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Publisher citation:

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Scots Law Times

2016

Case Comment

The continuing tension between human rights and extradition

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Subject: Extradition . **Other related subjects:** Human rights. Penology and criminology.

Keywords: Extradition proceedings; Inhuman or degrading treatment or punishment; Prison conditions; Scotland; Taiwan;

Legislation:

ECHR

Case:

[Dean \(Zain Taj\) v Lord Advocate \[2016\] HCJAC 83; 2016 S.L.T. 1105 \(HCJ\)](#)

**S.L.T. 211* The author considers the tension between human rights and extradition in the light of [Lord Advocate v Dean \[2016\] HCJAC 83; 2016 S.L.T. 1105](#) .

The recent case of [Lord Advocate v Dean, 2016 S.L.T. 1105](#), clearly illustrates the tension between the human rights of requested persons and the interests served by extradition. That tension has its origins in a European Court of Human Rights case decided nearly 30 years ago, [Soering v United Kingdom \(1989\) 11 E.H.R.R. 439](#). It continues to this day. In [Dean](#) the High Court examined Taiwanese prison conditions and related assurances in the light of ECHR art.3, which prohibits torture and inhuman and degrading treatment and punishment.

The 23 September 2016 judgment in [Dean](#) is a recent development in a case that began with a hit and run traffic accident in Taiwan in 2010. Dean had been convicted of causing the death of a Taiwanese delivery man when driving under the influence of alcohol. He absconded from Taiwan before serving his sentence, returning to his native Scotland in 2012. The Taiwanese Government has sought his extradition since 2013 when it discovered his whereabouts. The High Court decision was necessitated by [Dean v Lord Advocate, 2015 S.L.T. 419](#), in which it was held that human rights law required consideration of whether the conditions in which Dean would be held in Taipei prison would be compatible with ECHR art.3. At the hearing the High Court heard evidence from the appellant and two witnesses for the Lord Advocate.

The decision in [Dean](#) was by a majority, with Lady Paton and Lady Clark allowing the appeal, and Lord Drummond Young dissenting. The majority held that arguments based upon human rights exceptionally outweighed the interests served by extradition. Lady Paton gave the leading opinion, and began by setting out the legal test to be applied. That test is relatively clear, having been developed and considered by the European Court of Human Rights and the UK Supreme Court, amongst other courts. It provides that in order for an extradition to be barred an applicant must demonstrate that there are substantial grounds for believing that there is a real risk of treatment incompatible with ECHR art.3 in the requesting territory. A court's examination of the existence of a real risk must be a rigorous one ([Saadi v Italy \(2009\) 49 EHRR 30](#) at para.128).

Consideration of the conditions in Taipei prison by the High Court took place in the light of a number of assurances and undertakings by the Taiwanese authorities relating to aspects of Dean's incarceration. Amongst other things they provided that periods in detention in Scotland would be deducted from the sentence to be served in Taiwan, that Dean would be assigned to a cell that was ECHR art.3 compliant with a non-violent foreign cellmate in a dedicated part of the prison, and that he would be allowed use of an exercise area that had been cleared of other prisoners.

Having listed the various assurances given by the Taiwanese authorities, Lady Paton set out the evidence and arguments of the appellant and the Lord Advocate. The appellant relied upon conditions within the prison including overcrowding, understaffing and insufficient medical facilities as well as the fact that he was a notorious figure in Taiwan. In regard to the latter, he was well known in Taiwan and portrayed, according to his representatives, 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 ..." (at p.1112, para.16). The appellant also questioned the ability of the Taiwanese authorities to abide by the assurances they had given. The Lord Advocate led evidence from two individuals purportedly familiar with prison conditions in Taiwan. The first, a Taiwanese academic, had limited experience of prisons. The second was a former UK academic and member of the Committee for the Prevention of Torture, Dr McManus, whose evidence was examined quite closely. He concluded that upon the assumption that all the assurances given were honoured, the conditions in which Dean would be held were ECHR art.3 compliant. ***S.L.T. 212**

Lady Paton began her decision by expressing her unease that the High Court had to address the conditions in Taipei prison, and that there was no established system within the UK or internationally which had undertaken, or would undertake, that task. Relatedly, that there was no mechanism under which an examination of whether the assurances were given effect was a "matter of considerable concern" (at p.1124, para.56). The gist of her decision that there existed substantial grounds for believing there was a real risk of Dean being subjected to treatment incompatible with ECHR art.3, however, was ironically found in the wide ranging nature of the assurances given. Lady Paton stated that the arrangements afforded to Dean would be viewed by the prison community as "wholly exceptional", and cause "significant animosity amongst other prisoners" which would be "highly disadvantageous" to him (at p.1122, para.47). In light of the overcrowded and understaffed prison Lady Paton doubted whether it would be possible for Dean to be given sufficient protection from violence from other prisoners (at p.1123, para.52). She concluded, therefore, that his extradition would not be compatible with ECHR art.3.

Lord Drummond Young, dissenting, began his opinion by iterating five general propositions. The first was that extradition was important in maintaining the rule of law, nationally and internationally. He thought it an "essential policy consideration" that an extradition request be given effect where it comes from a country respecting the rule of law and where it conforms to the requirements of extradition law (at p.1126, para.64). The second was that extradition arrangements, including that in Dean's case, followed agreement between the executives in two territories. Related to this was the third proposition which was that the courts should exercise a degree of deference to the executive and respect the decision to enter into an extradition arrangement and not act in a way to override it. The executive has access to the Foreign Office, Diplomatic Service and Home Office to inform its decisions, he noted, something the judiciary does not. The fourth proposition was that where an extradition agreement is entered into courts should assume that it, and any supplementary agreements and assurances, will be observed in good faith. The final proposition was that whilst extradition agreements exist within international law and are therefore more difficult to enforce than domestic law, compliance with international law can be monitored and there are meaningful reasons why states comply with their international legal obligations.

As with Lady Paton, Lord Drummond Young set out the law as it has developed in regard to ECHR art.3 in extradition cases. Notably, he included this passage from [Ahmad v United Kingdom \(2013\) 56 E.H.R.R. 1](#) at p.55, para.177: "[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" (at p.1128, para.73).

This quote supports a contextual application of ECHR art.3, and gives rise to a conflict in light of a number of authorities providing that the requirements thereof are "absolute". Lord Drummond Young firmly sides with the contextual and relative nature of art.3 stating "... 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" (at p.1129, para.75).

Lord Drummond Young came to the conclusion that Dean's extradition would not give rise to a breach of art.3 by pointing to the assurances given by the Taiwanese authorities as well as the evidence of Dr

McManus. In regard to the assurances, Lord Drummond Young assessed them according to the test laid out in [Othman v United Kingdom \(2012\) 55 E.H.R.R. 1](#). The test includes the question of whether the assurances provide a sufficient guarantee in their practical application that the individual will be protected against ill treatment. Amongst the more specific issues assessed by the test were the specificity of the assurances, whether compliance could be objectively verified and whether the reliability of the assurances had been examined by the requested state. Lord Drummond Young concluded that sufficient of the criteria were satisfied for the High Court to accept the assurances. ***S.L.T. 213**

Where Lord Drummond Young parted from Lady Paton was in regard to the possibility that the special treatment of the appellant would give rise to resentment which would lead to a serious risk of retribution by other prisoners. It was "highly dubious", he felt, that the treatment would give rise to a serious degree of resentment (at p.1134, para.98). The emphasis placed on hostility of other prisoners was, he thought, "significantly exaggerated" (at p.1134, para.97). He also was of the opinion that any resentment against the appellant engendered by his especial treatment could be controlled (at p.1131, para.85). Overall, Lord Drummond Young concluded that Dean failed to establish that there were substantial grounds for believing there was a real risk of being subjected to treatment in violation of art.3.

Lady Clark gave the third opinion in the judgment. It was on the faith that could be placed in the Taiwanese authorities and the weight to be attached to general factors within Taipei prison and Taiwan more broadly that she disagreed with Lord Drummond Young. In regard to the former she stated that she did not share his optimism that it was likely the assurances would be observed (at p.1138, para.116). This conclusion is linked to the fact that the approach Lady Clark adopted was in a certain respect broader than that of Lord Drummond Young. She felt it necessary to take into account the wider Taiwanese context of Dean's possible incarceration including the general conditions in Taipei prison, decision making within prison management and the wider political culture in Taiwan (at p.1138, paras 112 and 113). It was not possible, in her view, to divorce the particular prison conditions promised under the assurances from these considerations. Finally, Lady Clark expressed her concern over the effectiveness of monitoring the assurances by UK diplomatic staff in Taiwan. For these reasons, and those of Lady Paton, Lady Clark held that the appeal by Dean be allowed.

Comment

The decision of the High Court in [Dean](#) is a clear reminder of the conflicting interests in extradition. The prosecution of criminality nationally and transnationally, the maintenance of good international relations, the human rights of requested persons, and adherence to the national and international rule of law are all at play. In cases such as this extradition also gives rise to a degree of conflict between the executive and judiciary. [Dean](#), involving as it did the prohibition of torture and inhuman and degrading treatment and punishment, also brings to the fore the debate over whether that right is absolute or relative in nature.

The conflicting interests in extradition were demonstrated by Lady Paton and Lady Clark giving considerable weight to the human rights of the appellant and placing less emphasis upon the presumption that the UK's extradition partners will abide by their obligations including extradition agreements, diplomatic assurances and other international legal obligations. As noted, though, Lady Paton's reasoning did include the point that the observance of the assurances may well give rise to resentment and hostility that could amount to substantial grounds for the belief that there was a real risk of a violation of art.3. Lord Drummond Young, on the other hand, focused upon the presumption that Taiwan would act in good faith and abide by its obligations (one of the general propositions he set out) as well as the other underlying considerations he identified including the desire to give effect to extradition agreements and to exercise a degree of judicial deference to the UK executive. He also emphasised that ECtHR jurisprudence has held that the Convention, including art.3, is not a means by which state parties may impose their standards outside the Council of Europe. This raises the vexed question of whether art.3 standards are absolute and universal or whether they are relative and contextual. There is a jurisprudential and academic debate on both sides, with one of the leading authorities cited by Lord Drummond Young being in favour of the relative and contextual nature of the ECHR art.3 prohibition.

The litigation stemming from the incident in Taipei may not be over. As the author writes Edinburgh Sheriff Court is scheduled to consider a new extradition request from Taiwan in Dean's case. This concerns the

fact that Dean absconded from Taiwan prior to serving his sentence, not the imposition of that punishment. Note also, an application for leave to appeal the present decision to the Supreme Court by the Lord Advocate was refused on 4 November ([Lord Advocate v Dean \[2016\] HCJAC 117](#)). *S.L.T. 214

Conclusion

There is little doubt that the tension between competing interests in extradition will remain. In addressing the question of which interests will prevail, courts will continue to engage in the awkward task of examining the law and practice of the UK's extradition partners including assurances that they may make. This is something that the courts are not best suited to undertake. The exercise can raise almost insuperable evidential difficulties for both parties to a case. Lady Clark referred to the "very difficult task for the appellant" to obtain information about Taipei prison (at p.1137, para.111). It is not unreasonable to conclude that similar difficulties were encountered by the Lord Advocate. As Lady Paton noted, the UK executive and international or regional bodies are considerably better placed to address these questions. In an ideal world such an examination by the executive or some other body — let alone the judiciary — would not be necessary and the UK's extradition partners would uphold human rights to a level roughly akin to the UK itself. Judgment upon the prisons (or judiciary, medical facilities et cetera) of third states would not be necessary. Alas, the world is far from ideal.

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S.L.T. 2016, 40, 211-214