

[35] However Dr McManus did not give the same opinion in relation to the main detention building in Taipei prison, emphasising that his remit had not been an assessment of the whole prison. When it was pointed out that the 17 UK nationals serving sentences in the main detention building did not appear to have received any special or improved conditions, but were apparently experiencing all the difficulties listed in paragraph [33] above, Dr McManus acknowledged that the British Office in Taipei had either made no interventions on the UK nationals' behalf, or any interventions made had been unsuccessful, (he rather thought the former). He also agreed that a letter from the Foreign and Commonwealth Office dated 5 January 2016 [13/14], stating that the appellant would be able to raise any concerns about his prison conditions with the British Office staff, gave no indication of any action or remedy which the British Office could take.

Productions referred to by or on behalf of the appellant in the course of the evidence

[36] As noted above in paragraph [16], the appellant referred to various productions in his evidence, including:

[37] Inventory number 11 of process

- The Straits Times 12 February 2015 [11/9] "6 inmates in Taiwan prison hostage drama commit suicide;siege ends".

- The South China Morning Post 12 February 2015 [11/13] concerning the same incident and commenting "Taiwan President Ma … has demanded speedy reform of the island's much-criticised prison conditions … [a commentator added] the incident exposes the serious over-congestion of prison cells in Taiwan, the unstable emotions of the inmates … and inadequate manpower, facilities and budgets in all prisons across Taiwan".

- A report from the Taiwan Ministry of Justice Agency of Corrections on Prison Conditions (possibly dated 2012) [11/14], untranslated, with a photograph at page 3 showing 18 to 20 prisoners sleeping side-by-side huddled together on the floor.President Chen (imprisoned in Taipei prison for bribery) was given preferential treatment, including sharing a cell with one other person and having a desk.

- A Taiwan Ministry of Justice Agency of Corrections report dated 26 February 2015 [11/16] (untranslated) concerning hostages and suicides.

[38] Inventory number 15 of process (with three joint minutes 15, 34, and 41):

- Control Yuan (May 2010) review of Taiwan's prisons [25/6] referring to obvious understaffing (including medical and pharmaceutical staff), overcrowding ("still a big problem").

- Review of the Initial Reports of the Government of Taiwan on the Implementation of the International Human Rights Covenants.Concluding Observations and Recommendations adopted by the International Group of Independent Experts Taipei, dated 1 March 2013 [15/2] paragraph 61 *et seq* of which provides:

  "61. The overcrowding of prisons is recognized by the Government of Taiwan as an 'urgent problem' (para.146 of the initial report). Overcrowded prisons lead to a variety of human rights problems, such as poor hygienic and health standards, lack of privacy, an increase of violence and often to conditions of detention that can only be qualified as inhuman or degrading treatment … [Recommendations follow, including the construction of new prisons, measures to reduce the number of prisoners, and improvements in the prison health services]

  62. Article 9(4) ICCPR (the International Covenant on Civil and Political Rights) provides that anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful (right to habeas corpus) … the Government of Taiwan admits that the writ of habeas corpus is not applicable to foreigners …"

- Article on “room captain culture” by Taiwan Action for Prison Reform (“TAPR”) 21 March 2013 [15/8] describing stronger and more powerful inmates governing, bullying, and abusing weaker and vulnerable inmates (“prison reform in Taiwan [has] still a long way to go”).

- A national news channel (NOW) March 2013 [15/15] describing sexual assaults on a teenage prisoner by a room captain in Taipei prison.

- The news channel NOW April 2013 [15/16] describing an inmate “violently tortured by other inmates from the same cell” who died due to the violent abuse.

- Liberty Times April 2013 [15/14] describing a prisoner repeatedly beaten by another inmate resulting in his death, no preventative action having been taken by the prison management.

- E-News of The Liberty Times dated 26 April 2013 [15/28] containing “enraged” comments from the father of the man who died in the road traffic accident, in particular stating “I will offer a NT$ 1,000,000 for [the appellant’s] head … There will be retribution … waiting for [the appellant] and his girlfriend …”.A compensation award of NT$7,550,000 had been awarded against the appellant by Taipei District Court.His departure from Taiwan had “caused a great uproar and the furious President Ma … has also ordered for his arrest through any possible channels.Some Taiwan citizens claiming to be underworld gangs offered to hunt down [the appellant] till he returns to Taiwan and faces trial.”

- Article on sexual abuse in Taiwan prisons 30 April 2013 [15/13] by TAPR, referring to overcrowded prison cells, room captain culture and lack of prison guards.

- Article by an assistant professor in sociology, Taiwan University, October 2013 [15/25] noting that “overcapacity and guard ratio is the worst in East Asia … not just the daily living environments of inmates but the working conditions of inmates are all terrible”; referring further to insufficient medical service and inadequate “space, air, sunlight, water”.

- A Public Television Service (PTS) item [15/12] describing inadequate food and poor air flow in the violation room in Taipei prison.

- A DVD containing a television programme broadcast in 2014 [15/17] and a trailer for the programme [15/22].The programme (which was shown to the sheriff) was described as depicting inmates sleeping shoulder-to-shoulder on the floor with an open toilet in the corner.

- SET News report dated 5 February 2016 [15/37] entitled “Are you joking?British businessman Zain Dean rejects return to Taiwan only because of ‘inhumane’ prison conditions”.The article includes the following comments:

  “ … It has been revealed that in order to fight for extradition, the Ministry of Justice is offering a luxury prison cell, which contains a bunk bed, as well as a toilet and shower

facilities. It has even proposed to cater for his religious and dietary requirements by providing hamburgers and pasta. It is truly a luxurious prison. The response from the Ministry of Justice is that because the UK has concerns over human rights in Taiwan's prisons, the purpose of providing this document is for the Ministry of Justice to prove the prison conditions rather than to offer special treatment to Zain Dean … Cheng Ming-tang, the deputy Minister of Justice, said, 'This is not tailored for Zain Dean. [The British government] has concerns over our prison conditions. We are just demonstrating that our prison facilities are not inhumane' … Providing such generous conditions will surely devastate the family of the deceased victim".

- SET News report dated 2 May 2016 [15/38] entitled "[Conditions] even better than A-bian [Taiwan's ex-president Chen]! Zain Dean's 5-star prison cell is revealedDeceased victim's father:I might as well go and live there".The article includes the following comments:

  "It seems that the authorities will have to negotiate conditions with Zain Dean in order to make him serve his sentence in Taiwan. The large prison cell being offered to him is of 5-star quality … The father of … the deceased newspaper delivery man was furious after he learnt of the news. He said that if Zain Dean was to live in such a luxurious prison cell, he might as well go live there … Although the former president Chen Shui-bian received preferential treatment, he still had to live in a [4.3 square metres] cell, but Zain Dean is being offered an en-suite room of more than [13.22 square metres] in size. The toilet used by Chen Shui-Bian was in an open space, so there was no privacy at all when he used the toilet … it makes people wonder on what basis does Zain Dean, the killer of a filial son, negotiate terms with Taiwan …"

- Next Magazine internet article dated 12 May 2016 [15/39] entitled "[Exclusive] In order to extradite Zain Dean to serve his sentence, the Ministry of Justice is offering an en-suite twin room, together with hamburgers and spaghetti".The article includes the following comments:

  > " … After killing the victim on the road, Zain Dean did not apologise or pay any compensation. What was even worse was that he appeared to be extremely arrogant, which really infuriated the public in Taiwan … Earlier this year, in order to extradite Zain Dean, the Ministry of Justice submitted a special official document with attached photos to the UK court, showing them that the prisons in Taiwan were not like what the outsiders had imagined at all, but in fact they had good facilities and good welfare … From the photos submitted to the UK court by the Ministry of Justice, it can be seen that if Zain Dean comes to Taiwan to serve his sentence, he will be living in a 'luxury' en-suite room [the facilities are then described, including the provision of special food such as hamburgers and spaghetti]. In order to extradite Zain Dean back to Taiwan, the Ministry of Justice painted a rose-tinted picture of the prison conditions in Taiwan, but what is it really like for inmates to live in a prison in Taiwan? More than 10 people are crammed into a small cell and they sleep on the floor. It is difficult to understand whether it is

> because the Ministry of Justice offers 'special care' in the hope of getting Zain Dean to serve his sentence in Taiwan, or whether it had absolutely no regard for the human rights of the inmates in Taiwan. Chen Ming-tang, the Administrative Depute Minister of Justice, provided the following explanations. Zain Dean refused to serve his sentence in Taiwan on the basis of poor prison conditions in Taiwan. In response to this, the Ministry of Justice showed the UK our newly-renovated prison cell facilities. This was to prove that our prison conditions were not poor and that we would be able to provide special meals based on the religious requirements of different countries. However these facilities are scarce so they cannot be made available to all inmates. Therefore, even if Zain Dean comes to Taiwan, he may not be able to actually receive such treatment. (Written by: The Social News Team)."

Discussion and decision

[39] The request to extradite the appellant to Taiwan is unique. There is no precedent. To date, the Taiwanese authorities have not sought the extradition of any person to Taiwan, including Taiwanese nationals who have fled the country accused of crimes. As Professor Chin explained in evidence, other countries have not entered into international treaties with Taiwan as a result of the dubiety attached to Taiwan's status in the world. As Dr McManus observed, most countries enter into extradition treaties with recognised "states", and not with "territories".

[40] It seems that little is known in the United Kingdom about the conditions in which prisoners are held in Taiwan, and in particular in Taipei prison. As discussed in paragraph [56] *et seq* below, there is no established UK or international system whereby the conditions in any prison in Taiwan, including Taipei prison, are monitored. When asked for information on the subject, the staff at the British Office in Taipei were guarded in their response (see paragraph [56] below).

[41] This court nevertheless has to address the question whether, in relation to the conditions in which the appellant is intended to be held in Taipei prison, "substantial grounds have been shown for believing that there is a real risk of treatment [of the appellant] incompatible with article 3 "(*Saadi* v *Italy* (2009) 49 EHRR 30, paragraph 128). A real risk means "more than mere possibility but … something less than the balance of probabilities" (*Aldhouse* v *Thailand* [2012] EWHC 2235, paragraph 26). "The burden of proof is less than proof 'on the balance of probabilities', but the risk must be more than fanciful" (*Florea* v *Judicial Authority, Romania* [2015] 1 WLR 1953, paragraph 21, quoting *Torreggiani*). I approach the question on the basis of the evidence led in court, applying the tests set out in *Kapri* v *Lord Advocate* 2015 JC 30, 2014 SLT 557, *Saadi, Aldhouse* and *Florea*.

[42] For the purpose of this exercise, I shall consider the evidence on the hypothesis that every effort would be made by the Taiwanese authorities and their prison staff to fulfil all assurances given (including those noted in paragraph [10] above). I accept that, as this case is the first extradition request made by Taiwan to the United Kingdom (or indeed to any foreign country), and as the appellant's particular circumstances and offence have made his case a high-profile one, there is a:

> "substantial interest on the part of the judicial authorities of Taiwan to ensure the assurances are observed. Failure on their part would deny them the opportunity in future to pray in aid with any other jurisdiction their commitment to ensure assurances they offer will be observed and given practical effect" (paragraph 19 of the note by Mr Dickson dated 21 June 2016).

[43] Adopting this approach, I find that it is not necessary to explore whether there have been ambiguities or misunderstandings about past undertakings (for example, concerning time spent in custody in Scotland, or additional requests for extradition) as it is my opinion that even if it is assumed that every endeavour would be made to fulfil the assurances, there are nevertheless "substantial grounds … for believing that there is a real risk of treatment [of the appellant] incompatible with article 3" (*Saadi* paragraph 128). I have reached that conclusion for the following reasons.

[44] I am satisfied beyond reasonable doubt on corroborated evidence that the main detention building in Taipei prison suffers from gross overcrowding, significant understaffing, problems of unchecked and

uncontrolled abuse and bullying of weaker prisoners, inadequate ventilation and toilet facilities, and inadequate opportunities for prisoners to exercise in the open air. Further I am satisfied beyond reasonable doubt on corroborated evidence that the appellant and his past offending behaviour have received such widespread adverse publicity in Taiwan that he is at particular risk of being the focus of hostility from prisoners within the prison. It is my opinion therefore that, were the appellant to be housed in the standard conditions in the main detention building, substantial grounds have been shown for believing that there is a real risk of treatment of the appellant incompatible with article 3 (*Saadi* paragraph 128).

[45] I consider therefore that the only live question for this court to determine is whether the undertakings given and special arrangements proposed by the Taiwanese authorities, assuming they are fulfilled to the letter, would have the result that the appellant could serve his sentence in Taipei prison without there being a real risk of treatment of him incompatible with article 3.

[46] As noted above, I am working on the hypothesis that every effort would be made by the Taiwanese authorities, prison staff, and others, to fulfil and honour all the undertakings and special arrangements promised by the Taiwanese authorities. Thus I assume that the appellant would not be housed in the main prison building, but in the nearby building. He would occupy a special cell, in the company of one other foreign prisoner. He would have a bed, toilet and shower facilities, and a desk and chair. He would be able to choose whether or not to go to work during the day. He might at times be offered "western" food, such as spaghetti and hamburgers. He might be able to have books and papers, and to watch a battery-operated television (there being no electrical sockets in the cell). If and when taken out for exercise in the fresh air – which Dr McManus understood would, in the appellant's case, be for up to an hour each day – other prisoners would be removed from the exercise area.

[47] Such arrangements would, in my opinion, be viewed by the prison community in Taipei prison (both staff and inmates), and by the public in Taiwan, as wholly exceptional. Other prisoners interviewed by Dr McManus wanted nothing to do with those arrangements, from which I infer that being so favoured by the authorities would cause significant animosity amongst other prisoners. That would be highly disadvantageous for the appellant, who is already notorious and unpopular because of his personal circumstances and the offences of which he has been found guilty.

[48] The exceptional nature of the proposed arrangements was highlighted in the course of this litigation. Initially the Taiwanese authorities expected the appellant to occupy a standard cell. They undertook to reduce the number of fellow-prisoners in the cell, and to select non-violent prisoners. Thus the appellant was intended to share the cell and its open communal toilet with fellow prisoners; have no bed, desk or chair; sleep on a mat on the floor; have no fan or other form of artificial ventilation; go to work each day with other prisoners; and take the minimal outdoor exercise available along with other prisoners. In the course of the extradition proceedings, the authorities undertook, stage by stage, to provide revised and improved arrangements, all as noted in paragraph [10] above. Against that background, the comments of the Taiwan Justice Minister on 5 February 2016 quoted in paragraph [38] above ("This is not tailored for Zain Dean") are not, in my opinion, an accurate reflection of the facts. I consider that it is obvious that the special cell and conditions have been "tailored" for the appellant – tailored in the course of these extradition proceedings, in part with the benefit of advice from Dr McManus. I also consider that it is obvious that such special conditions have provoked, and will continue to provoke, considerable anger and resentment on the part of the deceased's grieving family, the local Taiwanese people who are aware that the appellant (a foreigner) has been convicted of killing a Taiwanese newspaper delivery man, and other prisoners in Taipei prison, who would resent the superior comfort, space and facilities in the special cell, resent the special food which he might receive, resent being excluded from the exercise area to allow the appellant to be there on his own (when time outside in the fresh air was so limited and precious), resent the appellant's ability to choose whether or not to go to work/education, and resent the appellant's immunity from being sent to the punishment block.

[49] Thus the Taiwanese authorities would be placed in a difficult position. If they qualify or depart from the offer of the special cell and conditions all as set out in the various assurances in paragraph [10] above, they might succeed in placating resentment against the appellant, but they would then conspicuously fail to honour the assurances given, and expose the appellant to the very conditions which I consider not to be article 3 compliant.

[50] Against that background, I have carefully considered all the evidence. I am not satisfied that the exceptional arrangements described in the assurances remove the real risk of treatment of the appellant incompatible with article 3, for the following reasons.

[51] Taipei prison is grossly overcrowded and significantly understaffed. Despite the plans of the Agency of Corrections, the overcrowding appears to have increased from 32% in May 2014 (the letter dated 7 May 2014) to 41% in August 2015 (the month of Dr McManus's visit). As is pointed out in the CPT standards (Rev 2015) [13/6] at pages 22-23:

> "*Extract from the 7th General Report [CPT/Inf(97)10]*
>
> … 13. … An overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff. This list is far from exhaustive.
>
> The CPT has been led to conclude on more than one occasion that the adverse effects of overcrowding have resulted in inhuman and degrading conditions of detention …
>
> **Inter-prisoner violence**
>
> 27 … Tackling the phenomenon of inter-prisoner violence requires that prison staff be placed in a position, including in terms of staffing levels, to exercise their authority and their supervisory tasks in an appropriate manner."

[52] In the overcrowded and understaffed circumstances currently prevailing in Taipei prison, I consider it highly doubtful that the prison, even with well-trained and well-motivated staff, has the capacity to be able to provide sufficient protection for the appellant in the context of the large numbers of prisoners who require supervision.

[53] If the appellant were to decide to remain full-time in his cell for his own safety (thus being wholly segregated from other prisoners), he would not be able to work and earn parole; he would have little to do; he would have little exercise; he would in effect be held in solitary confinement in a locked cell which cannot be categorised as a "special unit" in which some degree of activity and interaction with others might be possible. The definition of solitary confinement includes a locked cell containing two occupants. Solitary confinement is generally accepted as very harmful to a prisoner's mental and physical health: cf the observations in *Shahid v Scottish Ministers* [2016] AC 429 paragraph 75 *et seq*; CPT "Living space per prisoner in prison establishments" (CPT/Inf (2015) 44) [13/9] at page 7:

> "*Purposeful activities:* The CPT has long recommended that prisoners should be offered a range of varied purposeful activities (work, vocation, education, sport and recreation). To this end, the CPT has stated since the 1990s that the aim should be for prisoners – both sentenced and on remand – to spend eight hours or more a day outside their cells engaged in such activities, and that for sentenced prisoners the regime should be even more favourable."

See too the CPT standards (CPT/Inf/E(2002)1-Rev 2015 English) [13/6]:

> "[page 17] paragraph 47. A satisfactory programme of activities (work, education, sport etc) is of crucial importance for the well-being of prisoners … prisoners cannot simply be left to languish for weeks, possibly months, locked up in their cell, and this regardless of how good material conditions might be within the cells. The CPT considers that one should aim at ensuring that prisoners in remand establishments are able to spend a reasonable part of the day (8 hours or more) outside their cells, engaged in purposeful activity of a varied nature. Of course, regimes in establishments for sentence prisoners should be even more favourable.
>
> [page 18] paragraph 48. Specific mention should be made of outdoor exercise. The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard …
>
> [page 20] paragraph 56 … Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible …

> [page 29] paragraph 53 ... The CPT has always paid particular attention to prisoners undergoing solitary confinement, because it can have an extremely damaging effect on the mental, somatic and social health of those concerned.
>
> This damaging effect can be immediate and increases the longer the measure lasts … Clearly, therefore, solitary confinement on its own potentially raises issues in relation to the prohibition of torture and inhuman or degrading treatment or punishment …
>
> [page 29] paragraph 54. The CPT understands the term 'solitary confinement' as meaning whenever a prisoner is ordered to be held separately from other prisoners, for example … for the protection of the prisoner concerned. A prisoner subject to such a measure will usually be held on his/her own; however, in some States he/she may be accommodated together with one or two other prisoners, and this section applies equally to such situations."

[54] On the other hand, if the appellant were to emerge from his cell, for example to go to work or exercise, he would be an easy target for other prisoners. Even with an effective full-time personal escort or guard, he would in my opinion be at significant risk of attack. In any event, there was no evidence that the prison, overcrowded and understaffed as it is, could, or would, provide an effective full-time personal escort or guard for the appellant moving around the prison, outside the safety of his cell.

[55] Further, I am not satisfied that there are sufficient medical staff and services available for the prisoners, including the appellant. Such evidence as the court heard suggested otherwise: see paragraph [33] above. Dr McManus was careful to point out that a CPT inspection group would include a qualified doctor who would be better able to assess the prison's medical cover and services. Without that authoritative assessment, on the information before this court, I have concerns that (a) there are insufficient medical staff available for the large prison population; (b) there are insufficient pharmaceutical staff and resources for that population; (c) prisoners have to pay for non-emergency medical and dental treatment; (d) prisoners have to pay for non-standard makes of drugs. I note from the CPT standards [11/6] at page 39 that access to a doctor and dentist is regarded as important for prisoners.

[56] It is also a matter of considerable concern that, in this case, there is no established UK or international system whereby the prison conditions in Taipei prison are monitored, and whereby a route to remedial action may be pursued. If, for example, the Taiwanese authorities, despite their best endeavours, found themselves unable to fulfil any of the assurances given, there is no effective remedy, and therefore no fulfilment of criteria (6) to (9) in paragraph [189] of *Othman* v *United Kingdom* (2012) 55 EHRR 1. No external UK or international independent body (such as the Commission for the Prevention of Torture, or a committee from the United Nations) visits or inspects Taipei prison, or has any power to ensure that the assurances given by the Taiwanese authorities and set out in paragraph [10] above are enforced. Taiwan is not a signatory to the European Convention on Human Rights (ECHR) or the European Convention on Extradition (ECE), nor is it a member of the Council of Europe, or of the United Nations. The British Office in Taipei does not appear to be able to insist that assurances are enforced, or even to provide some degree of protection or assistance to a UK citizen inmate of Taipei prison. There was certainly no evidence to suggest that the British Office had ever managed to achieve an improvement in conditions. The Consular Directorate of the Foreign and Commonwealth Office explained by letter dated 8 September 2015 [16/1]:

> " … We do conduct consular visits to prisons in Taiwan. We consider that passing on to third parties information obtained during the provision of consular support to our prisoners goes beyond our consular remit and could therefore jeopardize our consular access in the future … In this case, the information being withheld relates to conditions in prison in Taipei … Disclosure of the information that was given to us in confidence would damage our relationships with the individuals concerned: they would be more guarded and less co-operative in their dealings with us … Please find attached some information from public sources …"

A similar message was sent earlier by e-mail dated 19 August 2015 [11/10], stating:

> "I am afraid that we are not in a position to provide you with an assessment of the treatment of British nationals in Taipei prison. Our consular staff are not experts on prison standards and do not have the access that would enable them to give factual evidence on this matter. Furthermore, in

> general, the FCO [Foreign and Commonwealth Office] considers that passing on information obtained during the provision of consular support to our prisoners goes beyond our consular remit and could therefore jeopardize our consular access in the future. For these reasons, it would be more appropriate for you to gather information from organisations devoted to providing expert assessments of prison conditions …"

It is of note that, so far as Dr McManus was aware, the British Office in Taipei had, at the time of his visit, either never attempted to intervene on behalf of the 17 UK citizen prisoners in Taipei prison in order to achieve improved conditions for them; or alternatively the consular staff had intervened, without noticeable effect. Dr McManus suspected the former, and his view is supported to some extent by the letter from the Foreign and Commonwealth Office dated 5 January 2016 [13/14] which gives no indication of any steps which the British Office would or could take on the appellant's behalf were he to have concerns.

[57] Another matter which I regard as important is the fact that there is no established route within the Taiwanese courts whereby a prisoner can seek a remedy in respect of prison conditions (contrast with the United Kingdom: see, for example, *Shahid* v *Scottish Ministers* [2016] AC 429). On the evidence, it would appear that the concept of "prisoners' rights" is at a very early stage of development in Taiwan. There is no recognised tried and tested route available to a prisoner to raise a court action concerning his conditions of detention. Any such action would be a pioneering venture, and it is not clear whether the administrative or the criminal courts would be the appropriate forum (cf Professor Chin paragraph [23] above). Funding might present difficulties, as might the availability of an *interim* remedy. Professor Chin was unaware of any such case having been pursued in the past. Thus it would appear that one of the fundamental CPT standards is unlikely to be met (paragraph 54 of the CPT standards (Rev 2015) [13/6]).

[58] For all these reasons, even taking into account the guidance given in *Ahmad* v *United Kingdom* (2013) 56 EHRR 1 referred to by Lord Drummond Young in paragraph [73] below, I am satisfied that substantial grounds have been made out for believing that, even if all the undertakings and special conditions were to be fulfilled, there remains a real risk of treatment of the appellant incompatible with his human rights in terms of article 3 of the European Convention on Human Rights (cf *Saadi* v *Italy* (2009) 49 EHRR 30, paragraph 128, *Aldhouse* v *Thailand* [2012] EWHC 2235). Accordingly the appellant's extradition to serve his sentence in Taipei prison would not, in my opinion, be compatible with the Convention. As Blake LJ explained in *Florea* v *Judicial Authority, Romania* [2015] 1 WLR 1953:

> "31 … If there are [substantial grounds for fearing a real risk of treatment that would amount to inhuman or degrading treatment], removal [to the receiving state] is not possible, however compelling the public interest in return: see *Badre's* case [2014] EWHC 614 and the speech of Lord Kerr of Tonaghmore JSC giving the judgment of the Supreme Court in *R (EM (Eritrea))* v *Secretary of State for the Home Department* [2014] 2 WLR 409 paragraphs 41-43 and 58-64.
>
> 32 The Supreme Court has clarified that the test is not whether a violation of human rights is systemic or systematic. However evidence of enduring problems with the system can support the existence of substantial grounds for a belief in a real risk of article 3 ill-treatment, despite the starting point of the presumption of compliance …"

[59] I have reached this conclusion on the basis of evidence led before this appeal court which was not available at the extradition hearing before Sheriff Maciver (section 104(4) of the Extradition Act 2003). As a result, it is my view that the appeal under section 103 should be allowed, as the evidence referred to above would, in my opinion, have resulted in the sheriff's deciding the article 3 question differently, such that he would have been required to order the appellant's discharge (section 87 and 104(1) to (4)). In terms of section 104(5) I propose that this court orders the appellant's discharge, and quashes the order for his extradition.

[60] I note that this unique case has a protracted history, which may, in part, be explained by the difficulties of litigating about prison conditions existing in another territory when so little information about those conditions is available in the public domain. In the result, the appellant has in fact been in custody in Scotland for a period longer than the period he would have served (with parole) had he received a 4 year sentence in the Scottish jurisdiction. I would also add that it is possible that, in this particular case, the

observations of Lord Drummond Young in paragraph [66] below may not reflect the situation as it was in October 2013, when the unique Memorandum of Understanding relating to one individual (the appellant) was entered into. Bearing in mind the terms of the letter from the Home Office dated 22 October 2014 relating to Taiwan [11/12] quoted in paragraph [10] above, and the introductory comment made by Dr McManus at the outset of his report, quoted in paragraph [28] above, about reading "what little information [was] available in the public domain on the prison system of Taiwan", the evidential hearing in this case might be regarded as something of a voyage of discovery.

Appeal in terms of section 108; devolution issue minutes

[61] It would follow from a decision to allow the appeal in terms of section 103 of the 2003 Act that it would not be necessary for this court to issue an opinion in terms of section 108, or to decide the devolution issue minutes.

Expenses

[62] Any question of expenses should be continued.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2016] HCJAC 83
HCA/2014/003519/XM
HCA/2014/0003518/XM

Lady Paton
Lord Drummond Young
Lady Clark of Calton

OPINION OF LORD DRUMMOND YOUNG

in

APPEALS UNDER SECTIONS 103 AND 108 OF THE EXTRADITION ACT 2003

by

ZAIN TAJ DEAN

Appellant;

against

(FIRST) THE LORD ADVOCATE; (SECOND) THE SCOTTISH MINISTERS

Respondents:

Appellant: Bovey QC, Devlin; V Good & Co

First Respondent: D Dickson (sol adv); Crown Office
Second Respondents: Moynihan QC, Charteris; Scottish Government Legal Directorate

23 September 2016

[63] The present stage of proceedings concerns the question of whether acceding to the request by the Republic of China for the extradition of the appellant would contravene his rights under Article 3 of the European Convention on Human Rights. In my opinion it would not do so. In explaining this conclusion, I propose to consider five general propositions that are in my opinion of crucial relevance to the present case. Thereafter I will discuss the application of those principles, and finally I will consider the details of the argument presented on behalf of the appellant that his return would be likely to result in a contravention of his Article 3 rights.

General propositions

[64] First, it is, I think, worth emphasizing the importance of extradition in maintaining the rule of law at both a national and an international level. It is obvious that the criminal law of a country could not be consistently and impartially maintained if those accused or convicted of crimes were able to escape due process of law by moving to another country. For this reason I consider that an essential policy consideration is that a request for extradition, if it conforms to the standard requirements of double criminality and speciality and comes from a country where the rule of law is respected, should normally be given effect, provided that the request is supported by adequate evidence that the subject of the request has committed a crime. Consequently refusal of such a request on a ground such as a failure of the requesting state's prison system to conform to Article 3 standards should be regarded as exceptional.

[65] Secondly, the system of extradition law is based on arrangements concluded between the United Kingdom and other states and territories. These include treaties and analogous agreements, and also international arrangements such as the European Union Council Framework Decision on the European Arrest Warrant. In the present case, extradition is sought on the basis of a Memorandum of Understanding concluded between the government of the United Kingdom and the judicial authorities of the Republic of China (Taiwan) dated 16 October 2013. Although the Memorandum of Understanding relates only to the appellant, it still enjoys the status of an international agreement concluded between the governments of the United Kingdom and Taiwan. We have already held that Taiwan is a "territory" for the purposes of the Extradition Act 2003, and further that it has a functioning legal system and effective government: decision of 24 June 2015, at paragraphs [18]-[19]. The Memorandum of Understanding was concluded by the Home Office on behalf of the United Kingdom and by the judicial authorities of Taiwan on behalf of the Republic of China. Subsequent letters have been issued by Taiwan regarding the conditions under which it is proposed that the appellant should be held in prison. These have all been issued on behalf of the Ministry of Justice, which is a department of the executive of Taiwan. Thus all of the proposed arrangements have been agreed between the respective executives of the two countries. That is the normal way in which extradition arrangements are concluded.

[66] Thirdly, extradition arrangements, of which the Memorandum of Understanding is an example, are concluded by the executive arm of government on behalf of the United Kingdom and by the appropriate agency of the executive in the other territory or territories concerned. So far as the United Kingdom is concerned, the decision as to whether or not to enter into an extradition arrangement with a particular territory is a matter for the executive arm of government. The courts should in my opinion respect the government's decision to enter into such an arrangement, and should not act in such a way as to override the decision. The decision to enter into an extradition arrangement is ultimately that of the Home Secretary, and it is in my view material that in concluding such an agreement the Home Secretary will have access to a range of government services, including those available from the Foreign Office and Diplomatic Service as well as those within the Home Office. Thus it is likely that the Home Secretary will be better informed than the court can be as to whether it is desirable to enter into an extradition agreement with a particular territory, and as to what the terms of any such agreement should be.

[67] Fourthly, when the United Kingdom enters into an extradition arrangement with a foreign territory, the courts should in my opinion assume that the requirements of the agreement, together with any supplementary undertakings, will be observed in good faith by the authorities of that territory. That is the fundamental basis upon which extradition arrangements proceed. It has been recognized in a number of cases; for example, in *Deya* v *Government of Kenya*, [2008] EWHC 2914 (Admin), Dyson LJ, delivering the opinion of the Divisional Court, referred at paragraph 40 to

> "a fundamental assumption that the requesting state is acting in good faith. That assumption may be contradicted by evidence. But the evidence required to displace good faith must possess special force".

Likewise, in *Gomes* v *Government of Trinidad and Tobago*, [2009] UK HL 21; [2009] 1 WLR 1038, Lord Brown of Eaton-under-Heywood stated at paragraph 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".

A similar presumption of good faith applies to assurances issued by the requesting state: *Cato* v *Republic of Peru*, [2016] EWHC 914, at paragraphs 15 and 23.

[68] As with any agreement at an international level, an extradition agreement takes effect as a matter of international law. While obviously the enforcement of international law presents much greater difficulties than the equivalent in domestic law, the extent to which a state observes its international obligations or fails to do so can be monitored by diplomatic and consular staff. If it becomes clear that a state is failing to implement its international undertakings, it is likely that other states will be reluctant to conclude agreements with it in future, which is a sanction in itself. In general, it can be said that states recognize "the great desirability of honouring extradition treaties made with other states": *R (Ullah)* v *Special Adjudicator*, [2004] 2 AC 323, at paragraph 24, per Lord Bingham of Cornhill. We have been informed that the Memorandum of Understanding is the first extradition arrangement into which the Republic of China has entered; the Republic of China faces obvious difficulties because of its lack of recognition at an international level. That it seems to me, makes it especially likely that the requirements of the Memorandum will be observed.

[69] At this point I should briefly note the status of Taiwan, or the Republic of China. It was suggested in submissions for the appellant that Taiwan's international status was a cause for concern in considering whether the Memorandum of Understanding and subsequent assurances are likely to be observed. The existence of Taiwan is not recognized by the United Kingdom, nor by the majority of other states. Nevertheless, as the court held in its earlier opinion, Taiwan has a functioning government and legal system; indeed, if those requirements were not satisfied Taiwan could not qualify as a "territory" for the purposes of the Extradition Act. Furthermore, a British diplomatic presence is maintained there, although it does not amount to a full embassy or consulate. Thus there is the possibility of monitoring Taiwan's observance of the Memorandum of Understanding and subsequent assurances. For these reasons I am of opinion that the international status of Taiwan is not a factor of great significance in relation to extradition.

Application of Article 3 to extradition

[70] The issue that is now under consideration is the application of Article 3 of the European Convention on Human Rights to the Taiwanese prison system. The application of Article 3 to extradition has been considered in a large number of cases, both in Strasbourg and domestically. The principles laid down in these cases were recently summarized by Aikens LJ, issuing the decision of the Divisional Court in *Elashmawy* v *Court of Brescia, Italy*, [2015] EWHC 28 (Admin), at paragraph 49:

> "(2) If it is shown that there are substantial grounds for believing that the requested person would face a 'real risk' of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country then Article 3 implies an obligation on the Contracting state not to extradite the requested person. (3) Article 3 imposes 'absolute' rights, but in order to fall within the scope of

> Article 3 the ill-treatment must attain a minimum level of severity. In general, a very strong case is required to make good violation of Article 3. The test is a stringent one and it is not easy to satisfy. (4) Whether the minimum level is attained in a particular case depends on all the circumstances, such as the nature of the treatment, its duration, its physical and mental effects and, possibly, the age, sex and health of the person concerned …. (5) The detention of a person in prison as a punishment lawfully imposed inevitably involves a deprivation of liberty and brings with it certain disadvantages and a level of suffering that is unavoidable because that is inherent in detention. But lawful detention does not deprive a person of his Article 3 rights".

It is recognized, however, that when prison overcrowding reaches a certain level the resulting lack of space may constitute "the central element to be taken into account when assessing the conformity of a given situation within Article 3. As a general rule, if the area for personal space is less than [3 square metres], the overcrowding must be considered to be so severe as to justify itself a finding of a violation of Article 3": *ibid*. The European Court of Human Rights has expressed the law in similar terms, notably in *Gaefgen* v *Germany*, (2011) 52 EHRR 1, at paragraphs 87-93.

[71] The application of the Article 3 test was considered in *R (Ullah)* v *Special Adjudicator*, *supra*, at paragraph 24:

> "In relation to Article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment".

The expression "real risk" must, I think, be taken to indicate a significant or substantial risk of treatment contrary to Article 3. In *Saadi* v *Italy*, (2009) 49 EHRR 30, the Strasbourg court stated, at paragraphs 128-129:

> "In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with art.3, the Court will take as its basis all the material placed before it or, if necessary, material obtained *proprio motu*. [The] Court's examination of the existence of a real risk must necessarily be a rigorous one.
>
> It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to art.3. Where such evidence is adduced, it is for the Government to dispel any doubts about it".

The foregoing statement was commented on in *Deya* v *Government of Kenya*, *supra*, at paragraphs 36-37:

> "We do not consider that the court is here saying that the legal burden of proving an Article 3 case shifts from the claimant to the defendant. In our judgment, the legal burden remains on the claimant".

Ullah was cited in support.

[72] A useful, and more recent, statement of the law on this issue is found in *Aldhouse* v *Royal Government of Thailand* [2012] EWHC 3385 (Admin), at paragraph 26:

> "(a) a fugitive must not be extradited if there are substantial grounds for believing he faces a real risk of treatment prohibited by Article 3 in the receiving country…;
> (b) a real risk is more than mere possibility but it is something less than the balance of probabilities…;
> (c) in the absence of torture, which always violates Article 3, there is no single feature of treatment that necessarily amounts to inhuman or degrading treatment or punishment. What amounts to such treatment depends on all the circumstances of the case…"

[73] It has been held that the Convention, and in particular Article 3, is not to be treated as a means by which Convention countries may impose their own standards on other states. The result is that, even if conditions in prison would amount to a breach of Article 3 if they occurred in the United Kingdom, they

might not necessarily do so if present in another non-Convention country. This issue was considered by the Strasbourg court in *Ahmad* v *United Kingdom*, (2013) 56 EHRR 1, when it was stated, at paragraph 177:

> "[T]he absolute nature of art. 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State …. [T]he Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other states. This being so, treatment which might violate art.3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of art.3 in an expulsion or extradition case. For example, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of art.3 but such violations have not been so readily established in the extra-territorial context".

The court went on in that case (at paragraph 178) to list a number of factors which tend to lead to the conclusion that there has been a violation of Article 3 in a case involving ill-treatment of prisoners; these include an intention to debase or humiliate the prisoner, the absence of any specific justification for the measure imposed, the arbitrary punitive nature of the measure, the length of time for which the measure was imposed, and the fact that there had been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. The court added (at paragraph 179) that it had been cautious in finding that removal from the territory of a contracting state would be contrary to Article 3, and that such a finding would be unlikely in the case of removal to a state with a long history of respect for democracy, human rights and the rule of law.

[74] Similar observations are found in the opinion of the Divisional Court in *Richards* v *Ghana*, [2013] EWHC 1254 (Admin), at paragraph 57, where it was pointed out that a tension might be thought to exist between this, essentially contextual, application of Article 3 standards and other statements by the Strasbourg court that the requirements of Article 3 are absolute. The suggested reconciliation of this tension lay in the emphasis that is placed in the case law on the need for "very strong grounds" before a court would be willing to conclude that prison conditions in a non-Convention state attain the level of severity that amounts to inhuman or degrading treatment or punishment in such a way that Article 3 is violated: paragraph 58.

[75] It follows from the foregoing authorities that in the context of extradition a strong case is required before it can be held that conditions in a foreign prison will result in a contravention of Article 3. While overcrowding can amount to a breach of that article, if adequate assurances are given that special measures will be taken to ensure that the subject of extradition will be housed in a cell that is not overcrowded, I am of opinion that there will normally be compliance with the Convention. Furthermore, it must in my opinion be assumed that the authorities in the requesting state will act in good faith, and will observe any undertakings that they have given as to the conditions in which the subject of extradition will be housed. Finally, it is in my view clear from the authorities that the standards applicable to foreign prisons in non-Convention states need not be assessed in such a way as to impose fully Convention-compliant standards; it is enough that there is a reasonable level of such compliance.

Application to the request under consideration

Undertakings given by Taiwan

[76] On the foregoing approach, I am of opinion that the appellant has failed to demonstrate a breach of Article 3 such as to bar his extradition to Taiwan. The Memorandum of Understanding was entered into between the Home Office and the judicial authorities of Taiwan on 16 October 2013. Thereafter a number of undertakings have been given, which are summarized at paragraph [10] above. Those undertakings represent an attempt by the Taiwanese authorities to meet concerns expressed in Scotland about the conditions in which the appellant would be held if he were returned to Taiwan and the length of the sentence that he would be made to serve. The concerns about the conditions of detention were based in large measure on the standards that would be required in a Scottish prison and the requirements of the European Convention on Human Rights, in particular Article 3 thereof. On 23 December 2013 an undertaking was given by the Taiwanese authorities that all periods of detention in Scotland arising from the execution of their request would be deducted from the total period of detention that the appellant required

to serve as a result of his conviction for the extradition offence. On the same date an undertaking was given that the sentence of four years' imprisonment would not be further reviewed. At this point I observe that a sentence of that order would be regarded in Scotland as well within acceptable limits for causing death by either dangerous driving or driving while under the influence of alcohol.

[77] On 25 February 2014 a further important undertaking was given by the Taiwanese authorities to the effect that the appellant would be supervised by appropriate correctional staff and his safety would be secured by assigning him a cell with fewer inmates; those inmates would be foreign prisoners with no record of violence serving sentences for relatively minor offences and unconnected to criminal organizations. The same undertaking also included establishing clear channels of communication for complaints or requests and screening prisoners with ill intent towards the appellant, in such a way that any such prisoners would not come into contact with him. If necessary, the appellant would be separated from group activities and interaction with other prisoners. For reasons previously discussed, I am of opinion that the foregoing undertakings must be accepted as made in good faith. If they are implemented, they should in my view secure the appellant's safety so far as that is practicable.

[78] Following the issuing of the first opinion of the court in this case, on 14 August 2015 Dr James McManus was instructed by the Lord Advocate of behalf of the Taiwanese authorities to assess the conditions of detention proposed by the Taiwanese authorities. On 19 August 2015 a further undertaking was given relating to the cell in which the appellant would be held. The undertaking was that the cell would be consistent with Article 3 of the European Convention on Human Rights. Details were given, and it is plain that the cell in question, which the appellant would share with one other foreign prisoner, is not overcrowded according to Convention standards. That undertaking was given by the Ministry of Justice, and on the same date an undertaking to abide by the terms of all assurances given in respect of the appellant was given by the Director General of the Agency of Corrections.

[79] On 31 August 2015 Dr McManus issued a report on the conditions in which the appellant would be held. This included additional assurances that had been given to him by the Taiwanese authorities. These related to the appellant's safety, including clearing an exercise area for him should that be necessary. The appellant would be permitted to choose whether or not to apply for a place working in a factory or education group. While the assurances were not formally confirmed to the court by the Taiwanese authorities, they were made to a person known to be preparing a report for the court, and if there were any doubt about the matter it would clearly be possible to obtain formal confirmation. On 25 December 2015 certification was received that, in the event that consular staff at the British Office in Taipei raised an issue about a perceived breach of an assurance, the Taiwanese authorities would respond to ensure that the breach was remedied. Finally, on 31 May 2016 a letter was received from the Minister of Justice in the new Taiwanese government confirming the foregoing assurances.

[80] In the light of the foregoing assurances, and on the assumption, which I consider must be made, that the assurances will be observed in good faith, I am of opinion that nothing in the proposed conditions in Taipei prison would amount to a breach of Article 3 of the European Convention on Human Rights. While overcrowding appears to be endemic in Taiwanese prisons, the appellant will not be kept in overcrowded conditions. Understaffing is a problem, but the cell in which it is proposed that the appellant should be kept is in the hospital block, and the problems of understaffing should not have a serious impact on his safety.

Evidence of Professor Chin and Dr McManus

[81] The evidence of Professor Chin is summarized above at paragraphs [21]-[24]. I accept that his evidence was not wholly satisfactory, and that it revealed doubts about the availability of judicial remedies for mistreatment of prisoners in Taiwan. That would be a strong consideration against extradition in the absence of any assurances given by the Taiwanese government. In this case, however, the Taiwanese Ministry of Justice has given the assurance of 25 December 2015 to the effect that concerns raised by consular staff at the British Office would be responded to. The Memorandum of Understanding is an international agreement between states, having force in international law, and the assurances subsequently given by the Taiwanese government are supplemental to that agreement and similarly have force in international law. In matters concerning the treatment of one country's citizens in another country, consular representations are the normal means of securing enforcement of any treaty or similar rights. In the present case, for reasons

already discussed, I am of opinion that the court must treat the Taiwanese assurances as given in good faith, and that if there is any breach British consular staff can be expected to take action.

[82] Dr McManus met staff at the British Office in Taipei and visited Taipei prison, when he was shown areas of it including the cell which the appellant would occupy and the outdoor exercise area to which he would have access. He was also able to speak to foreign prisoners. He confirmed the nature of the cell intended for the appellant, and indicated that it was well lit and ventilated. It was adjacent to the convalescent cell, where an observation room was situated which was permanently staffed. Dr McManus concluded that Taipei prison was seriously overcrowded, and that is a factor that would be of serious concern to this court if the appellant were to be accommodated in mainstream prison conditions. That problem, however, does not arise in view of the assurances that had been given about the cell in which the appellant is to be accommodated. Dr McManus also referred to understaffing, which could affect the prison authorities' ability to control inter-prisoner violence. In the present case, however, I am of opinion that the special arrangements for accommodating the appellant in a cell adjacent to the convalescent cell where there is a member of staff on duty at all times should provide a high level of protection. Furthermore, Dr McManus expressed the opinion that the level of control in the prison was very good, although he conceded that there had been a number of violent incidents in Taiwanese prisons. Nevertheless, the special conditions proposed for the appellant are clearly designed to deal with any perceived threat to his safety.

[83] I found Dr McManus's evidence helpful in explaining the conditions in which it was proposed that the appellant should be held in the event of his extradition. Dr McManus was able to give a clear description of what would be involved. In my opinion the arrangements that he described are such that they would protect the appellant from any realistic threat of violence from other prisoners.

Press and Internet articles

[84] The court was referred to a substantial number of press and internet articles about the prison system in Taiwan. In general terms, these disclosed a degree of concern among prison reformers about the present conditions, although it was apparent that those concerns were not widely shared among the population as a whole. The articles and other documents confirmed the fact that there is serious overcrowding in Taiwanese prisons, and that a number of violent incidents have taken place in recent years. Nevertheless, the undertakings given by the Taiwanese Ministry of Justice in relation to the appellant are specifically designed to address these problems, and in my opinion they should be successful in doing so. In this connection, it is necessary to bear in mind the principle, affirmed in *Ahmad* v *United Kingdom*, *supra*, that the European Convention on Human Rights does not require Convention states to impose Article 3 standards on non-Convention states. As long as there is reasonable compliance with the Convention, that will suffice to permit extradition to take place. Furthermore, it is important at all times to bear in mind the principle that the courts should presume that agreements and undertakings entered into by other states will be observed and implemented in good faith.

[85] Certain of the articles and other documents produced on behalf of the appellant suggested that the family of the man who was killed in the accident that formed the basis for his conviction were resentful and intent on revenge against him. In addition, some recent articles were critical of the conditions in which it was proposed that the appellant should be held, on the basis that these were much better than those enjoyed by ordinary prisoners. It is obviously necessary to approach press and Internet articles of this nature with some circumspection. They cannot be relied on in respect of matters of detail. The articles did tend to indicate that there was a high level of resentment on the part of the victim's family, and that there was some criticism of the conditions in which it was proposed that the appellant should be accommodated. Nevertheless, resentment on the part of a victim's family is hardly unusual, and criticism of allegedly luxurious prison conditions is certainly not confined to Taiwan. I cannot believe that any resentment against the appellant, whether on the part of the victim's family or more generally, cannot be controlled by the Taiwanese authorities.

Proposed treatment of the appellant in Taipei prison

[86] On the assumption that the assurances given by the Taiwanese Ministry of Justice are observed, I am of opinion that the treatment that is proposed for the appellant is adequate to satisfy the requirements of

Article 3 in a case involving extradition to a non-Convention territory. Overcrowding will not be a problem for the appellant because of the special conditions in which he is to be housed. Exercise will be available, to a reasonable degree. The appellant may work if he wishes to do so, and if he does so he will earn parole. That is obviously subject to any concerns about his safety, but the decision to work is his decision alone.

[87] Two specific matters call for comment. First, in Taiwanese prisons a system exists whereby prisoners can earn eligibility for early release by performing work. If the appellant is unable to work because of concerns about his safety, that will have a prejudicial effect. Likewise, the Taiwanese authorities have stated that time spent by him in Scottish prisons will not count towards parole, although it will count as part of the basic sentence (letter of 23 December 2013, quoted at paragraph [14] above). This undoubtedly represents a disadvantage to the appellant. It cannot, however, in my opinion be said that this amounts to inhuman or degrading treatment such as to amount to a contravention of Article 3.

[88] Secondly, concern has been raised about the fact that the appellant will be kept in what is effectively solitary confinement; unless he chooses to mix with other prisoners, his contacts will be confined to a single foreign prisoner who shares a cell with him. The reason for the solitary confinement, however, is concern for the appellant's own safety. In the British prison system prisoners can be kept in solitary confinement for their own safety, for very obvious reasons. Reference was made to *Shahid* v *Scottish Ministers*, [2016] AC 49. In that case, however, the reason that the prisoner's solitary confinement was held to be illegal was a failure to observe the formal statutory requirements for such confinement. The serious nature of solitary confinement was recognized, of course, but if it is necessary for a prisoner's safety it is plain that there is no alternative. Thus I cannot consider that confining the appellant to a cell with one other prisoner, with solitary exercise periods, will infringe Article 3; exactly the same could be done, legally, in a prison in the United Kingdom.

[89] A number of other concerns about the conditions in which he would be held in Taipei prison and possible threats to his security were raised on behalf of the appellant. In general, I am of opinion that these were largely speculative, and in some cases trivial. They did not in my opinion satisfy the test of a "real risk" of inhuman and degrading treatment as they would be dealt with by the assurances given on behalf of the Taiwanese government. Consequently I would disregard these concerns. I will, however, discuss them in more detail in the last part of this opinion. Before that, however, it is necessary to say something about the status of the assurances that have been given by Taiwan.

Assurances given by the receiving state

[90] As I have indicated, the argument presented on behalf of the Lord Advocate relied in large measure on the assurances given by Taiwan as to the treatment that the appellant will receive if he is imprisoned there. The test for the assessment of such assurances is that laid down by the European Court of Human Rights in *Othman* v *United Kingdom*, (2012) 55 EHRR 1, at paragraphs 177-190. First, the court is obliged to examine "whether the assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment". In assessing the practical application of such assurances, the first question is whether the general human rights situation in the receiving state excludes accepting any assurances whatsoever. The Court indicated, however, that it would only be in "a rare case" that the general situation in the country would mean that no weight at all could be given to assurances: paragraph 188. In my opinion it cannot be argued that Taiwan is such a case. Taiwan has ratified the United Nations International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These are broadly comparable to the European Convention on Human Rights. Furthermore, the court has already found that Taiwan has effective government and a functioning legal system, and no documentation or other evidence has been advanced by the appellant to suggest that there is a wholesale disregard of human rights in Taiwan. Indeed, the appellant lived there for a substantial period and only left following the legal proceedings that gave rise to the present request for extradition.

[91] More specific criteria for the assessment of assurances are laid down in paragraph 189 of *Othman*. The court is obliged to assess the quality of the assurances given and whether, in the light of the receiving state's practices, they can be relied upon. A number of factors relevant to this question are enumerated. So far as material, these are as follows:

> "(1) whether the terms of the assurances have been disclosed to the Court;

(2) whether the assurances are specific or are general and vague;

(3) who has given the assurances and whether that person can bind the receiving state;

(4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;

(5) whether the assurances concern treatment which is legal or illegal in the receiving state;

(6) whether they have been given by a Contracting State;

(7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;

(8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;

(9) whether there is an effective system of protection against torture in the receiving state …;

(10) whether the applicant has previously been ill treated in the receiving state; and

(11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State".

[92] In my opinion sufficient of these criteria are satisfied in the present case for the court to accept the assurances given by the Taiwanese Ministry of Justice. As to the first and second, the terms of the assurances have been disclosed to the court, and they are in my view clear and unequivocal in their terms. As to the third criterion, the assurances have been given by the Director General of the Taiwanese Ministry of Justice charged with signing the Memorandum of Understanding and issuing the assurances. That in my opinion is an official at a sufficiently high level to bind Taiwan. In this connection, it should be noted that in English cases assurances have been accepted which were given by persons such as the President of the National Penitentiary Council (*Cato* v *Republic of Peru*, [2016] EWHC 914), the Attorney General, signed by an official on his behalf (*Government of Ghana* v *Gambrah*, [2014] EWHC 1569), the Executive Director of the Office of the Attorney General (*Aldhouse* v *Thailand*, [2012] EWHC 3385), and the Director of Prosecutions and Commissioner of Prisons (*Devani* v *Republic of Kenya*, [2015] EWHC 3535). In my opinion the present assurances are signed at a sufficiently high level.

[93] As to the fourth criterion, the critical question is whether the assurances given by the Taiwanese Ministry of Justice will be binding on those responsible for the administration of the prison service. In my view it is clear that they will be treated as so binding; that is apparent from Dr McManus's dealings with the prison service in respect of Taipei prison, and also from statements made by officials in the letters sent on behalf of the Minister of Justice. On the fifth criterion, the assurances relate to the manner in which legal custody is organized in Taiwan. The sixth criterion is not satisfied, as Taiwan is not a Contracting State in respect of the European Convention on Human Rights. As to the seventh criterion, this is the first occasion when a special extradition arrangement has been concluded between Taiwan and the United Kingdom. Nevertheless, although formal diplomatic relations are not maintained, the United Kingdom maintains a representative office in Taipei and has diplomatic and consular representation there. Nothing in the documents and evidence available to the court suggested that normal consular protection would not be available in the event that any difficulties arose between the appellant and the Taiwanese prison authorities. In their letter of 25 December 2015 the Taiwanese authorities undertook that, in the event that an issue were raised by British consular staff as to a perceived breach of an assurance, they would respond to ensure that the breach was remedied. The question of diplomatic representation is the subject of the eighth criterion. In

this case, the Foreign and Commonwealth Office have confirmed by letter that the appellant will have access to the United Kingdom representative office. That in my opinion goes a long way towards satisfying the eighth criterion.

[94] On the ninth criterion, Taiwan has ratified the United Nations International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. On the other hand, the evidence of Professor Chin was inconclusive as to the extent to which prisoners' rights would be entertained by the courts in Taiwan. For this reason I do not think that it can be said unequivocally that the ninth criterion is satisfied. Nevertheless, the existence of diplomatic and consular representation, and the letter from the Foreign and Commonwealth Office stating that such representation would be available, goes some way to countering this factor. The tenth criterion is not directly relevant, as the appellant has not previously been in custody in Taiwan. He has not, however, made any specific complaint of previous ill-treatment. Finally, as to the eleventh criterion, the reliability of the assurances given by Taiwan is currently under examination by this court.

[95] When the whole of the *Othman* criteria are taken together, I am of opinion that the assurances given by the Taiwanese government can be relied on by this court. Those assurances have been provided at a high level within the Taiwanese government. They are specific in their terms, and are clearly directed towards protecting the appellant against ill-treatment, whether through overcrowding or through attacks by fellow prisoners. The Foreign and Commonwealth Office has indicated that consular protection will be available in Taiwan. It is obviously important to any reasonable state or territory that its international undertakings and assurances should be observed; if they are not future dealings with other states are likely to be impaired. I think it clear that the Taiwanese government will be well aware of this consideration. I am accordingly of opinion that the court should take the Taiwanese assurances into account in assessing whether returning the appellant to Taiwan would infringe his rights under Article 3 of the Convention.

Particular circumstances relied on by appellant

[96] As I have indicated, other concerns were raised about the conditions under which the appellant would be held in Taipei prison if he were extradited. These related both to general prison conditions in Taiwan and to particular threats to the appellant. I have already stated that in my opinion these concerns did not amount to a "real risk" of treatment that contravened Article 3. In addressing the concerns raised by the appellant, I should reiterate the point that I have made previously, that it must be assumed that the Taiwanese authorities will act in good faith and will do their best to fulfil all of the assurances that have been given.

[97] Great emphasis was placed in the appellant's submissions on the fact that the main detention building in Taipei prison, and indeed the prison system in Taiwan generally, suffers from overcrowding, understaffing, problems of uncontrolled bullying of weaker prisoners, inadequate ventilation and lavatory facilities, and inadequate opportunities for prisoners to exercise in the open air. I do not doubt that these criticisms appear in general to be well founded; there are serious deficiencies in the general prison system in Taiwan, at least measured according to Western European standards. Nevertheless these deficiencies are generally irrelevant to the position of the appellant in view of the assurances that have been given by the Taiwanese Ministry of Justice as to the conditions in which he will be kept. Furthermore, I am of opinion that the emphasis placed on hostility of other prisoners was significantly exaggerated. I do not doubt that the family of the victim of the incident that gave rise to the present proceedings will feel aggrieved towards the appellant. Nevertheless, the victim worked as a courier, and there is no suggestion that his family would have had any connections with organized crime, or even with powerful persons who might be prepared to avenge the victim's death. It is not unusual for the families of the victims of crime to feel extremely aggrieved; that is as true in Scotland and the remainder of the United Kingdom as it is in Taiwan. Nevertheless, prison authorities are well aware that they must prevent private vengeance, and take effective steps to do so. That is one of the concerns that the Taiwanese authorities have sought to address in the assurances that they have given.

[98] It was suggested on behalf of the appellant that the special arrangements made to accommodate concerns about the appellant's imprisonment would be viewed by inmates and staff in Taipei prison, and by the general public in Taiwan, as exceptional, and that this would work seriously to his disadvantage. It was

further suggested that he was already notorious and unpopular because of the circumstances of the offence of which he has been convicted. That, it was suggested, would produce anger and resentment against the appellant, with the result that he would be subject to a serious risk of retribution by other prisoners. In my opinion there is little or no substance in this fear. In the first place, I think it highly dubious that the conditions in which the appellant is held would cause a serious degree of resentment. Dr McManus gave evidence that ordinary prisoners would not want arrangements of this nature. It seemed to me, however, that the reason for this was that they wished to feel part of the prison community, with friendships among other prisoners. If they enjoyed different conditions from other prisoners, that would destroy the bonds among them. Consequently their attitude to the conditions in which the appellant might be held was based not on resentment against his having those conditions but because they wanted to relate to their friends among the other prisoners, and could not do so if they were held in different conditions. Furthermore, the appellant was expected to share a cell with another prisoner, and there was no suggestion that that prisoner would be the subject of resentment. The undertaking was that that prisoner would be another foreigner, and the obvious reaction of the generality of prisoners would be that this is special treatment that foreigners enjoy because they are foreigners. That would distance them from the general prison population, and that would be perceived as a disadvantage in itself.

[99] The conditions in which the appellant would be held would, measured against western standards, be considerably better than those endured by the majority of prisoners. Nevertheless it is important not to apply western standards too rigorously to conditions in a foreign prison. For example, given the photographic evidence that was available, sleeping on the floor appears to be what Taiwanese prisoners expect when they are in prison, and it may well reflect conditions in the poorer quarters of Taipei and other cities from which most of them are likely to come. The same is true of the other features that appear seriously inadequate to modern Western eyes. On 5 February 2016 the Taiwanese Deputy Minister of Justice was quoted in a news report on SET News as stating that the conditions that the appellant would enjoy were not tailored for him. The article was seriously critical of the provision of such "generous conditions", suggesting that these would "surely devastate the family of the deceased victim". I have already suggested that press and Internet articles must be viewed with an appropriate level of scepticism. In any event, it is manifestly untrue that the conditions in question were not tailored for the appellant, in the light of the concerns that the United Kingdom had expressed about the conditions in which he would be held. In my view this makes no difference to the outcome of the case; it is not unknown for politicians to make misleading statements to the media, and it is appropriate for the courts to be sceptical about such statements.

[100] It was suggested that the Taiwanese authorities would be placed in a difficult position in this respect: if they departed from the assurance regarding a special cell and conditions they might placate resentment against the appellant, but in that event they would fail to honour the assurances that had been given to the United Kingdom. In my opinion this is not a serious dilemma. It is the duty of any government to fulfil its obligations, and for reasons that I have already indicated the courts must act on the assumption that in an extradition case the government of a receiving territory will honour its assurances, provided that these satisfy the *Othman* criteria. Thus it must be assumed that the Taiwanese authorities will fulfil in good faith the obligations that have been given to the United Kingdom authorities. Moreover, I consider that the degree of resentment felt against the appellant has been grossly exaggerated in the submissions made on his behalf. No evidence was produced to suggest that the average prison inmate would be aware of who the appellant was, let alone feel any resentment against him. The existence of a number of hostile articles in the media in my opinion signifies little or nothing, as there was no evidence that these would be known to the average prisoner or even that they reflected a general mood of resentment within the prison. Prisons typically contain people guilty of very serious crimes, notably murder, and it seems to me to be most unlikely that the crime of which the appellant has been convicted, serious though it is, will rank especially highly. Furthermore, the humble background of the victim's family does not suggest that they will be able to recruit avengers from criminal gangs or similar elements within the prison population. Furthermore, the Taiwanese authorities have agreed to take substantial measures to protect the appellant, and these must be taken into consideration.

[101] If the appellant is concerned about his safety it is likely that he will remain within his cell, largely segregated from other prisoners, and will not be able to work and earn parole. This is perhaps the most

significant criticism of the arrangements that are proposed by the Taiwanese authorities. Nevertheless, as I have already indicated, solitary confinement for the protection of a prisoner is countenanced within the Scottish Prison Service, and if it is necessary it is simply a feature of prison life that must be endured. It is not in fact proposed that the appellant will be in total solitary confinement; he will share a cell with another occupant, who may obviously change from time to time. The inability to work might be unfortunate in itself, although there would be nothing to prevent the appellant from reading or listening to television or radio in his cell, subject to the limits of battery operated appliances. The inability to work would prevent the appellant from earning parole, but in my view that cannot reasonably be considered an infringement of Article 3. Furthermore, there would be nothing to prevent the appellant from going to work, if he considered that the risk of personal harm were sufficiently low. The choice between remaining in a relatively comfortable cell and running the risk of going to work is one for the appellant alone. As I have already indicated, I consider that the risks to the appellant from other prisoners resentful at his treatment or determined to revenge his crime were seriously exaggerated in the submissions made on his behalf.

[102] As to the question of parole, the Taiwanese authorities have made it clear that time spent in prison in Scotland is unlikely to be taken into account in determining the parole to which the appellant is entitled. That, however, is merely a consequence of the fact that the appellant has fled Taiwanese jurisdiction. It does not in my opinion engage Article 3 in any way. The same applies to the fact that if the appellant does not work in the prison workshops he will not earn parole; the terms on which parole may be granted do not in my view have anything to do with whether a prisoner is subjected to inhuman or degrading treatment, or anything else that might engage Article 3.

[103] Concerns were raised about the level of medical services available in the prison. Dr McManus had been unable to assess the medical services fully. Nevertheless, no hard evidence was produced to support such a contention. Furthermore, Taiwan is a country at a reasonably advanced level of development, and in such a country it would be expected that reasonable medical services are available. It is in my opinion irrelevant that they might not be at the same standard as those in the United Kingdom; Article 3 of the Convention is not to be used to impose the standards of the United Kingdom and other Contracting States on countries that are not Contracting States.

[104] For the appellant it was submitted that the conditions in Taipei prison were not monitored by any established United Kingdom or international system. Given the relatively small number of United Kingdom nationals who are prisoners in Taiwan, the fact that there is no regular monitoring by the British authorities is hardly surprising. Nevertheless, assurances have been received from the Foreign and Commonwealth Office that consular services, or their equivalent in Taiwan, will be available to the appellant. That is the standard way in which assurances given in an international undertaking or assurance would be enforced. Consequently I cannot see that there is significant force in this argument. For this purpose the fact that Taiwan is not a member of the Council of Europe or of the United Nations is irrelevant. The fundamental point is that assurances given by a receiving state must be accepted as made in good faith; that appears very clearly from the authorities discussed above.

[105] Reference was made to communications from the Foreign and Commonwealth Office of 19 August and 8 September 2015. The main thrust of those communications was to indicate that they were unwilling to provide an assessment of the treatment of British nationals in Taipei prison and that they would not pass on to third parties information obtained during the provision of consular support to prisoners. A specific reason was given for the latter refusal; it could jeopardise consular access in the future. It is in my view obvious that the consular authorities must treat visits that they make in an official capacity in confidence, and thus the refusal to pass on information is exactly what would be expected. Likewise, I do not find it surprising that they state that they are not experts on prison conditions; their function is to deal with the limited number of prisoners who happen to be British nationals, and to deal with any complaints or issues that they have. That does not put them in a position to assess prison conditions generally; that seems to me to be obvious. Dr McManus was not aware that the British Office in Taipei had ever attempted to intervene on behalf of any prisoner who was a United Kingdom citizen to obtain improved conditions, or at least of any case where they had intervened with noticeable effect. Given the limited number of British prisoners, however, I cannot see that anything can be taken from this piece of information.

[106] A further concern raised by the appellant was the lack of any established procedure whereby a prisoner could challenge prison conditions in the Taiwanese courts. Professor Chin suggested that the law in this area was developing, but that it remained at an early stage of development. In my view that is irrelevant for present purposes. The fundamental principle so far as the British courts are concerned is that the assurances made by the Taiwanese authorities must be taken in good faith. Furthermore, the usual recourse of consular representation would unquestionably be available; that is the standard means whereby international agreements are enforced.

Conclusion

[107] For all of the foregoing reasons I am of opinion that the appellant has failed to establish that there is any real risk of his being subject to treatment that infringes Article 3 of the Convention. It must be assumed by the court that the Taiwanese authorities will honour the assurances that they have given to the United Kingdom. Those assurances were designed to ensure compliance with the Convention, and thus to engage with European standards on prison conditions, and in my view they must be regarded in that light. The element of solitary confinement, which is the major criticism that can be made of those arrangements, is designed for the purpose of securing the appellant's safety, a concern that he himself has raised. In such cases, solitary confinement is used in the United Kingdom, and it does not contravene the Convention, where the rights under Article 3 must be balanced against the right to life conferred by article 2 and the right to personal security conferred by article 5. Taiwan should not be held to a higher standard.

[108] Finally, I should note that the arguments presented by the appellant to the effect that his Article 3 rights would be contravened would be equally applicable to persons guilty of more serious offences such as murder; the arguments relate to prison conditions, not to the seriousness of the charges that the person subject to extradition faces. In my opinion the law of extradition would be open to serious criticism if, say, a terrorist or other mass murderer could not be extradited in spite of assurances such as those given by the Taiwanese authorities in the present case. In my opinion those assurances remove any real risk of inhuman or degrading treatment, and thus ensure compliance with Article 3.

[109] Consequently, in respectful disagreement with the majority, I would have refused the appeal under section 103 of the Extradition Act 2003.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2016] HCJAC 83
HCA/2014/003519/XM
HCA/2014/0003518/XM

Lady Paton
Lord Drummond Young
Lady Clark of Calton

OPINION OF LADY CLARK OF CALTON

in

APPEALS UNDER SECTIONS 103 AND 108 OF THE EXTRADITION ACT 2003

by

ZAIN TAJ DEAN

Appellant;

against

(FIRST) THE LORD ADVOCATE; (SECOND) THE SCOTTISH MINISTERS

Respondents:

Appellant: Bovey QC, Devlin; V Good & Co
First Respondent: D Dickson (sol adv); Crown Office
Second Respondents: Moynihan QC, Charteris; Scottish Government Legal Directorate

23 September 2016

[110] I have had the advantage of reading the Opinions in draft of Lady Paton who chaired the court and of Lord Drummond Young. I am grateful to both of them for that privilege. I am in full agreement with the findings, reasoning and conclusions of Lady Paton, following some minor agreed revisions which have been incorporated into her final Opinion. Had the Opinion of this court been unanimous, I would not have thought it necessary to make any further observations. As that is not the result, it may be helpful to express some further views.

[111] This is a case in which the appellant has maintained throughout the lengthy extradition proceedings, that the conditions in Taipei prison are not Article 3 (ECHR) compliant. This contention was opposed by the first respondent. I consider that in the circumstances of this case it was a very difficult task for the appellant and his legal advisers to obtain evidence about the conditions in Taipei Prison. The appellant had no personal experience based on serving any custodial sentence. Dr McManus confirmed the evidence of the appellant that there was very little information in the public domain about the prison system in Taiwan. Evidence of general conditions in Taipei Prison was readily available to the Taiwanese authorities and could have been made available to be led by the first respondent. The only witness brought by the first respondent from Taiwan was Professor Chin. His very limited experience of Taiwanese prisons was based on a student law tour and some visits to clients in prison. A second expert led by the first respondent, was Dr McManus. Dr McManus has extensive experience of prisons but knew very little about the prison system in Taiwan prior to his visit there. The remit of Dr McManus appears to have been deliberately framed by the first respondent to exclude a consideration by him of the general conditions in Taipei Prison. Thus in the absence of any oral evidence, for example, from a prison manager with experience of the general conditions in Taipei Prison, the court was left with the task of trying to piece together evidence from disparate and limited sources about the general conditions in Taipei prison.

[112] As the evidence emerged about the general conditions in Taipei Prison which resulted in the findings by her Ladyship in the Chair, I had difficulty in understanding the position of the first respondent. I consider that the evidence demonstrated that it is blindingly obvious that the general conditions existing in Taipei Prison are shocking and non-compliant with Article 3. There was never any concession by the first respondent reflecting that. Indeed at some point in oral submissions, the solicitor advocate for the first respondent submitted that this court was not entitled to form an opinion about the general conditions in Taipei Prison and should confine its consideration to the proposed regime for the appellant set out in the undertakings. In my opinion, this court is not only entitled but bound to consider the general conditions in the prison in which it is proposed that the appellant be confined. Consideration of the undertakings becomes relevant once it has been accepted or the court has found that the general prison conditions in the proposed prison are non-compliant and the extent of that non-compliance.

[113] Even in a jurisdiction, such as Scotland, where both the law and practice are imbued with the concept of giving practical effect to convention rights, problems have arisen and breaches of Article 3 have occurred.

In the present case I consider that the problem is not limited to the serious nature of the systemic non-compliance with Article 3. I am satisfied on the evidence that there exists a culture both at the political level and day to day decision making at management level indicating that Article 3 considerations are not given any priority in relation to the prison regime. The evidence of Professor Chin made it plain that the concept of prisoners' rights was a very undeveloped jurisprudence in Taiwan with little support politically or in popular thinking.

[114] What has happened in the present case is that various sporadic *ad hoc* proposals and undertakings about a regime for the appellant have been made in the course of court proceedings. There was no evidence that anyone with knowledge of the Taipei Prison system has tried to work out, even assuming that was possible, how an Article 3 compliant regime could be operated in respect of the appellant within a prison regime which is non-compliant in the way which I consider it to be. Reference was made in the evidence of Dr McManus to the special regime in Barlinnie Prison in Scotland devised for the prisoner convicted of the Lockerbie bombing as an example of a special regime. This was not an *ad hoc* arrangement. It was not a special regime which required to be devised and operated in circumstances where the general conditions in the prison were in breach of Article 3. In my opinion the undertakings cannot be assessed in the abstract, divorced from the non-compliant regime in which they are supposed to operate.

[115] I do not disagree with Lord Drummond Young about the importance of extradition in promoting due process of law. Nevertheless difficult questions may arise if, for example, a UK national seeks refuge in the UK to avoid being imprisoned under non-compliant Article 3 prison conditions in circumstances where no effective legal remedy exists in a state or territory which is maintaining such non-compliant prison conditions.

[116] In this jurisdiction, Parliament has legislated for a statutory regime which gives the courts powers and duties to consider extradition issues. At the heart of that consideration is a consideration of the ECHR implications. Without impugning the good faith of the Taiwanese authorities or UK diplomatic staff, I do not share the optimism expressed by Lord Drummond Young in paragraph [68]. Merely because this is the first extradition agreement into which the Republic of China has entered it does not follow that "that … makes it especially likely that the requirements of the Memorandum will be observed". In my opinion whether the undertakings would be observed would depend upon the practicalities of trying to run an Article 3 compliant regime for the appellant in the context of an understaffed prison with systemic problems resulting in a non-compliant regime in a situation where staff, other prisoners and the public are likely to be resentful and angry about the special regime.

[117] I also have concerns about the effectiveness of monitoring by the British diplomatic presence in Taiwan. There is no evidence of any history of effective diplomatic intervention by them of any kind in relation to prison conditions in Taiwan. This proposed diplomatic involvement gives a very limited form of protection, if it can be considered protection, to an individual in a territory where there is no effective legal remedy. I agree with the views expressed by the select Committee of the House of Lords in paragraph [91] of the second report on extradition law published March 2015. It is stated:

> "The Home Secretary told us that the Home Office and Foreign and Commonwealth Office were reviewing the issue of monitoring (of assurances). We welcome the Government's review … as we are concerned that the current arrangements via consular services fall well below what is necessary."

There was no information before the court about the outcome of the Government's review and whether any changes have been made to make diplomatic monitoring effective.

[118] For the reasons given by the Chair of the court which I have adopted and these further reasons, I agree with Lady Paton that the appeal in terms of section 103 of the 2003 Act should be allowed and that it is not necessary for this court to issue an Opinion in terms of section 108, or to decide the devolution issue minutes.