Case No: CO/4920/2016

Neutral Citation Number: [2018] EWHC 696 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th March 2018

Before :

LORD JUSTICE HICKINBOTTOM
MR JUSTICE GREEN

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Between :

	ALEXANDER IOSKEVICH	**Appellant**
	- and -	
	GOVERNMENT OF THE RUSSIAN FEDERATION	**Respondent**

- -
- -

Malcolm Hawkes (instructed by **Lansbury Worthington**) for the **Appellant**
Peter Caldwell (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing dates: 8th March 2018

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Judgment MR JUSTICE GREEN :

A. Introduction

1. In this appeal the Appellant challenges the decision of District Judge McPhee of the 1st August 2016 pursuant to which the judge sent the request of the Russian Federation for the extradition of the Appellant to the Secretary of State who then ordered the extradition of the Appellant to serve a sentence of 18 months imprisonment in Russia for an offence of fraud. The Judge arrived at his conclusion taking into account assurances provided by the Russian Federation as to the identities of the pre-trial detention facility and the post-trial penal colony in which the Appellant would be held were he to be extradited. Permission to appeal on two grounds was granted by Gross LJ and Ouseley J on 24th January 2017. The two grounds are that extradition would infringe Articles 3 and 6

ECHR.

2. The ground of appeal pursuant to Article 3 focuses upon conditions in pre and post-trial custody in Russia. An additional argument is premised upon alleged inhuman conditions in transit in Russia. It is said that information and assurances provided by Russia as to custody facilities are not to be trusted and that it cannot be assumed that the Russian Federation would act in good faith in implementing the assurances it has given.

3. The grounds based upon Article 6 ECHR are to the effect that the case advanced against the Appellant before the Criminal Courts in the Russian Federation is discriminatory and selective and initiated on behalf of an influential businessman. It is said that the criminal justice system is tainted and corrupt and the Appellant would be denied a fair trial.

4. The Russian Federation seeks the extradition of the Appellant to enforce a sentence of 18 months imprisonment imposed upon him on 27th June 2014 for an offence of fraud. The proceedings against the Appellant had originally commenced as an Accusation Request dated 16th December 2013. That request was certified by the Secretary of State pursuant to section 70 of the Extradition Act 2003 (EA 2003) on 19th December 2013. During the course of the extradition process, criminal proceedings in the Russian Federation continued which resulted in the conviction of the Appellant. It is not disputed in the present proceedings that he is a fugitive from justice. Following conviction, a second request dated 19th August 2015 was certified on 2nd September 2015. It was agreed that the Appellant would be entitled to a retrial should he seek one upon his return to the Russian Federation.

B. The Alleged Fraud

5. The request sets out adequately the particulars of the conduct said to amount to criminal proceedings in the Russian Federation. It specifies an extradition offence. Neither of those propositions is in issue.

6. The conduct in issue is described in the judgment of the Pervomaisky District Court. Both the Complainant (Mr Kovalev), the Appellant, and his business partner (Mr Dorshenko) were interviewed by investigators. Summaries of their accounts are set out in the judgment of the District Court. The Appellant was the General Director of a company named "Dionis" and his deputy was Mr Dorshenko. It appears that the Appellant, through Dionis, was involved in negotiations to undertake a construction project to build residential properties for employees of the Ministry of Internal Affairs in the Krasnodar region of the Russian Federation. One component of the contract was that Dionis would demolish and rebuild and then equip a medical "polyclinic" in the area.

7. The Complainant, Mr Kovalev, was the First Deputy Director of a company called "InzhStroyMontazh" ("ISM").

8. The core allegation was that the Appellant agreed to give ISM, as sub-contractor, the construction work for the polyclinic upon condition that it provided as security for their participation in the project a bond in the sum of 4 million roubles. It appears that it was a condition of the provision of the 4 million rouble bond that Dionis would produce documentation establishing that it had been contractually engaged to perform the construction work and had the necessary permissions to proceed. In the event that this proof was not forthcoming Dionis was under an obligation to return the security. On the 19th September 2011 ISM duly provided the bond to Dionis. However, the requisite documentary proof to be furnished by Dionis never transpired. Dionis did not, however, return the money and the allegation was that the Appellant had appropriated then dissipated the funds for his own personal ends.

9. The request issued by the Russian Federation describes an account given by the Appellant himself to investigators. This account indicates that the Appellant became aware of the construction project and the opportunity that it presented to Dionis. He organised for investors from the UK and an engineer to visit the site. He agreed that ISM was to be offered the sub-contract. He also acknowledged that Dionis was under an obligation to repay the bond in the event that it was unable to provide the required documentation. He apparently acknowledged further that Dionis was unable to repay the bond for lack of funds.

10. Mr Dorshenko, the Appellant's colleague in Dionis, also provided a statement to investigators. He, likewise, acknowledged there was an obligation to return the 4 million roubles upon it becoming clear that the contract could not proceed. He also accepted that the money was not available. He could not, however, account for its whereabouts.

11. Although the conduct arises in the course of business dealings it is the position of the Russian Federation that the request concerns a criminal allegation of fraud, and not merely a private law dispute. It is said that the Appellant received the 4 million rouble bond knowing, upon receipt, that he did not have the contract in place which he could certify and thereby avoid the obligation to repay the bond.

12. The Pervomiasky District Court concluded as follows:

> "Having weighed the provided evidence in total, the court considers that actions of the defendant Loskevich A. E. have been qualified correctly as stipulated by Part 4 Article on 60th Criminal Code of the Russian Federation as misappropriation, that is stealing of other peoples property entrusted to the convicted person, in connection with duties of office, on an especially large scale."

13. The ruling of the court is to be construed as a finding of dishonesty. Dionis was, at all material times, liable to return the bond to ISM. The money was held by Dionis and therefore by the Appellant in a position of trust. The conduct would constitute an offence under English law of fraud by abuse of position contrary to section 4 of the Fraud Act 2006.

1. C. The judgment of the District Judge

The approach adopted towards the evidence

14. I turn to the judgment of District Judge McPhee. The Judge set out his conclusions on the grounds advanced before him in considerable detail. In view of the arguments advanced on the appeal I start this part of the judgment by describing the approach adopted by the Judge towards the evidence.

15. The Judge heard evidence from a wide variety of sources. He, in particular, received expert evidence on the criminal justice system in Russia. I can summarise the evidence in the following way. Professor Morgan was jointly instructed by the requested person and by the requesting authority. He is said by the Judge to be a leading authority on prison conditions across the world and especially in Europe. He had previous experience of visiting prisons in Russia. In June 2016 he visited two prisons named in assurances provided by the Russian Federation as facilities where the Appellant would be detained. Professor Morgan gave live evidence before the Court. Expert evidence was also provided by Professor Bowring for the Appellant. According to the description of qualifications and experience attached to his expert report he has considerable experience of the Russian judicial system. He did not however visit the prisons in issue. He has given evidence in cases involving Russian interests in the domestic courts on previous occasions. The Judge also heard evidence from the requested person. He took into account institutional material and reports from bodies such as: the European Committee for the Prevention of Torture; a committee on Legal Affairs and Human Rights from the Parliamentary Assembly of the Council of Europe; and, the US State Department Country Practice annual report on Russia. The Judge also took into account a body of more anecdotal evidence relating to the justice system and prison conditions in Russia including from newspapers and other articles and literature.

16. I turn now to the details of the expert evidence of Professor Morgan. He expressed his opinion that both the pre-trial detention facility and the post-conviction penal colony were Article 3 compliant. Professor Morgan had visited the pre-trial detention centre and penal colony that the Appellant would be detained in were he to be extradited. The Judge addressed the experience of Professor Morgan to make assessments of compliance by the Russian state, through its judicial system and penal conditions, with the ECHR. He examined Professor Morgan's evidence in the context of submissions that in effect he had been hoodwinked by his "*minders*", during his visit to the prisons in question. The Judge was conscious of the risk of concoction and staging. He carefully reviewed the evidence about this. He considered whether Professor Morgan was able adequately to assess the risk that what he had witnessed was artificially managed for his benefit.

17. The Judge also considered whether, if there had been staging, Professor Morgan had been able (in effect) to see through the manipulation and form an independent and considered judgment notwithstanding. An illustration of the approach adopted by the Judge was in relation to the evidence of Professor Morgan that during his visit to the penal colony all the prisoners appeared to be sitting in a disciplined and regimented manner attending (and enjoying) a rock concert. Professor Morgan was of the view that there may well have been aspects of his visit that had been "*staged*". He pointed out that inspection visits, such as that he was engaging in, were rare in the Russian Federation

and excited the interest of the authorities. He described the large groups of officials who attended his every move.

18. The Judge also placed the evidence of Professor Morgan in the context of concessions made by Professor Bowring. For example, Professor Bowring acknowledged that it was possible to receive a fair trial in Russia notwithstanding the copious evidence of systemic corruption. He also noted the acknowledgment by Professor Bowring that there was no political dimension to the Appellant's case or likelihood of ill-treatment were he to be extradited.

19. It is, in my judgment, clear that the Judge was aware of the complex and nuanced task that confronted him of unravelling the evidence and distinguishing the genuine from the contrived. I turn now to the Judge's particular findings of fact in relation to the issues arising.

Pre-trial detention

20. In relation to pre-trial detention the Judge considered the evidence of Professor Morgan who visited the pre-trial detention unit (PRSI-IK14) to which the assurance related. This unit (which is part of a wider post-conviction colony) is intended for persons awaiting determination of a re-trial or appeal. It is not however part of the general remand population. On the day of Professor Morgan's visit the section held 14 detainees but had a capacity for 26 prisoners. The detention rooms were small but not unacceptably crowded and the available living space exceeded $3m^2$ per detainee. Each unit had a separate lavatory with closable doors. These were annexed to each room. There was a shower cubicle which detainees could use once per week. The windows were of a reasonable size and were capable of being opened and they admitted good daylight. Each room was provided with safe drinking water from a dispenser. The detention unit had an exercise yard where prisoners were taken on a twice daily basis for 30 minutes upon each occasion though Professor Morgan described this yard as "*pitifully small"*. There was a conventional and well-staffed hospital wing.

21. The overall conclusion of Professor Morgan was that the Committee for the Prevention of Torture ("CPT") would not be likely to find the general conditions at the detention unit to be inhuman or degrading nor did Professor Morgan conclude that the conditions would breach Article 3 ECHR.

Post-trial imprisonment

22. In relation to Penal Colony FKU-9 where the Appellant would serve a post-conviction sentence the Judge made the following findings arising out of Professor Morgan's evidence. The prisoners sleeping areas were scrupulously clean albeit spartan. Prisoners were afforded living space in excess of $3m^2$. Prisoners had access to outdoor yards adjacent to the dormitory block which they could use whenever they had free time. They had free time when they were not in workshops or classrooms or otherwise employed. Prisoners were entitled to a weekly shower and clean clothing. Professor Morgan spoke to some prisoners unattended. They said that they felt safe. They spoke positively about

the prison culture. They were given timely access to medical facilities. Professor Morgan was critical of the arrangements for prison visits for medical consultations. However, overall he considered that it was "*inconceivable"* that the conditions would be found to be in breach of Article 3 ECHR.

Rejection of the evidence of Professor Bowring

23. Professor Bowring was critical of Professor Morgan's report. The judge noted the tone of scepticism raised by Professor Bowring to the effect that Professor Morgan had been deceived or misled as to the reality of conditions. The Judge however preferred the evidence of Professor Morgan. Professor Bowring had not visited the facilities. Indeed, he had not even attended to hear Professor Morgan's evidence given in court. The judge addressed the risk that Professor Morgan had been misled. The Judge made a number of findings about this. First, inmates had, in private conversation, told Professor Morgan that conditions were normal. Second, the possibility that prisoners had been "*decanted*" was inherently unlikely on the particular facts of the case. Third, this was not a "*political case*" and there was no obvious motive for the authorities to create a false impression to this effect. Fourth, the assurances and statements about the availability of legal protection for the appellant had been confirmed by Professor Bowring to be truthful.

Conclusion on prison conditions

24. The Judge concluded that there was no likelihood of a breach of Article 3. The Judge accepted the assurances given to him in relation to the facilities where the appellant would be detained. The combined effect of the evidence of Professor Morgan and the assurances were sufficient to satisfy the judge.

25. As observed an important part of the judge's reasoning was his preference for the conclusions of Professor Morgan and that, *on the particular facts of the present case,* there was no risk of a violation of Article 3. The Judge addressed the opposing view of Professor Bowring, that there were systemic problems inherent in the prison estate of the Russian Federation which indicated that it was intrinsically non-compliant with Article 3. This indeed was the central issue in the case. A flavour of the debate can be seen from the analysis in relation to "*decanting*" which is the tactic or device used by the authorities to convey the impression that a particular detention facility is not over-occupied by removing prisoners for the duration of the visit by an inspection team. As to this the Judge stated as follows:

> "Professor Bowring suggests that the fact that Prison numbers were not properly released to Professor Morgan is sinister. I accept that an open state and government would publish such numbers. Especially in the face of international concern about prison numbers and conditions in the Russian Federation. The Russian Federation is not such a state and there may be myriad and complex reasons behind that. Their stance, I accept, does little to allay fears. Here the relevance is twofold. The evidence provided to Professor Morgan does show the remaining prison

> estate in the Krasnodar Region remains heavily, if not over-occupied. Professor Bowring would be concerned at the possibility that Prisoners had been decanted, that is deliberately moved out of IK-14 or IK-9 before the 15th and 16th June visits so as to show Professor Morgan facilities slightly under-occupied. He would be concerned that as IK-14 seems so under occupied that prisoners could be moved in and from the main penal colony to which it is attached. Professor Morgan accepted these possibilities but clearly did not feel the wool had been pulled over his eyes. He is the expert, he was there on the ground and he spoke with the prisoners he selected at random and in privacy. I would prefer the evidence of Professor Morgan to the concerns expressed by Professor Bowring which are not based on clear evidence but on suspicion about the secretive and sometime manipulative Russian State. It is however the evidence of Professor Bowring that there is no political element to this case. Such decanting of prisoners, if nothing else, would need some committed organisation and at some cost. That is not to say such deception is not impossible, but I conclude on these facts unlikely. Much more likely is the evidence of that which the Professor actually saw rather than what he was told. The pop concert he accepted may have been staged but you could not stage the fact he said that there was a purpose-built auditorium or that only one prison guard was there to watch over 600 inmates, a scene he had never seen replicated in any Western European Prison. That indicated to him that what the prisoners told him, all first time in prison, was that they all simply tried to get along to ease each of their individual paths towards freedom.
>
> Interestingly other assurances provided by the Russian Federation, the right of the requested person to a re-trial, the fact that if his appeal is dismissed his prison sentence cannot be increased together with the submissions of the Russian Federation that there is here no allegation of ill-treatment and no political element are all enthusiastically supported by Professor Bowring without demur."

Assurances

26. The assurances identified the precise facilities where the Appellant could be held. The Judge concluded that he could accept them. He set out the relevant case law which identified the test to be applied.

27. He concluded that the assurances were specific and personalised towards the requested person and could be accepted. Ambiguities in early assurances had been comprehensively addressed in subsequent documents provided by the Russian Federation. The person or agency who had given the assurances had the power to bind the receiving State. The assurances would be honoured by the relevant local authority (in Krasnodar). The assurances sufficed under domestic law to bind the state. The assurances had been given by a Contracting State (to the ECHR). He took into account any evidence that the Russian Federation had, in the past, failed to adhere to assurances

given to domestic courts. He was satisfied that the assurances could be objectively verified through diplomatic or other monitoring mechanisms including providing unfettered access to the applicant's lawyers. The Judge pointed out that the Appellant had been represented at trial in Russia by a lawyer (albeit in his absence) and he accepted the evidence of Professor Bowring that a requested person was entitled to seek a re-trial.

28. The Judge also addressed briefly whether there was an effective system of protection against torture in the Russian Federation including whether it was willing to cooperate with international monitoring mechanisms and whether it was willing to investigate allegations of torture and to punish those responsible. He recorded the evidence of Professor Bowring which was that civil society in Russia was "*shrinking*". However even Professor Bowring accepted that Prison monitoring appeared to be functioning for the Krasnodar Region. The relevant monitoring committee had taken up prisoner complaints. The Commissioner for Human Rights for the Krasnodar region had involved himself in the present case through discussion with Professor Morgan during the course of the visits in June 2016. There was no evidence that the Appellant had been previously ill-treated by the Russian Federation. Professor Bowring pointed out that it was no part of the Appellant's case that he would in fact receive ill-treatment.

29. With regard to whether the reliability of assurances had been examined by the domestic courts of the sending state the Judge accepted that the assurances had not been previously examined by the courts in England and Wales. However, the judge cited the views of judges in other cases that were the Russian Federation to fail to meet the undertakings and assurances given in the present case this would set back future extradition requests for many years. The conclusion of the judge was in the following terms:

> "I am therefore satisfied that I can and so should rely on the assurances provided in this case that if he seeks retrial he will receive a re-trial and that in those circumstances the requested person will be housed in pre-trial detention in Sizo IK-14 and that if his conviction is not appealed, or if it is and the conviction is upheld then the maximum effective penalty would be 18 months imprisonment served in penal colony IK-9, although he may receive a non-custodial or suspended sentence."

Article 6: Fair trial

30. Turning to the issue of fair trial, the evidence of Professor Bowring was that there was a "*toxic mixture of financial corruption, political interference and lack of judicial independence in Russia*" which, in combination, provided the conditions in which powerful individuals could exploit the law enforcement agencies for commercial purposes. Professor Bowring said that Mr Kovalev, the Complainant in the criminal proceedings (see paragraphs [6ff] above) was just such a powerful and influential person. This was the essence of Professor Bowring's case on behalf of the Appellant.

31. The Judge rejected this analysis as applied to the present facts. He was "*struck*" by the evidence of Professor Bowring who also acknowledged that it <u>was</u> possible to receive a

fair trial in Russia (and that indeed Professor Bowring had *personally* been tried "*fairly*" in Russia). There was "*scant evidence in this case*" of a lack of judicial independence and the evidence of Professor Bowring himself was that there was no political dimension or likelihood of ill-treatment. Professor Bowring had failed to identify "*in any credible way*" Mr Kovalev as a powerful individual who would have the wherewithal to manipulate the criminal justice system for his own ends.

32. The Judge did not deny that there was widespread, systemic, evidence of corruption within the Russian judicial system. However, there were no features or characteristics of the present case which would indicate that the Appellant would not receive a fair trial in Russia.

33. The Judge stated:

> "[Professor Bowring] relies on the research of Professor Ledeneva on the prevalence and methodology of corruption in the criminal justice system in Russia, the phenomenon of telephone justice and the subordination of the judiciary to external influences. Research does of course discount the suggestion that every case is so manipulated. Here there is no evidence at all that in this case there is any issue of this, save for the assertions of the requested person. I simply do not find evidence that Kovalev is this well-connected powerful and wealthy individual capable of pulling the strings in a dispute over a relatively small sum of money. Is it likely that someone so well connected and powerful would have to give evidence himself at the trial, and even if his evidence was not taken in the court room that he was prepared to have his evidence reduced into writing and presented in court? I do not find in the letter of 3rd December 2012 a level of threat indicated by the requested person. If the letter does contain a hidden agenda it is that Kovalev will use more of his resources to pursue the requested person through the court if he does not repay towards he money taken and not repaid. There is nothing inherently sinister in a private individual complaining to the state about what they allege is theft of money by a responsible officer in breach of trust."

34. Finally – torture: The Appellant made reference in his skeleton argument before the judge below about the use of torture and the admissibility of evidence obtained by torture being admitted at a retrial. However, the Appellant gave no evidence of any ill-treatment at all and certainly not of torture. The judge concluded that there was no credible evidence of torture. Professor Bowring indeed, made plain in his report and in his oral evidence that this was not a case about positive mistreatment.

35. The Judge concluded:

> "I do not find that there is a real risk of a breach of Article 6 occurring in the retrial or indeed any evidence that it has occurred in the trial which resulted in this conviction"

D. Analysis and conclusions

The approach to be adopted on an appeal

36. I turn now to my conclusions. I start by considering the approach to be adopted by this court to the findings of fact made by the judge. It is apparent from the grounds of appeal and the skeleton arguments advanced in support of the grounds that, at base, the Appellant simply objects to the findings of fact made by the Judge. In the course of the oral hearing Mr Hawkes argued that the findings made by the Judge were not open to him on the basis of the evidence. He stopped short however of describing them as "*perverse*"; but he argued that they were simply wrong. The issues before this court (save in relation to the transit - see below) concerning Article 3 and 6, were raised before the District Judge and it follows that this court would allow the appeal if the Judge ought to have decided the question before him differently and if he had done so he would have been required to order the Appellant's discharge. That is the equivalent of the issue which arises on an appeal in a Part 1 case under section 27 EA. In *Celinski v Poland* [2015] EWCH 124, which was a Part 1 case, Lord Thomas LCJ observed at paragraph [24] that "*the single question which arises for the Appellate Court is whether or not the District Judge made the wrong decision*". The question therefore is whether the Judge made the wrong decision in sending the case to the Secretary of State for her to decide whether the Appellant should be extradited to the Russian Federation.

37. Nonetheless an appeal is not a rehearing and an appellate court is, manifestly, not in a comparable position to a judge at first instance who hears live witnesses and evidence and makes consequential findings of fact.

38. Where (as here) the appeal amounts to an attack on the primary fact finding of the Judge, the appellate court will accord to the Judge a considerable leeway before concluding that the Judge made the wrong decision. Less leeway may be accorded if the error complained of is as to an inference which is drawn from established facts, since the appellate court might be as well placed as the Judge to form its own view on this. And the same would apply, for instance, in relation to the construction of a document.

39. In *Dzgoev v Russian Federation* [2017] EWHC 735 (Admin) ("*Dzgoev*") Gross LJ and Garnham J, also in a case concerning extradition to the Russian Federation, having explained that on an appeal the function of the court was to decide whether the Judge below came to the correct decision (cf *ibid* paragraphs [22] and [23]) stated came to the same view. They stated:

> "Nonetheless, the matter before us is an appeal, not a rehearing. The District Judge had the benefit of hearing live evidence. In particular, he saw and heard the two expert witnesses called by the Appellant being questioned and cross-examined. We have not had that advantage. It is appropriate, therefore, to defer to him on his assessment of that oral evidence. As the District Judge observed at page 7 of his judgment, however, there were no purely factual matters upon which he was invited to make

> findings. And on the interpretation of documentary material and assessment of submissions, we are in as good a position as him to reach a judgment."

40. Mr Caldwell, for the Respondent, cited the observation of Sedley LJ in *Wiejak v Olsztyn Circuit Court of Poland* [2007] EWHC 2123 at paragraph [23]:

> "The effect of sections 27(2) and (3) of the Extradition Act 2003 is that an appeal may be allowed only if, in this court's judgment, the District Judge ought to have decided a question before her differently. This places the original issues very nearly at large before us, but with the obvious restrictions, first, that this court must consider the District Judge's reasons with great care in order to decide whether it differs from her and, secondly, that her fact-findings, at least where she has heard evidence, should ordinarily be respected in their entirety."

In that judgment it is right also to record that Sedley LJ went on to add (at paragraph [24]) that if, having accepted all of the judge's findings of fact, the appellate court nonetheless disagreed with the inferences that the judge drew from those findings then the appellate court was free to substitute its own conclusion for that of the judge.

41.

A finding or conclusion might be readily susceptible to challenge, for instance, if it simply does not follow as a matter of logic from the evidence relied upon to support the conclusion: A Judge might: misconstrue a document or simply and obviously misunderstand a piece of key evidence; arrive at a conclusion having completely overlooked a critical piece of admissible evidence; take into account and find to be significant a piece of evidence that is plainly wholly immaterial or irrelevant. However it seems to me to be a much more difficult task on an appeal simply to recite various pieces of evidence that were put to the witnesses in cross-examination during the trial and/or which were adduced in submissions to the Judge and then recycle them before the appeal court as reasons why the Judge erred. In large measure this was the thrust of the Appellants approach to this appeal. That approach cannot suffice because it assumes that no respect is to be accorded to the trial Judge who, it will be assumed, is in a superior position to the appeal court when it comes to determining the primary facts.

42. The Judge addressed himself to all relevant matters. He did not take into account irrelevant matters. He addressed himself to the competing categories of evidence and he set out his reasons for preferring one person's evidence over another (and in particular that of Professor Morgan over that of Professor Bowring). He acknowledged the strengths and the weaknesses of different pieces and categories of evidence and he factored this into his analysis. He was manifestly aware of the risk that the evidence presented to Professor Morgan, and which formed the basis of his report, had been manipulated and he sought to adjust his assessment accordingly. The Judge adopted a thoughtful, nuanced, and thorough approach to the evidence and his findings were well within the margin of discretion that this appellate court should accord to a trial Judge in

these circumstances.

Article 3: Governing principles

43. I turn to the basic principles to be applied. Article 3 ECHR prohibits "…*inhuman or degrading treatment or punishment*". It is established that Article 3 prevents a member state of the Council of Europe from extraditing a person to a state (whether or not a member of the Council of Europe) where that person may be at risk of treatment violating Article 3: see *Dzgoev v Prosecutor General's Office of the Russian Federation* [2017] EWHV 735 (Admin) ("*Dzgoev*") at paragraph [31]. Where the requesting state is a member of the Council then a presumption of compliance applies arising out of the principle of mutual-trust between contracting states which is at the heart of adherence to the ECHR: see eg *Dzgoev* at paragraph [5]. The presumption is, however, rebuttable: eg *Krolik v Poland* [2012] EWHC 2357 (Admin) at paragraph [37]. The presumption is most readily rebutted where the Court of Human Rights has issued a "*pilot judgment*" against the requesting state in question. Under Rule 61 of the Court's rules a pilot judgment can be made where there are "…*structural or systematic problems or other similar dysfunction*…" which leads to multiple applications to the Court about the same issue.

44. In relation to the Russian Federation the European Court of Human Rights has issued a pilot judgment in respect of pre-trial detention and systemic overcrowding: see *Ananyev v Russia* [2012] 55 EHRR 18 ("*Ananyev*"). Pilot judgments depart from the normal practice of determining cases on the merits. It is important however not, without more, to assume from failings identified in pilot judgments that other features of the same system in the requesting state will also be in breach of Article 3: *GS v Hungary* [2016] EWHC 64 (Admin) at paragraph [14]; and *Dzgoev* (ibid) at paragraph [41].

45. Where a pilot judgment exists, and the presumption of compliance is inapplicable, the requesting state has the responsibility for demonstrating that the requesting person will not be subjected to conditions violating Article 3: see eg *Badre v Italy* [2014] EWHC 614 (Admin) at paragraphs [65ff].

46. The general principles were, as they applied to the size of prison cells, pulled together and summarised by Hickinbottom LJ in *Georgiev v Bulgaria* [2018] EWHC 359 (Admin). I rely upon that summary but do not repeat it.

Article 3: Prison conditions

47. I turn now to the specific complaints. Mr Hawkes analysis of the Judge's conclusions in relation to prison conditions in the light of Article 3 entailed a recitation of the arguments advanced at trial as to why the Judge should have rejected the evidence of Professor Morgan. I set out below some of the Appellant's principal arguments and explain why I do not accept them as going to the heart of the judgment below.

48. First, the opinion and judgment of Professor Morgan was criticised: He was not a native Russian speaker and needed an interpreter; his experience of Russian prison conditions was not that extensive; he failed to make a proper analysis of occupancy rates at the facilities in issue because the Russian authorities refused to provide statistical evidence;

he had accepted that (in principle) the authorities could have decanted prisoners elsewhere to create a false impression of low occupancy rates but then discounted that risk in an unjustified manner; he had been unable to view the transport vehicles yet discounted this omission also from his analysis, etc. These criticisms do not grapple with the task confronting the Judge. Professor Morgan was jointly appointed by the parties, including therefore the Appellant. His experience of the prison conditions in issue was based upon first hand scrutiny. His experience of Russian prisons seems, indeed, to be better than that of Professor Bowring who certainly did not go anywhere near the prisons in question so had no first-hand knowledge to call upon when he directed his criticisms at Professor Morgan. The Judge set out why he preferred Professor Morgan's evidence. He had seen him give oral evidence and be cross-examined. Professor Morgan was aware of the pitfalls and limitations of his inspection exercise and the risks of subversion by the Russian authorities. Professor Morgan factored this into his analysis. The Judge was equally aware of the risk that the Russian authorities had sought to manipulate and engineer the visit of Professor Morgan so that he would, when he drafted his opinion, create a false picture. It is evident from reading the Judgment below that, in forming his conclusion, the Judge endeavoured to peer through the fog of deception that might have been practiced upon Professor Morgan. This was a nuanced and complex exercise and the Judge was optimally placed to conduct it.

49. The criticism that Professor Morgan might have been hoodwinked and that the Judge erred in falling for this distorted and false version of events is thus wide of the mark. It ignores the evident truth which was that the issue of manipulation of the evidence by the Russian Federation was at the heart of the case. Of course, if the Judge *had* failed to spot this risk then his findings could have been readily challenged. But he did not. In my view the nuanced exercise which the expert and the Judge were perforce engaged in served to increase the leeway that this appeal court should accord to the Judge's findings of fact.

50. Second, and in similar vein, Mr Hawkes argued that the Judge erred because there was the *possibility* that various facts observed by Professor Morgan during his visits appeared strange or might not have been be as they seemed. It was argued that the "… *conditions Prof Morgan observes for himself in the SIZO facility at PFRSI-14 are likely anomalous*". But this is not a ground of appeal. An argument that (in substance) the expert's conclusion that conditions in the facility were acceptable was "*likely anomalous*", is not an argument that can properly be advanced. This is a broad and sweeping assertion which does not descend to particulars and is based only on likelihoods. The simple fact that there was something anomalous to be witnessed is nothing to the point. The Judge and Professor Morgan were both aware of the risk of manipulation and their very task was to disentangle hard facts from false impressions and anomalies. The Judgment sets out the Judge's conclusions on this issue. The criticism does not grapple with his reasons.

51. Third, and again in similar vein, Mr Hawkes argued that some of the persons who were held out by the Russian authorities as domestic inspectors or human rights monitors "*may have been imposters and this may have been part of a deliberate attempt to mislead Prof Morgan*". Once again this is not a sensible ground of appeal. The proposition as advanced is conjecture based upon a double "*may"*. It ignores the fact that it was an all-pervasive thread running through the Appellant's argument at the hearing before the District Judge that Professor Morgan had been hoodwinked. Professor Morgan was cross-examined on this. He acknowledged the risk. His expert opinion

took that risk into account. The Judge addressed this. To succeed on an issue such as this on appeal entails close analysis of the reasoning of the judge. The argument does not get off the ground merely by reciting the evidential points made before.

52. Fourth, and yet again in similar vein, the Appellant argued that Professor Morgan was not able to speak to prisoners on the punishment block. Professor Morgan was part of a "*large and obviously official entourage, numbering up to 20 persons*". It is said that the only rational explanation is that the prisoners were "*afraid of physical reprisals*" if they did speak to the Professor. This, once again, is conjecture. Professor Morgan attended the detention facility. He spoke with the staff and prisoners there and he formed an expert view. That view was tested at trial. It is not a proper approach to an appeal simply to recite evidential points made and rejected at trial without explaining how or why the Judge was not entitled to accept that view.

53. There are other points raised in relation to prison conditions at the two facilities which I do not go into. I do not underestimate the real forensic difficulty confronted by the parties and by the court is weaving their way through the evidence in a case such as this. I would have been impressed by the Appellant's argument *if* it had been evident that the Judge had proven oblivious to these evidential risks. But he was not. He recognised that there was a clear risk, and even strong likelihood, of staging and artifice by the Russian authorities. He viewed Professor Morgan's evidence through this optic. Both the Professor and the Judge were attempting to strip away the artifice in order to obtain sight of the base, core, facts about the prison conditions and then to draw inferences from them. This was unquestionably a difficult exercise. In these circumstances it seems to me that on appeal this court must accord substantial weight to the Judge's findings. And a ground of appeal that does not take this point head on, is not going to prevail.

54. This brings me to the issue of assurances which, as I have explained before identified the facilities where the Appellant would be held.

55. The Appellant's attack on the assurances provided operates, in large measure, at the level of generality. It is argued, by reference to a variety of international studies, that Russia systemically fails to observe assurances. It is not a state to be trusted. In their skeleton argument (at Annex A) the Appellant sets out a litany of high profile incidents (such as the attack on Alexander Litvinenko and the shooting down of Malaysian Airlines flight 17) where the conduct and *bona fides* of the Russian state has been found wanting or called into question by the international community. Mr Caldwell does not in his submissions for the Respondent address these instances. He simply observes that nonetheless the United Kingdom retains extradition relations with the Russian Federation and that these considerations did not prevent the Court in *Dzgoev* from accepting assurances. The broader point is made that *if* in fact the Russian State proves to be an untrustworthy partner when it comes to the giving, observing and monitoring of assurances provided to these Courts in order to secure extradition then this would impact negatively upon the willingness of the Courts in this jurisdiction to accept assurances in the future. There is, in my view, real force in this point and the desire of the Russian Federation to continue to be able to use effective extradition proceedings should be a powerful incentive to honour assurances.

56. Professor Morgan did not materially demur from the proposition that very great care had

to be exercised in deciding whether to accept assurances from the Russian Federation. It is apparent from the Judge's analysis that he conducted a careful analysis of the assurances. In *Ananyev (ibid*) concerning overcrowding in pre-trial detention ("SIZOs") the European Court of Human Rights made clear that the Russian Federation had a duty to adduce evidence and assurances to the court that would suffice to obviate an Article 3 risk. In *Dzgoev* the Divisional Court accepted that assurances given by the

Russian Federation were capable of dissipating an Article 3 "*Ananyev*" risk. In that case the Russian Federation was invited to proffer assurances in suitable form and when they were so provided the Court accepted them as adequate. In the present case the assurances proffered have been verified by a jointly appointed expert, which is in fact a point of distinction with *Dzgoev.*

57.

The assurances in this case were provided incrementally. In my view the assurances must be viewed as they have evolved ie in the round. If gaps and lacuna in earlier versions have been rectified, then it is the most up to date position that should be taken into consideration. It is in fact not much of a surprise that the position has developed in a piecemeal fashion since, as Mr Caldwell for the Respondent pointed out, the details about the detention centre changed as arrangements were made for Professor Morgan's visit. By the time of the extradition hearing before the Judge the position had crystallised, and the exact identity of the custody facilities had been spelled out.

58. There was no such verification of the assurances in *Dzgoev,* yet they were nonetheless accepted. 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.

59. For these reasons I reject the appeal in relation to prison conditions.

Article 6: Fair trial

60. The Appellant's case involves a systemic attack on the probity of the Russian judicial system. The right to a fair trial is "… *seriously undermined by judicial corruption. Business disputes in Russia are often resolved extra-judicially, but there is a risk that even those cases which reach the court are not the subject of fair hearing*". Mr Kovalev has engineered the prosecution. It is accepted that there was no direct evidence of links to senior officials, but various pieces of evidence are referred to which identifies him as

a director of certain utilities companies who do have links to very wealthy individuals. Professor Bowring has set out evidence showing that prosecutions can be brought "*to order*". There is "telephone" justice: someone rings the Judge up and tells him/her what to rule. The prospects of a fair trial are "*bleak*". The Russian criminal justice system is characterised by "*legal nihilism*". Evidence of academic researchers exists such as Professor Ledeneva who write and research on judicial corruption. The submission boiled down to this: Professor Browning was of the opinion that "*if"* Mr Kovalev was indeed a wealthy and powerful individual then "*it is plausible*" that he could "*ensure*" the Appellants conviction. The judge erred in concluding otherwise.

61. I do not accept that this is a good ground of appeal. The point is based upon unevidenced hypotheses and it recycles the evidential points advanced at trial and rejected, with reasons, by the judge. Moreover, it is partial since it omits a number of evidential points that the Judge considered relevant, namely that Professor Bowring himself accepted in evidence that it *was* possible to have a fair trial in Russia. The Judge looked carefully at the features of the case to see whether it matched the criteria for a risk of a rigged or corrupt trial. He concluded that it did not. He considered the position of Mr Kovalev and he came to the conclusion that he was not the sort of rich and powerful businessman who could or would use his influence to rig judicial proceedings. The grounds of challenge on this appeal do not address the Judges reasoning.

62. In my judgment this is a short point. There is no significant attack on the Judge's reasoning. The grounds advanced recycle evidential arguments advanced at the trial and which were rejected. I can detect no error in the judge's reasoning. This ground fails.

Article 3: Conditions in transit

63. The third and final ground of appeal concerns an allegation that, by virtue of the proposed transport arrangements of the Appellant within Russia, it is evident that the Russian government intends to subject him to a transport and transit regime which engenders an unacceptably high risk of Article 3 violation. There is no permission granted for this ground of appeal to be raised. However, it arises by virtue of a letter served on the 5th March 2018, but dated the 28th February 2018, in which the Russian government provided details of the proposed transport arrangements of the Appellant. It also provided details of the transport arrangements employed in the case of Mr. Dzgoev, a recent extraditee to Russia pursuant to the order of Divisional Court in *Dzgoev* (ibid). No objection had been taken by the Respondent to this ground being advanced. It was subject to full argument in court. In my judgment it is appropriate that this Court should address the issue.

64. The Appellant's case can be summarised as follows. It is evident from the information provided by the Russian government that Mr. Dzgoev was transported in inhuman and degrading conditions on account of the extremely cramped space in which he was taken by vehicle between train stations to prisons during his very long journey from Moscow to Irkutsk (where he was to be detained). In the circumstances assurances and promises by the Respondent in this case to the effect that the transport of the Appellant would meet Article 3 standards cannot be trusted. The Respondent intends to subject the Appellant to the same regime which, thereby, will violate the Appellant's rights under Article 3. In written submissions upon this ground the Appellant has provided evidence, in tabular form, setting out details of the types of vehicle that are used to transport

prisoners, the length and width of the cells they are in, the square meterage, prisoner capacity, and the per prisoner minimum space also measured in square meterage. From this it can be seen that small cell vehicles envisage 36 or 39 cm² for a prisoner transported alone. Large cell vehicles offer, at most 4.32 m² and 1.55 m² respectively. However the larger vehicles are intended to convey up to 15 prisoners and were three or more prisoners carried in such conditions it would amount to a breach of Article 3. The large cell vehicles, even with one prisoner, would be non-Article 3 compliant. Carried to capacity the position would be "*wholly intolerable*".

65. In relation to the position of Mr. Dzgoev details are provided, again in tabular form, which provide a breakdown of his journey from Moscow to the detention facility. It identifies the amount of time taken on each leg of the journey and the amount of space that Mr. Dzgoev was detained in for each leg. It is submitted that he was transported in conditions of between 36 cm² up to a maximum of 1.55 m². One leg of the journey exceeded 40 hours in duration during which he was detained in conditions which, it is argued, are non-Article 3 compliant.

66. So far as the position of the Appellant Mr. Ioskevich is concerned if he were to be extradited he would be escorted to the city of Krasnodar by an air flight with a transfer at one of the international airports in Moscow. Upon arrival at the Moscow airport the Appellant would be flown to Krasnodar Airport by direct flight. The travel time is approximately 2 hours and 20 minutes. From the airport at Krasnodar to the pre-trial detention facility is approximately 16 kilometres. He would be transported in a special prison vehicle. The distance from the detention facility to the court is approximately 12 kilometres. Transportation of suspects and accused from remand centres to courts is conducted by guard-convoy units of the Ministry of Internal Affairs and not by the convoy teams designated by the Federal Penitentiary Service. The letter from the Russian Federation gives details of what would happen in the event of a medical emergency. The letter also gives details of the cell sizes in each type of vehicle. It is pointed out that by a determination of the Supreme Court of the Russian Federation No. APL12-200 of 17 April 2012 the standard capacity and size of the cells of special vehicles used in the penal system was held to comply with technical specifications established for special vehicles and did not violate the rights and freedoms of convicts.

67. The Russian Federation reply to a point made, in these proceedings, by the Appellant which is that a recent International Report on prisoner transport prepared by Amnesty concluded that the cramped conditions of prisoner transport vehicles constituted inhuman and degrading treatment. This conclusion was endorsed by the Court of Human Rights in *Kavalerov v Russia* (Application No, 55477/10, 4 May 2017). In their letter the Russian Federation states as follows:

> "The issues raised by the Amnesty International report cannot be the subject of discussion in the case of A.E Ioskevich, since he will be transported to Krasnodar through the territory of the Russian Federation only by air transport. Transportation in the territory of the capital Krasnodar Region will be carried out in a special vehicle."

68. The nub of the ground of appeal is, by reference to the treatment of the extraditee in *Dzgoev*, that the information provided by the Russian Federation cannot be trusted. The

Appellant would be subjected to degrading and inhuman treatment in the transport arrangements applicable to him were he to be extradited.

69. I am unable to accept this submission. This is for the following reasons.

70. First, the information provided to this Court by the Russian Federation is extremely detailed. It is explicitly designed to satisfy the court that the concerns expressed in the Amnesty International Report and endorsed by the European Court of Human Rights in *Kavalerov* do not apply. There is, in my view, no reason why this Court should directly apply the criticisms made by Amnesty International to the quite different situation contemplated in the present case of air transport.

71. Second, there is, at least at present, no reason to doubt the *bona fides* of the information provided by the Russian Federation. In a recent judgment by the Senior District Judge (Chief Magistrate) of 5th February 2018 in *Zarmaev v Government of the Russian Federation* the issue before the Court was whether the appellant's extradition was compatible with Articles 3 and 6 ECHR. One issue concerned the weight to be attached to assurances proffered by the Russian Federation. That particular case had a complex history. It had included an earlier judgment by the (then) Chief Magistrate Howard Riddle who had accepted assurances given by the Russian Federation. The (present) Chief Magistrate at paragraph [50] of her judgment stated as follows:

> "I too conclude as Chief Magistrate Howard Riddle did that I can accept the assurances given by the Russian Federation. He knew as I did that they had breached assurances in the international context. I accept that there will be difficulties in monitoring them (diplomatic monitoring will be particularly difficult) but I find that Mr Musaed will ensure any breach will be brought to the attention of the authorities there and here. The particular persons have been identified. The Russian Federation is a member of the Council of Europe. The RS will not want to breach any assurance because if they did so they know that all extradition to the Russian Federation would be stopped in its tracks. The RP in this case is accused of a very serious offence but there are many more significant Russians requested by the Federation."

72. It is worth, before proceeding with my own analysis, to observe that the Chief Magistrate said the following in relation to the transit of the RP within Russia:

> "I accept that there is a chance that the RP will have a very uncomfortable transit journey from Moscow to Chechnya. This will be for a limited period of time. The RP would know that he was on his way to conditions which have been the subject of the assurance."

73. In *Dzgoev*, in a postscript to the judgment, the Divisional Court recorded that in the light of the earlier judgment the Russian Federation had provided assurances to address concerns articulated by the court. The court then said as follows:

> "We note, in particular, that these assurances are provided to this court to address particular concerns we articulated related to this individual appellant. The Russian Federation plainly has a strong interest in honouring these assurances. In those circumstances, we are content to rely on those assurances. Accordingly, this appeal is dismissed."

74. The position has thus been reached, in particular in view of recent case law, that the court should accept assurances from the Russian Federation provided, of course, that they are adequate and accurate in terms of scope and content. At this juncture in time the Court will give the Russian Federation the benefit of the doubt and assume that it has a strong incentive to adhere to assurances provided by it. It necessarily follows, of course, that were the Russian Federation to be proven to have acted in bad faith or otherwise not to be enforcing assurances (in this or in other cases) then it is highly probable that the door to future extraditions would be shut hard. In the present case it is manifest that the Russian Federation has been at pains to provide assurances which specifically address the concerns of these courts and take into account criticisms made by such bodies such as Amnesty Intentional and the European Court of Human Rights. We do not underestimate the complexities associated with monitoring. Nonetheless, we are confident that in the event that there are breaches of assurances, in the present case, or indeed in other cases, that these will come to light.

75. Third, the pilot judgment in *Ananyev* applies only to pre-trial detention. It does not apply to transit arrangements. Accordingly, as has been recognised in other cases, the presumption in favour of compliance with ECHR obligations by convention parties applies to the Russian Federation. Provided that the Court can rely upon the information provided by Russia there is no reason for this court to go further and assume an intent not to adhere.

76. As to the Appellant's argument that the details provided by the Russian Federation as to the transit arrangements for Mr Dvgoev amounted to a breach of Article 3 I am not persuaded by this. Even upon the hypothesis that a breach is established in that case it would not without more amount to a good reason to reject the information provided by the Russian Federation in this case. There is a dearth of information as to precisely what did happen to Mr Dvgoev. It would appear at least possible that he was transported for a lengthy period of time in conditions which did not satisfy the minimum strict space requirements set out in certain cases. However, the legal position is not as unequivocal as the Appellant contends. In *Yakovenko v Ukraine* (Application No. 15825/06, 25th January 2008) the Court of Human Rights observed that individual compartments measuring 0.4, 0.5 or even 0.8 square metres could be unsuitable for transporting a person "*no matter how short the duration*" (paragraph [108]). Mr Hawkes relied upon this to support the proposition that the size rules were absolute. However, subsequently, in *Mursic v Croatia* (Application No. 7334/13), 20th October 2016) the Court stated, even in the light of *Ananyev*, that short, occasional and minor reductions in the Requested Person's space would not necessarily amount to a violation of Article 3 (in the context of pre-trial detention): see ibid paragraphs [129ff]. Moreover, in the authority specifically relied upon by Mr Hawkes in his written submission on this point (*Kavalerov* (ibid) – see paragraph [68] above) the Court (at paragraph [7]) stated only that extreme lack of space in a cell or overcrowding weighed heavily as an aspect to be taken into account for the purpose of establishing whether detention was degrading.

Such evidence could disclose a violation standing alone or taken together with other circumstances. In short, the case law indicates that the question of space is a contextual question which takes account of all of the surrounding circumstances.

77. In all these circumstances I do not consider that the arrangement proposed by the Russian Federation for transporting the Appellant either to the detention facility, or from the detention facility to court and back, would amount to a violation of Article 3. For these reasons this ground of appeal does not succeed.

E Conclusion

78. For all these reasons I would reject the appeal.

LORD JUSTICE HICKINBOTTOM:

79. I agree that, for the reasons given by my Lord, Green J, this appeal should be dismissed.