



28 June 2017

PRESS SUMMARY

Lord Advocate (representing the Taiwanese Judicial Authorities) (Appellant) v Dean (Respondent) (Scotland) [2017] UKSC 44
On appeal from [2016] HCJAC 83 and 117

JUSTICES: Lord Mance, Lord Sumption, Lord Reed, Lord Hughes, Lord Hodge

BACKGROUND TO THE APPEAL

The respondent was born in the United Kingdom. He had lived in Taiwan for about 19 years when he was involved in road traffic accident there which killed a man in 2010. He was convicted by the District Court of Taipei of driving under the influence of alcohol, negligent manslaughter and leaving the scene of an accident. He was sentenced to four years' imprisonment. While his appeal was pending, he fled Taiwan and came to Scotland. In his absence his conviction was confirmed and the Taiwanese authorities applied for his extradition.

The Ministry of Justice of Taiwan obtained a provisional arrest warrant for the respondent under the Extradition Act 2003 ("the 2003 Act"). The respondent was arrested in Scotland on 17 October 2013 and remained in custody for almost three years. An extradition hearing commenced in January 2014, following which the sheriff decided that the respondent's extradition would be compatible with his Convention rights and refused the respondent's devolution minutes. The Scottish Ministers made an extradition order on 1 August 2014.

The respondent appealed against the sheriff's decision and against the extradition order of the Scottish Ministers. The Appeal Court of the High Court of Justiciary ("the Appeal Court"), ordered an evidential hearing to determine whether prison conditions in Taiwan were such that to extradite the respondent would breach his right under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") not to be subjected to torture or to inhuman or degrading treatment or punishment. It reserved its opinion on the extradition order appeal until it had dealt with the article 3 challenge. The Appeal Court, by majority, found that even if the written assurances given by the Taiwanese authorities to the Lord Advocate in respect of the conditions in which the respondent would be held were fulfilled, a real risk of ill treatment would remain and thus the respondent's extradition to Taiwan would be incompatible with article 3 ECHR.

The Lord Advocate appeals the judgment of the Appeal Court, on the ground that it had not applied the correct legal test in assessing the risk of harm which the respondent might face in Taiwan from non-state actors. The respondent raises a separate issue: whether the Appeal Court determined a devolution issue and, therefore, whether the Supreme Court has jurisdiction to hear the Lord Advocate's appeal. The respondent also advanced challenges under articles 5 and 8 ECHR.

JUDGMENT

The Supreme Court unanimously rejects the respondent's challenge to the competency of the appeal and allows the Lord Advocate's appeal on the devolution issue. The Court remits the case to the Appeal Court to deal with the respondent's appeal against the extradition order of the Scottish

Ministers and his devolution minute in that appeal. Lord Hodge gives the judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The competency of the appeal to the Supreme Court

The challenge to the competency of the appeal is misconceived [14]. An appeal from the sheriff's decision under section 87(1) of the 2003 Act as to whether extradition would be compatible with the respondent's Convention rights raises a question of the legal competence of the Scottish Government [15]. Schedule 6 to the Scotland Act 1998 paragraph 1(d) includes within the definition of a "devolution issue" "a question whether a [...] proposed exercise of a function of the Scottish Executive [...] would be, incompatible with any of the Convention rights" [18]. Therefore, the question whether the Scottish Government's acts in seeking to extradite the respondent are compatible with Convention rights is a devolution issue which was determined by the Appeal Court [19, 22]. Neither party to the appeal intimated the devolution issue to the Advocate General for Scotland thus depriving him of his right to take part in the Appeal Court proceedings. That omission, however, does not affect the competence of any appeal of the determination of the devolution issue to this court [21].

The correct legal test

The Appeal Court, in assessing the compatibility of the extradition with article 3 ECHR, applied the wrong legal test [9]. The correct legal test when the threat comes from the acts of third parties is whether the state has failed to provide reasonable protection against harm inflicted by non-state agents. The Appeal Court did not address that test and no clear distinction was drawn between the threat from other prisoners, and the conduct for which the state was responsible. The court must assess, first, whether the Taiwanese authorities are undertaking to provide the respondent with reasonable protection against violence by third parties while in prison, and, secondly, if they are, whether the conditions in which he is to have such protection would infringe article 3 [24].

There is no evidence that the Taiwanese authorities will not give the respondent reasonable protection against harm at the hands of other prisoners: the undertakings would allow him to elect to remain in his cell and exercise outdoors alone [39]. As to whether the confinement which such a regime would entail would risk a breach of article 3, the relative isolation which the respondent may elect for his own protection does not come close to a breach of article 3. Further, the other factors which influenced the majority of the Appeal Court, including the ratio of medical staff to prisoners and the monitoring of the assurances by UK consular staff, do not outweigh the other factors which point towards accepting the assurances [40-47]. The assurances offer the respondent reasonable protection against violence by non-state actors and the circumstances of his confinement, should he be unable to mix with the wider prison population, do not entail a real risk of his being subject to treatment that infringes article 3 [48].

Article 5 and Article 8

The article 5 and article 8 challenges are without substance [49]. There is nothing arbitrary for the purposes of article 5 in the respondent serving two-thirds of the remainder of his sentence in Taiwan before he would be eligible for parole. The respondent's inability to obtain credit toward parole in Taiwan for the time spent in custody in Scotland is the result of his flight from justice in Taiwan. This involves no injustice [50]. The interference with the respondent's article 8 right to private life which arises from his extradition and imprisonment in Taiwan is justified because it is necessary for both the prevention of crime and for the protection of the rights and freedoms of others [51].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>