APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 31
HCA/2014/003519/XM

Lady Paton
Lord Drummond Young
Lady Clark of Calton

OPINION OF LADY PATON

in

APPEAL UNDER SECTION 108 OF THE EXTRADITION ACT 2003

by

ZAIN TAJ DEAN

Appellant

against

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

Respondents

Appellant: Bovey QC, Haddow, Harvey; G R Brown Solicitor
First Respondent: D Dickson (sol adv); Crown Office
Second Respondents: Moynihan QC, Charteris; Scottish Government Legal Directorate

6 June 2019

Extradition to Taiwan: appeals in terms of sections 103 and 108

[1] The appellant appeals against an order for his extradition from Scotland to Taiwan. There are two appeals: one, in terms of section 103 of the Extradition Act 2003 concerning the sheriff's decision; and a second, in terms of section 108 of that Act, concerning Scottish Ministers' decision. The section 103 appeal, which latterly focused on prison conditions, was finalised by the Supreme Court ([2017] 1 WLR 2721, 2018 SC (UKSC) 1, 2017 SLT 773). The Supreme Court remitted the outstanding section 108 appeal to the High Court of Justiciary.

[2] Procedural and informational difficulties were encountered in the course of the section 108 appeal. On occasions, the court had to make specific requests for information from the Taiwanese authorities. The ensuing responses, while graciously phrased, were not always easy to understand. Taiwanese letters of assurance dated 6 and 12 December 2017, 12 January 2018 and 12 February 2018 appeared to conflict with evidence given by Dr Chang, Scottish Ministers' expert in Taiwanese criminal law, who stated that it was not a requirement in Taiwanese law for the appellant to pay compensation of £280,000 in respect of the road traffic accident and to issue a public apology in order to enable the Taiwanese prosecutor to withdraw an existing prosecution for absconding using another's passport (see paragraph [11] below). Furthermore, the letters of 6 and 12 December 2017 appeared to contradict each other: one letter indicated that the appellant's abandonment of his section 108 appeal in Scotland was a prerequisite of the withdrawal of the Taiwanese prosecution, whereas the other did not (see the texts of the letters, summarised in the appendix to this opinion). Further difficulties arose when attempts were made to take evidence from persons in Taiwan by live television link or other similar means, partly as a result of stringent conditions imposed by the Taiwanese courts. Dr Chang was not immediately available to visit Scotland, resulting in a postponement of the case for several months. Ultimately evidence and submissions were completed by 21 December 2018.

[3] On 21 December 2018, certain important matters were clarified by senior counsel for Scottish Ministers, and by the solicitor advocate for the Lord Advocate acting as agent for Taiwan. In particular, the court was advised that:

- In the context of extradition, the Taiwanese authorities always had 5 criminal offences in mind. However the extradition agreement entered into between the UK government and Taiwan on 16 October 2013 ("the MOU") specified only 3 of

the offences, namely the conviction offences relating to the road traffic incident in 2010 and comprising (i) drink driving, (ii) negligent manslaughter, and (iii) leaving the scene of the accident. The MOU did not specifically include two outstanding charges awaiting trial in Taipei District Court, namely accusation offences of (iv) alleged absconding from Taiwan in 2012 and (v) alleged use of another's passport in so doing. (The full terms of the MOU can be found in the opinion of Lady Clark.)

- The first extradition request made by Taiwan in a letter to Theresa May, Secretary of State, dated 28 October 2013 (*per incuriam* dated "October 28, 2014"), sought extradition of the appellant in order to serve his prison sentence for the conviction offences (i) to (iii). While the appellant's alleged absconding and use of another's passport were narrated as background in paragraph 4 (quoted in paragraph [44] below), the letter did not request his extradition for those specific offences. Importantly, the letter did not mention that a prosecution against the appellant for allegedly absconding and using another's passport had in fact been raised by an independent prosecutor in Taipei District Court in March 2013, and had been suspended pending the appellant's return to Taiwan.
- When matters were passed to Scotland in 2014 to be dealt with by the Lord Advocate, the Ministers, and the Scottish courts, Scottish Ministers were not made aware of that live criminal prosecution in Taipei District Court for absconding using another's passport raised in March 2013. Scottish Ministers, when making their decision dated 1 August 2014 to extradite the appellant to serve the balance of his sentence for the road traffic matters, remained wholly unaware of that live criminal prosecution.

- Scottish Ministers and the Lord Advocate did not participate in the negotiations between the UK and Taiwan leading to the MOU, and could not advise this court why the MOU did not include the alleged absconding and passport offences, or why the extradition request dated 28 October 2013 did not mention the live prosecution raised in March 2013 for absconding using another's passport.

[4] The question which arises as a result of these circumstances is whether Scottish Ministers, when ordering extradition on 1 August 2014, complied with the mandatory conditions of "speciality" set out in section 95 of the 2003 Act. The aim of speciality is to ensure that a British citizen "must not" be extradited to a territory such as Taiwan for crimes X, Y, and Z, but on arrival there (or at some future date) find himself being dealt with for different crimes A and B. The MOU agrees terms under the heading "Speciality" in paragraph 11, but that paragraph does not reproduce the words or meaning of section 95. The appellant contends that there were no speciality arrangements in place satisfying the mandatory terms of section 95 of the 2003 Act when Scottish Ministers granted the extradition order on 1 August 2014 (ostensibly so that the appellant could serve his 4-year sentence for the road traffic offences). As a result, Scottish Ministers should have "decided … differently" and not ordered his extradition (section 109(3) and (4)).

The practical effect of extradition for the road traffic offences while the prosecution for absconding/ passport is currently live

[5] If the appellant were to arrive in Taiwan, he would immediately be vulnerable to the live prosecution (for alleged absconding using another's passport) taking its course at the order of the independent chief prosecutor of Taipei District Court. In the event of conviction for those offences, the sentence(s) of imprisonment could amount to 9 years, as explained by Dr Chang (see paragraph [12] below). If that sentence or those sentences were imposed to

run consecutively to the 4-year sentence for the drink driving offences, the total period of imprisonment in Taiwan could be a maximum of 13 years, subject to any discount for almost 3 years served by the appellant in Saughton Prison in Scotland (the extent of which discount is unclear) and also subject to Taiwanese prison rules relating to good behaviour, apparently only applicable when the prisoner is physically in custody in Taiwan.

Relevant extracts from the Extradition Act 2003

[6] The Extradition Act 2003 provides *inter alia*:

"**Section 95: Speciality**

(1) The Secretary of State must not order a person's extradition to a category 2 territory if there are no speciality arrangements with the category 2 territory.
(2) But subsection (1) does not apply if the person consented to his extradition under section 127 before his case was sent to the Secretary of State.
(3) There are speciality arrangements with a category 2 territory if (and only if) under the law of that territory or arrangements made between it and the United Kingdom a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if -
    (a) the offence is one falling within subsection (4), or
    (b) he is first given an opportunity to leave the territory.
(4) The offences are –
    (a) the offence in respect of which the person is extradited;
    (b) an extradition offence disclosed by the same facts as that offence, other than one in respect of which a sentence of death could be imposed;
    (c) an extradition offence in respect of which the Secretary of State consents to the person being dealt with;
    (d) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.
(5) Arrangements made with a category 2 territory which is a Commonwealth country or a British overseas territory may be made for a particular case or more generally.
(6) A certificate issued by or under the authority of the Secretary of State confirming the existence of arrangements with a category 2 territory which is a Commonwealth country or a British overseas territory and stating the terms of the arrangements is conclusive evidence of those matters.

Section 108: Appeal against extradition order

(1) If [Scottish Ministers order] a person's extradition under this part, the person may appeal to the High Court against the order …
…(3) An appeal under this section may be brought on a question of law or fact.

Section 109: Court's powers on appeal under section 108

(1) On an appeal under section 108 the High Court may –
  (a) allow the appeal;
  (b) dismiss 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) [Scottish Ministers] ought to have decided a question before [them] differently;
  (b) if [they] had decided the question in the way [they] ought to have done, [they] would not have ordered the person's extradition.
(4) The conditions are that –
  (a) an issue is raised that was not raised when the case was being considered by [Scottish Ministers] or information is available that was not available at that time;
  (b) the issue or information would have resulted in [Scottish Ministers] deciding a question before [them] differently;
  (c) if [they] had decided the question in that way, [they] would not have ordered the person's extradition.
(5) If the court allows the appeal it must –
  (a) order the person's discharge;
  (b) quash the order for his extradition.

Section 129: Consent to other offence being dealt with

(1) This section applies if –
  (a) a person is extradited to a category 2 territory in accordance with this Part;
  (b) the Secretary of State/Scottish Minister receives a valid request for his consent to the person being dealt with in the territory for an offence other than the offence in respect of which he was extradited.
(2) A request for consent is valid if it is made by an authority which is an authority of the territory and which the Secretary of State/Scottish Minister believes has the function of making requests for the consent referred to in subsection (1)(b) in that territory.
(3) The Secretary of State/Scottish Minister must serve notice on the person that he has received the request for consent, unless he is satisfied that it would not be practicable to do so.
(4) The Secretary of State/Scottish Minister must decide whether the offence is an extradition offence.
(5) If the Secretary of State/Scottish Minister decides the question in subsection (4) in the negative he must refuse consent.
(6) If the Secretary of State/Scottish Minister decides that question in the affirmative he must decide whether the appropriate judge [i.e. the sheriff] would send the case to him (for his decision whether the person was to be extradited) under sections 79 to 91 if –
    (a) the person were in the United Kingdom, and
    (b) the judge were required to proceed under section 79 in respect of the offence for which the Secretary of State's consent is requested.
(7) If the Secretary of State/Scottish Minister decides the question in subsection (6) in

the negative he must refuse his consent.

(8) If the Secretary of State/Scottish Minister decides that question in the affirmative he must decide whether, if the person were in the United Kingdom, his extradition in respect of the offence would be prohibited under section 94, 95 or 96.

(9) If the Secretary of State/Scottish Minister decides the question in subsection (8) in the affirmative he must refuse his consent.

(10) If the Secretary of State/Scottish Minister decides that question in the negative he may give his consent.

Section 141: Scotland: references to Secretary of State

(1) This Part applies in relation to any function which falls under this Part to be exercised in relation to Scotland only as if references in this Part to the Secretary of State were to the Scottish Ministers.

(2) Subsection (1) does not apply to the references to the Secretary of State in paragraph (b) of section 70(2), in paragraph (c) of section 93(4) and in sections 83(3), 101(5) and 121.

Dates

[7] Significant dates are set out below.

25 March 2010: The appellant was involved in a road traffic accident in Taiwan. He was subsequently convicted in Taiwan of drink driving, negligent manslaughter and leaving the scene of the accident. On appeal, his sentence was increased to a total of 4 years imprisonment. He appealed to Taiwan Supreme Court.

August 2012: While awaiting a decision in Taiwan Supreme Court, the appellant is alleged to have left Taiwan illegally, using a friend's passport. He came to Scotland.

March 2013: A prosecution against the appellant for two offences namely absconding from Taiwan and using another's passport was raised in Taipei District Court.

20 May 2013: The Lord Advocate in Scotland became aware of that prosecution through formal channels, but took no action as there was no extradition treaty with Taiwan. Despite the raising of extradition proceedings in Scotland at a later date (see below), the Lord Advocate did not inform Scottish Ministers or any of the Scottish courts about that prosecution.

16 October 2013: The UK government (not Scottish Ministers) negotiated with Taiwan, and ultimately entered into the MOU with Taiwan. This was a unique extradition agreement relevant only to the appellant and only to the road traffic convictions. The UK Home Office advised the Lord Advocate of this development.

17 October 2013: The appellant was arrested in Edinburgh and remanded in HM Prison, Saughton. He remained in Saughton for just under three years while extradition proceedings and appeals were taking place.

28 October 2013: Taiwan made for the first extradition request in a letter to Theresa May, Secretary of State (the letter being wrongly dated "October 28, 2014").

23 December 2013: Chen Wen-Chi, Director General of International and Cross-Strait Affairs, Ministry of Justice, Taiwan, provided a letter addressed to the Lord Advocate stating that the sentences imposed for the road traffic offences, 4 years in total, "are not subject to further review, and the death penalty will not be imposed".

25 July 2014: Chen Wen-Chi, Director General of International and Cross-Strait Affairs, Ministry of Justice, Taiwan, provided a letter addressed to the Lord Advocate relating to speciality (quoted in paragraph [43] below).

1 August 2014: The Scottish Justice secretary Mr MacAskill, on behalf of Scottish Ministers, ordered the appellant's extradition to Taiwan.

23 January 2015: Scottish Ministers, in a report specifically requested by the court, provided new information to the court and to the appellant that a criminal prosecution for absconding using another's passport had been raised by an independent prosecutor in March 2013 in Taipei District Court.

14 June 2016: Taiwan (who had already made a second unsuccessful request for the appellant's extradition for absconding/passport offences) made a further third request

to Scottish Ministers for the appellant's extradition for the accusation offences of absconding and use of another's passport. The Ministers processed the request and issued the statutory certification dated 24 August 2016.

9 October 2017: In a judgment dated 9 October 2017, Sheriff McFadyen ruled that Taiwan's extradition request of 14 June 2016 concerning absconding and the use of another's passport was fundamentally invalid, as the MOU covered only conviction offences, not accusation offences. There was no appeal.

6 and 12 December 2017: Following upon Sheriff McFadyen's decision, the Director General of the Department of International and Cross-strait Legal Affairs on behalf of the Ministry of Justice in Taiwan provided two letters dated 6 and 12 December 2017 addressed to the Lord Advocate indicating that the prosecuting authority would be enabled to withdraw the absconding indictment if certain conditions were fulfilled, namely (i) the withdrawal of the appellant's extradition appeal in the High Court of Justiciary, Scotland (letter of 6 December 2018, although not the letter of 12 December 2018); (ii) the appellant's physical presence in Taiwan (having been duly extradited to serve his 4-year sentence, or the balance of that sentence, for the road traffic offences); (iii) payment by the appellant of compensation of £280,000 to the father of the deceased victim in the road traffic accident; and (iv) a public apology by the appellant expressing his remorse for his misconduct. The full text of those letters can be found in the appendix to this opinion.

12 January 2018: The Director General of the Department of International and Cross-strait Legal Affairs on behalf of the Ministry of Justice in Taiwan provided a letter dated 12 January 2018 addressed to the Lord Advocate, stating *inter alia* that, following Sheriff McFadyen's decision of 9 October 2017, the Ministry of Justice

undertook not to apply for a new MOU of extradition concerning the appellant's absconding charge (text in the appendix).

12 January 2018: The Chief Prosecutor of Taipei District Prosecutor's Office provided a letter dated 12 January 2018 addressed to Lady Paton indicating that once the appellant was extradited to Taiwan, the absconding indictment would be withdrawn in accordance with the Code of Criminal Procedure (text in the appendix).

12 February 2018: The Director General of the Department of International and Cross-strait Legal Affairs on behalf of the Ministry of Justice in Taiwan provided a letter dated 12 February 2018 addressed to the Lord Advocate stating that Taipei District Court had raised the absconding prosecution, and thus no other court could have jurisdiction. The existing live prosecution could only be transferred to another district court if (i) the original court was unable to exercise its judicial powers because of a matter of law or fact; or (ii) exceptionally, a trial convened in the original court was considered likely to give rise to unfairness or public disturbance (text in the appendix).

Evidence of Dr Chang

[8] Dr Chih-Ping Chang (aged 40), assistant professor of law since February 2018 at Shih Hsin University, Taiwan, was led as an expert witness by senior counsel for Scottish Ministers on 6 to 8 November 2018. Dr Chang was originally intended by Scottish Ministers to give expert evidence on both Taiwanese criminal law and procedure, and Taiwanese constitutional law. The report which she provided for the court's assistance extended to constitutional law matters. However counsel for Scottish Ministers did not ultimately seek to rely on her evidence in relation to constitutional issues. Dr Chang had a law degree and a PhD in Law,

Science and Technology (her thesis being Social Media, Digital Evidence and its use in Criminal Law). She was studying for another PhD, focusing upon the status of the accused in criminal proceedings. She taught university students criminal law and procedure. She had never practised law, her career having focused on academic and research projects.

[9] Dr Chang gave evidence with the assistance of an interpreter, although she was often able to understand what was said in court.

[10] Dr Chang was able advise the court about some aspects of Taiwanese criminal law and procedure. Constitutional law was outwith her expertise: when asked in cross-examination how international legal agreements gained force in, or were incorporated into, Taiwanese domestic law, she emphasised on several occasions that such an area of law was "out of her experience". Nevertheless she endeavoured to assist, and stated that it was her belief that the MOU would be given effect in Taiwanese domestic law.

[11] Dr Chang's position was that the MOU was an international agreement which the Taiwanese authorities were obliged to implement. In terms of the MOU and the doctrine of speciality, it was Dr Chang's view that the live prosecution for alleged absconding and use of another's passport should be discontinued. In her opinion, there was no obstacle to its immediate withdrawal, abandonment or cessation. When asked on Tuesday 6 November 2018 whether the prosecution could be withdrawn there and then, or whether any obstacles could be identified, Dr Chang confirmed that, in her view, the proceedings could be withdrawn immediately. In particular Dr Chang gave evidence that:

- In her opinion, the withdrawal of the absconding prosecution did not require the appellant's physical presence in Taiwan as a legal prerequisite or condition of that withdrawal.
- It was not a legal requirement or prerequisite of withdrawal of the absconding

> prosecution that (i) the appellant's extradition appeal in the High Court of Justiciary, Scotland, was abandoned; (ii) compensation (of about £280,000) was paid by the appellant to the father of the deceased victim in the entirely separate matter of the prosecution in respect of the road traffic accident; (iii) a public apology was made by the appellant expressing his remorse for his misconduct.

The witness confirmed that these conditions were not part of the Taiwanese criminal codes, and described the conditions as "a diplomatic move".

[12] In relation to Taiwanese sentencing, Dr Chang stated that the appellant's alleged offence of absconding could attract a custodial sentence of a maximum of 3 years (Article 74 of the Taiwan Entry, Exit and Immigration Act). The passport offence could separately attract a custodial sentence of a maximum of 3 years. The fact that the appellant had previously offended (namely a computer offence and the road traffic matters) entitled the Taiwanese court to increase each of the 3-year sentences by 50%, leading to a potential maximum custodial period of 9 years, which could be ordered to run consecutively to the outstanding balance of the appellant's 4-year sentence.

The court's request on Tuesday 6 November 2018

[13] On Tuesday 6 November 2018, having heard one day's evidence from Dr Chang, the court made a formal request. Dr Chang's evidence, as the court understood it, was that in terms of Taiwanese criminal law and procedure it was not a mandatory prerequisite of the chief prosecutor's withdrawal of the absconding prosecution that the appellant had to (a) make payment of compensation of £280,000 to the father of the deceased victim in the separate criminal case involving the road traffic accident and/or (b) issue a public apology in respect of that road traffic accident, expressing remorse. Having received that guidance from

the expert witness, the court's formal request was in the following terms:

> "In all the circumstances, the court wishes to have by Thursday 8 November 2018 at 10.30 am: first, written confirmation that the proceedings for all the matters contained in the indictment [in respect of the alleged absconding using another's passport] which is number 56/12 of process (in the Chinese version) and 56/11 (in the English version) have been abandoned; secondly, an undertaking from the Taiwanese authorities that no proceedings in respect of the matters contained in that indictment (i.e. 56/12, English interpretation 56/11) will be re-raised; and thirdly, an undertaking from the Scottish Ministers (i.e. a written undertaking from the Scottish Ministers) that they will not consent to a fresh prosecution in Taiwan in respect of the matters contained in that indictment (56/12, translated 56/11)."

[14] On Thursday 8 November 2018 Mr Dickson, on behalf of the Taiwanese authorities, indicated that he was not in a position to tender any written confirmation of the abandonment or withdrawal of the proceedings against the appellant in respect of the alleged absconding and use of another's passport. Mr Dickson had been in email correspondence with the Taiwanese authorities, but had not received the written confirmation requested. Mr Moynihan, on behalf of Scottish Ministers, tendered an envelope which he explained contained an undertaking dependent upon the Taiwanese authorities providing their written confirmation in compliance with the court's request. The court rejected that envelope without reading the contents, stating that the court wished to have a self-standing undertaking from Scottish Ministers which was not dependent upon the Taiwanese written undertaking. On Friday 9 November 2018, Mr Moynihan tendered the following written undertaking by Scottish Ministers:

> "Scottish Ministers undertake that, should their consent be sought to a fresh prosecution of the appellant in Taiwan in respect of the matters in the indictment, a copy of which was lodged and numbered 56/11 of process and a translation of which was lodged as 56/12 of process, or any other similar or related offence, Scottish Ministers' consent will never, under any circumstances, be given."

Submissions for the appellant

[15] Senior counsel submitted that the appellant was entitled to challenge the extradition decision in terms of both section 109(3) and 109(4). Whichever subsection was applied, the conclusion was that there were no effective speciality arrangements in place satisfying the conditions in section 95. The different wording of paragraph 11(1)(b) of the MOU exposed the appellant to prosecution for absconding using another's passport. The letters of assurance did not assist. In relation to the letter from the prosecutor, the prosecutor had a statutory duty to prosecute, which the government could not control. Further, there was no provision in Taiwanese law permitting a prosecutor to give any assurance in any particular case. It was not clear that, in Taiwanese domestic law, international obligations overrode the domestic law (in contrast with the circumstances in *Cokaj* v *Secretary of State for the Home Department* [2007] EWHC 238 (Admin), [2007] Extradition LR 51). Dr Chang was insufficiently qualified in relation to constitutional law, and her evidence on such matters should not be given much weight. Her opinion (that the MOU would be effective and would result in the withdrawal of the prosecution for absconding using another's passport) could not be relied upon.

[16] Reliance on the letters of assurance had been further undermined by events occurring after the Supreme Court's decision on 28 June 2017. For example, the Deputy Minister of Justice had spoken to the press the following day (29 June 2017), causing confusion about the prison conditions in which the appellant would be kept. The subsequent letters of assurance dated December 2017 lacked clarity and introduced a requirement of payment of compensation (a requirement not disclaimed by the Director General in Answer 8 of his letter dated 12 January 2018). Applying the *Othman* criteria, senior counsel submitted *inter alia* that the assurances were imprecise and often contradictory of each other;

there was no established track record for extradition from the UK to Taiwan (in fact, this was Taiwan's first extradition request in relation to any country); and the UK consular staff in Taiwan could provide only limited assistance.

[17] Senior counsel further submitted that it was not clear, on the basis of the materials before the court, that the MOU and the assurances had any validity in Taiwanese domestic law, or that they were legally binding in Taiwan. The evidence of Professor Chin (in the section 103 appeal) and Dr Chang (in the section 108 appeal) did not establish that the full procedures had been carried out.

Submissions for Scottish Ministers

[18] In submissions marked by significant changes in direction, senior counsel for Scottish Ministers contended that adequate speciality arrangements were provided by (i) the MOU alone; failing which (ii) the MOU and the letter of 25 July 2014; failing which (iii) the MOU, the letter of 25 July 2014, and the letters of 6 and 12 December 2017, 12 January and 12 February 2018. While acknowledging that the letters of December 2017 "gave rise to as many questions as answers", and that they raised questions of interpretation which were for the court to decide, senior counsel contended that ever more weighty and specific assurances had been provided by Taiwan. The relevant texts, construed in the light of the fundamental principles of international comity, reciprocity, mutual trust and respect, good faith, and the strong public interest in promoting and maintaining the rule of law, satisfied the requirements of section 95 of the 2003 Act. Only strong evidence could rebut the presumption of comity (*Deya* v *Kenya* [2008] EWHC 2914 (Admin), Dyson LJ at paragraph 40; *Patel* v *India* [2013] EWHC 819 (Admin) Kenneth Parker J at paragraph 71; *RO* [2018] EUECJ C-327-18 PPU-19 September 2018 at paragraph 61; *Lord Advocate* v *Dean* 2018 SC

(UKSC) 1, Lord Hodge at paragraph 36; *Ruiz* v *Central Court of Criminal Proceedings, Madrid* [2008] 1 WLR 2798 at paragraph 67; *USA* v *Giese* [2016] 4 WLR 10, [2018] 4 WLR 103 at paragraph 38). Such evidence had not been produced.

[19] The primary position of Scottish Ministers was that the MOU itself, properly construed in accordance with the presumption of comity, provided satisfactory speciality arrangements, even although paragraph 11(1)(b) of the MOU did not precisely reproduce the language of section 95(4)(b). On a proper construction, paragraph 11(1)(b) was controlled by the concluding reference to "that offence". "That offence" in paragraph 11(1)(b) referred back to paragraph 11(1)(a), i.e. to "the offence in respect of which the person is extradited" (the drink driving offences). Thus the "information provided" referred to information relating to "that offence", namely the drink driving offences. Accordingly it was not correct to read paragraph 11(1)(b) as apt to include the alleged offences of absconding using another's passport. This submission was supported by four considerations. (i) The MOU should be given a purposive construction (*Al-Malki* v *Reyes* [2017] 3 WLR 923 at paragraphs 10-11). Paragraph 11(1)(b) had been included in the MOU in order to implement international obligations, of which speciality was one, and was to be construed in a way compliant with speciality. (ii) The MOU permitted extradition only for the purpose of serving a prison sentence, as Sheriff McFadyen held in his decision in October 2017. (iii) Any ambiguity was resolved by the letter of assurance dated 25 August 2014. (iv) The case of *R* v *Seddon* [2009] 1 WLR 2432, [2009] 2 Cr App 9 (a case directly parallel to the present) clearly supported Scottish Ministers' argument. In *Seddon*, an incidental narration that someone was unlawfully at large in breach of the Bail Act did not constitute an offence for which prosecution was authorised. In the result, there was no basis upon which to infer that the granting of the first extradition request of 28 October 2013

would now, directly or indirectly (for example, by means of section 129) secure extradition or consent in respect of any alleged offence of absconding using another's passport.

[20] But in any event, there had been considerable developments in the years following upon Scottish Ministers' order for the appellant's extradition on 1 August 2014. That being so, there was a question whether the section 108 appeal should be dealt with in terms of section 109(3) or section 109(4). As I understood him, senior counsel ultimately submitted that the word "or" which linked those subsections was conjunctive, not disjunctive. Accordingly, in the light of the events and information which had emerged since the extradition order of 1 August 2014, the preferred provision was section 109(4). In the context of section 109(4), the authorities demonstrated that the court could and should take into account post-ministerial-decision assurances (*Cokaj* v *Secretary of State for the Home Department* [2007] EWHC 238 (Admin); *Welsh* v *Secretary of State for the Home Department* [2007] 1 WLR 1281; *Patel* v *India, cit sup; USA* v *Giese, cit sup*). Such assurances could, and did in the present case, either retrospectively rectify any deficiencies thought to exist in the extradition arrangements, or alternatively provide clarification of any ambiguities thought to arise.

[21] Any apparent discrepancies in the letters of assurance dated 6 and 12 December 2017 and 12 January and 12 February 2018 were, on a proper construction in the light of good faith and comity, resolvable. The chief prosecutor's letter dated 12 January 2018 should be construed in the light of the letter from the Director General dated 12 January 2018. When assessing the MOU and the letters of assurance, "novelty" (in the sense that Taiwan had never before achieved the extradition of any person, and thus had no history or track record of abiding by undertakings in the context of extradition) was an insufficient reason for suspecting a lack of good faith (*Lord Advocate* v *Dean* 2018 SC (UKSC) 1 at paragraph 36 *et*

seq). The letter dated 12 December 2017 had been issued in order to clarify any possible dubiety arising from the letter of 6 December 2017, and was intended (in senior counsel's submission) to state that if the appellant were to remain in Scotland, Taiwan wished to preserve the right to prosecute him for the alleged absconding and passport offences; whereas if the appellant was extradited to Taiwan, the absconding/passport prosecution would be withdrawn after he had arrived there. Senior counsel submitted that the Taiwanese authorities were entitled to take such a pragmatic approach, keeping certain options open. If, for example, the appellant was not in fact extradited to Taiwan from Scotland, but nevertheless in some way ended up physically within the Taiwanese jurisdiction, the Taiwanese authorities would wish the appellant to serve the balance of his 4-year sentence and to face prosecution for the alleged offences of absconding using another's passport.

[22] Senior counsel submitted that the assurances satisfied the criteria in *Othman* v *UK* (2012) 55 EHRR 1. While the Supreme Court had been concerned with prison conditions (*Lord Advocate* v *Dean* 2018 SC (UKSC) 1 at paragraph [38]), the observations made in that paragraph were of general relevance. Taiwan was a developed society with a tradition of respect for the rule of law. There could be no doubt that a chief prosecutor would implement an assurance given to this court. Given its lack of full status in international law, Taiwan had few "treaties": but it was all the more to be expected that Taiwan would fulfil its obligations so as not to jeopardise its future ability to achieve such agreements. The suite (or web) of assurances now in place met the *Othman* criteria.

[23] Scottish Ministers did not know why the alleged offences of absconding using another's passport had not been included in the UK-Taiwan MOU dated 16 October 2013, or why the live prosecution for those matters was not mentioned in Taiwan's first request for

extradition dated 28 October 2013. Nor did Scottish Ministers know the precise reasons why, despite the court's request of 6 November 2018, no written confirmation from the Taiwanese authorities that the live prosecution had been withdrawn had been tendered to the court (although senior counsel suggested that this might be an illustration of the principle of the mutuality of obligations: Taiwan sought the physical presence of the appellant in its jurisdiction, in exchange for which the criminal prosecution for absconding using another's passport would be withdrawn). But in any event, the fact that there was a live prosecution was a red herring, because the question in issue had always been the same, namely: were there sufficient assurances in place such that the appellant would not be prosecuted for the alleged offence of absconding using another's passport. The Taiwanese authorities had given assurances that the prosecution would be withdrawn following upon the appellant's extradition to and arrival in Taiwan. Scottish Ministers did not represent Taiwan and did not have access to Taiwanese information, but they relied upon the fundamental principles of comity and good faith (cf *Beggs* v *HM Advocate* 2010 SCCR 681, Lord Eassie at paragraph 185, indicating that the principal purpose of the speciality rule was to preserve comity between states rather than to effect a protection for the accused; *Deya* v *Kenya* [2008] EWHC 2914 (Admin) Dyson LJ at paragraph 40; *Patel* v *India* [2013] EWHC 819 (Admin) Kenneth Parker J at paragraph 71; *Lord Advocate* v *Dean* 2018 SC (UKSC) 1 at paragraph 36). Scottish Ministers expected Taiwan to respect the undertakings which they had given, and to implement them, such that there was no prospect whatsoever of a prosecution of the appellant for absconding using another's passport. That expectation was the sole basis upon which Scottish Ministers supported the decision to extradite and the sole basis of their opposition to the appeal under section 108. If any ambiguity or gap was thought to arise from the MOU and the written assurances, Taiwan was represented in the

appeal court and had heard all the arguments, and now was the time for the Taiwanese authorities to put matters right.

Submissions for the Lord Advocate acting on behalf of Taiwan

[24] Mr Dickson confirmed that he was acting on behalf of Taiwan in terms of section 191 of the Extradition Act 2003. He adopted the submissions for Scottish Ministers, and provided such further information as he could. He was unable to explain why the MOU did not include the specific offences of absconding using another's passport, or why the live prosecution for those alleged offences was not mentioned in the letter of request for extradition dated 28 October 2013, or the letter to the Lord Advocate concerning speciality dated 25 July 2014. It was the UK government (not Scottish Ministers) who had made the unique extradition arrangements with Taiwan. The UK government had then passed the matter to Scotland to be dealt with. Mr Dickson explained that Taiwan had acted in good faith throughout, and any suggestions to the contrary were entirely unfounded.

[25] When asked about a response to the court's request of Tuesday 6 November 2018, Mr Dickson confirmed that he had no written confirmation of abandonment or withdrawal to tender to the court. He relied upon such documentation as the court already had.

Discussion

The rule of speciality (or "specialty")

[26] The rule of speciality has been defined in textbooks as follows:

> "The rule of specialty prevents a person being prosecuted in the requesting state for conduct not detailed in the warrant; it is therefore an important protection for those facing extradition." (*Grange & Niblock, Extradition Law,* 2015)
>
> "Specialty arrangements between states are designed to ensure that the person is dealt with in the requesting state only for those offences for which he has been extradited

> … The question is whether there are practical and effective arrangements in the requesting territory …" (*Jones & Davidson, Extradition and Mutual Legal Assistance,* paras 6.33 and 6.37)
>
> "Specialty (also called 'speciality') is a rule of extradition law that is intended to ensure that a person extradited is not dealt with in the requesting state for any offence other than that for which he was extradited … In its absolute form, specialty requires that the defendant only be tried for the offence for which his extradition was granted. However the rule as stated has been widely relaxed in modern extradition legislation, including the EA 2003. That relaxation is reflected in the fact that under the EA 2003 the requesting state may be permitted to deal with the defendant for offences other than those for which he was returned which are disclosed by the facts upon which his surrender was based. Also, the requesting state may be permitted to seek from the requested state its consent to try the defendant for another offence not covered by its original request, provided that the offence is extraditable." (*Nicholls, Montgomery and Knowles, The Law of Extradition and Mutual Assistance* (3rd ed para 5.72 *et seq*).

[27] Decided cases also emphasise the protection of the requested person. In *M and B* v *Italy* [2018] EWHC 1808 (Admin) 16 July 2018 at paragraph 47, it was noted that:

> " … if extradited, the Requested Person can only (putting it over-simply) be prosecuted for the offences for which extradition was ordered …"

In *Welsh* v *Home Secretary* [2007] 1 WLR 1281 at paragraph 135, Ousely J encapsulated the effect of section 95 of the 2003 Act (set out in paragraph [6] above) as follows:

> "The effect of section 95 is to impose a prohibition on extradition where the conditions it contains are not met …"

In *R* v *Seddon* [2009] 1 WLR 2432, [2009] 2 Cr App R 9, the court observed at paragraph 5:

> " … if surrendered, the prisoner could only be dealt with for the offence for which he had been sought, otherwise plainly the surrendering State's power to refuse would be circumvented. That principle is called specialty … The rationale for it may owe something to the protection of the individual, but it plainly lies principally in the international obligation between States."

[28] In my view therefore, an important element of the rule of speciality (as enacted in section 95 of the 2003 Act) is the protection of the requested person. As this court commented in *Beggs* v *HM Advocate* 2010 SCCR 681 at paragraph [185], the "principal purpose [of the speciality rule] is … to preserve comity between states": but comity between states is best preserved by clear arrangements preventing circumvention of the surrendering state's power

to refuse extradition where the conditions in section 95 are not met, and avoiding the risk that the requested person, having been returned to the requesting territory for a particular crime or crimes, is there unexpectedly dealt with for other crimes.

[29] The question arising from the application of section 95 in the present case is whether speciality arrangements were in place on 1 August 2014 when Scottish Ministers ordered the appellant's extradition, failing which whether speciality arrangements were subsequently perfected, and in either case whether the arrangements meet the conditions of section 95. The appellant is entitled to challenge this, and has done so. The appellant answers the question in the negative; Scottish Ministers and the Lord Advocate answer in the affirmative.

[30] Ultimately the position adopted by senior counsel for Scottish Ministers was as follows: (i) the MOU, standing alone, provided the necessary speciality arrangements; (ii) if the court did not accept that proposition, the MOU together with the letter dated 25 July 2014 provided the necessary speciality arrangements; but (iii) on any view, the necessary speciality arrangements were provided by the MOU, the letter dated 25 July 2014, and the subsequent letters of undertaking and assurance dated 6 and 12 December 2017, 12 January 2018 (two letters, one from the Director General and one from the Chief Prosecutor of Taipei District Court), and 12 February 2018. Mr Dickson for the Lord Advocate adopted those submissions. Summaries of the submissions are set out in paragraphs [18] to [25] above. The texts of the letters of undertaking and assurance can be found in the appendix to this opinion.

The proper construction of the word "or" in section 109 of the Extradition Act 2003

[31] In my opinion, section 109 is clear in its terms. On a proper construction of that section, an appeal may be allowed if the conditions in subsection (3) are satisfied. Quite independently, an appeal may also be allowed if the conditions in subsection (4) are satisfied.

I have found nothing in the wording of section 109, properly construed, or in the wording and structure of the 2003 Act as a whole, or in any authority, to support the contention that the court must apply subsection (4) before being able to turn to subsection (3), or that the court must, in the event of information emerging or events occurring after the ministerial decision to order extradition, apply section 109(4) to the exclusion of section 109(3). Each case depends on its facts. If the appellant satisfies either subsection, the court may allow his appeal. Theoretically, an appellant might satisfy the conditions in both subsections, and the court would be entitled to so find.

Section 109(3) of the 2003 Act

[32] Section 95(3) of the Extradition Act 2003 is quoted in paragraph [6] above. The section provides *inter alia*:

> "(3) There are speciality arrangements with a category 2 territory if (and only if) under the law of that territory or arrangements made between it and the United Kingdom a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if –
>
> (a) the offence is one falling within subsection (4), or
>
> (b) he is first given an opportunity to leave the territory.
>
> (4) The offences are –
>
> (a) the offence in respect of which the person is extradited;
>
> (b) an extradition offence disclosed by the same facts as that offence, other than one in respect of which a sentence of death could be imposed;
>
> (c) an extradition offence in respect of which the Secretary of State consents to the person being dealt with;
>
> (d)an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence"

[33] The provisions in section 95(4)(a) to (d) of the 2003 Act were reflected to some extent in the MOU in paragraph 11 headed "Speciality". However the wording of sub-paragraph 11(1)(b) of the MOU (the equivalent of section 95(4)(b)) is different. There is no reference in the MOU to the death sentence exclusion. In addition, the wording in the MOU is as follows:

> "(b) an offence *disclosed by the information provided by Taiwan* in respect of that offence

[ie the offence in respect of which he has been extradited] …(emphasis added)"

[34] The wording in the MOU – "disclosed by the information provided by Taiwan in respect of that offence" – may have given rise to differences in perception on the part of the UK and Taiwan. Taiwan might have considered that the MOU entitled them to seek extradition for the absconding and passport offences (cf paragraph [63] below), whereas the UK, in compliance with section 95 of the 2003 Act, would not.

[35] It is also of note that paragraph 11(1)(c) of the MOU refers to the consent "given by the UK" which might suggest that the consent of the Secretary of State is required, and not the consent of Scottish Ministers.

[36] In the present case, Scottish Ministers' order for the appellant's extradition specified "the [offences] in respect of which the [appellant] is extradited" (section 95(4)(a)) as follows:

> "**Count 1**
> **This charge being broadly speaking:**
> Operating a motor vehicle while impaired by alcohol
>
> **Count 2**
> **This charge being broadly speaking:**
> Negligently resulting in the death of another
>
> **Count 3**
> **This charge being broadly speaking:**
> Fleeing the scene after the motor vehicle he drove had caused an accident resulting in the death or injury of another."

[37] In terms of section 95(4)(b) to (d) of the 2003 Act, the requesting state may be able to deal with certain other offences despite their not being "the [offences] in respect of which the [appellant] is extradited", but only in certain circumstances.

[38] In relation to section 95(4)(b), it is my opinion that no alleged absconding or passport offence was "disclosed by the same facts" as the road traffic offences, all of which occurred on 25 March 2010. On the contrary, the absconding and passport allegations relate to an entirely different and independent set of circumstances which are said to have occurred 2 years later

in August 2012 when the appellant left Taiwan and came to Scotland. Any purported reliance upon the different wording of paragraph 11(1)(b) of the MOU would, in my opinion, constitute a breach by Scottish Ministers of the mandatory section 95 of the Extradition Act 2003, and would, in my opinion, be illegal and *ultra vires.*

[39] In relation to section 95(4)(c), the November 2018 undertaking given by Scottish Ministers (quoted in paragraph [14] above) was intended to exclude the possibility of reliance upon subsection (c) by way of, for example, a request for the Ministers' consent to an absconding/passport prosecution. However two possibilities remain: first, the Secretary of State representing the UK government could consent to such a prosecution in terms of paragraph 11(1)(c) of the MOU; secondly, Scottish Ministers under the 2003 Act could consent to the re-activation of the existing suspended prosecution in Taipei District Court once the appellant is physically in Taiwan, without breaching the undertaking, which refers to "a fresh prosecution". This illustrates the lack of clarity in the MOU when one attempts to assess whether the conditions in section 95 are met.

[40] In relation to section 95(4)(d), the appellant has not waived any rights.

The validity and status of the MOU and assurances

[41] Senior counsel for the appellant challenged the validity and status of the MOU and assurances, and questioned whether they would be recognised or given effect to in Taiwanese law. These matters are discussed in the opinion of Lord Drummond Young. While I agree with many of the principles set out in that opinion, I am ultimately unable to agree with the conclusion, for the reasons given in this opinion.

Whether the appellant is correct in his contention relating to section 109(3)

[42] In the context of section 109(3), I consider that this court should examine the circumstances as known to Scottish Ministers on 1 August 2014 when ordering the appellant's extradition.

[43] Scottish Ministers were provided with the UK-Taiwan MOU, an international agreement negotiated by the Home Office of the UK government in London. Scottish Ministers appreciated that they had an obligation to implement the MOU (cf *dicta* of Lord Drummond Young in *Dean* v *Lord Advocate* 2016 SLT 1105 at paragraph [64] *et seq*). However Scottish Ministers were aware of the discrepancy in wording between section 95 of the 2003 Act and paragraph 11(1)(b) of the MOU (referred to in paragraph [33] above). Following upon a letter from the appellant's then agents Messrs J R Rahman dated 7 July 2014 addressed to Mr MacAskill, Minister for Justice in the Scottish Government, which *inter alia* pointed out perceived difficulties with speciality, ambiguities in the MOU, and concerns about a possible prosecution for absconding, Scottish Ministers were provided with a letter of assurance from Chen Wen-Chi, Director General of the Department of International and Cross-Strait Legal Affairs, Ministry of Justice, Taiwan. The letter was dated 25 July 2014 and was addressed to the Lord Advocate in Scotland. The letter stated:

> "Dear Lord Advocate,
>
> Regarding the extradition of Zain Dean, the following is the assurance with relation to speciality.
>
> Further to the memorandum of understanding entered into between the Home Office and the Judicial authority of Taiwan, the judicial authority of Taiwan hereby undertakes and offers assurance that, notwithstanding para 11(1)(b) of the said memorandum of understanding, should the judicial authority of Taiwan seek to prosecute Zain Taj Dean for any offence committed before extradition other than those listed in paragraph 2 of page 2 of the Request for Extradition dated October 28, 2013, namely (1) driving under the influence as indicated in Article 185-3, (2) negligent manslaughter as indicated in Article 276(a) and (3) escaping after having caused traffic casualties as indicated in Article 185-4 all of the Criminal Code of the Republic

of China (Taiwan), it shall issue a further request for extradition. Any such additional request for extradition shall seek the consent of Scottish Ministers to permit Zain Taj Dean being dealt with for any alleged offence committed before extradition, or an offence other than the offences in respect of which he was extradited, in particular his alleged absconding from Taiwan referred to at paragraph 4 on page 3 of the said request …"

[44] Scottish Ministers were also provided with the letter of request for extradition of 28 October 2013 (*per incuriam* dated "October 28, 2014"), referred to in the assurance quoted above. That letter was from Chen Wen-Chi on behalf of the Ministry of Justice (MOJ), and was addressed to The Rt Hon Theresa May MP, Secretary of State, Home Department, Home Office, The United Kingdom. The letter listed the offences for which extradition was sought (namely (1) to (3) quoted above), and continued:

"**Summary of Pertinent Facts**

1. ZAIN TAJ DEAN was driving under the influence of alcohol … [There follows a description of the road traffic accident resulting in the death of a motorcycle rider].

2. Investigation and Trial

   The Taiwan Taipei District Prosecutors Office (TDPO) completed its investigation on April 19, 2010 and prosecuted ZAIN TAJ DEAN on the following counts: (1) driving under influence as indicated in Article 185-3, (2) negligent manslaughter as indicated in Article 276(a), and (3) escaping after having caused traffic casualties as indicated in Article 185-4 of the Criminal Code of the Republic of China (Taiwan) … [There follows a narration of the finding of guilty on all three counts, the imposition of a prison sentence of 4 years in total].

3. Enforcement

   [There follows a narration that the appellant failed to appear in response to a summons, and that a warrant for his arrest was issued.]

4. Defendant absconding

   Investigation by the TDPO has found that [the appellant] already departed from Taiwan through Taoyuan International Airport with the passport of his British friend [Christopher Churcher, personal details given] at 7:00 am on August 14, 2012. TDPO has placed [the appellant] on the wanted list since January 29, 2013."

[45] Three items were attached to the letter of 28 October 2013, namely (i) the arrest

warrant and wanted warrant; (ii) abstracts of final judgments of the Taiwan High Court and the Taiwan Supreme Court; and (iii) the judgment of the Supreme Court of Taiwan, the judgment of the Taiwan High Court, and the judgment of Taipei District Court. The arrest warrant and wanted warrant included the phrase "Cause of being wanted: absconding". Importantly, however, there was no mention of the prosecution for absconding and use of another's passport which had been initiated in Taipei District Court in March 2013. Thus the Scottish Ministers were, on 1 August 2014, unaware of that live prosecution for offences other than drink driving, negligent manslaughter, and leaving the scene of an accident.

[46] Against that background, it is my opinion that the documents and information available to Scottish Ministers on 1 August 2014 did not satisfy the mandatory provisions of section 95 the Extradition Act 2003 (speciality) for the following reasons.

[47] First, it is not clear whether an international agreement such as the UK-Taiwan MOU (which, unusually, has been certified in terms of section 194 of the 2003 Act, with conclusive effect in terms of section 194(5)) can be "modified" or "qualified" merely by a subsequent letter to the Scottish Lord Advocate who, in these proceedings, represents Taiwan. As explained more fully in the opinion of Lady Clark, section 95(3) requires "speciality arrangements … under … arrangements made between [Taiwan] and the United Kingdom" – in other words, the arrangements in paragraph 11(1)(b) of the MOU. Alteration or modification of the arrangements by a letter such as that dated 28 July 2014 is not envisaged or provided for in the MOU. The mandatory requirement that adequate "speciality arrangements" be in place before a Scottish Minister makes an extradition order for a British citizen, and the existence of a formal MOU entered into between the UK government and Taiwan, makes this context different from that of assurances in other cases.

[48] Secondly, paragraph 11 of the MOU does not reflect the wording or meaning of the

mandatory provisions of section 95. For example, the difference in the wording of paragraph 11(1)(b) has the effect that the appellant could, on counsel's submissions, be prosecuted for other offences (although counsel could not agree which offences). It is arguable that, on a proper construction of (i) the letter of request of 28 October 2013 and (ii) paragraph 11(1)(b) of the MOU, the offence of "absconding" was indeed "disclosed by the information provided by Taiwan" in respect of the offences for which he was to be extradited. In particular, paragraph 4 on page 3 of the letter of request for extradition dated 28 October 2013 entitled "Defendant absconding" (quoted in paragraph [44] above) *prima facie* qualifies as "an offence disclosed by the information provided by Taiwan in respect of [the offence in respect of which he has been extradited]" in terms of paragraph 11(1)(b) of the MOU, and thus on one view (a view which the Taiwanese authorities may have taken) the Taiwanese authorities are entitled to prosecute the appellant for the alleged offences of absconding using another's passport. Even if, as was contended by senior counsel for Scottish Ministers, a contrary argument can be presented, the very fact that the wording in paragraph 11(1)(b) gives rise to such ambiguity, uncertainty, and legal debate involving questions of construction and nuance, renders the speciality arrangements unsatisfactory and insufficient, bearing in mind the mandatory nature of section 95 which binds Scottish Ministers.

[49] Thirdly, the letter of assurance to the Lord Advocate dated 25 July 2014 does not cure the ambiguity and doubts raised by paragraph 11(1)(b) of the MOU and paragraph 4 on page 3 of the letter of request of 28 October 2013. The letter of 25 July 2014 does not mention the live prosecution for absconding using another's passport, which was in existence at that date (having been raised over a year previously, in March 2013). The clear implication of the phrase in the second paragraph of the letter, namely:

> "*should the judicial authority of Taiwan seek to prosecute Zain Taj Dean* for any offence committed before extradition other than those listed in paragraph 2 of page 2 of the

> Request for Extradition dated October 28, 2013 [namely the offences described as counts (1), (2), and (3) noted in paragraph [36] above]"

is that if the Taiwanese judicial authority wished, *at some future date*, to raise a prosecution against the appellant for an offence other than the road traffic offences committed prior to extradition (such as alleged absconding using another's passport), the Taiwanese judicial authority *would make a further request for the appellant's extradition for that offence.* No information is given about the existing prosecution for absconding raised in March 2013. Significantly, for the purposes of satisfying the mandatory principle of speciality, the letter of 25 July 2014 gives no undertaking or assurance in respect of that existing prosecution for absconding raised in March 2013. Thus as soon as the appellant arrived in Taiwan, he would be vulnerable to that prosecution with a possible sentence of 9 years in addition to the 4-year sentence for which he was extradited. That is precisely the result which speciality arrangements should prevent.

[50] Scottish Ministers, in a letter headed Justice Directorate, Criminal Justice Division, to the appellant (then in Saughton prison) dated 1 August 2014 informing him of their order for his extradition, advise the appellant as follows:

> " 20. Regardless of any differences between section 95(4)(b) of the Act and paragraph 11(1)(b) of the MOU, Scottish Ministers have received assurances from the Taiwanese authorities that, should the latter seek to prosecute you for any offence committed before extradition other than those listed in the request for extradition dated October 28, 2013, they shall issue a further request for extradition. Any such additional request for extradition shall seek the consent of the Scottish Ministers to permit you to be dealt with for any alleged offence committed before extradition, or an offence other than the offences in respect of which you were extradited. Those offences essentially comprise: causing death by dangerous driving; driving under the influence of alcohol; and failing to stop after an accident.
>
> 21. These assurances meet the requirements of section 95(4)(c) of the Act and of paragraph 11(1)(c) of the MOU. Notwithstanding any differences between section 95(4)(b) of the Act and paragraph 11(1)(b) of the MOU, therefore, the Scottish Ministers, in consideration of these assurances in conjunction with the MOU, believe that the conditions set out in section 95(3) and (4) of the Act are met."

The "assurances" referred to in that letter are presumably the letter dated 25 July 2014, referred to in paragraph [43] above. But as already indicated in this opinion, I consider that letter to be either insufficient or too ambiguous to satisfy the mandatory terms of section 95 of the 2003 Act.

[51] Accordingly, on the basis of the circumstances known to Scottish Ministers on 1 August 2014, it is my opinion that, in order to comply with the mandatory provisions of section 95 of the Extradition Act 2003, Scottish Ministers ought to have decided the question before them differently and not ordered the appellant's extradition (section 109(3)).

Section 109(4) of the 2003 Act

[52] In the context of section 109(4) of the 2003 Act, senior counsel for Scottish Ministers invited the court to take account of Taiwan's letters of assurance dated 6 and 12 December 2017, 12 January 2018, and 12 February 2018. Under reference to *Cokaj* v *Secretary of State for the Home Department* [2007] EWHC 238 (Admin), [2007] Extradition LR 51, *Welsh* v *Secretary of State for the Home Department* [2007] 1 WLR 1281, and other authorities, senior counsel submitted that the web of assurances thus created, together with the MOU, was such that the court could be satisfied that adequate speciality arrangements were in place. On the basis of those authorities, it mattered not that the additional undertakings and assurances were given after the ministerial decision on 1 August 2014. Mr Dickson for the Lord Advocate adopted those submissions. Both senior counsel and Mr Dickson accepted that the question of the proper construction of the MOU and the subsequent letters of assurance was a matter for this court.

[53] In my opinion, the question again arises whether an international agreement such as the UK-Taiwan MOU can be "modified" or "qualified" by, or interpreted as dictated by,

subsequent letters to the Scottish Lord Advocate and to myself (a Scottish judge). As explained more fully in the opinion of Lady Clark, section 95(3) requires "speciality arrangements … under … arrangements made between [Taiwan] and the United Kingdom" – in other words, the arrangements in paragraph 11(1)(b) of the MOU. Letters such as those dated December 2017 and January and February 2018 are not envisaged or provided for in the MOU. The mandatory requirement that adequate "speciality arrangements" be in place before a Scottish Minister makes an extradition order for a British citizen, and the existence of a formal MOU entered into between the UK government and Taiwan and certified in terms of section 194 of the 2003 Act, makes this context different from other cases where assurances have been accepted about, say, prison conditions, in contrast with assurances about speciality.

[54] Even if it were possible to qualify or modify a formal international agreement such as the MOU by the letters, it is my opinion that, on a proper construction of the letters of assurance dated December 2017, January and February 2018, no adequate speciality arrangements are in place to meet the mandatory conditions required by section 95 of the 2003 Act. I have reached that view for the following reasons.

[55] In my opinion, on a proper construction of the letters, the undertaking to withdraw the existing prosecution for absconding using another's passport is dependent upon 4 conditions precedent, namely:

- The withdrawal of the appellant's appeal (i.e. the current section 108 appeal in the High Court of Justiciary, Edinburgh).
- The appellant's physical presence in Taiwan (having been extradited there in order to serve his sentence for the road traffic offences).
- The payment by the appellant of over £280,000 to the father of the deceased victim of the road traffic offences, in terms of a decree in the High Court in England

dated May 2014 for NT$9,086,334.64 with interest (current value thought to be in excess of £280,000)

- The making of a public apology by the appellant, expressing his remorse for the road traffic matters.

[56] The key to the proper construction lies in answer 8 of the letter from the Director General dated 12 January 2018. Answer 8 states:

> "In answer to Question 8, the appeal referred to in the penultimate paragraph of page 6 of the letter of 6th December 2017 is the current appeal against the First Request decisions. The paragraph was intended to convey that if Mr Dean withdrew his current appeal thereby allowing the extradition to proceed, paid compensation to the victim's father, expressed remorse and apologised, his conduct would enable the prosecution authority to withdraw the absconding charge because the conditions enabling this would have been fulfilled under article 269 of the Code of Criminal Procedure.

[57] Article 269 of the Code of Criminal Procedure provides:

> "A public prosecutor may withdraw prosecution before conclusion of the argument at the trial of the first instance if circumstances indicate that prosecution should not have been initiated or that it is appropriate not to prosecute.
>
> Withdrawal of a prosecution shall be in writing stating the reasons therefor."

[58] The chief prosecutor's letter of undertaking addressed to me and dated 12 January 2018, must, as counsel accepted, be construed in the light of the guidance provided in answer 8 of the letter of 12 January 2018 from the Director General, a senior legal officer. Thus when the chief prosecutor states:

> " … Once Mr Dean is extradited back to Taiwan, Taipei District Prosecutors Office will, *in accordance with the Code of Criminal Procedure,* withdraw the indictment of which the proceedings are suspended in Taipei District Court due to Mr Dean's absence from trial in Taiwan. As long as the indictment is withdrawn, the criminal proceedings for the absconding case will come to an end, and Taipei District Court shall close the case definitively …"

he is, in my view, undertaking to withdraw the live prosecution for absconding using another's passport once (i) the appellant is physically in Taiwan, having been extradited

there; and (ii) the conditions in the Code of Criminal Procedure are satisfied ("in accordance with the Code of Criminal Procedure"), and as explained by the Director General, that means that once compensation has been paid to the victim's father, and once the appellant has expressed his remorse and apologised, the appellant's "conduct would *enable* the prosecution authority to withdraw the absconding charge because the conditions *enabling* this would have been fulfilled under article 269 of the Code of Criminal Procedure [emphasis added]". I do not consider that such an undertaking fulfils the requirements of speciality. Leaving aside, for the moment, the questionable nature of a condition of payment and apology in an entirely separate criminal case (road traffic offences) before an indictment for absconding using another's passport is withdrawn, it is entirely possible that the appellant could not pay £280,000. Yet the letters of assurance, properly construed, make payment a condition precedent. The logical result would be that on arrival in Taiwan, the appellant, unable to pay compensation of £280,000, would face an ongoing trial for absconding using another's passport which might lead, on conviction, to an additional 9-year sentence. That is precisely the situation which the rule of speciality in its statutory form in section 95 of the 2003 Act seeks to avoid.

[59] I accept that the chief prosecutor's letter includes the words:

> "We hereby undertake that we will be bound by the Speciality Doctrine set out in the first extradition MOU and elaborated in the decision rendered by Judge McFadyen, the presiding judge with Edinburgh Sheriff Court, on the extradition request for the absconding case".

However the speciality doctrine "set out in the first extradition MOU" contains paragraph 11(1)(b) with all the doubts, ambiguities, and uncertainties referred to in paragraphs [47] to [50] above. Furthermore Sheriff McFadyen's judgment of 9 October 2017 focused on the fact that the MOU concerned conviction offences, but not accusation offences, and did not elaborate on the doctrine of speciality. Finally, referring to the speciality doctrine

does not, in my view, provide the necessary comfort in the face of the very specific prerequisites spelled out for the withdrawal of the absconding and passport proceedings, namely the appellant's physical presence in Taiwan, his payment of £280,000 compensation, and his public apology, all as set out, reiterated, and confirmed in the letters of assurance dated 6 and 12 December 2017, and 12 January 2018.

[60] Mr Moynihan's submission suggesting that the December 2017 letters outlined different scenarios and outcomes, depending upon whether the appellant remained in the UK or arrived in Taiwan (see paragraph [21] above) may be just stateable, but in my opinion those submissions (i) present a strained and artificial interpretation of the letters; (ii) demonstrate that ambiguities arise from the texts; and (iii) on one view, are contradicted by the plain terms of answer 8 of the letter from the Director General dated 12 January 2018.

[61] It might be suggested that there are alternative interpretations of the letters of 6 and 12 December 2017 and 12 February 2018, rather than the construction outlined in paragraph [55] above, and that a suitable alternative should be selected in accordance with the principles of comity and mutuality between the UK and a friendly territory. I cannot agree. First, the construction outlined in paragraph [55] is, in my opinion, the proper construction of the words used. Secondly, even if there are alternative interpretations, the very existence of possible different meanings underscores the difficulties in communication and understanding which have been prevalent in this case, resulting in an unsatisfactory and unclear state of affairs. Thirdly, these uncertainties could easily have been avoided by clear communication during negotiations leading to the MOU and clear drafting of the MOU: if difficulties of enforcement have arisen, they can be laid at the door of those responsible for negotiating and drafting, and they may be inevitable despite principles of comity, mutual trust and respect.

[62] That said, it is difficult for this court to understand the reasons underlying the approach adopted by the Taiwanese authorities in this case. As noted previously, the Taiwanese authorities have never before achieved the extradition of anyone from any territory to Taiwan. Thus this case would appear to be a "first" for Taiwan, possibly resulting in novel arrangements; lack of experience in making such arrangements; a potential for error or oversight; and communication failures, perhaps due to different cultures and different perceptions. Certainly it might be thought to be generally accepted that international obligations should take precedence over domestic law, even if, as noted by the Supreme Court, "the Lord Advocate acknowledges that the memorandum of understanding does not have the status of a treaty enforceable in international law" (*Lord Advocate* v *Dean* 2018 SC (UKSC) 1 at paragraph 36). However, on a construction of the letters of assurance which in my opinion is the correct one, or at the very least the most obvious one, the Taiwanese authorities appear to consider that the conditions precedent imposed by their domestic law (in particular the Taiwanese Code of Criminal Procedure) must be satisfied before the absconding proceedings are withdrawn with a view to achieving the aim of speciality as understood by UK lawyers. This may reflect the lack of a clear and express provision in Taiwanese law permitting international obligations to override the requirements of domestic law (cf *R* v *Lyons* [2003] 1 AC 976): or again, at the very least, the fact that no specific override provision was identified for the assistance of this court.

[63] One aspect of this case seems clear: the Taiwanese authorities very much wish to achieve convictions and sentences for the appellant's alleged absconding and use of another's passport. They made two requests for the appellant's extradition for those alleged offences in terms of the MOU, although, as Sheriff McFadyen ruled on 9 October 2017, the MOU did not extend to accusation offences. In their submissions before Sheriff McFadyen (submissions

which were rejected), they sought to argue that their request for extradition for absconding using another's passport was "ancillary to the original request, which referred to the [appellant] absconding … [which] should be treated as a breach of bail": see the sheriff's judgment of 9 October 2017 paragraph 22. It is perhaps indicative of Taiwan's position in relation to those alleged offences that this court's request of Tuesday 6 November 2018, referred to in paragraph [13] above, did not produce a written confirmation of the withdrawal of the live absconding and passport prosecution – a withdrawal which would acknowledge the primacy of international obligations.

[64] It will be seen from the above that, even with the web of assurances referred to by senior counsel for Scottish Ministers, I do not accept that there are effective specialty arrangements in place to satisfy the mandatory statutory conditions set out in section 95 of the 2003 Act. Accordingly in my opinion the appellant succeeds in terms of section 109(4) of the 2003 Act, in that:

(a) an issue is raised that was not raised when the case was being considered by [Scottish Ministers] or information is available that was not available at that time;

(b) the issue or information would have resulted in [Scottish Ministers] deciding a question before [them] differently;

(c) if [they] had decided the question in that way, [they] would not have ordered the person's extradition.

The issue raised that was not raised when the case was being considered by Scottish Ministers is the very important issue that, unknown to Scottish Ministers on 1 August 2014, and even with all the post-decision letters of assurance dated December 2017, January and February 2018, the appellant is at risk of the live prosecution for absconding and use of another's passport being taken to its conclusion with a possible sentence on conviction of 9 years

(which might run consecutively to the 4-year sentence) bringing out a total of 13 years, instead of the 4 years or fewer understood by Scottish Ministers as at 1 August 2014. The assurances and protections concerning prison and other conditions were given by Taiwan only in relation to the offences for which a sentence of 4 years in total was imposed. The assurances did not, and do not, extend to any sentence imposed in respect of any other offence. The risk of the continuing prosecution proceedings for absconding using another's passport (a risk unknown to Scottish Ministers as at 1 August 2014) meant that Scottish Ministers, by ordering the appellant to be extradited to Taiwan, were wholly unaware that in so doing they might be acting in breach of the mandatory terms of section 95 in that there were, as at 1 August 2014, no effective speciality arrangements with Taiwan which would eliminate that risk, and currently (in 2018-2019) despite the letters of assurance, there are no such speciality arrangements. Scottish Ministers would undoubtedly have sought to comply with the terms of section 95 of the 2003 Act, and accordingly the issue raised would have resulted in Scottish Ministers deciding the question before them (viz whether or not to extradite the appellant) differently, namely by finding the appellant's extradition "barred by reason of speciality" on the ground that there were no effective speciality arrangements which would prevent the appellant being dealt with for the alleged absconding and passport offences.

The interests of comity and reciprocity

[65] The conclusion reached above is sufficient for the resolution of this appeal. However it was suggested that the MOU (particularly paragraph 11(1)(b)) and the letters of assurance are open to alternative constructions, and it was submitted on behalf of Scottish Ministers and the Lord Advocate that the interests of comity and of reciprocal international relations require

a construction such that, where any wording might appear to be ambiguous or unclear, that wording should be construed in favour of Taiwan (accepted by the UK as a friendly territory). As noted in paragraphs [48] and [61] above, I have already dealt with that submission in particular contexts. However it may be appropriate that I give more general views on the matter.

[66] My first observation is that the MOU is not, in my opinion, "reciprocal" in the sense used in *Deya* v *Kenya* [2008] EWHC 2914 (Admin); *Patel* v *India* [2013] EWHC 819 (Admin); and *RO* [2018] EUECJ C-327/18 PPU 19 September 2018. The MOU is a unique, one-way agreement relating to one individual alone, namely the appellant, to be extradited to Taiwan. A "reciprocal" agreement normally involves some *quid pro quo,* a like-for-like service (for example, the Taiwanese authorities agreeing to extradite to the UK any person in Taiwan accused of having committed a crime in the UK; the UK authorities agreeing to extradite to Taiwan any person in the UK accused of having committed a crime in Taiwan). No such reciprocal arrangement has been agreed: the only person who is the subject of the MOU is the appellant, and the extradition is one-way (to Taiwan). Any observations concerning the strong public interest in promoting and maintaining the rule of law by means of extradition must be read in that unusual, and possibly unique, context.

[67] Secondly, a belief in good faith and the desire to enhance cordial relations cannot, in my view, alter the plain meaning of the MOU and the letters of assurance when properly construed, all as set out earlier in this opinion.

[68] Thirdly, submissions were presented to the court relating to the criteria in *Othman* v *United Kingdom* ((2012) 55 EHRR 1). In that context, and focusing upon the assurances given by Taiwan *following upon* the decision of the Supreme Court on 28 June 2017, it is my position that even if I was satisfied that the *Othman* criteria were fulfilled in every respect, that would

not assist in resolving the problems and difficulties outlined above. As it happens, I am not persuaded that the criteria are satisfied, and in deference to counsel's submissions, I now give my reasons.

[69] The seventh criterion is in the following terms:

> "(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."

[70] As already noted, the MOU is a unique agreement relating to the extradition of one individual only (the appellant) in one direction only (to Taiwan). The MOU is not "reciprocal" in the sense used when two or more states make extradition arrangements with each other which have a general application and will result in persons being returned to each state. Moreover the United Kingdom has given international recognition to mainland China, not to Taiwan. There is no formal diplomatic or consular presence in Taiwan, although there is what is known as a British Office in Taipei. Taiwan does not feature in the United Kingdom's standard extradition treaties, arrangements and legislation. Taiwan is not listed as a Category 1 or a Category 2 country in the Extradition Act 2003. Taiwan is not a signatory to an international convention such as the European Convention on Extradition (contrast with Albania in *Cokaj*). At no time in the history of its existence to date has Taiwan achieved the extradition to Taiwan of a United Kingdom citizen (or indeed anyone of any nationality). The United Kingdom has never before entered into an extradition treaty or agreement with Taiwan (in contrast with, for example, India in the case of *Patel*).

[71] In these circumstances there is little upon which to base "the length and strength of bilateral relations between the sending and receiving states". As for "the receiving state's record in abiding by similar assurances", there is no record. What is sought in the present case has never before been achieved. The difficulties which have arisen may be attributable to some extent to different outlooks, failures in communication, and subtleties of language

and translation. But one matter seems clear: Answer 8 in the Director General's letter of 12 January 2018 (which, importantly, was issued *after* the Supreme Court's decision of 28 June 2017), does not appear to acknowledge the supremacy of international obligations over domestic law in the interests of comity. In my opinion, Answer 8 suggests that Taiwan considers that there is room for the imposition of domestic law conditions (payment of £280,000 and a public apology in order to satisfy Article 269 of the Code of Criminal Procedure such that the prosecutor is "enabled" to withdraw the absconding prosecution) before compliance with any international obligation. Such an approach gives rise to a loss of confidence in the context of extradition. Even if some other interpretation of the letters of assurance might be thought possible, the letters are too ambivalent and ambiguous to provide the necessary comfort in the context of speciality.

[72] For my part, there have been other losses of confidence in this case. Examples include the following. (i) The still unexplained apparent omission to advise the UK government about the existence of the absconding prosecution (raised in March 2013) in the course of negotiations leading to the MOU (signed on 16 October 2013), or when making the first request for extradition (the letter of 28 October 2013), or when providing the letter of assurance relating to speciality dated 25 July 2014. (ii) The fact that it took pointed questions and/or requests from the bench to obtain (a) some basic knowledge about the existence of the live absconding prosecution against the appellant; (b) more information about that prosecution, including (ultimately) a copy of the indictment to allow the court to identify what offences were charged; and (c) information about the maximum sentences which could be imposed upon the appellant in respect of the absconding prosecution. (In that context, Dr Chang's evidence in November 2018 that a maximum of 9 years could be imposed, which 9 years could – if the judge was so minded – be made to run consecutively

to the balance of the 4-year sentence for the road traffic matters, came as a significant revelation when compared with the maximum of 3 years envisaged in Scottish Ministers' report to the court dated 23 January 2015). (iii) The discovery made for the first time by Dr McManus in 2015, when visiting Taipei Prison, that time served in a Scottish prison would not count towards parole in Taipei Prison – a matter which had somehow not been made clear before his visit (see *Dean* v *Lord Advocate* 2016 SLT 1105 paragraph [11] *et seq).* (iv) There was the episode following upon the decision of the Supreme Court on 28 June 2017 when the Taiwanese press apparently misunderstood an announcement made to them by the Taiwanese Deputy Minister of Justice concerning the prison conditions in which the appellant would be held, and the Director General's subsequent categorisation of the appellant's prison conditions (which had been specially arranged for the appellant and which were described in considerable detail by the Supreme Court in a public judgment available to all on websites), as being contained in "a confidential document", the contents of which could only be disclosed by three people (see the Director General's letter to the Lord Advocate dated 6 December 2017) – an approach which seemed inappropriate for such well-publicised prison arrangements.

[73] The eighth criterion is as follows:

> "(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."

[74] The UK does not have a formal consular presence in Taiwan. The staff at the British Office appear to be limited in what they can achieve (see paragraph [56] of *Dean* v *Lord Advocate* 2016 SLT 1105). My notes of an earlier hearing on 3 September 2015 disclose that the bench (Lord Eassie, myself, and Lord Drummond Young) was advised by senior counsel for the appellant that staff at the British Office had co-operated fully with the Lord

Advocate's witness Dr McManus during his visit to Taiwan in 2015, but had not provided assistance to the appellant's lawyers. Taiwan is not a member of the European community, and is not a signatory to the European Convention on Human Rights, the European Convention on Extradition or the European Committee for the Prevention of Torture. On the information presently available to this court, I am not persuaded that the eighth criterion is satisfied.

Conclusion

[75] For the reasons given in this opinion, I am persuaded that the provisions of sections 109(3) and 109(4) are satisfied. I propose therefore that the appeal be allowed, that the appellant be discharged, and that the order for his extradition be quashed.

Postscript

[76] I have read the opinion of Lord Drummond Young. As already noted, while agreeing with many of the principles set out in that opinion, I am unable to agree with the conclusion, for the reasons given in this opinion. I would make the following additional observations: (i) In paragraphs [109] and [111], Lord Drummond Young notes that the conditions (namely withdrawal of the appellant's appeal so that extradition can proceed; payment of compensation to the victim's father; and a public apology) are clearly inconsistent with the principle of speciality, giving rise to a serious question whether the speciality doctrine would be observed in the event of extradition. I agree. Where we differ is that I am not persuaded that the subsequent letters, properly construed, clearly disavow those conditions. Indeed answer 8 of the letter dated 12 January 2018 [B37] appears to confirm and endorse those conditions. (ii) In relation to knowledge about the existence of a live prosecution for

absconding, it is my opinion that it was a matter for the requesting state (Taiwan) to advise the UK and then Scottish Ministers of that prosecution when, respectively, entering into the unique extradition agreement, and making the request for extradition. (iii) Ministers and courts in the UK have no option but to apply the provisions of the Extradition Act 2003, regardless of any perception or understanding held by a requesting state.

[77] I have read the opinion of Lady Clark and agree with that opinion.

APPENDIX

Taiwan's letters of explanation, undertaking, and assurance provided in December 2017, January and February 2018

[78] Following upon Sheriff McFadyen's judgment of 9 October 2017, the Taiwanese authorities provided several letters:

> *Letter dated 6 December 2017* [B19] The letter is from Tsai Chiou-Ming, Director General of the Department of International and Cross-Strait Legal Affairs, on behalf of the Ministry of Justice, and is addressed to the Lord Advocate. For present purposes, the main points (paraphrased) are:
>
> - The appellant was indeed indicted for absconding on 8 March 2013. The proceedings have been suspended meantime.
> - It is Taipei District Court which is in charge of the trial proceedings, not the Ministry of Justice.
> - The prosecuting authority may only withdraw the absconding indictment if certain conditions are met, namely (i) the appellant's physical presence in Taiwan; (ii) the withdrawal of the appellant's extradition appeal in the High Court of Justiciary, Scotland; (iii) payment by the appellant of compensation (of about £280,000) to the father of the deceased victim in the road traffic accident; (iv) a public apology by the appellant expressing his remorse for his misconduct.
>
> At page 5 of the letter, there is a passage apparently undertaking (1) to abide by the principle of "specificity" stipulated in the MOU and "elaborated" in Sheriff McFadyen's decision, and (2) not to "take advantage of [the appellant's being extradited to Taiwan] to pursue him on the absconding case unless Taiwan has a fresh MOU with the UK or obtain a new consent from the Scottish Ministers". That passage is, in my opinion, of little assistance as (a) paragraph 11 of the MOU is flawed, as explained in my opinion; (b) Sheriff McFadyen's decision does not elaborate on the principle of speciality; and (c) taking "advantage … to pursue [the appellant] on the absconding case" apparently refers to a fresh prosecution on the basis of a fresh MOU or new Scottish Ministers' consent, but does not unambiguously deal with the existing absconding prosecution which may only be withdrawn if conditions (i) to (iv) above are satisfied.
>
> The letter also deals with an apparent misunderstanding between the press and the Deputy Minister on the day following upon the issuing of the Supreme Court's decision on 28 June 2017 ([2017] 1 WLR 2721, 2017 SLT 773). In that misunderstanding, the Deputy Minister was reported by the press as announcing that "Dean will be placed in Taipei Prison's new wing once he is extradited to Taiwan". The new wing had been constructed following upon the Inner House decision (2016 SLT 1105) critical of the conditions in Taipei Prison. The inference drawn from the Deputy Minister's statement as reported by the press was that the appellant would not in fact be placed in the specially-created cell described and accepted by the

Supreme Court, but would be placed in the newly-constructed wing, which the Supreme Court had not had an opportunity to consider. The letter of 6 December 2017 explains that the Minister had made no such statement, and points out at pages 4 and 5:

> "We would like to emphasize that the assurance of Dean's prison condition is a *confidential* document in the MOJ, and only a few officials, namely Minister, Deputy Minister, Director General of the Department of International and Cross-Strait Legal Affairs, are authorized and competent to disclose it on behalf of the MOJ … the assurance of Dean's prison condition is all seemed [*sic*] as a *confidential* document in the MOJ … [emphasis added]"

Letter dated 12 December 2017 [B20]: The letter is from Tsai Chiou-Ming, Director General of the Department of International and Cross-Strait Legal Affairs, on behalf of the Ministry of Justice, and is addressed to the Lord Advocate. It seeks to clarify the letter of 6 December 2017. For present purposes, the main points (paraphrased) are:

- The prosecuting authority may only withdraw the absconding indictment if certain conditions are met, namely (i) the appellant's physical presence in Taiwan; (ii) payment by the appellant of compensation (of about £280,000) to the father of the deceased victim in the road traffic accident; (iii) a public apology by the appellant expressing his remorse for his misconduct.
- If the prosecuting authority persisted in the absconding prosecution, the judge in charge of the case would need a new MOU in order to abide by the speciality doctrine, before the case goes forwards. But if the UK declined to enter into a new MOU, the prosecution authority "has to consider the seriousness of Mr Dean's offence (absconding is classified as a misdemeanor, not a felony), its damage and our undertaking for conforming the Specialty Doctrine to decide whether to withdraw the indictment".

On page 3 of the letter, it is emphasised that "whether or not Mr Dean is extradited back to Taiwan can make a great difference as to whether the withdrawal requirement can be fulfilled …".

Letter dated 12 January 2018 [B 37]: The letter is from Tsai Chiou-Ming, Director General of the Department of International and Cross-Strait Legal Affairs, on behalf of the Ministry of Justice, and is addressed to the Lord Advocate. It answers 8 questions posed by the court on 11 January 2018. In the following summary, the court's questions have been inserted for ease of reference, and the answers are noted *verbatim.*

> Q1: Following upon Sheriff McFadyen's decision, what steps (if any) have been taken, or are intended to be taken, to apply for a new Memorandum of Understanding on the absconding charge?
>
> A1: Following Sheriff McFadyen's decision, the MOJ has no intention of taking any steps to apply for a new Memorandum of Understanding (MOJ) on the

absconding charge. I give an undertaking that the MOJ will not apply for a new MOU of extradition on Mr Dean's absconding charge.

Q2: To what extent would:

a. The acquisition of a new memorandum of understanding
b. The failure to acquire a new memorandum of understanding,

affect the proceedings for absconding (currently suspended in Taiwan)?

A2: The effect of not seeking a new MOU is that Taiwan recognizes that there is no provision entitling it to prosecute Mr Dean for the offence of absconding in keeping with the doctrine of specialty, and that it has no right to do so. This follows from the ruling of Sheriff McFadyen. There is however an existing prosecution for absconding which was begun on 8th March 2013 and which is currently suspended in the Taipei District Court. The decision whether or not to proceed with that prosecution lies under Taiwanese law with the prosecutor. The Chief Prosecutor has written to the court in Edinburgh undertaking to withdraw that prosecution as set out in his letter of even date.

Q3: On what date was a decision taken to prosecute Mr Dean for the absconding offence?

A3: Taipei District Prosecutors Office made a decision to prosecute Mr Dean for the absconding offence on 8 March 2013.

Q4: On what date did the prosecution put the prosecution indictment to a court in Taiwan?

A4: The prosecution indictment (or formal charge) was filed with Taipei District Court on 18 March 2013.

Q5: In the event that there is a new Memorandum of Understanding, what would the Taiwanese government wish the Memorandum of Understanding to say about "speciality"?

A5: Question 5 posed by the court does not apply because there will be no new MOU. The Chief Prosecutor of Taipei District Prosecutors Office, SHING Tai-Chao, has submitted an undertaking to withdraw the indictment when Mr Dean is extradited to Taiwan for service his sentenced term of the driving case. The undertaking will enable Taipei District Court to close definitively the pending absconding case. This undertaking has been given in order to comply with the Specialty Doctrine.

Q6: How would it be possible for the Taiwanese government to stop the absconding proceedings when it is the prosecutor alone who has the discretionary power to do so?

A6: Question 6 has been answered above.

Q7: Do the Taiwanese authorities wish further time from this court to allow them to try to achieve a new Memorandum of Understanding before any final decision is given by this court; and if not, why not?

A7: The Taiwanese authorities do not wish further time.

Q8: What appeal is being referred to in the second last paragraph of page 6 of the letter of 6 December 2017 from the Director General to the Lord Advocate?

A8: In answer to Question 8, the appeal referred to in the penultimate paragraph of page 6 of the letter of 6th December 2017 is the current appeal against the First Request decisions. The paragraph was intended to convey that if Mr Dean withdrew his current appeal thereby allowing the extradition to proceed, paid compensation to the victim's father, expressed remorse and apologised, his conduct would enable the prosecution authority to withdraw the absconding charge because the conditions enabling this would have been fulfilled under article 269 of the Code of Criminal Procedure.

Additional paragraph 9: The Taiwanese authorities do not regard the undertakings given in connection with the absconding charge as compromising the integrity of its judicial system. By comparison with the driving manslaughter case, the absconding charge is less serious. These extradition proceedings can be simplified by withdrawing the charge.

Letter dated 12 January 2018 [B38]: The letter is on unheaded notepaper, without an official seal, bears to be from Shing Tai-Chao, Chief Prosecutor, Taipei District Prosecutors Office, and is addressed to Lady Paton (i.e. myself) as follows (a *verbatim* quote):

"Dear Your Honour,

On behalf of Taipei District Prosecutors Office, Republic of China (Taiwan), which is the competent public prosecution service for the case against Mr Zain Taj Dean for his absconding offence, we hereby extend our undertaking regarding Mr Dean's above-mentioned case as follows:

We hereby undertake that we will be bound by the Specialty Doctrine set out in the first extradition MOU and elaborated in the decision rendered by Judge McFadyen, the presiding judge with Edinburgh Sheriff Court, on the extradition request for the absconding case. Once Mr Dean is extradited back to Taiwan, Taipei District Prosecutors Office will, in accordance with the Code of Criminal Procedure, withdraw the indictment of which the proceedings are suspended in Taipei District Court due to Mr Dean's absence from trial in Taiwan. As long as the indictment is withdrawn, the criminal proceedings for the absconding case will come to an end, and Taipei District Court shall close the case definitively.

Please feel free to raise further inquiries if you might have any. My colleagues and I will be happy to response to them. Again, on behalf of the Taipei District Prosecutors Office, we ensure that the undertakings mentioned above will be performed when Mr Dean is extradited back to Taiwan. Thank you very much,

Sincerely yours,
(signed) Tai-chao, Hsing [*sic*]
SHING Tai-Chao
Chief Prosecutor
Taipei District Prosecutors Office
Republic of China (Taiwan)

Certain features of the letter may be noted:

1. There is no reference to the other letters of assurance which specified conditions precedent of withdrawal as payment of £280,000 and a public apology.
2. It is not clear whether a letter from a Taiwanese prosecutor to a Scottish judge (neither being members of the respective governments) would have effect in Taiwan.
3. Paragraph 11 of the MOU (Speciality) contains a significant ambiguity: thus the reference to "the Speciality Doctrine set out in the first extradition MOU" is of less assistance than might otherwise be the case.
4. The doctrine of speciality was not "elaborated" in the decision by Sheriff McFadyen. That *ratio* of that decision is that the MOU deals only with conviction offences: the alleged absconding and passport offences are accusation offences, not covered by the MOU, and the Scottish Ministers' attempt to grant consent to extradition for the alleged absconding and passport offences was *ultra vires* principally for that reason (although there may be other reasons).
5. The writer appears to accept that Taiwan is bound by the speciality doctrine, and thus that the appellant cannot currently be prosecuted for any alleged offence of absconding. However the writer also indicates that the prosecution for absconding cannot be withdrawn until the appellant is physically present in Taiwan. Furthermore withdrawal of the absconding proceedings would have to be "in accordance with the Code of Criminal Procedure", which appears to allow for a measure of discretion on the part of the prosecutor. For example, articles 269, 253, and 376 of the Taiwan Code of Criminal Procedure are in the following terms: article 269: If a prosecutor [considers it is appropriate not to prosecute, he may withdraw the prosecution]; article 253: If a public prosecutor considers it appropriate not to prosecute a case specified in article 376 [i.e. offences with a maximum punishment of no more than 3 years imprisonment, detention, or a fine only] after having taken into consideration the provisions of article 57 of the Criminal Code, he may make a ruling not to prosecute; article 57: Sentencing … special attention shall be given to
[factors 1 to 10, including the offender's attitude after committing the offence]".
That element of discretion seems out of place in the implementation of an international obligation.

6. If the prosecutor found himself unable to withdraw the live prosecution "in accordance with the Code of Criminal Procedure", that prosecution could arguably be transferred to another court on the view that the above letter, as a matter of law, prevented the prosecution from continuing in Taipei District Court.
7. The writer appears to sign his name "Hsing": however the typed version of the name is "Shing". It is possible that any obligations purportedly undertaken in the letter typed on unheaded notepaper, without a seal, with an apparently defective signature, would not be accepted in Taiwan as a binding and enforceable obligation on the prosecution authorities in Taipei and elsewhere.

Letter dated 12 January 2018 [B39]: The letter is from Tsai Chiou-Ming, Director General of the Department of International and Cross-Strait Legal Affairs, Ministry of Justice, and is addressed to the Lord Advocate. For present purposes, the main points (paraphrased, except where shown to be direct quotations) are:

- Only three people (the Minister, Deputy Minister and the Director General himself) are "authorized and competent to comment publicly on behalf of the MOJ about Dean's prison conditions".
- Referring to the content of the letter dated 6 December 2017, it is explained that "[i]t was not intended to suggest that the matters, including specified arrangements, which were fully discussed and adjudicated upon by the UK Supreme Court were somehow not fully in the public domain. This is obviously not the case … To that extent the use of the word 'confidential' was mistaken and imprecise".
- "The assurances given in relation to Dean's prison conditions are set out in restricted documents within the MOJ's internal organization. This limits disclosure among related staff authorized to deal with the relevant matters. Persons not specifically authorized by the MOJ to speak publicly about the arrangements do not represent the MOJ's position. Dean's specially arranged cell and other arrangements have not been widely publicized within Taiwan, and are controversial. The publication of the letter of undertaking which appeared in the press in Taiwan in May 2014 was unauthorized: it was leaked."
- "Only duly authorized persons are empowered to provide official interpretation, comments or related remarks on the special arrangements being made for Dean, especially when responding to questions raised by the media".

Aspects of the letter dated 12 January 2018 are puzzling. So far as this court is aware, the special arrangements for the appellant's cell have indeed been "widely publicized within Taiwan". Those special arrangements have provoked fury and outrage on the part of the Taiwanese public and in particular the family of the deceased victim in the road traffic accident. The angry reaction of the public to those special arrangements are noted in this court's opinion (*Dean v Lord Advocate* 2016 SLT 1105, paragraphs [38], [48], and [54]), and was a major factor contributing to the court's concern about the appellant's safety if extradited to Taipei prison. It is also of note that a suggestion that the Taiwanese MOJ might use the word "confidential" inappropriately tends to

highlight the possible linguistic and communication difficulties in a case such as this.

Letter dated 12 February 2018 [B40]: The letter is from Tsai Chiou-Ming, Director General of the Department of International and Cross-Strait Legal Affairs, Ministry of Justice, and is addressed to the Lord Advocate. For present purposes, the main points (paraphrased, except where shown to be direct quotations) are:

- Two areas had jurisdiction to prosecute the appellant for absconding, namely Taipei (where the appellant lived) and Taoyuan (where the airport is situated). Only a single absconding prosecution could be raised. The power was exercised by the Taipei prosecutor in March 2013. "As there can only be one prosecution for any given offence, his exercise of the power operated to exclude the Taoyuan Prosecutor from initiating criminal proceedings against Dean for absconding … Any hypothetical fresh prosecution of Dean for absconding after the present proceedings had been dismissed upon withdrawal by the Taipei prosecutor would infringe those provisions and not to be permitted to proceed."
- "The second matter I have been asked to clarify is whether the exclusive jurisdiction of the Taipei prosecutor to prosecute Dean for absconding could be transferred by order of a superior court out of the Taipei district court to a different district court and a different prosecutor.

  The exercise by the superior courts of Taiwan of the power to order transfer from one district court to another is confined by Art.10 of the Criminal Code to circumstances where the original court is either unable to exercise its judicial powers because of a matter of law or fact, or where, exceptionally, a trial convened in the original court is considered likely to give rise to unfairness or public disturbance. There are no other circumstances in which transfer can be ordered. The conditions for a transfer of jurisdiction from Taipei District Court are not satisfied in Dean's case. Given the terms of Taiwan's binding international obligations to withdraw the prosecution, there is no real prospect that they ever can be. Jurisdiction remains in Taipei District Court and not be transferred …"

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 31
HCA/2018-3519/XM

Lady Paton
Lord Drummond Young
Lady Clark of Calton

OPINION OF LORD DRUMMOND YOUNG

in

APPEAL UNDER SECTION 108 OF THE EXTRADITION ACT 2003

by

ZAIN TAJ DEAN

Appellant

against

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

Respondents

Appellant: Bovey QC, Haddow, Harvey; G R Brown Solicitor
First Respondent: D Dickson (sol adv); Crown Office
Second Respondents: Moynihan QC, Charteris; Scottish Government Legal Directorate

6 June 2019

[79] The Scottish Ministers have ordered the appellant's extradition in accordance with Part 2 of the Extradition Act 2003, and the appellant has appealed against their order in accordance with section 108 of that Act. I am grateful to your Ladyship in the chair for setting out the general background to the appeal. In my opinion the appeal should be

dismissed in accordance with section 109(1)(b) of the Act. My reasons for this conclusion are as follows.

General considerations

[80] In the first place, I should repeat certain of the general policy considerations that in my opinion are fundamental to the law of extradition. These are set out more fully in my dissenting opinion in the section 103 appeal, but they are equally applicable to the section 108 proceedings. First, extradition is of obvious importance for maintaining the rule of law at a national and an international level. Consequently, I consider that if a request for extradition conforms to the standard requirements of double criminality and specialty and comes from a country where the rule of law is respected, it should normally be given effect, provided that it is supported by adequate evidence of criminal behaviour. Secondly, the Memorandum of Understanding between the United Kingdom and the Republic of China (Taiwan) dated 16 October 2013 forms the legal basis for Scottish Ministers' decision to extradite the appellant; it creates special extradition arrangements for the purposes of section 194 of the Extradition Act 2003, which are a necessary condition of a decision to extradite to a territory that is neither a category 1 territory nor a category 2 territory. The Memorandum is not an international treaty in the strict sense of the word, nor for the purposes of the Extradition Act 2003. Nevertheless it is an agreement concluded at an international level between the United Kingdom and Taiwan. Taiwan is a "territory" for the purposes of the Extradition Act 2003, and it has a functioning legal system and effective government. Thus the essential requirements of an agreement between territories, and thus at an international level, are prima facie satisfied. Subsequent assurances that had been given by the Taiwanese authorities have been given by governmental bodies, notably the

Ministry of Justice and the Chief Prosecutor of Taipei District, and in my view each of those assurances should be treated as validly given by the authority that bears to have given it. Thirdly, the decision as to whether to enter into an extradition agreement is for the executive branch of government, in the case of extradition the Home Secretary. The courts should in my opinion show proper respect for the decision of the Home Secretary to enter into an agreement with another country or territory.

[81] The fourth of the general policy considerations is of particular importance in the present appeal. This is that, when the United Kingdom has entered into an extradition agreement or arrangement with a foreign state or territory, the court should assume that the requirements of the agreement or arrangement, together with any supplementary undertakings, will be observed in good faith by the authorities of that state or territory. That is the fundamental basis upon which extradition proceeds. This has been recognized in a number of cases; in the section 103 proceedings I made reference to the opinions of Dyson LJ in *Deya* v *Government of Kenya*, [2008] EWHC 2914 (Admin), at paragraph 40, and Lord Brown of Eaton-under-Heywood in *Gomes* v *Government of Trinidad and Tobago*, [2009] UK HL 21; [2009] 1 WLR 1038, at paragraph 36. The importance of good faith was further recognized in the judgment of Lord Hodge in the subsequent appeal to the UK Supreme Court, *Lord Advocate* v *Dean*, 2018 SC (UKSC) 1, at paragraphs [36] and [38]. At paragraph [36] Lord Hodge stated:

> "In agreement with the judges of the Appeal Court, I proceed on the basis that the judicial authorities of Taiwan are acting in good faith in entering into the memorandum of understanding and in giving the assurances which they have. I also agree with the judges of the Appeal Court in so far as they proceeded on the assumption that the Taiwanese authorities responsible for the management of Taipei prison would make every effort to fulfil those undertakings.… The UK Government has chosen to enter into extradition treaties with friendly foreign states or territories giving rise to mutual obligations in international law. In Gomes v Government of Trinidad and Tobago, Lord Brown stated (para 36)

> 'The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multi-lateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations'.
>
> The Lord Advocate acknowledges that the memorandum of understanding does not have the status of a treaty enforceable in international law. That notwithstanding, there remains a strong public interest in promoting and maintaining the rule of law by means of extradition".

Thus the courts must proceed on the basis that the requirements of an extradition agreement or arrangement will be observed in good faith. I give further consideration to this principle in the context of international law at paragraphs [84] and [85] below. At paragraph [38], Lord Hodge mentions the role of consular staff in monitoring assurances given by the Taiwanese authorities. The same point clearly applies to ensuring that Taiwan observes the basic obligations contained in the extradition agreement, including the principle of specialty.

International law

[82] The critical question in the section 108 appeal is whether the appellant should be extradited to Taiwan in accordance with the request made by the Ministry of Justice of the Republic of China on 28 October 2013 (wrongly dated as 2014). That request was made pursuant to the Memorandum of Understanding that had been concluded between the Home Office of the United Kingdom and the judicial authorities of Taiwan concerning the extradition of the appellant. The Memorandum of Understanding had been concluded on 16 October 2013. I consider the detailed terms of the Memorandum of Understanding and the request subsequently. For present purposes, it is important to note that the Memorandum of Understanding is an agreement between the relevant authorities of two countries, and has force between the two countries as a matter of international law. It is not a treaty in the

technical sense of that word, but it has the status of an international agreement containing arrangements for extradition.

[83] The principles that govern the interpretation and, importantly for present purposes, the application of international agreements are well established. Those principles are binding on a Scottish court in so far as it requires to interpret or apply international law: compare *Al-Malki* v *Reyes*, [2017] 3 WLR 923, at paragraph 10 per Lord Sumption. The rules for the interpretation of treaties are laid down in the Vienna Convention on the Law of Treaties, of 1969. Although the Convention applies in its terms to "treaties", it incorporates well established principles of customary international law, and in my opinion it is clear that the principles stated in the Convention should apply to international agreements of all kinds, including special extradition arrangements concluded for the purposes of section 194 of the Extradition Act. Article 31(1) of the convention provides as follows:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

The principles of purposive and contextual interpretation are familiar in Scots law. Indeed it is difficult to understand how any rational legal system could fail to construe legal texts in their context, both legal and factual. A purposive interpretation means that the substance of the legal text under consideration must be given effect, having regard to its main objects but without undue regard to niceties of wording or pedantic literalism. The text itself is of course the primary document, as is made clear in *Al-Malki* at paragraph 11, but that text is to be construed in a practical manner that has regard to both its purposes and its context.

[84] Article 31 also indicates that a treaty must be interpreted in good faith. The concept of good faith is on occasion said not to be a principle applicable to the construction of contracts in the Scots or, especially, English domestic law of contract. This is I think true up

to a point. When parties are negotiating an agreement, there is obviously a duty of honesty, but except in special cases, for example involving agency or mandate, there is no duty on one party to disclose to the other circumstances that might be to the latter's detriment. Once an agreement is concluded, however, there is a duty to implement the terms of that agreement, construed in a purposive and contextual manner, and that duty verges on a duty of good faith. This is perhaps especially true of Scots law, where its civilian antecedents point towards a duty of good faith in implementing a contract. The origins of customary international law lie in Dutch and German writers of the 17th century, notably Grotius' *De Jure Belli ac Pacis* of 1625. Those writers were heavily influenced by Roman law, and it can be said that modern Scots law, through jurists such as Stair, is derived from the Roman Dutch law of the 17th century. The importance of good faith in customary international law is clearly established.

[85] Good faith in this context is perhaps incapable of comprehensive definition. Its important features, however, do appear fairly clear. The principal meaning is that the parties to an international agreement should implement its main purposes and objectives, construed in a practical manner. Regard should be had to the primary substance of the agreement rather than the details of its wording; a pedantic approach to the wording used should not permit a party to escape implementation of its fundamental obligations under the agreement. Good faith also requires that the legitimate expectations of the parties to an agreement should be respected. This is not to suggest that legitimate expectations are a source of obligation in the same way as the terms of the agreement. They are rather a factor – an important one – in the exercise of construing those terms and determining what the terms require by way of implementation or performance. In effect, the terms must be construed in such a way that they achieve what the parties might reasonably have expected

when they concluded the agreement. In addition, the concept of good faith permits consideration of the question of abuse of rights or abuse of process – whether one party to the agreement is attempting to use its provisions to oppress or unfairly to prejudice the other. Abuse of rights is difficult to define, but the element of unfairness will usually be clear, even in a case where there is strictly literal compliance with the terms of the agreement.

[86] The United Kingdom adopts a dualist theory of international law: international law is only enforceable in the domestic courts in so far as it has been incorporated into national law. The relevant principle is expressed in what is perhaps the leading Scottish case in this area, *Mortensen* v *Peters*, 1906, 8 F 93, in the following terms (per LJ G Dunedin at 100-101):

> "In this Court we have nothing to do with the question of whether the Legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed… is supreme, and we are bound to give effect to its terms."

In relation to extradition, international extradition agreements receive statutory effect through the Extradition Act 2003, in the case of the Memorandum of Understanding through section 194 of the Act. For the purposes of the Act, Taiwan is treated as if it were a category 2 territory, and thus extradition is governed by part 2 of the Act, which includes sections 108 and 109. Nevertheless, in giving effect to an extradition agreement, a Scottish court must have regard to the principles of construction applied in international law: see the principles adopted in *Al-Malki* v *Reyes*, *supra*, at paragraphs 10-12. The Memorandum of Understanding, and all supplementary assurances, must accordingly be construed in accordance with the foregoing principles for the construction and application of international agreements. Moreover, in applying those documents, the court must 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. That proposition respectfully appears to me to apply to all arrangements for extradition, as a matter of elementary common sense.

Specialty

[87] The principle of specialty (spelled "speciality" in the legislation) is a fundamental aspect of the law of extradition. Put shortly, it prevents a state or territory requesting extradition from prosecuting the person extradited for any offence other than the offence or offences in respect of which extradition is granted, or another offence that is disclosed by the facts of the extradition offence. Scottish Ministers are empowered to consent to the prosecution of the person extradited for another offence, but that does not limit the fundamental principle; in any event, for reasons discussed subsequently, I consider that any such decision by Scottish Ministers would be subject to judicial review by the High Court.

[88] The legislation governing specialty in respect of category 2 territories is found in section 95 of the 2003 Act. Section 95(1) provides, so far as Scotland is concerned, that Scottish Ministers must not order a person's extradition to a category 2 territory if there are no specialty arrangements with the relevant territory. Subsections (3) and (4) then provide:

> "(3) There are speciality arrangements with a category 2 territory if (and only if) under the law of that territory or arrangements made between it and the United Kingdom a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if –
>
> (a) the offence is one falling within subsection (4), or
> (b) he is first given an opportunity to leave the territory.
>
> (4) The offences are –
>
> (a) the offence in respect of which the person is extradited;

> (b) an extradition offence disclosed by the same facts as that offence…;
> (c) an extradition offence in respect of which [Scottish Ministers consent] to the person being dealt with;
> (d) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence."

[89] The Memorandum of Understanding of 16 October 2013 makes express provision for specialty, in paragraph 11. This provides as follows:

> "Speciality
>
> 1. Zain Dean may not be dealt with in Taiwan for any offence committed before extradition except for:
>
> (a) the offence in respect of which he has been extradited;
> (b) an offence disclosed by the information provided by Taiwan in respect of that offence; or
> (c) an offence in respect of which consent to his being dealt with is given by the UK."

It is apparent that the wording of paragraph 11 differs somewhat from section 95(4) of the Act; instead of the statutory wording "an… offence disclosed by the same facts as [the extradition] offence", it refers to "an offence disclosed by the information provided by Taiwan in respect of [the extradition] offence". An important question for present purposes is whether the difference in wording abrogated the principle of specialty. For the appellant it was contended that it did abrogate that principle, and that consequently extradition should not have been ordered by Scottish Ministers. Counsel for Scottish Ministers, on the other hand, contended that the Memorandum of Understanding respected the principle of specialty.

The first extradition request

[90] The first extradition request from the Taiwanese government is dated 28 October 2013 (wrongly dated as 2014). Although subsequent requests were made (one of which I

discuss subsequently), this is the request that was granted by Scottish Ministers. The request refers to the Memorandum of Understanding and then gives what is described as a "Summary of Pertinent Facts". The summary states:

> "ZAIN TAJ DEAN was driving under the influence of alcohol… at around 5:00 am on March 25, 2010 and accidentally hit the victim [named], was driving a motorcycle…, causing the victim to fall with his motorcycle. Having known that he caused the accident, ZAIN TAJ DEAN failed to provide the victim with necessary first aid assistance or call the police. Instead, ZAIN TAJ DEAN drove his sedan away from the scene. The victim… was later sent to the hospital and died".

There follows a summary of the charges against the appellant. These were first, driving under the influence of drink contrary to a particular provision of the criminal code, secondly negligent manslaughter as indicated in a further provision of the criminal code, and thirdly, escaping after having caused traffic casualties as indicated in a third provision of the criminal code. It is then recorded that the Taiwan High Court had found the appellant guilty on all three counts on 26 July 2012, with sentences of six months, one year and four months and two years and six months respectively. Four years in total was to be spent in prison. It was narrated that appeals had been rejected.

[91] Particulars are then given of the appellant's absconding from Taiwan. This narrated his departure through Taoyuan International Airport using a friend's passport. The provisions of the criminal court code dealing with driving under the influence of alcohol, fleeing the scene of a traffic accident and negligently causing the death of another were then set out. It should be noted that all of those details relate to the offences connected with the traffic accident. On the basis of this document, it is in my opinion clear that the references to absconding and using a friend's passport are not given as part of the offences in respect of which extradition is sought, but rather as an explanation of why the Taiwanese authorities have applied to the United Kingdom for extradition.

Policy considerations

[92] In considering the argument presented on behalf of the appellant in relation to the Memorandum of Understanding, it is important in my opinion to have regard to the fundamental policy considerations that underlie the principle of specialty. The most helpful legal analysis of specialty is perhaps that found in the opinion of the court delivered by Lord Eassie in *Beggs* v *HM Advocate*, [2010] HCJAC 27, 2010 SCCR 681, at paragraphs [184]-[185] (cited with approval in *R* v *W (G)*, [2018] 4 WLR 129; [2018] EWCA Crim 1155, at paragraph 41):

> "[W]e have come to the conclusion that the specialty principle prevents a State to which a person has been surrendered from prosecuting that person for an offence different in its essential nature from the charge, or any of the charges, upon which he or she was extradited. The rule does not however have any effect, or operate any restriction, upon the evidence which may be deployed by the prosecutor in proof of the commission of the criminal conduct in respect of which the person was surrendered; and that is so even if the evidence so deployed discloses or suggests the commission of a criminal offence for which extradition was not granted by the sending state.
>
> We would add that these conclusions are, in our view, entirely consistent with the origins and rationale of the specialty rule. The rule is primarily one of international law. It is concerned with respecting the power of the extraditing State to refuse extradition and ensuring that in so far as that State has a discretion to refuse extradition, that discretion is not abused by the receiving State. Its principal purpose is thus to preserve comity between States, rather than effect a protection for the accused. Given that such is the primary purpose, it is in our view comprehensible that the rule should not be concerned with the nature of the evidence and procedure followed in prosecuting the extradition offence…"

[93] Three important points emerge from the foregoing passage. First, the principle of specialty is part of international law. That means that all states and territories that are party to international extradition arrangements can be expected to observe the principle. Secondly, the restriction on prosecution created by the principle of specialty is not to be regarded as a defence for an accused person. It is rather intended, as a matter of

international law, to respect the powers and authority of the extraditing state, as a matter of international comity. Thirdly, the principle is concerned with the identification of the charges in respect of which extradition is ordered, rather than the manner in which those charges may be proved. That is entirely consistent with the foundation of the principle in international comity between the state or territory requesting extradition and the state or territory acceding to the request. For present purposes this has two significant consequences. First, the requesting state can be expected to observe the requirements of international law, including the principle of specialty, as a matter of both legal obligation and good faith. Secondly, specialty is concerned only with the nature of the charges for which extradition is requested. It is not concerned with wider matters of evidence or narrative. This is in my opinion significant when the first request made by Taiwan is construed.

Good faith and principles of interpretation

[94] The authorities on extradition make it clear, first, that any extradition request will be subject to an overriding requirement of good faith, and secondly, that when an extradition agreement is given effect it is presumed that the requirements and conditions of the agreement will be observed in good faith. I have discussed the basic principle of good faith in relation to extradition requests at paragraph [81] above, including references to the main authorities, which include the decision of the UK Supreme Court in the present appellant's section 103 appeal, *Lord Advocate* v *Dean*, *supra*. 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. The principle of good faith as applied to extradition agreements and requests is merely an example of the general rule that international agreements must be

interpreted and applied subject to the requirement of good faith, discussed at paragraphs [84] and [85] above.

[95] In relation to the principle of specialty, the requirement and presumption of good faith means in my opinion that the requesting state must observe the spirit and purpose of the principle of specialty. That means that when a court construes the terms of an extradition agreement such as the Memorandum of Understanding in the present case, it must apply the concept of good faith to the task of construction and it must presume that the requesting state will observe that principle in dealing with the subject of the extradition request. In doing so, the requesting state is doing no more than observing its obligations in accordance with an important aspect of international law. Furthermore, in construing an extradition agreement and determining how it applies in practice, a court must also have regard to the principles of purposive and contextual interpretation, as discussed at paragraph [83] above.

Interpretation of the Memorandum of Understanding of 16 October 2013

[96] When the Memorandum of Understanding is construed in accordance with the foregoing principles, I am of opinion that it imposes substantially the same requirements as section 95(3) and (4) of the Extradition Act 2003. The Act refers to an offence "disclosed by the same facts as" the offence in respect of which extradition has been ordered. Paragraph 11 of the Memorandum of Understanding refers to an offence "disclosed by the information provided by Taiwan in respect of that offence". While the prepositional phrase "in respect of" can on occasion have a degree of ambiguity, any such concern is in my opinion conclusively removed by proper application of the principle of purposive and contextual interpretation and the principle of good faith.

[97] Specialty is a fundamental principle of the law of extradition as a matter of international law. It is a critical part of the context in which any extradition agreement will be concluded. It is accordingly unlikely in the extreme that the United Kingdom authorities, in concluding an extradition agreement with a foreign territory, would intend to exclude the principle. It is equally unlikely that any foreign territory concluding an extradition agreement with the United Kingdom would intend to exclude the principle. Moreover, when a purposive construction is applied to the Memorandum of Understanding, regard must be had to the substance of the text, to its main objects, without undue regard to pedantic literalism or niceties of wording. On that basis I am of opinion that the wording used in paragraph 11 of the Memorandum of Understanding is intended, as a matter of substance, to achieve exactly the same object as section 95(4)(b) of the Extradition Act. Specialty is an important – indeed essential – aspect of the law of extradition, and the purpose of paragraph 11 is plainly to ensure that the normal requirements of specialty will apply.

[98] Consequently, when paragraph 11.1(b) refers to the information provided "in respect of" the offence that is the subject of the extradition request, that obviously refers to the information that discloses the extradition offence: in this case, the offences of operating a motor vehicle while impaired by alcohol, negligently causing the death of another person; and thereafter fleeing the scene following an accident resulting in the death or injury of another person. The nature of those offences appears from the decision of Scottish Ministers of 1 August 2014 ordering the appellant's extradition to Taiwan. The decision in question would not cover other, distinct, offences, such as absconding or using another person's passport to flee Taiwan. It is obvious as a matter of common sense and elementary legal analysis that these are quite distinct offences. In my opinion it is clear that the purpose of

the extradition request, interpreted in the light of paragraph 11 of the Memorandum of Understanding, did not extend to any prosecution for those offences.

[99] Furthermore, the Memorandum of Understanding as a whole provides an important context for the application of the principle of specialty. In paragraph 1(a) "extradition" is defined as the surrender to Taiwan of the appellant "who is wanted by the competent authorities in that territory for the purpose of serving a sentence of imprisonment". That sentence had already been imposed, and was related to the offences of driving under the influence of alcohol, negligently causing the death of another person while so driving, and fleeing the scene of the resulting accident. That of itself limits the scope of the request for extradition.

[100] All of the foregoing is supported by the requirement of good faith. Taiwan has made a request for extradition based on clearly specified offences, namely driving while impaired by alcohol, negligently resulting in the death of another person, and fleeing the scene of the resulting accident. Absconding and using another person's passport to flee Taiwan are offences of a wholly different nature. There is no doubt a temporal sequence whereby the latter offences follow the former. Nevertheless, conceptually, they are quite distinct. In these circumstances if Taiwan wished to prosecute the appellant for absconding or using another's passport it would require, as a matter of good faith, either to make a fresh request for extradition or to seek the consent of Scottish Ministers, under paragraph 11.1(c) of the Memorandum of Understanding. In the absence of such procedures, it must be presumed that Taiwan will act in good faith, will observe the principle of specialty and will not prosecute the appellant for any offences other than driving under the influence of alcohol, negligently causing the death of another person and fleeing the scene of the resulting accident.

[101] Finally, support for the foregoing construction of paragraph 11.1(b) of the Memorandum of Understanding is provided by the decision of the Court of Appeal in England in *R* v *Seddon*, [2009] 2 Cr App R 9. That case involved extradition to the United Kingdom pursuant to a European Arrest Warrant, and thus is somewhat different from the facts of the present case. What is important for present purposes, however, is that the narrative of the offence in the warrant included references to breach of bail conditions as well as the substantive offence of blackmail. The court, in an opinion delivered by Hughes LJ, held that the statutes governing extradition should be construed so far as possible consistently with the international obligations undertaken by the United Kingdom: paragraph 16. The statutory provision under consideration was section 146(3)(b) of the Extradition Act 2003, which provides that a person extradited to the United Kingdom from a category 1 territory may only be dealt with in the United Kingdom for offences committed before his extradition if they fall within defined categories. One of these (contained in subsection (3)(b)) is "an offence disclosed by the information provided to the category 1 territory in respect of that offence". The Court of Appeal stressed the words "in respect of", and held that that paragraph did not permit extradition for offences mentioned incidentally in the course of narrative for procedural reasons or in order to give a full narrative of how the substantive charges arose. In the case under consideration, the reference to the extradited person's being unlawfully at large did not amount to an assertion that he had committed an independent Bail Act offence: paragraph 21. That is generally similar to the present case, where it is clear in my opinion that the reference to absconding and using another person's passport are merely narrative, and do not amount to an assertion, for the purposes of extradition, that the appellant had committed independent offences of that nature. No specification is given of any such offences, and the provisions of the Criminal Code that apply to them are not mentioned.

The extradition requests and the responses by Scottish Ministers

[102] Similar principles of interpretation apply to the extradition requests. The most important of these is the first, that of 28 October 2013, because extradition has been ordered in terms of that request. That request was expressly made pursuant to the Memorandum of Understanding, and like the latter document it has effect in international law, as well as an effect in domestic Scots law through the operation of the Extradition Act. As already noted (paragraphs [90] and [91] above), the offences to which the extradition request relates are confined to those connected with the road accident, namely driving under the influence of alcohol, negligent manslaughter and escaping after having caused traffic casualties. There is a reference to absconding, but that is not put forward as part of the relevant charges, and the sections of the criminal code dealing with absconding and the use of a false passport are not narrated, unlike the relevant provisions dealing with the traffic accident. On an objective construction of the request, I am of opinion that the only offences that can properly be described as "disclosed by the information provided by Taiwan in respect of [those offences]" are the three offences connected with the accident. The reference to absconding is not made "in respect of" those offences, but is rather a narration of how the appellant came to arrive in the United Kingdom.

[103] Furthermore, as indicated in *Beggs* v *HM Advocate*, supra, specialty is concerned only with the nature of the charges for which extradition is requested. It is not concerned with wider matters of evidence or narrative. For that reason the narration of the appellant's departure from Taiwan, even though it involves offences of absconding and using another person's passport, is not a matter in respect of which extradition has been requested. For that reason alone there is no infringement of the principle of specialty as a result of Scottish

Ministers' granting the request for extradition; that request was only granted in respect of the three offences specifically narrated, which were accompanied by references to the Taiwanese legislative provisions that govern those offences.

[104] Scottish Ministers' decision letter granting the request, dated 1 August 2014, addressed the question of the specialty arrangements between the United Kingdom and Taiwan under the Memorandum of Understanding. Scottish Ministers took the view that specialty arrangements clearly existed, and that the only question requiring to be addressed was whether the arrangements met the conditions set out in section 95(3) and (4) of the 2003 Act. Their letter then stated (paragraphs 20 and 21):

> "Regardless of any differences between section 95(4)(b) of the Act and paragraph 11(1)(b) of the MoU, Scottish Ministers have received assurances from the Taiwanese authorities that, should the latter seek to prosecute you for any offence committed before extradition other than those listed in the request for extradition dated October 28, 2013, they shall issue a further request for extradition. Any such additional request for extradition shall seek the consent of the Scottish Ministers to permit you to be dealt with for any alleged offence committed before extradition, or an offence other than the offences in respect of which you were extradited. Those offences essentially comprise: causing death by dangerous driving; driving under the influence of alcohol; and failing to stop after an accident.
>
> These assurances meet the requirements of section 95(4)(c) of the Act and of paragraph 11(1)(c) of the MoU."

[105] The assurances referred to are contained in a letter dated 25 July 2014 from the Director General of the Department of International and Cross-Strait Legal Affairs in the Taiwanese Ministry of Justice to the Lord Advocate. In that letter it is narrated that, notwithstanding paragraph 11(1)(b) of the Memorandum of Understanding:

> "should the judicial authority of Taiwan seek to prosecute Zain Taj Dean for any offence committed before extradition other than those listed in paragraph 2 of Page 2 of the Request for Extradition dated October 28, 2013, namely (1) driving under the influence as indicated in Article 185-3, (2) negligent manslaughter as indicated in article 276(a) and (3) escaping after having caused traffic casualties as indicated in Article 185-4 all of the Criminal Code of the Republic of China (Taiwan), it shall issue a further request for extradition. Any such additional request for extradition shall

> seek the consent of Scottish Ministers to permit Zain Taj Dean being dealt with for…in particular his alleged absconding from Taiwan referred to at paragraph 4 on page 3 of the said request."

In my opinion that assurance is clear in its terms. It gives full effect to the principle of specialty, and in particular states that the appellant will not be prosecuted for absconding, or any offences other than the three specified in the request, without the consent of Scottish Ministers. It does not modify the Memorandum of Understanding, but it clarifies that document in unequivocal terms. I am accordingly of the opinion that Scottish Ministers were entirely justified in treating the assurances of 25 July 2014 as satisfying the principle of specialty. When assurances are given by a requesting state the standard presumption of good faith applies: *Cato* v *Republic of Peru*, *supra*, at paragraphs 15 and 23. In the present case I am unable to find anything in the material before the Court to displace that presumption of good faith.

[106] The proposition that the Taiwanese authorities were acting in good faith is further supported by their later conduct, in particular a third extradition request made on 14 June 2016. In this document the Taiwanese authorities requested extradition of the appellant on the ground that he had left Taiwan when forbidden to do so and had used the passport of another person in order to achieve that end. In the sheriff court proceedings that followed that request, the Lord Advocate argued that a wider interpretation should be given to the specialty provisions in paragraph 11 of the Memorandum of Understanding, and that the appellant should accordingly be extradited to Taiwan for the offences of absconding and using the passport of another person. On 9 October 2017 Sheriff McFadyen held that the Memorandum of Understanding did not permit extradition for those offences. The Memorandum of Understanding made no provision for extradition to face trial on an accusation warrant; it was clear on the terms of the Memorandum, in paragraphs 1(a) and 3(1), that it was restricted to

extradition to serve a sentence. That decision has not been appealed, and it is accordingly determinative of the issue in question. For present purposes, two aspects of this decision are important. First, it is clear that the Taiwanese authorities acted in good faith in making a further request for extradition rather than relying on the earlier request. Secondly, Sheriff McFadyen's decision precludes any further attempt to rely on the Memorandum Understanding in order to prosecute the appellant for absconding or using another person's passport.

[107] In view of all the foregoing considerations, I am of opinion that the Memorandum of Understanding satisfies the requirement of specialty, and prohibits prosecution for any offences beyond those relating to driving under the influence of alcohol, negligently causing the death of another person and fleeing the scene of an accident. It merely extends to serving the sentence that has already been imposed for those offences. Consequently, if returned to Taiwan, the appellant could not be prosecuted for absconding or using the passport of another person.

The assurances given by Taiwan subsequently to the Memorandum of Understanding

[108] Apart from the assurances contained in the letter from the Taiwan Ministry of Justice dated 25 July 2014, which were relied on by Scottish Ministers in deciding to extradite the appellant, a number of further assurances have been given, in large part at the request of the Court. Specialty can be secured by means of assurances or undertakings given in respect of the particular case in question. This is clear from, for example, *Welsh* v *Home Secretary*, [2007] 1 WLR 1281, at paragraph 150:

> "I see no reason why section 95(3) should be interpreted as precluding specific undertakings as part of the arrangements to be considered or as part of the law of the requesting state."

The court in that case further held that the significance of such assurances was not affected by the fact that they were only given after the decision of the Home Secretary to order extradition in order to uphold his decision: paragraph 151. A similar approach was taken in a subsequent case, *Cokaj* v *Home Secretary*, [2007] Extradition LR 51, at paragraph 19, where the views expressed in *Welsh* were adopted. On that basis the Divisional Court held that material obtained subsequently to the Home Secretary's decision to extradite the appellant was admissible to establish that Albania, the country requesting extradition, would observe the principle of specialty.

[109] In the present case assurances were given by letters dated 6 and 12 December 2017. These were both written by the Director General of the Department of International and Cross-Strait Legal Affairs at the Taiwanese Ministry of Justice. The first of these, in part 2, discusses what is referred to as "the position of pursuing the absconding case". This states that Taiwan will abide by the principle of "Specificity", which clearly means specialty, as stipulated in the Memorandum of Understanding and elaborated in Sheriff McFadyen's decision. It then continues:

> "If Mr Dean is ordered to extradite to Taiwan on the appeal case, we undertake we will not take advantage of this opportunity to pursue him on the absconding case unless Taiwan has a fresh MoU with the UK or obtain a new consent from Scottish Ministers."

So far what is said is consistent with the principle of specialty. The letter then states, however, that the indictment in respect of the absconding case could only be withdrawn in a situation that met statutory conditions. It was thought that the conditions were not satisfied at the current stage for the prosecutor to withdraw the prosecution that had been filed. Thus it was impossible at that stage to withdraw the indictment. The writer continues:

> "However, if Mr Dean can withdraw his appeal, make all compensation to the victim's father and express his remorse and apology for his misconduct in public, we undertake the prosecution will withdraw the indictment of the absconding case."

Those provisions are clearly inconsistent with the principle of specialty.

[110] Six days later, however, in the letter of 12 December 2017, the same writer accepted that if the prosecutor were to persist with the indictment on the absconding charge the judge in charge of that case, in order to make the appellant available for commencing the trial while abiding with the specialty doctrine, would be in need of a new Memorandum of Understanding. The letter continued:

> "If the UK declines to enter into a new MoU in the foregoing situation, the prosecution authority will withdraw the indictment of absconding case in order to ensure that our undertaking will be firmly held for the Specialty Doctrine.…
>
> When Mr Dean is extradited back to Taiwan, we will be bound by the Specialty Doctrine set out in the first extradition MoU. In such a situation, if the court insists on proceeding [to trial], we are obliged to seek a new MoU with the UK. However, in case the request is declined by the UK, the Taiwan prosecution authority has to consider the seriousness of Mr Dean's offence (absconding is classified as a misdemeanour, not a felony), its damage and our undertaking for conforming the Specialty Doctrine to decide whether to withdraw the indictment. Given the importance of upholding an undertaking for keeping successful extradition system, and respect a rule of international practice, the prosecution authority in Taiwan will definitely withdraw the indictment because the obligation so incurred shall be performed. And as a result, this situation creates a new setting that will meet the legal requirement for the prosecutor to withdraw the indictment".

[111] The first of these letters was undoubtedly badly worded, and had it stood alone a serious question might have arisen as to whether the specialty doctrine would be observed in the event of extradition. The second letter, by contrast, is in my opinion quite clear in its terms, and indicates definitively that the prosecution for absconding will be withdrawn. As previously mentioned, it is presumed in extradition cases that the terms of extradition agreements and any incidental assurances that are given in connection with extradition will be observed in good faith by the requesting state; that is a fundamental feature of the

principle of comity on which extradition is based. The statements in the letter of 12 December are expressed to apply in the event of extradition. That, however, is merely an expression of the basic principle of mutuality of obligations, which obviously applies to international agreements.

[112] At the request of the court, further assurances were given on 12 January 2018. The first of these, addressed to the Lord Advocate, was once again given by the Director General of the Department of International and Cross-Strait Legal Affairs. The second, addressed to Lady Paton at the High Court, was given by the Chief Prosecutor for Taipei District. In the first, the writer states that he is authorized by virtue of his office to answer the questions put on behalf of the Taiwanese state. He states that following Sheriff McFadyen's decision, the Ministry of Justice had no intention of taking any steps to apply for a new Memorandum of Understanding on the absconding charge. An undertaking to that effect is given. The letter continues:

> "The effect of not seeking a new MoU is that Taiwan recognizes that there is no provision entitling it to prosecute Mr Dean for the offence of absconding in keeping with the doctrine of specialty, and that it has no right to do so. This follows from the ruling of Sheriff McFadyen. There is however an existing prosecution for absconding which was begun on 8th March 2013 and which is currently suspended in the Taipei District Court. The decision whether or not to proceed with that prosecution lies under Taiwanese law with the Prosecutor. The Chief Prosecutor has written to the Court in Edinburgh undertaking to withdraw that prosecution as set out in his letter of even date."

The substantive part of the letter concludes by referring to the fact that the absconding charge was less serious than the driving manslaughter charge, and that the extradition proceedings could be simplified by withdrawing the absconding charge.

[113] The letter from the Chief Prosecutor of Taipei District contains the following passage:

> "We hereby undertake that we will be bound by the Specialty Doctrine set out in the first extradition MoU and elaborated in the decision rendered by Judge McFadyen… on the extradition request for the absconding case. Once Mr Dean is extradited back

> to Taiwan, Taipei District Prosecutors Office will, in accordance with the Code of Criminal Procedure, withdraw the indictment of which the proceedings are suspended in Taipei District Court due to Mr Dean's absence from trial in Taiwan. As long as the indictment is withdrawn, the criminal proceedings for the absconding case will come to an end, and Taipei District Court shall close the case definitively."

In my opinion the foregoing passage is a clear indication that, if the appellant is extradited, the relevant Prosecutors Office will withdraw the absconding indictment. In that event the criminal proceedings for absconding will terminate and the case will be closed.

The assurances and Taiwanese domestic law

[114] The indictment on a charge of absconding had been raised in March 2013. Evidence about the legal position in Taiwan in relation to criminal prosecutions was available from Dr Chang Chih-Ping, who was led by Scottish Ministers to give expert evidence on the matter. Dr Chang gave evidence that the prosecutor had been obliged to raise the prosecution, even in the appellant's absence, but that the proceedings were suspended because of his absence. She stated that the prosecutor could have withdrawn the indictment at any stage under articles 269 and 252(9) of the Criminal Procedure Code. There was no obligation to do so as a matter of international law, however, until Taiwan entered into the Memorandum of Understanding, at which point the principle of specialty came into operation in the event of extradition. The obligation to withdraw the indictment would, however, only come into operation on extradition, as a matter of mutuality of contract in respect of the extradition agreement.

[115] Dr Chang explained how withdrawal could take place under the provisions of the Taiwanese Criminal Procedure Code; the prosecutor had power to withdraw the indictment under articles 269 and 252(9). It was suggested by counsel for the appellant that the prosecution could be moved from one district to another, but on Dr Chang's evidence that

was only possible as long as the prosecution was still live; once it was withdrawn it could no longer be moved. The Chief Prosecutor is empowered to withdraw the indictment, and that brings proceedings to an end. Counsel raised a further issue about the authentication of the Chief Prosecutor's letter. As that letter was issued to demonstrate that Taiwan would comply with the principle of specialty, a well-established principle of international law, I consider that details of authentication are not material. Taiwan is still bound to apply the principle of specialty in good faith, and it is evident from both the Memorandum of Understanding and the subsequent assurances that the Taiwanese authorities accept that they are bound by that principle. Finally, on the question of authentication, Dr Chang gave evidence that at the present day documents in Taiwan can be authorized by signature alone. For the foregoing reasons I consider that the appellant's argument that the principle of specialty could not be relied on because the prosecutor had not withdrawn or would not withdraw the prosecution is without foundation.

[116] Finally, in relation to assurances, two further points should be noted, both of which are accepted by the Divisional Court in *Cokaj* v *Home Secretary*, *supra*. First, assurances can be accepted from a state or territory requesting extradition even if they relate to the actions of an independent party, such as a public prosecutor: see paragraphs 30-32 of that case. Secondly, assurances can be accepted that the principle of specialty will be observed even in the absence of an identified and specific procedural provision to achieve that result. In *Cokaj* the court held that the law of Albania, because it incorporated the European Convention on Extradition, contained the specialty provision required by section 95(3). In addition, however, it had regard to assurances given by the Albanian Minister of Justice, who stated that domestic law incorporated the Convention, and that he expressly accepted that it applied in the appellant's case. The guarantee was described as having been given in

"absolute and unequivocal terms". As to the procedural provisions required to give effect to the principle of specialty, the court was not persuaded that the absence of an identified specific procedural provision for doing so was required. The Divisional Court referred (at paragraph 30) to an argument that there was such lack of clarity about the practical arrangements for giving effect to the principle, in relation to the merger of sentences, that it could not be held that section 95(3) was satisfied. Ultimately, however, the court was persuaded otherwise. In effect, the court accepted that the assurances were given in good faith and would be implemented in an appropriate manner.

[117] In the present case, I consider that the assurances given by Taiwan can be accepted as having been made in good faith and in accordance with Taiwan's obligations under the Memorandum of Understanding. In addition, in her evidence Dr Chang explained how the assurances in relation to the withdrawal of the absconding prosecution could be given effect under the provisions of the Criminal Procedure Code. On either of these grounds, I consider that the Taiwanese authorities have adequately demonstrated that the principle of specialty will be observed. I would add that the assurances given in the two letters of 12 January 2018 appear to me to be quite clear in their terms, and to be sufficient by themselves to satisfy the principle of specialty. Finally, on the question of whether the assurances are likely to be observed, I repeat the observation made in my earlier opinion in this case (at 2016 SLT 1105, paragraph [68]) that the fact that the Memorandum of Understanding is the first extradition agreement into which the Republic of China has entered, and the obvious difficulties that the Republic of China faces because of its lack of recognition at an international level, make it especially likely that the requirements of the Memorandum will be observed. In my opinion exactly the same applies to the assurances that have been given.

Possible subsequent decisions by Scottish Ministers to allow extradition on other charges: susceptibility to judicial review

[118] Paragraph 11.1(c) of the Memorandum of Understanding contemplates that consent to a future prosecution might be given by Scottish Ministers. That is a standard feature of extradition agreements; an equivalent provision is found in section 95(4)(c) of the Extradition Act. Such consent would be given by virtue of section 129 of the Act. Counsel for the appellant advanced the argument that, if Scottish Ministers were in future to permit extradition of the appellant for an offence committed before extradition in reliance on paragraph 11.1(c), the appellant could not challenge the decision by way of judicial review. This was said to follow from section 116 of the Act, which in relation to Scotland provides that a decision of Scottish Ministers under Part 2 of the Act can only be challenged by means of an appeal under that Part.

[119] In my opinion this argument must be rejected. For section 116(1) to preclude challenge to a decision other than by appeal, there must actually be a right of appeal under Part 2 of the Act. Authority to that effect is found in *BH* v *Lord Advocate*, 2012 SC (UKSC) 308, at paragraph 32 per Lord Hope. At perhaps a more fundamental level, it has come to be recognized in recent years that it is an important function of the courts to ensure that the rule of law is duly observed: see, for example *Walton* v *Scottish Ministers*, 2013 SC (UKSC) 67, and *Wightman* v *Secretary of State for Exiting the European Union*, 2018 SLT 959; [2018] CSIH 62. If section 116 had the effect of preventing any challenge to a subsequent decision of Scottish Ministers, that would obviously frustrate the objective of enforcing the rule of law. Furthermore, if a challenge to a decision of Scottish Ministers is based on rights under the European Convention on Human Rights, that raises a devolution issue, which is invariably justiciable.

Section 109 and information that has become available since the Scottish Ministers' decision

[120] The present appeal is against Scottish Ministers' decision of 1 August 2014 to grant the first extradition request made by the Taiwanese authorities, that made on 28 October 2013. It is an appeal against an extradition order and is made on the basis of section 108 of the Extradition Act 2003. The powers of the High Court on such an appeal are set out in section 109. For an appeal to succeed, the conditions set out in either subsection (3) or subsection (4) must be satisfied. The condition in subsection (3) is that Scottish Ministers ought to have decided a question before them differently. For all of the foregoing reasons, I am of opinion that that ground has not been made out. In addition, under subsection (4), an appeal may be allowed if information is available that was not available at the time of Scottish Ministers' decision. It is on the basis of that subsection that the appellant now relies on information about the prosecution for absconding that had already been initiated in Taiwan. It is submitted that the appellant was unaware of that prosecution until January 2015, and that the appellant's discovery of the prosecution led him to raise the matter in court.

[121] Section 109(4)(a) refers to information that was "not available" at the time of Scottish Ministers' decision. It has been held that for this purpose "not available" means:

> "evidence which either did not exist at the time…, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. If it was at the party's disposal or could have been so obtained, it was available": *Hungary* v *Fenyvisi*, [2009] EWHC 231 (Admin), at paragraph 32, per Sir Anthony May; followed in *Patel* v *Home Secretary*, [2013] EWHC 819 (Admin), per Kenneth Parker J, at paragraphs 86 - 89.

No evidence has been led to the effect that the appellant was unaware of the prosecution at the time when Scottish Ministers reached their decision on 1 August 2014. Furthermore, one of the

co-accused on the Taiwanese indictment was the then girlfriend, now wife, of the appellant. It accordingly seems likely that the appellant was aware of the prosecution at that time.

[122] In any event, assurances have been given by the Taiwanese authorities in relation to the prosecution in Taiwan: see paragraphs [108]-[113] above. In my opinion those assurances are sufficient to deal with the risk of prosecution for absconding, even though they were given well after Scottish Ministers' decision to extradite. It was suggested that it was not permissible for the purposes of section 109(4) to have regard to assurances given after the date of Scottish Ministers' decision. In my opinion that suggestion is unfounded. It would result in a wholly artificial situation where explicit assurances that prosecution would not occur given in good faith by the requesting state were disregarded for the sole reason that they related to new information that had come to light. I am unable to discover any rational basis for adopting that course. For the reasons already stated, I am of opinion that those assurances are sufficient to satisfy the principle of specialty. That by itself is sufficient to deal with the appeal so far as it is based on section 109(4).

Conclusion

[123] The questions that must be addressed by the court are those stated in section 109(3) and (4) of the Extradition Act 2003: whether Scottish Ministers ought to have decided the question before them differently, and if they had done so whether they would not have ordered the appellant's extradition to Taiwan. In subsection (4) the questions relate to the new information that has been raised. For the reasons that I have given previously I am of opinion that those questions should be answered in the negative. The extradition of the appellant has been ordered by Scottish Ministers solely in order that he may serve the sentence imposed for the offences of driving under the influence of alcohol, negligent manslaughter and escaping

after having caused traffic casualties, as indicated in the extradition request of 28 October 2013. In respect of any other charges or prosecutions, I am of opinion that the principle of specialty will apply, and I am satisfied that the Taiwanese authorities, acting in good faith, will observe that principle.

[124] In disagreement with the majority, therefore, I would have refused the appeal under section 108 of the Extradition Act 2003.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 31
[Case No]

Lady Paton
Lord Drummond Young
Lady Clark of Calton

OPINION OF LADY CLARK OF CALTON

in

APPEAL UNDER SECTION 108 OF THE EXTRADITION ACT 2003

by

ZAIN TAJ DEAN

Appellant

against

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

Respondents

Appellant: Bovey QC, Haddow, Harvey; G R Brown Solicitor
First Respondent: D Dickson (sol adv); Crown Office
Second Respondents: Moynihan QC, Charteris; Scottish Government Legal Directorate

6 June 2016

The Section 108 Appeal

[125] On 1 August 2014 the Cabinet Secretary for Justice (a Scottish Minister) ordered Zain Dean's extradition to Taiwan. Zain Dean appealed to this court under sections 103 and 108 of the Extradition Act 2003 ("the 2003 Act").

[126] This court did not issue any decision in 2016 in relation to the section 108 appeal because it upheld Zain Dean's appeal under section 103 of the 2003 Act (2016 SLT 1105). That decision was challenged by the Lord Advocate. The Supreme Court allowed the appeal by the Lord Advocate against the determination of a devolution issue arising from issues relating to Article 3 of the European Convention on Human Rights (2017 SLT 773; [2017] 1 WLR 2721). This court reconvened to deal *inter alia* with the outstanding section 108 appeal and allowed further legal submissions in relation to section 109(3) and new issues and information to be addressed by the appellant in relation to section 109(4).

[127] The court's powers in an appeal under section 108 are set out in section 109 which states:

> "**109 Court's powers on appeal under section 108**
>
> (1) On an appeal under section 108 the High Court may—
>
> (a) allow the appeal;
>
> (b) dismiss 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 Secretary of State ought to have decided a question before him differently;
>
> (b) if he had decided the question in the way he ought to have done, he would not have ordered the person's extradition.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised when the case was being considered by the Secretary of State or information is available that was not available at that time;
>
> (b) the issue or information would have resulted in the Secretary of State deciding a question before him differently;

(c) if he had decided the question in that way, he would not have ordered the person's extradition.

(5) If the court allows the appeal it must—

(a) order the person's discharge;

(b) quash the order for his extradition."

[128] In the section 108 appeal, as originally argued before this court in 2015, counsel for Zain Dean invited the court to allow the appeal on the basis that the conditions in subsection 109(3) were satisfied. Counsel for Zain Dean made the deceptively simple point that the terms of the memorandum of understanding did not *prima facie* satisfy the conditions in section 95 of the 2003 Act, which govern speciality, and that the letter from the Director General, Ministry of Justice of Taiwan to the Lord Advocate dated 25 July 2014 did not cure the problems. Separately, he also submitted that the practical effect of the speciality arrangements in leaving outstanding alleged offences relating to absconding were an abuse of process and contrary to articles 3, 6 and 8 of the European Convention on Human Rights. That remained counsel's position in relation to section 109(3) when the appeal hearing was reconvened. At that stage counsel was permitted to advance a case also in relation to matters relevant to section 109(4). In response, counsel for Scottish Ministers submitted that the terms of the memorandum of understanding, properly interpreted, satisfied section 95 of the 2003 Act. *Esto* the court was not so satisfied, counsel invited the court to consider the memorandum of understanding together with the letter of assurance dated 25 July 2014 as this was the basis on which the Scottish Minister for Justice made the decision to grant extradition. He submitted that there was no error of law, the abuse of process submissions and ECHR issues raised were premature and the extradition order should be upheld.

[129] The submissions of counsel for all parties changed over time and there was dispute about the interpretation of section 109. Ultimately counsel for Scottish Ministers submitted that the appeal had passed beyond section 109(3) because of new issues and new assurances. The court should focus on section 109(4), not section 109(3), and refuse the appeal as plainly the web of assurances now given both by Scottish Ministers and on behalf of Taiwan satisfied speciality.

[130] The course of this appeal has been beset with difficulties. This court has required to cope with volumes of paperwork, new evidence and issues and changing submissions. Counsel for Scottish Ministers urged the court to approach the case in a structured fashion and I think there is merit in that. I have chosen to focus on speciality to try and make some sense of the facts and the submissions.

Speciality in extradition: introduction

[131] The rule of speciality has a long history but is essentially a simple concept originally intended to prevent a surrendered person being dealt with by the requesting state for any offence committed prior to surrender other than the offence or offences for which the surrender is made. But that rule in its very restricted form has developed and there is no such restricted definition in international law. The origins and purpose of the rule is concerned with respecting the power and discretion of the returning state which is entitled to decide whether or not to grant the request and to limit the circumstances in which the state requesting extradition may deal with the person in relation to other offences which were not the subject of the extradition request. The speciality terms are often, but not necessarily, agreed between the states in treaty arrangements. Arrangements agreed between states may go well beyond the original narrow rule of speciality and, for example, may include

agreement that the state to which the person is to be surrendered may deal with the person in respect of pre extradition unrelated offences, if the extraditing state consents or if the extradited person consents. Mutual respect and cooperation, and presumption of good faith are all implicit in the arrangements made between any particular states. States are also entitled to expect that the terms they have agreed shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. I agree with the general principles set out in more detail in paragraph 83 of the opinion of Lord Drummond Young and have sought to apply these principles. I would merely add to this that the courts in the UK, if called upon to implement arrangements in the context of a treaty or similar arrangement must do so in the context of any relevant domestic UK law. Current domestic law in the UK provides that, before extradition is granted, there must be speciality arrangements, which satisfy specified conditions in the law of the requesting territory for example, rules about speciality adopted into the domestic law of the requesting territory; or in arrangements made with the requesting territory, for example, in treaty provisions. In a disputed case, matters may become complex and it may be helpful to the understanding of the issues about speciality to consider this more generally before focusing on the present case.

[132] For many centuries extradition arrangements have been grounded in treaties and arrangements made between states. Treaties are not self executing in UK law and generally the treaty will be incorporated into domestic law usually by Order in Council. In addition, detailed provisions have been legislated in domestic law, in a variety of statutes, to regulate *inter alia* the decision-making, split between the courts and ministers, as to whether a particular person should in all the circumstances be surrendered as requested. Extradition law has been described "as a blend of international and national law" (*Dugard & Van den*

Wyngaert (1998) 92 AJIL 187-8). A comprehensive national system was enacted in the UK Parliament in the Extradition Act 1870 which specified *inter alia* procedures for extradition involving states with which the United Kingdom had made arrangements. Her Majesty's Dominions were treated separately under different domestic legislation until the Extradition Act 1989 which regulated extradition to foreign states, including colonies and Commonwealth countries. Following a Green Paper entitled Extradition Cmnd 9421 (February 1985), legislation was enacted but more fundamental changes were made later in the Extradition Act 2003. Some historical provisions are reflected in the 2003 Act but a new structure was created. For present purposes relevant changes proposed in the Green Paper included the adoption of the "no list" method of defining extradition offences; a redefinition of the speciality rule; ad hoc extradition; and separate jurisdiction for Scotland in extradition cases. These changes are all reflected in the 2003 Act. One of the main purposes of the 2003 Act was the implementation of the European arrest warrant system under the Council Framework Decision (2002/584/JHA) to create a simpler surrender procedure reflecting agreement between Member States of the European Union. The 2003 Act in Parts 1 and 2 deal respectively with the different provisions which apply for extradition to Category 1 and 2 territories. The Secretary of State is given power by order to designate Category 1 and 2 territories. A Category 1 territory may not be so designated if a person found guilty in the territory of an offence may be sentenced to death under the general criminal law of the territory (section 1(3)). The provisions relating to Category 1 territories reflect political decision-making about countries which have signed up to common standards such as the Framework Decision and the European Convention on Human Rights and are subject to the European Court of Human Rights. The provisions in relation to Category 2 territories in Part 2 of the 2003 Act, specify that Category 2 territories are territories

designated by the Secretary of State for the purposes of Part 2. There is a shared responsibility for extradition split between the judiciary and ministers. The judiciary require to determine whether the statutory criteria are satisfied and the relevant minister must determine whether or not surrender should be made according to the statutory criteria which regulate ministerial decision-making. There is an appeal system both from judicial and ministerial decision-making. The 2003 Act recognises the separate jurisdiction and court system in Scotland and there is also specific provision in section 141 for the exercise of certain functions under the 2003 Act by Scottish Ministers.

[133] In terms of section 193 of the 2003 Act, a territory may also be designated by order made by the Secretary of State if it is not a Category 1 territory or a Category 2 territory and it is a party to an international convention to which the United Kingdom is a party. Where such a territory is designated by order the 2003 Act applies "as if the territory were a Category 2 territory" (section 193(2)).

[134] Section 194 is of particular importance in this case. The Green Paper considered the merits of ad hoc extradition a useful supplement to existing arrangements. It is stated in paragraph 8.2 that:

> "Any power to enable the United Kingdom to extradite on an ad hoc basis would need to be made subject to safeguards similar to those which already apply in the case of bilateral and multilateral arrangements. The Working Party suggested that it would also be necessary to require the Secretary of State to be satisfied that the standards of justice and penal administration in the requesting state were such that it would be in the interests of justice to surrender the fugitive."

The subsequent white paper which summarised proposals for extradition entitled Criminal Justice Plans for Legislation Cmnd. 9658, in paragraph 51, did not recommend any such positive duties on the minister and the terms of section 193 in the 2003 Act are unqualified.

Ad hoc extradition was first introduced in section 15 of the Extradition Act 1989 albeit under a very different statutory scheme.

[135] Section 194 of the 2003 Act states:

> "**Special extradition arrangements**
>
> (1) This section applies if the Secretary of State believes that—
>
> .
>
> (a) arrangements have been made between the United Kingdom and another territory for the extradition of a person to the territory, and
>
> (b) the territory is not a category 1 territory or a category 2 territory.
>
> (2) The Secretary of State may certify that the conditions in paragraphs (a) and (b) of subsection (1) are satisfied in relation to the extradition of the person.
>
> (3) If the Secretary of State issues a certificate under subsection (2) this Act applies in respect of the person's extradition to the territory as if the territory were a category 2 territory.
>
> (4) As applied by subsection (3), this Act has effect—
>
> (a) as if sections 71(4), 73(5), 74(11)(b), 84(7) and 86(7) were omitted;
>
> (b) with any other modifications specified in the certificate.
>
> (5) A certificate under subsection (2) in relation to a person is conclusive evidence that the conditions in paragraphs (a) and (b) of subsection (1) are satisfied in relation to the person's extradition."

Speciality in the 2003 Act

[136] The 2003 Act has separate but not identical provisions about speciality in relation to Part 1 and Part 2 territories. Section 17 deals with speciality in relation to a Category 1 territory. Section 17(3)(c) should be noted as this provides that consideration of whether consent should be given for offence(s) other than the offence(s) in respect of which the person is extradited is a judicial decision with a specific procedure specified in sections 54 and 55. It should also be noted that in certain circumstances, in terms of article 27 of the

Framework decision, consent may be presumed for the receiving state to deal with offences committed prior to extradition other than the offence for which extradition is sought.

[137] In relation to Part 2 territories the relevant provision is to be found in section 95:

> "**95 Speciality**
>
> (1) The Secretary of State must not order a person's extradition to a category 2 territory if there are no speciality arrangements with the category 2 territory.
>
> (2) But subsection (1) does not apply if the person consented to his extradition under section 127 before his case was sent to the Secretary of State.
>
> (3) There are speciality arrangements with a category 2 territory if (and only if) under the law of that territory or arrangements made between it and the United Kingdom a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if—
>
> (a) the offence is one falling within subsection (4), or
>
> (b) he is first given an opportunity to leave the territory.
>
> (4) The offences are—
>
> (a) the offence in respect of which the person is extradited;
>
> (b) an extradition offence disclosed by the same facts as that offence, other than one in respect of which a sentence of death could be imposed;
>
> (c) an extradition offence in respect of which the Secretary of State consents to the person being dealt with;
>
> (d) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.
>
> (5) Arrangements made with a category 2 territory which is a Commonwealth country or a British overseas territory may be made for a particular case or more generally.
>
> (6) A certificate issued by or under the authority of the Secretary of State confirming the existence of arrangements with a category 2 territory

> which is a Commonwealth country or a British overseas territory and stating the terms of the arrangements is conclusive evidence of those matters."

[138] For present purposes it should be noted that section 95(3) gives a special definition to "speciality arrangements". Speciality arrangements might exist in a general sense but they will not exist for the purposes of section 95 unless the specified statutory conditions are satisfied. In addition section 95(3) sets out mandatory conditions to be considered by the Secretary of State and directs the attention of the Secretary of State to consider the conditions in relation to "the law of [the Category 2] territory" or "arrangements made" between the Category 2 territory and the United Kingdom. The courts in the UK may conclude that speciality arrangements were agreed by states for their own purposes in their own words and all in good faith but nevertheless that even on a generous and purposive interpretation the specified statutory conditions in section 95(3) are not met.

[139] The meaning of section 95(4) of the 2003 Act is clear and was not in dispute. Section 95(4)(a) is self-explanatory and it was not disputed that the offences covered by section 95(4)(a) in relation to Zain Dean are the three offences set out in the extradition request for which he was convicted and sentenced. There is no reference in section 95(4)(a) to a restriction in relation to the death penalty but that is not necessary because there is specific provision in section 94 for the death penalty to be considered by the Secretary of State prior to extradition.

[140] There is specific reference to an exclusion for an offence in respect of which a sentence of death could be imposed in section 95(4)(b) of the 2003 Act. I consider that this is important because the purpose of section 95(4)(b) is to allow some discretion to the receiving state to deal with a person after extradition in respect of section 95(4)(a) offences without any further consideration on behalf of the returning state and in particular without any need

for the receiving state to obtain the consent of the Secretary of State. This may often arise in relation to persons who are accused, but not convicted, of offences but the statutory provision is not limited to accusation cases. In many circumstances the facts disclosed when considered, at some time post extradition, by the prosecutor in the receiving state may justify prosecution under the name of an offence different from an offence specified in the extradition request. For example, in a hypothetical case, the same facts may be capable of justifying a prosecution for various offences such as causing death by negligent driving, causing death by driving under the influence of alcohol or drugs, culpable homicide or murder. The importance of the exception in section 95(4)(b) in respect of offences which could result in a sentence of death is that the exercise of the discretion by the receiving state post-dates the consideration by the Secretary of State. The Secretary of State under section 94 is required to have satisfied himself about the question of the death sentence in relation to the offences relevant to section 95(4)(a) before any order for extradition. Looking to the future when the decision-making and exercise of the limited discretion rest with the receiving state, the Secretary of State is required to satisfy himself that the receiving state is subject to the statutory speciality arrangements preventing the receiving state from using the limited discretion in respect of an offence in respect of which a sentence of death could be imposed. Section 95(4)(b) is intended to direct the attention of the Secretary of State to the speciality arrangements relevant to the receiving state to ensure that section 95(4) is met. Obviously there are many differences in the law and practice of states both in relation to the categorisation of offences, prosecution policy and the question of whether or not a particular state has the power now or in the future, after a change in the law, to reconsider and re-prosecute offences. Such a power exists, for example, in the jurisdiction in Scotland in terms of the Double Jeopardy (Scotland) Act 2011. The Secretary of State is not required to carry

out a detailed investigation into all of these matters in any particular case but the Secretary of State must be satisfied that the statutory speciality arrangements, intended to deal with these possibilities in any particular state, satisfy section 95(4)(b).

[141] In relation to section 95(4)(c) it was not disputed that this relates to post-extradition consent and that the 2003 Act make specific provision for the conditions relating to this in section 129. Section 95(4)(d) is not relevant on the facts of the present case.

Arrangements made between Taiwan and the United Kingdom

[142] It is not disputed that Taiwan has no general extradition arrangements by treaty or otherwise with the United Kingdom. There are no historical arrangements to provide precedent or give guidance about domestic practice in Taiwan in contrast to the situation with many states. The Taiwanese legal system is not a system familiar to our courts but it is not disputed that a sentence of death continues to exist under Taiwanese law and such punishment is still carried out. Taiwan is neither a Category 1 or Category 2 territory.

[143] The evidence in this case is to the effect that no person has ever been extradited to or from Taiwan from any state. Special extradition arrangements were made with the UK under section 194 of the 2003 Act. The special extradition arrangements took the form of a memorandum of understanding dated 16 October 2013. It was signed by Chen Wen-chi, Director General, Department of International and Cross-Strait Legal Affairs, MOJ and for the Home Office (United Kingdom) by an official described as Director, International Criminality and Extradition. The memorandum of understanding related to the extradition of one individual namely Zain Dean. On the same date, a minister of state at the Home Office (presumably with the authority of the Secretary of State), who would be a relevant

Secretary of State for the purposes of section 194, granted a certificate under section 194(2) certifying:

> "… pursuant to section 194(2) of the Extradition Act 2003, that arrangements have been made between the United Kingdom and Taiwan for the extradition of Zain Taj Dean… to Taiwan, as specified in the attached memorandum of understanding; and that Taiwan is not a Category 1 territory or a Category 2 territory (as those terms are defined in section 216 of the Extradition Act 2003)."

The grant of this certificate had the effect of bringing into effect section 194(3). The 2003 Act applies in respect of the person's extradition to Taiwan "as if" Taiwan "were a Category 2 territory". All the provisions of section 194 are relevant and in particular, in terms of section 194(5) and (1), the certificate issued is conclusive evidence that arrangements, as specified in the memorandum of understanding, have been made between the United Kingdom and Taiwan for the extradition of Zain Dean to Taiwan. I consider that this certification which is a very unusual feature in extradition cases is important to the understanding of this case. I have used underlining for emphasis.

[144] The proceedings relating to the request by Taiwan for extradition of Zain Dean dated 28 October 2013 have been protracted and complicated. It is in the context of these proceedings that the section 108 appeal is made by Zain Dean. Because of the length of the proceedings and the passage of time, issues have become unfocussed. I think it is important to focus on the foundation of this case flowing from ministerial actions based on section 194 and the speciality arrangements which were made as part of the arrangements, certified in terms of section 194(5).

The memorandum of understanding and speciality

[145] It is fair to say that the terms of the memorandum of understanding have caused difficulties over the past few years. For my purpose it is not necessary to elaborate all these

difficulties. It should be noted however that Taiwan chose to maintain a live prosecution (albeit suspended) for some years without disclosure to the court then chose to make a new second and then third request for the extradition of Zain Dean for absconding and misuse of a passport and relied on the terms of the memorandum of understanding. The second request was refused by Scottish Ministers. The history and reasons for refusal of the third request are explained in the decision by Sheriff Norman McFadyen dated 9 October 2017 (unreported). One point which should be noted is that in the proceedings relating to the third request, the procurator fiscal depute submitted that the third request should be regarded as ancillary to the extradition request dated 28 October 2013 and relied on the narrative of facts about absconding by Zain Dean in the extradition request. Reliance was also placed on section 151A(3)(b) of the 2003 Act which directs attention to conduct rather than the legal elements of an individual offence as the test for extradition in Category 2 territories under the 2003 Act. Despite the English authority of *R* v *Seddon* [2009] 1 WLR 2432, the procurator fiscal depute submitted that the absconding should be treated as akin to a breach of bail similar to an aggravation of a substantive offence in respect of which the first request for extradition was made. The submissions were rejected by the sheriff. The sheriff's decision related to the scope of the extradition proceedings, not to speciality. There was no appeal from the refusal of the application by the sheriff. None of this suggests that Taiwan has any clear understanding of the meaning of the memorandum of understanding.

[146] In my opinion, any speciality arrangements in this case relating to Zain Dean are part of the arrangements certified by the minister under section 194(5). It is therefore necessary to look in some detail at the memorandum of understanding.

[147] The memorandum of understanding was not a reciprocal agreement and related only to Zain Dean in circumstances in which the conduct described by way of factual narrative related to offences in respect of which he was convicted and also the alleged offending conduct associated with his escape, namely absconding from Taiwan with the use of the passport of his friend. This was all information within the knowledge of the Taiwan authorities at the time the request for extradition was made. According to the decision of Sheriff Maciver dated 11 June 2014 (2015 SLT 419 at 421), the escape of Zain Dean led to discussions which resulted in the memorandum of understanding and a request by the judicial authority of Taiwan for a provisional arrest warrant dated 9 October 2013.

[148] The memorandum of understanding is short, consisting of 16 paragraphs. In discussion during the appeal it was described as "a cut and paste job". That may be so but I consider that it is unfortunate that it is not cut and pasted from a tried and tested document which fits with the scheme of the Extradition Act 2003 and provides some internal clarity and consistency in relation to the agreed extradition.

[149] In order to provide context to my criticisms, I set out the full terms of the memorandum of understanding.

> "This Memorandum of Understanding between the Home Office (United Kingdom) and the Judicial Authorities of Taiwan.
>
> DESIRING to provide for more effective cooperation in combating crime;
>
> HAVING DUE REGARD for human rights and the rule of law;
>
> MINDFUL of the guarantees under their respective legal systems which provide an accused person with the right to a fair trial, including the right to adjudication by an impartial tribunal established pursuant to law;
>
> Records the understandings which have been reached for the extradition of Zain Dean to Taiwan:

Paragraph 1
Definitions

For the purposes of this Memorandum:

(a) 'Extradition' means the surrender to Taiwan of Zain Dean who is wanted by the competent authorities in that territory for the purpose of serving a sentence of imprisonment;

(b) 'The UK Judicial Authority' means the judicial authority which is charged, under the law of the United Kingdom, with the duty of considering requests for extradition;

Paragraph 2
Arrangement to extradite

The UK will surrender Zain Dean to Taiwan in accordance with the provisions of this Memorandum.

Paragraph 3
Offences allowing extradition

1. Extradition will be granted where (a) the conduct would constitute an offence under the law of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in the United Kingdom, and (b) a sentence of imprisonment or another form of detention for a term of four months or a greater punishment has been imposed in Taiwan in respect of the conduct.

2. An offence will be an extraditable offence whether or not the laws of the territories place the offence within the same category or describe the offence by different terminology.

Paragraph 4
Grounds for refusal

Extradition may be refused if:

(a) it appears to the UK Judicial Authority that Zain Dean would be entitled to be discharged under any rule of law relating to previous acquittal or conviction if he were charged with the offence for which extradition is sought in the territory of the UK;

(b) it appears to the UK Judicial Authority that the request for Zain Dean's extradition has been made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions; or that he may be prejudiced at trial, or that he will be detained or otherwise restricted in his personal liberty, for any of those reasons.

(c) it appears to the UK Judicial Authority that it would be unjust or oppressive to extradite by reason of the passage of time since Zain Dean is alleged to have committed the offence for which his extradition is sought;

(d) it appears to the UK Judicial Authority that extradition would be incompatible with Zain Dean's human rights;

(e) it appears to the UK Judicial Authority that the physical or mental condition of Zain Dean is such that it would be unjust or oppressive to extradite him;

(f) if it appears to the UK Judicial Authority that Zain Dean has been convicted in absentia, unless:

(i) he deliberately absented himself from his trial; or
(ii) an assurance is provided that he will be entitled to a retrial or (on appeal) to a review amounting to a retrial.

(g) extradition would be contrary to the 1951 Convention Relating to the Status of Refugees;

(h) Zain Dean could be sentenced to death, unless a written assurance is given that a sentence of death will not be imposed, or, if imposed, will not be carried out;

(i) there are no speciality arrangements in place between the UK and Taiwan;

(j) extradition is barred for any other reason under the domestic law of the UK.

Paragraph 5
Extradition procedures and required documents

1. The request for extradition will be made in writing.

2. The request for extradition will be made to the Secretary of State for the Home Department.

3. The request for extradition will be supported by:

(a) as accurate a description as possible of Zain Dean, together with any other information that would help to establish identity and probable location;

(b) a statement of the facts of the offence;

(c) the relevant text of the law(s) describing the essential elements of the offence for which extradition is requested;

(d) the relevant text of the law(s) prescribing the punishment for the offence for which extradition is requested;

(e) such evidence as would justify committal for trial or the equivalent under the laws of the relevant part of the United Kingdom, where arrest is effected; and

(f) a copy of the warrant or order of arrest issued by a judge or prosecutor.

4. The documents which accompany the extradition request will be received and admitted as evidence in extradition proceedings if they are authenticated in a manner accepted by the law of the UK.

5. If the UK considers that further information is needed the UK may request that additional information be furnished within such time as it specifies.

Paragraph 6
Language

All documents submitted by either territory will be in English or accompanied by an English translation which is authenticated in a manner accepted by the law of the UK.

Paragraph 7
Provisional arrest

1. In an urgent situation, the Judicial Authorities of Taiwan may request the provisional arrest of Zain Dean pending the making of a full request for extradition.

2. The request for provisional arrest will be made to the Secretary of State for the Home Department.

3. The application for provisional arrest will contain:

(a) a description of Zain Dean;

(b) the location of Zain Dean, if known;

(c) a brief statement of the facts of the case including, if possible, the date and location of the offence;

(d) a description of the law(s) violated;

(e) the original or a copy of the warrant or order of arrest, the finding of guilt, or the judgment of conviction against Zain Dean; and

(f) a statement that the supporting documents for Zain Dean will follow within the time specified in Paragraph 7(5) of this Memorandum.

4. The Judicial Authorities of Taiwan will be notified without delay of the decision on its request for provisional arrest and the reasons for any inability to proceed with the request.

5. The Judicial Authorities of Taiwan must submit a full request for extradition in compliance with Paragraph 5 of this Memorandum within sixty (60) days of the date of provisional arrest.

6. A failure to comply with Paragraph 7(5) of this Memorandum may result in the discharge of the person sought.

7. The fact that the person sought has been discharged from custody pursuant to Paragraph 7(6) of this Memorandum will not prejudice the subsequent re-arrest and extradition of that person.

Paragraph 8
Decision and surrender

1. The UK will promptly notify Taiwan through the Judicial Authorities of Taiwan of its decision on the request for extradition.

2. If the request is refused in whole or in part, the UK will, unless obligations as to confidentiality prevent it, provide information as to the reasons for the refusal. The UK will provide copies of pertinent judicial decisions upon request.

3. If the request for extradition is granted, the authorities of the Territories will make arrangements for the surrender of Zain Dean.

4. At the conclusion of the extradition proceedings, Zain Dean must be extradited within 28 days. If circumstances prevent the UK from

surrendering Zain Dean within that timeframe, it will notify Taiwan. The Territories will decide upon a new period of time for surrender.

Paragraph 9
Postponed and conditional surrender

1. The UK may postpone the surrender of Zain Dean in order to proceed against him or, if he has already been convicted, in order to enforce a sentence of imprisonment. In such a case the UK will advise Taiwan accordingly.

2. The UK may, instead of postponing surrender under Paragraph 9(1) of this Memorandum, temporarily surrender Zain Dean to Taiwan in accordance with conditions to be decided between the Territories.

Paragraph 10
Multiple requests for extradition

If the UK receives requests from Taiwan and from any other territory for the extradition of Zain Dean, either for the same offence or for a different offence, the UK will determine which of the requests for extradition will be considered first. In making the decision, the UK will consider all relevant facts, including but not limited to:

(a) the relative seriousness of the offences concerned;

(b) the place where each offence was committed (or was alleged to have been committed);

(c) the date on which the requests were received; and

(d) whether, in the case of each offence, Zain Dean is accused of its commission (but not alleged to have been convicted) or has been convicted.

Paragraph 11
Speciality

1. Zain Dean may not be dealt with in Taiwan for any offence committed before extradition save for:

(a) the offence in respect of which he has been extradited;

(b) an offence disclosed by the information provided by Taiwan in respect of that offence; or

(c) an offence in respect of which consent to his being dealt with is given by the UK.

2. Where a request for the purpose of Paragraph 11(1)(c) of this Memorandum is made, the UK may require the submission of the documents called for in Paragraph 5 of this Memorandum.

3. Paragraphs 11(1) and (2) of this Memorandum will not prevent Zain Dean being dealt with for an offence committed before extradition where he:

(a) has left Taiwan after the extradition but has voluntarily returned to it; or

(b) has not left the territory of Taiwan despite having been given an opportunity to do so.

Paragraph 12
Consent

If Zain Dean consents in writing to surrender to Taiwan, the UK may, notwithstanding that the requirements of Paragraph 5 of this Memorandum have not been met, surrender Zain Dean as expeditiously as possible.

Paragraph 13
Seizing and surrender of property

1. The UK will, within the authority of its domestic law and without prejudice to the rights of others, seize the materials stated below and deliver the same to Taiwan at the time of extradition of Zain Dean or immediately thereafter:

(a) items used in the commission of the offence or which constitute evidence of the offence; and

(b) items obtained during the commission of the offences if they are in the possession of Zain Dean at the time of the arrest.

2. If the seized materials referred to in Paragraph 13(1) of this Memorandum are required for an investigation or for the prosecution of an offence in the UK, then the delivery of those materials may be delayed, or those materials may be delivered on the understanding that they will be returned after the conclusion of the proceedings in Taiwan.

3. Where the law of the UK or the protection of the rights of third parties so requires, any property so delivered will be returned to the UK free of charge after the completion of the proceedings, if that territory so requests.

Paragraph 14
Procedure

Except where this Memorandum otherwise provides, the procedure with regard to the extradition and provisional arrest will be governed solely by the law of the UK.

Paragraph 15
Representation and expenses

1. The UK will arrange for the interests of Taiwan to be represented in any court proceedings directly concerning the request for extradition by arranging for the provision of advice, assistance, and representation.

2. Taiwan will bear the expenses related to the transport of Zain Dean at his surrender. The UK will pay all other expenses incurred in that territory as a direct result of the extradition proceedings.

3. Neither territory will make an pecuniary claim against the other territory arising out of the arrest, detention, examination or surrender of Zain Dean.

Paragraph 16
Effective date

This memorandum will come into effect on the date of signature."

The interpretation of the memorandum of understanding and how it fits with the 2003 Act

[150] I wish to make some general points. The memorandum does not follow the structure or language of the 2003 Act. Some paragraphs, such as paragraphs 5, 7 and 10 deal with matters which may be described as procedural. Other paragraphs deal with provisions which represent the unique substantive agreement between the parties such as paragraph 2, 6, 8, 11 and 15. Some provisions appear to be substantive such as paragraph 4 which specifies the grounds for refusal but the paragraph includes a general reference in paragraph 4(j) to "any other reason

[because of which] extradition is barred… under the domestic law of the UK". This provides a link to the 2003 Act. But such a general clause does not appear in other paragraphs where it might be relevant to bring in the detailed provisions of the 2003 Act. In paragraph 7(5), for example, there is a time limit specified of 60 days for the submission of a full request for extradition. But the corresponding procedural provisions in section 74(11)(a) of the 2003 Act is 45 days. Section 74(11)(b) does not apply to this case as Taiwan is not a Category 2 territory designated by order in which a longer period is specified. Paragraph 9 is partly procedural but paragraph 9(2) provides that new conditions about conditional surrender may be agreed between the UK and Taiwan as a development of the terms of the memorandum of understanding. Paragraph 12 appears to provide an override of the procedural requirements set out in the memorandum of understanding if Zain Dean consents in writing to surrender. In identifying some of these difficulties, I am not attempting an exhaustive analysis of the interaction between the memorandum of understanding and the 2003 Act. But I think it is relevant to emphasise that in my opinion there are serious problems which arise when one attempts to interpret the memorandum of understanding even adopting a purposive interpretation as I have sought to do.

[151] I turn now to consider provisions which have some significance to the issues in this case. It is not now disputed by counsel for Scottish Ministers or the Lord Advocate that the memorandum of understanding covers only extradition "for the purpose of serving a sentence of imprisonment" as defined in the "definitions" in paragraph 1(a). This also fits with the time limits specified in paragraph 3(1). These time limits mirror the time limits in section 138(2) of the 2003 Act and are different from the time limits specified in section 137(3), where extradition is requested, where a person has not been sentenced.

[152] In the memorandum of understanding, there is no definition in respect of the judicial authorities of Taiwan. The memorandum bears to be signed by Chen Wen-chi, Director General, Department of International and Cross-Strait Legal Affairs, MOJ. The only other definition given in paragraph 1 relates to the UK Judicial Authority. In terms of paragraph 1(b), there is implicit recognition that the judicial authority in the UK may be a court in one of a number of jurisdictions and that by implication includes Scotland. This is in line with the provisions in the 2003 Act sections 139 to 140 which make provision for the identification of the appropriate judge for the extradition hearing and other purposes. The memorandum makes specific reference to the Secretary of State for the Home Department in a number of paragraphs but there is no definition relating to the Secretary of State for the Home Department corresponding to section 141 of the 2003 Act or similar provision to that defining the judicial authority.

[153] Paragraph 2 makes specific provision that surrender to Taiwan is to be in accordance with the provisions of the memorandum.

[154] The definition of "extradition" in paragraph 1(a) and paragraph 3 are important. The 2003 Act defines extradition offences in three categories. The definition in the memorandum corresponds to the third category only ie post-sentence extradition offence in section 138 of the 2003 Act which states:

> "(1) This section sets out whether a person's conduct constitutes an 'extradition offence' for the purposes of this Part in a case where the person—
>
> (a) has been convicted, in the category 2 territory to which extradition is requested, of an offence constituted by the conduct, and
>
> (b) has been sentenced for the offence…"

Unfortunately, in other paragraphs of the memorandum of understanding, the terms are not restricted to post-sentence extradition but plainly envisage extradition in other

circumstances. See for example paragraph 4(b) "the request for… extradition has been made for the purpose of prosecuting…"; paragraph 4(f)(i) "he deliberately absented himself from his trial"; paragraph 5(3)(e) "such evidence as would justify committal for trial or the equivalent…"

[155] Paragraph 14 is important as it makes provision for procedure in regard to extradition and provisional arrest to be governed by the law of the UK which includes by implication reference to the detailed provisions in Part 2 of the Extradition Act 2003. But uncertainty is introduced because of the drafting. Paragraph 14 states "… Except where this Memorandum otherwise provides…" The 2003 Act sets out very detailed and specific provisions and it is not clear whether the less detailed provisions specifically made in the memorandum of understanding are intended to be replaced or supplemented by the more detailed provisions from the 2003 Act or whether the memorandum provisions are intended to apply according to their own terms.

Speciality in the Memorandum of Understanding

[156] That brings me to a consideration of speciality in the memorandum of understanding. Paragraph 4(i) provides that extradition may be refused if "there are no speciality arrangements in place between the UK and Taiwan…"

[157] I consider that the provisions of the memorandum of understanding contained in paragraph 11 are the substantive speciality arrangements made between the United Kingdom and Taiwan duly certified under section 194(5) and therefore conclusive evidence of the speciality arrangements made between the UK and Taiwan.

The task of Scottish Ministers in applying section 95 of the 2003 Act

[158] The task of Scottish Ministers, in exercising their statutory functions under section 93 of the 2003 Act, was to consider the certified arrangements in this case and decide *inter alia* whether the speciality arrangements set out in the memorandum of understanding satisfy the specified conditions in section 95 of the 2003 Act.

[159] Section 95(1) is in mandatory terms and is to the effect that Scottish Ministers must not order a person's extradition if there are no speciality arrangements with the Category 2 territory. Speciality arrangements are defined for the purposes of the legislation in terms of section 95(3) and (4) and have a statutory meaning.

[160] On 1 August 2014 the Cabinet Secretary for Justice, a member of the Scottish Government, ordered the extradition of Zain Dean in respect of charges specified which are the offences for which he was sentenced in Taiwan. He concluded *inter alia* after consideration of section 95 that the extradition was not prohibited by the 2003 Act. Accordingly he must have been satisfied that the conditions of speciality in section 95 were met.

[161] A letter to the appellant from the Criminal Justice Division of the Justice Directorate of the Scottish Government, dated 1 August 2014, explained the decision-making. Speciality is dealt with in paragraphs 17 to 21. Those paragraphs do not explain whether, or why, the Cabinet Secretary for Justice was satisfied that the conditions of speciality in section 95 were satisfied by the terms of the memorandum of understanding. In paragraph 19 it is stated that speciality arrangements clearly exist in the terms of the memorandum of understanding. But counsel accepted, correctly in my opinion, that the question which falls to be addressed is whether these arrangements meet the relevant conditions in sections 95(3) and (4). An attempt to answer the question whether the arrangements meet the relevant conditions in section 95(3) and (4) is made in paragraphs 20 and 21, and draws upon "the assurances from the Taiwanese

authorities" (apparently a reference to the letter dated 25 July 2014). Paragraphs 20 and 21 are as follows:

> "20. Regardless of any differences between section 95(4)(b) of the Act and paragraph 11(1)(b) of the MoU, Scottish Ministers have received assurances from the Taiwanese authorities that, should the latter seek to prosecute you for any offence committed before extradition other than those listed in the request for extradition dated October 28, 2013, they shall issue a further request for extradition. Any such additional request for extradition shall seek the consent of the Scottish Ministers to permit you to be dealt with for any alleged offence committed before extradition, or an offence other than the offences in respect of which you were extradited. Those offences essentially comprise: causing death by dangerous driving; driving under the influence of alcohol; and failing to stop after an accident.
>
> 21. These assurances meet the requirements of section 95(4)(c) of the Act and of paragraph 11(1)(c) of the MoU. Notwithstanding any differences between section 95(4)(b) of the Act and paragraph 11(1)(b) of the MoU, therefore, the Scottish Ministers, in consideration of these assurances in conjunction with the MoU, believe that the conditions set out in section 95(3) and (4) of the Act are met."

[162] The ministerial decision-making was not limited to the terms of the memorandum and the minister took into account the terms of the letter dated 25 July 2014. It has not been explained to this court the reasons said assurances were given. We have been provided only with the relevant letter dated 25 July 2014. This letter addressed to the Lord Advocate from Director General Chen Wen-Chi dated 25 July 2014 states:

> "Dear Lord Advocate,
>
> Regarding the extradition of Zain Dean, the following is the assurance with relation to speciality.
>
> Further to the memorandum of understanding entered into between the Home Office and the Judicial authority of Taiwan, the judicial authority of Taiwan hereby undertakes and offers assurance that, notwithstanding para 11(1)(b) of the said memorandum of understanding, should the judicial authority of Taiwan seek to prosecute Zain Taj Dean for any offence committed before extradition other than those listed in paragraph 2 of page 2 of the Request for Extradition dated October 28, 2013, namely (1) driving under the influence as indicated in Article 185-3, (2) negligent manslaughter as indicated in Article 276(a) and (3) escaping after having caused traffic casualties as indicated in Article 185-4 all of the Criminal Code of the Republic of

> China (Taiwan), it shall issue a further request for extradition. Any such additional request for extradition shall seek the consent of Scottish Ministers to permit Zain Taj Dean being dealt with for any alleged offence committed before extradition, or an offence other than the offence in respect of which he was extradited, in particular his alleged absconding from Taiwan referred to at paragraph 4 on page 3 of the said request."

[163] The terms of the letter state that they are "further to the memorandum of understanding" and the letter undertakes and offers assurance "notwithstanding para 11(1)(b)." It is not clear what this means, and whether this is meant to be in substitution for the express terms of the memorandum. The intent however seems to be to offer assurances and thus satisfy the Scottish Minister that the conditions of section 95(3) and (4) are satisfied and that for the purposes of the 2003 Act there are speciality arrangements. It appears that was the basis on which the Scottish Minister was so satisfied.

[164] Paragraph 17(2) of said letter appears to misunderstand the consent provisions in paragraph 11.1(c) in the memorandum by referring to paragraph 5 of the memorandum which deals not with consent but with the extradition request. There is no relevant engagement with the consent provisions by the Scottish Minister.

The section 108 appeal: consideration of whether the conditions in section 109(3) are satisfied

[165] I turn now to consider the appeal in relation to speciality. Section 194 of the 2003 Act gives the decision-making and certification powers to the Secretary of State and this certification was carried out by a UK minister. I consider that the certification arrangements are important for a number of reasons. For present purposes I wish to focus on the fact that the certificate granted by the minister identifies that arrangements have been made for the extradition and identifies the document in which the arrangements are set out. The

memorandum of understanding in paragraph 11 deals with speciality and also provides in paragraph 4(h) (in relation to sentence of death) an agreed mechanism in specified circumstances for a written assurance to become part of the agreed arrangements. This is not a case in which somehow or other speciality arrangements are to be found elsewhere, for example in a treaty or in the law of the requesting state.

[166] In passing, I note subsections (5) and (6) of section 95 of the 2003 Act. These subsections provide for speciality arrangements in a Category 2 territory which is a Commonwealth country or a British overseas territory which may be made for a particular case or more generally. Section 95(5) (and its equivalent for Category 1 territories, namely section 17(6)) does not specify by whom such arrangements are to be made, but unless there are delegated powers it would be done under reserved powers. Section 17(6) and section 95(6) provide that a certificate issued by or under the authority of the Secretary of State (confirming the existence of such arrangements and stating the terms of the arrangements) is conclusive evidence of those matters. The subsections in section 95(5) and (6), and the corresponding subsections in Part 1, have no direct relevance to the present case. In my opinion however they are relevant to understand the importance of identifying if there are agreed arrangements between the territories which are founded upon in a particular case. It is these arrangements which require to be considered by the courts and ministers when they come to examine what the arrangements are and how arrangements are made.

[167] I note also that there is a contrast between section 194 and section 95(5) and (6) and the equivalent provisions in section 17. Although in the latter provisions the issuing of the certificate in relation to arrangements allows for the certificate to be issued by or under the authority of the Secretary of State, section 194 is framed on the basis that the certification is by the Secretary of State in relation to the special extradition arrangements. It is not clear from

section 194 that the Secretary of State can authorise a delegation to a minister of state, albeit it is a minister of state who has signed the certificate in this case. But no challenge is made in relation to this and for present purposes I assume that the certificate by the minister under section 194 is valid.

[168] So, on the assumption that the section 194 arrangements and certification were duly carried out, the arrangements which have been made between the United Kingdom and Taiwan for the extradition of Zain Dean are identified, and there is a conclusive certificate to that effect. There is no provision within section 194, or elsewhere in the 2003 Act, for a procedure to alter the arrangements which have been certified or give guidance, authoritative or otherwise, about interpretation. Ministers on behalf of states or territories may, if they wish, include as part of the agreed arrangements, as we have seen in paragraph 4(h) of the memorandum of understanding (in relation to sentence of death), provision for future assurances or undertakings to become part of the agreed arrangements. But no other provision is made in the memorandum of understanding to agree that future assurances or undertakings relevant to speciality whether constituted by letter, or by a supplementary agreement, or by some other means, are to become part of the agreed arrangements or assist in some way with their interpretation.

[169] Standing the history of this case, some questions arise: have the certified arrangements been altered or amended; and if so what are the arrangements as revised or amended in this case; can the arrangements be altered at any time up to the conclusion of the appeal; can statements or assurances by different governmental agents of Taiwan postdating the agreed arrangements assist with interpretation. There may be other questions, but these seem to be some of the problems which this case raises. Counsel for Scottish Ministers was not prepared to engage with such issues, and I understood his final position to be that although Scottish

Ministers relied on the assurance in the letter of 25 July 2014, they did not require to do so, as the wording of the memorandum of understanding was itself sufficient.

[170] Counsel submitted that said letter of 25 July 2014 and the subsequent letters of assurance should be admissible to be considered by the court to assist in the interpretation of the memorandum of understanding and to clarify any deficiencies or ambiguities in the wording. He specifically departed from his submission that, somehow, by some legal principle which he was not able to identify, the assurances in subsequent letters had become part of the speciality arrangements agreed by the UK and Taiwan.

[171] There is plainly merit in having a method of identifying what the agreed special extradition arrangements are, and we see that approach being adopted in section 194 of the 2003 Act. It is only in relation to certain types of speciality arrangements in respect of a Commonwealth country or a British overseas territory that a statutory mechanism is provided in sections 17 and 95 for agreeing and identifying the speciality arrangements which do not fall within the special extradition arrangements agreed (such as the memorandum of understanding).

[172] I consider that it is at least arguable that it may be possible to change the arrangements which have been made and certified in a particular case. That would involve agreed changes to the arrangements being made by parties representing the United Kingdom and Taiwan authorised and entitled to amend or change the terms of the agreed and certified memorandum of understanding. I also accept that, as we have seen in paragraph 4(h) of the memorandum of understanding, parties may agree to put in place some mechanism by which they may introduce new speciality arrangements in the future, going beyond what is contained in the memorandum of understanding. But there is no evidence in this case that there was any attempt to alter the arrangements certified, and no internal provision for future

agreement regarding speciality or guidance about interpretation was made in the memorandum of understanding. Therefore in my opinion the speciality arrangements which ought to have been considered by the Scottish Minister are to be found only in the memorandum of understanding in this very unusual case which is subject to section 194.

[173] I now turn to consider the relevant provisions in the memorandum of understanding. Before turning to the detail, it might be helpful to express my opinion as to the most obvious and purposive interpretation of paragraph 11. This allowed extradition for the offences in respect of which Zain Dean had been sentenced; allowed prosecution and further proceedings in relation to the absconding and passport offences all as referred to in the information provided by Taiwan and without the need for Taiwan seeking any further consent; and thirdly allowed for Zain Dean being dealt with for pre extradition offences where the UK consented. Such an arrangement was pragmatic and certainly fits the circumstances. This would have allowed Taiwan to extradite Zain Dean for the offences for which he had been sentenced and, without any further procedure, carry on the prosecution for the absconding and passport offences after he had been returned to Taiwan. The courts however are given the duty to consider the arrangements in the context of specific UK statutory provisions before agreeing or refusing implementation. Inevitably this may involve a detailed consideration of the provisions and of the relevant statutory provisions in section 95. I accept that it is a detailed exercise but in my view it is necessary and an essential part of the court's function and I now deal with that.

[174] I note that paragraph 11.1(a) is not in identical terms to section 95(4)(a) but I am of the opinion that there is no problem in concluding that section 95(4)(a) is satisfied. It is not in dispute that for the purposes of both paragraph 11.1(a) and section 95(4), reference to "offence" is a reference to the three offences "driving under influence", "negligent

manslaughter" and "escaping after having caused traffic casualties" in respect of which Zain Dean was convicted in Taiwan, sentenced to imprisonment and his extradition was sought.

[175] Turning to consider paragraph 11.1(b) of the memorandum of understanding, it is obvious that the wording therein does not fit with the conditions set out in section 95(4)(b) of the 2003 Act. For ease of reference, I set out the wording. Paragraph 11.1(b) of the memorandum of understanding states:

> "an offence disclosed by the information provided by Taiwan in respect of that offence; or…"

Section 95(4)(b) of the 2003 Act states:

> "an extradition offence disclosed by the same facts of that offence, other than one in respect of which a sentence of death could be imposed."

[176] Section 95(4)(b) recognises very limited circumstances in which a person may be dealt with by the receiving state post-extradition other than for the offence in respect of which the person is extradited. It is limited to an "extradition offence" disclosed by the same facts as the offence in respect of which the person is extradited. There is a further important limitation to exclude an offence in which a sentence of death could be imposed. The restriction in section 95(4)(b) is an important restriction and is clear in its terms. Paragraph 11.1(b) of the memorandum of understanding is not framed in the same terms, and there is missing the important reference to the restriction about the death sentence. In my opinion, the memorandum does not in its terms satisfy section 95(4)(b) and meet the conditions specified therein. There has been considerable dispute during this case and in this appeal about the meaning of paragraph 11.1(b). Whatever that paragraph means, it does not mean the same as paragraph 11.1(a). It is a reference to something different, that is some offence disclosed by the information provided by Taiwan. Counsel for Scottish

Ministers submitted that the words "that offence" in subparagraph 11.1(b) is a reference back to sub-paragraph 11.1(a) and not to the word "offence" where it appears on two occasions in paragraph 11.1(b). He submitted that it was relevant to look in detail at the form and content of the extradition request dated 28 October 2013. I consider that the wording in paragraph 11.1(b) is vague. There is no restriction to "an extradition offence". When one reads the request dated 28 October 2013 it is possible to read the factual narration in respect of the three offences for which Zain Dean was convicted and sentenced as providing a factual foundation in the information given for some other kindred offence in respect of which he might be dealt with. That was the submission by counsel for Scottish Ministers. I consider the more obvious interpretation in the context of this case is that it relates alternatively or additionally to the factual information provided about the conduct of absconding and use of a passport by Zain Dean. Counsel for Zain Dean supported that interpretation. Whatever the meaning paragraph 11.1(b) permits Zain Dean to be dealt with by Taiwan post extradition for some other offence provided it was disclosed by the information provided by Taiwan. There is ambiguity and a lack of clarity. Also in paragraph 11.1(b) there is no restriction in relation to an offence other than one in respect of which a sentence of death could be imposed. On the interpretation supported by counsel for Scottish Ministers, I consider that it appears to open up the possibility of a new prosecution for a more serious kindred offence arising out of the facts about Zain Dean's conduct than the offences for which he has been convicted and sentenced. At its worst, there could be a new prosecution for murder. The statutory restrictions in section 95(4)(b) are designed to limit the receiving state from dealing with the extradited person post extradition in relation to the facts relating to the extradition offences and this applies in the future when law and

prosecution policy may all change and new evidence may lead to different decisions about the appropriate prosecution decision.

[177] Properly interpreted, section 95(4)(c) of the 2003 Act is restricted to post-extradition ministerial consent subject to the terms of the 2003 Act. It is unclear whether paragraph 11.1(c) of the memorandum of understanding is so restricted.

[178] Looking beyond paragraph 11 of the memorandum of understanding, I note that there is specific provision in paragraph 4(h) of the memorandum of understanding for refusal of extradition if "Zain Dean could be sentenced to death, unless a written assurance is given that a sentence of death will not be imposed, or, if imposed, will not be carried out". The memorandum of understanding as I have said earlier makes specific provision (in paragraph 4(h)) for circumstances in which a written assurance may become part of the arrangements in certain specified circumstances. It should be noted that this is the only provision of this type in the memorandum of understanding. I have identified that there is a written assurance as provided for in the memorandum. That assurance is framed in terms which can only be interpreted as applying to paragraph 11.1(a) and not 11.1(b). The assurance is dated 23 December 2013. It is addressed to the Lord Advocate and is given by Chen Wen-chi who signed the minute of understanding. It states:

> "I Chen Wen-chi on behalf of the Ministry of Justice of the Republic of China (Taiwan), hereby certify that the death penalty will not be imposed on Zain Dean for his extradition offence".

A further document with the same date, also signed by Chen Wen-chi states:

> "I, Chen Wen-chi, on behalf of the Ministry of Justice of the Republic of China (Taiwan), hereby certify that the sentences which the courts previously imposed against Zain Dean are not subject to further review, and the death penalty will not be imposed."

In a footnote to that document, it is specifically explained that "the sentences" are those imposed in respect of the three offences of "driving under influence; negligent manslaughter; escaping after having caused traffic casualties" and reference is made to the articles of the criminal code relative to these three offences and to the 4 years prison sentence. In my opinion these written documents have become part of the arrangements between the UK and Taiwan as they adopt the prescribed procedure in paragraph 4(h) agreed on behalf of the UK and Taiwan in the memorandum of understanding as certified by the minister.

[179] For whatever reason, however, there appears to be an obvious and serious gap in the arrangements relating to paragraph 11.1(b) whatever the proper interpretation of that paragraph. There is an agreed mechanism, as part of the certified arrangements, (namely paragraph 4(h)) by which 11.1(b) might have been brought into line with section 95(4)(b) at least in relation to excluding dealing with Zain Dean for an 11.1(b) offence in which a sentence of death could be imposed. But this mechanism has not been used. None of the later written materials or assurances (whatever their status or relevance) fill this gap.

[180] In relation to paragraph 11.1(c) of the memorandum of understanding, there is no restriction to "an extradition offence", no reference to the Secretary of State for the Home Department and no restriction as to when such consent may be given. In terms of paragraph 11.1(c), consent might be judicial or ministerial, whether given by the Secretary of State or a devolved minister, such as a Scottish Minister, and might relate to any offence even if it is not an extradition offence of the type specified in paragraph 3. Consent might be given in some other way, wholly undefined. In contrast section 95(4)(c) is expressed in more restricted terms and applies only to post extradition consent by the Secretary of State (or, applying section 141, by Scottish Ministers) in respect of an "extradition offence".

[181] The UK and Taiwan are entitled to agree any arrangements they wish about extradition, which is what they have done in the memorandum of understanding. There is nothing to prevent them agreeing, for example that, pre or post-extradition, Taiwan would be entitled to seek consent to deal with Zain Dean for any offence arising from the information described, which might include the more serious kindred offences, or separately the absconding and the passport offence, or any other offence committed in Taiwan prior to extradition. They might also agree that the UK might grant such consent in any way it thought appropriate. But although it is open to states (in this case the UK and the territory of Taiwan), to make any "arrangements" they wish in relation to extradition, the 2003 Act does impose limitations about the effect which will be given to them by the courts. As we have seen, the starting point in this case is the procedure for special extradition arrangements under section 194 of the 2003 Act. The content of the arrangements is a matter entirely for the contracting parties. But the courts in the UK under domestic law are obliged to impose the structured approach and the statutory conditions set out in the 2003 Act in considering the arrangements which have been made. It is not for the courts to remake or revise arrangements agreed and certified at ministerial level, or to use post agreement extraneous documents to interpret the memorandum of understanding.

[182] Counsel for Scottish Ministers submitted that it was not an error of law for the Scottish minister (and for this court) to take into account the terms of the letter dated 25 July 2014. Indeed he submitted that there was a variety of "assurances" which should now be taken into account by this court. I will for present purposes concentrate on the letter dated 25 July 2014 for the purposes of considering further section 109(3). The Scottish minister in making his decision to grant extradition did not have any of the later written "assurances".

[183] Counsel for Scottish Ministers referred to the many authorities in which assurances or undertakings have been taken into account by courts in reaching a decision in extradition cases. There are many cases but few relate to speciality, and many relate to assurances about ECHR conditions. In all of the cases it is important to understand the relevant statutory regime. In support of his submission that the court should look beyond the memorandum of understanding and take into account the various letters of assurances, counsel prayed in aid the approach in *Welsh* v *Secretary of State for the Home Department* [2007] 1 WLR 1281 paragraphs 149 to 151. He accepted that the remarks of Ouseley J were obiter. Ouseley J considered submissions on behalf of Welsh to the effect that undertakings given after the Secretary of State's decision were ineffective, at least in relation to sentencing, and legally irrelevant under section 95 of the 2003 Act. Ouseley J was referred to the provisions in section 95(5) which gave statutory authority to speciality arrangements with a Category 2 territory which is a Commonwealth country or a British overseas territory. He accepted that such statutory provisions did not exist in relation to other Category 2 territories, but concluded in paragraph 150 that the absence of such a statutory provision did not warrant the inference that assurances were prohibited in relation to other countries. He envisaged that many arrangements in respect of the death penalty, for example, would be *ad hoc* arrangements. I did not find this analysis helpful to the present case. *Welsh* was a case involving a request from the United States. There are formal and detailed arrangements between the UK and the United States in treaty provisions which have been brought into domestic force in The United States of America (Extradition) Order 1976 (SI 1976/2144). The problem which concerned the court in *Welsh* related to the way in which sentencing practice was used in the United States. The criticism was not directed at the form and content of the speciality provisions which existed. The issue was whether the US would correctly interpret

and observe the speciality rules in the treaty which had been incorporated into the domestic provisions. The attempt in *Welsh* to rely on post-decision undertakings was not an attempt to "make or create" "or interpret" speciality provisions which on the face of it would satisfy section 95. It was an attempt to meet a problem which was said to arise in practice because of the different sentencing approaches adopted in the United States. Ouseley J was not dealing with the implications of special extradition arrangements certified under section 194. In addition he omitted to note that specific provision is made in section 94 of the 2003 Act to permit the Secretary of State to take account of written assurances in relation to the death penalty. Counsel for Scottish Ministers also relied on *Cokaj* v *Secretary of State for the Home Department* [2007] Extradition LR 51. That case is very different from the present case. The problem appeared to be the identification of the existence of <u>any</u> speciality provisions. According to paragraph 31, speciality provisions were eventually identified, not in any arrangements made between Albania and the United Kingdom but in the law of Albania. Mr Justice David Clarke, taking into account the approach in *Welsh*, was satisfied:

> "… that by virtue of the European Convention being part of the law of Albania, taking precedence over any domestic provision with which is inconsistent, and by virtue of article 504(2) of the Albanian Code of Criminal Procedure…, the law of Albania contains the speciality provision required by section 95(3)."

In my opinion, properly interpreted, this case is merely an example of speciality arrangements which exist under the law of the requesting territory rather than in arrangements made between states. The "guarantees" referred to in the case appear to be an expression by the Minister of Justice as to what the law was and confirmation that it applied to the person whose extradition was sought.

[184] As I explain in paragraph [172], I accept that in certain circumstances, assurances or undertakings agreed by the relevant ministers of the territories or those so authorised on their

behalf may become "arrangements made" between the territories. There requires however to be some rigour and analysis applied before such a conclusion is reached. In my opinion, when properly analysed, none of the assurances or undertakings in this case which post-dated the memorandum of understanding became part of the arrangements in relation to speciality made by the UK and Taiwan. In the context of this case I do not accept that they assist in some way with interpretation. Accordingly the Scottish minister should not have taken into account the letter dated 25 July 2014. But in case I am wrong, I have considered whether said letter assists the case of Scottish Ministers.

The assurance dated 25 July 2014

[185] I note that although the assurance purports to cover any alleged offence committed before extradition and therefore is properly to be interpreted as wider than merely covering conduct amounting to offences such as absconding and misuse of documents referred to in the letter of request, there is no assurance of the type specified in section 95(4)(b) in relation to a sentence of death. Another obvious omission is that there is no limitation, as there is in section 95(4)(c), to "an extradition offence". Following paragraph 11(c), the letter of 25 July 2014 refers to any alleged offence committed before extradition and appears to be given on the basis that Scottish Ministers can give such consent pre extradition to any such alleged offence being dealt with. The wording of the assurance is also very strange. It appears to cover a situation, which is inherently unlikely, that the judicial authority of Taiwan might seek to prosecute Zain Dean for an offence committed before extradition other than the listed offences. It does not deal with the facts, well known to the parties to the memorandum and to the Scottish Minister, that Zain Dean allegedly absconded and used a friend's passport. No explanation or assurances are given in relation to what, if anything, the Taiwan prosecutor

had done in respect of prosecution of alleged offences arising from such conduct. I accept that Scottish Ministers at the time of the decision to grant extradition were unaware of the fact that Taiwan prosecutors had raised a prosecution in 2013 and that prosecution was still live, albeit suspended. But it might be thought an obvious question to ask Taiwan whether they had or intended to prosecute Zain Dean in respect of his conduct of absconding and use of a friend's passport which are described in the request for extradition.

[186] The Scottish Minister reached his decision on the basis of paragraph 11 and the letter dated 25 July 2014 with their inherent defects. This letter, in my opinion, certainly does not clarify the interpretation of paragraph 11. In addition the letter does not fit with the 2003 Act and is strangely worded. It does not deal with post-extradition consent, which is the only form of consent provided for in the 2003 Act, and is premised on a further request for extradition. Attempting to read and interpret the two documents together is not easy and in my opinion merely adds to the lack of clarity and confusion. There is no assurance regarding a limitation on dealing with an offence in respect of which a death sentence could be imposed, as is required in section 95(4)(b). It also appears to proceed on an interpretation of the memorandum of understanding which is inconsistent with the interpretation which counsel for Scottish Ministers advanced to this court and which I summarised in paragraph [176] as it is focussed not on kindred offences but the absconding and passport offences.

Conclusion re speciality and section 109(3)

[187] I consider that the task, carried out in this case by the Cabinet Secretary for Justice, of scrutinising the arrangements made about speciality and reaching a decision whether the terms of section 95 were satisfied is an onerous one.

[188] In considering section 109(3) I have put out of my mind the information gleaned in the course of the appeal about the real and practical problems which have arisen in relation to prosecution of Zain Dean for other offences. I have also put out of my mind the fact that it is plain from the information now available that had Zain Dean been extradited following the order of extradition in 2014, which he appealed, neither the memorandum of understanding nor the letter of 25 July 2014 would have prevented him from facing the live prosecution for allegedly absconding using another's passport, raised by an independent prosecutor and nothing in the letter dated 25 July 2014 brings that prosecution to an end.

[189] In my opinion, the speciality provisions set out by section 95 are perfectly clear. They are intended to apply to a range of different territories where legal and treaty provisions may vary greatly and may change in the future. They are designed to prevent an extradited person being dealt with for an offence in respect of which the death sentence could be imposed, regardless of the different laws or legal procedures which may apply in any territory both at the date of the decision and in the future. Some limited discretion is given to the receiving state or territory but clarity and defined limits are important in this statutory scheme. In this case, relating to one individual, nothing should have been simpler than to set out provisions consistent with sections 95(3) and (4) of the 2003 Act. I consider that in a case in which the arrangements are specific to the circumstances of one particular individual, there is no good reason for the confusion and absence of clarity which exists in this case. That applies both to the memorandum of understanding and to the letter of 25 July 2014 if it is relevant.

[190] It may be that the reason for some of the problems which have arisen in this case is the unusual nature of the arrangements involving Taiwan and the use of section 194.

[191] In this case, in terms of section 194(5), a certificate under subsection (2) in relation to a person is conclusive evidence that the conditions in paragraphs (a) and (b) of subsection (1) of

section 194 are satisfied in relation to the person's extradition. Such special extradition arrangements have rarely been entered into by the UK under section 194, and we were not made aware of any other similar special arrangements. The note to section 194 in the annotated current law statutes (41/193-194) states that the writer has been able to identify only one such arrangement in 1993 with Brazil and that the arrangement was based very closely on the relevant, but very different legislation in force, at the time. The writer also expressed the view that in the case of an arrangement with Brazil, such an approach would accord well with that country's own approach to extradition which is based on reciprocity as a self-sufficient basis for extradition without treaty.

[192] Counsel for Scottish Ministers emphasised the importance of the extradition process to the wider interests of justice, and the importance of giving effect to agreements in this context. I accept that, but in my opinion the court is also bound in an extradition case to oversee the legality of the decision-making of ministers and to consider whether the conditions in section 109 are met.

[193] In this opinion I have concentrated on the ministerial decision-making of the UK and Taiwan and of the Scottish Minister under the 2003 Act. I fully recognise the importance of respecting such ministerial decision-making. I have not lost sight however of the fact that this is an extradition case, and the rights of the appellant are also important. I am mindful of the comments of Lord Hope of Craighead in *R (Guisto)* v *Governor of Brixton Prison* (HL(E)) [2004] 1 AC 101 at paragraph 41.

> "**41** There is no doubt that the information produced to the district judge was sufficient to show that the applicant had been convicted of the extradition offence which was alleged against him. But it is a fundamental point of principle that any use of the procedures that exist for depriving a person of his liberty must be carefully scrutinised. Lord Atkin's declaration in *Liversidge* v *Anderson* [1942] AC 206, 245: 'that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act' has lost none of the force which it had when

> it was delivered over sixty years ago. When, in *In re Farinha (Antonio da Costa)* [1992] Imm AR 174, 178 Mann LJ said that the courts must be vigilant to ensure that the extradition procedures are strictly observed, he was making precisely the same point. The importance of this principle cannot be over-emphasised. We are not dealing here with what *Sharpe, The Law of Habeas Corpus*, 2nd ed (1989), p 55 has described as a legal defect of a trivial nature which may be excused. There can be no more fundamental error in the use of the extradition procedures than the making of a decision by the court which lies outside its jurisdiction. That is what has occurred in this case."

I also note the approach of Lord Rodger of Earlsferry in the same case in paragraphs 82 and 83. The issues in that case were different from the present case but I consider that the general approach is relevant to this case.

[194] I am grateful for the assistance provided in the opinions of her Ladyship in the chair and Lord Drummond Young. My reasoning is not dependent upon any analysis and interpretation of the various letters set out in detail by her Ladyship in the chair but I fully agree with her criticisms and conclusions. From my perspective I was repeatedly astonished in this case by the difficulty in obtaining information about basic facts. The unexpected appearance of assurances did nothing to assist in shortening the proceedings in this case. Assurances which appear to be inconsistent were never withdrawn and I agree with the opinion of her Ladyship in the chair, there was never any clarity. The fact that the live prosecution (albeit suspended) still remains outstanding in Taiwan in relation to Zain Dean extended these court proceedings as it became necessary to consider evidence and submissions about domestic law in Taiwan, the rights of prosecutors to withdraw proceedings and many other related issues. I much regret the length, complexity and delay in these proceedings. Much of this could have been avoided if there had been clarity in the memorandum of understanding and open disclosure from the start. The history of these proceedings may serve as a salutary warning about the importance of good drafting and the problems which may arise if that is neglected.

[195] In my opinion the memorandum of understanding relating to Zain Dean is flawed. Unusually this court was prepared to allow the parties time to consider whether Taiwan wished to seek a new memorandum of understanding but the court was advised that Taiwan did not so wish. That is a matter for Taiwan. But the interests of comity which I fully recognise do not mean that this court should overlook the difficulties which plainly exist in the memorandum of understanding when considered in the framework of the 2003 Act.

[196] For the reasons given, I would allow the appeal by Zain Dean as I consider the conditions in section 109(3) of the 2003 Act are satisfied. In my opinion the Cabinet Secretary for Justice ought to have decided that section 95 of the 2003 Act was not satisfied. And in so deciding he would not have ordered the extradition of Zain Dean. And if that is in error, I would allow the appeal and adopt the reasons of her Ladyship in the chair.