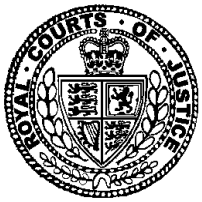

Neutral Citation Number: [2018] EWHC 3534 (Admin)

Case No: CO/5950/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2018

Before :

LORD JUSTICE BEAN
MR JUSTICE DOVE

- -

Between :

ALEXEY SHMATKO	**Appellant**
- and -	
THE RUSSIAN FEDERATION	**Respondent**

- -
- -

Mark Summers QC and Adam Payter (instructed by **Kingsley Napley**) for the **Appellant**
Peter Caldwell and Nicholas Hearn (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing dates: 20-21 November 2018

- -

Judgment Approved

Lord Justice Bean:

1. This is the judgment of the court, to which we have both contributed. It is given on an appeal from Senior District Judge Emma Arbuthnot ("the judge"), who on 23 October 2017 sent the case of Alexey Shmatko to the Secretary of State for him to decide whether Mr Shmatko is to be extradited to the Russian Federation. The request emanates from Penza, which is a rural area of Russia to the south east of Moscow.

2. Mr Shmatko's case was heard by the judge together with that of Mr Ayk Avdalyan: the accusations against the two men were not factually linked but each of them resisted extradition to Penza on similar grounds. The judge discharged Mr Avdalyan on the grounds that the request for his extradition, though purporting to be made on account of the extradition offence alleged against him, had in fact been made for the purpose of prosecuting him on account of his political opinions. She also found that there were substantial grounds for thinking that Mr Avdalyan might be prejudiced at his trial or

punished, detained or restricted in his personal liberty by reason of his political opinions. His extradition was therefore barred under Section 81(a) and (b) of the Extradition Act 2003.

3. The requesting authority alleges that Mr Shmatko committed three offences of fraud in the years 2004 to 2008. The alleged fraud involved the purported purchase of boilers and their sale to an end user, before claiming back from the Russian tax authorities VAT supposedly paid by the purchaser. The frauds involved at least one alleged co-conspirator who worked in a local tax office and ensured that the VAT refund was paid without investigation.

4. Mr Shmatko's role was in arranging bank loans for the purported purchase and sale of the boilers. He used a number of intermediary companies, said to be shell companies, which bought and sold boilers. A Mr Mashkov was said to be at the head of the fraud. The requesting authority relied inter alia on a signed confession dated 29 April 2011 made by Mr Shmatko in the presence of one of his lawyers, giving details of how the fraud was organised and the role which he played in it.

5. The judge, referring to both of the cases before her, described the defence evidence as "voluminous". Mr Shmatko did not, however, give evidence before the judge. Oral evidence was given on his behalf by Dr Juliet Cohen, a forensic physician, Mr Sergei Golubok, a Russian lawyer, and Dr Connolly, a British expert on corporate raiding or "rent-seeking" by State officials and their associates. Statements were read from Mr Shmatko's father, his wife and Mr Ruslan Bilan, one of his Penza lawyers. The judge also heard evidence on behalf of both requested persons from Professor William Bowring about prisons and the criminal justice system generally. She also heard evidence about prison conditions in Penza from Mr Obukhov, a criminal lawyer practising there and further expert evidence about prison conditions from Dr Alan Mitchell.

The defence case on the facts

6. "The whole premise of Mr Shmatko's case", in the words of the judge, was that the allegations arose from corruption in the FSB (the former KGB). In Spring 2008, after the alleged frauds had taken place, he had been introduced by Mr Mashkov to a senior official of the FSB who asked him to employ an FSB security officer. Mr Shmatko fobbed them off over a period of months. There then followed a bogus allegation of assault on a police officer in the presence of Mr Mashkov and of the lawyer Mr Bilan. The appellant alleged that his wife had been told that the prosecution had been "ordered by someone senior". The judge observed that neither Mr Bilan nor Mrs Shmatko confirms the allegation that a prosecution had been ordered or said to have been ordered by someone senior. The judge found that the appellant "used a perfectly ordinary allegation of assault on a police constable and weaved in a false story that the FSB were behind that prosecution, a story which is unsupported by the people who were at the incident".

7. The next phase in the story was the stabbing of Mr Shmatko by Mr Mashkov who was trying to extract money from him and saying that if he didn't pay "them" money he would end up in prison. The judge found that "either the argument was about Mr Mashkov giving evidence against Mr Shmatko in relation to the assault on the police officer or it was a falling out between thieves". It appears that Mr Mashkov was later

imprisoned for his part in the fraud alleged against Mr Shmatko. The watch factory fraud is alleged to have been another example of the fraudulent obtaining of a VAT refund on boilers. Mr Shmatko alleged that he had seen prosecution papers in that matter with a stamp saying "secret" which made it clear to him that Mr Mashkov must have been recruited as an FSB agent. He said that he had discussed this with Mr Bilan, but there was no evidence from Mr Bilan to confirm this. The judge made a number of findings about this matter but it is not necessary for me to set them out in detail.

The allegation of torture

8. Mr Shmatko said that he was tortured repeatedly in the local remand prison known as SIZO-1 from June to August 2010 before he pleaded guilty to a VAT fraud on 18 August 2010. Much later he was examined by Dr Cohen who found that his scars were highly consistent with his account of what had happened, particularly on 14 July 2010 when he said he had refused to sign a confession. The judge accepted that Dr Cohen was a very experienced professional and expert but found it significant that Dr Cohen had not read the statements which were before the judge. The judge held that she was in a better position than Dr Cohen had been to assess the credibility of Mr Shmatko's account. She observed that there was no corroboration of the appellant's account of his injuries from his lawyer even though the two men were meeting two or three times a week during Mr Shmatko's period in custody in mid-2010.

9. The judge continued:-

> "Mr Bilan, who explains that Mr Shmatko pleaded guilty to the offence of fraud, never suggests that any confession was obtained by torture. He mentions pressure, but that is a long way from the RP's account. If this torture was really happening I would have expected Mr Shmatko to tell his lawyer and for his lawyer to have seen evidence of injuries on his client.
>
> The RP says he needed lengthy daily treatment in a private clinic. The father still lives in Penza, as does Mr Bilan and numerous statements have been from other witnesses based in Penza yet there are no medical records or reports produced that would confirm the seriousness of the injuries set out by the RP.
>
> …
>
> The RP did not give evidence and could not be asked about this crucial part of his evidence. I do not question that Dr Cohen saw scars and that she was correct when she attributed the stomach scar to a knife wound. I accept too that the RP is likely to have been assaulted on one occasion in SIZO-1 but I do not accept that this caused the scars seen by Dr Cohen.
>
> …

> The allegation of torture was not only not drawn to his lawyer's attention but was not drawn to the attention of the court at the time of the RP's sentence in August 2010."

The judge's findings of fact

10. The judge held:-

> "What I find is that throughout these proceedings and before, Mr Shmatko has cynically manipulated the system to try and avoid being prosecuted for these incidences of alleged fraud. He has been trying to avoid imprisonment by trying to blame Mr Mashkov and the FSB for the allegations made.
>
> ….
>
> It is clear from his confession of April 2011, if it is to be taken at face value, that he was at the heart of the fraud and provided bank contacts to make it appear that genuine activity was taking place as opposed to a fraud to obtain a repayment of VAT. The detail in that confession is striking, for example the fact that he received 500,000 roubles for his role. He was represented by a different lawyer on that occasion. There is no evidence from that lawyer and no one to support the RP's contention that he only confessed as he and his family were threatened.
>
> It is only since the RP reached the United Kingdom and had his asylum claim refused that he has suddenly started complaining that he was the victim of corruption and corporate raiding. He made no such complaint when he was in Cyprus.
>
> …
>
> I summarise my findings as follows: on the face of it and based on his detailed confession of April 2011 Mr Shmatko was involved in VAT frauds with Mr Mashkov and others. The assault on the police officer has nothing to do with these allegations but was an assault carried out by the RP when it is likely he knocked the hat off the officer when he was asked for a bribe. Whilst that offence is being investigated, there is a falling out between Mr Shmatko and Mr Mashkov that ends in a fight in which Mr Shmatko gets stabbed. The fight might have been over money. As a result Mr Mashkov changes his evidence and says he witnessed the assault on the police officer. Mr Mashkov and the others are the witnesses against Mr Shmatko in the watch factory case.
>
> Mr Shmatko is remanded into custody. He is assaulted in SIZO-1 on 14th July 2010 which leads to a complaint to the prison authorities on 15th July 2010. I do not accept he was tortured let alone tortured by investigators in his case. The ill-treatment

> which I found he suffered on one occasion, did not lead to a confession nor do I find that it was the reason for his confession nine months later. He did not tell his lawyer or his father that he was tortured.
>
> His lawyer who sees him two or three times a week does not see a broken nose or jaw. His father who sees him when he comes out of prison does not see a broken nose or jaw. Both notice bruises and scratches. The RP does not tell his lawyer or father that he had suffered a broken nose and jaw and had been knocked unconscious. The RP says his parents paid a bribe to get him out of prison. I do not accept that. He came out when he pleaded guilty and was given a suspended sentence.
>
> The RP pleads guilty to the watch factory offence but does not inform the sentencing court on 18th August 2010 that he was tortured. Realising that other frauds would be uncovered and that Mr Mashkov would be blaming him again for them, he gets in first and initiates proceedings with the tax division by speaking to the police major on 7th September 2010. He does not inform them that torture or physical ill-treatment was the reason for his plea of guilty in August.
>
> He says he goes to hospital a month later for treatment. There is no evidence, amongst the pages of evidence produced by the defence, to confirm he had injuries. If he went into hospital a month later for daily treatment it had nothing to do with the way he was treated in the SIZO.
>
> From being a prosecution witness and once the police have investigated, Mr Shmatko becomes a suspect. The co-defendants are arrested in the summer of 2011 and Mr Shmatko realises the net is closing in. He leaves the country firstly for Cyprus and then for the United Kingdom. He is refused asylum and within three weeks becomes a frequent critic of the authorities in the Russian Federation. I find he is doing all he can to ensure he is not returned to the RS. He is a profoundly dishonest and manipulative man."

11. Later, the judge said:-

> "I have set out above the series of serious inconsistencies between his evidence and what others say which have led me to reject Mr Shmatko's evidence in a number of respects. Professor Bowring says that "If as he says the problems [he] has faced are the result of FSB involvement and pressure, then there would be a real risk for him of unfair trial". I do not accept Mr Shmatko's evidence about the FSB pressure on him.
>
> Mr Summers makes the point that Mr Shmatko had become an outspoken critic of corruption within the FSB, the Investigative

> Committee, the local police and the Russian regime. I would point out that Mr Shmatko became an outspoken critic only once his claim for asylum has been refused. About three weeks later he starts his campaign, which I am afraid to say, I find to be manipulative (see below under Article 6 for a further consideration of the effect of his behaviour subsequent to the refusal of asylum).
>
> Whether I am right or wrong in my interpretation of the definition of political opinion, it matters not in Mr Shmatko's case as I do not find any evidence in relation to Mr Shmatko that would bring him within the section whether a broad or narrow interpretation is taken."

The issues before the judge and the grounds of appeal

12. There were five issues raised before the judge as bars to extradition. One was that the offences alleged are not extradition offences within the meaning of section 137(3) of the Extradition Act ("EA") 2003. The judge rejected that and it has not been pursued before us. The other four issues argued before the judge, and which formed the grounds of appeal against her decision, were that;-

    i) The allegations were not sufficiently particularised (EA section 78(2)).

    ii) The prosecution is motivated by extraneous considerations (EA sections 79(1)(b) and 81(a) and (b).

    iii) That there is a real risk of a flagrant denial of justice if Mr Shmatko is returned to stand trial in Penza and thus a real risk of breach of Article 6 of the ECHR.

    iv) Prison conditions in Penza are such that there is a real risk that the appellant would be subjected to treatment contrary to Article 3 of the ECHR.

13. Before considering these grounds we will summarise the fresh evidence which is before us and was not before the judge.

Fresh evidence

14. The investigation into the alleged crimes of Mr Shmatko was led by a Mr Valeriy Tokarev. Mr Shmatko alleges that he was tortured in prison in July 2010 and that Mr Tokarev was involved.

15. Since the hearing before the judge, Professor Judith Pallot has written a number of reports relevant to the case. Since they relate to recent developments, Mr Caldwell has rightly not objected to our considering them. In her first report dated 18 June 2018 she wrote about credible allegations of torture or at least inhuman and degrading treatment in the Penza remand prison SIZO-1 in an investigation led by Mr Tokarev.

16. In her most recent report, headed "Update on the Penza Network Case" and written on 18 November 2018, Prof Pallot states that in a decision of the Pre-Volga Federal Region Military Garrison Court given on 12 November 2018 in the cases of Pchelintsev and Shakurskii the higher court upheld the defendants' appeals against a decision of the

Penza Garrison Military Court, and directed the Penza Military Garrison Investigative Committee to open a criminal investigation into the allegations of torture. With this decision, writes Professor Pallot, the higher court accepted that there was a prima facie case to answer against the actions of the FSB in relation to those two appellants. She adds that "the higher court also sent a formal reprimand to the lower instance court for its errors in this case". She states that the appeal made on behalf of the two suspects in the Penza network case specifically named Mr Tokarev as responsible for the torture in SIZO-1.

17. Meanwhile, on 9 November 2018, the Crown Prosecution Service had requested further information and assurances from the Russian authorities on the subject of prison conditions. On 15 November 2018 the office of the Federal Prosecutor General passed the request to the relevant regional prosecutor's office. The Prosecutor General responded to the CPS's request on 19 November 2018. This response mentions the decision on 12 September 2018 of the Penza Garrison Military Court dismissing the appeal of Mr Pchelintsev and cites it as authority for the proposition that there was no objective confirmation of the alleged use of torture on Mr Pchelintsev and Mr Shakurskii. There is no mention of the regional court's decision of only a few days earlier overturning the decision of the Garrison Military Court. We find this omission extremely disturbing.

Ground 1: Lack of Particularity

18. The judge dealt with this briefly and so can we.

19. The request for extradition dated 8 May 2015 and addressed to the Director of Public Prosecutions attached three "Case Initiation Orders" describing the alleged offences committed by the Appellant in relation to three companies, whose respective names in abbreviated form were Ramis, IPP Energiya and Promsila. It was in respect of these three charges that the judge ordered that the case be sent to the Secretary of State. Mr Summers points out that the request is also accompanied by a longer narrative document involving several suspects as well as the Appellant and describing frauds not only against these three companies, but two others, Ramis and Invest Holdings. He submits that it is not clear whether extradition is sought for three offences or for five. The judge said:

> "There may have been separate frauds alleged against individual co-conspirators, but these three alleged frauds are clearly set out in the papers and if extradited, Mr Shmatko should not be prosecuted for any separate allegations involving Ramis (and obtaining 12,951,634.50 roubles) and Invest Holdings (and obtaining 915,201 roubles). The principle of specialty will apply and there is no reason to think that the RF would not be bound by it. If [he is] extradited I would direct that the CPS provide this judgment to the Russian authorities. Mr Shmatko can only be tried in relation to the three allegations set out in this paragraph."

20. We agree and have nothing to add.

Ground 2: extraneous considerations

21. Section 81 of the 2003 Act provides that a person's extradition is barred by reason of extraneous considerations if (and only if) it appears that:-

> "(a) the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or
>
> (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions."

22. In his respondent's notice on behalf of the Russian Federation, Mr Caldwell submits that the portrayal of Mr Shmatko as a whistle-blower in order to refer to him as having a political opinion is a construct. The only party who has imputed political opinions to the Appellant is himself. Even on the Appellant's own case his "whistle-blowing activity" began after the investigations for these cases commenced. His decision not to give evidence means that there is in reality no available evidence of the assertions by him that he had been subject to rent-seeking by the FSB which he had resisted; that he had reported this to the police; or that he had been tortured or threatened with torture. Neither his wife, his father nor his lawyer Mr Bilan gave oral evidence. Dr Cohen's evidence is capable of supporting the conclusion that the Appellant had been stabbed but cannot attribute the existence of scarring to a particular event.

23. Mr Caldwell further submits that the case as put forward by the Appellant in fact has few of the indicia of a typical corporate raiding case. There is no suggestion that any other party was trying to take over the business and divest Mr Shmatko of control. To the extent that there is evidence of "rent-seeking", this relates to a single individual, Mr Mashkov, who has himself been prosecuted; these circumstances hardly support the conclusion that Mashkov's actions were state sponsored. The experts, Mr Caldwell submits, have not properly considered the alternative explanation, namely that the reason why Mr Shmatko is being prosecuted for fraud is because there are grounds to suspect him of complicity in the offending.

24. Like the judge, we attach great significance to the decision of Mr Shmatko not to give oral evidence and the fact that he signed a confession in April 2011 nine months after the alleged torture. We also attach significance to the absence of any support in the witness statements of the lawyer Mr Bilan for the argument that the confession was extracted under duress.

25. Mr Summers submits that corruption and corporate raiding (or "rent-seeking") are endemic in Russia; and that there is evidence that the Penza region is particularly corrupt, from its former governor downwards. He relies on the evidence of Professors Connolly and Bowring to which I have referred. He draws support from the finding by the judge that the (separate) case brought against Mr Avalyan was motivated by extraneous considerations and that the investigating committees for the present case and that of Mr Avalyan had at least one member in common.

26. It is right that the judge discharged Mr Avalyan. She found that in his case there was evidence of corporate raiding on his company over a number of years by relatives or associates of the then governor of the Penza region. She found no such evidence in the case of Mr Shmatko. We consider that as the evidence stood before her she was entitled to find that the allegations against Mr Shmatko were genuine and not motivated by extraneous considerations.

27. Mr Summers also relies on the fresh evidence as being relevant to ground 2 (as well as to grounds 3 and 4). He submits that the fact that an appellate court in Russia has found a prima facie case of criminality by local FSB operatives and directed the opening of a criminal investigation into allegations of torture on two suspects in Penza supports Mr Shmatko's case that he too was tortured by the local FSB in 2010. The next step in his argument is to ask why the FSB would be involved at all unless there were political considerations involved in his prosecution. Further, if the Appellant is telling the truth about torture, he may be telling the truth about other matters such as corporate raiding.

28. We are not persuaded that the fresh evidence should lead us to re-visit the judge's decision on ground 2. Her findings of fact remain valid despite the fresh evidence. The judge was also entitled for the reasons she gave to find against Mr Shmatko in relation to his belated attempt to portray himself as an outspoken critic of the Russian regime.

Ground 3: Would any prospective trial of Mr Shmatko be flagrantly unfair?

29. Section 87 of the 2003 Act requires the court to decide whether extradition would be compatible with the fugitive's Convention rights. The case law demonstrates that the burden is upon the appellant, but it is only to show substantial grounds for believing that there is a real risk of a flagrant denial of justice. Mr Caldwell reminded us that it would be wrong simply to make a blanket assumption that this must be so in every case where Russia is the requesting state.

30. The UK and Russia do still have mutual extradition arrangements. In two recent cases (*Dzgoev v Prosecutor General's Office of the Russian Federation* [2017] EWHC 735 (Admin) and *Ioskevich v Government of the Russian Federation* [2018] EWHC 696 (Admin)), to which we will return later, this court upheld requests to extradite suspects to Russia.

31. Mr Summers referred us to observations of Lord Hope of Craighead DPSC in *Kapri v Lord Advocate representing the Republic of Albania* [2013] 1 WLR 2324 (at para 32):

> … the stark fact is that systemic corruption in a judicial system affects everyone who is subjected to it. No tribunal that operates within it can be relied upon to be independent and impartial. It is impossible to say that any individual who is returned to such a system will receive that most fundamental of all the rights provided for by article 6 of the Convention, which is the right to a fair trial…"

32. Professor Bowring provided evidence that there is a consensus among reputable international observers that Russia is infected with judicial corruption in cases of importance to the state and that its judicial system is not independent. In oral evidence before the judge he said that the Russian judiciary was not capable of protecting people

from corporate raiding activity and that "the barometer for the court may be whether a case is important to the regime". He considered that the present case engages the interest of the State, or of powerful individuals associated with the regime, and that accordingly there is a significant risk of a biased decision.

33. Mr Summers referred us to a decision of Sheriff Ross in the Scottish case of *Russian Federation v Shapovalov* [2018] SC EDIN 35. The Sheriff in that case found that Russia had presented an acceptable argument that the prosecution based on alleged fraud was not political. However, he found that:-

a) Corruption exists in the judiciary, mainly in the form of making decisions for fear of personal consequences such as dismissal or demotion.

b) Prosecutions to order have become a major threat to entrepreneurs and investors.

c) "Telephone justice", a term referring to the informal but effective means of officials influencing judicial decisions, is widely recognised, as is the selection of judges who are prepared to make decisions acceptable to those in power.

d) The acquittal rate in trials by judge alone is 0.4% of cases. Professor Bowring describes this as a "no acquittals" policy.

In the present case, Professor Bowring relied on all these points and expressed the view that, being a matter of importance to the local state apparatus, any trial of the appellant would be flagrantly unfair.

34. It is unnecessary for us to reach a conclusion on ground 3 in view of ground 4, to which we now turn.

Ground 4: Prison conditions

35. In the present case, Mr Shmatko, if extradited to Russia, would initially be held in the remand prison SIZO-1 and after conviction in the Federal Public Institution Penal Colony Number 8 for the Penza region ("Penza IK8"). Originally no assurances were given about prison conditions in the request for the Appellant's extradition. However, following the hearing in this court of the *Dzgoev* case (in which Mr Summers, Mr Caldwell and Mr Hearn all appeared) assurances were given by letter of 10 July 2017 (applicable at that time both to the appellant and to Mr Avdalyan) that each of them would, while in SIZO-1, be guaranteed living space of not less than four square metres per person, together with the ability of individuals held in the same cell to move freely between pieces of furniture, and that the same guarantee would apply to conditions in Penal Colony Number 8, except that the amount of living space guaranteed would then be reduced to three square metres per person. There were also references to meals, bedding, cutlery, medical-sanitary support and the right, when held in custody before trial, to daily walks of a duration of not less than one hour.

36. The practice of giving assurances in cases of this kind derives from leading cases in the jurisprudence of the European Court of Human Rights (ECtHR). The starting point is a

presumption that any Member State of the Council of Europe is able and willing to fulfil its obligations under the Convention in the absence of clear, cogent and compelling evidence to the contrary (see *Krolik v Poland* [2012] EWHC 2357 (Admin) per Sir John Thomas P). The presumption is rebutted when the ECtHR has issued a pilot judgment against the requesting state identifying systemic or structural problems of wider significance; see *Dzgoev* at paragraph 42.

37. Such a pilot judgment was delivered in respect of Russian remand prisons in *Ananyev v Russia* (2012) 55 EHRR 18. At paragraph 148 of the judgment the ECtHR gave its view on over-crowding. It said that in deciding whether or not a detainee's Article 3 rights have been violated on account of lack of personal space the court had to have regard to the following three elements: an individual sleeping space in the cell for each detainee; at least three square metres of floor space per detainee; and space to move freely between furniture items. It added that "the absence of any of the above elements creates a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3".

38. Where a pilot judgment has been given the requesting state may, nevertheless, adduce evidence that there is no real risk of the detainee's Article 3 rights being violated. It may produce evidence that the systemic problem or problems identified in the pilot judgment have been dealt with by improvements in prison conditions, or it may give assurances that if the fugitive is returned he will be kept in particular prisons which do not suffer from the defects identified in the pilot judgment. In *Othman v UK* (2012) 55 EHRR 1 the Court held at paragraphs 188-189:-

> "188 In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human-rights situation in the receiving state excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances.
>
> 189 More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:
>
> (1) whether the terms of the assurances have been disclosed to the Court…;
>
> (2) whether the assurances are specific or are general and vague…;
>
> (3) who has given the assurances and whether that person can bind the receiving state…;
>
> (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them…;

> (5) whether the assurances concerns treatment which is legal or illegal in the receiving state…;
>
> (6) whether they have been given by a Contracting State…;
>
> (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances…;
>
> (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers…;
>
> (9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible…;
>
> (10) whether the applicant has previously been ill-treated in the receiving state…; and
>
> (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State…"

39. Mr Summers' case is that the assurances given in this case are simply not credible and that the absence of any effective monitoring regime in the Penza region further increases the risk that they will not be honoured.

40. Mr Obukhov, an independent lawyer practicing in Penza, confirmed both in writing and in oral evidence before the judge that SIZO-1 contains cells for 16 inmates measuring not more than 30 square metres (less than two square metres per person) including a large dining table and an open toilet. The evidence of six witnesses concerning conditions in SIZO-1 in 2017 also suggests that the prison is constantly at maximum capacity, which means that prisoners have below three square metres of personal space; and there are many other defects in material conditions. There was supporting evidence to this effect from a prominent human rights activist, Ms Alexeyeva.

41. The appellant's own experiences in Penza between June and August 2010 (though of course relating to a period many years ago), also confirmed this evidence. He was initially detained in a cell of not more than five square metres with three other prisoners, all of whom suffered from hepatitis C. He was transferred to a very crowded larger cell shared with twenty prisoners with no room on the floor and no chairs. There was an un-partitioned open toilet in the room. Ventilation and natural light were minimal and the bedding was never changed. Dr Mitchell, one of the experts whose evidence was before the judge, concluded that the conditions described by the appellant were "entirely consistent with what is known about Russian prisons generally" and Professor Bowring

concluded that there was a real risk that the appellant would be exposed to prison conditions that would violate Article 3.

42. The pilot judgment in *Ananyev* does not cover post-conviction detention, so that at that stage the burden is on the requested person to establish a real risk of Article 3 mistreatment. But there is essentially no dispute that Russian penal colonies, including Penza IK8, are designed and built on the basis of two square metres of space per prisoner. There was a substantial volume of witness evidence before the judge suggesting that the provision of three square metres per prisoner is simply not physically achievable in IK8. There was no evidence that individual cells were available or that they could or would be provided to the appellant on a privileged basis. There was also no evidence that the local prison authorities could or would make the sharp reductions in the numbers of prisoners that would in practice be necessary in order to give the Appellant three square metres of personal space.

43. The judge found that the most serious concern in SIZO-1 was overcrowding but held that in view of the assurance as to personal space given by the letter of 10 July 2017 it was unnecessary for her to consider in any detail the material conditions in SIZO-1. The question then is whether that assurance is likely to be met in practice. It is right that the statements before the judge from witnesses about prison conditions were in writing; but it is significant that the requesting state served no factual evidence in response to them.

44. Since the hearing before the judge, Professor Pallot has provided evidence which further increases the concerns which we would in any event have had about the credibility and effectiveness of the assurances.

45. In 2008 the Russian Parliament established prison monitoring committees known as Public Oversight Commissions (the Russian acronym is ONK; the English version is PMC). These monitor the observance of the human rights of people held in detention in certain specified facilities.

46. Professor Pallot's evidence about the recent composition and activity (or lack of activity) of the Penza PMC is that it is dominated by law enforcement officials and has no independence from the prison service. It has apparently received no complaints of anyone alleging any ill treatment or any adverse conditions in the pre-trial or post-trial detention facilities in Penza.

47. In any event, by Federal Act No. 203 of 19 July 2018 the 2008 Law has been amended in a way which in the opinion of Professor Pallot;-

> "… has effectively put the final nail in the coffin of independent and impartial prison monitoring in the RF and has removed the only channel for making complaints, that is formally at least independent of law enforcement and criminal justice agencies. The amendments legalise the de facto practices that had already undermined the rights of prisoners in the original legislation to have confidential and private conversations with members of PMCs. The amendments also end the unimpeded access of PMC members to penal institutions…"

48. Prison staff are now required by law to monitor conversations between PMC members and prisoners. The opportunity for NGOs to recommend monitoring committee members has been restricted.

49. We were told that the cases of *Dzgoev* and *Ioskevich* were the only two recent incidences of requests for extradition to Russia being upheld in this court. It is important to note that in both cases great significance was attached to the issue of independent monitoring. In *Dzgoev* Gross LJ, giving the judgment of the court, referred to a previous case in which the expert witness Professor Morgan had visited a SIZO which had been suddenly emptied of many prisoners before his visit and was told a lie about it. Gross LJ said at paragraph 67:-

> "… it is to be recollected that in respect of overcrowding in SIZOS it is for the Russian authorities to establish that the concerns expressed in *Ananyev* have been dealt with. Accordingly the importance of proper monitoring is self-evident in this case so as to assure that the assurances in respect of of overcrowding given by the Russian authorities are honoured. This is especially so given the unfortunate incident with Professor Morgan discussed above.
>
> For these reasons in our judgment the evidence presently before us needs to be supplemented by further assurances."

50. The appeal was stayed on the grounds relating to pre-trial detention until further assurances were provided. These were that Mr Dzgoev would be detained in a particular pre-trial detention centre in Irkutzk; a second related to his detention in a cell with an individual sleeping place, at least three square metres of personal floor space and the ability to move freely between the furniture in the cell. The final assurance was in these terms:-

> "The Russian Federation guarantees that the ONK responsible for SIZO-1 (in Irkutsk) continues to operate on the same independent basis as it did at the time of its report of March 2015 and will monitor regularly compliance with all the assurances set out above."

On these assurances being given, Mr Dzgoev was extradited.

51. In *Ioskevich*, Professor Morgan had visited the pre-trial detention unit in question as a jointly instructed expert. On the day of his visit the section held 14 detainees but had capacity for 26. The available living space exceeded three square metres per detainee. The assurances from the requesting state were, as Green J put it, "provided incrementally" but were to be viewed as they had evolved in the round. At paragraph 58 he said:-

> "In my judgment the assurances are sufficient. It is important in this regard that they were then subject to independent verification by Professor Morgan. I can detect no error in the approach adopted by the Judge towards the acceptance of assurances in this case. I would mention, finally on this point,

> that the Appellant has adduced new evidence from Professor Bowring which suggests that the internal monitors appointed within the Russian Federation have, in effect, been hijacked. Indeed, it is suggested that the identified monitors are imposters. We cannot, on this appeal, test the truth of this submission. Similar points were however made before the District Judge. This case turns upon the acceptance of the Russian assurances. As emphasised elsewhere if it turns out, in this or other cases, that Russia dishonours assurances or thwarts or impedes external monitors or if it appears that internal monitoring is ineffective or lacking transparency then it is possible that extradition will no longer be ordered."

52. Both these cases emphasise the importance of independent monitoring. The recent legislation to which Prof Pallot refers does indeed tend to show in our view that the pessimistic predictions of Prof Bowring mentioned by Green J have been borne out.

53. Mr Caldwell did not argue that the Penza PMC had shown itself to be a robust and independent monitor of detention conditions in its region. He valiantly suggested that the gap could be filled by human rights organisations or by lawyers visiting their clients in the relevant institutions. As to the first we have no confidence, especially in view of the recent legislation, that human rights organisations could or would be allowed to take the place of PMCs.

54. As to the second, although *Othman* at paragraph 189(8) indicates that a factor to be considered is whether unfettered access to defence lawyers may be a means of monitoring, we regard it as both unrealistic and contrary to principle to suggest that visits by defence lawyers can be used as a substitute for effective independent monitoring of prison conditions. In any event, there is no evidence that lawyers would be allowed to speak to anyone other than their own clients, and no doubt in respect of their own clients the Russian authorities would say that the lawyers are not independent.

55. In our judgment there is not merely a real risk but a very strong probability that, if extradited to the Penza region of Russia, Mr Shmatko would be held, both pre and post-trial, in conditions which involve serious violations of Article 3 and that the absence of any effective independent monitoring of prison conditions in Penza further increases that probability. In view of the serious non-disclosure by the prosecuting authorities of the requesting state in relation to the recent decision of the regional court to which we have referred above, we are not prepared to seek further assurances from the same source regarding prison conditions in Penza.

56. For these reasons we conclude that Mr Shmatko's extradition is barred on Art 3 grounds.

57. We see considerable force in the observations of Sheriff Ross in *Shapovalov* (at [123]) that there is good reason to reconsider the benefit of the doubt accorded to the Russian Federation as a member of the Council of Europe in cases of this kind. Since *Ioskevich* there has been a serious deterioration in relations between the UK and Russia following the Salisbury poisoning case; and sanctions have been imposed on Russia by the Council of Europe. But it is unnecessary to consider that issue further in the present

case. It is likewise unnecessary to consider whether Mr Shmatko's extradition would also be barred on the grounds that there is a real risk of a flagrant denial of justice.

58. The appeal will be allowed and the Appellant discharged.