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Extradition, Taiwan and the Speciality Principle

The latest judgment in the long-running attempt by Taiwan to extradite Zain Dean was handed down 6 June, in *Dean v Lord Advocate* [2019] HCJAC 31. The case was an appeal by Dean against a decision of the Scottish Ministers 1 August 2014 to order his extradition. The judgment delivered another blow to Taiwanese prosecutors, similar in effect to the High Court decision *Dean v Lord Advocate* [2016] HCJAC 83. That case, subsequently reversed by the Supreme Court in *Dean v Lord Advocate* [2017] UKSC 44, also upheld an appeal by Dean. In one sense, then, history is repeating itself. The High Court, similarly constituted and in a 2-1 decision, has again blocked the extradition of Dean. In another sense, however, the two cases are fundamentally different. They turned on wholly different points of extradition law.

The 6 June judgment centred on the speciality rule of extradition found in section 95 of the Extradition Act 2003 (the 2003 Act). The 2016 case and subsequent Supreme Court decision concerned human rights and the conditions facing Dean in a Taiwanese prison if extradited. Generally, the rule of speciality, also referred to as specialty, provides that where an individual is extradited he or she must only be tried or punished for the crimes that were the subject of the extradition request, and no others. Specifically, section 95 firstly requires that an extradition must not take place in the absence of speciality arrangements. The section continues that such arrangements, or the law of the requesting territory, must provide that the requested person is only dealt with for the offences for which he was extradited, offences disclosed by the same facts, offences to which the Secretary of State has consented he is dealt with, or offences with which the requested person has waived his speciality right.

Section 95 of the 2003 Act is relatively straightforward. Its application to the particular facts in a unique context is what led to the complexity of the case. Indeed, large parts of the 126 page judgment containing the three opinions of Lady Paton, Lord Drummond Young and Lady Clark are devoted to interpreting the extradition agreement with Taiwan and the information, missives and assurances provided subsequent to its conclusion in the light of section 95. Seemingly exasperated, Lady Clark described the course of the appeal as being beset with difficulties with the court having been required to cope with volumes of paperwork, new evidence and issues and changing submissions (at para 130).

The crux of the case arose from the terms of the Memorandum of Association entered into by the UK and Taiwan to facilitate Dean's extradition following his convictions there for drink driving, negligent manslaughter and leaving the scene of an accident. The present author described the previous litigation in *The Wheels of Justice in Extradition* (2017) 26 SLT 143. The MOU was necessary in the absence of a bilateral extradition treaty. That agreement, however, failed to align precisely with the speciality terms within the 2003 Act. The nature of the MOU led to it being criticised in the case as a "cut and paste job" (at para 148). Whilst it implicitly provided that Dean was to be extradited for the three conviction offences mentioned above, it did not allude to two offences that Dean had subsequently been charged with. These two offences, of absconding from Taiwan and the use of a third person's passport, were instead first referred to as background narrative

in the first extradition request made under the MOU on 28 October 2013. The fact that trial proceedings had been raised in Taipei District Court for these offences was not mentioned. The Scottish Ministers therefore were not aware of those pending proceedings when they ordered Dean's extradition on 1 August 2014 for the conviction offences. Of greater relevance to the final decision in the case, however, was the disparity in wording between the speciality provisions in the MOU and section 95 of the 2003 Act. Paragraph 11.1.(b) of the MOU provided that a requested person may be dealt with for an offence not specified in the extradition request where it is "disclosed by the information provided". In contrast, section 95(4)(b) states that that may happen where the offence is "disclosed by the same facts of that offence, other than one in respect of which a sentence of death could be imposed".

The lack of effective speciality arrangements that satisfied section 95 was put forward by counsel for Dean in opposition to extradition. It was argued that he remained at risk of further prosecution. The evidence given on behalf of the Scottish Ministers could not be relied upon and the Taiwanese assurances had been undermined by events in Taiwan, counsel for Dean argued. Further, the status of the further assurances given by Taiwan was suggested to be unclear. On behalf of the Scottish Ministers it was averred that satisfactory speciality arrangements were in place, either under the MOU alone or the MOU in conjunction with subsequent Taiwanese assurances. Whilst certain of those assurances were not straightforward, it was argued that the principles of international comity, reciprocity, mutual trust and respect and good faith affecting extradition as well as the strong public interest in upholding the rule of law led to section 95 being satisfied. The criteria laid down by the European Court of Human Rights as to the validity of assurances in *Othman v UK* (2012) 55 EHRR 1 were met, it was argued.

Dean v Lord Advocate [2019] HCJAC 31 is a complex judgment in which the three opinions given generally rely on different reasoning. The leading opinion is given by Lady Paton. Subsequent to setting out the law and arguments she addresses the rule of speciality, including its nature and purpose. In contrast to the view expressed on behalf of the Scottish Ministers, and that of Lord Drummond Young, she highlighted that it exists to provide protection to requested persons in addition for reasons of comity (at para 28). Lady Paton then measured paragraph 11 of the MOU governing speciality against the terms of section 95. She referred to the disparity in terminology noted above and then found that since the charges relating to absconding and passport misuse were not disclosed by the facts of the road traffic offences reliance upon paragraph 11 would breach section 95 (at para 38).

Lady Paton then goes on to consider whether the appeal, brought against the Scottish Ministers under section 108 of the 2003 Act, should be allowed under sections 109(3) or 109(4) or both. The former provides, in essence, that an appeal be allowed if the Scottish Ministers should have decided a question before them differently. She found that the information available to the Scottish Ministers was such that the mandatory provisions of section 95 were not met. She based her decision on the extradition being founded upon the MOU and the differences in terms between it and section 95. The further information provided to the Lord

Advocate by Taiwan did not, she held, cure the ambiguity. Lady Paton upheld the appeal on the basis of section 109(3). She did likewise under section 109(4). This provides that an appeal be allowed where an issue or information was not raised or available when the case was considered and that, had it been, the extradition would not have been ordered. The information not known by the Scottish Ministers was that there were live proceedings against Dean. Affecting her decision under both subsections was the view that the MOU could not be modified or qualified by subsequent letters to the Lord Advocate or herself. A distinction was drawn between the present case and cases where, say, assurances about prison conditions are given. Overall, Lady Paton found that it appeared clear the Taiwanese authorities wished to prosecute Dean for the two alleged accusation offences although they were not included in the first request, and that the terms of the MOU and the subsequent assurances did not satisfy her that this would not in fact happen.

Not specifically affecting Lady Paton's decision were the interests of comity and reciprocity. She concludes her opinion, however, with a discussion of their relevance to the case. These comments are of particular import in light of the weight put upon them by Lord Drummond Young in his dissenting opinion. As regards reciprocity, she notes that the MOU was not 'reciprocal', in the sense of facilitating extradition in to the UK. It was a bespoke agreement to allow Dean's extradition to Taiwan. Comity, she suggested, could not alter the plain meaning of the MOU and letters of assurance, properly construed. As to the validity of the assurances, Lady Paton held that even if the Othman criteria were met, the appeal should still be allowed. She went on, however, to hold that two of the criteria were not satisfied. Lady Paton held Dean be discharged and the order for his extradition quashed.

In contrast to Lady Paton, Lord Drummond Young took a relatively broad approach in his reasoning that included reliance upon factors extrinsic to the case itself. It mirrored his stance in his dissenting opinion in the 2016 High Court judgment. He emphasised, for instance that maintenance of the rule of law at both a national and international level required that where an extradition request met the demands of speciality and double criminality, and came from a country where the rule of law was respected, it should normally be given effect. Of particular relevance, he held, was the point that where an agreement is entered into by the executive courts should assume that its requirements and of any supplementary undertakings will be observed in good faith.

In line with his approach Lord Drummond Young noted that the critical question in the appeal was simply whether Dean should be extradited to Taiwan (at para 82). Governing this was, of course, the MOU. In interpreting it Lord Drummond Young invoked the principles applying to the interpretation of international agreements, including that an agreement should be interpreted in good faith in the light of its object and purpose (at para 83). This, he held, meant that regard should be had to the primary substance of the agreement rather than the details of its wording. In applying this to the case, he considered whether the difference in terminology between the MOU and section 95 "... abrogated the principle of speciality" (at para 89). Ultimately he held that it did not.

Again differing in emphasis from Lady Paton, Lord Drummond Young noted that the speciality principle exists to preserve comity between nations. The principle is part of international law and it is not to be regarded as a defence for an accused person, he suggested. In applying these principles Lord Drummond Young held that the MOU "... imposes substantially the same requirements..." as those found under section 95 of the 2003 Act (at para 96). The MOU itself, in paragraph 1(a), defined extradition as the surrender of Dean to Taiwan for the purpose of serving a sentence, Lord Drummond noted. The assurances given by Taiwan subsequent to its extradition arrest also gave effect to the speciality principle, he held. Dean's appeal was refused for the above reasons, and the questions under sections 109(3) and 109(4) were answered in the negative.

A third approach to the case was taken by Lady Clark. In her opinion she concentrated on its foundations, noting that through the length of the proceedings and the passage of time the issues had become unfocussed (at para 144). Those foundations were the ministerial actions based on section 194 of the 2003 Act under which the special extradition arrangements with Taiwan were made. In discussing the difficulties caused by the MOU Lady Clark highlighted that Taiwan had made second and third extradition requests under it for the alleged absconding and passport misuse offences. This, she suggested, demonstrated Taiwanese misunderstanding of the MOU. In contrast, Lord Drummond Young had found this fact supported Taiwan's good faith. Lady Clark emphasised that section 95(3) of the 2003 Act gave a special definition of 'speciality arrangements', and whilst they might exist in a general sense they will not exist for the purpose of section 95 unless the statutory conditions are satisfied.

Lady Clark then focused upon the speciality arrangements under the MOU. She criticised the agreement on account of its conflation of procedural, substantive and especial paragraphs reflecting its unique nature. She found that serious problems of interpretation arose as a result, even where a purposive approach was adopted. Lady Clark found that section 194 and the certification made under it brought the absence of arrangements for the MOU to be altered or given guidance or interpretation to the fore. The certification was conclusive evidence that arrangements have been made for the extradition of Dean as specified by the MOU. In other words Lady Clark highlighted that no provision was made to facilitate future assurances or undertakings relevant to speciality becoming part of the arrangements or to assist in their interpretation (at para 168). The MOU did provide for subsequent assurances in relation to the death penalty, but contained no such provision as regards speciality. Accordingly, Lady Clark held that the speciality arrangements were limited to the terms of the MOU itself.

Lady Clark then considered the relevant provisions of the MOU directly in the light of section 95 of the 2003 Act. As with Lady Paton, the difference in wording between the MOU and the 2003 Act was important. She held that the MOU did not in its terms satisfy section 95(4)(b) of the 2003 Act. The provision was vague, and the more obvious interpretation, she found, was that paragraph 11.1(b) related to the conduct of alleged absconding and passport misuse.

Further to the effect of the process under section 194 Lady Clark noted that whilst the content of *ad hoc* arrangements is for the contracting parties UK courts are

obliged to impose the approach under the 2003 Act. They cannot “remake or revise arrangements agreed and certified at ministerial level, or to use post agreement extraneous documents to interpret the memorandum of understanding” (at para 181). She held that Scottish Ministers should not have taken into account a letter dated 25 July 2014 putatively containing an assurance, but in the event she was wrong on this the letter did not act to clarify paragraph 11 of the MOU. Lady Clark concluded that the court was bound to oversee the legality of the decision making of ministers, and to consider whether the conditions in section 109 were met. She concentrated on ministerial decision making, and in the light of the need to observe that extradition procedures are strictly observed, held that the MOU was flawed. She upheld the appeal under section 109(3).

Discussion

Dean v Lord Advocate [2019] HCJAC 31 gives a fascinating insight into the law of extradition and judicial decision making. First human rights and now the principle of speciality have been successfully invoked to bar Dean’s extradition to Taiwan. The Taiwanese press suggests that a second appeal to the Supreme Court may be sought. What is notable in the case is the sheer breadth of relevant considerations. UK extradition law, Taiwanese law and procedure and international law and comity were all at play in the case at the outset and as it continue to evolve as being heard. In light of this it is perhaps not surprising that the three opinions within the judgment differed rather markedly. Whilst Lady Paton and Lady Clark agreed, their opinions contained differing emphases. Their general focus was on the compatibility of the MOU with the 2003 Act. Lady Paton’s analysis centred in particular upon statutory compliance and interpretation whilst Lady Clark’s largely turned upon the certification of the MOU and its compatibility with the 2003 Act. Lord Drummond Young, on the other hand, stayed true to the approach he took in the 2016 appeal and stood apart from the majority. He took a broad approach adhering to the presumption in favour of extradition. He appeared to recognise the *sui generis* nature of extradition hearings, something that taken place in England to a limited extent. The differing opinions also mirror the two conflicting purposes of extradition, that of cooperation and protection. Illustrating this are the discussions of the purposes of speciality where the principle is understood to both provide protection to requested persons and to respect the right of requested territories to extradite on their own terms. As it turned out, the protective purpose of the speciality principle prevailed and Dean was discharged.