SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 35

E103/16; E87/17

JUDGMENT OF SHERIFF N A ROSS

on extradition requests by

THE LORD ADVOCATE ON BEHALF OF THE RUSSIAN FEDERATION

for the extradition of

ALEXANDER SHAPOVALOV

under the Extradition Act 2003

Requesting State: Meehan; Crown Office
Requested Person: Bovey QC, Mitchell; Good and Stewart, Solicitors

Edinburgh, 13 June 2018: the Sheriff, having resumed consideration of the cause, discharges the requested person Alexander Shapovalov from (i) the extradition request dated 9 September 2016 and (ii) the extradition request dated 22 August 2017, each issued by the Russian Federation in respect of the requested person, and makes no further order.

Note:-

[1] On 24 August 2015 following a trial lasting approximately one year, and after two years' house arrest, the requested person, Alexander Alexandrovitch Shapovalov, was sentenced at the Primorsky District Court of St Petersburg to 10 years imprisonment (later reduced by two months on appeal) for fraud in a sum, at current values, of approximately £40,663. He was not there to hear it. One week previously he had heard the prosecutor ask

for conviction and a sentence of 9 years imprisonment. He lost faith that he would be acquitted of the offences, of which he maintains innocence, or receive a just sentence, and fled the jurisdiction. He arrived in Scotland later in 2015 where he has lived since. The Russian Federation has served two extradition requests. The first relates to further proceedings raised after his departure from Russia and in which Dr Shapovalov is accused of further frauds. That is dated 9 September 2016. The Scottish Cabinet Secretary for Justice certified on 30 November 2016 that the extradition request is valid (the "accusation request"). The second request is dated 4 October 2017 and related to the said conviction. A similar certificate was granted on 14 September 2017 (the "conviction request").

[2] Dr Shapovalov refuses consent to extradition. He claims that he has already been treated unfairly by the prosecution and justice system in Russia, that he will not receive a fair trial due to corruption, that he will face inhumane prison conditions both on remand and after conviction, and also on the basis of the human rights of his family in Scotland. He is the former head of what is described as "FSUE Russian Research Centre 'Applied Chemistry'", described below.

[3] The present proceedings are for decision on whether extradition is barred under section 81 of the Extradition Act 2003 (the "2003 Act") or whether extradition would be compatible with the human rights of Dr Shapovalov and his family, particularly under Articles 3, 6, 8 and 18 of the European Convention of Human Rights.

[4] It was a feature of this case that the Russian Federation provided very little evidence, and the evidence provided was of limited assistance, for reasons discussed below. Having heard evidence and submissions over 12 days, I was able to accept the evidence of Dr Shapovalov, his partner Ms Imamutdinova, his lawyer Mr Marietsky, and the thee expert witnesses led, as credible and reliable, as discussed below. The Russian Federation led no

oral evidence, and lodged two statements by Prof Khaliulin and further statements from the Prosecutor-General's office. I did not find that evidence to be of assistance and did not accept it as reliable.

The evidence for the requested person

[5] **Alexander Alexandrovich Shapovalov** is a 57 year-old male who presently resides in Scotland. He is married and long-separated, and his wife and adult son live in Moscow. He resides with his partner, Regina Imamutdinova, and his two young children aged 6 and 2 years. The younger has Down's Syndrome. The elder may, as discussed later, be autistic.

[6] In his youth he attended a special English school in Leningrad (now St Petersburg) and holds a degree in Economic Geography from the University of Leningrad and a PhD in world economy and international relations from an institute in Moscow. During his early career he assisted in creating a business school at St Petersburg University. He thereafter went to work for a bank, creating a St Petersburg subsidiary of a Moscow bank. He was engaged in travel, including to the UK, where he contributed as a lecturer in a UK business school. His subject was the emerging economy of Russia. He completed a MBA degree in the UK. He thereafter went to work for Nestle for a year, then returned to St Petersburg to work for private companies in the banking sector. From 1998 he worked in Moscow.

[7] Dr Shapovalov has been an accomplished martial artist from an early age, and attended a training school in St Petersburg, run by Vasily Shestakov. They formed a friendship based on their shared interest. It was a school for top athletes, and trained martial artists to Olympic standard. It formed a commercial offspin "Yuvara Neva" to promote competitions in Japan, Germany, the UK and elsewhere. In setting up this venture Mr Shestakov engaged Dr Shapovalov to provide business expertise. Mr Shestakov is a close

friend of Vladimir Putin, the President of the Russian Federation, having grown up and trained together in St Petersburg. The wives of Mr Shestakov and of Mr Putin were also close friends. Mr Putin is a keen sportsman and accomplished judo player and spent a lot of time around athletes. In the 1990s he was a director of the FSB (formerly the KGB).

[8] Dr Shapovalov and Mr Shestakov worked together in the Yuvara Neva venture. Mr Shestakov's background was in sport and he did not then have business experience, for which he relied on Dr Shapovalov. They spoke and visited frequently. Dr Shapovalov met Mr Putin in the 1990s. Mr Putin was at that time in charge of economic and business interests in the St Petersburg mayor's office. Mr Putin, at the behest of St Petersburg banking interests, wished to persuade Dr Shapovalov not to establish a branch of a Moscow bank there. Dr Shapovalov's wife is a painter of some renown, and her paintings have been gifted to Mr Shestakov and to Mr Putin's former wife.

[9] Mr Putin's election in 2000 to the Presidency of Russia meant that Mr Shestakov's influence increased, as Mr Putin sought advice from a long-term friend. People sought access to the President through him, to bypass bureaucracy and seek political influence. Mr Shestakov, in turn, asked Dr Shapovalov to accompany him to meetings due to his inexperience in dealing with oligarchs and officials. Dr Shapovalov participated in negotiations.

[10] Mr Putin has developed a strong autocratic style of government, and imposed his own controls and opinion on state affairs. In the early days, however, he was open to advice from friends and relatives, and consulted others. He has remained in power since 2000. Although Mr Medvedev became president in 2008, it was widely accepted that this was simply a device to avoid the two-term limit on presidency, and Mr Putin as prime minister from 2008 to 2012 remained in control. Mr Putin has since reverted to the presidency.

[11] Prior to this, Mr Putin had risen to head of the FSB. The FSB's predecessor organisations had been powerful organisations for state repression, but the FSB was initially limited in its operations after the collapse of the USSR in the early 1990s. Under Mr Putin, the influence gradually increased towards the end of the 1990s and beyond. It is now the most powerful body in Russia, and in Dr Shapovalov's words "decides everything", controlling all political and economic life and taking over economic entities and state enterprises. Dr Shapovalov's first experience of the FSB was in 2000, when he was proposed as an office holder in a large state-owned oil company. The FSB opposed him and succeeded in getting their own nominee appointed, who would run the financial affairs through the FSB.

[12] In the 2000s Dr Shapovalov was able to predict the rapid rise of the Russian economy and invested in bonds and blue chip companies. The stock market rose rapidly and afforded 400 per cent margins, earning him considerable sums. He was thereafter financially independent. His expertise was management, and he sought such a position to make best use of his talents. He remained one of Mr Shestakov's advisors, and described meetings to propose business ventures, financial operations and market possibilities, which Mr Shestakov would then propose to Mr Putin. Many people sought a short-cut to the President. Shestakov and Putin would meet regularly, in business premises or at Putin's villa, and Shestakov would be permitted two recommendations per meeting. It was important that those recommendations were good. Dr Shapovalov's task was to evaluate third party proposals and to advise Shestakov as to whether to take them to the President. The proposers would pay for influence, and Dr Shapovalov would receive discretionary payment from Shestakov. Over time, Shestakov's meetings with Putin became less frequent. Shestakov became a member of parliament for three terms. Mr Shestakov's son has since

become Minister for Fisheries. Another such advisor to the President was Mr Rotenburg, who also achieved considerable power. Dr Shapovalov performed a similar function for Mr Rotenburg.

[13] During this period, and because of a long-standing enthusiasm for Scotland, Dr Shapovalov purchased his present home in the Scottish highlands, with a view to eventual retirement there.

[14] Dr Shapovalov was asked to advise on crisis management in relation to ailing state industries. After the collapse of the former USSR, state industries had fallen on hard times as both their funding and their customer base collapsed. He was asked by Mr Rotenburg to manage the Kiravochpeirsky Chemical Plant, a large chemical plant in the Kirov area.

[15] By the 2000s there were many Russians who thought the country was moving in the right direction, and wanted to see industry and commerce built up again so Russia could be a member of the international community. Dr Shapovalov wanted to use his knowledge and experience in business management to contribute.

[16] The "FSUE Russian Research Centre 'Applied Chemistry'", also translated as the "Institute of Applied Chemistry" (hereafter "IAC") dates back to 1919, and was one of the key state industries during the Soviet era. It was a key industry during a period where other states would not share their knowledge with the USSR. Its purpose was to develop new chemical technology. It was formerly a huge industrial concern within the former Soviet Union carrying out extensive civil and top-secret military research and production, and still performs this function in the Russian Federation. It is owned by the Ministry of Science and Education. It formerly had between 25,000 and 27,000 employees, and was similar in size to Du Pont or ICI.

[17] In about 2002 the Ministry of Science and Education approved Mr Shapovalov's appointment to the IAC. In about 2004 the director of the IAC, Mr Gedanskov, asked him to become his deputy and this was approved.

[18] The IAC had both civilian and military purposes. Parts of its operation were classified as top secret, and involved four separate levels of classification. It had a huge research and development facility, and developed a wide variety of products from chemical fertilisers to napalm, and solid fuel for missiles. It had a variety of plants and a large headquarters area over 11 hectares in a prime central area of St Petersburg. There were 300 pilot plants which tested product technology, and a 100 hectare site in Perm, in the Urals.

[19] By 2004 the demand for product had collapsed. Salaries were low, and were approximately 10 months in arrears. After the breakup of the USSR, funding had slowed or stopped, and the highly skilled and formerly highly-paid staff had created their own private businesses operating from IAC properties. These businesses required space, heat, lighting and staff, and the IAC was unwittingly funding the rent, utilities and other resources while the products were sold for private profit. Staff levels had fallen to about 2000 people, who worked unsupervised making products for which there were no customers. The type of product required a critical mass to make production profitable. The estate was in poor condition, with buildings dating from the 1950s onwards and heavy chemical contamination of land. Chemicals leaked into the rivers and then into the Baltic Sea, causing international concern. In hot weather the land and buildings gave off noxious fumes and there was a danger of explosion.

[20] Dr Shapovalov started to take steps to stem losses and create profits. Electrical cables extending from the industrial park and leading to nearby businesses were disconnected to

prevent ongoing theft of electricity. Salaries were paid on time by the end of 2004. Negotiation of payment of debts was required. The strain of operating at a loss was considerable, and Mr Gedanskov resigned two years later. Dr Shapovalov was appointed General Director in 2006. Sales built up from very little to many billions of roubles. The headquarters in St Petersburg was on a prime site, but was very outdated, contaminated with chemicals and a source of large bills for taxes and utilities. He negotiated the sale of this site and relocation of the IAC to a new site in 2011. The old site required 7 metres depth of soil removed to deal with contamination. His aim was to make the IAC great once more, producing world-class technology. The main market was China, as it was very difficult to deal with developed countries. Mr Putin took an interest, and the IAC received investment.

[21] Dr Shapovalov appointed a deputy, Alexei Karpenko. His role was to solve technical problems while Mr Shapovalov dealt with strategic issues. Their relationship ended when he reported Mr Karpenko for criminal proceedings for fraud, using private companies to purchase IAC properties, then using IAC resources to decontaminate them to increase the value.

[22] Elena Viktorova Koslova was a schoolmate and friend of Putin. Her sister was the director of an institute which produced plastics. The sister, Galina Gregorian, had ambitions to merge the two institutes under her own direction. Dr Shapovalov saw a letter addressed to Mr Putin by Ms Gregorian denouncing Dr Shapovalov as being too close to the West and suggesting her own appointment. Because of her sister's influence with Putin, Dr Shapovalov was placed under scrutiny but ultimately cleared. He was however summoned to the Ministry of Science and Education and told to employ Ms Koslova at a substantial salary as "special envoy". He had no option but to do so, and paid her salary from his own pocket.

[23] At around the same time he came into conflict with the FSB, who run the state-sponsored electronic bidding system for construction contracts. Dr Shapovalov's view is that this system was manipulated to ensure FSB-linked companies win the tenders. Such a contractor "won" the tender for construction of new buildings. It demanded thirty per cent payment in advance, and then demanded the remaining seventy per cent prior to completion, despite the project being unfinished. Dr Shapovalov refused payment, as paying out state assets wrongfully is an offence. He received threats to initiate criminal charges against him. The next development was that the police arrived at his door to investigate a complaint against him. They found nothing wrong. The FSB sent an investigator to the IAC, and searched through the company contracts. He discovered an alleged fraud of payment to a supplier for goods not delivered. Dr Shapovalov neither knew about nor benefited from such a payment. The Ministry of Science and Education refused to make a complaint. Nonetheless it was reported to the police who brought charges of fraud.

[24] The police searched Mr Shapovalov's apartment, where he lived with his disabled mother. They said he was accused of a minor offence, and proposed a payment of 200,000 Euros to close the case. Dr Shapovalov refused and called a public press conference in St Petersburg, accusing the police officer in charge of collusion with the contractor. Thereafter he was summoned with his lawyer to police headquarters. His lawyer was able to contact a senior official, and the police released him. He was re-arrested thereafter on a more serious charge, based on the same alleged facts.

[25] He appeared in court. He was permitted bail, but was not permitted to leave his flat at all, or make contact with the outside world. He was placed under surveillance. His flat was raided regularly without notice, to obtain evidence he was breaching rules about communication, with a view to having him remanded in custody. There were prosecution

motions for remand in custody. They interviewed his mother at length, despite serious illness. He heard of threats of being killed in prison, and an intent to pressure him into relinquishing his assets. He was held for 36 hours in custody in a two-person cell, with a notorious robber from Central Asia. State bailiffs had raided his flat and removed a lot of furniture belonging to his mother, never returned.

[26] After one year's house arrest the trial started. It lasted a further year. His house arrest continued, but he was eventually granted two, later four, hours of liberty per day when he could go for a walk wearing an ankle tag. The trial was conducted in one two-hour session per month. The evidence was largely written, and the statements suspiciously similar in appearance and content. The main witnesses did not attend court, despite summonses. There was no benefit proved to the alleged fraud. He anticipated acquittal. Ms Koslova gave evidence that he was a Chinese special agent. At the end of the trial, the prosecutor was changed. The new prosecutor asked for a nine-year sentence, despite this exceeding the normal tariff for the crime. One week before sentencing, in August 2015, he lost faith that he would be acquitted. He faced a long period in custody in dreadful conditions. It is not, he said, unusual for guilt to be decided in advance of trials. He fled with his child and partner, who was then pregnant with their second child. He was duly convicted and sentenced in absence to 10 years custody.

[27] He arrived in Scotland. The accusation request (on different charges) was made and he was arrested. He spent six months in custody in Saughton Prison before release on bail during the current proceedings, during which the second, conviction request was made. His partner speaks little English, and has to look after two children in a rural area of Scotland. They have no income and exist on savings. He had one account in a bank in Hong Kong, but this has been frozen following proceedings at Inverness Sheriff Court, at the request of the

Russian Federation. He always thought he was in danger of being punished by the Russian state.

[28] People in Scotland have been very kind to his family, particularly when he was in custody. His 2 year-old son has Down's Syndrome, and requires a number of medical procedures to address his hearing and a loss of weight. He did not know how his family would cope if he were extradited to Russia, and could not imagine life without them. His sentence would be served in a correctional facility with little access by his family. He was not guilty of any crime. He knew that people in prison there were pressured to give up their assets, so had transferred his assets as he feared the worst.

[29] He is now aware of the allegations which form the basis of the accusation request. Neither he nor his Russian lawyer understand how the charges are justified. He did not participate in selling premises as alleged. It was not possible to sell property without scrutiny by the Ministry of State Property, and the property itself was owned by the Ministry of Science and Education. He faces conviction and sentence in addition to the sentence already passed. His view was that Russian state promises could not be trusted, after events in Syria and the poisonings in Salisbury. He thought that if he were to return to St Petersburg, he would initially be held in SIZO (pre-detention facility) 5 in the St Petersburg area, and after conviction would be held in IK5, a correctional institute, in the same area.

[30] He spoke of the practices of the wealthy in Russia. All rich people in Russia move funds overseas, because of the risk of fabricated criminal cases designed to strip these assets away. He indicated there are plenty of examples of this. He had done the same. Funds mostly go through UK entities, or Cyprus, or the Caribbean. Cyprus is now one of the biggest sources of inward investment in Russia. Nobody in Russian trusts the authorities.

Formerly the main problem in Russia was the Mafia and other criminals, but now it was the FSB, the police and the prosecution service. Criminal cases are opened with a view to intimidate.

[31] He was clear in his view that his trial verdict was pre-determined. He was also given a chance at an early stage to pay a bribe to a judge, but refused as he had not committed any offence. During his trial there were 36 witnesses against him, but all the evidence was poor quality, with no evidence of intention, or gain, or conspiracy. The main witnesses did not appear, but signed similar statements. If a statement is signed, there is no opportunity to test or cross-examine the evidence. He discussed the decision of the Court (lodged in process) and refuted the findings.

[32] **Regina Imamutdinova i**s 29 years old and the mother of two sons aged 6 and 2. She is Dr Shapovalov's partner and lives with him in Scotland. She gave evidence through an interpreter. She is Russian-born. She was a student. They formed a relationship in 2011. She lived with him during his house-arrest in Russia. She fled with him in 2015. She very much enjoyed living in Scotland and people were kind to them. She does not drive a car. They have both claimed asylum (she on the basis of her relationship to Dr Shapovalov), and for their children. There was "no chance of life for us" in Russia. Their children have a good life in Scotland. The youngest child is ill, and required a transplant at one year-old. He will require an operation to assist his hearing. He receives regular medical care.

[33] While Dr Shapovalov was on remand in Edinburgh, life was very difficult for them. As she could not drive, and lived one hour's walk from their village, the neighbours and school had helped her. If he were extradited, it would be a tragedy for the family. She did not have any other right to remain in the UK, and could not say what would happen to the family. Their house required a lot of maintenance, and the children required a lot of care.

They are assisted by loans from others. She could not return to Russia with their youngest, because Down's children are very poorly treated. She thought not a single Down's person was employed in Russia. Eighty per cent of families reject a Down's child after birth, and these children "don't survive". In the UK, he would get an education and probably a job. In Russia he would face discrimination and would have no prospects for education or employment. Disabled people are not seen on the streets.

[34] The time of house arrest in Russia was a very difficult period. There were many searches. Each time the police would collect the computer, the iPad and phones and would say they would be checked and returned. They were never returned. Leaving Russia while pregnant and with a young child was extremely stressful. The terms of their residence in the UK meant they receive no benefits, no supports and could not even sit a driving test. She did not know how she could stay in the UK if the current extraditions were granted.

[35] **Michael Marietsky** gave evidence via live link from St Petersburg, with interpretation by the court interpreter. It is noteworthy, for discussion later, that setting up this live link was not found to pose any technical or scheduling difficulty for either him or the court.

[36] Dr Marietsky has been a lawyer since 1995 and is a member of the St Petersburg Chamber of Advocates. He works in criminal law. He represented Dr Shapovalov in his criminal trial in 2015, and in a subsequent appeal hearing. He participated in all the pre-trial investigations. Dr Shapovalov was on house arrest before and during his trial, and was forbidden to communicate with any witness, or to use any mobile phone or other means of communication or to receive correspondence of any sort. He was eventually allowed out to walk for 2 hours per day. There were attempts to have him remanded, which were rebuffed

by showing there was no breach of these terms. He was frequently investigated. His elderly mother was interrogated, which was not accepted procedure.

[37] Were he to be remanded, there was a great risk that Dr Shapovalov would be pressured into making a false confession.

[38] After trial, Mr Marietsky was not surprised that the court convicted, as the acquittal rate in St Petersburg in 2017 for such charges, in cases which went to trial, was estimated at only 0.2 per cent. That was down from 2015, when the rate was about 0.5 per cent. He was surprised at the severity of the sentence. He described court procedure in general. If a case goes to trial, a great deal of work is carried out by the prosecutor, and the court is reluctant to issue an acquittal because of the work done. The assumption is that, if the accused is not guilty, the prosecutor will discover that during his investigations and will discontinue the prosecution. The acquittal rate is not improving.

[39] He assessed the evidence against Dr Shapovalov at trial as being very weak. A conviction under Article 159 (the basis of both extradition requests) requires only one witness, but the prosecution could not produce any witness or document showing that he had stolen any money. The alleged victim company was controlled by an individual, Karpenkov, who was the accused in a case where Mr Shapovalov was the complainer, and which he initiated. A financial director who did give some evidence was vulnerable to pressure. Prosecutorial investigations do not, in his view, attempt to find the truth, but rather to promote state interests. His view is that the courts always support the criminal investigators. The defence is not allowed to lead contradictory evidence, but is only allowed to point out inconsistencies in the prosecutor's evidence. Prosecutors prefer to obtain confessions, but Dr Shapovalov did not provide one. Mr Marietsky was sure that, had there

been an acquittal, new charges would have been brought. FSB observers were in court during Dr Shapovalov's trial. Such presence is unusual.

[40] The sentence under Article 159 would normally be five years, or seven years suspended. The prosecutor asked for nine years. The court imposed ten years' imprisonment. Mr Marietsky considered that this was most likely a matter of external pressure on the judge, although it did not help that Dr Shapovalov was not present.

[41] He commented on Ms Koslova, and confirmed that she took over from Dr Shapovalov as General Director of IAC after his arrest. Prior to this, she had said in his presence that she had "huge admiration" for Dr Shapovalov, which changed once she was appointed in his stead. She was prone to stating in public that she was personally acquainted with Vladimir Putin. He thought this was part of the pressure on the court. She publicly blamed Dr Shapovalov for misfeasance, and gave such evidence in the trial. She gave false evidence, and sent condemnatory letters to Putin and to the government. Character witnesses can be called in such circumstances. Another character witness was Ms Vidman, the mother of a child with Dr Shapovalov, who hates him and gave false evidence. The Ministry of Education and Science, as owner of the IAC which would have suffered any loss, did not make any allegation of fraud. The conviction was appealed, and the sentence reduced by two months. Such appeals are rarely successful. Mr Marietsky had not seen full details of the new accusation, but the documents showed a doubtful case.

[42] He accepted that he was able to see prosecution documents in advance of the trial. The problem was that courts were reluctant to acquit not only because of the large amount of work done by the prosecution, but also a fear of being accused of being corrupt. This was an established view amongst the lawyers appearing in these courts. The courts were under pressure to conform to the "system" rather than to take an independent view of the

evidence. Doubtful evidence must be interpreted in the accused's favour, but this was not done in Dr Shapovalov's case. He found the verdict "deeply wrong". The sentence might be appropriate for armed robbery, or murder. He'd never seen such a high sentence for an Article 159 offence.

[43] **Professor Bowring** is professor of law at Birkbeck College, University of London. He is a barrister and practises at the European Court of Human Rights. He is a fluent Russian speaker and has visited the USSR and then Russia regularly since 1983. His family are Russian citizens. He has published more than 100 books, articles and chapters on Russian language, history, law and legal practice. He founded the European Human Rights Advocacy Centre with a one-million Euro grant from the European Commission. He has been involved in hundreds of cases alleging human rights abuses in Russia. He has been an adviser to the UK government and initiated large projects in the Russian Federation in the field of judicial reform, penal reform and human rights monitoring. He is one of relatively few Western experts on Russian law and practice and has intimate knowledge of court regulation, practice and implementation throughout Russia. He has visited pre-conviction centres and correctional colonies. He has acted as expert on Russian law and practice for the Council of Europe, the European Union, OSCE, the US Department of Justice, and other organisations. He worked in drafting the Russian Criminal Procedural Code and has personal contacts who are Russian academics, practitioners and judges. He has given expert evidence in many extradition cases involving Russia. The foregoing is only a brief overview of his extensive experience, more fully set out in his report lodged in this case. His CV and his oral evidence are eloquent of his profound knowledge of Russian law and practice, and this was not challenged in evidence. I accept his expertise as established and his written and verbal evidence as informed, accurate and balanced.

[44] Professor Bowring prepared the report lodged in process, extending to 94 pages with 115 annexed documents and two supporting volumes of materials. His evidence in court was taken over two days. It is not possible without prolixity to discuss every aspect (and reference should be had to his full report in process) and what follows represents only an overview. The Crown, for reasons discussed later, had insufficient factual material to challenge, far less undermine, the large majority of this evidence, and challenge was limited primarily to what alternative conclusions could legitimately be supported from the same factual material. Because of the lack of material this was a largely ineffective challenge, and I was able to accept Prof Bowring's evidence as credible and reliable.

[45] Prof Bowring's report commences by narrating his understanding of Mr Shapovalov's situation, which in all material respects accords with the evidence I heard.

Abuses of the Russian judicial and legal system

[46] Prof Bowring set out how the legal system is abused by the state, and by rival businessmen. The two main forms of abuse are (i) prosecutions to order and (ii) corporate raiding. These are assisted by the lack of independence of the judiciary, the excessive influence of the state, in the form of the FSB, in judicial, police, prosecutorial, commercial, political and other areas, and oppressive penal conditions. This is set against the traditional Russian view that the courts are not primarily an instrument for individual justice, but rather an instrument for educating the population.

Prosecutions to order

[47] In the former USSR criminal prosecution, threatened or actual, was used as a political tool for forcing compliance. This practice has continued, but with an additional aspect that

the justice authorities have close ties with commercial business interests. This practice is known as "zakaznoye delo", or prosecution to order. Such practices are widespread and endemic.

[48] An article in Business Week in 2008 estimated that there were 8,000 such prosecutions a year. Lawsuits or investigations are instigated at the instance of businesses manipulating police and prosecutors in order to harass competitors, to take them over or to put them out of business. In some cases corrupt courts are influenced to rule on fundamental property rights. In some cases such pressures are used to force transfer of shares. In 2008 the practices were sufficiently common to be able to put an approximate tariff on such activities – USD20,000 to USD50,000 to open a criminal investigation, USD30,000 for an office raid, and anything from USD10,000 to USD200,000 for a favourable court ruling. A criminal investigation can lead to physical raids by paramilitary police, removing documents and computers and leading to criminal charges which may take years to resolve.

[49] Certain judges have spoken out. A senior judge in 2008 is reported to have said, before being dismissed, that there was a practice of meeting with the chairman of the court at the start of every week, when the position to be taken in that week's cases would be directed and agreed. There is a culture of "telephone justice", when a judge will receive a verbal instruction from a senior colleague, or a political figure, as to how to decide a case.

[50] The bringing of a criminal prosecution is made easier by vague formulation of some laws, including Article 159, which allows them to be interpreted arbitrarily and subjectively. The initiation and investigation of criminal cases is the prerogative of the investigator, without any oversight. The definition of fraud is sufficiently imprecise to allow the receipt of profit or transfer of rights of ownership to be investigated as a crime, thereby covering

practically any commercial or economic activities. The effect of the bringing of a prosecution is that, because of the lack of judicial or other oversight, there is a period in which pressure can be brought to bear. In 2012 it was estimated that 13,000 entrepreneurs found themselves in places of detention, and more than 120,000 have received suspended sentences for economic crimes. Prof Bowring gave some reported examples of these situations.

[51] President Medvedev introduced some reforms designed to limit these abuses, but the reforms have recently been overturned by Putin. In 2016 it was reported that prosecutions in Russia were falling, but economic prosecutions were rising, with 240,065 in 2016. Less than 20 per cent reached court, and the great majority were raised for the purpose of corporate raiding.

Raiding or unlawful seizure

[52] Prosecutions to order are closely linked to raiding of corporate assets, or "reiderstvo". This was no more than organised crime using the weapon and cover of the law. It could involve intellectual property squatting, with false registration of rights to extort money, corporate raiding using corruptly obtained legal documents such as shareholders' resolutions, court orders or state registration documents, to seize assets, or collusive litigation to obtain a predetermined judicial ruling on property rights. Again, anecdotal evidence was discussed. A US legal adviser, Thomas Firestone, formerly working at the US embassy in Moscow, managed to persuade the US to pass the "Magnitsky laws" (restricting the rights of corrupt Russian citizens), named after a Russian lawyer who sought to expose such practices but who was arrested and died in detention in 2009. Criminal prosecutions had been opened against more than 100,000 business people in early 2016. The problem is

devastating the Russian economy. Prof Bowring testified that the sheer number of incidents in the information available pointed to reliability and general accuracy.

The Russian judiciary

[53] Former president Medvedev described the judicial system as suffering from "legal nihilism", a toxic mixture of financial corruption, political interference and lack of judicial independence. This means that a powerful individual can use the law enforcement agencies and the courts for personal commercial purposes. The European Court of Human Rights found in *Gusinskiy* v *Russia* (App no 70276/01) that the Russian authorities have used criminal investigation for improper commercial reasons. Academic research by Prof Ledeneva of UCL about telephone justice ("telefonnoye parvo") describes the practice of making informal requests in order to influence formal decisions as an entrenched practice. Prof Bowring has carried out many conversations with serving and former Russian judges, and has served on a variety of reform projects, and this mirrors his experience. In his view, there is a higher risk of a biased decision whenever the interests of the state or powerful individuals are involved. Often telephone justice is avoided by the selection of a compliant judge who will to the "right thing".

[54] Judges are vulnerable to influence because they depend for renewal of their tenure on senior colleagues and government officials. They will lose promotion, lose tied benefits such as housing, and face dismissal. One judge, Olga Kudeshkina, was dismissed for revealing improper pressure to convict, and lost everything. She won a case in ECtHR in 2009. The practices go unabated. Research shows that large numbers of cases which do not impinge on state interests are decided objectively, but not where state or commercial interests are involved. Even if a judge decides objectively in such a case, their judgement

will be overturned on appeal. The most important factor was fear and dependence on the chairman of the court, who wields great power and decides on promotion, bonuses, houses, disciplinary procedures and dismissal. The chairman of the court is in turn appointed, and re-appointed, by Putin, thereby ensuring in turn the chairman's dependence on the authorities. Because of direct political, and as a result of close business ties commercial, influence, the courts can be used as instruments of repression, not justice. The lower the court, the greater the pressure. An acquittal is 30 times more likely to be overturned on appeal than a conviction. There is fear in acquittal, not least because it may lead to an accusation of corruption against the judge. Commercial fraud cases do not go to a jury. All of this shows that the Russian judiciary is not free-standing and impartial. In addition, the detention power of prosecutors, themselves vulnerable to political influence, is almost unchecked.

[55] In evidence Prof Bowring was taken through a large number of source documents, and illustrated some of these propositions by reference to academic studies, particularly studies of trials such as Khordorkovsky and Lebedev (the "YUKOS cases") and reports such as the US State Department report, Amnesty International and Human Rights Watch. He discussed his understanding of Dr Shapovalov's case (which mirrored the evidence heard in this case), and concluded that there is a real risk that he was subject to an unfair trial, and would not receive a fair trial on the accusation request charges.

[56] Prof Bowring spoke to a number of source documents, of various levels of authority. The US Department of State "Country Reports on Human Rights Practices for 2016" summarises the human rights problems in Russia, including suppression of civil society through state interference with NGO work, discrimination against minorities, use of torture and excessive force by law officers, prison overcrowding and life-threatening conditions,

executive pressure on the judiciary, a climate of impunity for officials and many other problems. Notably it concluded that "persons with mental disabilities were subject to severe discrimination in education and employment" (page 63) and the conditions of guardianship imposed by the courts "deprived them of almost all personal rights" and children could be left isolated at home or in orphanages where they faced abuse and neglect. While there were laws to prevent discrimination, these were not enforced. The "Amnesty International report 2017/18" noted further restrictions on rights, the harassment of minorities, the frequent violation of the right to fair trial, and the further erosion of the powers of inspection bodies for places of detention. There were reports of torture and ill-treatment in detention centres across Russia. The state continued to block UN and other international resolutions.
Prof Bowring commented on the contempt that Russia has for the UK and other countries, and treats them as enemies. Russia appeared set to make itself an international outlaw by defiance of the Council of Europe and the ECtHR. Human Rights Watch is a similar US-based independent human rights organisation, with a reputation for robust criticism even of the USA when merited. Their "World Report 2018" noted an increased crackdown in Russia on political dissent (page 440), the decriminalisation of domestic violence, interference with opposition campaigns, continued mistreatment of people with disabilities, and labelling of dissenters as foreign agents. These reports are too voluminous to summarise properly, but they are all publicly available.

[57] He was referred to a number of news sources. I am prepared to take notice of these, but they require to be treated with caution, as the impartiality of these sources cannot be assumed and I did not hear from the authors of the articles. Senior counsel accepted that point, but submitted that the sheer volume of material from disparate sources which spoke to similar events allowed some general inferences to be reached, which in turn were of value

in assessing the direct evidence of Prof Bowring and of the official reports. I accept that this material is admissible and useful for this purpose. I have no reason, and none was given by the Crown, for rejecting it.

[58] Prof Bowring spoke to the report on "The Putin Critics who have been assassinated" from Sky news 3 March 2015, which lists the murder of Boris Nemtsov outside the walls of the Kremlin; Alexander Litvinenko murdered in London; Anna Politkovskaya, murdered in 2006; lawyer Sergei Magnitsky beaten to death in custody in 2009; Natalia Stemirova (2009); Stanislav Markelov (2009) Anastasia Baburova (2009); Paul Klebnikov (2004); Boris Berezovsky (2013) and others, and a list of those who have had show trials. He spoke to articles from a variety of sources, including Buzzfeed, The Guardian, Sky News, The Independent, BBC, The World Anti-Doping Agency, domestic Russian media (now a very limited resource) and others, which were similar stories of abuse or misinformation.

[59] Prof Bowring spoke also to the large number of private enterprises taken over by seizure or otherwise by the state, of which the YUKOS company was the biggest, handed over to Rosneft, a state enterprise headed up by Igor Sechin, a confederate of Putin. This was a prime example of a prosecution to order.

[60] He commented on cases from ECtHR such as *Smolentsev* v *Russia* (2017) involving mistreatment in detention; *Tagayeva* v *Russia* (2007) involving failure by the state to investigate state actions; *Urmanov* v *Russia* (2016) and *Chugunov* v *Russia* (2016) involving failure to investigate human rights abuses in detention. Russia's standing in Europe was further damaged by Interpol's recommendation that countries no longer honour Russian international arrest warrants following abuse of this procedure. A CIA report "Assessing Russian Activities and Intentions in Recent US elections" discussed Russian efforts to interfere in US domestic politics.

[61] I accept that all of these sources create a bleak picture of a consistent and increasing refusal by the Russian state to observe either its international obligations, or its domestic obligations toward its own people and the rule of law.

[62] Prof Bowring accepted in cross examination that there were instances of the Russian judiciary acting justly, and that some judges were prepared to issue dissenting opinions on appeal. The culture, however, in society was of kleptocracy, a word coined in academic studies, leading to pressure brought to bear on the judiciary for commercial ends. He accepted that contemporary media reports appeared to accuse Dr Shapovalov of wrongdoing, but this reporting seemed to start at a time when he was the subject of attempts to oust him, and it was not clear that this was coincidence. He'd seen cases where judgements had been excellent, and accepted that many cases were correctly decided, but the more important the case, the less likely this was to be so.

[63] **Professor Judith Pallot** gave evidence on the conditions of detention in Russia. She is Professor Emeritus University of Oxford and Christchurch. She has been researching Russian prisons since 2005 and teaches and researches Soviet and Russian studies. She is a Russian speaker and has made numerous research and academic visits to Russia. She has visited adult correctional colonies and juvenile re-education colonies, and has interviewed prisoners, ex-prisoners, family members, prison personnel and prison reformists. She has gathered and analysed statistical materials and official reports and has published research articles, all as more fully set out in a comprehensive curriculum vitae. I was able to accept that her evidence was authoritative and accurate in relation to the conditions of Russian detention facilities, and this was not challenged by the Crown.

[64] Her report commences with a discussion of the challenges in presenting evidence in this case. Noting that the Russian state has said that Mr Shapovalov will be held in the St

Petersburg area, in Remand Prison number 5 (SIZO-5), and after conviction in Correctional Colony number 5 (IK-5), information on specific prisons has become very difficult in the last decade. Political scientists agree that since 2002 the Russian state has moved away from democratisation and the rule of law, towards semi-authoritarianism, or outright authoritarianism. Prof Pallot referred in part to the same Human Rights Watch, Amnesty International and US State Department reports as Prof Bowring relied upon. The state relies more on security forces, and this has impacted on FSIN, the Russian prison service. Independent academic researchers, media and public monitoring bodies had reasonable access to penal facilities in the 1990s, but from 2000 onwards restrictions began to be put in place. Russian researchers had confirmed to her that 2007 was the last year of access to serving prisoners for research. In 2008 public monitoring commissions (ONKs) were set up to monitor prison conditions, but their numbers and independence had been progressively compromised since. The Moscow ONK had set up "the 16 per cent", being a dissenting group of human rights activists who did not accept the view of the majority. The CPT of the Council of Europe, reporting on prison conditions in member states, publishes annual reports, but every report since 2012 has been vetoed by the Russian state and publication thereby prevented. Because of the lack of independent monitoring and reporting, it did not follow that a lack of reports meant that a facility was respecting human rights. In light of the sheer volume of reports from across Russia about violations of prisoners' rights, any official information must be treated with caution. Reported cases focused on the gross violations such as beatings, torture, deaths and use of punishment cells, which tended to obscure low-level everyday abuses, which are deeply embedded in Russian penal culture. These might include denial of medical services, food and toilet facilities, extremes of temperature, forced physical stresses and abuse, unnecessary shackling, lack of privacy, allowing bullying,

exploitation and so forth. Such reports as did exist did not take into account problems in other areas, such as transportation conditions, police holding cells or court holding cells.

[65] Part of this problem is historic. The prison system in 1991 was acknowledged as the most inhumane, along with that of Nazi Germany, in the 20th century. The FSIN has stated that it is committed to modernisation, but has failed to invest sufficiently or bring about a change of culture. It recognised, for example, that the use of dormitories housing between 80 to 120 prisoners and run by the prisoners created problems of gang culture and prison discipline, high tension and low trust within prison. In 2010 a change towards smaller cells overseen by staff was announced as part of radical reforms. These reforms were abandoned in 2013.

[66] There has been a stream of cases to the ECtHR. Eventually a pilot judgment relating to remand prisons (but not correctional colonies) was issued, namely *Ananyev and others* v *Russia* [2012] 55 EHHR 18, which noted the obligations and repeated failure of Russia to improve the "practically inhuman conditions" (paragraph 186) of pre-trial detention centres. The effect of this pilot judgment is to create a presumption that Russian pre-trial facilities breach the human rights of an appellant, unless the state can prove otherwise. This relates only to physical conditions such as floor space, overcrowding and sleeping conditions, and does not cover treatment by prison staff, also a source of appeals.

[67] Pre-trial detention can be for a very long period. A prisoner can be moved from facility to facility, and between different types of cell. ONKs had no access to inspect pre-trial facilities. The minimum acceptable floor area for a prisoner is 3 square metres, but is breached. Overcrowding is a serious problem, and in some SIZOs prisoners have to sleep in shifts. A cell may hold 30 or 40 prisoners, double the design number. Food allowance has recently been reduced to 72 roubles (86 pence) a day. Complaints can result in harsher

treatment. In addition, some prisons are run by the FSB, formerly KGB, and their conditions are not supervised. Such "private" prisons were renounced as a condition of membership of the Council of Europe, but were retained using a loophole for border security cases. The FSIN does not control such prisons. Conditions are unknown.

[68] Prof Pallot had gleaned some information on SIZO-5, St Petersburg. It was largely a women's remand prison, and the space was officially 4 square metres per prisoner. Unfortunately, according to the local ONK, overcrowding meant that figure cannot be regarded as accurate. Status of prisoners could be changed rapidly.

[69] She spoke to the letters of reassurance lodged on behalf of the Russian state. These did not give enough information to be relied upon, such as how many persons per cell, the number of categories of prisoners and changes in population, and did not say whether a temporary single cell would be a detention cell, important because such cells, which are often the only way of segregating vulnerable prisoners, may have only 2 square metres. A prosecutor would not have knowledge of prison conditions. I refer to Prof Pallot's detailed critique as set out in her report, including the detailed commentary on Prof Khaliulin's report. It is too lengthy to set out here, but I accept this evidence, which was not successfully contradicted and is detailed, principled, measured and authoritative. I accept that there are sound reasons to refuse to accept these assurances from the Russian authorities, and I do not accept them.

[70] Prof Pallot stated that Dr Shapovalov's status as an entrepreneur might render him vulnerable. Business people in Russian have been detained in increasing numbers in recent years. The federal ombudsman for the rights of entrepreneurs found that most of these posed no danger to society. They are incarcerated to pressure them, either to give evidence against other entrepreneurs, or for extortion purposes. They are particularly vulnerable in

multi-occupancy cells, where they have to share accommodation and bunks with hardened criminals. The process often started with a 2-person "press cell", where a cell mate was selected. The staff would select a long-term prisoner who had agreed to work for them, and who would apply pressure through various means to extract confessions. The FSIN denies the existence of such cells, but complaints are widespread, and the Moscow ONK discovered such practice. If this did not produce results, the entrepreneur would be moved to a larger overcrowded barracks cell. There they would be pressured to hand over assets and sign away properties. These practices were part of the old Soviet practice, but have been revived for use against political and business opponents. Two businessmen have died this year in such circumstances.

[71] Prison control was variable, and had led to unofficial categories of "black" or "red" prisons. Black prisons were out of official control and run by the prisoners, often due to a weak or corrupt governor. Red were officially controlled by the prison staff. Each could be dangerous to prisoners in different ways – ordered "mass suicides" in black prisons, or harsh crackdowns in red prisons. This status could change rapidly, and there was a high turnover of prison governors. Prisoners could be moved frequently between prisons. FSIN was unable to guarantee prison conditions. Meanwhile ONKs had been increasingly marginalised, deprived of resources, and were not trained as inspectors. In any event they have no power to change conditions.

[72] It is possible that, but unknown if, the British Embassy did visit prisoners. They would not, however, visit a non-UK citizen like Dr Shapovalov. As he was convicted of one charge, and facing trial on another, it was uncertain if he would be held in a SIZO or an IK. There was an established practice that if a case became the subject of media interest, the prisoner could find themselves summarily removed to a distant region away from public

gaze, for example Siberia. Prof Pallot spoke at length about problems with conditions on transport, and lack of medical facilities.

[73] Visiting rights were restricted. In an IK correctional colony a prisoner was allowed three short and three long visits per year. A long visit was for three close family members for three days at a time. A short visit was for four hours. These privileges could be removed or restricted. A long visit was only permitted to married prisoners, and this would not include Mr Shapovalov's new family in the UK. Children were permitted, but were often not taken due to the poor condition of prisons and the risk to safety, particularly from disease such as tuberculosis. Such visits might be made difficult if the prisoner was sent a long way from home. A prison in Siberia might be 8,000 km away. More visits were available while on remand in a SIZO.

[74] While the Russian state had set up a Presidential Human Rights Council, this had not addressed the underlying problems. The whole thrust of Prof Pallot's opinion is that the problems are systematic and structural. She could "safely say" that anyone in any penal colony within Russia will suffer inhumane and degrading treatment. Record-keeping and CCTV surveillance was poor and limited.

[75] Post recent developments in the UK, UK/Russian relations had been particularly poor. The St Petersburg consulate was closed. In the present case, the Russian state had produced reports from their experts. They did not normally do so.

[76] In cross-examination, Prof Pallot accepted that there were prison visits and regulations in place. These, however, were ineffective at changing the structure and culture of the prisons. She considered it highly unlikely that Prof Khaliulin had ever seen inside a prison. He is employed by the Ministry of Justice at their own institute, and would be responsible for the education of police officers, prison officers and prosecutors. It had

university status. He could not be regarded as independent of the state, or of the prosecutorial or law enforcement establishment. The main problem with Prof Khaliulin's rebuttal is that he does not address the central criticisms, and relies on referring to the law but not practice. She accepted that some complaints about a prison system were likely to be vexatious, but the complaints about the Russian system were so numerous, consistent and widespread that if even only a small percentage were justified it would still amount to a problem with the system.

Evidence for the Requesting State

[77] The Lord Advocate did not lead verbal evidence (although a belated attempt was made, to which I refer below). Instead, written reports were lodged, which bore to be rebuttals of the evidence led for Mr Shapovalov.

[78] The first was by S.V.Gorlenko, Assistant to the Prosecutor General, Russian Federation. The letter commences by disputing that Prof Bowring's sources can be regarded as reliable and objective. In relation to comments about judicial independence, he quotes the Chairman of the Moscow City Court, O.A. Yegorova, as dismissing Prof Bowring as biased (because of his human rights cases), not prominent and subjective. The Russian judiciary are professionals, and the constitution is supreme. Prof Bowring is described as campaigning to defame the Russian judicial system. It cites a single instance of a judge making an acquittal and who was not dismissed. His decision was overturned on appeal. It describes the dismissal of the Russian judge O.B. Kudeschina for making unacceptable comments about the Russian judiciary, without examining why she made those comments, dismissing them as an attempt to gain political power. The letter does not address the alleged systemic problems at all. Prison conditions are discussed by reference to a report by a Prof Morgan in

two cases (but not in this one), including the *Dzgoev* case (see below), who found there not to be overcrowding in one prison – a finding later undermined in the *Dzgoev* case by a recognition that prisoners had been removed before his visit. Mr Gorlenko does not address the Russian refusal to allow the release of the CPT (Council of Europe) reports, the failed reforms, or the disempowering of the ONKs referred to by Prof Bowring. It sets out acceptable conditions in SIZO-5, but gives no guarantee that Dr Shapovalov will not be moved, that his status will not change, or the issue of red or black prisons, and does not mention the *Ananyev* pilot case about inadequate remand facilities. It gives only brief details about IK-5. The only independent check might be the St Petersburg PMC (ONK), but does not address the removal of resources from ONKs. It discusses the alleged political motivation of the prosecution, and sets out an acceptable argument that the prosecution is not political but based on alleged fraud. This is the only persuasive part of the letter. It does not, of course, address whether that prosecution for fraud is soundly or fairly based. The tenor of the letter is to rely on the formal legal protections afforded to an accused. These by themselves might be acceptable. It does not, however, provide any reassurance for the point that these legal protections are, in practice, ignored or circumvented.

[79] There is also a report by Professor Aleksandr Khaliulin, Professor of the Academy of the Prosecutor General's Office of the Russian Federation, who teaches criminal procedure to officers of the prosecution service, judges, and students. He has spent many years working in the Institute of Professional Advancement of the Prosecutor General's Office and later the Scientific Research Institute of the Academy of the Prosecutor General's Office. His view is that the history of the collapse of the IAC "reveals the most negative personal moral qualities of the requested person and cannot be considered as a proper argument of the defense", a statement which appears not to understand that it is the conviction itself which

is under criticism. He relies on the existence of prosecution of high-ranking figures and prominent cultural figures as evidence that the judiciary is not corrupt: again, this point does not meet the premise, which is that there is prosecution to order. His report proceeds to pick at Prof Bowring's report, and makes value judgements without offering evidence or assurances of its own. One part of Prof Bowring's argument is "amusing". In dismissing Prof Bowring's conclusions, it relies on corruption being in all countries, not just Russia and the inappropriateness of reference to other cases. The report amounts to a judgement both on Prof Bowring's evidence and on Mr Shapovalov, rather than a source of positive evidence to allow this court to make favourable findings. As such, the report is misguided and of little help, because no court can or would simply substitute Prof Khaliulin's opinions for its own. A statement such as "It should be said that the fact that A. Shapovalov having broken the electronic bracelet and, accordingly, having violated the preventive measure in the form of house arrest, fled from Russia shows his very negative personal qualities" is of no assistance. Worse, it shows no understanding of the role of an expert, which is to give information to a court in a fair and balanced manner. In fairness, Prof Khaliulin may not have been informed of his duties as an expert witness. However, the dismissive and judgemental tone of the report, the absence of specific or positive evidence in rebuttal, and the obvious point that he is employed by the Prosecutor General's office and lacks any appearance of independence, mean I have not been able to accept this report as a source of independent, fair or informative evidence. Prof Khaliulin also provided a report dated November 2017 which comments on Prof Pallot's evidence. Similar observations apply, together with the additional problem that I cannot regard a professor of criminal procedure as an expert on prison reform. He does not explain why he is qualified to comment on prisons, other than to cite

the relevant underlying rules and regulations. The problem, according to Prof Pallot, is that these rules and regulations are, in practice, ignored.

[80] The requesting state has also supplied an undated document by I.G Rezunov, deputy prosecutor of St Petersburg, setting out the numbers of prisoners and the names of the likely prisons. This information is helpful, but does not address the underlying issue that regulations are circumvented or ignored. There is no independent source of information on this. Publication of recent CPT reports would be a good start.

[81] For these reasons, the reports are not helpful. They all take a formalistic approach, and assume that if a regulation or law is in place, then the rights of the accused, or prisoner, are assured. The problem here is that the evidence shows otherwise, from a large number of sources, including those which cannot be dismissed as biased or unverified.

[82] I record that the advocate-depute had a very challenging task in representing the Russian Federation. He advised, in at least two pre-proof hearings as well as the proof, that he found himself unable to present evidence as he would have wished. From about March 2018 onwards Crown Office made repeated but unanswered contact with the Prosecutor's Office in St Petersburg and the Consulate in Edinburgh. A formal request by this court to allow evidence by live link (of Prof Khaliulin and Mr Gorlenko) from St Petersburg was ignored, without explanation or remedy. He informed me representatives from the Consulate failed to turn up at scheduled meetings, without explanation. Further, enquiries with the Crown Prosecution Service in England revealed a similar withdrawal of co-operation. As a matter of historical fact, this sudden silence started shortly after a rapid deterioration in UK/Russian relations following the alleged poisoning of Russian citizens in Salisbury Accordingly, through no lack of effort or intention on his part, the advocate depute was unable to lead oral evidence.

[83] As a post script, after final submissions for Mr Shapovalov had concluded, the Crown "returned to the office to a ringing telephone". That was the Prosecutor's Office in St Petersburg belatedly offering co-operation. Following the inevitable motion to allow late evidence, I refused the motion for reasons which I then gave in full, but which can be summarised as the absence of good reason for withdrawal of co-operation, the very late stage in proceedings, prejudice to the defence and the lack of credibility of the Prosecutor-General's proffered reason that "it took time to find everything out and obtain appropriate information from the Ministry of Justice". It is noteworthy that the live link with Mr Marietsky was arranged by the requested person without apparent difficulty. Further and in any event, the Russian Federation did not offer to lead expert evidence from independent witnesses of the type heard in the English cases referred to below.

Summary of evidence

[84] For the reasons discussed, I accept the evidence led on behalf of the requested person as credible and reliable. The evidence for the Russian Federation was poor quality, inadequate and misdirected, and I reject it as any reliable source of information for the reasons discussed above.

[85] This approach is supported by wider considerations, all of which underline the unreliability of the Russian Federation position. First, there is the strange and unprofessional approach taken in this case to giving proper and full instruction to Crown Office. All co-operation was withdrawn for the period leading up to the proof, for no principled reason. It was inconsistent with the conduct to be expected of a responsible and well-governed state careful to observe its international obligations. Secondly, while evidence is particular to each case and should only be cross-referred with caution, there is a strikingly similar body of case

law from the English courts where similar allegations have been made for many years. In addition, there is a consistent body of case law before the ECtHR, and a pilot judgement in relation to pre-detention conditions. The Council of Europe have suspended the participation of the Russian Federation. There are wider complaints about political behaviour in a number of geographical areas, and about the abuse of human rights of the domestic population. Even giving due consideration to the fact that news sources must be treated with great care, which proposition I accept, there is such a body of material from authoritative sources that the volume starts to lend a weight of its own. I do not give undue weight to such sources, but it serves to underpin the specific allegations in this case.

[86] For all these reasons, I have treated the evidence for Dr Shapovalov as accurate, credible and reliable. For that reason I will discuss it only sparingly below, in the interests of avoiding prolixity in an already lengthy judgment.

The grounds for refusal

[87] Mr Bovey turned to the defence to this action. The Russian Federation is, for the purposes of the Extradition Act 2003, a "Category 2 territory" covered by Part 2 of the 2003 Act. The extradition requests were each served and certified under section 70 and this procedure has followed from that. Section 79 sets out the bars to extradition. The present defence relies on section 81 (extraneous considerations) and section 87 (human rights)

Section 81 – extraneous considerations

[88] In my view section 81 is not engaged. Extradition can be barred if:

> "(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 him on account of his race, nationality, gender, sexual orientation or political opinions."

Part (b) applies if he might be prejudiced at trial or punished, detained or restricted for similar reasons.

[89] Mr Bovey sought to construct a case that Dr Shapovalov was being extradited because of his political opinions, by virtue of his leadership of a politically sensitive industry and links with politicians. I can agree that this extradition might be regarded in some sense as political, because it involves the manipulation of legal process for economic or political reasons, but that is not enough. It would have to be for political "opinions". I agree that these could be imputed or perceived, rather than actual opinions (*RT (Zimbabwe) and others* v *SSHD* [2012] UKSC 38). I do not know Dr Shapovalov's political opinions. The evidence tends to show that the Russian Federation neither knows nor cares. There is no evidence of imputation or perception. The evidence shows possible motives to include manipulation for extortion, pressure, self-promotion or revenge, depending on the inference one draws. They may vary between the police, prosecutors, the courts, Ms Kozlova or others, but none of them cover political "opinions". I was referred to the English first instance cases of *Izmylov* v *Russian Federation* (unreported, 22 December 2008) and *Shefler* v *Russian Federation* (unreported, 8 June 2010) where such an inference was made. In my view these cases are particular to their facts and don't assist in the present case. The view of the district judge in another first instance case of *Russian Federation* v *Korolev* (unreported, 8 December 2016) is in accordance with my own.

Human rights - Article 18

[90] Mr Bovey then founded on section 87, and several different breaches of human rights. The first was Article 18, which provides:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

[91] While inevitably extradition will interfere with Article 5 and 8 rights, such interference is proportionate and permissible provided the aim is legitimate, in other words one of those specified in the article in question. An extradition may have mixed purposes, and it depended on which was predominant. A restriction can be compatible with convention rights but still breach Article 18 if it was predominantly meant for another purpose (*Merabishvili* v *Georgia* 72508/13 [2017] ECHR 1070 at paragraphs [297] to [305]). Here, he submitted, the predominant purpose was not a legitimate one, and therefore Article 18 was violated.

[92] Article 18 has no independent existence (*ibid* paragraph [287]) so only applies when a state is using a permitted derogation from Convention rights. Although I accept, on the balance of probabilities, that the predominant motivation of the Russian Federation is not punishment for a genuine fraud (conviction request) or prosecution of a genuine fraud (accusation request), no reliance is placed by the state on derogations from Convention rights. Instead, the Russian Federation declares that it is protecting these rights, not derogating from them. In these circumstances, Article 18 conveys no relevant protection to Dr Shapovalov.

Human rights - Article 6

[93] Mr Bovey submitted that if Dr Shapovalov were extradited there would be a real risk he would be subjected to a flagrant denial of justice (*Kapri* v *HMA* 2015 JC 15). Clearly a trial

before a tribunal that was not impartial and independent would be a flagrant breach of Article 6 (*Brown* v *Rwanda* [2009] EWHC 770 (Admin)).

[94] The advocate depute submitted that clear, cogent and compelling evidence would be necessary before this court could make such a finding (*Kapri*, above). I agree with that position, but in my view the evidence is clear and uncontradicted that Dr Shapovalov will not receive a fair trial on the accusation matter, and did not receive a fair trial on the conviction matter.

[95] I have accepted the uncontradicted evidence of Prof Bowring and will not repeat it at length here. I accept that there is evidence throughout Russian society of corruption, but particularly within the executive and the prosecution and police services. Business and power are intertwined, and senior members of government become extremely wealthy. Corruption exists in the judiciary, mainly in the form of making decisions to avoid personal consequences such as dismissal or demotion. Of particular relevance in this case are three issues, namely prosecutions to order, lack of judicial independence, and negligible acquittal rate.

[96] Prosecutions to order have become a major threat to entrepreneurs and investors, and involve the use of state apparatus to threaten or imprison selected individuals with a view to influencing their behaviour, forcing them to relinquish assets, or driving them out of business. Abuse of the legal system has become a central mechanism for the purpose of applying power or removing individuals. It therefore appears that there are sound grounds for finding that the legal proceedings against Dr Shapovalov were not soundly and fairly based. This doubt is reinforced when considering the specific experiences of Dr Shapovalov and Mr Marietsky.

[97] Telephone justice is a phrase which appears to be widely recognised, and refers to the informal but effective means of influencing judicial decisions. In other cases, judges are selected because of their personal preparedness to make decisions which are acceptable to others. The very existence of these features is enough to breach Article 6.

[98] The negligible acquittal rate is not necessarily attributable to corruption, although a link can easily be inferred. The evidence is that non-jury trials in St Petersburg have an extremely low acquittal rate. Appeals against any acquittal have an extremely high likelihood of succeeding. These features also indicate strongly that justice is not being done. Whether this is a result of an inbuilt bias towards the prosecution, and an unjustified reliance on the prosecutor having prosecuted only the guilty, is unlikely to be resolved, although I accept Prof Bowring's evidence in this regard.

[99] All of these systemic features would be enough, in my view, to amount to clear, cogent and credible evidence that Dr Shapovalov's right to a fair trial has, or will be, breached. This evidence is strongly reinforced by the specific features spoken to by Dr Shapovalov and Mr Marietsky.

[100] These include: the lack of compelling evidence, with only one witness from the IAC which was nominally the complainer; the conflict of interest of Ms Kozlova who supplanted Dr Shapovalov as Director General of the IAC; the absence of entitlement to lead contradictory evidence; the introduction of unrelated character evidence for the state; the inbuilt bias of the judiciary towards the prosecution; and the unduly harsh nature of the sentence (against a norm of four or five years). I have discussed these factors already.

[101] The advocate depute submitted that justice was seen to be done in some cases, and that the Russian Constitution was drafted to protect the innocent litigant. These points are

correct, but justice is clearly less likely in a high-profile case such as Dr Shapovalov's, and the whole tenor of the evidence is that the Russian Federation simply ignores its own rules.

[102] On the basis of the evidence of all the witnesses for Dr Shapovalov, I find that extradition on the accusation request would breach Dr Shapovalov's Article 6 rights to a fair and public hearing within a reasonable time limit by an independent and impartial tribunal, and to the presumption of innocence until proved guilty according to law, and the right to obtain the attendance and examination of witnesses on his behalf.

Abuse of process

[103] Founding on the same evidence as for Article 6, Mr Bovey submitted that there was clearly an abuse of process. The criteria for such a finding are set out in *R(Government of USA)* v *Bow Street Magistrates* [2007] 1 WLR 1157. If a court at any time has cause to suspect that a prosecutor may be manipulating or using the procedures of the court to oppress or unfairly prejudice a defendant before the court it is the duty of the court to inquire into the situation and ensure that its procedure is not being abused. Where an allegation is made, the first step is to insist that the infringing conduct is identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that the abuse has not occurred (*ibid* at paragraph [84]). The key elements are oppression and unfair prejudice.

[104] I accept that the present extradition proceedings amount to an abuse of this court process. The conduct founded upon is the use of the extradition process to secure Dr Shapovalov's presence in Russia and remove his assets. This process has already been

commenced by Proceeds of Crime Act proceedings in Inverness. During his house arrest repeated attempts were made to have him remanded, for no evident reason, and the family assets such as furniture and computers were repeatedly stolen during searches. I accept the evidence of Dr Shapovalov and Ms Imamutdinova that this occurred, which is not contradicted or disproved. I am not satisfied that the abuse has not occurred. The evidential basis for all of this I have set out already.

[105] The advocate depute submitted that abuse of process was not made out, but through no fault of his he had no contrary material to lead.

[106] In my view it is proved (on the basis of the whole of the evidence for the requested person) that the prosecution is brought for reasons other than a genuine body of evidence showing guilt of the charges, and is therefore an abuse both of the St Petersburg court and, by extension, of this court in making the request for extradition. I am therefore under a duty, following *R(Government of America)* above, not to accede to the request for extradition.

Human rights - Article 3

[107] Article 3 of ECHR provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[108] There is an obligation under Article 3 not to expel a person to a country where their rights would be violated. It is an absolute obligation (*Othman (Abu Qatada)* v *The United Kingdom* [2012] ECHR 56. The court requires to consider both the general human rights conditions and the particular characteristics of the individual. Assurances by the country under consideration will carry varying weight according to circumstances. In the present case, both of the extradition requests contain detailed assurances about the identity of the

proposed facility and (in part) the conditions which pertain. I find that conditions both in pre-trial and post-conviction facilities will breach Dr Shapovalov's Article 3 rights.

Prison conditions - pre-trial detention

[109] There is a distinction to be drawn between pre-trial and post-conviction facilities. The pilot judgement of *Ananyev* relates only to pre-trial conditions and provides that the Russian Federation must prove that the conditions do not amount to inhuman or degrading treatment or punishment. The Extradition Request dated 9 September 2016 states only that "*During his criminal prosecution A.A.Shapovalov will be kept in special facilities which comply with the standards set forth in the [ECHR] and European Prison Rules of 11.01.2006, and that the officers of the British Embassy in Moscow will be allowed to visit him at any time…"* I note that this last point is cold comfort – as a Russian citizen the British Embassy is under no obligation or direction to visit him, and in recent times the size and capacity of that embassy has been forcibly decreased by expulsions. By further letter dated 25 May 2017, the assurance is given that he will be held in SIZO 5, and some size information given. This falls well short of proof that the pre-detention facilities are adequate, and which is required by the reverse-burden of *Ananyev*. Even if the assurances were accepted, they cover only one prison (and transfers are frequent) and cover only cell area. They fail to address the conduct of prison staff, the adequacy of medical facilities, the control by other prisoners, the existence of "press cells", the use of detention cells as the only means of segregation, and the other features described by Prof Pallot. For this reason alone extradition under the accusation request could not be approved. Any assurance is not only unevidenced but wholly inadequate. I find that the Russian Federation has failed to discharge the evidential burden upon them that Dr Shapovalov will not be held in pre-trial facilities which infringe his Article 3 rights.

Prison conditions – correctional colonies

[110] No reverse burden exists in relation to post-conviction detention. However, the same points about assurances exist as for pre-trial conditions (above).

[111] I accept the evidence of Prof Pallot in relation to prison conditions. I reject the evidence of Prof Khaliulin for the reasons already discussed. I accept that post-conviction correctional colonies are "supremely dangerous places" as Prof Pallot puts it, and accept as proved all of the features spoken to by Prof Pallot. The evidence is overwhelming. These conditions individually and collectively amount to inhumane and degrading treatment or punishment.

Assurances about prison conditions

[112] These points might be mitigated if the Russian Federation were to give trustworthy assurances that Dr Shapovalov would be held in Article 3-compliant facilities.

[113] Mr Bovey submitted that any assurances offered by the Russian Federation were inherently untrustworthy and should not be accepted. He commenced by referring to the multiple types of breaches of international obligations which are recorded against the Russian Federation, and which are set out in detail in Prof Bowring's report. These include: killings at home and abroad, and associated failure to prosecute killers of political targets such as journalists; the invasion of Ukraine and the Crimea; interference with elections in other countries; increasingly restricted media freedom; prosecutions to order; failure to observe ECtHR decisions; state sponsorship of doping of athletes; the increasing disempowering and exclusion of human rights agencies. He founded on Prof Bowring's evidence that the Russian Federation regards the UK, amongst other states, as an enemy,

and therefore that lying to an enemy is justified. This evidence is gleaned from a wide variety of sources, of which the most authoritative are the US State Department, the Foreign and Commonwealth Office, Amnesty International, Human Rights Watch, World Anti-Doping Agency, European Council, US Central Intelligence Agency, Federal Bureau of Investigation, National Security Agency, together with a battery of news reports from a wide variety of unrestricted western news agencies. I accept this evidence. It all points in the same direction, carries the weight of a number of respected international and national bodies of responsible governments, and is weighty in volume and quality. The Russian Federation has led no satisfactory evidence in rebuttal. I accept the tenor of this evidence, namely that Russian State assurances are not to be lightly trusted. The question is whether they can be in this case.

[114] On behalf of the Russian Federation the advocate depute submitted that the assurances could be accepted. He referred to the recent English cases of *Dzgoev* v *Prosecutor General's Office of the Russian Federation* [2017] EWHC 735 (Admin) and *Ioskevitch* v *Government of the Russian Federation* [2018] EWHC 696 (Admin) in which similar assurances from the Russian Federation have been considered and accepted by the Court of Appeal in England. While these cases are persuasive rather than binding on this court, they are careful and insightful decisions which I have found to be of substantial assistance. I was also referred to the Scottish appeal of *Dean* v *Lord Advocate* [2017] UKSC 44, which reflects a similar approach to evidence in a Scottish case relating to Taiwan. While certain principles emerge, all of these decisions are highly specific to their facts. I have concluded that the evidence in this case has been significantly different from that heard in those cases, and I have come to a different conclusion as a result.

[115] In *Dzgoev*, the Court of Appeal was prepared, subject to further assurances, to make a reference for extradition. Mr Dzgoev was requested for two robbery convictions. The evidence at first instance included an expert report from a Prof Morgan which found that prison conditions did not breach Article 3, and which the district judge was able to prefer to that of Profs Bowring and Pallot, who in that case also accepted that the statistics showed there was no overcrowding in the specific detention facility. The court gave five reasons for rejecting further claims based on poor cell conditions, criminal sub-cultures, violence, harsh discipline and bullying. These included (at paragraphs [72] to [77]):- the presumption that the Russian Federation would, as a member of the Council of Europe and a high contracting party to ECHR comply with its obligations; that it had given assurances; that the appellant had served time in a Russian prison, and had not been ill-treated; that there was a powerful incentive for Russia to honour its obligations, under pain of refusal of further requests; and the absence of any ECtHR authorities suggesting any structural problems in post-trial detention.

[116] In *Ioskevich*, the requested person had been sentenced to 18 months for fraud, dishonestly paying 4 million roubles (approximately £48,000) to a company's subcontractor without security. The appeal court noted that the district judge had appropriately addressed the "complex and nuanced task" of considering the evidence, and would not overturn the findings without good reason, which were not forthcoming. The evidence of Prof Morgan on prison conditions was that it was "inconceivable" that they would breach Article 3, and the district judge accepted this evidence. The judge rejected Prof Bowring's evidence on the basis that there was "scant evidence" of a lack of judicial independence, and that a fair trial was possible in this case, notwithstanding that systemic corruption within the Russian judiciary was not excluded. The complainer was not well-connected or wealthy enough to

credibly be able to influence judicial decisions. In relation to prison conditions, Prof Morgan had visited the prison and his evidence was accepted. The state assurances had been verified by a jointly-appointed expert. The Court of Appeal accepted that there was no reason to doubt the bona fides of information provided by the Russian Federation, that the assurances were very detailed, that there was a strong interest in Russia honouring the assurances and that only pre-trial detention was covered by the pilot judgement.

[117] While respecting the reasoning of the Court of Appeal, there are a number of significant evidential reasons to regard Mr Shapovalov's case in a different light. The evidence here was very different in character.

[118] First, the evidence I heard was heavily one-sided. I heard over the course of several days from Prof Bowring and Prof Pallot, and over further days from Dr Shapovalov and Mr Marietsky. The Crown led no oral evidence, and produced only the letters referred to above. I did not find these letters to be of much assistance, as they singularly failed to meet the points made, and in Prof Khaliulin's case, also failed to amount to any significant evidence at all. I have already discussed this.

[119] Second, neither Mr Dzgoev nor Mr Ioskevich were persons of significant interest to the Russian state. The first was a street robber. The complainer in the latter was found to have no credible influence with those in power. Dr Shapovalov, as a formerly wealthy man in a former position of considerable influence, is in a different category of accused/convict, and the evidence is that he would be treated differently as a result. Prof Bowring accepted that the Russian courts could reach a just result in an ordinary case. However, the prospects of justice decreased markedly once those in power took an interest and exercised their influence. In my view this is such a case.

[120] Third, the sentences in those cases were relatively modest and objectively in keeping with the offences. Dr Shapovalov received a sentence of 10 years for a fraud allegedly worth approximately £40,000, contrasted with Mr Ioskevich's 18 months for £48,000. There is immediately a doubt about how fairly he was treated.

[121] Fourth, Dr Shapovalov and his lawyer both gave direct evidence of an unfairly-conducted trial, continuing oppression and bad faith by the prosecution and police, Dr Shapovalov spending time on remand in a press cell with a known violent criminal, an unduly long period on house arrest, and the switching of prosecutor who then asked for an unusually severe penalty. Unlike Mr Dzgoev, Dr Shapovalov has already been treated in an inhuman and degrading way.

[122] Fifth, the court in those cases heard independent academic evidence on behalf of the requesting state. No such evidence was available here. The only evidence timeously offered had little helpful content and gave no appearance of being fair, balanced, informed, expert or independent. Prof Bowring's evidence was careful, balanced, informed, expert and not contradicted. In neither *Dzgoev* nor *Ioskevitch* did the court doubt that there were severe systemic problems in Russia.

[123] Sixth, there is good reason to reconsider the benefit of the doubt accorded to the Russian Federation in those cases. I have mentioned the poor conduct by them of this case (and the frustration of counsel and agents in court). I have referred already to the evidence of the wider opprobrium which has met Russian actions internationally. Even since *Ioskevitch* there has been a considerable deterioration in political relations between the UK and Russia. Any trust of the Russian Federation as a member of the Council of Europe must be placed in some question by the sanctions visited on them by that body, the non-payment

of their financial contribution, and the possibility, spoken to by Prof Bowring, that the Russian Federation may withdraw from the Council of Europe.

[124] Seventh, the presumption that Russia has a strong interest in complying, at pain of losing future extraditions, is cast into some doubt by the decreasing transparency of prison populations. In the light of the disempowering and fettering of the ONKs, the year-on-year suppression of the CPT reports, the closing of the British consulate in St Petersburg, the closing of the British Council, the practice of transfer to remote locations over vast distances, it is far from clear how anybody could reliably check on the conditions in which Dr Shapovalov was in fact being held.

[125] For all these reasons, the cases of *Dzgoev* and *Ioskevitch* fall to be distinguished on their facts. I do not accept the said assurances. It is overwhelmingly likely that Dr Shapovalov will find himself, for the whole or part of his incarceration in Russia, in facilities which infringe his rights under Article 3 of ECHR.

Human rights - Article 8

[126] A discrete part of Dr Shapovalov's case centres on the Article 8 rights of himself and his family, quite separately from the circumstances he will face in Russia. He and his partner, Miss Imamutdinova have two children, aged 6 and 2 respectively. The younger child has Down's Syndrome. The elder child, during preparation for this case, has shown signs of either autism or a learning disorder.

[127] Prof Boyle gave evidence and his report dated 24 May 2018 is lodged. He is a chartered child psychologist, but has a special interest in children with special needs and the effect of these on the wider family. His report deals with the interests of all four family members, which I would briefly summarise as follows:-

[128] For the youngest child, aged 2, he has a diagnosis of Down's Syndrome, a lifelong condition requiring care, supervision and protection. He has some further medical needs, and is currently under investigation for losing weight. It is Ms Imamutdinova's view that the younger child would be segregated in Russia, and regarded as an "embarrassment" at school and in the community. There would be no state help for him, and no prospects of employment. Such children are rarely seen in public and his mother gave information that 80 per cent are in institutions and the majority do not survive beyond their fourth birthday.

[129] For the elder child, aged 6, there are significant symptoms which, on the balance of probabilities and pending a formal diagnosis, show he is either autistic or has learning difficulties. He is not yet a fluent English speaker, which is unusual as a child of his age would normally pick up English with a local accent long before now. Diagnosis has been delayed because his mother refuses to contemplate that such a diagnosis is likely, citing positive school reports. As Dr Boyle stated, such a reaction of denial is not uncommon for a parent, particularly where there is already a disabled child. His head teacher describes significant problems in expression and social relationships, and a failure to integrate, identifying "autistic tendencies". He has a particularly close relationship with Dr Shapovalov, and when his father returned from six months remand in Scotland his mother described "the happiest day of his life". He would lose this significant relationship.

[130] For the mother, she and her husband jointly parent the children, and his help is central to her coping. She does not speak fluent English and has difficulties in dealing with professionals. She has some local assistance. Her family in Russia would not be able to help if she was to return, and she says they would not accept a Down's child. She would not return to Russia as she is fearful of the treatment of the younger child, and the loss of medical and other support for him. She faces acute pressure to cope, which can often lead to

psychological problems such as depression. Parents often suffer anxiety about the future of their children, and she would have no-one to share this with.

[131] For Dr Shapovalov, he will be absent for his 10 year sentence, plus whatever other sentence (on more serious charges) is added. Dr Boyle described how children gradually forget parents who are not present, and the relationship could not be maintained.

[132] In relation to resources, the elder child presently attends mainstream primary school, where he receives special help from a classroom assistant. The family home is spacious and the family obtains assistance from neighbours and the community. Dr Shapovalov owns no such property in Russia, and has neither parent has available family assistance there. There is no state help of the type the children receive here.

[133] It is a highly unusual feature that this family has most likely two, not just one, special needs children. Dr Boyle estimated that the chances of this are 1:20,000 upwards. Care for a single such child is demanding and exhausting, but the burden of caring for two such children can be overwhelming. Neither child will reach a stage where care can be relinquished as he approaches adulthood. Leaving aside the younger child's needs, autism, which appears a likely diagnosis, is by itself one of the most challenging disabilities for any parent, because of the unpredictable nature of behaviour and need for constant supervision. The absence of one of the parents, particularly one heavily involved in child care, would be particularly burdensome in this case, because of the needs of the two children.

Ms Imamutdinova, if left alone, would most likely be overwhelmed by the challenge of both children, and require significant state intervention and respite care. This is particularly stark where she is socially isolated and has no family support. It is not clear that any support would be available in Russia.

[134] In summary, Dr Boyle's view was that separation from their father could have severe effects on the children. It would also have severe consequences for the mental health and wellbeing of Ms Imamutdinova, who would lose a partner and co-carer for two children with demanding needs.

[135] The advocate depute did not lead any contradictory evidence, and did not dispute Dr Boyle's qualification to give these views. He tested the hypotheses by questioning, but Dr Boyle did not deviate from his evidence that these were two very demanding children who would require lifelong care and intense parenting.

[136] Mr Bovey submitted, relying on *H(H)* v *Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1AC, that the test for whether Article 8 rights are breached is:

> "whether the interference with the private and family life of the extraditee and other members of his family is outweighed by the public interest in extradition" (at paragraph 8).

[137] He recognised that:

> "…it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe" (H(H) (above) at paragraph 8); *Norris* v *Government of the United States of America (No 2)* [2010] UKSC 9, which refers to "a quite exceptionally compelling combination of features").

[138] He submitted that the effect of extradition here would be devastating, and it was not a proportionate response to extradite Dr Shapovalov. The advocate depute submitted that the strong public interest in extradition won out despite the family circumstances.

[139] It is clear that the ordinary incidents of separation of an extraditee from his or her family, such as distress, financial pressures or relationship loss, would not be enough to prevent extradition. The test is a high one. The evidence here, however, is not of ordinary damage to the family and its members. I accept that Dr Shapovalov has proved a "quite

exceptionally compelling combination of features" and that the consequences of the interference with family life would be quite exceptionally severe.

[140] There are a number of serious and intersecting factors. Dr Shapovalov has already been sentenced to almost 10 years in a Russian correctional colony. Another sentence for an apparently much more serious offence appears likely. His absence is likely to span at least the whole childhood of both children. There would be no realistic prospect even of prison visits in Russia, because they are only afforded to married couples and in any event children are not often brought because of risk of disease and safety issues. The family would suffer severe pressures both as a unit and as individual members, and the future of the children severely adversely affected by Dr Shapovalov's absence, for a long but unknown period. He is 57 years old.

[141] Ms Imamutdinova has no identified right to remain in the UK. Her right derives solely from Dr Shapovalov, who has claimed asylum. There is a significant possibility that she would require to return to Russia. She would require to take the children with her. Returning to Russia would cause severe hardship for the whole family. There is no family residence or family support or evident source of finances. The family would suffer exceptional hardship from the loss of support in particular.

[142] The children would suffer from the loss of resources in the UK. They would not enjoy state recognition and protection for their special needs. In Russia at least the younger child would face significant discrimination and loss of life quality, as the Russian state does not enforce discrimination laws and society tends to reject Down's Syndrome children.

[143] The two children have significant special needs. I accept Dr Boyle's evidence as credible, reliable and well-informed. I accept that he is correct in regarding a diagnosis in the elder child, of autism or a similar condition, as highly likely, and that this will be a lifelong

condition. Autism is one of the most demanding forms of disability. The number of families with two such children is very small. Caring for either of these children alone would be demanding. The pressures on parenting and care of both of them, even with two parents, will be severe. The pressure of parenting with the loss of one parent will be exceptionally severe.

[144] The two children are happy, well-adjusted and well-provided for. They are, or will be, in mainstream education and will receive state help. Their rights are respected and they can look forward to a high quality of life. For at least the younger child, this would be utterly lost if he returned to Russia.

[145] For both children, even if permitted to remain in the UK, the loss of one parent would severely diminish his quality of care. Their mother depends heavily on the assistance of their father. The loss of their father would severely diminish the quality of their care and education, as their respective needs would quickly become overwhelming for their mother. Their relationship with Dr Shapovalov would disappear over time.

[146] Their mother, Ms Imamutdinova, would also suffer exceptionally severely, for a number of reasons. She would lose the society of Dr Shapovalov, on whom she depends heavily for communication with the community and various social work and medical professionals. She would become isolated and vulnerable. She would lose a vital source of assistance with the children. She would most likely become overwhelmed by their needs, and face the risk of mental health issues. She would not be able to source reliable alternative care. Her own needs would not be met. Her ability to parent would diminish. Her children would suffer doubly, from the loss of their father and the distress of and lower standard of care from their mother.

[147] The effect on Dr Shapovalov would be to lose his family. I accept that this would be "unthinkable" for him, and that he has a close, loving and nurturing bond with all of them.

[148] Accordingly, for all these reasons, I have no doubt that the family circumstances, already subject to considerable stresses of language, disability and isolation, would become all but intolerable if extradition were to be ordered, with permanent and irreparable damage to family life and to the individual interests of each of the children, of Ms Imamutdinova and of Dr Shapovalov. This is a "quite exceptionally compelling combination of features", and would require extradition to be refused even in the face of a robust and principled extradition request, which latter point is open to severe doubt in the present case.

[149] I will accordingly refuse extradition on the basis of breach of the Article 8 rights of Dr Shapovalov, Ms Imamutdinova and of each of their two young children.

Decision

[150] For the purposes of the 2003 Act, in relation to the conviction request, I answer the questions in sections 78(2) and 78(4) in the affirmative. I do not find that extradition is barred in terms of sections 79 and 81. For the purposes of section 79(5) Dr Shapovalov is unlawfully at large in respect of the conviction request, and I answer section 85(1) in the negative and section 85(3) in the affirmative. However, under sections 85(4) and 87 I find that his extradition would not be compatible with his Convention rights as so defined, in particular under Article 3 and Article 8. Accordingly as required by section 87(2) I order his discharge from the conviction request.

[151] In relation to the accusation request, I answer the questions in sections 78(2) and 78(4) in the affirmative. I do not find that extradition is barred in terms of sections 79 and 81. For the purposes of section 79(4) Dr Shapovalov is accused of the commission of

those offences but is not unlawfully at large after conviction in respect of those. There is sufficient evidence for the purposes of section 84 to make a case against him. However, under sections 84(6) and 87, I find that his extradition would be incompatible with his Convention rights, in particular under Article 3, Article 6 and Article 8. Accordingly as required by section 87(2) I order his discharge on the accusation request also.

[152] Separately, I also find that there has been an abuse of process, for the reasons discussed. I would therefore separately have refused to make a reference for extradition for this reason on both extradition requests.