



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

**CASE OF KHODORKOVSKIY AND LEBEDEV v. RUSSIA**

*(Applications nos. 11082/06 and 13772/05)*

JUDGMENT

STRASBOURG

25 July 2013

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Khodorkovskiy and Lebedev v. Russia,**

The European Court of Human Rights (Chamber), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,

Khanlar Hajiyev,

Mirjana Lazarova,

Linos-Alexandre Sicilianos,

Erik Møse,

Ksenija Turković,

Dmitry Dedov, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 2 July 2013,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in two applications (nos. 11082/06 and 13772/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Russian nationals, Mr Mikhail Borisovich Khodorkovskiy (“the first applicant”) and Mr Platon Leonidovich Lebedev (“the second applicant”) on 16 March 2006 and on 28 March 2005 respectively.

2. Each applicant was represented by a group of lawyers. The legal team for the first applicant included Mrs K. Moskalenko and Mr A. Drel, lawyers practising in Moscow, Mr N. Blake QC, Lord D. Pannick QC, and Mr J. Glasson, lawyers practising in London, and Dr W. Peukert, a lawyer practising in Germany. The second applicant’s legal team included Ms Y. Liptser and Mr Y. Baru, lawyers practising in Moscow, as well as Dr W. Peukert, the late Prof A. Cassese, and Prof Ch. Tomuschat. The Russian Government (“the Government”) in the two cases were represented by Mr P. Laptev and Mrs V. Milinchuk, the former Representatives of the Russian Federation at the European Court of Human Rights, and subsequently by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicants complained, in particular, about their criminal conviction for tax evasion and fraud, as well as about other events related to the criminal proceedings against them. They alleged, in addition, that their prosecution was motivated by political reasons, in breach of Article 18 of the Convention.

4. By decisions of 27 May 2010 (in the second applicant’s case) and 8 November 2011 (in the first applicant’s case), the Court declared the applications partly admissible.

5. The applicants and the Government each filed further written observations on the merits (Rule 59 § 1 of the Rules of Court). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other’s observations.

6. On 2 July 2013 the Chamber decided to join the two cases, pursuant to Rule 42 § 1 of the Rules of Court.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. Mr Khodorkovskiy (the first applicant) was born in 1963. He is currently serving a prison sentence in a penal colony in the Karelia Region. Mr Lebedev (the second applicant) was born in 1956 and is now serving a prison sentence in the Yamalo-Nenetskiy Region.

#### A. Introductory summary

8. The first applicant is the former head and one of the major shareholders of Yukos Plc, which at the relevant time was one of the largest oil companies in Russia. Before working in Yukos Plc, he was a senior manager and co-owner of the Menatep bank and the Rosprom holding (an industrial holding affiliated with Menatep) and controlled a number of other financial and industrial companies. In particular, he was the Head of the Executive Board of Yukos-Moskva Ltd and later its President. Further below the group of companies affiliated with Yukos will be referred to as “Yukos”.

9. The second applicant was the first applicant’s business partner and a close friend. In 1990s the second applicant was the chief executive of the Menatep bank and a top-manager of the Rosprom holding. From 1998 the second applicant worked as a one of the directors of Yukos-Moskva Ltd. He was also one of the major shareholders of Yukos.

10. Yukos was created as a result of the mass privatisation of the State oil and mining industry which took place in the mid-1990s. Following privatisation, new management techniques were introduced and the companies acquired by Yukos were reorganised. In particular, sales of the producing companies were re-directed to new trading companies. As a result, Yukos became one of the most successful businesses in Russia, and the first applicant was mentioned in the press as one of the richest persons in Russia.

11. Amongst other acquisitions by Yukos in the course of the privatisation were 20 per cent of the shares of a large mining company, Apatit Plc (hereinafter referred to as “Apatit”), a major supplier of the apatite concentrate in the country. The acquisition of Apatit shares gave rise to litigation in which the State Property Fund opposed Yukos. The former claimed that Yukos had failed to meet its obligations under the privatisation agreement. That litigation ended in 2002 with a friendly settlement: the State Property Fund accepted a termination fee while acknowledging the rights of Yukos to 20 per cent of Apatit shares.

12. Most of the Yukos produce was sold abroad. However, Yukos did not trade directly with foreign firms but sold its output to several Russian

companies (“trading companies”) registered in the zones with special tax regime, in particular in the town of Lesnoy, situated in the Sverdlovsk region in the Urals (also referred to as the “ZATO”, an abbreviation translated as “closed administrative territorial formation”). Special taxation in Lesnoy was established by the Federal Law “On Closed Administrative-Territorial Entities” of 14 July 1992 (the “ZATO Act”). The ZATO Act was supposed to attract investors to economically depressed areas and foster economic growth there.

13. Such mode of operation persisted for several years; Yukos trading companies were operating on the basis of “preferential taxation agreements” with the administration of the Lesnoy town. Those agreements were renewed every year since 1998. Thus, for example, on 28 January 2000 the town administration concluded a preferential tax agreement with Business Oil Ltd (hereinafter referred to as “Business Oil”), the main trading company of Yukos in Lesnoy, providing it, amongst other tax cuts, a 75 per cent reduction of the “local” part of the corporate income tax (i.e. of the part destined for the local budget). Under that agreement Business Oil was supposed to transfer a certain amount of money to the town budget (5 per cent of the amount of tax cuts obtained). A major part of the profits of Business Oil and other trading companies were later transferred on a gratuitous basis in the form of investments in the “fund for financial support for production development”, which was founded within Yukos on the basis of a resolution of the Board of Directors.

14. In addition to obtaining tax cuts, the trading companies registered in the low-tax zones paid some of their taxes not with money but with promissory notes issued by Yukos. Those notes were accepted by the local authorities as a method of payment of taxes and were later honoured by Yukos. The trading companies also enjoyed VAT exemption in respect of the oil they were selling abroad. VAT was reimbursed in monetary form from the State budget to the bank accounts of those companies. Tax audits carried out in 1999 confirmed the eligibility of Business Oil for tax cuts.

15. The applicants’ personal income consisted of the salaries they received from Yukos and the dividends from the Yukos shares they owned. In addition, both applicants earned substantial amounts of money as self-employed contractors (or “individual entrepreneurs”, in the Russian terminology), by providing consulting services to foreign firms. As “individual entrepreneurs” the applicants were entitled to preferential taxation under the Law “On Simplified Form of Taxation, Accounting and Reporting for Small Businesses” (No. FZ-222, 29 December 1995, the “Small Business Act”).

16. In 2003 the office of the General Prosecutor of the Russian Federation (hereafter “the GPO”) started a criminal investigation into the business activities of Mr Khodorkovskiy and his partners. The charges against the applicants originally concerned fraudulent acquisition of Apatit and another firm during the mass privatisation of 1990s. Later the GPO charged the applicants with large-scale tax evasion. In particular, the GPO suspected that the trading companies registered in the low-tax zones were in fact sham legal entities (*podstavnye*, i.e. “frontman companies”;

hereinafter referred to as “sham companies”) affiliated with the applicants, as they were neither present nor operated in the place of their registration, had no assets and no employees of their own but were fully controlled from the Yukos head-quarters in Moscow. Therefore, tax cuts had been obtained by them unlawfully. The tax authorities also characterised payment of taxes with promissory notes as tax evasion. Furthermore, the tax authorities suspected that the firms to which the applicants, in their private capacity, had been rendering consulting service were affiliated with them and that no services had been provided to those firms in reality.

17. In 2003 both applicants were arrested and detained on remand. That investigation led to a trial which ended with the conviction and imprisonment of the applicants. Facts related to this trial (the “first case”) are at the heart of the present case. The applicants’ prison terms have now expired; however, they both remain in prison on account of new accusations brought against them within related but separate court proceedings (the “second case”).

18. In parallel with criminal proceedings against the applicants the Russian Tax Service<sup>1</sup> in 2004 lodged a claim for tax arrears owed by Yukos, which led to proceedings before the Moscow Commercial Court. Those proceedings concerned the operation of the “tax-minimisation scheme” using trading companies, described above. In the following months more claims concerning the tax situation of Yukos and its affiliates were lodged. The commercial courts granted most of the Tax Service’s claims. As a result Yukos had to declare itself insolvent and bankruptcy proceedings were started, which ended up by a forced sale of its assets and, finally, by the liquidation of the company on 12 November 2007. The company ceased to exist, leaving over RUB 227.1 billion (around 9.2 billion US dollars (USD)) in unsatisfied liabilities. For further details on the tax claims and Yukos bankruptcy see the statement of facts in the case of *ОАО Нефтяная компания YUKOS v. Russia* (no. 14902/04, judgment of 20 September 2011), hereinafter referred to as the *Yukos* case.

19. In 2004 and in the following years similar tax claims (related to the operation of trading companies in various low-tax zones within Russia) were lodged against at least three other major oil companies, namely Lukoil, Sibneft, or TNK-BP. However, in respect of those companies the Government ultimately accepted a settlement; tax claims were dropped in exchange of considerable amounts paid by those companies to the State budget, which allowed those companies to survive.

## **B. Events preceding criminal prosecution of the two applicants**

20. The applicants alleged that the criminal proceedings against them, described below, had been politically and economically motivated. In support of that assertion they referred to a large number of events which preceded the criminal proceedings against them and their partners. Those facts, in so far as relevant, are summarised below.

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<sup>1</sup> Also referred to as the Tax Ministry in the text; the name of the Russian tax authority changed several times during the period under consideration

### *1. Business projects of Yukos*

21. In 2002-2003 Yukos began to pursue a number of ambitious business projects which would make it one of the strongest players on the market and independent of the State. In particular, Yukos challenged the official Russian petroleum policy of tacit alignment with the OPEC policy of reducing oil production. Yukos sought instead to maximise its oil production and market share. Further, from 2003 Yukos was in the process of merging with Sibneft, another large Russian oil company. The merger was supposed to take place in two steps: firstly, completion of the deal on paper, and then unification of the new company's management structures. The first aspect of the deal was finalised in October 2003; the second was supposed to be implemented by January 2004. Yukos was also engaged in merger talks with the US-based Exxon Mobil and Chevron Texaco companies. According to the applicants, Chevron Texaco was considering the purchase of 25 per cent of Yukos shares, while Exxon Mobil planned to buy at least 40 per cent of the future Yukos Sibneft company.

22. Yukos was also planning to build a liquid gas pipeline to the Arctic Ocean in order to export natural gas to the western part of Europe without passing through the State-controlled pipelines. Similar plans existed in respect of China; here the applicants advocated building an oil pipeline along an alternative route to that favoured by the Presidential Administration.

23. Finally, Yukos and the State-owned company Rosneft were involved in a public struggle for control over certain oil fields. Yukos was successfully competing with Gazprom, another State-owned company, on the natural gas market.

### *2. Political activities of the first applicant*

24. In 2000 Mr Putin was elected President of the Russian Federation. One of the points of his political programme was to "liquidate the oligarchs as a class". Furthermore, President Putin advocated, according to the applicants, the renationalisation of the oil and mining industries, which had been privatised by his predecessor in the mid-90s.

25. In 2001 the first applicant founded a non-profit NGO, the "Open Russia Foundation". Its annual budget in 2003 amounted to approximately USD 200 million. This NGO cooperated with other Russian human rights NGOs, such as Memorial, the Moscow Helsinki Group, etc., and was involved in a number of humanitarian and educational projects across the country.

26. From at least 2002 the first applicant openly funded opposition political parties, namely Yabloko and the SPS (Union of Right Forces). He also made certain public declarations criticising anti-democratic trends in Russian internal politics. A number of his close friends and business partners became politicians. Thus, Mr Dubov and Mr Yermolin were members of the Duma (the lower chamber of the Russian parliament); Mr Shakhnovskiy, Mr Nevzlin, Mr Guryev and Mr Bychkov were all at various times members of the upper chamber, the Federation Council.

27. The first applicant asserted that his political and business activities had been perceived by the leadership of the country as a breach of loyalty

and a threat to national economic security. As a counter-measure the authorities undertook a massive attack on the applicant, his company, colleagues and friends.

3. *First inquiries into business activities of Yukos in 2002-2003*

(a) **The GPO inquiry of 2002**

28. On 6 March 2001 Business Oil, the main trading company of Yukos in the Lesnoy town at the time, terminated its operations and was removed from the register of taxpayers of the Lesnoy town. Sales of Yukos oil were henceforth conducted through other trading companies registered in other low-tax zones.

29. In July 2001 the Tax Service of the Sverdlovsk Region inspected the activities of the Lesnoy Tax Inspectorate. On 8 July 2001 it issued a report which established that tax cuts granted to Business Oil were lawful.

30. In 2002 the administration of the Lesnoy town commissioned an economic study from the Urals Branch of the Russian Academy of Sciences which concerned operations of the trading companies registered in the town. The report (called “legal and economic expert review”) came to a conclusion that the impugned trading companies were all lawfully entitled to claim tax exemptions under the federal law relating to taxation in closed administrative territories. The experts also concluded that the refund of tax overpayments by Yukos promissory notes did not inflict economic loss on the budget and that the trading companies were entitled to pay tax in advance. Finally, the experts concluded that the Lesnoy town administration was entitled to accept tax payments by way of promissory notes in 1999.

31. On 29 March 2002 a case was opened to investigate the acceptance by the Lesnoy town administration of tax payment by way of promissory notes from Yukos. That case was closed on 29 August 2002. The reasons why the case was closed were summarised by the GPO in July 2003 in the following terms:

“According to the conclusions of a legal and economic expert review of the case, there were no losses caused to the federal budget and municipal budget of Lesnoy town as a result of granting tax privileges, receiving taxes in the form of Yukos promissory notes and fulfilling the investment programme. Detected violations of the legislation by conducting these financial operations may be regarded as the subject matter of administrative and economic legislation. The receipt of taxes by way of promissory notes issued by Yukos was registered in the municipal budget for the 1999-2000 fiscal year, the federal budget received payment only in the monetary form”.

It is unclear whether the “legal and economic expert review” referred to by the GPO was the same as the report by the Urals Branch of the Russian Academy of Sciences prepared at the request of the town administration (see paragraph 30 above), or whether a different study was made at the request by the GPO.

(b) **Presidential Directive No. Pr-2178**

32. In November 2002 governors of several Russian regions wrote a letter to the then General Prosecutor of the Russian Federation,



Mr Ustinov. In that letter they complained that Apatit was abusing its dominant position on the apatite concentrate market and boosting prices of phosphate fertilisers, which, in turn, increased food prices. They also alleged that Apatit was using various schemes to evade or minimise taxes. They urged General Prosecutor Ustinov to return Apatit to State control and to apply anti-trust measures in order to make Apatit reduce prices.

33. In December 2002 the governor of the Pskov Region wrote to the then President of the Russian Federation, Mr Putin. He drew the President's attention to the friendly settlement in respect of the Apatit shares (see paragraph 11 above) and claimed that its terms were contrary to the interests of the State, since the amount received by the State in pursuance to that settlement was significantly lower than the market price of the shares.

34. On 16 December 2002 President Putin issued Directive No. Pr-2178 requiring reports to be obtained in relation to whether there had been "violations of the existing legislation committed during the sale of shares of the Apatit and whether the State had suffered any loss as a consequence of the friendly settlement that had been approved by the Moscow Commercial Court in 2002". The directive was addressed to Prime Minister Kasyanov and General Prosecutor Ustinov.

35. On 19 February 2003 the first applicant, together with other influential businessmen, met President Putin in the Kremlin. At that meeting the first applicant made critical remarks concerning the recent acquisition of a private oil company by the State-owned company Rosneft. The first applicant implied that that transaction had involved high-level corruption. According to the first applicant, President Putin reacted by reminding the applicant that Yukos had experienced problems with the payment of taxes, which had not yet been fully resolved.

36. On 27 April 2003 the first applicant met President Putin to discuss the merger between Sibneft and Yukos. According to Mr Dubov, the applicant's business partner, Mr Putin approved the merger but warned the first applicant against political activity, namely funding the Communist Party.

37. On 28 April 2003 General Prosecutor Ustinov reported to the President that there was no basis for a criminal case in relation to the circumstances surrounding the acquisition of a 20 per cent block of shares of Apatit. The inquiry had not established that Apatit had been abusing its position on the market or that the amount of the friendly settlement reached with the State privatisation agency had been unfair. The terms of the friendly settlement had been approved by the Prime Minister, Mr Kasyanov. Apatit's tax payments had been constantly monitored by the Tax Service; although Apatit and its affiliates had been subjected to various penalties and financial sanctions in the past, and a new audit was underway, the GPO did not see any reason to start criminal proceedings in this respect. At the same time the Government insisted on the expediency of entering into an agreement with Yukos in order to settle the matter.

38. On 29 April 2003 Prime Minister Kasyanov wrote to President Putin informing him that the law enforcement agencies had stated that they would not commence a criminal prosecution as there was no *corpus delicti*

in relation to the circumstances surrounding the acquisition of a 20 per cent block of shares of Apatit.

**(c) The cases of Mr Pichugin and other senior managers of Yukos**

39. In one of his interviews in April 2003 the first applicant stated publicly that he intended to leave business and go into politics, and confirmed his funding of the SPS and Yabloko parties. He also said that some major Yukos shareholders supported the Communist Party.

40. On 19 June 2003 a Yukos senior security official, Mr Pichugin, was arrested and charged with murder in an unrelated case. This arrest led to Mr Pichugin's trial and conviction for murder (for a more detailed description of the facts of the case, see *Pichugin v. Russia*, no. 38623/03, 23 October 2012).

41. In the following months several senior executives and shareholders of Yukos, namely Mr Nevzlin, Mr Dubov, Mr Brudno and several others left Russia out of fear of prosecution. Some lower-level Yukos managers or personnel of its contractors also left. Thus, according to the written testimony of Mr Glb., obtained in 2007, in 2003 the first applicant had met him and persuaded him to leave Russia. Later he had been told not to return to Russia. He understood that the security service of Yukos moved a part of its personnel to London. A staff member of one of the trading companies, Ms Kar., testified in 2008 that in 2003 a manager of Yukos persuaded her to leave Russia for Cyprus and paid for her stay there. The applicants, however, remained in the country and continued their professional activities.

**C. Arrest of the two applicants. Detention on remand of the second applicant during the trial**

42. On 20 June 2003 the GPO initiated a criminal investigation into the privatisation of Apatit, which eventually led to charges being brought against the applicants.

43. On 27 June 2003 the second applicant (Mr Lebedev) was summoned for questioning within the Apatit case. The questioning was scheduled for 10 a.m. on 2 July 2003.

44. On 2 July 2003 the second applicant was admitted to Vishnevskiy Hospital in connection with his chronic diseases. At 9.50 a.m. Mr Drel, the second applicant's lawyer, called the investigator and informed him that his client had been urgently hospitalised in an ambulance car. According to a certificate from the hospital the applicant was admitted there at 12.56 p.m. On the same day the GPO investigator accompanied by armed FSS (Federal Security Service) officers arrived at the hospital. At 3.20 p.m., the doctors, at the request of the investigator, examined the applicant. The doctors observed an improvement of his condition and described his condition as "satisfactory". The second applicant was arrested as a suspect in the criminal case concerning the privatisation of Apatit and brought to the Lefortovo remand prison. According to the FSS officers present during the second applicant's arrest, he threatened the investigator with criminal liability for his unlawful prosecution. He also

threatened to bring a press campaign against the GPO officials involved in his case. In the following months the second applicant's detention was repeatedly extended. For further details on the second applicant's detention until November 2004 see *Lebedev v. Russia*, no. 4493/04, partial decision on admissibility of 25 November 2004, decision on admissibility of 18 May 2006, and judgment of 25 October 2007, hereinafter referred to as the *Lebedev (no. 1)* judgment.

45. On 23 October 2003, whilst the first applicant was away from Moscow on a business trip to eastern Russia, chief investigator Karimov summoned him to appear in Moscow as a witness on the next day at noon. The first applicant's staff informed the GPO that the first applicant was away from Moscow until 28 October 2003. On 24 October 2003, the first applicant having missed the appointment, the investigator Karimov ordered his enforced attendance for questioning.

46. In the early morning of 25 October 2003 a group of armed law-enforcement officers approached the first applicant's aeroplane on an airstrip in Novosibirsk, apprehended him, and flew him to Moscow. The first applicant was charged, arrested as a suspect and later detained on remand. For more details concerning the detention on remand of the first applicant see *Khodorkovskiy v. Russia*, no. 5829/04, §§ 22 et seq., 31 May 2011, hereinafter referred to as the *Khodorkovskiy (no. 1)* judgment.

*1. Extensions of the second applicant's detention on remand by the court pending trial*

47. On 6 April 2004 the Meshchanskiy District Court decided that the second applicant should remain in detention pending trial. No reasons were given for that decision. On 15 April 2004 the District Court dismissed the application for release lodged by the defence. The court held as follows:

“[The court] takes into account that [the applicant] is accused of a number of offences, including serious ones, punishable with more than two years' imprisonment. The combination of the seriousness of the charge and the information about the applicant's character gives reason to suspect that, if released, the applicant may abscond from trial, interfere with the proceedings and influence witnesses. [In particular], the persons suspected of having committed the offences in concert with [the applicant] have gone into hiding. [The applicant] maintains international connections. [He] is accused of offences committed in his capacity as a manager of commercial companies. The persons with whose assistance, according to the investigating authorities, [the applicant] committed the offences, still work in the companies and depend on [him] financially and otherwise. [The applicant] may therefore influence them ...”

The District Court concluded that the second applicant should be kept in custody pending trial.

48. On 19 August 2004 the second applicant's lawyers lodged an application for release on behalf of the second applicant, referring, in particular, to his poor health. The District Court refused to release him, on the basis that the second applicant could receive adequate medical aid in the remand prison. The court also held that the second applicant's continuous detention was justified in view of the gravity of crimes imputed to him, and “information about [the second applicant's] character”. The District Court also noted that the persons with whose assistance the second

applicant had allegedly committed the offences still worked in the companies and depended on him.

49. At the hearing of 10 September 2004 the prosecutor requested the court to extend the second applicant's detention on remand until 26 December 2004, since the previous detention order would expire on 26 September 2004. After that the defence declared that they needed to study the request and asked for a one-hour adjournment. The court gave the adjournment sought. An hour later the second applicant asked for one hour more to prepare a reasoned reply to the detention request. Again, the court granted that motion. At the end of the period the defence lodged a written reply to the prosecutor's motion. The defence objected but the court granted the request and extended the second applicant's detention on remand as requested. The reasons given by the District Court in its decision of 10 September repeated the reasons stated in the decision of 15 April 2004.

50. The defence appealed. According to the Government, the brief of appeal against the extension order of 10 September 2004 was submitted on 20 September 2004. On 13 October 2004 the Moscow City Court upheld the decision of the lower court. The City Court noted that "the circumstances in which the imputed acts had been committed" suggested that, if released, the second applicant might pervert the course of justice by putting pressure on witnesses or otherwise influencing them, or might abscond, and that the City Court "had not discovered any reason to repeal the [lower] court's decision as requested by the brief of appeal".

51. At the hearing of 14 December 2004 the prosecutor again requested an extension of the second applicant's detention until 26 March 2005. That request was made orally. The defence was given two hours to prepare written submissions. The defence produced written arguments, following which the court granted the request and extended the detention until 26 March 2005, giving the same arguments as in the detention orders of 15 April and 10 September 2004.

52. The appeal against the detention order of 14 December 2004 was lodged on 24 December 2004 and examined on 19 January 2005 when the Moscow City Court upheld it.

53. At the hearing of 2 March 2005 the State prosecutor requested a new extension of the second applicant's detention pending trial. The prosecutor referred to the second applicant's oral statement of 1 March 2005, when he had said that he "would haunt the prosecutor until his last day". In reply to the request the defence did not ask for additional time to prepare their arguments. The second applicant explained, in particular, that there had been nothing new in the prosecution's requests for detention since 2003, and that he was prepared to give his arguments immediately. The court heard the defence and granted the request extending the second applicant's detention until 26 June 2005. That detention order repeated the reasons given in the previous detention orders.

54. The detention order of 2 March 2005 was appealed against on 11 March 2005; the first hearing was scheduled for 23 March, but the defence sought an adjournment in order to obtain a Ruling by the

Constitutional Court of 22 March 2005 (no. 4-P). The appeal was therefore examined and dismissed on 31 March 2005.

*2. Conditions of detention of the second applicant*

55. The second applicant claimed that in the remand prison IZ-77/1 where he had been detained from 21 October 2003 until his transferral to the correctional colony on 27 September 2005, he had been deprived of all physical exercise. Thus, he constantly missed his daily walks because of the need to read the materials in the case file or participate in the hearings. On weekends and holidays, when there were no court hearings he could not go outside because he was ill. Further, the food in the prison was incompatible with his illnesses, and he only received appropriate food from his relatives or lawyers to a limited extent. It was impossible to have a hot meal at midday when there was a hearing or when he was reading the case file. During the Christmas holidays the second applicant was transferred to an overcrowded “common” cell. Despite his requests, he was not given a calculator or a magnifying glass. As a result, he was able neither to prepare for the hearings nor to have a rest.

56. The second applicant complained to the prison doctors about his health problems. On 2 March 2004 he was examined by a panel of doctors composed of the Chief Physician of the Moscow Health Department, Deputy Medical Director of the Moscow Prisons Department, Healthcare Director of the remand prison, and an infectiologist. The panel described his state of health as follows:

“[The applicant] is suffer[ing] from neuroculatory dystonia of the hypertensive type, chronic non-complicated sub-acute hepatitis, i.e. without transformation into cirrhosis and portal hypertension.”

57. On 18 August 2005 the second applicant was placed in a solitary confinement cell (or “isolation cell”) as a punishment, allegedly for refusing to go outside for a daily walk. The documents produced by the Government also indicated that the applicant had refused to go to the shower rooms, whereas, according to the applicant, the remand prison did not have a bath-house for inmates. According to the applicant, the cell was very small and had no natural light or ventilation. He did not receive hot meals. It was prohibited to lie or even sit on the bed between 6 a.m. and 10 p.m. The bed was very close to the toilet pan. The water for flushing, drinking and washing was available from the water-tap above the toilet pan. The second applicant spent seven days in that cell.

58. The Government described the conditions in the isolation cell as follows. The cell in which the second applicant was placed measured 5.52 square metres, which was more than the minimal surface area established by law. The second applicant was detained in the cell alone. The cell had a folding bed, a washbasin with cold water, a toilet, a shelf for toiletries, a chair and a table. The cell was ventilated naturally, and was lit by a day-time lamp and a night-time lamp (*dezurnoye osvescheniye*). In addition, the cell had a window measuring 60 x 90 cm. The cell was equipped with a cistern for boiled water which was supplied by the warders when necessary. Referring to the certificates issued by the head of the remand prison, Mr Tagiyev, dated 7 August 2008, the Government alleged that

illumination, temperature and humidity in the isolation cell had corresponded to the sanitary standards. The distance between the toilet and the bed was one metre, which was explained by the small dimensions of the cell; such a distance, however, respected basic requirements of hygiene. The bed was unfolded during the night, namely between 11 p.m. and 6 a.m. During the daytime the second applicant could sit on the chair. The Government also attached a report of inspection of sanitary conditions of certain other premises of the remand prison (not apparently related to the cells where the second applicant was detained), dated January 2006, as well as two reports of the inspection of the ordinary cells where the second applicant was detained dated February 2004 and January 2005, which concluded that sanitary condition of the cells was satisfactory. The Government also produced a contract with a firm in charge of disinfestation of the remand prison, dated 15 August 2005, and several “certificates of completed work”, dated 2006 and later.

59. Further, in the Government’s words, while in detention in the isolation cell the second applicant was provided with hot meals three times a day in accordance with the established standards. The Government produced extracts from prison’s kitchen record, describing composition of the meals served to the prisoners. The second applicant had a right to a one-hour daily walk during the daylight hours.

60. On the hearing days the detainees were provided with dry meals; in the court building they were given hot water to prepare tea, coffee, or instant food. As follows from the documents submitted by the Government, in 2004-2005 the second applicant took part in over 160 days of hearings. However, he always refused to take the dry meal; he preferred the food he received from his relatives. The Government produced a handwritten waiver by the second applicant whereby he refused to receive dry meals. The doctors did not recommend him any special diet, so he could have eaten the same food as other prisoners.

#### **D. Criminal prosecution of the applicants**

##### *1. Investigative actions by the GPO in 2003*

61. On 4 July 2003, soon after the arrest of the second applicant, the first applicant was summoned to the GPO and interviewed as a witness in the criminal case concerning Apatit. He appeared before the investigator and gave testimony. During the interview he was assisted by Mr Drel, one of his and the second applicant’s lawyers.

62. On an unspecified date in July 2003, the First Deputy General Prosecutor, Mr Biryukov, ordered that the case concerning tax payments of the trading companies registered in the Lesnoy town, which had been closed on 29 August 2002 (see paragraph 31 above), be re-opened and transferred to the GPO.

63. On 8 July 2003 the prosecution searched the premises of the regional office of the State Property Fund, situated in Murmansk, which could have held information on the privatisation of Apatit.

64. On 9 July 2003 the investigators searched the premises of Apatit.

65. On 10 July 2003 the prosecution searched the premises of the bank Menatep Sankt-Petersburg, which was affiliated with Yukos. The search was authorised by the Deputy General Prosecutor, Mr Biryukov, in a decision of 8 July 2003.

66. On 29 July 2003 the GPO searched the premises of Russkiye Investory Plc.

67. On 7, 8 and 14 August 2003 new searches were carried out in the premises of Menatep Sankt-Petersburg.

68. On 16 August 2003 the GPO obtained a report by two experts, Mr Yeloyan and Mr Kupriyanov. That report calculated damages allegedly suffered by Apatit as a result of the manipulation with the trading prices of apatite concentrate. It compared the net profit of Apatit during the periods when apatite concentrate was sold independently and when it was sold through intermediaries proposed by the Yukos management.

69. On 3 October 2003, based on the warrant issued by the Deputy Prosecutor General on the same day, the investigative team, headed by investigators Mr Pletnev and Mr Uvarov, carried out the first search in Yukos's premises and in the homes of its senior managers located in the village of Zhukovka, Moscow Region, building no. 88. In particular, the investigators searched the homes of the second applicant, the homes of Yukos vice-president Mr Brudno, and the home of the applicant's friend, Mr Moiseyev. The investigators also searched the office of Mr Dubov, a Duma Deputy. According to the applicants, the investigators entered the building and started the searches without having produced a search warrant. The searches were attended by several attesting witnesses, in particular Ms Ardatova and Ms Morozova, cleaning ladies.

70. The applicant indicated that the search had been carried out simultaneously on several floors of the building, so the attesting witnesses had been physically unable to see what materials had been seized. Furthermore, the documents found during the search were seized and packed in bulk, without detailed lists enumerating particulars of those documents. The documents seized during the search were later added to the materials of the case-file. Some of the documents and objects seized during that search were added to the case file by an order of 11 February 2004.

71. On 9 October 2003 the investigators, based on a search warrant issued on the previous day by the Deputy Prosecutor General, searched the offices of ALM Feldmans, a law firm providing legal services to Yukos, and the offices of the applicants' lawyer, Mr Drel, all located in the Zhukovka village. According to Mr Rakhmankulov, who testified about the circumstances of the searches later at the trial, he had asked investigator Mr Karimov whether the latter had been aware that the rooms in question had been rented by the law office of Mr Drel. Mr Karimov had replied in the affirmative. Mr Moiseyev testified that he had informed the investigators that the offices they had been searching belonged to a lawyer. At the entrance to the floor of the building there had been a sign identifying Mr Drel as a lawyer. The files seized during the search were labelled as containing lawyers' notes related to the defence of the applicants. The search report mentioned that the seizure had been carried out "in the Moscow Region, village of Zhukovka 88a, 4th floor, rented by

ALM Law Bureau ...”, and that one of the offices had a tag indicating “work papers of lawyer Mr Drel”. Some time after the start of the search Mr Drel arrived in Zhukovka. He informed the investigators that he was a lawyer with the Moscow Bar and protested against the breaking into his office. However, the investigators did not let him enter the building. At the end of the search he was allowed to make his comments on the search record. A separate sheet with comments on the procedure in which the search was carried out stated: “Lawyer Drel, who appeared at the premises around 7 p.m., despite his protests, was taken by police officers [out] of the territory on which building No. 88a was located” and notes “breaking and entering into Moscow City Bar Association lawyer Drel’s [office]”.

72. As a result of those two searches, a large number of documents were seized, as well as hard drives of several computers. The hard drives were examined by the investigators at the GPO premises in the presence of attesting witnesses and then transmitted to experts for the extraction of information contained therein. The experts drew up a list of files that had been found on the drives, but neither the drives themselves nor the list of files were attached by the GPO to the applicants’ criminal case materials. Electronic documents from those drives were presented to the trial court in the form of print-outs. The applicants claimed that there had been a discrepancy between the amount of information on hard drives of the computers seized during the search and the amount of information produced to the court. Furthermore, the applicants claimed that the hard drives seized had not been properly packed and sealed, so it was possible to add information to them while the drives were in the possession of the GPO.

73. Over the following days the GPO also searched the headquarters of the political party Yabloko and an orphanage which was under the patronage of the first applicant; they removed from the latter premises a computer server, said by the authorities to hold Yukos financial data.

74. On 10 October 2003 a GPO investigator, Mr Karimov, refused to grant the petition of the second applicant to attach official correspondence related to the inquiry conducted following Presidential Directive No. Pr-2178 (see paragraph 32 above) to the case materials.

75. On 17 October 2003 Mr Drel was summoned to the GPO for questioning in relation to the criminal cases against the second applicant. Mr Drel refused, referring to his status as advocate and his position as the second applicants’ representative in the criminal proceedings at issue. Later the Moscow City Chamber of Lawyers ruled that to answer questions in the circumstances would be a violation of the law “On the Advocacy and the Bar in the Russian Federation”.

76. On the same day the prosecution brought charges of personal tax evasion against Mr Shakhnovskiy, a close friend and business partner of the first applicant. According to the prosecution, he fraudulently reduced the amount of personal income tax due by using the “individual entrepreneur” scheme (see paragraph 15 above).

77. On 20 October 2003 the investigator ordered a seizure from Trust Investment Bank and received the sanction of First Deputy Prosecutor General, Mr Biryukov, for that measure.



78. On 21 October 2003 the Deputy General Prosecutor, Mr Kolesnikov, said in a press conference that charges might be brought against other senior managers of Yukos. On the same day the investigator again searched the premises of the Menatep Sankt-Petersburg bank.

79. On 22 October 2003 the investigator searched the premises of the Trust Investment Bank.

80. On 25 October 2003 the first applicant was arrested in Novosibirsk and transported to Moscow where GPO charged him with business fraud and tax evasion. Further, at the request of the GPO, the Basmanniy District Court of Moscow decided to detain the applicant pending the investigation. During the following months his detention was extended several times.

81. On the same day Mr Drel was summoned to the GPO to testify as a witness. He refused to testify, referring to his professional status and his position in the case of the first and second applicants.

82. On 27 October 2003 the GPO attempted to interrogate Mr Drel as a witness. He refused to testify.

83. On the same day Mr Shakhnovskiy was elected to serve as a Senator, i.e. member of the upper chamber of the Russian Parliament. Later he resigned following a request by the Prosecutor General in which the latter claimed that Mr Shakhnovskiy's election had been irregular and thus null.

84. On 3 November 2003, as a consequence of his arrest, the first applicant resigned as chief executive of Yukos.

85. On 10 November 2003 the first applicant was formally charged by the GPO.

86. On 11 November 2003, an investigator of the GPO investigative team arrived at the Trust Investment Bank for the second time and carried out another seizure with reference to the search warrant of 20 October 2003.

87. On an unspecified date in November 2003 the Tax Service lodged, within criminal proceedings against the applicants, a civil claim against them on behalf of the State. The Tax Service claimed that the applicants, in their capacity as Yukos senior managers, caused the State damages in the amount of 17,395,449,282 Russian roubles (RUB) (taxes not paid by the trading companies) plus RUB 407,120,540 (taxes unlawfully reimbursed from the State budget). The overall amount of the civil claim was RUB 17,802,569,822 (over 510 billion euros (EUR)); these amounts corresponded to the amounts mentioned in the bill of indictment on company tax-evasion charges brought against the applicants. The statement of claim was lodged by one of the Deputy Ministers, Mr Shulgin. The text of the statement by Mr Shulgin did not contain any calculation of the amounts due by the applicants.

88. On 5 and 16 December 2003 a GPO investigator conducted a search in Tax Inspectorate no. 5 for the Central District of the City of Moscow and seized some documents. According to the applicants, no prior approval had been obtained from the General Prosecutor for that search.

89. Later in 2003 the Moscow City Tax Inspectorate No. 5 lodged additional civil claims against the applicants claiming tax arrears and penalties related to the personal tax evasion charges.

2. *Essence of criminal charges against the applicants*

90. The charges against the applicants formulated by the GPO may be summarised as follows:

(a) **Misappropriation of Apatit shares**

91. In 1994 the State privatisation authority decided to sell 20 per cent of the stock of Apatit Plc, a large mining company producing apatite concentrate. Under the conditions of the privatisation tender the buyer would be under an obligation to invest money in Apatit's business activities.

92. In order to participate in the privatisation tender, the applicants, together with their subordinates and friends, created several sham companies: Volna, Malakhit, Flora, and Intermedinvest. The director of Volna was Mr Kraynov. Further, the second applicant, as head of the Menatep bank, issued indemnity bonds on behalf of Menatep, guaranteeing the capacity of the first three companies to pay. The fourth company produced a fake indemnity bond from the European Union Bank. As a result, the four companies were admitted by the State privatisation authority for participation in the tender. The applicants delegated several people working in the Menatep bank and affiliated companies to participate in the privatisation tender on behalf of the sham companies.

93. At the tender on 30 June - 1 July 1994 Intermedinvest offered the best conditions (RUB 19,900,000 in the form of investment obligations), but then revoked its bid. Other companies participating in the tender did the same. As a result, Volna, which had submitted the lowest bid, obtained the privatisation contract.

94. Under that contract Volna acquired 415,803 shares in Apatit (or 20 per cent of its capital) from the State for a nominal price of RUB 415,803,000 (pre-1998 devaluation). According to the prosecution, the real price of the shares at the time was RUB 563,170,000,000 or USD 283,142,283. In addition, Volna accepted an obligation to invest RUB 79,600,000 in Apatit within one month, and RUB 394,219,000 by 1 July 1995. However, that condition was not met within the time-limits specified in the privatisation contract.

95. On 29 November 1994 the prosecutor, acting on behalf of the State privatisation authority, brought proceedings against Volna before the Commercial Court of Moscow seeking nullification of the privatisation contract and the return of the Apatit shares. The prosecutor indicated that Volna had failed to fulfil its investment obligations under the privatisation contract.

96. In 1995 Volna transferred the amount stipulated in the privatisation contract to Apatit's bank account and submitted a bank transfer order confirming this to the Commercial Court. Consequently, on 16 August 1995 the Commercial Court adopted a judgment rejecting the claims against Volna on the ground that the money stipulated in the privatisation contract had been duly paid. However, on the same day the amount received by Apatit was transferred back to Volna's bank accounts by the director of Apatit. Therefore, *de facto* the money due under the

privatisation contract was not paid. The prosecution qualified this episode as business fraud.

**(b) Failure to comply with the court decision concerning Apatit**

97. On 12 February 1998 the judgment of 16 August 1995 was quashed. The Commercial Court of Moscow, sitting as a court of appeal, declared the privatisation contract null and void and ordered that the Apatit shares be returned to the State. However, by that time Volna had already sold the Apatit shares to a number of other legal entities created and controlled by the applicants. As a result, the decision of the Commercial Court of Moscow of 1998 remained unenforced and the enforcement proceedings were discontinued.

98. In March 2002 the second applicant proposed a friendly settlement of the dispute and the State Property Fund (the body in charge of the privatisation deal) accepted his offer. On 19 November 2002 the friendly settlement was concluded. Under that settlement Volna paid the State USD 15,130,000 and the State withdrew its claim to the Apatit shares. The above amount was calculated by the audit firm BC-Otsenka, and was accepted by the Commercial Court of Moscow as the market price for the shares. On 22 November 2002 the Commercial Court of Moscow endorsed the friendly settlement agreement and closed the case. However, according to the prosecution, the real market price of the shares at the relevant time was USD 62,000,000. It referred to the audit report of 19 August 2003, commissioned by the investigator (the report by Mr Yeloyan and Mr Kuprianov), and a report by the consulting firm Rusaudit, Dorhoff, Yevseyev and Partners, dated December 2002, commissioned by the Government of the Russian Federation. Thus, the decision of the Commercial Court had been based on false evidence. As a result, the decision of 12 February 1998 remained non-enforced through the applicants' fault. The prosecution qualified this episode as intentional avoidance of execution of a court judgment.

**(c) Embezzlement of Apatit's profits and assets in 1997 – 2002**

99. By 1995 the applicants owned, through affiliated companies, a controlling stake of Apatit's shares (including the 20 per cent acquired through the privatisation tender). On 1 December 1995 the applicants, as major shareholders, appointed a group of managers and assigned to them all of Apatit's sales operations. As a result, all sales went through a number of sham companies controlled by the applicants and located in low-tax zones. The apatite concentrate was bought by those companies at a lower price and then re-sold at the market price. The companies controlled by the applicants thus accumulated Apatit's profits; the difference between the "internal" and "external" prices was accumulated in foreign bank accounts controlled by the applicants. As a result, the minority shareholders of Apatit (including the State, which retained a block of shares in that company) suffered pecuniary losses. The prosecution qualified this episode as embezzlement.

**(d) Misappropriation of NIUIF shares**

100. In 1995 the State privatisation authority decided to sell at tender 44 per cent of the shares in NIUIF Plc, a Moscow-based research institute. To that end the authority issued an invitation to tender. One of the conditions of the privatisation tender was that the winner would have to invest a certain amount of money to support NIUIF's on-going activities.

101. According to the prosecution, the applicants were interested in obtaining the rights to one of the main assets of NIUIF – an office building in Moscow. In order to take part in the privatisation tender the applicants, acting through their subordinates, in the Menatep bank, created two sham companies: Polinep and Walton. Further, the second applicant issued two indemnity bonds on behalf of Menatep in the amount of USD 25,000,000, guaranteeing those companies' capacity to pay. As a result, they were authorised by the State privatisation authority to participate in the tender.

102. At the privatisation auction Polinep proposed that it would invest USD 50,000,000 in NIUIF; this was the highest bid, so Polinep was declared to have won. However, Polinep immediately withdrew its bid. Walton made a bid of USD 25,000,000; this was the highest investment bid, so on 12 September 1995 Walton obtained the privatisation contract. On 21 September 1995 the State sold 44 per cent of the shares in NIUIF to Walton at the nominal price of RUB 130,900,000. According to the prosecution, the market price of the shares acquired by Walton was RUB 5,236,000,000.

103. On 28 December 1995 Walton transferred the investment money to NIUIF's account in the Menatep bank. Mr Klassen, the then director of NIUIF, reported to the State privatisation authority that Walton had fulfilled its obligations under the privatisation contract. On the following day he transferred the money back to Walton's account in Menatep. As a result the conditions of the privatisation contract were not met *de facto*. The prosecution qualified this episode as fraud.

**(e) Failure to comply with the court decision concerning NIUIF**

104. In February 1996 Walton sold the NIUIF shares to another three sham companies created by the applicants: Khiminvest, Metaksa, and Alton. Under the sale contract those companies received the shares but were free from any investment obligations vis-à-vis NIUIF. Mr Klassen confirmed to those companies in writing that NIUIF would not have any pecuniary claims against the buyers of the shares. Mr Klassen also reported to the State privatisation authority that Walton had fulfilled its investment obligations under the privatisation contract.

105. Further, in order to control the activities of NIUIF, the applicants delegated several employees from the Menatep bank to the NIUIF board of directors. As a result, the board of directors approved the sale of NIUIF's main asset – its office buildings in Moscow – to Pender Limited, an offshore company controlled by the applicants and registered in the Isle of Man. That company acted through persons who worked in the Menatep bank or the Rosprom holding and were thus affiliated with the applicants. The applicants also delegated their staff to the NIUIF management in order to oversee that company's day-to-day activities.

106. In 1997 the State Property Fund (the privatisation authority) learned that Walton had failed to discharge its main obligation under the privatisation contract, namely to invest in NIUIF. The State Property Fund brought proceedings against Walton, seeking the return of the shares. As a result, on 24 November 1997 the Commercial Court of Moscow quashed the privatisation contract of 1995 and ordered the seizure of the shares from Walton.

107. However, by this time the NIUIF shares had already been sold by Walton, so that decision could not be executed. In January 1998 the shares were re-sold to several other sham companies, which had also been created by and were controlled by the applicants (Danaya, Galmet, Fermet, Status, Elbrus, Triumph, Leasing, Renons, Izumrud, Topaz). As a result, the decision of the Commercial Court of Moscow could not be enforced because of the applicants' manipulations with the NIUIF shares. The prosecution qualified this episode as intentional avoidance of execution of a court judgment.

**(f) Company tax evasion: unlawful tax cuts**

108. Under Article 199 of the Criminal Code ("Evading Payment of Taxes ... Collectible from Organisations") the GPO forwarded two distinct charges against the applicants: one related to unlawful tax cuts and another related to payment of taxes with promissory notes. According to the prosecution, the overall amount of unpaid taxes under these two heads in 1999-2000 amounted to (post 1998 devaluation) RUB 17,395,449,282.

109. As to the first episode, according to the prosecution, the applicants through their subordinates registered a number of sham companies in the Lesnoy town, namely Business Oil, Forest Oil, Vald Oil and Mitra. Those companies were not formally affiliated with the applicants or Yukos, but were controlled by them *de facto*. Those companies claimed to operate in Lesnoy, and, on that ground, they qualified for tax cuts. However, those companies did not actually have any business activities in Lesnoy but were controlled and administered from Moscow. As a result, the profits from the oil trade were concentrated in those companies. Some of the profits of the sham companies were later returned to Yukos bank accounts by means of a series of complex financial transactions involving the exchange of promissory notes. The industrial group's overall fiscal burden was thus significantly lightened.

110. According to the bill of indictment, Business Oil avoided payment to the Lesnoy town budget of RUB 1,217,622,799 in 1999 on account of unlawfully obtained tax cuts, and RUB 1,566,046,683 in 2000 (or RUB 2,783,669,482 in aggregate). The prosecution qualified this scheme as tax evasion.

**(g) Company tax evasion: payment of taxes with promissory notes**

111. The second charge concerned the method of payment of the remaining taxes (after the tax cuts) by the sham companies. In addition to obtaining tax cuts, the sham companies registered in Lesnoy did not pay taxes in monetary form. Instead, they obtained promissory notes from Yukos and then transferred them to the Lesnoy town Tax Inspectorate. The

value of the promissory notes was later offset from the tax debt of the sham companies. Thus, in 1999 the four sham companies (Business Oil, Forest Oil, Vald Oil and Mitra) transferred to the Lesnoy town budget promissory notes in the amount of RUB 5,315,535,283; in 2000 the sham companies transferred promissory notes worth of RUB 10,381,901,191.

112. Over the following years the promissory notes were paid off, but only in part: in 2000 promissory notes amounting to RUB 1,048,391,487 had not yet been honoured. The prosecution qualified payment of taxes by promissory notes by the sham companies as another count of tax evasion.

**(h) Unlawful tax refund**

113. Since the value of some promissory notes was higher than the tax debt, the sham companies obtained a tax refund from the State in monetary form. Thus, in 2000-2001 the Federal Treasury paid the sham companies the difference between the tax debt and the value of the promissory notes, or deducted that difference from the amounts of taxes to be paid by those companies.

114. In 2001, when the regional tax authority started a tax audit of the sham companies registered in Lesnoy, those companies formally discontinued their activities in Lesnoy and merged with another sham company registered in the town of Aginskiy, another low-tax zone. Later those companies were again re-registered in the Chita Region. Each new company received a part of the claims which the liquidated companies had had against the State budget on account of the hypothetical overpayment of taxes. According to the prosecution, in 1999-2001 the applicants, through the sham companies, received RUB 407,120,540 from the budget on account of "tax overpayments". The prosecution qualified that situation as embezzlement of the budget funds and qualified it under Article 159 of Criminal Code ("Fraud").

**(i) Money transfers to Mr Gusinskiy's companies**

115. In 1999 and 2000 the first applicant allegedly misappropriated assets belonging to the Yukos group. Thus, important sums of money were transferred from the accounts of Yukos and two other companies affiliated with Yukos (Mitra Limited and Greis Limited) to the bank accounts of companies belonging to Mr Gusinskiy, a mass-media tycoon, namely Media-Most, Delf, Byron, Sard, Osmet, GM-2, NTV-Mir Kino, and Most Bank. Those transfers had no business purpose and thus caused damage to Yukos shareholders. According to the prosecution, Mr Gusinskiy received RUB 2,649,906,620 from the applicant. The prosecution qualified those transfers as fraud.

**(j) Personal income tax evasion**

116. Over the period 1998-2000 the applicants registered themselves as self-employed entrepreneurs. In the registration form they indicated that they were private consultants for several foreign firms, and that their income consisted of fees for consulting services. This status permitted the applicants to pay a fixed amount of imputed income tax (or the cost of a "patent" – a licence obtained for the consulting services), defined by the

Small Business Act, instead of paying personal income tax and making social-security contributions (as they would do if they declared their benefits as their “salary”).

117. In order to prove their eligibility for the status of “self-employed entrepreneur”, the applicants concluded and produced fake agreements on consulting services (“consultancy agreements”) for foreign companies, namely Status Services Limited and Hinchley Limited, situated in the Isle of Man. The consultancy agreements of the first applicant with Status Services were agreements of 2 March 1998, 5 October 1998, 30 November 1998, and 20 April 1999.

118. The second applicant was the chief executive of Status Services. On that particular point the bill of indictment (p. 532) stated that “according to American Express corporate cards, which were seized during a search at [the second applicant’s house and added to the case file], on 6 June 2000 the said cards were sent to him as the head of Status Services Limited”. The second company was controlled by Mr Moiseyev, a close friend of both applicants. Under that agreement the applicants received money in the guise of payment for consulting services; however, in reality the money was a wage for their work in Yukos and affiliated firms. As a result, they paid much lower taxes than if they had received the same sum as their salaries. According to the prosecution, the unpaid personal income tax (together with social security contributions) amounted in 1998-1999 to RUB 54,532,186 for the first applicant and in 1998-2000 to RUB 7,269,276 for the second applicant. The prosecution qualified that scheme as personal tax evasion.

### *3. Preparation of the defence for the trial*

#### **(a) Access to the materials of the case files before the trial**

119. At the pre-trial stage the criminal cases of the two applicants were investigated separately. On 22 August 2003, the pre-trial investigation in the second applicant’s case was over and materials of his criminal case were presented to him and to his lawyers for familiarisation (the “period of trial preparation”). On 25 August 2003 the second applicant’s lawyers, Mr Baru and Mr Drel, signed a form attesting that they had received 146 volumes of the criminal case and thirteen audiotapes with questionings. Later the prosecution supplemented the materials of the case with additional volumes (see paragraph 126 and 127 below).

120. On 25 November 2003 the pre-trial investigation in the first applicant’s case was over. The first applicant and his lawyers were given access to 227 volumes of the criminal case file, containing approximately 55,000 pages.

121. The applicants studied the materials of their respective case files in the remand prison, with or without their lawyers. As follows from the forms produced by the Government, the applicants’ lawyers and the applicants studied the materials on an almost daily basis. Each defence team was given access to one copy of their respective case files. The applicants were entitled to read their respective case files in the remand prison in the presence of the investigator. The applicants were not

permitted to make photocopies of the documents, but they could take handwritten notes. When the applicants wished to discuss the documents in private with their lawyers the investigator removed the documents. On 17 October 2003 the second applicant asked the investigator to allow him photocopying in the remand prison, but this was refused. The second applicant also complained that the schedule for studying the materials of the case was not respected, and that he had been given only about three hours per day to study the case.

122. In the course of 2003, as from August and November, respectively, the defence lawyers were able to study the materials of the case files separately from their clients in the premises of the GPO, and to make photocopies of documents from those case files that they had pre-selected. However, there was only one official copy of the materials of the case, so if a particular volume of the case file was in the premises of the GPO, it was not available for examination at the remand prison. The defence lawyers could pass photocopies to the applicants, but after the perusal by the administration of the remand prison. According to the applicants, they were unable to keep any significant amount of documents in their cells, since the cells had not been designed for that purpose.

123. At some point in January 2004 both case files were transported to the remand prison and remained there. On 27 January 2004 Mr Krasnov, one of the lawyers for the second applicant, complained to the investigator that although the defence lawyers wanted to study the materials in the GPO premises, this had become impossible since the whole file remained in the remand prison. On 2 February 2004 Mr Krasnov repeated that complaint. On 3 February 2004 the lawyer Mr Gridnev wrote a complaint in similar terms, but the case file remained in the remand prison.

124. On 15 January 2004 the second applicant wrote a complaint about the refusal of the investigator to allow him to make a copy of the materials of the case file for his own use.

125. On 6 February 2004 the second applicant asked the investigator to allow him use of a magnifying glass and a calculator. However, this was refused. In the following months the second applicant repeatedly refused to study the case file without those objects.

126. On 16 February 2004 new charges were brought against the second applicant, and 16 further volumes of the case file were presented to him and his defence for familiarisation. The total number of volumes in the second applicant's case file thus grew to 162. The defence asked to be given a possibility to study those materials in the premises of the GPO, since it was impossible to make photocopies or use cameras in the remand prison. On 25 February 2004 one of the investigators replied to the second applicant's lawyer, Mr Baru, that it was impossible to examine the materials of the case file in the GPO premises.

127. Before the criminal case was referred to the trial court, two volumes of the bill of indictment setting out the prosecution's version of events, with references to the case file, were served on the second applicant. Each volume contained 250 pages on average, i.e. the overall amount of materials in the second applicant's case grew to 41,000 pages in total.



128. On 24 March 2004 the newspaper *Komsomolskaya Pravda* published an interview with Mr Biryukov, the First Deputy Prosecutor General. In that interview he stated as follows:

“The defendants [Mr Khodorkovskiy and Mr Lebedev] are taking their time before the trial; they know that after [their] conviction they will not have an opportunity to appeal to the public and complain about injustice, but will have to endure a well-deserved punishment. ... They knew it long before we charged them. They knew it when they were committing those crimes! Yukos is like a viral infection, quickly spreading across the country and covering it with pockets of contamination. Here is the map of the epidemic: Samara, Volgograd, Mordoviya. ... They left dirty marks everywhere in the country.”

129. On 25 March 2004 the lead investigator decided to withdraw the case files from the applicants and submit it to the court. It appears, however, that the case files were not withdrawn on that date.

130. On 20 April 2004 the prosecution filed a petition with the court, seeking to limit the period for trial preparation with the case materials granted to the applicants. On 23 April 2004 the Basmani District Court of Moscow gave the defence teams until 15 May 2004 to finalise preparations for the trial. The defence challenged that decision, claiming that the applicants needed more time. The first applicant indicated that he had been studying the case-file according to the established schedule, without lunch breaks, and was prepared to study it on Saturdays, so that it was not his fault that the preparation for the trial was taking so long. However, on 25 May 2004 the Moscow City Court upheld the lower court's ruling.

131. According to the Government, on 7 May 2004 the second applicant obtained access to the records of the court hearings of 15, 16 and 20 April 2004. On 12 May 2004 he was given access to the record of the court hearing and volumes 157 and 158 of his case file.

132. On 13 May 2004 the GPO withdrew the case file from the defence. On the same day the second applicant signed a statement in which he confirmed that he had read all the materials in the case file. However, on 17 May 2004 he withdrew that statement.

133. On 14 May 2004 the prosecution submitted the applicants' cases to the Meshchanskiy District Court of Moscow for trial.

**(b) Communication of the applicants with their lawyers before the trial**

134. At the pre-trial stage each applicant was defended by his own defence team, each comprised of several lawyers. Although formally there was no cooperation between the two defence teams, it appears that they pursued the same strategy, enjoyed the same procedural rights and were subjected to the same limitations during the investigation proceedings.

135. According to the applicants, the lawyers' documents were routinely examined by the prison staff both before entry to the meeting rooms and on exit from it. As attested by one of the lawyers on behalf of the second applicant, Mr Mkrtychev, the prison administration insisted on inspecting all written correspondence between the applicants and their lawyers. Furthermore, the applicants' own paper notebooks were inspected before and after the meetings with the lawyers. The applicants also indicated that all meetings could only take place in specific consultation

rooms (even if that meant that the defence team had to wait for one of them to become free whilst other rooms were available). The applicants inferred that those meeting rooms had been equipped with secret listening devices.

136. On 11 November 2003 a lawyer for the first applicant, Ms Artyukhova, was searched as she was leaving the applicant's remand prison. A report dated 11 November 2003 by a prison officer who had participated in the search indicated that the search had been ordered by inspector Mr B., who had ordered the search because he had had sufficient grounds to believe that Ms Artyukhova was carrying prohibited objects. A report by another prison officer, inspector Mr F., to his superiors stated that he had seen that the first applicant and Ms Artyukhova "exchanged a notebook with some notes, and also made notes in it" during their meeting. The documents which she was carrying were seized and a piece of paper allegedly written by the applicant was removed and sent to the prosecution. All of the seized documents were added to the case materials and later used by the prosecution before the Basmanniy District Court of Moscow in support of its requests for extensions of the applicant's detention, as proof that he was planning to intimidate prosecution witnesses. The applicant claimed that the note was in Ms Artyukhova's own handwriting and that it had been compiled before her visit to prison and not during it. That note read as follows:

"- Kodirov [the applicant's cellmate]: expects a second visit by the lawyer Solovyev;

- to work on the question of sanctions concerning violation of rules on keeping in custody SIZO (active <-> passive forms of behaviour (ex. hunger strike);

- to work on the question of receiving money for consultancy fees on the purchase of shares by various companies involved in investment activities;

- expert analysis of signatures, to work on this question because the documents submitted are not the originals but photocopies (expert analysis of photocopies of signatures of M.B.);

- to work through questions with witnesses Dondonov, Vostrukhov, Shaposhnikov (questioning on 06.11.03 - according to circumstances);

- concerning participation in RTT Lebedev must give negative (indecisive) answer;

- prerogatives of executives of Rosprom and Menatep - to show the scope of their prerogatives, how promotions are made;

- check witnesses of the defence (former managers and administration of Rosprom, Menatep position about 100, the essence of testimonies

1) absence of intention;

2) absence of instructions, advise on methods of investment and tax activity;

It is necessary to work on testimonies of witnesses Fedorov, Shaposhnikov, Michael Submer, tax people;

Other - to conduct, by Western audit and law firms, audit of personal fortune, in the following context 'I have right to receive income in accordance with decision of meeting of shareholders ' counsel. ... in the case ...'

137. On 4 December 2003 the second applicant met with one of his lawyers, Mr Baru. According to the Government, a prison officer who supervised the meeting noted that the second applicant gave Mr Baru a

handwritten note which was not a part of any “procedural document”. Mr Baru tore the note to pieces and hid the shreds in the pocket of his trousers. At the end of the meeting the prison officer informed Mr Baru that all written complaints and requests addressed to the lawyer must first be inspected by the administration of the remand prison and then forwarded to the lawyer within three days. Mr Baru was invited to hand over the “prohibited object” but he refused. Prison officers then searched Mr Baru’s clothes and discovered the shreds of the note. Those shreds were seized.

138. According to the handwritten explanations by Mr Baru made on the same day he had indeed had in his pocket shreds of the notes he had made during the meeting with his client. Those shreds were seized by a prison officer with reference to section 34 of the Detention on Remand Act. On 5 December 2003 the shreds of the note were sent by the remand prison administration to the investigator. It contained handwritten sketchy notes which mentioned the names of General Prosecutor Mr Ustinov and his deputy Mr Biryukov, press campaign in the mass media, names of the lawyers, reference to the European Court, some allusions to the current political situation, etc.

139. On 11 March 2004 documents were seized from the first applicant’s lawyer Mr Shmidt as he left the detention facility after a consultation with the first applicant. The inspector at the first control post demanded that Mr Shmidt should hand over to her for inspection a transparent plastic paper-case that he had with him. Mr Shmidt refused, explaining that it was his lawyer’s file. In response, the inspector forcibly seized the papers from him. According to the first applicant, the seized document itself comprised two sheets. The first sheet was written by Mr Simonov, the head of the Glasnost Defence Foundation. It was in Mr Simonov’s own handwriting and was a rough draft of a proposed letter in support of the applicant - that letter was published some time later. The second sheet was in Mr Shmidt’s own handwriting. Both notes were written quite some time before the 11 March visit to the applicant. On 13 March 2004 Mr Karimov, the lead investigator, wrote to Mr Denisov at the Ministry of Justice stating that the note seized “contained an instruction on counteraction to the investigation by way of influencing the investigation through mass media”. Mr Denisov then wrote on 26 March 2004 to the head of the Main Directorate of the Ministry of Justice requesting measures to be taken against Mr Shmidt. On 7 May 2004 the Ministry of Justice Main Directorate wrote to the St Petersburg Bar Association requesting that disciplinary proceedings be started against Mr Shmidt for breach of professional ethics. Mr Shmidt was subsequently exonerated at the disciplinary proceedings, where it was determined that Mr Shmidt had been entitled to take the document into and out of the remand prison and that it was legally privileged.

140. The Government produced a report by Mr Ms., a remand prison officer, dated 15 July 2010. In his handwritten deposition he testified that there had been no seizures of computers or documents from the lawyers of the second applicant. A similar written declaration was made by Mr Sl., and Mr Zkh., remand prison officers.

#### 4. *Trial of Mr Shakhnovskiy*

141. On 5 February 2004 Mr Shakhnovskiy was convicted by the Meshchanskiy District Court, presided by Judge Kolesnikova, for personal income-tax evasion. In those proceedings Mr Shakhnovskiy did not plead guilty; however, he had reimbursed to the State the amounts of outstanding taxes and penalties as calculated by the Tax Service. Execution of the sentence was conditionally suspended by the Judge.

142. Judge Kolesnikova found that Mr Shakhnovskiy had deliberately included false information into his personal tax declarations by stating that he had received payments from Status Services for some “consulting services”, although he had been aware that *de facto* he had received the aforesaid amounts for his work in Yukos (pages 22-23 of the judgment). In support of those findings Judge Kolesnikova referred, *inter alia*, to an internal memo addressed to the first applicant and written by Ms Kantovich, one of the employees of Yukos-Moskva, on behalf of Mr Aleksanyan, the then head of the legal department of Yukos. That memo analysed various methods of tax minimisation, in particular the “individual entrepreneur” scheme. The Judge also referred to identical contracts concluded between Status Services and other Yukos senior managers, including the second applicant, and to the corporate credit cards in the name of the second applicant sent to him as the head of Status Services and seized during the search in Zhukovka on 3 October 2003.

#### 5. *Start of the trial of the applicants. Conditions in which the parties presented their cases*

143. On 8 June 2004 Judge Kolesnikova ruled that the case of the first applicant should be tried jointly with the cases of the second applicant and of Mr Kraynov (director of Volna, a firm which had participated on behalf of Menatep in the privatisation of Apatit). Upon the joinder of the cases the first applicant was given a copy of the second applicant’s case-file (165 volumes). The second applicant was given a copy of the first applicant’s case file (227 volumes). The case thus ran to 392 volumes in all at the start of the trial. Subsequently the applicant’s legal teams made copies of those case files for their use.

144. The trial court in the joint case was composed of three judges: Ms Kolesnikova (president, a professional judge), Ms Klinkova and Ms Maksimova (lay assessors, non-professional judges). The court was assisted by seven secretaries who kept a summary record of the hearings. No verbatim record was made; however, the defence made an audio recording over the course of the trial. The prosecution was represented by Mr Shokhin and Mr Arkhipov. The united defence team was composed of Mr Aleksanyan, Mr Baru, Mr Drel, Mr Gridnev, Mr Krasnov, Ms Liptzer, Ms Lvova, Mr Mkrtychev, Ms Moskalenko, Mr Padva, Mr Rivkin, Mr Shmidt (who died in 2012), and several others.

145. The hearings were public. They took place in a courtroom which held, according to the applicants, up to thirty people. The defence made an application for the case to be heard in a larger courtroom, but the court did not respond. Further requests were made by the defence for the trial to be televised or audio-recorded. However, no external media transmission of

the hearings was allowed. A number of journalists were present in the courtroom.

146. On 16 June 2004 the court held the first hearing, which was immediately adjourned due to the illness of one of the defence lawyers.

147. On 23 June 2004, at the second hearing, the first applicant requested the court to grant him more time to study the materials in the second applicant's case. That request was supported by the first applicant's defence lawyers who stated they also needed more time. The defence claimed that they needed at least one more month to become conversant with the additional case materials. The court gave the defence time until 12 July 2004.

148. On 12 July 2004, Ms Moskalenko (one of the defence lawyers for the first applicant) complained to the court about the insufficiency of the time granted. She indicated that in the time allocated by the court she had succeeded to familiarise herself with only 72 volumes of the second applicant's criminal case. The Meshchanskiy District Court refused to give more time.

149. Before the prosecution started presenting its case, the court discussed the arrangements for the future trial. The court indicated that the hearings would start at 11 a.m. and that it would not sit on Wednesdays, which would thereby assist the parties in the preparation for the trial. Those arrangements persisted during the first phase of the trial when the prosecution was presenting its case (July – November 2004).

150. The two applicants were held in a barred dock resembling a metal cage, guarded by armed escorts. The third co-defendant, Mr Kraynov, who was not detained on remand, had a place in the courtroom outside the cage. The applicants were able to communicate with the defence lawyers through the bars. The conversations were always within the hearing of the escort officers and sometimes of the prosecutors, and the escort officers prevented the applicants and their lawyers from exchanging any documents.

151. On 23 August 2004 the defence lawyers complained to the court that they were unable to show the defendants case materials in the courtroom and were unable to discuss the case confidentially with them. The escort officers required that the lawyers did not approach closer than 50 cm to the cage where the applicants were detained. Mr Padva, the lead lawyer for the first applicant, explained that he had to speak very loudly to his client to be heard at such a distance. The first applicant, in his turn, asked the court to be shown instructions or rules which fixed that distance and, more generally, defined the conditions of the communication between a defendant and his lawyer in the courtroom. The prosecutor replied that the defendants had to solve the matter not with the judge but with the administration of the remand prison or the escort service. Judge Kolesnikova then explained to the parties that she was not against them communicating during the breaks. However, in her words, the question of transmitting documents between the defence lawyers and the applicants did not belong to the competence of the court; the defendants were detained on remand and all questions related to the exchange of documents were within competence of the respective institution, in particular the escort service,

and were regulated by the internal rules. If the exchange of the documents was compatible with those rules, the court would not be against it.

152. At the hearing of 26 August 2004 Mr Padva again asked the court to allow him to show documents to his client. He agreed that he would submit to the judge all documents he would show to his client. According to him, the remand prison administration did not object to such a method of communication, provided that it satisfied the judge. The judge checked that information with the chief escort officer and then ruled that the court would review all the documents which the defence lawyers wanted to show to their clients. Mr Padva agreed that if those documents existed in a computer format, he would print them out and show them to the court in advance.

153. On 27 August 2004 the defence lawyers once again complained that it was impossible to communicate effectively with the applicants during the questioning of witnesses, emphasising that if an adjournment was announced every time one or other question had to be discussed with the applicants in the court session, the trial would progress very slowly. The court responded by asserting that the discussion of any questions whatsoever with the applicants was possible only during the adjournments.

154. On 31 August 2004 the first applicant personally complained to the court about the difficulties he was facing. He explained that his lawyers had initially been permitted to stand about 50 centimetres away from his cage but that that situation had changed and they were now required to stand about one metre away, while additional guards had recently been placed between the lawyers and the cage. The applicant explained that it was now impossible to have any confidential discussions at all with his lawyers whilst in the courtroom. In response, the head of the escort guards referred to a “security plan” which necessitated these arrangements.

155. Over the following months the defence submitted several requests seeking to facilitate contact with the applicants in the courtroom, but the court refused to change the security arrangements. Thus, on three occasions (on 28 December 2004, 14 February 2005 and 15 February 2005) the first applicant prepared draft written testimony. On each occasion his lawyers were able to review the testimony only after the court had reviewed the drafts.

156. On 28 September 2004 Ms Leutheusser-Schnarrenberger, the Special Rapporteur appointed by the Parliamentary Assembly of the Council of Europe, visited the Meshchanskiy District Court. She asked the court, through the first applicant’s lawyers, to allow her to speak to the first applicant. However, the court refused permission.

157. In November 2004 the court moved on to the examination of the evidence submitted by the defence. On 11 November 2004 the court changed its working schedule and decided that it would start the hearings at 9.30 a.m. instead of 11 a.m. As a result, the duration of the time spent by the applicants in the court increased.

158. At the end of 2004 the trial arrangements changed again. On 31 December 2004 the Meshchanskiy Court ruled that it would no longer observe Wednesdays as a non-court day. On 18 January 2005 the defence tried to obtain adjournments of the Wednesday hearings, but the request to

that end was refused. The judge however explained to the parties that they could ask for an adjournment at any moment. The defence used that opportunity successfully at least twice: on 25 January and 22 February 2005.

159. On 9 March 2005 the defence lodged an application for the judges to withdraw on the basis that their decisions to date had been in violation of Russian and international law. They referred to the one-sided treatment of evidence, serious limitations on contact between the applicants and their lawyers, the unfair denial of adequate time to prepare the case, etc. That application was dismissed.

#### *6. Position of the defence on some points of the accusation*

160. The applicants pleaded not guilty. The defence maintained, firstly, that the whole case had been politically driven and that the GPO was acting in bad faith. Further, they challenged the admissibility of evidence relied upon by the prosecution, in particular as regards those documents which had been seized during the searches in Zhukovka, in Mr Drel's offices and at the second applicant's home in 2003.

161. As to the charges concerning company income tax evasion in connection with the Lesnoy trading companies, the applicants claimed that they had had no relation to those companies, that they had never heard of them, directed their operations or participated in their creation.

162. Alternatively, the defence claimed that all tax cuts had been obtained by the trading companies in a lawful manner, that the law at the time allowed payment of taxes with promissory notes and that all the promissory notes had been eventually honoured, so the State budget had suffered no losses. Even if some of the financial operations described in the bill of indictment and impugned to the applicants had taken place, they did not amount to a criminal offence. The law, as applied at the relevant time, regarded those financial practices as perfectly legal or at least tolerated them. In support of those claims the defence sought to adduce a large number of documents, expert opinions and witness testimonies.

163. As to the personal income tax evasion charge, the first applicant insisted that he had rendered services to Status Services and Hinchley; however, he refused to give more details on this point, referring to his right to remain silent provided by Article 51 of the Constitution. He was unable to give details concerning the conclusion of the service agreements with these two firms, and did not explain when and where exactly he had been providing services to them. The second applicant gave evidence in similar terms. In addition, he contested the allegation of the prosecution authorities that he had been a chief executive of Status Services. At the trial the first applicant testified that he decided to obtain a licence and become a self-employed entrepreneur at the advice of his lawyers.

#### *7. Presentation of evidence by the prosecution*

##### **(a) Written expert opinions**

164. The prosecution sought to rely on expert evidence dealing variously with an analysis of business transactions involving the applicants

and the companies affiliated with them and tax payments and tax procedures at the relevant times. The experts for the prosecution were all appointed by the investigator at the preliminary stage of the investigation, and their written reports were submitted to the Meshchanskiy District Court together with the bill of indictment.

165. Thus, Mr Yeloyan and Mr Kuprianov prepared three reports in all: a first report dealing with the evaluation of Apatit's net profit for 2000-2002 and January-September 2002 from the sale of the apatite concentrate (see paragraph 68 above); a second concerning the personal income tax evasion charges against the first applicant, and a third concerning the personal income tax evasion charges against the second applicant.

166. Mr Ivanov, Mr Kuvaldin, Mr Melnikov and Mr Shkolnikov prepared an expert report on the evaluation, as on 1 July 1994 and 1 October 2002, of the 20 per cent block of shares in Apatit.

167. Mr Dumnov, Mr Krotov, Mr Khanzhyan and Mr Semago prepared an expert report on the material which was extracted from the computer server that had been seized in Zhukovka in October 2003.

168. On 27 December 2004 the defence lodged a petition for a notarised and apostilled statement by Mr Prokofiev, who was absent on a business trip in the UK, to be attached to the materials of the case. This witness had been questioned in the course of the investigation and his name was included in the list of prosecution witnesses. The court refused the petition on the basis that it was a request for legal assistance. Some time later the defence petitioned the court to send to the UK a legal assistance request, whereby Mr Prokofiev could be questioned in the UK. Again, this petition was refused.

169. On 30 December 2004 the defence challenged the conclusions reached by Mr Yeloyan and Mr Kuprianov, relying on the following arguments. In relation to the Apatit report, the experts had needed to study a huge volume of documents, running to more than 4,000 pages, and yet they had been able to complete the report within two days of having been appointed by the GPO. Moreover the report was drawn up on the GPO's premises, which raised further questions as to the impartiality of the experts.

170. The defence made three applications for Mr Yeloyan and Mr Kuprianov to be called to give oral evidence: on 11 January 2005, 21 January 2005 and 9 March 2005. Thus, on 11 January 2005 Mr Rivkin, a defence lawyer for the second applicant, argued that the defence wished to cross-examine the two experts on the forensic accounting methods that they had used in their reports, and to identify which original materials they had used in preparing their reports and to question them on their conclusions. Similar petitions were lodged on 21 January and on 9 March 2005. The defence insisted that to ensure equality of arms they should be permitted to question the two experts just as the GPO had been able to put questions to the experts when they had drawn up their reports. On all three occasions the court refused to grant the defence team's requests. On 9 March 2005 the court ruled that there were no grounds for examination of the expert witnesses in person; the court explained that the assessment



of the experts' reports would be carried out by the court when they would withdraw to the deliberations room.

171. On 1 March 2005 the defence petitioned the court to call Mr Shulgin, Deputy Head of the Federal Tax Service, to give evidence in court. Mr Shulgin had been questioned in the course of the preliminary investigation and was initially included in the list of prosecution witnesses. The request arose following the court's decision to admit a letter from Mr Shulgin which sought to discredit the defence expert Mr Shchekin (in the judgment the court referred to Mr Shulgin's letter as one of the reasons why it did not accept Mr Shchekin's evidence). Furthermore, Mr Shulgin had previously revoked a tax audit because it had failed to take into account a directive from the Ministry of Justice and Ministry of Taxes stating that promissory notes could be accepted in 1999. His evidence therefore went to the heart of the corporate tax evasion charges. The court rejected the defence application stating that Mr Shulgin could not give oral evidence since he was a representative of the civil plaintiff (the Federal Tax Service) in that case.

**(b) Other documentary evidence**

172. In support of the charges the prosecution also referred to a large number of documents: tax-inspection reports, in-house correspondence between the companies affiliated with Yukos, bank transfer orders, charters of incorporation, etc. The defence claimed that a considerable proportion of the written evidence submitted by the prosecution should be excluded from the case file because it had been obtained unlawfully or contained serious discrepancies. The court rejected all of the defence applications on the exclusion of evidence, either in the course of the trial or in the text of the judgment itself.

173. Thus, at the hearing of 12 January 2005 the defence asked the court to exclude evidence obtained during the searches in Zhukovka on 3 and 9 October 2003. The defence claimed that the searches had been carried out in such disorder that the persons concerned and attesting witnesses had been unable to oversee the actions of the investigative team. For example, the searches took place simultaneously on three floors of the office building. The investigators participating in the searches were moving from one room to another, leaving the premises and returning. One of the attesting witnesses, Mr Moiseyev, kept being called out of the office by the investigators. The documents seized at Mr Dubov's office were not shown to the witnesses at the moment of their seizure but only when the witnesses returned to the room. The members of investigative team kept bringing unidentified document files to the rooms where the search was being carried out.

174. The defence further noted that the offices of Mr Dubov, a member of the Duma, had been searched. According to the defence, the prosecution had failed to obtain prior authorisation from the State Duma and the Supreme Court, as required in such cases. The defence further claimed that the investigators had known whose offices they had been searching; there was a door sign indicating clearly that the offices belonged to Mr Dubov. The court heard two witnesses, Ms Ardatova and Ms Morozova, cleaning

staff in the office building in Zhukovka, who confirmed the facts relied on by the defence.

175. At the hearing of 17 January 2005 the defence also asked the court to exclude materials obtained as a result of the search on 9 October 2003 in the office of Mr Drel in Zhukovka. At that time Mr Drel had been the second applicant's lead representative in the criminal proceedings. He also acted for the first applicant and had attended the first applicant's meeting with the GPO representatives on 5 July 2003, when this applicant had been questioned as a witness in the criminal case against the second applicant. The prosecution could not have been unaware that they were searching the offices of an advocate. Despite the special status of Mr Drel, the prosecution did not obtain the special approval needed under the law. The court heard a witness, Mr Rakhmankulov, who had been present in the premises of the ALM Feldmans law firm during the search. He testified that Mr Drel had not been given access by the investigators to his office during the search. Further, Ms Pschenichnaya, a lawyer for the firm GLM Management Services S.A. was not allowed to be present during the search.

176. Finally, the defence noted that the searches of 3 and 9 October 2003 in Zhukovka had been carried out on the basis of the single search warrant of 3 October 2003, which was against the law. They claimed that the CCrP required a separate search warrant for each search. Further, some of the documents seized during those searches were examined by the investigator and added to the materials of the case file only several months later. Finally, the defence referred to various informal terms and discrepancies in the reports on the search and seizure of documents.

177. Based on the above arguments, the defence asked the District Court to exclude those materials from the case file. The court rejected the objections as premature. Subsequently the District Court dismissed the defence's objections in the judgment (see Section 9 (a) below, §§ 241 et seq.)

178. On 21 January 2005 the defence requested the exclusion of the materials seized in July-August 2003 in the course of several searches in the premises of the Menatep Sankt-Petersburg bank. The prosecution claimed that those searches had been authorised by the Deputy General Prosecutor on 8 July 2003. However, the defence claimed that only one search had been authorised by that search warrant, not several consecutive searches. On the same ground the defence sought exclusion of evidence seized during the search in the Trust Investment Bank on 11 November 2003. Further, the defence referred to various discrepancies in the search reports.

179. On the same day the defence sought to exclude documents seized during the searches in the Trust Investment Bank on 11 November 2003 and from the Tax Inspectorate No. 5 of 5 and 16 December 2003. Thus, in the opinion of the defence, seizures from the Tax Service were unlawful as the investigator had failed to obtain the prior sanction of a prosecutor as required by law, since it was clear that the investigator had seized from the inspectorate documents containing "tax secret".

180. On the same day the defence also requested the exclusion of the materials obtained as a result of the search in the premises of Russkiye Investory on 29 July 2003. According to the defence, the search started at 2.20 p.m.; however, a written note on the report of the search certified that the investigator had examined the seized documents already as from 9.15 a.m.

181. On 8 February and 10 March 2005 the defence asked the court to exclude evidence obtained from the computers seized as a result of the search in Zhukovka on 9 October 2003, namely the print-outs of computer files. The defence referred to various inconsistencies in the bill of indictment, in the list of files extracted from the computers, etc.; further, they criticised the methods which had been employed by the prosecution to extract information from the hard drives of those computers. In particular, on 22 March 2005 Mr Dumnov confirmed to the court that the electronic files from the hard drives seized during the searches of 9 October 2003 had been copied onto the “re-writable” disks provided by the GPO and transmitted to the experts without having been properly sealed. Further, attesting witnesses who were present when the drives were examined by the GPO experts had also participated in four other investigative acts, which raised doubts as to their independence. When examining the hard drives, the investigators discovered 4,939 more files than on the drives examined by the experts. There were discrepancies in the documents which recorded the particulars of the materials seized. The court rejected the objections by the defence to the evidence on the ground that those objections were premature.

182. On 10 March 2005 the defence challenged the evidence obtained as a result of a search in the State Property Fund in Murmansk on 8 July 2003. The defence noted that the search report contained certain discrepancies as to where and when the search had been carried out.

183. On numerous occasions the defence requested the District Court to declare prosecution documents inadmissible – in particular, because the documents were illegible, were not certified, were not translated from foreign languages, or did not meet the requirements of law. For example, on 18 February 2005 the prosecutor sought to adduce three documents, none of which met the stipulated requirements for the signature, stamp or official letterhead. The defence objected against adding such documents to the case-file, but the court dismissed the objection and the documents were admitted.

**(c) Examination of witnesses for the prosecution**

184. In the bill of indictment, the prosecution indicated that they were relying on about 240 witnesses. Out of those, 83 were examined in court. Of these, the interview records of 32 witnesses were subsequently read out at the prosecution’s request, in addition to their oral submissions. Thus, the prosecution insisted on reading out the testimonies of Mr Shchhavelev, Mr Pozdnyakov, Ms Rashina, Mr Gidaspov, Mr Vostrukhov, Mr Dobrovolskiy, Ms Kuchinskaya, Mr Anilionis and many others.

185. On 13 September 2004 the defence raised objections to the practice of reading out the records of the questioning of witnesses at the

preliminary investigation stage. The defence claimed that this was possible only if there were essential discrepancies between the witness testimonies at the court hearing and those during the preliminary investigation. However, the prosecution failed to demonstrate any such discrepancies. Further, the defence claimed the court itself put pressure on witnesses Mr Schavelev, Mr Krasnoperov and others, urging them to confirm their earlier testimonies to the GPO investigators. The Meshchanskiy District Court did not accept the defence objections.

186. On 14 September 2004 Ms Antipina was questioned before the court. She was released after partial questioning. On the same day a GPO investigator summoned and questioned her in the GPO. On 23 September 2004 Ms Antipina was again questioned before the trial court. The prosecutor put to her the same questions as those put by the investigator nine days previously.

187. On 30 September 2004 Mr Lipatnikov testified that, before giving evidence to the GPO investigator, he had been visited by a Federal Security Service (FSS) officer who had told him what to say.

188. On 30 September 2004 the defence filed a new objection against the practice of reading out written testimonies by prosecution witnesses and urging them to confirm those testimonies. The court dismissed that objection.

189. On 4 October 2004 Mr Abramov was questioned by the court. At the hearing he testified, *inter alia*, that only some of his answers appeared in the record of his questioning by a GPO investigator.

190. On 11 October 2004 Mr Klassen testified that he had been asked leading questions by the investigator and that the record of his testimony was not totally accurate. According to the applicants, this remark by Mr Klassen was later omitted from the trial record, although it was recorded on audio by the defence and the relevant recordings were submitted to the court.

191. On 15 October 2004 Mr Kobzar was summoned and questioned by the GPO investigator. He was required to sign a written undertaking not to reveal to anyone the contents of that interview. On the same day he testified before the court.

192. On 18 October 2004 Mr A. Ustinov was questioned by a GPO investigator. On the following day Mr A. Ustinov testified before the court about the same events.

193. On 14 March 2005 the prosecution filed a motion to read out the testimony of witnesses Mr Petrauskas, Mr Stankevicius, Mr Surma and Mr Rysev on the basis that they were foreign nationals who refused to appear in court. The defence objected to the reading out of their testimony because none of the witnesses had actually been questioned in relation to criminal case no. 18/41-03. They had been questioned in relation to another criminal case that was not the subject of the trial by the Meshchanskiy District Court. The trial court rejected the defence objections and permitted the statements to be read. Subsequently their evidence was relied upon by the Meshchanskiy District Court in its judgment (pages 265 and 271-272 of the judgment). At the court hearing on 17 March 2005, the prosecution filed a motion to read out the testimony

of Mr Kartashov, Mr Spirichev and Ms Karaseva as well as to read into evidence the orders to bring charges against each of them. It was said by the prosecution that the application was made pursuant to Article 281 of the RF Code of Criminal Procedure. The defence objected to the motion, as neither the testimony of accused individuals nor the decisions to charge them came within the ambit and scope of evidence that could be read out as defined by Article 281 of the RF Criminal Code. The Meshchanskiy District Court rejected the defence objections and allowed the prosecution motion. This evidence was subsequently relied upon by the Meshchanskiy District Court in its judgment (pages 501, 502-503 and 521 of the judgment).

194. On 1 March 2005 the defence again petitioned the court to summon Mr Shulgin, the Deputy Head of the Federal Tax Service, to give evidence. As to the status of that witness, the applicants said that Mr Shulgin himself would explain in what status he would speak. On 1 March 2005 the court refused to call Mr Shulgin. The court referred to Article 56 of the Criminal Procedure Code which defines the term “witness” as “a person who knows information which is of consequence for the examination of the case”. The court also referred to Articles 44 and 45 of the Criminal Procedure Code which provided that a representative of the civil plaintiff within the criminal proceedings has a right to give evidence, but is not obliged to do so.

**(d) Materials allegedly in the possession of the GPO but not disclosed to the defence**

195. On 30 September 2004, the second applicant’s defence filed a motion in which they asked the court to require the state prosecutors to explain the reasons for the disappearance of American Express corporate cards from the case file, to take measures to obtain those cards and to add them to the materials of the case; and to present to the court documents on the basis of which the GPO concluded that the second applicant had allegedly been the head of Status Services. On 11 October 2004, the second applicant’s defence filed a motion seeking the disclosure from the archives of the Meshchanskiy District Court the criminal case against Mr Shakhnovskiy in order to find therein the American Express corporate cards on the basis of which the GPO had concluded that the second applicant was allegedly the head of Status Services, as well as other documents concerning the applicant’s activity as a taxpayer. Upon disclosure the second applicant indicated that he would ask for the originals or certified copies from the Shakhnovskiy case file to be added to his own case file.

196. On 27 December 2004 the defence made an application for the prosecution to disclose correspondence between the GPO and the Presidential Administration relating to the Presidential inquiry of December 2003 into the sale of the 20 per cent share in Apatit. The prosecution objected, stating that, first of all, those documents were irrelevant, and, furthermore, if the defence knew that such documents existed they should have requested them from the competent authorities.

The request was refused by the court. In all but one instance the requests were dismissed with no reasons given.

197. On 28 January 2005 the defence sought disclosure of further material in relation to the acquisition of Apatit. Two letters were sought: one was a letter from the GPO to the Russian Property Fund (RFFI) dated 1 March 1999 and the other was a letter from GPO aide Mr Fomichev to Akron Plc, dated January 2003. Those letters had been mentioned in the materials of the case but had not been added to the case file. Those letters also confirmed that any dispute in respect of the acquisition of the 20 per cent block of Apatit shares raised purely civil rather than criminal issues. The defence lawyers had sought disclosure directly from the GPO. The Head of the Supervision Department of the GPO Mr Azarchenkov had replied that “all documents necessary for the fulfilment of defence may be requested by the court after discussion of the parties and granting a corresponding petition”. The court refused the application, stating that it could not see any reasons why the motion should be granted.

198. On 9 March 2005 the defence lawyers requested disclosure of the expert report that had been allegedly commissioned by the prosecution in the context of the criminal investigation into the activities of the Lesnoy town administration (the case which had been closed in 2002). For the defence it was unclear whether this report (mentioned in some of the GPO documents, namely in the decision to re-open the case of 18 July 2003) was the same document as the study prepared by the UBRAS at the request of the Lesnoy town administration (see paragraph 30 above), the copy of which was in the possession of Mr Bochko and which had earlier been submitted to the court by the defence (see paragraph 214 below). The prosecution objected to disclosure of the expert report, arguing that the court had no power to order disclosure. On 9 March 2005 the court ruled that the defence had not specified what legal and economic review might be obtained from the materials of the 2002 criminal case. Moreover, the court noted that the expert evaluation requested had been carried in the context of a criminal case which was still at the stage of preliminary investigation.

#### *8. Presentation of evidence by the defence*

##### **(a) “Expert evidence” and other materials attached to the case-file but later rejected as inadmissible**

199. The defence submitted to the court written opinions by several specialists in the areas of taxation, financial law and accounting. In particular, reports by Mr Shchekin (a professor at Moscow State University), Mr Semenov (professor of tax law at Moscow State University), Ms Petrova (a qualified auditor since 1994, professor at Moscow State University and General Director of Expertaduit, an audit firm), Mr Grechishkin (director of Audit-Premier Limited, an audit firm) and Mr Lubenchenko (former Director of the Legal Department and then Head of the Russian Central Bank, professor of law at Moscow State University) were produced.

200. Mr Shchekin presented two reports: one referring to the personal income-tax evasion charge and the other in relation to the corporate tax evasion charge. Both reports were collected by the defence on 10 January 2005. In his report on the company-tax evasion charges Mr Shchekin explained that it was common and accepted practice for taxes to be paid for by promissory notes in 1999; he relied in particular upon a letter of December 1999 from the Finance Minister and the First Deputy Minister of Taxes and the decision of the Federal Commercial Court of 24 December 2001. Mr Shchekin further explained that the trading companies had entered into lawful agreements with the local administration for taxes to be paid by way of promissory notes. Mr Shchekin also explained that in his opinion there was no basis for characterising the trading companies as sham companies. He indicated that the question of where the oil products traded by those companies were produced and kept was irrelevant for granting them the tax cuts. In support he referred to the decision of the Federal Commercial Court for the North-West District, which in the judgment of 5 June 2002 in case no. A42-6604/00-15-818/01 considered the granting of tax cuts in a similar situation to be legal.

201. Mr Semenov in his report of 7 April 2004 analysed the relevant legislation and concluded that it was not open to the tax authorities retrospectively to annul tax concessions agreed with the authorities. He further referred to the case-law indicating that what the applicants were accused of doing had been considered legitimate at the relevant time, including the non-monetary payment of tax, and that there was no negative effect on the budget because of such practice. The tax audits carried out by tax inspectorates during the period under review did not reveal any violations of the law in this respect; tax authorities registered and recorded non-monetary tax payment receipts in accordance with the established procedures (*inter alia*, by completing a form which was approved under Decree of 23 December 1998). He explained that the promissory notes were highly liquid securities which, bearing an interest rate of 28 per cent per annum, were well suited to constitute investments for a municipal administration. Payment on such notes was underwritten by the *Doveritelny i Investsiionny* Commercial Bank, which entered into an agreement with the Lesnoy town authority to repurchase the securities on demand.

202. Ms Petrova in her report of 10 November 2004 analysed standard procedures of recording on the balance sheet of tax payments, overpayments of taxes and payments of taxes in non-monetary form. Questions addressed by Ms Petrova at the request of the defence touched in particular upon the following points:

- (a) the accepted procedure in 2000-2001 for entering onto the balance sheet tax payments, including overpayments of tax; and
- (b) whether the fiscal bodies took into account non-monetary payments in 1999-2000.

203. Mr Grechishkin in his report of 25 January 2005 demonstrated that the promissory notes used by the trading companies had been repaid in full

and even in excess of their nominal value, and that the companies had only paid taxes by way of promissory notes in 1999.

204. Mr Lubenchenko in his report of 30 December 2004 gave his opinion on the lawfulness of the issuing of the indemnity bonds by Menatep within the privatisation auction concerning 20 per cent of shares of Apatit.

205. The above reports were submitted by the defence to the court on various dates in January – March 2005. The reports were initially admitted by the court to the materials of the case. However, the court later declared those reports inadmissible as evidence (see the summary of the judgment in Section 11 (b) below).

**(b) Materials attached to the case file but later discarded as unreliable**

206. On 8 February 2005 the court accepted from the defence a series of documents in relation to the Lesnoy town trading companies. These were reports of tax inspections conducted by the Lesnoy tax inspectorate, with the attached documents regarding the number of staff working in the trading companies Business Oil, Mitra, Forest Oil, and Wald Oil; staff pay-sheets; notes regarding real-estate assets, etc. Documents showing the payments of all promissory notes and the absence of any litigation between the Lesnoy town administration and Yukos between 1999 and 2004 were also included in the materials of the case file. Those materials related to the issue as to whether the companies were *bona fide* trading companies or sham companies as alleged by the prosecution, and whether any damage was sustained by the State or municipal budget. The court later discounted that evidence in its judgment as unreliable (see Section 9 (b) below, §§ 261 et seq.).

**(c) Materials not attached to the case file**

207. On 27 December 2004 the defence filed a request to add to the case file several documents, in particular:

(a) a study from which it could be seen that in 1999-2003 proceeds from sale of products, works and services by Yukos amounted to USD 50.569 billion, out of which the profit amounted to USD 15.821 billion. These documents demonstrated that during that time shareholders directed USD 13.193 billion to the development of Yukos. In the opinion of the defence, it undermined the position of the prosecution as to the applicants' motives, and, in particular, the mercenary intent, in the absence of which there is no criminal liability;

(b) a letter from the Director of the Achinsky refinery which stated that Mitra (one of the trading companies) was not the management company of the Achinsky refinery, as had been alleged in the bill of indictment. That response refuted the allegation of the prosecution to the effect that the applicants had controlled all transactions posted to Mitra, Business Oil, Wald Oil and Forest Oil, "as evidenced *inter alia* by the fact that Mitra was the managing company of Achinsk Refinery";

(c) documents demonstrating that the applicants had been paid dividends on shares in Yukos for 1999, 2000, 2001 and 2002, showing the



amounts of the dividends and the income tax paid. The defence claimed that those documents were important for tax evasion charges;

(d) copies of the defence's requests and responses thereto confirming provision of managerial and consulting services by the applicants (in connection with the personal tax evasion charges);

(e) written answers by Mr Prokofiev, the first applicant's former interpreter, to the questions put to him by the defence. Mr Prokofiev lived in London and was thus unable to testify personally.

The court refused to admit those documents to the materials of the case. In particular, as regards the written statement by Mr Prokofiev, the court indicated that the latter had not been duly informed by the defence about his procedural rights. The court considered that the questioning of a witness abroad should have been conducted within special proceedings, namely by rogatory letters from a Russian court to a British court.

208. On 28 December 2004 the defence asked to have other documents attached to the materials of the case. Those documents included:

(a) the response of the Lesnoy Tax Inspectorate, which included a tax report on Business Oil dated 7 March 2000, concluding that the company had not committed any violations of the Tax Code;

(b) confirmation from the Lesnoy town Finance Department that it had suffered no damage as a consequence of the payment of taxes by way of promissory notes in 1999, that no payment of taxes with promissory notes occurred in 2000, and that in 1999 the Lesnoy town administration accepted promissory notes from at least 55 other taxpayers;

(c) official documentation of the Duma of the Town of Lesnoy from 1 July 1998 to 31 December 2000 concerning the granting and use of tax benefits for all types of taxes by all taxpayers that were legal entities located in the ZATO of the Town of Lesnoy. Those documents would refute the prosecution's argument that those benefits were obtained unlawfully;

(d) a lawyer's request and the response thereto from the Economic Development Ministry concerning the methodology for valuation of damages to the state caused by the non-return of the stake in Apatit. The response was relevant to the Apatit charges against the applicants;

(e) a copy of a letter from the Chairman of the Russian Federal Property Fund, Mr Malin, to the Chairman of the Russian Government, Mr Kasyanov, which set out in detail all the circumstances surrounding court proceedings between the Murmansk Regional Property Fund and Volna related to dissolution of the sale contract for the 20 per cent stake in Apatit;

(f) a copy of a letter of 3 March 2003 from Deputy Finance Minister to the Russian Federal Property Fund which said, in particular, that in evaluating the alleged damage to the Russian budget and the non-return of the 20 per cent stake in Apatit resulting from non-fulfilment by Volna of its investment obligations, the applicable law was Federal Law No. 152 of 29 July 1998 ("On Valuation Activities"), and in the event of a dispute concerning reliability of the size of a valuation or another value, that dispute should be considered by the Commercial Court in accordance with

the established jurisdiction or in the procedure established by the law regulating valuation activities;

(g) a copy of a letter to the Ministry for Natural Resources of 27 February 2003, which said that a review of the established conditions for subsoil use and compliance with environmental law revealed no violations by Apatit;

(h) a copy of the lawyers' requests and responses thereto from the Meshchanskiy District Court and the Moscow City Court concerning the disclosure of the American Express cards from the Shakhnovskiy case file. In doing so, the defence sought to demonstrate that the defence had exhausted all the options for obtaining the American Express corporate cards or at least information concerning their whereabouts. It was submitted as the court had previously denied a defence motion for the disclosure of the Shakhnovskiy case file from the archives of the Meshchanskiy District Court, in particular on the ground that the defence had not exhausted its options for obtaining those cards through their own efforts.

All of the above applications were refused and the documents were not admitted to the case file. The court referred in particular to the fact that the text of the response of the Tax Inspectorate was unclear and that the attached tax review did not have the proper official stamp on it. As to the other documents, the court refused to admit them referring to Article 286 and 252 of the Code of Criminal Procedure.

209. On 21 January 2005 the defence produced a report by Mr Gulyaev (a professor at the Moscow Academy of Economics and Law) concerning the legality of the searches conducted within the pre-trial investigation of the case. Mr Gulyaev commented on the necessity for each search to be the subject of a separate warrant from an investigator. The District Court refused to attach that report to the case stating that Mr Gulyaev had commented on matters that were exclusively for the court to determine.

210. On 7 February 2005 the defence petitioned the Meshchanskiy District Court to have a letter from the Commercial Court of the Chita Region admitted to the case-file. The letter concerned Investproekt, the successor company to the Lesnoy town trading companies. It indicated that the Commercial Court's decision to dissolve the company Investproekt and remove it from the tax register had not been annulled or challenged by anyone as at the date of the letter. The Commercial Court of the Chita Region confirmed that its decision was still in force. Despite that decision the tax authorities reinstated Investproekt in the register. The defence considered that the decision of the Commercial Court was relevant to the company income tax evasion charges faced by the applicants.

211. On 8 February 2005 the court refused the request on the ground that the letter had been incorrectly certified, in that the signature had not been verified by an official seal. The defence wrote to the Commercial Court of the Chita Region, asking it to send a reply sealed with an official court stamp. The Commercial Court replied that official regulations expressly prohibited such letters being stamped.

212. On the same date applications were made by the defence to admit documents from the Rating Agency which demonstrated the

creditworthiness of Most Bank at the material time, and a letter from the Moscow department of the Tax Service confirming that at the material time Most Bank was appropriately licensed. The defence needed those documents to prove that the promissory notes from Most Bank had real market value. The court refused to grant the applications because the documents were deemed to be irrelevant to the case.

213. The court also rejected an application to admit documents from Metamedia on the purchase of the building at 5/1B Palashevskiy Lane, Moscow. The documents were two court decisions provided by Metamedia which confirmed that the transactions were lawful. The defence claimed that the purchase of that building was supposed to cover Most Bank's debts to Yukos on account of money transfers made in 1999 and 2000.

214. On 1 March 2005 the court heard an expert witness proposed by the defence, Mr Bochko. Mr Bochko was the Deputy Head of the Institute of Economics of the Urals Branch of the Russian Academy of Sciences (UBRAS); he had participated in 2002 in the preparation of the "technical and economic study" by the UBRS (see paragraph 30 above). That study had been seized by the GPO but not attached to the case materials. Mr Bochko produced a copy of that report to the court; the defence asked the court to attach it to the materials of the case. That study concluded that, far from causing any damage, the granting of the tax concessions had been positively beneficial. The granting of tax concessions had made it possible to rescue the Lesnoy town economy from a state of permanent crisis. In particular, the experts concluded that the refund of tax overpayments by Yukos promissory notes "had not caused damage to the town and federal budgets" and that the Lesnoy town trading companies had been entitled to pay tax in advance since this was the "unconditional right of a taxpayer". Further, the experts concluded that the Lesnoy town administration was entitled to accept tax payments by way of promissory notes in 1999. The report also came to a conclusion that the trading companies registered there were all lawfully entitled to claim tax exemptions under the federal law relating to taxation in closed administrative territories.

215. On 5 March 2005 the defence produced to the court the reports from Ernst and Young, which valued the 20 per cent stake holding in Apatit as in 1994 and 2002, and analysed the investment programme that the Lesnoy town undertook from 2000 onwards. With that report the defence sought to prove that the town had not suffered any damage.

216. On 14 March 2005 the defence produced to the court a report from Price Waterhouse Coopers, which analysed the sale price of apatite concentrate by Apatit to a number of Russian trading companies for the period 2000 to 2002 from the perspective of the requirements of Articles 20 and 40 of the Tax Code. The report concluded that in the relevant period Apatit fixed its prices at a level 23 per cent higher than world companies performing similar activity which were recognised as Apatit's competitors. The defence argued that as such the report was of great importance in establishing the extent of the alleged loss and was clearly relevant to the Apatit charges against the applicant.

217. By the rulings of 1 March (in relation to the UBRS report), on 4 and 5 March (in relation to the Ernst and Young report), and 14 March

2005 (in relation to the Price Waterhouse Coopers report) the court refused to admit those reports to the materials of the case file.

218. In particular, as to the study obtained from Mr Bochko (UBRAS report), the court held that it had been prepared at the request of third persons, and that it contained elements of legal analysis, and that the report could not be qualified as “expert” or “specialist” reports within the meaning of the CCrP. It also did not qualify as “other documents” which a party may wish to attach to the materials of the case.

219. As to the report by Ernst and Young, the court first referred to a number of informalities in the report itself, in particular to the fact that the report mentioned the names of two persons who contributed to the report, but in fact other specialists of the Ernst and Young had also participated in its preparation. The report did not mention their names and was not signed by them. Mr Gage, a partner with Ernst and Young who testified before the court, named those persons in his oral submissions, but since they had not signed the report, it was impossible to establish their role in the preparation of the report and their qualifications. The only signature on the report was that of the general director. Furthermore, the report had been obtained at the request of ALM-Feldmans law firm, which was not participating in the criminal proceedings. The cover-letter with which that report was forwarded to ALM-Feldmans was irrelevant. Finally, the report contained analysis and therefore did not qualify as a “document” within the meaning of the CCrP. Similarly, it could not have qualified as an opinion of a “specialist” within the meaning of the CCrP.

220. As to the report by Price Waterhouse Coopers, the court observed that the defence did not indicate to what type of evidence listed in the CCrP that report belonged. That report was originally commissioned by Apatit outside the criminal proceedings in the applicants’ case, so it could not be considered as an expert report or a report by a specialist. Furthermore, the conformity of the copy of the report was certified by a manager of Apatit and not by Price Waterhouse Coopers itself, and did not contain signatures of the persons who had conducted the examination. That report also contained opinions on legal matters.

221. After the court’s rulings that those reports were inadmissible as “expert reports” the defence made a further application on the basis that the reports came within the category of “other documents” within Articles 74 (2) (6) and 84 of the CCrP. Again, the Meshchanskiy District Court rejected the defence application.

222. On 14 March 2005 the defence produced a report by Mr Pleshkov, a senior economist in the Giperruda research institute. He produced an expert opinion (called “technical-economic assessment”) on the economic feasibility of the investment programme to the privatisation plan for Apatit. On the same day the court refused to admit this document in evidence. The court noted that the “other documents” mentioned in Article 74 of the CCrP had to have relevance for the case. Having reviewed the report produced by Mr Pleshkov the court concluded that it “contained opinions of certain persons based on investigations and qualification of the documents on the questions provided by the defence, a part of which were questions of legal character”. Consequently, the court did not accept this

“assessment” as evidence. Furthermore, the court noted that the CCrP did not provide with such method of collecting evidence as “commissioning a study”. As to the other documents submitted by the defence together with the report by Mr Pleshkov, the court ruled that they “were of no importance for the criminal case”.

223. On 16 March 2005 the defence filed a new motion with the District Court attaching a reply from the Commercial Court of the Chita Region confirming that the affixing of a stamp was not permitted by the official regulations. The court again refused to uphold the defence’s motion, claiming that a stamp was essential in all instances and that, moreover, the Russian Federation emblem on the official form used by the Commercial Court was not depicted on a heraldic shield as required by the relevant legislation.

**(d) Examination of “experts” and other witnesses for the defence**

224. On 17 January 2005 the second applicant’s lawyers advised the court that they would not be calling witnesses for the defence, out of fear of repressive measures which could be taken by the prosecution against those persons if they testified before the court.

225. Nonetheless, a number of witnesses for the defence were heard by the court at the request of the defence. Thus, several experts whose written opinion had been submitted to the trial court gave oral testimony.

226. Thus, Mr Shchekin was questioned in court on 17, 18, 20 and 21 January and on 14 March 2005 with regard to tax law and its implementation. The court repealed a number of questions put to Mr Shchekin by the defence as irrelevant or relating to legal matters in which the court had no need of anyone’s opinion.

227. Ms Petrova was questioned on 24 January 2005 about the content of her report.

228. Mr Semenov was questioned on 25 January 2005. He commented on the lawfulness of the non-monetary method of payment of taxes, which included payment by promissory notes. A part of the defence questions to Mr Semenov were dismissed by the court.

229. On 28 January 2005 the first applicant personally addressed the court, explaining why, in his view, questioning of expert witnesses on the issues of tax law, book-keeping and business and financial practices was important for the case.

230. Mr Bochko was questioned on 1 and 2 March 2005. He was asked by the defence to give evidence on two inter-related areas concerning the “tax-minimisation” schemes used by Yukos and involving companies registered in Lesnoy. The defence lawyers first asked the witness whether the town of Lesnoy had suffered any damage in accepting payment of taxes by way of promissory notes and, secondly, questioned him on the investment programme in the town. However, the court dismissed those questions. The court said that the first area of questioning related to a domain where the court did not need any external opinion (legal analysis), whereas the second area was irrelevant.

231. On 3 and 4 March 2005 the court heard evidence from Mr Myasnikova, an official from the Financial Department of the Lesnoy

town administration. The court prevented Ms Myasnikova from answering a question by the defence lawyer as to whether other companies paid taxes by way of promissory notes. During the cross-examination of Ms Myasnikova, the prosecutor repeatedly referred to charges being brought against Mr Ivannikov, the Mayor of Lesnoy.

232. On 4 and 5 March 2005 the court heard Mr Gage (a partner with Ernst and Young) who was questioned about the methods he employed while preparing the report on the market evaluation of the 20 per cent block of shares in Apatit, proposed by the defence for its inclusion in the materials of the case (see paragraph 215 above).

233. On 23 March 2005 the prosecution informed the court that the GPO planned to bring charges against one of the witnesses called by the defence, Ms Myasnikova.

234. The defence also examined Mr Lubenchenko, Mr Grechishkin and Mr Pleshkov. According to the applicants, the defence's attempts to question those witnesses were severely restricted.

#### *9. The two judgments of 16 May 2005*

235. On 25 March 2005 the defence advised the court that, following the prosecution's closing submissions, the defence would need five days to prepare a reply.

236. On 30 March 2005, after the prosecution had presented their closing submission, the defence confirmed that it would need five days to prepare a reply. The court ordered that the trial would continue at 9.30 a.m. on 1 April 2005.

237. On 27 April 2005 the Meshchanskiy District Court declared that it would deliver its judgment on 16 May 2005.

238. Between 16 May and 31 May 2005 the court read out its judgment. In all the trial lasted from 8 June 2004 until 31 May 2005 and the court sat for 159 days. During the trial, 34 further volumes of materials were added to the case file (fifteen volumes of the trial record and nineteen volumes of motions, expert reports and other documents added during the trial).

239. The Meshchanskiy District Court delivered two separate judgments. The first judgment concerned the allegation of misappropriation of Apatit shares (see Section 2 (a) above, §§ 91 et seq.). The court found the applicants guilty as charged; however, because the crime had been committed more than ten years previously, namely in July 1994, the court applied the statute of limitations and relieved the applicants from criminal liability. The text of that judgment runs to 90 pages.

240. The second judgment related to the other charges against the applicants, which were not time-barred (hereafter – the “principal judgment”). That judgment is 660 pages long; it may be summarised as follows.

##### **(a) Admissibility of evidence produced by the prosecution**

241. The court analysed objections raised by the defence as to the admissibility of evidence submitted by the prosecution and dismissed all of them.

242. In particular, the court dismissed the complaint about multiple searches carried out on the basis of a single search warrant. The court held that this had been a lawful practice. Further, the court decided that the discrepancies in the report on the search in the premises of the State Property Fund in Murmansk had been the result of a typing error. In fact, the documents were seized and examined in Murmansk and not in Moscow. The court also noted that the report on the search of 9 July 2003 in Apatit's premises indicated that the documents seized during that search had been examined by the investigators on 10 June 2003. The court considered that this had been a typing error too. The report of the search in the premises of *Russkiye Investory* also contained a discrepancy: it indicated that examination of the documents seized in the search had started before the documents had been seized. The court decided that this was yet another typing error.

243. The court refused to exclude evidence obtained as a result of the searches of 3 and 9 October 2003 in Zhukovka. The court found that the searches in Zhukovka had been carried out in full compliance with the law.

244. As regards evidence obtained from Mr Drel's office in the premises of the ALM-Feldmans law firm, the court indicated that the CCrP did not prohibit searching the premises of a law firm without a court order as the defence suggested. Further, according to the search warrant, the search "was not carried out in respect of Mr Drel personally but in the business premises". Finally, the court noted that the investigators did not know that they were searching in the premises of a law firm. None of the lawyers who were present during that search asked the investigators to allow them to participate in the searches. The District Court noted that a search was an urgent measure. In the court's opinion, the investigators had learnt that they had been searching in the offices of a lawyer "from V.V. Moiseyev, who participated in the search, but who did not produce any documents to support this fact".

245. As to the searches in other premises, the court decided that they had been conducted in an orderly and lawful manner. The court referred to the statements by Mr Uvarov and Mr Pletnev, members of the investigative team, who had participated in the searches. The court held their testimony for truthful since they "had no reasons to give false testimony". The court further held that several attesting witnesses had participated in the searches and were able to supervise their progress. As to the statements by Ms Ardatova, Ms Morozova and Mr Rakhmankulov, relied on by the defence, the court discounted them. The court considered that those witnesses were partial, since they had been working in the firms which provided services to Yukos' management. The court also noted certain discrepancies in their testimony and the fact that although they had been free to make notes in the search report on any irregularity they had not done so.

246. The court further dismissed the objections raised by the defence in respect of the information obtained from the hard drives seized by the prosecution in Zhukovka. The court held that the statement by Mr Rakhmankulov, who confirmed the defence's version of events, was unreliable and contradicted the testimony of Mr Pletnev and Mr Dumnov,

the latter being one of the two experts who had examined the drives at the request of the prosecution.

247. The court dismissed several other requests from the defence seeking to have excluded evidence submitted by the prosecution. The court also analysed the testimonies of several witnesses called by the defence, but held that their testimonies did not contradict the findings of the court as to the applicants' guilt.

**(b) Admissibility of evidence produced by the defence**

248. In the principal judgment the court also analysed evidence produced by the defence.

*(i) Inadmissible "expert evidence" produced by the defence*

249. The court held that the written expert opinions by Mr Shchekin, Ms Petrova, Mr Semenov, Mr Lubenchenko and Mr Grechishkin were inadmissible as evidence. The court's reasons can be summarised as follows.

250. First, in the opinion of the court, under Article 86 the defence did not have the right to collect evidence in the form of written opinions of the "specialists" (*spetsialisty*, p. 621 of the judgment).

251. Second, the law provided in Article 58 of the CCrP that a prospective "specialist" should be notified about his or her rights and obligations by the persons vested with such a right by the current law of procedure, which do not include the defence lawyers or the expert themselves. The court noted that the written opinions produced by those persons contained entries that such rights had been known or had been explained to them by the defence lawyers. However, even if the lawyers had notified some of the "experts" about their procedural rights, that notification was not valid.

252. The third argument concerned the reports by Mr Shchekin, Mr Semenov and Mr Grechishkin. As followed from those reports, their authors had reached their conclusions on the basis of materials from the case file which had not been "duly certified". They based their conclusions on the documents which they believed were from the materials of the criminal case; however, those persons were not allowed to study the official copy of the materials submitted by the prosecution to the trial court and they had to rely on the copies produced to them by the defence lawyers. As to the report of Mr Shchekin, the court also noted that he had at his disposal some additional documents which were not a part of the case-file.

253. The fourth argument was that those persons had given their opinion on points of law, which was not within their competence. The court noted that those reports touched upon questions of guilt, intention, assessment of arguments of the prosecution, as well as evidence produced to the court, and interpretation of the applicable legislation. All that, in the opinion of the court, was not within the terms of reference of the experts under the CCrP.

254. The fifth argument concerned the reports by Ms Petrova and Mr Lubenchenko. The court observed that those experts had been engaged



by relatives of the applicants who were not a party to the proceedings and who had not therefore had a right to collect evidence.

255. As to the research by the UBRAS, the District Court said that since it had not been specially commissioned for the criminal trial it was inadmissible.

*(ii) Inadmissible documentary evidence*

256. The court further ruled that some of the documents submitted by the defence, namely the charter of incorporation of Status Services, and the list of staff of that company (which had paid the second applicant for his consulting services) were inadmissible, since they had been obtained in breach of Article 53 of the CCrP. Further, the court noted that the content of those documents did not contradict the findings of the court that the second applicant was the head of that company.

*(iii) Inadmissible oral evidence*

257. The court further dismissed oral testimony by Mr Shchekin, Mr Semenov, Mr Lubenchenko and Ms Petrova as inadmissible evidence. The court held it to be inadmissible because those persons had never worked for the tax authorities or in audit or accounting firms. They were lawyers, and the court did not need their opinion on legal matters. Furthermore, the court noted that Mr Shchekin had represented Yukos in the commercial courts.

258. The court took note of Mr Bochko's testimony, but only to the extent that it concerned his participation in the preparation of the UBRAS report. At the same time the court refused to admit in evidence Mr Bochko's testimony concerning the substantive conclusions of the report.

259. The court admitted testimony by Mr Gage about the methods used by Ernst and Young in evaluating 20 per cent of the shares in Apatit. The court, however, noted that that testimony was "general in nature" and did not contradict the court's earlier findings. As such, audit reports submitted by the defence had not been admitted.

260. The court also admitted Mr Pleshkov's testimony about the Apatit investment programme. In the court's view, the evidence by Mr Pleshkov did not contradict the court's earlier findings. Finally, the court admitted testimony by Mr Grechishkin concerning his contacts with the applicant's lawyers but not on other points.

*(iv) Unreliable documentary evidence*

261. The court took note of certain documentary evidence submitted by the defence. In particular, the court examined the tax reports by the Lesnoy Tax Inspectorate, lists of staff working in the Lesnoy trading companies, documents concerning the activities and assets of those companies, letters from the Lesnoy administration, etc. However, the court discounted this evidence as unreliable. The court noted, in particular, that the acting head of the Tax Inspectorate and the Mayor of Lesnoy were under criminal investigation for granting improper tax cuts. Further, the court found that the documents submitted to the court concerning the activities of the

trading companies had not existed at the relevant time, when the inspections of those companies had been carried out.

262. The court also examined the documents confirming the honouring the promissory notes received by the Lesnoy town administration from the trading companies. The court discounted that evidence, stating that the companies which had confirmed the authenticity of the promissory notes were controlled by Yukos, and were not therefore a reliable source of information. The court also discounted a number of documents, letters and certificates issued by the Lesnoy administration, and several expert opinions. The court considered that the entities which had provided the documentary evidence in question had been dependent on the applicants. It also noted that the defence had not relied on those documents during the preliminary investigation.

263. The court discounted documents submitted by the bankruptcy administrator of Most Bank with regard to the payment of promissory notes by Byron, Osmet-1, Sard-1 and GM-2. The court noted that those documents did not contain information as to when and how the promissory notes were paid, and were therefore unreliable.

264. The court finally admitted and analysed a large number of other documents produced by the defence. However, the court concluded that none of them could affect its findings as to the facts of the case, or change their legal characterisation.

**(c) Findings of the Meshchanskiy District Court on the merits**

*(i) Criminal charges*

265. The Meshchanskiy District Court found both applicants guilty as charged (see Section 2 points (b) – (j) above, §§ 97-118). In particular, the court found that the companies involved in the transactions with shares of the privatised enterprises, the trading companies registered in Lesnoy and other low-tax zones, as well as foreign companies which paid fees to the applicants had in fact been sham legal entities with no real business purpose. Most of the persons who had set up those companies on their behalf worked at Yukos, Menatep, Rosprom, and other affiliates of Yukos. In that capacity those persons were subordinated to the applicants. Further, the sham companies had no financial resources of their own, but operated with the financial support of Menatep, Rosprom, and Yukos. The sham companies did not have premises or personnel; they did not make a profit and some of them had been definitively liquidated or abandoned. Therefore, the sham companies were created solely for participation in the sham transactions; they were controlled by the applicants through their personal friends or subordinates.

266. The conclusive paragraphs of the judgment in respect of the company-tax evasion read as follows:

“As a result of the aforementioned actions, the aforementioned companies which *de facto* did not carry out any commercial activities in the territory of the [Lesnoy Town], obtained a right to preferential taxation. Later, using this circumstance, through the CEOs of the aforementioned companies controlled by them, [the applicants]... arranged the filing of the 1999 and 2000 tax returns of the aforementioned companies with the Tax Inspectorate for Lesnoy town, having

deliberately included in them false information that tax privileges were assessed and they had no tax arrears; as a result, budgets of various levels did not receive taxes in the aforementioned amount. Also, with a view to evading paying taxes, in violation of the requirements of the current tax legislation ..., [the applicants] arranged for the payment of taxes by the aforementioned companies using promissory notes from Yukos, which cannot be deemed to be in compliance with the statutory requirements to pay mandatory taxes. Later, out of the “overpayment” which built up in the aforementioned manner, netting operations for the following tax periods were also carried out. Furthermore, with a view to evading paying taxes, the defendants arranged non-filing by the aforementioned companies controlled by them of the 2000 balance sheet with the Tax Inspectorate, the filing of which is mandatory under Art. 23 of the Tax Code, and non-inclusion in the companies’ tax declarations of the information about the companies’ actual tax arrears. By means of the aforementioned actions, [the applicants] organized tax evasion ...”

267. As to the amounts of unpaid taxes, the judgment of the Meshchanskiy District Court mentioned the following figures. In 1999 Business Oil obtained unlawful tax cuts in the amount of RUB 1,217,622,799. In 2000 Business Oil obtained unlawful tax cuts in the amount of RUB 1,566,046,683. Further, the four trading companies (Business Oil, Vald Oil, Forest Oil and Mitra) paid in 1999-2000 taxes with promissory notes. On that last point the judgment repeatedly referred to various amounts of unpaid taxes for different tax periods and for each company (p. 49-50 of the judgment). Figures of tax underpayments indicated in various parts of the judgment did not always match other figures concerning the same periods and operations of the same trading companies and did not fit to the overall result indicted in the conclusive paragraphs of the judgment concerning company income tax evasion charges. No explanation for those discrepancies was given in the judgment.

268. When analysing the applicants’ involvement in the unlawful tax refund scheme, the District Court indicated, on page 51 of the judgment, that “by 2000 promissory notes of Yukos worth RUB 1,048,391,487 still remained not honoured”. The District Court found that the applicants had fraudulently obtained from the State budget RUB 407,120,540 through that scheme. In support of its conclusions on the corporate tax evasion charges the judgment referred *inter alia* to documents seized from Trust Investment Bank (p. 488 of the judgment).

269. On page 521 of the judgment the District Court indicated that in 1999 the applicants evaded taxes in the amount of RUB 5,447,501,388 (that figure included tax cuts obtained by Business Oil plus payment of taxes by the four companies, including Business Oil, with promissory notes), and that in 2000 they evaded taxes amounting to RUB 11,947,947,894 (again, it included tax cuts granted to Business Oil and the amount of promissory notes transferred by the four trading companies to the budget). The overall amount of unpaid taxes for 1999-2000 was therefore RUB 17,395,449,282.

270. On the personal tax-evasion charges the District Court confirmed the account contained in the bill of indictment. In particular, to demonstrate that service agreements concluded between the applicants and the two Isle of Man companies, namely Status Services and Hinchley, were not real, the judgment referred to the memo prepared by Ms Kantovich on behalf of Mr Alexanyan which had been addressed to the first applicant

and described the “individual entrepreneur” scheme. The judgment also referred to corporate credit cards issued in the name of the second applicant as the head of Status Services Limited and discovered during the search in his house on 3 October 2003 in Zhukovka. Documents seized from Tax Inspectorate No. 5 were also referred as proof of the applicants’ guilt concerning the personal tax evasion charge (pp. 475-478 of the judgment).

271. In support of its conclusions on the episode concerning the embezzlement of Apatit’s benefits and in relation to the corporate tax-evasion charges the Meshchanskiy District Court relied, *inter alia*, on documents seized from Mr Drel’s office in Zhukovka. The court also referred in this respect to some of the print-outs from the hard drives seized during the searches. In turn the trial court stated that the applicant’s guilt was confirmed by the “conclusions of the complex accounting-economic expert examination, the results of which show the net profit of Apatit for the period 2000-2002 in case apatite concentrate was sold independently, without intermediaries at purchasing prices of consumer plants, and at USD 45 per tonne on FOB terms to Murmansk in case of export, would have increased by RUB 6,168,043,000, including: in 2000 - by RUB 2,840,223,000, in 2001 - by RUB 1,956,565,000, in 2002 - by RUB 1,371,255,000” (p. 322 of the judgment). In support of its conclusions on the episode concerning misappropriation of Apatit benefits the District Court referred, *inter alia*, to the valuation of the Apatit product made by Mr Yeloyan and Mr Kuprianov in their report of 16 August 2003.

(ii) *Civil claims*

272. The District Court also ordered the applicants to pay to the State RUB 17,395,449,282 on account of unpaid company taxes, to be recovered from both applicants on a solidarity basis. The District Court’s judgment in the part related to civil claims run to eight lines and did not contain any calculation of the amount of damage caused to the State by the applicants’ failure to pay company taxes. The judgment in this part did not refer to any provision of the law.

273. The civil claims of the Tax Inspectorate no. 5 concerning personal income tax evasion were left without determination; the District Court ruled that those claims should be examined by a court within separate civil proceedings.

274. From the judgment it appears that the amount claimed by the Tax Service under the head of unlawful tax refund (RUB 407,120,540) was not recovered from the applicants.

**(d) Evidence mentioned in the judgment but not presented to the defence during the investigation and trial**

275. The applicants claimed that certain pieces of evidence, referred to by the Meshchanskiy District Court in its judgment, had never been produced to the defence for examination in adversarial proceedings. In particular, the judgment referred to:

(a) the second applicant’s income and expenditure book for the year 2000;

- (b) the letter from ZAO Yukos RM of 11 August 2000;
- (c) American Express credit cards said to have belonged to the second applicant; and
- (d) alleged contracts between the second applicant and Status Services.

**(e) Sentence**

276. In conclusion, the District Court sentenced both applicants to nine years' imprisonment in an "ordinary regime correctional colony".

*10. Appeal proceedings*

**(a) Preparation of the brief of appeal**

277. Within 10 days of the conclusion of the reading of the judgment, the defence teams submitted a "short" version of their appeal to the Moscow City Court. The full grounds of appeal could only be prepared after studying the trial record.

278. According to the Government, on 7 June 2005 the first applicant received a copy of the judgment in the case.

279. On 28 July 2005 the defence team was notified by Judge Kolesnikova (the presiding judge) that they could commence studying the trial record in order to check its accuracy. Between 29 July and 8 August 2005 the defence was permitted access to volumes 1-15 of the original trial record in the premises of the Meshchanskiy District Court. However, the applicants' lawyers were not able to read all of the 30 volumes of the trial record. In particular, the defence was not given access to the volumes containing documents attached to the case-file during the court sessions and copies of the rulings delivered by the court after retiring to chambers. The applicants' lawyers were told that they could not have access to the remaining volumes as they were being used by the prosecutor.

280. On 5 August 2005 a copy of the fifteen volumes of the trial record, prepared by the Meshchanskiy District Court on its own initiative, was made available for the defence (5,565 pages). The copies of the record were not certified and they had no internal numbering or index. According to the Government, the defence was given the following time-slots to study the trial record: from Monday to Thursday, between 9 a.m. and 6 p.m., and on Friday, between 9 a.m. and 4.45 p.m. Every lawyer had been given his own copy of the trial record.

281. The defence lodged an application to review the original of the trial transcript but the court did not respond to that application.

282. In early August it became known that the first applicant intended to stand for election to the State Duma of the Russian Federation.

283. On 8 August 2005 the first applicant was transferred to another block in the detention centre, to a cell containing 16 detainees.

284. On 9 August 2005 Judge Kolesnikova informed the defence by fax that the last date for submitting comments on the hearing record was 25 August 2005. In reply the first applicant wrote a letter to Judge Kolesnikova in which he asked for additional time. In particular, he

described the conditions in which he had to study the trial record as follows:

“I am forced to study the protocol in an investigative room together with my lawyers or in the cell where I am currently being held. However, I can hardly do it in the cell because there are more than 10 more people in this cell, and they are, of course, speaking loudly to one another, many of them are smoking (I personally don't smoke), eating, and relieving themselves, in other words, creating a situation in which it's extremely difficult to focus on the protocol.

As to the conditions of studying the protocol in the investigative room together with my lawyers, I'd like to note the following. Every day the lawyers are allocated one and the same investigative room to meet with me. This room is unventilated with a totally sealed double-pane window, without air-conditioning and any ventilation whatsoever. The room has a table, which is too small to hold all the documents necessary to be able to work on the protocol, and two chairs, which are not enough either because I'm visited by up to five lawyers at the same time. Meanwhile, adjacent investigative rooms are vacant and have a lot of chairs. In this situation, allocating one and the same investigative room gives reason to assume that it is equipped with some special technical devices ruling out confidential communication between me and my lawyers. ... By today, I managed to study only 4.5 volumes out of the 15 volumes of the “copies” of the protocol that I had been given. To speed up the familiarisation ... I have to refuse the daily open-air walks ...”

285. From 9 August 2005 the defence lawyers repeatedly sent telegrams and letters to the Meshchanskiy District Court requesting that the defence be allowed to examine the original trial record. However, the defence received no reply to those requests.

286. On 15 August 2005 Ms Moskalenko, one of the defence lawyers, complained to the Meshchanskiy District Court about the improper conditions in which she had to review the trial record with the applicant.

287. On 19 August 2005 the defence submitted to the Meshchanskiy District Court audio recordings made by the defence in the course of the trial. Judge Kolesnikova returned the audio recordings to the defence, claiming that the case was closed and that nothing could be attached to the case materials.

288. On 23 August 2005 Judge Kolesnikova dismissed a request for additional time to review the trial record, asserting that the applicant and his lawyers had been given sufficient time.

289. On 24 August 2005 the defence lodged comments on the volumes of the trial record to which they had been given access. The comments ran to 126 pages. In the applicant's words, the trial record contained certain inaccuracies, some of which were relatively minor, whereas others were much more significant. Thus, entire paragraphs were missing from the trial record. The applicant gave as an example an episode in which the court discussed time arrangements for the hearing. That episode was not included in the trial record. Further, there were numerous omissions in the record of questioning of certain important witnesses (such as, for example, Mr Klassen, who had told the court about the investigator's selective approach to the questioning).

290. On 26 August 2005 the prosecution informed the defence about the decision taken by the Acting Chairman of the Meshchanskiy District Court, Mr Kuryukov, to fix the date of the appeal hearing on 14 September 2005.

291. On 2 September 2005 Judge Kolesnikova issued a decree dismissing all of the points raised by the defence, with the following reasoning:

“The comments on the trial record are not based on fact – i.e. the trial record was made by court secretaries in the very course of the court proceedings, and all comments made by participants, their statements, motions, all documents examined and disclosed, witness testimony, questions and replies to those questions, as well as to the order of court proceedings, etc, have been recorded accurately and in their entirety”.

292. On 9 September 2005 the defence submitted a number of motions to the Moscow City Court, requesting that evidence which had been excluded or discounted by the Meshchanskiy District Court be re-considered at the forthcoming appeal. The motions, *inter alia*, concerned the report by Ernst and Young in relation to the investment programme that had been conducted in the Lesnoy town. Further, the defence sought to admit several letters from the Lesnoy Financial Department concerning payment of taxes by promissory notes and their redemption by Yukos. Further, the defence drew the court of appeal’s attention to the items of evidence which had been misinterpreted by the prosecution and subsequently by the trial court.

293. On 13 September 2005 Ms Moskalenko submitted an additional brief of appeal in which she complained about alleged violation of the European Convention in the course of investigation and trial. In particular, she complained about the impossibility for the first applicant to have confidential contacts with his lawyers in the courtroom during the hearings and in the prison.

294. On the same date the defence lawyers asked the court of appeal to annul the hearing of 14 September 2005, since the date had been set in a manner that was not in accordance with the procedure prescribed by law.

295. In all, the briefs of appeal submitted by the defence on behalf of the applicants run to about a thousand pages.

**(b) Representation of the applicants during the appeal proceedings**

296. In July-August 2005, the director of the detention facility persistently refused to grant Ms Khrunova, one of the first applicant’s lawyers, a meeting with him, since the Meshchanskiy District Court refused to issue her with a “meeting permit”. After lodging a complaint with the Judges Qualification Board she was allowed access to the case by the court.

297. On 22 July 2005 Ms Mikhaylova, who was engaged as the first applicant’s ECHR lawyer in the absence of Ms Moskalenko, was not allowed access to the first applicant by the director of the detention facility. In a letter of 14 January 2008 the then director of the detention facility explained that Ms Mikhaylova had not been admitted to the proceedings in the capacity of the first applicant’s lawyers under Article 53 of the CCrP and was therefore denied access to the first applicant.

298. On 27 July 2005 Ms Mikhaylova and Mr Prokhorov were denied access to the first applicant by an oral order from the director of the detention facility. The lawyers then submitted a formal written request to

visit the applicant, but on 10-11 August 2005 they were again denied access to him, again with reference to Article 53 of the CCrP.

299. On 4 August 2005 the remand prison administration sent a request to the Meshchanskiy District Court asking whether Ms Mikhaylova and Mr Prokhorov had been admitted to the proceedings as the first applicant's lawyers. On 11 August 2005 the vice-chairman of the Meshchanskiy District Court replied that those two advocates had not participated in the trial on behalf of the first applicant. On 15 August 2005 the Meshchanskiy District Court submitted to the administration of the remand prison a list of the first applicant's lawyers who had been admitted to the case under Article 53 of the CCrP and were thus allowed to visit him.

300. The first applicant had instructed Mr Padva, his lead lawyer, to represent him at the appeal. However, Mr Padva was admitted to hospital shortly before the appeal hearing because of a very serious concern over his health. The hearing on 14 September 2005 was therefore adjourned until 19 September 2005.

301. On 15 September 2005 Mr Mkrtychev and Mr Drel, the first applicant's lawyers, tried to meet the first applicant but were denied access to him by the administration of the detention facility. On the same day an inmate suffering from an infectious disease was placed, firstly, in the first applicant's cell and then transferred to the cell where the second applicant was detained. As a result, quarantine was imposed in respect of the detainees in those cells, including both applicants. However, after lengthy negotiations with the administration of the remand prison, Ms Levina and Ms Moskalenko obtained the right to visit the applicants.

302. As Mr Padva was still in hospital on 19 September 2005, the hearing was adjourned until 20 September. On 20 September the hearing was again adjourned, on that occasion until 22 September 2005.

303. On 21 September 2005 the Moscow City Court appointed Mr Shmidt to be the first applicant's defence lawyer in the appeal proceedings.

304. On 21 September 2005 Mr Padva was denied access to the first applicant in the remand prison.

305. On 22 September 2005 the court of appeal ruled that, if Mr Padva was still absent, Mr Shmidt, another of the first applicant's lawyers, should take his place and represent the first applicant. As a result, Mr Padva discharged himself from hospital so that he could represent the first applicant. Mr Shmidt, who was appointed as the first applicant's lawyer by the court's decision, requested an adjournment, but was permitted only a short meeting with the first applicant in the court building, which, in his words, did not allow for confidentiality.

**(c) Appeal hearing of 22 September 2005**

306. The Moscow City Court, sitting as the court of appeal, was composed of three judges: Mr Tarasov (the presiding judge), Mr Marinenko and Ms Lokhacheva. In total, the hearing on 22 September 2005 lasted about eleven hours.

307. At the outset of the hearing the defence lawyers requested additional time so that they could take instructions from their clients.



Mr Padva explained that he had been refused access to the first applicant on the previous day. Mr Shmidt asked for the hearing to be adjourned for at least one day. The first applicant explained to the City Court that it was imperative he should be given further time to see his lawyers. He also explained that he had been given wholly insufficient time and facilities to prepare for the appeal. The judgment ran to six hundred pages, leaving aside the vast size of the trial record and the documents in the case file, and he had had only two weeks to read them and prepare his comments before the quarantine was imposed.

308. The City Court refused the applications for an adjournment but granted a period of time to the first applicant to discuss his case with Mr Padva and Mr Shmidt whilst in the courtroom. They discussed the case in presence of the guards.

309. Mr Shmidt, referring to the breaches of domestic law in assigning the case to the appeal hearing, made an application for the judges to withdraw. However, that application was dismissed.

310. The appeal court examined several requests by the defence to admit evidence into the case file, including documents lodged earlier in writing and several new requests made orally at the hearing. Thus, at the hearing Mr Padva requested the City Court to admit the report from Giproruda (on the 1994 investment programme for Apatit), the Ernst and Young reports (evaluating the 20 per cent stockholding in Apatit in 1994 and 2002) and the UBRAS report. In reply to that request the City Court held as follows:

“The court considers that there are no grounds to study the documents which were already studied by the first-instance court. The court will study the applications in which the defence state that the documents were improperly evaluated by the Meshchanskiy Court. That being said, the court accepts the documents for review.”

311. The City Court heard addresses by the first applicant, Mr Padva, Mr Shmidt (the lawyers) and Mr Shokhin (the prosecutor). The defence enumerated various breaches of procedural law in the course of the trial, as well as substantive inconsistencies in the judgment of the first-instance court. They also asked the City Court to discontinue the proceedings concerning the misappropriation of the NIUIF shares on the ground that by 22 September 2005 the ten-year statutory time-limit established for such crimes had expired.

312. At the end of the day the City Court retired for one hour and, on the same evening, pronounced the operative part of its decision.

**(d) Judgment of 22 September 2005 by the Moscow City Court**

313. The decision by the Moscow City Court runs to 62 pages. The appellate court did not detect any major breaches of procedural law in the course of the trial. On the merits the court of appeal upheld some parts of the judgment by the Meshchanskiy District Court, while rejecting other accusations or modifying the District Court’s reasoning.

314. The City Court ruled that the charges concerning non-payment of personal income tax in 1998 were time-barred. The episode concerning the misappropriation of Apatit profits in 1997-1999 was also time-barred. As to the NIUIF charges, the City Court held that the time-limit concerning

the privatisation of NIUIF would have expired at midnight on 22 September 2005. As a result, the City Court ruled itself competent *ratione temporis* to examine charges related to that episode, and confirmed the first instance court's findings in that respect.

315. The City Court upheld the conviction in the part concerning misappropriation of profits of Apatit in the years 2000-2002, misappropriation of NIUIF shares, corporate income tax evasion in 1999-2000 (tax cuts unlawfully obtained by the trading companies), personal income tax evasion in 2000, and unlawful tax refund by the trading companies.

316. As to the first episode concerning corporate tax-evasion (related to the tax cuts) the City Court held in particular as follows:

“[The trading companies] did not own or rent production facilities or fixed assets for processing, storage, or shipment of output in the territory of the ZATO Lesnoy. Employees hired by the firms and registered in Lesnoy were hired exclusively in order to meet the conditions for granting additional tax privileges. Employees residing in Lesnoy were not engaged in preparing documents for entering into agreements, negotiations with buyers or sellers of oil or oil products, or accounting.”

317. As to the personal income tax evasion the City Court held, in particular, that under the service agreements the amounts received by applicants were in fact paid “for their work at Rosprom, Yukos [Moscow], and foreign companies”. The City Court, in particular, found as follows:

“The facts of issuance of the patent and switch of [the applicants] to the simplified taxation scheme are confirmed by the materials adduced in the judgment and examined at the court, seized at the tax inspectorate documents on the state registration of [the applicants] as entrepreneurs carrying out their activities without setting up a legal entity, service contracts with foreign companies, 1998-2000 income declaration; [the applicants'] applications for patents to switch to the simplified taxation, accounting, and reporting scheme; patents and decisions of the inspectorate heads to issue them; payment receipts for the patents; powers of attorney for representation at the tax inspectorate; entrepreneurs' income and expense books; and other documents”.

318. The City Court further found the applicants not guilty in respect of several episodes. Thus, the following charges were dismissed:

(a) non-compliance with the commercial court judgments in respect of Apatit and NIUIF (see Section 2 (b) and (e) above, §§ 97 et seq. and §§ 104 et seq.);

(b) payment of taxes with promissory notes (see Section 2 (g) above, §§ 111 et seq.). In this part the City Court held that it cannot be characterised as “tax evasion” under the new Article 199, which came into force in December 2003; it also held that payment with promissory notes could not be regarded as “submission of false information” in the fiscal documents, punishable under Article 199 of the Criminal Code. The City Court added that the fact that those actions were not criminal did not affect in any way the District Court's findings on the civil claims lodged by the Tax Ministry, since such payment of taxes with promissory notes remained unlawful (page 39 of the decision);

(c) money transfers to Mr Gusinskiy's companies (the Most Bank episode imputed to the first applicant, see Section 2 (i) above, §§ 115).

319. As to the pecuniary claims forwarded against the applicants, the City Court held that the amounts of non-paid taxes cannot be recovered from the sham companies; therefore, they should be recovered from the applicants personally, since they were the *de facto* organisers and beneficiaries of the tax evasion scheme. The judgment of the City Court in this part did not refer to any provisions of the law.

320. Finally, the City Court changed the legal classification of certain episodes with which the applicants had been charged. As a result, the overall sentence was reduced to eight years' imprisonment for each applicant. A reasoned decision was delivered by the court of appeal some time later.

## **E. Serving of the sentences by the applicants**

### *1. Placement of the first applicant in FGU IK-10*

321. On 9 October 2005 the first applicant was transferred from the remand prison.

322. On 15 October 2005 the first applicant arrived at penal colony *FGU IK-10*, located in the town of Krasnokamensk, Chita Region. On 20 October 2005 the first applicant's wife was notified of that by post.

323. The distance between Moscow and Chita is about 6,320 km by motorway. According to the Government, *FGU IK-10* is located about 580 km from the city of Chita. There is a railway line between Chita and Krasnokamensk; the trains have "sleeping wagons" (first-class compartments for two persons) with Internet connection and a dining car. The "transport infrastructure" within Krasnokamensk allowed the visitors to reach the territory of the penal colony.

324. According to the first applicant, penal colony *FGU IK-10* in Krasnokamensk was not quite the furthest penal colony from Moscow but it was the least accessible, because direct flights were available to the colonies further from Moscow. To reach Krasnokamensk from Moscow involved a minimum of two days. It was a long and strenuous journey, made even more difficult by the infrequency of flights from Moscow to Chita. A flight from Moscow to Chita took approximately six and a half hours (occasionally more, when the aircraft had to refuel in Yekaterinburg). On arrival in Chita, there was a seven-hour wait before boarding a train for Krasnokamensk, which took another fifteen hours to arrive. Alternatively, the visitors had the choice of a train ride from Moscow, 106 hours on an uninterrupted run. This made it very arduous for the first applicant's lawyers and family to gain access to him, and inevitably some of them were not seeing the first applicant as much as they otherwise would. The first applicant's lawyers described the journey as "very exhausting and debilitating". Mr Mkrtichev, a lawyer who undertook the journey from Moscow to Krasnokamensk on eight occasions, testified that he had never seen any "sleeping wagons" or a dining car on the trains on which he had travelled. Internet and mobile

phone reception were also impossible, contrary to what the Government had maintained. The first applicant further maintained that Krasnokamensk itself was subject to huge extremes in climate. According to Mr Mkrtychev, during his first journey there in October 2005 the temperature was approximately minus ten degrees Celsius, with a freezing and almost unbearable wind. On one of his later visits the temperature dropped to 41 degrees below freezing point. The short summer was equally oppressive, with blistering heat and swarms of mosquitoes.

325. On 25 October 2005 the first applicant's wife visited him in the colony. She was entitled to a "long family visit" and stayed with the first applicant until 28 October 2005.

326. The decision to send the first applicant to the Krasnokamensk colony was taken by the Federal Service of Execution of Sentences – FSIN. On 9 January 2006 the defence lodged a complaint challenging that decision. They claimed that the decision was unlawful and arbitrary. In addition, the first applicant's lawyers pointed out that the second applicant had also been sent to a very remote region of the Russian Federation, in apparent disregard of the provisions of Russian law.

327. At the hearing the representatives of the FSIN argued that there had not been enough places in the penitentiary facilities in Central Russia, and that a decision had been taken that five convicts should be sent from Moscow to various regions of Russia. There was no requirement in the law to consider the individual circumstances of each convict; as a result, the first applicant was among the five detainees who had been sent to the Chita Region.

328. The first applicant in the proceedings referred in particular to the figure mentioned in an interview by the then Minister of Justice Mr Chayka, who said that in September 2005 the admission capacity of Russian colonies was 786,753 places, whereas only 637,079 convicts were detained there. In another interview by Mr Kalinin, the then director of the FSIN, acknowledged that there had been free places in some of the colonies.

329. On 6 April 2006 the Zamoskvoretskiy District Court of Moscow dismissed the first applicant's claim and, referring to Article 73 § 2 of the Code on the Execution of Sentences, upheld the FSIN's decision as lawful and justified. The District Court found that under Article 73 of the Code of Execution of Criminal Sentences a convicted person had the right to serve his sentence in the region where he was convicted or where he had lived before. However, if in that prison there were no places vacant, the detainee could be sent to serve his sentence in the nearest region where it was possible to accommodate him. The District Court referred to a decision of FSIN which defined which colonies must accept convicts from Moscow and in what proportions. According to the District Court, that decision was taken within the competence of FSIN, and did not violate the law. The District Court also held that if the first applicant was placed in a nearer colony the rights of other prisoners might have been violated. The court ruled that information contained in the interviews of Mr Chayka and Mr Kalinin on the number of places vacant in the Russian colonies was

inadmissible evidence. On 13 June 2006 the Moscow City Court upheld that decision.

## *2. The first applicant's contacts with his lawyers*

330. While in the Krasnokamensk colony the applicant first continued to work with his lawyers. However, his contacts with them were seriously limited. Thus, at the beginning of his prison sentence the first applicant was only permitted to see his lawyers at the end of the working day and only one lawyer at a time was allowed to see him.

331. On 10 November 2005 Ms Terekhova, one of the applicant's lawyers, was denied access to the first applicant. On 15 November 2005 the colony staff seized documents from Mr Mkrtychev. On 16 November 2005 Ms Levina was subjected to a body search by the colony staff when visiting the first applicant; the procedure of the search involved undressing. On 17 November 2005 Ms Khrunova was also subjected to a similar body search. On 18 November 2005 Ms Terekhova was body-searched on her way to and from the meeting with the applicant, and her professional files were examined. On 23 and 26 November 2005 she was body-searched again in the same manner.

332. From 29 November to 1 December 2005 the first applicant was visited by three of his lawyers in connection with his application to the European Court of Human Rights. They needed to see the first applicant together but were not permitted to do so. Later the first applicant successfully challenged the prison regulations concerning visits by lawyers. In a judgment dated 25 May 2006 the Supreme Court held that the rule was invalid. However, the colony authorities continued to refuse the lawyers' access to the first applicant during working hours.

333. During the meetings with his lawyers the first applicant was separated from them by a screen which ran from wall to wall and floor to ceiling. Such arrangements had been introduced in the penal colony in question since the first applicant's arrival. The first applicant was not permitted to retain legal documents brought to him by his lawyers on legal visits. The first applicant had a right to copy part or all of a document in his own handwriting in the course of a legal visit. As a result, the first applicant was unable to work with lengthy documents, such as the application before the Court.

334. In November 2005 the first applicant's British lawyers, Mr Nicholas Blake and Mr Jonathan Glasson, asked permission to meet him. In February 2006 they applied for a Russian visa, but the Russian embassy did not deliver visas to them for the reasons which remain unknown.

335. On 11 March 2006 Mr Khrunova's professional ID was confiscated by the colony staff.

## *3. Disciplinary proceedings against the first applicant*

336. While in the Krasnokamensk colony the first applicant was subjected to a number of disciplinary proceedings regarding his conduct in the colony, which resulted in three periods of solitary confinement for a total of twenty-two days.

337. On 12 December 2005 the first applicant left his work-place in the sewing shop because his equipment was broken and he needed to find a repair worker. On the following day he was formally reprimanded by the administration for having done so.

338. On 16 January 2006 the applicant received by post the texts of two regulations by the Ministry of Justice concerning the regime of detention of convicted persons. Those items of mail had passed through the colony censor. On the following day those regulations were seized from the first applicant and on 24 January 2006 the first applicant received a second reprimand for keeping unauthorised printed materials. He was placed in a solitary confinement cell for five days.

339. On 9 February 2006 the Krasnokamensk Town Court quashed the decision of 12 December 2005 to reprimand the first applicant for absence from work.

340. On 17 March 2006 the first applicant was subjected to seven day's confinement in the punishment block for drinking tea in the communal area instead of in a canteen.

341. On 18 April 2006 the Krasnokamensk Town Court quashed the second reprimand of 24 January 2006.

342. On 3 June 2006 the first applicant received another reprimand. He was placed in the solitary confinement cell for ten days.

#### *4. Placement of the second applicant in FGU IK-3*

343. On 27 September 2005 the Moscow branch of the Federal Penitentiary Agency decided to send the second applicant to serve his sentence in a correctional colony *FGU IK-3* in the Kharp township situated on the Yamal peninsula (Yamalo-Nenetskiy region, Northern Urals, north of the Arctic Circle). That penitentiary institution was a "strict regime" colony which had a special "ordinary regime" zone. The second applicant lived in that zone.

344. The distance between Moscow and Kharp is over 3,300 km by road. According to the Government, Kharp township had a direct railway connection with Moscow. Several trains ran on that line, including "Polar Arrow", a "high-class train. That train had all necessary amenities, including two-bed compartments in "economy" and "business" class, services for children and a restaurant. Further, Moscow had a direct air connection with Salekhard, a nearby town. It was possible to get to Kharp from Salekhard by train or by car, through the town of Labytnangy and across the Ob River.

345. In the second applicant's submission, the Government's argument that there was a direct railway connection with Kharp township and direct flights between Salekhard and Moscow was certainly true. However, the train journey usually took 48 hours, while to reach Kharp from Salekhard airport one had to cross the Ob River: there was a ferry in the summer and an ice-crossing in the winter. In autumn and spring, when there was no ice, the river could only be crossed by air-cushioned vehicles, which was quite dangerous.

346. On 11 January 2006 Mr Kalinin, the Head of the Federal Penitentiary Agency, stated in an interview that the second applicant had been sent to that colony in order to guarantee his own safety.

347. On 23 January 2006 the second applicant's lawyers wrote a letter to the Department of the Federal Penitentiary Agency in the Kaluga region, adjacent to the Moscow region, seeking to obtain information about the number of detainees in the ordinary-regime colony (*FGU IK-2*) situated in that region. In the letter dated 31 January 2006 the second applicant's lawyers were informed that the Kaluga colony was capable of accepting up to 50 detainees; however, by 1 October 2005 only 48 people were serving their prison sentence in that colony. Between 1 and 10 October 2005 that number remained the same. Each detainee had 2 square metre of personal space in the colony.

348. On an unspecified date the second applicant's lawyers challenged in court the decision of the FSIN. They asserted that the second applicant had the right to serve his sentence in a colony situated in Moscow or in the Moscow region, where he had lived before his conviction. The defendant explained that since Moscow was a capital city, it had no correctional colonies on its territory.

349. On 16 February 2006 the Zamoskvoretskiy District Court of Moscow dismissed the complaint. The District Court established that there were no appropriate penitentiaries in Moscow; furthermore, it was impossible to accommodate all the convicts from Moscow in the Moscow Region. According to a letter from the head of the Special Register Bureau of the FSIN (*byuro spetsialnogo utcheta*), it was equally impossible to place the second applicant in correctional colonies in the regions adjacent to Moscow because of overcrowding, repair work, allocation of premises for remand prisons, etc. On 27 August 2003 and 28 July 2005 the FSIN had established quotas for sending convicts from Moscow to other regions of Russia. The quota for the Yamal peninsula was five persons. The fact that the second applicant suffered from certain chronic diseases was not an absolute obstacle to his being sent there. Consequently, the FSIN's decision to send the second applicant to a colony on the Yamal peninsula was lawful and justified.

## **F. Connected proceedings**

### *1. Tax claims against Yukos*

350. On 26 May 2004 the Commercial Court of Moscow ordered Yukos Oil Company Plc to pay taxes totalling RUB 47,989,073,311, fines in the amount of RUB 32,190,430,314 and a penalty in the amount of RUB 19,195,605,923. This award related, in particular, to taxes due by Yukos for the year 2000. The Commercial Court's award included (but was not limited to it) reassessed taxes for 2000 attributable to the operations of Mitra, Vald Oil, and Business Oil, i.e. three of the four ZATO trading companies that formed the basis for the civil damages award made against the applicants within the criminal proceedings. The Commercial Court found that those companies (along with trading companies registered in low tax zones) had obtained tax cuts unlawfully.

The Commercial Court further decided that their operations with Yukos oil had to be treated as operations of Yukos itself, because these companies were nothing more than a “façade” for Yukos, and Yukos obtained all benefits from those operations. Consequently, the Commercial Court imputed the unpaid taxes of those trading companies directly to Yukos (for more details see the judgment in the *Yukos* case, § 48). The decision of the Commercial Court did not contain a detailed calculation of the amounts due by each trading companies.

351. Those tax re-assessments were upheld on appeal on 29 June 2004, and on cassation appeal on 17 September 2004.

352. On 3 October 2006 the Meshchanskiy District Court ordered that the first applicant pay RUB 127,564,727.04 to the Moscow Tax Inspectorate no. 2 in relation to the unpaid personal income taxes.

353. Over the following months commercial courts examined several other cases opposing Tax Service and Yukos concerning tax underpayments. The majority of the claims by the Tax Service were upheld, which eventually led to the forced sale of the assets of Yukos and its bankruptcy.

## *2. Disciplinary and other measures against the applicants' lawyers*

354. In the course of the proceedings against the applicants and shortly afterwards the GPO made several attempts to disbar the lawyers who represented the applicants before the domestic instances and the Court.

355. Thus, of nineteen lawyers acting for the applicants and in associated cases, twelve have been the subject of disbarment proceedings (Ms Artyukhova, Mr Drel, Ms Moskalenko, Mr Shmidt, Mr Mkrtychev and others). In particular, the GPO sought disbarment of Ms Moskalenko in March 2007 on the basis that her absence from Chita “grossly violated the right of [the first applicant] to defence”. To counter those accusations the first applicant had to make a statement that he was fully satisfied with Ms Moskalenko’s work. Mr Drel was accused of acting in breach of professional conduct by not appearing at a hearing on 14 September 2005. On 23 September 2005 the Ministry of Justice sent a recommendation to the Moscow City Chamber of Lawyers to institute disciplinary proceedings against the lawyers, indicating that they should be disbarred. That same day the press service of the GPO published a demand on the part of the GPO for the institution of disciplinary proceedings and the disbarment of all the first applicant’s lawyers, with the exception of Mr Padva. The demands of the GPO, the Moscow City Court and the Ministry of Justice were subsequently rejected by the Chamber of Lawyers.

356. In the course of the proceedings the lawyers’ belongings were inspected, and some of the lawyers were subjected to bodily searches involving undressing (Ms Terekhova, Ms Levina and Ms Khrunova); one was detained in custody and left Russia for fear of prosecution. Two lawyers were assaulted by unknown individuals.

357. In November 2005 the International Protection Centre, which Ms Moskalenko founded, was subjected to a tax audit of the entirety of its activities.



358. Early in the morning of 23 September 2005, several hours after the appeal court had rendered its judgment, Mr Amsterdam, one of the first applicant's foreign lawyers, was visited in his hotel room by law-enforcement officers. Later that day his visa was revoked and he was ordered to leave Russia within 24 hours.

359. The question of harassment of the first applicant's lawyers was raised by several former managers of Yukos in the extradition proceedings in which they took part in the United Kingdom (for more details see below). Senior Judge Workman of the London Extradition Court, who examined extradition requests by the GPO, concluded that the first applicant's lawyers had been subjected to harassment. In particular, he held as follows:

"Mr Shmidt provided me with details of lawyers involved in the cases concerning Mr Khodorkovskiy, Mr Lebedev and Mr Pichugin. Of nineteen individuals, twelve have been the subject of application for disbarment, five have been subjected to searches, two assaulted, one detained in custody and two forced to leave Russia. I share Mr Shmidt's view that this catalogue defies belief that so many lawyers could coincidentally face so many misfortunes accidentally or by genuine due process of law. I am satisfied that at least some of the lawyers suffered harassment and intimidation".

### 3. *Second criminal case against the applicants*

360. Simultaneously with the investigation into the misappropriation of shares and tax evasion the GPO conducted a separate investigation into other facts related to the business activities of Yukos and its managers in 1998-2003. In particular, the applicants were suspected of having embezzled the profits arising from the output of the companies affiliated with Yukos. The applicants were also charged with money laundering.

361. In 2009 the second case was brought to trial. On 27 December 2010 the applicants were convicted by the Khamovnicheskiy District Court. This conviction was upheld on appeal on 24 May 2011.

362. On 21 December 2011, the Presidential Council of the Russian Federation for Civil Society and Human Rights submitted a 400-page report on the applicants' second trial. The report contained contributions from a group of Russian, European and American experts and scholars. None of the expert group found any support for the allegations of embezzlement or money laundering. Having considered the expert reports, the Presidential Council for Civil Society and Human Rights issued a series of recommendations in which, amongst other things, it called for the judgment to be repealed and describing the second case as "a miscarriage of justice": in particular, the report held that the applicants were convicted for acts that were not directly prescribed by the criminal law and did not contain features of a *corpus delicti*, as well as without due process. The experts pointed out that the verdict contradicted judgments in other Yukos-related cases, which have not been overturned, and which subjected Yukos to punitive taxation on oil sales; in this case, the same oil was found to have been stolen, which would have precluded it from being taxed.

4. *Proceedings on extradition of former Yukos managers, requests for legal assistance by the Russian Federation in foreign courts and other Yukos-related proceedings abroad*

363. Some of the applicants' former colleagues and business partners left for the UK for fear of prosecution (in particular Ms Chernysheva, Mr Maruev, Mr Temerko, Mr Gorbachev, Mr Burganov and others). The GPO lodged requests for their extradition to Russia. All of the extradition requests by the GPO were eventually dismissed by the British courts on the ground that those individuals might not receive a fair trial at home. In particular, in March 2005 Judge Workman, who reviewed one of the extradition requests, concluded that "it was more likely than not that the prosecution of Mr Khodorkovskiy was politically motivated." The GPO did not appeal against those decisions. A similar conclusion was reached by the Nicosia District Court (Cyprus) in a 2008 extradition case concerning former Yukos managers. On 31 July 2007 Czech High Court upheld the refusal of a lower court to extradite to Russia ex-employee of Yukos, Ms Vybornova. On 31 August 2007 the Vilnius Regional Court refused the extradition of Mr Brudno. Extradition of former Yukos employees and business partners was refused by the Estonian, German and Israeli courts, always with reference to the improper motives of prosecution.

364. The GPO also requested legal assistance from a number of European countries where Yukos' assets were presumably held or operations had been conducted. The Swiss Federal Tribunal ordered the Swiss government not to co-operate with the Russian authorities on account of such requests after it concluded that the applicants' trial had been politically motivated.

365. In particular, the Swiss Federal Tribunal in its judgment of 13 August 2007 concluded that all of the facts, taken together, "clearly corroborated the suspicion that criminal proceedings have indeed been used as an instrument by the power in place, with the goal of bringing to heel the class of rich oligarchs and sidelining potential or declared political adversaries". It noted, in particular, that "the political ... nature of the proceedings in Russia was reinforced by the violations of guarantees respecting human rights and the right to a defence" and referred to the conditions of the execution of the applicants' sentence.

366. In September 2010, in *Rosinvest Co UK Ltd v. the Russian Federation*, the Arbitration Institute of the Stockholm Chamber of Commerce considered the tax claims that had forced Yukos into bankruptcy in the context of a claim by a Yukos shareholder Rosinvest Co. for loss of investments on the basis of a 1989 bilateral UK-USSR treaty for the protection of capital investments. The Tribunal found that the Russian Federation had breached Article 5 of the IPPA, forbidding expropriation of the investments of investors of either Contracting Party. The Tribunal found that "the treatment of Yukos and of Mr Khodorkovskiy changed dramatically after the latter had publicly criticized the Putin administration and after several projects suggested by Yukos seem to have been understood as threatening the government's control over the Russian petroleum resources".

367. The applicants also informed the Court about other litigation before the arbitration tribunals which opposed minority shareholders of Yukos and the Russian Government. In particular, the first applicant submitted a copy of the decision of 20 July 2012 by the Arbitration Institute of the Stockholm Chamber of Commerce in the case of *Quasor de Valores, Orgor de Valores, GBI 9000 and ALOS 34 v. the Government of the Russian Federation*. In this case the Tribunal found in favour of the investors and concluded, in particular, that tax minimisation schemes employed by Yukos had been lawful, and that the domestic enforcement proceedings against Yukos amounted to a *de facto* expropriation and were not a genuine attempt to collect taxes.

### **G. Reaction of international organisations, NGOs and political figures**

#### *1. Public statements of State officials; testimony about “out of record” conversations with public officials about Yukos*

368. The applicants’ case attracted considerable public attention in Russia and abroad. In the course of the trial and after it many prominent public figures and influential organisations expressed their doubts as to the fairness of the criminal proceedings against the first applicant and his colleagues. The applicants submitted documents to that effect.

369. In particular, the applicants referred to statements by several high governmental officials who either directly confirmed or supposed that the applicants had been prosecuted for political reasons (such as Mr Gref, the Russian Economic Development and Trade Minister, Mr Illarionov, President Putin’s Economic Adviser, Presidential Aide Mr Shuvalov (now a First Deputy Prime Minister), the former Minister of Economics Mr Yasin, and Mr Mironov, the Chairman of the upper chamber of the Russian Parliament).

370. The applicants relied upon the public statements and court testimony of Mr Kasyanov, the Russian Prime Minister at the time of the applicant’s arrest and detention. Thus, in his interview to *Echo Moskvy* radio station on 27 September 2007 Mr Kasyanov stated as follows:

“There were mistakes, many mistakes, which I am also ashamed of, such as arrest of Mr Lebedev and then of Mr Khodorkovskiy, and start of pressure being put on Yukos ... I know that there are essential facts which the authorities should have presented in court, but which they didn’t present. The ministries, official bodies and various organizations that had anything to do with this case were forbidden to present any documents or facts that may have led people to form a different opinion from the one that was presented to the court by the prosecution. So the court took the only right decision, from the point of view of the authorities”.

371. In May 2010 Mr Kasyanov was called to testify at the applicants’ second trial at the Khamovnicheskiy District Court in Moscow. In particular, Mr Kasyanov testified about a conversation he had had with President Putin on 11 July 2003, after the arrest of Mr Lebedev. Mr Kasyanov described his dialogue with Mr Putin on that day in the following terms:

“During a break in the meeting I asked Mr Putin again about what was happening with Yukos. At the beginning, Mr Putin, as previously, tried to avoid giving a direct answer, but I was persistent, and after another attempt on my part he answered me that they (meaning [the first applicant] and other owners of Yukos) provided funding not only to Yabloko and the Union of Right Forces (the SPS) which he (Mr Putin) allowed them to provide funding to, but also to communists. And he didn’t allow sponsoring communists. I didn’t say anything in response because I was surprised at what was said. I hadn’t even suspected that statutory-allowed financial support of political parties also needed to be approved confidentially by the President. I didn’t know that Mr Putin had given [the first applicant] permission to fund the SPS and Yabloko. But Mr Putin’s answer left me in no doubt that by funding the communists [the first applicant] had crossed a line so far as Mr Putin was concerned and that the criminal prosecution case of Yukos employees was started exactly because of the funding of political parties not sanctioned by Mr Putin.”

372. Written depositions of Mr Kasyanov in the same terms were submitted to the Court in 2009. The former Prime Minister also explained that the tax optimisation schemes, which formed a central component of the criminal case against the applicant, had been in conformity with the law at the relevant time. Mr Kasyanov believed that the initial reason for the criminal prosecution of the applicant was the political concern of President Putin and his immediate circle prior to the State Duma election of December 2003. Mr Kasyanov did not think that the criminal prosecution of the applicant had originally been caused by economic reasons, including intent to take over his assets, but that goal appeared subsequently as a concomitant one to the original political goal of removing a political opponent. In the applicants’ words, Mr Kasyanov’s evidence supported that already given by Mr Dubov, a former Duma Deputy.

373. The applicants also referred to the testimony of senior Yukos executives who had contacts with governmental officials in 2003. Mr Shakhnovskiy testified in 2006 that in 2003 he had met the then Minister of Economy, Mr Gref, who had told him that “the real target of the attack [on the applicants] was the liberal-democratic wing of the government ... and not just Mr Khodorkovskiy himself”. Mr Gref also said that “Mr Khodorkovskiy had placed himself in the firing line by his overt and powerful support for the liberal wing in Russian politics”. Mr Shakhnovskiy also reported on his meeting with the then Minister of Finances, Mr Kudrin, who said, *inter alia*, that unpaid taxes had been just a pretext used to crush Mr Khodorkovskiy and take away his company. Mr Nevzlin, a former member of the upper chamber of the Russian Parliament and one of the co-owners of Yukos, has testified that in mid-spring 2003 he had been warned by Mr Lesin, the Media Minister, that a political decision had been taken to attack the first applicant and Yukos. Mr Dubov, another major shareholder of Yukos, testified that on 24 October 2003 (the day before the first applicant’s arrest) Mr Surkov (one of the closest aids of President Putin) had said that “all government institutions had been forbidden from having any contact with Open Russia and that President Putin had stated that Yukos was going to be eliminated from the political sphere”. Mr Dyatelev, one of the applicants’ lawyers, gave evidence that a former Tax Minister, Mr Pochinok, was told by Mr Surkov not to give evidence at the applicant’s trial in relation to the tax

charges. Mr Ivlev, a lawyer with ALM Feldmans (a law firm working for Yukos), testified that in November 2003 he had met Mr Shuvalov, another aid to President Putin, who had said that there had been absolutely nothing he could do to stop the attacks on the first applicant and Yukos, and implied that decision concerning their fate had been taken at the highest level within the Presidential Administration.

## *2. Statements by international organisations*

374. Several international organisations expressed their concern about a possible political underpinning of the first applicant's criminal prosecution in the first trial (see Resolution 1418 (2005) adopted on 25 January 2005 by the Parliamentary Assembly of the Council of Europe, and the statement of the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly adopted on 6 October 2005).

375. Further, in May 2009 the European Parliament adopted a Resolution on the Annual Report on Human Rights in the World 2008 and the European Union's policy on the matter, in which it stated that the first applicant was "a political prisoner".

376. On 23 June 2009 Mrs Leutheusser-Schnarrenberger, the Special Rapporteur of the Parliamentary Assembly of the Council of Europe published her report, entitled "Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states". At a plenary session on 30 September 2009 the Parliamentary Assembly accepted the report from Mrs Leutheusser-Schnarrenberger and unanimously passed a resolution that noted that the applicants' second trial gave rise to concerns that "the fight against legal nihilism launched by President Medvedev is still far from won". In her report the Special Rapporteur analysed the new trial as an example of a high profile case involving political motivation.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### **A. Criminal proceedings in Russia at the time of the events – a general overview**

377. For most criminal cases the proceedings start with a "preliminary investigation" carried out by an empowered State investigative agency. At this stage, the investigative agency, having received information about the commission or the preparation of a crime from other sources, opens the case and starts the investigation. The investigative authority in the present case was the office of the Prosecutor General ("the prosecution").

378. The prosecution carries out various investigative measures, such as searches, questioning of witnesses, expert examinations of material evidence, etc. For certain investigative measures the prosecution has to request a court order; the same concerns preventive measures, in particular the detention of the suspect. If having collected the evidence the prosecution concludes that a particular person has committed a crime, the prosecution makes an order formally charging the said person. The accused person may challenge any decisions (or inaction) of the prosecution before

a higher prosecution official or, in some instances, before a court. The accused person may also seek to supplement the case file by requesting additional investigative steps to be taken by the prosecution.

379. If, in the course of the investigation, the prosecution decides that there is no basis for bringing the case to trial, the accused is released (if detained) and the case is closed. Otherwise, the prosecution must draw up an act of indictment. At this point the prosecution must invite the interested parties, including the accused and his representatives, to examine the materials collected in the course of the investigation supporting the accusation and contained in the case file. The time for reading the case file by the accused and his counsel may be limited (for example, when the defence deliberately delays the proceedings). When the time for reading the case file is over, the prosecution refers the case to the appropriate court.

380. As a general rule, trials are held in open court. All evidence in the case is, as a rule, subject to direct examination in oral proceedings. The judgment of the court may be based only on the evidence examined during the trial. The same judge must hear the case from beginning to end. During the trial the prosecutor supports the accusation, but can withdraw it wholly or in part. The parties have equal rights to make challenges, submit petitions and objections, produce evidence, participate in examination, submit pleadings and remarks, etc. A court secretary keeps a summary record of the hearings.

381. Before the start of the hearing the presiding judge invites the parties to submit requests, if any (for example, to summon new witnesses, to carry out an additional expert examination, etc). After ruling on such requests, the judge begins the “judicial investigation” of the case. The prosecutor opens the case for the accusation by setting out succinctly the essence of the accusation with reference to the relevant Articles of the Criminal Code. The judge then asks the accused if he (the accused) understands the accusation and whether or not he considers himself guilty. If the accused understands the charges and does not plead guilty, the examination of evidence produced by the prosecution begins. The prosecution decides on the order in which witnesses are called and other evidence is presented to the court. The defence can intervene and challenge the witnesses for the prosecution, put questions, etc., but the presiding judge can reject leading or irrelevant questions. An expert witness who gave an opinion during the preliminary investigation may be summoned and questioned in court; further expert examinations can be ordered if necessary. After the prosecution finishes its submission of evidence, the floor is given to the defence. The prosecution can challenge evidence adduced by the defence.

382. Upon completing the study of evidence submitted by the parties, the court asks whether they want to add anything to the judicial investigation. If there is such a request, the court discusses the matter and takes a decision, together with performing any other necessary judicial actions. The judicial investigation is then declared to be completed and the court passes to the stage of oral argument.

383. Oral argument consists of statements to the court, first by the prosecution, and then by the defence. The victim, the claimants, if any, and

the defendants can also take part in the pleadings. After all the participants have given their statements, they may each speak in rebuttal, the right of last rebuttal always belonging to the defence counsel and the person brought to trial. The person brought to trial has the last word.

384. The deliberations are held and the judgment is drawn up in a conference room behind closed doors; no one, except the judges who consider the case, can be present. The judgment must be “lawful, well-founded and just”. Once the judgment is signed by all judges, the bench returns to the courtroom where it is read out to the parties and the public. It is common practice, in complex cases, to read out only the operative part of the judgment; in this case the full text of the judgment is delivered later.

385. The parties can appeal; in most criminal cases (except for those heard by the justice of the peace at first instance) the court of appeal is the only court of “ordinary” jurisdiction available for the parties to challenge the judgment. Access to “supervisory review” proceedings is at the discretion of the judicial authorities. The appeal must be filed within ten days from the date on which the judgment is delivered. The court of appeal may modify or quash the judgment, adopt a new decision or refer the case for fresh consideration to the first instance court. The appeal hearings are *de jure* open to the public and oral; however, in practice the court of appeal rarely examines evidence directly. More often the appeal hearing consists only of the parties’ oral argument.

## **B. Specific provisions of the criminal procedure law**

### *1. Withdrawal of a judge; legal force of the judgment in a related case*

386. Articles 61-63 of the CCrP describe the situations in which a judge cannot sit on the bench in a particular case. The judge must withdraw if he is an injured party in that criminal case, has already participated in that criminal case in a different capacity, if he is a relative of any participant in the criminal proceedings, or “if there are other circumstances which give reason to believe that [the judge] is personally, directly or indirectly, interested in the outcome of the criminal case”. A judge whose impartiality is in doubt must withdraw of his own motion (Article 62 § 1); alternatively, a party to the proceedings may challenge a judge on those grounds (Article 62 § 2). Article 63 of the CCrP provides that the same judge cannot sit on the bench in the trial court and later in the court of appeal or in the supervisory review court in the same case. A judge who sat on the bench during the first trial cannot remain in the composition if the case is remitted for re-trial.

387. There are no rules governing the participation of the same judge in different, yet related, criminal cases. Article 90 of the CCrP, as in force at the material time, provided that “factual circumstances established in a court judgment ... which have acquired legal force, should be accepted by a court ... without additional verification, if those factual circumstances do not raise doubt ... That being said, such a court judgment cannot predetermine the question of guilt of those persons who had not participated in [those] proceedings”.

2. *Confidentiality of lawyer-client contacts in prison and lawyers' professional privileges*

388. The Detention on Remand Act of 1995 (Federal Law On the Detention of Suspects and Defendants no. 103-FZ of 15 July 1995), as in force at the material time, provides in section 18 that a detainee has a right to confidential meetings with his lawyers. That section does not define whether the lawyer and the client are entitled to make notes during such meetings and to exchange any documents. Meetings should be conducted out of the hearing of prison staff, but the prison staff should be able to see what is happening in the hearing room. Section 18 establishes that a meeting can be interrupted if the person meeting the detainee tries to hand him “prohibited objects, substances, or foodstuff” or to give him “information which may obstruct the establishment of truth in the criminal case or facilitate criminal acts”.

389. Section 16 of the Detention on Remand Act defines that rules on sending and receiving correspondence, as well as rules on the seizure of prohibited objects, substances or foodstuff may be established by the internal regulations of the remand prisons.

390. Section 20 establishes that all correspondence by detainees goes through the prison administration, which may open and inspect the mail. Correspondence addressed to the courts, to the ombudsman, to the prosecuting authorities, to the European Court of Human Rights, etc., is free from perusal but correspondence with lawyers is not mentioned in this list (for more details see *Moiseyev v. Russia*, no. 62936/00, § 117, 9 October 2008). It appears (see the paragraphs immediately below) that the Detention on Remand Act was routinely interpreted by the prison authorities as allowing the latter to seize and inspect correspondence between a detainee and his lawyer.

391. Section 34 of the Detention on Remand Act provides, in so far as relevant, as follows:

“[Criminal defendants in the remand prisons] are subjected to personal search, taking of a photo and of fingerprints. Premises where they are detained are subjected to searches; [the defendants’] personal belongings and parcels are inspected. ...

Where there are sufficient reasons to suspect that a person entering or leaving the prison is carrying prohibited objects, substances [or] foodstuff, the prison officials may search their clothes and belongings ... and seize [those] objects, substances and food stuff ... which [detainees] are not allowed to have or to use.”

392. The Internal Regulations for Remand Prisons, introduced by Decree no. 148 of the Ministry of Justice of 12 May 2000, in the part entitled “Receiving and sending by the suspects and accused of telegrams, letters and money transfers”, contain sections 84 and 86, which provide that correspondence of the detainees is subject to perusal, and that all letters must be submitted to the remand prison staff member in a non-closed envelope. As a rule, the administration must forward letters to the addressee within three days of their receipt from the detainee. However, there are exceptions to this rule - section 91 provides as follows:

“Letters and telegrams addressed to [co-defendants], victims, or witnesses of the crime, as well as [letters and telegrams] containing information about the case, slanderous language, threats, calls for violence, crimes or other offences, information



on security arrangements in the remand prison, about prison staff, about methods of passing prohibited items, or [containing] other information which might prevent the establishment of truth in a criminal case, contribute to the commission of crimes, or which are written in cryptography ..., which contain State secret or other information protected by law, shall not be dispatched to the addressee, and must be transmitted to the body in charge of the criminal case”.

393. Pursuant to section 99 of the Internal Regulations, “proposals, declarations and complaints [of a detainee] addressed ... to the defence lawyer, shall be considered by the administration of the remand prison and dispatched to the addressee within three days”. Pursuant to section 103, “replies to the proposals, declarations and complaints received in the remand prison must be read out to [the detainee] ... and attached to their personal file”.

394. Section 27 of the Internal Regulations of 2000 reads as follows:

“Items prohibited for keeping and using [by the detainees] include objects (*predmety*), substances and foodstuff which are dangerous for life or health, which can be used as a tool of a crime, or which may frustrate achieving the purposes of detention on remand, and which are not included in the List of Foodstuff, Items of First Necessity, Shoes, Clothes and other goods [allowed for keeping and use by the detainees]”.

395. The Internal Regulations for Remand Prisons, introduced by Decree no. 189 of the Ministry of Justice of 14 October 2005 (which replaced Decree no. 148), contains section 146, which establishes that lawyers cannot use computers, audio- and video-recording equipment, copying machines, etc., during meetings with their clients in remand prisons unless authorised by the prison administration. On 31 October 2007 the Supreme Court of the Russian Federation struck down that provision as unlawful (decision confirmed on 29 January 2008).

396. On 29 November 2010 the Constitutional Court of the Russian Federation interpreted the above provisions of the Detention on Remand Act in their constitutional meaning. The Constitutional Court held that the law may legitimately introduce certain limitations on lawyer-client confidentiality, including perusal of their correspondence. However, such limitations should not be arbitrary, should pursue a legitimate aim and should be proportionate to it. Legitimate aims may include preventing further criminal activity by the accused and preventing him from exerting pressure on witnesses or otherwise obstructing justice. The general rule is that lawyer-client correspondence is privileged and cannot be perused. Any departure from this rule is permissible only in exceptional circumstances where the authorities have valid reasons to believe that the lawyer and/or his client are abusing the confidentiality rule. Further, the Constitutional Court specified that the prison authorities should have “sufficient and reasonable grounds to believe” that the correspondence contains unlawful content and that they may peruse such correspondence only in the presence of the persons concerned and on the basis of a written motivated decision. The results of the inspection of the mail should also be recorded. At the same time the Constitutional Court ruled that any correspondence addressed by a detainee to his lawyer but not submitted “through the prison administration”, as provided by the federal law, may be checked by the prison administration.

397. Article 19.12 of the Code of Administrative Offences defines liability for passing to the detainees of prohibited “objects, substances or foodstuff”. Article 27.1 of the Code provides, in so far as relevant, that in order to suppress an administrative offence government officials who have the power to do so may conduct “inspections” of the person and/or of the personal belongings and seize objects and documents. Article 27.10 regulates the procedure for the seizure of objects and documents. It provides that seizure of objects which are tools or an object of an administrative offence or documents which may have relevance for the administrative case, which are discovered at the place where the administrative offence was committed or which are kept by the person whose person or personal belongings are inspected, may be performed by a staff member of the remand prison in presence of two attesting witnesses.

398. Section 8 (2) of the Advocacy and Bar Act of 2002 (Federal Law of 31 May 2002, No. 63-FZ, the “Advocacy Act”) provides that a lawyer cannot be questioned as a witness on account of information which he had learned when a prospective client solicited his professional services or in the course of rendering such services. Section 8 (3) provides that a search in the premises occupied by an advocate for professional use must be authorised by a court order. Any information obtained as a result of the search may be used in criminal proceedings under condition that this information did not make part of the lawyer’s case file [*proizvodstvo*] in a particular client’s case (“except tools of crime and objects not allowed for free circulation under Russian law”). Section 18 prohibits seeking from advocates any information related to the legal assistance they render in a specific case.

399. On 8 November 2005 the Constitutional Court issued ruling No. 439-*O* which gave constitutional interpretation to Articles 7, 29, and 182 of the CCrP, read in conjunction with Section 8 (3) of the Advocacy and Bar Act. It ruled, in particular, that the Advocacy and Bar Act is a *lex specialis* and must therefore take precedence over the general rules of authorisation of searches insofar as searches in the lawyer’s offices are concerned. In particular, the Constitutional Court ruled that the applicable legislation in its constitutional meaning “does not allow searches to be conducted on the business premises of a lawyer or lawyers’ entity without a special court decision in this respect”.

### 3. *Expert evidence and documentary evidence*

400. Article 74 of the CCrP contains a closed list of sources of information which can be used as evidence in criminal trial. That list mentions *inter alia* expert reports and expert testimony, as well as “other documents” (Article 74 (2) (6)). Article 84 (1) of the CCrP provides that “other documents” can be admitted as evidence if they contain information which may be important for establishing the facts which need to be established within the criminal proceedings.

401. The CCrP (Articles 57 and 58) distinguishes between two types of expert witnesses: “experts” *proprio sensu* [*experty*] and “specialists” [*spetsialisty*]. Their role in the proceedings is sometimes similar, albeit not absolutely identical. Whereas the “experts” are often engaged in making

complex forensic examinations prior to the trial (for example, dactyloscopic examinations, or post-mortem examinations of corpses), a “specialist” is summoned to help the prosecution or court in handling technical equipment, examining an item of material evidence, understanding the results of “expert examinations”, assessing the methods employed by the “experts”, their qualifications, etc. Both can produce their reports to the court and/or testify in person. Under Article 57 of the CCrP (with further references) the right to commission an expert examination belongs to the investigator or to the trial court. The court may commission an expert examination at its own initiative or on the request of the parties.

402. Article 58 (1) of the CCrP defines the functions of a “specialist” (in so far as relevant to the present case) as follows:

“A specialist is a person possessing special knowledge, who is brought in to take part in the procedural actions ..., to assist in the discovery, securing and seizure of items of evidence ..., in the use of technical equipment ..., to put questions to the expert and also to explain to the parties and to the court matters which come within his or her professional competence”.

403. Article 58 (2) of the CCrP stipulates the rights that the specialist has in the proceedings, as well as his or her obligations. It refers to Articles 168 and 270 of the Code which deal with summoning the specialist and the procedure for his participation in the criminal proceedings. Article 164 deals with participation of the specialist in investigative actions at the pre-trial investigation stage at the request of the investigator. Article 270 provides that the presiding judge at the trial should explain to the specialist his or her rights and responsibilities before questioning.

404. The Plenary Supreme Court of the Russian Federation in its Ruling no. 8 of 4 July 1997 “On certain aspects of the application of penal law on tax evasion by the courts of the Russian Federation” held *inter alia* as follows:

“17. ... In view of the specific character of criminal cases concerning tax evasion, it is recommended that the courts, in order to establish circumstances of tax evasion in the most ample and comprehensive manner, invite for the participation in the trial, when necessary, specialists (*специалисты*) which have relevant knowledge in the field of taxation”.

405. Under Article 75 of the CCrP, evidence obtained in breach of the provisions of the Code, are inadmissible. By virtue of Article 50 (2) of the Russian Constitution, in the administration of justice evidence obtained in violation of the federal law shall not be used.

406. Article 252 of the CCrP stipulates that the trial proceedings must concern only the accused person and must be limited to the accusations which have been formulated against him. Changing the scope of the accusation is possible to the extent that it does not worsen his situation and does not impair the rights of the defence.

407. Article 286 of the CCrP provides that the court may attach to the materials of the case-file documents produced by the parties.

#### 4. *Collecting of evidence by the defence*

408. The old CCrP (in force before 2002) provided that the duty to obtain evidence fell to the investigative bodies. The new CCrP (applicable

to the case) recognises the defences' right to collect evidence, albeit with important limitations. Thus, Article 53 (2) of the Code provides that the defence lawyer has a right "to collect and submit evidence necessary for providing legal assistance, in accordance with Article 86 (3) of the Code". Amongst other powers of the defence lawyer Article 56 (3) mentions "engaging a specialist in accordance with Article 58 of the Code". However, it does not allow the defence to commission and produce "expert reports".

409. Article 86 of the new CCrP formulates the rules on collecting evidence as follows:

"1 In the course of the criminal proceedings evidence shall be collected by ... the investigator, the prosecutor and the court by means of investigative measures and other procedural actions provided by the present Code.

2. [An accused] ... and his representatives may collect and produce written documents ... to be added to the case file as evidence.

3. The defence lawyer may collect evidence by:

(1) obtaining objects, documents and other information;

(2) questioning persons with their consent; or

(3) requesting ... documents from the authorities ... and other organisations which are obliged to produce such documents or their copies."

410. The defence lawyer's right to obtain expert evidence is defined in Section 6 (4) (3) of the Federal Law No. 63-FZ "On Advocacy" of 2002:

"... 3. The advocate can ... (4) engage specialists on a freelance basis in order to obtain explanations on the issues relevant to the legal assistance".

411. Article 271 (4) of the CCrP stipulates that the court cannot refuse to hear a witness or a "specialist" who arrived at the court at the request of one of the parties.

##### *5. Reading-out of written testimony of witnesses at the trial*

412. Article 281 of the CCrP ("Reading-out of the testimony of the victim and of the witness) reads, in so far as relevant, as follows:

"2. If the victim or the witness did not appear in court, the court shall be entitled on the request of a party or on its own initiative to decide on the reading-out of the testimony previously given by them, in the event of:

1) the death of the victim or witness,

2) their very poor health, impeding their appearance in court,

3) the refusal of a victim or witness who is a foreign citizen to appear in court when summoned,

4) a natural disaster and other extraordinary circumstances impeding their appearance in court."

##### *6. Detention on remand*

413. For the relevant provisions of the Russian law concerning detention on remand under the Criminal Procedure Code, see *Khodorkovskiy (no. 1)*, §§ 86 et seq.

### C. Taxation; criminal and tax liability for tax evasion

#### 1. Tax Code on re-characterisation of transactions and application of market prices to “suspicious transactions”

414. Article 40 (1) of the Tax Code requires that parties trade at market prices. It also establishes a refutable presumption that the prices agreed to by the parties correspond to market levels and are used for taxation purposes. Under Article 40 (2) of the Tax Code, the tax authorities are empowered to overrule the above presumption by verifying and correcting the prices for taxation purposes. A finding that the prices were lowered usually leads to the conclusion that the taxpayer understated the taxable base and thus failed properly to pay his taxes. This may happen in a number of cases, in particular when the parties are interdependent.

415. Under Article 45 (2) 3 of the Tax Code the power to re-characterise transactions by a taxpayer with third parties, their legal status and the nature of the taxpayer’s activity in tax disputes lies with the courts (as opposed to executive bodies). Section 7 of Law No. 943-1 of 21 March 1991 “On Tax Authorities in the Russian Federation” vests the power to contest transactions as void and recover everything received in such transactions with the State budget.

416. Under Article 11 of the Tax Code, the institutions, notions and terms of the civil legislation of Russia used in the Tax Code keep their respective meanings, unless specifically stated.

#### 2. Sham transactions under the Civil Code

417. Under Article 153 of the Civil Code, transactions are defined as activities of natural and legal persons creating, altering and terminating their civil rights and obligations. Article 10 (1 and 2) of the Code states that parties involved in civil-law transactions are prohibited from abusing their rights. In such cases, the courts may deny legal protection in respect of the right which is being abused. Article 10 (3) establishes a refutable presumption of good faith and reasonableness of actions on the parties in civil-law transactions.

418. Article 166 of the Civil Code states that a transaction may be declared invalid on the grounds established by that Code, either by force of its being recognized as such by the court (a voidable transaction), or regardless of such recognition (a void transaction).

419. Under Article 167 of the Civil Code, void transactions entail no legal consequences, apart from those relating to their invalidity, and are invalid from the moment they are conducted.

420. Article 170 (2) establishes specific rules in respect of two types of void transactions: “imaginary” transactions (effected only for form’s sake, without the intention to create the corresponding legal consequences) and “sham” transactions (effected for the purpose of screening other transactions). This provision condemns both imaginary and sham transactions as void.

421. It also provides that in the event of sham transactions, the rules governing the transaction that was in fact intended by the parties may be

applied by a court, regard being had to the substance of this transaction (the so-called “substance over form” rule).

3. *Application of “sham transaction” and “bad faith” concepts in tax disputes*

422. By a decision dated 15 May 1997 in the case of the *Tax Service v. Commercial Bank Mechel-Bank and OAO Mechel* (no. F09-162/97-AK), the Federal Commercial Court of the Ural Circuit quashed the decisions of lower courts in which they had upheld the lawfulness of a “kickback” contract which had been concluded between the respondent bank and the respondent company. The Circuit Court ruled that the lower courts had failed to study and to take account of all of the circumstances relevant to the case at issue. In particular, the court noted the finding that the contract had been concluded specifically to avoid the payment of taxes. Accordingly, it reversed and invalidated the contract as unlawful, contrary to the legal order and morality, and ordered that the proceeds derived by the parties from the contract be seized in favour of the State.

423. In a decision of 9 December 1997 in case no. 5246/97, the Presidium of the Supreme Commercial Court of Russia invalidated a loan secured by a promissory note and a related pay-off agreement as imaginary and sham respectively. The court had regard to the terms of contracts concluded between the parties and the manner of their execution, in particular the fact that the loan had never been used by the borrower; it concluded that the transactions in question covered the sale of a promissory note and invalidated them as sham.

424. In a decision of 6 October 1998 in case no. 6202/97 the Presidium of the Supreme Commercial Court of Russia invalidated two contracts for the sale of securities and a related loan agreement as sham, having regard to the terms of contracts in question, the manner of their execution and the contractual prices. The court established that the sales contracts in fact covered the loan agreement secured by the pledge of securities and remitted the case for re-trial.

425. The case of *Tax Service v. OOO TF Grin Haus* (no. A40-31714/97-2-312) concerned a series of intertwined transactions (rent contracts and loan agreements) between the respondent entity and two third parties: as a result, the respondent leased a building in central Moscow to the third parties, but was able to avoid inclusion of the rent payments in the taxable base of its operations by claiming that they were interest payments in respect of the loan agreement. The Tax Service discovered the tax-evasion scheme, re-characterised the transactions in question as rent and ordered the taxpayer to pay RUB 2 billion in back taxes. The case was examined in three rounds of court proceedings by the courts at three levels of jurisdiction. Having regard to the substance of the transactions entered into by the respondent, the terms of payment and execution of the contested contracts, and, generally, to the conduct of the respondent company and the third parties, the courts decided that the contractual arrangement had been sham, re-characterised the arrangement as rent and upheld the decision of the Tax Service. In the first round of proceedings the courts adopted their decisions on the following dates: 1

December 1997, 27 January 1998 and 30 March 1998. In the second round of proceedings the decisions were adopted by the first-instance and appeal courts on 26 May 1998 and 21 July 1998. The decision of the cassation court was taken on an unspecified date. The third round of proceedings involved decisions on 17 November 1998, 25 January 1999 and 2 March 1999.

426. In its decision no. 24-*P* dated 12 October 1998, the Constitutional Court of Russia for the first time made use and interpreted the notion of “bad/good faith” to assess the legal consequence of the conduct of taxpayers in its jurisprudence. In this case this was done to define the moment at which a taxpayer can be said to have discharged his or her constitutional obligation to pay taxes.

427. In its decision no. 138-*O* dated 25 July 2001, the Constitutional Court of Russia confirmed that there existed a refutable presumption that the taxpayer was acting in good faith and that a finding that a taxpayer had acted in bad faith could have unfavourable legal consequences for the taxpayer. The case again concerned the definition of a moment at which a taxpayer can be said to have discharged his or her constitutional obligation to pay taxes.

428. Starting from 2002 the concept of a “bad-faith taxpayer” regularly appeared in the case-law of the North-Caucasian District Commercial Court (see the *Yukos* judgment, §§ 361 et seq.).

#### *4. Definition of tax evasion under the Criminal Code*

429. Articles 198 and 199 of the Criminal Code define tax evasion. In 1999-2003 those provisions, insofar as relevant, read as follows:

##### **Article 198. Evasion by a Natural Person of Paying Taxes or Contributions ...**

“1. Evasion by a natural person of paying taxes ... by way of failure to submit a tax declaration where submission of such declaration is obligatory under the law, or by knowing inclusion in the tax declaration of false data on profits and costs, as well as [evasion of paying taxes] by other means ...”

##### **Article 199. Evading Payment of Taxes and (or) Contributions ... Collectible from Organizations**

“1. Evasion of paying taxes and contributions ..., collectible from organisations, by way of knowing inclusion in the accounting documents of false data on profits and costs, or by other means, ...”

In December 2009 Article 199 was supplemented with footnote no. 2, which reads as follows:

“A person who had committed the crime provided by Article 199 ... for the first time, must be discharged from criminal liability if that person or the company which evaded taxes through the acts imputed to that person paid the outstanding amount of the taxes, plus penalties and fines in the amounts fixed in the Tax Code”.

430. A constitutional interpretation of Article 199 of the Criminal Code was given by the Constitutional Court of Russia in its Judgment no. 9-*P* of 27 May 2003. It concerned, in particular, interpretation of the concept of “other means” used in Article 199 of the Criminal Code. The plaintiffs in that case considered that the concept of “other means” was too vague, might lead to arbitrary interpretation and was therefore unconstitutional. In

particular, Mr T., one of the plaintiffs, was a director of a firm which had an outstanding tax debt. Instead of paying that debt he spent the money of his firm for other purposes. Such behaviour was considered as tax evasion “by other means” and Mr T. was convicted. The Constitutional Court held that “taxes ... can be considered as lawfully established only where the law defines clearly the object of taxation, the taxable amounts, the amounts of tax payments, category of taxpayers [concerned] and other substantive elements of a fiscal obligation”. It continued as follows:

“In cases when law provides various benefits relieving [taxpayers] from payment of taxes or allowing [them] to reduce the sum of the tax payments, the obligation to pay lawfully established taxes in application to the relevant categories of taxpayers means the need to pay only that part of them to which the benefits do not apply, and it is in relation to that part that those taxpayers are subject to the liability for failure to pay lawfully established taxes.

Thus, it is unacceptable to set liability for such actions of the taxpayer which, although resulting in non-payment of a tax or reduction of its amount, involve using rights granted to the taxpayer by law and related to the lawful tax exemption or to selection of the forms of entrepreneurial activity that are the most beneficial for him and therefore of the optimal kind of payment.”

The Constitutional Court also stressed that the key element in the disposition of Article 199 was the deliberate character of the tax evasion, i.e. the existence of the intent of the tax-payer to avoid paying taxes. It held that the law does not criminalise non-payment of taxes which results from inadvertence or from the lawful use of legal tools reducing tax burden (point 4 of paragraph 5 of the Judgment).

431. On 27 May 2003 in Ruling no. 254-*O* the Constitutional Court held, in particular, that “... criminal liability may only arise if [non-payment of taxes] is committed deliberately and is aimed directly by evasion of a lawfully established tax in violation of the tax law which should be established by a general jurisdiction court during examination of factual circumstances concerned”.

432. On 19 June 2003 the Constitutional Court adopted Judgment No. 11-*P*, where it held *inter alia* as follows:

“In accordance with the Small Business Act the simplified system of taxation, to which small business operators may transfer voluntarily, is based on replacing the taxes established by the legislation of the Russian Federation as payable to the federal, regional and local budgets with a tax calculated on the small business operator’s income received from the performance of entrepreneurial activity during the reporting period.”

433. On 8 December 2003 the Criminal Code was amended. The new law excluded from Article 198 the reference to “other means” of tax evasion, but added that tax evasion may take a form of submission of knowingly false data in the tax declaration as well as in “other documents” which must be produced to the tax authorities for fiscal purposes. A similar amendment was made to Article 199 of the Code. Furthermore, the Criminal Code from that time forth penalised only tax evasion on a particularly large scale.

434. The Plenary Supreme Court of the Russian Federation in its Ruling no. 64 of 28 December 2006 (points 2 and p. 9) indicated *inter alia* that tax evasion included deliberate submission to the tax authorities of



false information on the taxpayers' income, yield, property, eligibility to tax cuts etc. in the tax declaration or in other documents which a taxpayer must produce to the tax authorities. The Ruling also described situations where one person *de facto* pursued business activities through another person, a front man (*podstavnoye litso*), in order to evade taxes (point 6). The Supreme Court also noted that the courts can commission expert examinations and invite experts to participate in the trial in the tax evasion cases (point 23).

##### 5. Eligibility for tax cuts in the low tax zones

435. For the relevant legislation concerning taxation in the low-tax zones (ZATOs) and applicable case-law see the case of *Yukos*, §§ 307 et seq., cited above; see in particular §§ 354-357, and §§ 384-399.

436. On 14 October 1999 the Urals District Commercial Court, sitting as a court of cassation, adopted a ruling in the case of *OOO Chelpiks v. Tax Inspectorate for the Sovetskiy District of Chelyabinsk* (case no. F09-864.99-AK). It concerned the operation of a company (Chelpiks) registered on the territory of ZATO of the Snezhinsk town and operating there on the basis of a preferential taxation agreement concluded with the town administration. The Tax Inspectorate required that the company paid taxes in full. They argued that given the "*de facto* location of the company" preferential taxation agreement was not valid. The court of cassation disagreed. It observed that the company was lawfully registered on the territory of ZATO and that the preferential taxation agreement was not declared null; in such circumstances the court held that the company was entitled to tax cuts.

437. On 3 April 2001 the same court examined the case of *Tax Ministry (Tax Inspectorate for the Central District of the Ozersk town) v. ZAO Energosintez*. The latter company was registered in the ZATO of the town of Ozersk and operated on the basis of a preferential taxation agreement concluded with the town administration. The court of cassation noted that under the ZATO Act, in order to be eligible to tax cuts, the company should have at least 90 per cent of its assets and carry out at least 70 per cent of its business activities on the territory of the ZATO at issue; in addition, 70 per cent of the average number of personnel on payroll should be from ZATO, while at least 70 per cent of wage should be paid to workers who are permanent residents of ZATO. The court found that 70 per cent of the average number of staff in the company were ZATO residents and that they received more than 70 per cent of wages paid by the company. The central argument for the Tax Inspectorate was that the business activity of the defendant company (which consisted of processing and re-selling of oil-products) was not carried out on the territory of ZATO and that it was done by the industrial facilities which did not belong to the defendant company. The court however, rejected that argument as irrelevant and held that those factors did not affect eligibility of the defendant company to tax cuts.

438. On 27 December 2000 the Eastern Siberian District Federal Commercial Court examined the case of *Tax Service (Tax Inspection of the Zheleznogorsk town) v. OOO Siblekon* (cases nos. A33-6259/00-C3a-F02-

2820/00-C1 and A33-6259/00-C3a-F02-2821/00-C1). In that case a company registered in the Zheleznogorsk town ZATO was brought to tax liability for the allegedly unlawful use of tax cuts obtained on the basis of a preferential tax agreement with the town administration. The court of cassation upheld the first instance court's judgment insofar as it ordered the defendant company to pay taxes in full. The court of cassation found that the preferential tax agreement had been concluded by the town administration in breach of the procedure prescribed by law and was therefore invalid. At the same time the court of cassation quashed the first-instance court's judgment in so far as it concerned recovering penalties from the defendant company, and upheld the decision of the court of appeal in this respect. It held in particular as follows:

"The court of appeal relieved the applicant from paying penalties on the ground that there had been no fault of the taxpayer; having examined the court of appeal's reasoning on this account, [the court of cassation] considers as follows. OOO Siblekon used in the first quarter of 2000 tax cuts granted by a decision of the municipal authorities. Therefore, not only the taxpayer did not understand the unlawfulness of his actions [- the unlawfulness which consisted of not paying taxes in full amount] – he could not and must not have realised that. Therefore, there was no fault [of the taxpayer] even in the form of negligence".

439. On 5 June 2002 the North-Western District Commercial Court, sitting as a court of cassation, adopted a ruling in the case of the *Tax Service (Inter-District Inspectorate No. 3 for the Murmansk Region) v. OOO Pribrezhnoe* (case no. A42-6604/00-15-8-818/01). The case concerned tax cuts obtained by the defendant (OOO Pribrezhnoe) on the territory of the ZATO of the Snezhogorsk town, Murmansk Region, on the basis of a preferential tax agreement with the town administration. The tax authorities claimed that the tax cuts had been granted to the defendant (referred to in that Ruling as "the company") unlawfully, and that it had not satisfy the requirements of the law on ZATOs. In 2000 the Tax Inspectorate took a decision bringing the company to tax liability for unlawfully obtained tax cuts. That decision was upheld by the courts at two levels of jurisdiction. However, the North-Western District Commercial Court (sitting as a court of cassation) quashed the lower court's decisions and the decision of the tax inspectorate of 2000. The court of cassation held, in particular, as follows:

"[As demonstrated by decision of the ZATO administration no ... of ... the company is registered on the territory of Snezhnogorsk ZATO and also registered there as a taxpayer ...

According to the company's balance sheet ..., the only fixed asset of the company is a computer, which is ... located at the following address in Snezhnogorsk ...

The materials of the case confirm the fact that in 1999 at least 70 per cent of workers ... were permanent residents of ZATO whereas 70 per cent of wages were paid to those who resided in ZATO; these facts are not disputed by the plaintiff [i.e. the Tax Inspectorate].

The Tax Inspectorate based its tax claims... on the assumption that the defendant company had failed to prove that its "productive business activities" [*proizvodstvennaya deyatelnost*] had been carried out on the territory of ZATO. However, Article 5 (1) of the Law on ZATOs does not make tax cuts conditional on the character of business activities, 'productive' or others. As follows from the Charter of incorporation of the company ..., the main field of activities of the

company is wholesale and retail sale. As confirmed by the materials of the case, the taxable income was received by the defendant company mostly from the trading in oil-products and providing services to investors at the securities market ...

In such circumstances the question of whether the company had on the territory of ZATO any premises for storage and transportation of oil-products is irrelevant, since trading in oil products, i.e. concluding sell-and-buy agreements, neither requires that the company owns such premises nor requires that the oil-products are [physically] located on the territory of ZATO.

Furthermore, section 5 (1) of the Law on ZATOs makes tax cuts conditional on the volume of business activities carried out on the territory of ZATO and not at the address of registration [i.e. the address formally indicated by the company in the incorporation documents]; [consequently], it is irrelevant whether or not the company carried out its activities at the address of registration. In addition, the company concluded a rent agreement with the Municipal Property Department of the ZATO concerning non-residential premises located in Snezhogorsk.... Those premises were used by the company for its office, as confirmed by the town police department..., by a letter from the municipal enterprise ..., by the testimony of witnesses – employees of the company, questioned by the Tax Inspectorate ..., and by other materials of the case ...

In order to make and receive payments the company opened a bank account in the Snezhnogorskiy branch of the Sberbank ...

The reference of the first-instance court to the fact that the number of desks and chairs does not correspond to the number of personnel (minus a lawyer who had been working from home, and the cleaning-lady), is not convincing, since this fact does not prove indisputably that the company had not carried out its business activities on the territory of ZATO. The decision of the Tax Inspectorate at issue did not assert that the income had been received by the company not in its headquarters but in a branch office ...

There is no ground for the following assertions made by the lower courts: that the physical transfer of crude oil had taken place outside of the ZATO territory; that the head of the company-buyer of the crude oil had been in the town of Sarov at the moment when the report of the transfer of crude oil had been signed; that telephone numbers in the office rented by the company [in Snezhinsk] were registered at a different name; that the defendant company had not paid for the electricity in its office. All the above circumstances as such did not exclude that the company was carrying out its activities on the territory of the ZATO and are irrelevant for the case at hand, since they are not taken into account by the tax law in order to define conditions for tax cuts.

The fact that the first-instance court and the court of appeal examined those circumstances demonstrates that they interpreted Section 5 (1) of the Law on ZATOs wrongly and went beyond [the mere examination] of conditions explicitly referred thereby for obtaining tax cuts. In breach of Article 3 (7) of the Tax Code the lower courts [wrongly] assumed that since the law did not refer to other criteria for defining whether the business activity was carried out on the territory of ZATO other than the presence of fixed assets, personnel and wages [there], the tax inspectorate or the court could establish such criteria by themselves.

The argument of the Tax Inspectorate that the Director General of the company had no permanent place of residence in the ZATO is equally irrelevant, since Section 5 (1) of the Law on ZATOs makes tax cuts conditional of the fact that 70 per cent of staff of the company-taxpayer lives in the ZATO, but not necessarily the director of the company taxpayer. In addition, as follows from the materials of the case ..., the Director General of the company regularly stayed in a hotel in the ZATO.”

440. Further, the court of cassation indicated that the Tax Inspectorate collected evidence against the company in the course of “on-the-site” tax

audits of the contractors of the company, and following an “examination of the premises”. At the same time, the decision of the Tax Inspectorate of 2000 indicates that the company was brought to tax liability following a “desk” tax audit – i.e. solely on the basis of documents submitted by the taxpayer. The documents submitted by the company to the Tax Inspectorate demonstrated that the company satisfied all requirements of section 5 (1) of the Law on ZATOs. The Tax Inspectorate, within a “desk” tax audit, was not empowered to visit premises of the company. Although after the decision bringing the company to tax liability the Tax Inspectorate conducted an “on-the-site” tax audit of the company, its results cannot be used to support the conclusions of the decision of 2000. The court of cassation also held that it was wrong to shift on the company the burden of proof that it had indeed carried out its business activities on the territory of ZATO. Although it was possible to request the taxpayer to submit additional documents, in the case at hand it had been done simultaneously with rendering the decision on bringing the company to tax liability. The court also noted that the eligibility of the company to tax cuts was confirmed by the official letters of the Ministry of Taxes and the Ministry of Finances.

441. For the more recent case-law on tax cuts in the low-tax zones see §§ 429-458 of the *Yukos* judgment.

6. *Preferential taxation for individual entrepreneurs’ based on the Small Business Act*

442. Preferential taxation for small business was introduced by the Federal Law “On Simplified Taxation, Accounting and Reporting for Small Businesses” (No. FZ-222, 29 December 1995, the “Small Business Act”). It introduced *inter alia* a “patent” system for self-employed businessmen, who, instead of paying a variety of different taxes and submitting complex tax declarations, were only required to buy every year a “patent” (licence) for a particular type of activity, provided that their yearly proceeds do not exceed a particular amount (100,000 times the statutory minimum wage). The price of the licence thus constituted a nominal annual advance tax payment (calculated as a multiple of the State defined minimum wage), and exempted the entrepreneur from further taxation (including state insurance premiums) in respect of the licensed activity income. Under Article 1 of the Act, the businessmen eligible for the “licence system” were free to choose it or to remain within the “traditional” taxation framework. A separate licence was required for each category of services specified in the Small Business Act.

443. On 2 October 2002 the Federal Commercial Court for Eastern-Siberian District, sitting as a court of cassation, rendered a decision in the case of *Tax Service (Angarsk Inspectorate) v. Vliran Ltd* (case No. A19-884/02-24-F02-2873/02C1). That case concerned a service agreement concluded between Mr K. and the taxpayer - Vliran Ltd. Under that agreement Mr K. was supposed to work as a general manager of the taxpayer company, in exchange of a fee. Mr K. was registered as an individual entrepreneur; at the same time he was the sole owner of the Vliran Ltd (i.e. the taxpayer company). As a result, the service agreement

had his signatures on behalf of both sides: he signed it in the capacity of an individual entrepreneur and in the capacity of the sole owner of the company. The fees paid by the company to Mr K. were included in its declaration as “costs”. The Tax Inspectorate considered that these fees could not be regarded as “costs” on the ground that the service agreement between the company and Mr K. was null, since it was signed by the same person on both sides. The court of cassation, however, ruled in favour of the taxpayer company. It held, in particular, that the charter of the company did not provide for the position of a general director, and that his functions could therefore be transferred to an external person. Furthermore, there was nothing in the law to prevent the company from “outsourcing” the managerial function to somebody else. The court ruled that there was no evidence that the company acted in bad faith, and the service contract was therefore valid.

*7. Recovery of damages from a criminal defendant in cases under Article 199*

444. As a general rule (Article 56 § 1 of the Civil Code of 1994) civil liability of a company before its creditors is limited by the amount of its assets. At the same time, § 2 provides that where the insolvency of a legal person is caused by its owners or by other persons who “have the power to give binding orders to that legal person or are capable of controlling its activities otherwise”, those persons, in case the assets of the legal person are insufficient to satisfy the creditors’ claims, bear subsidiary liability for its debts.

445. A person who suffered pecuniary or non-pecuniary damage as a result of a crime may introduce a civil claim against the alleged perpetrator within the criminal proceedings against him (Article 44 § 2 of the new Criminal Procedure Code of 2001; Article 29 of the old Criminal Procedure Code). The criminal procedure law distinguishes between the figures of the victim of the crime and of the “civil plaintiff” (i.e. the person whose pecuniary interest had been affected by the crime): they are not necessarily the same person. Similarly, the criminal defendant (the suspect or the accused person) is not necessarily the same person as the “civil defendant”. The latter is defined in Article 54 of the new Criminal Procedure Code as “a legal person or an individual, who, under the Civil Code of the Russian Federation, bears [civil] liability for the damage caused by the crime [committed by the criminal defendant]”.

446. The Criminal Procedure Code does not define what provision of the Civil Code a civil plaintiff may rely upon in lodging a civil claim. By default, a civil plaintiff has to rely on the general rule of tort, that is on Article 1064 § 1 of the Civil Code, which provides that “damage caused to the property or to the person of an individual, or damage caused to the property of a legal person, must be compensated in full by the tortfeasor”. As a general rule, liability for tort is conditioned upon the fault of the tortfeasor; however, in some cases the law may provide for strict liability. The last paragraph of that provision stipulates that where the victim of the tort has asked for the damage to be caused, or has agreed to it, no liability for tort arises. In addition, Article 1068 of the Civil Code provides for

liability of a legal person for the damage caused by an employee of that legal person. Insofar as relevant it reads as follows:

“A legal person ... must compensate damage caused by its employee in the performance of work-related (official, service-related) duties. For the purposes of the present Article employees are understood as individuals working on the basis of a labour contract or of a civil law contract, if they acted or must have acted pursuant to the instructions of the legal person concerned ... and under its control of safety of the works performed [by the individual contractor]”.

447. Article 108 of the Tax Codes speaks of liability for violations of tax law. Under § 4 of that provision, “bringing a company to tax liability does not exclude ... bringing its managers to administrative, criminal or other liability provided for by the law”. Article 110 of the Tax Codes defines different types of fault (“*vina*” - the same word used for describing guilt in the criminal law context) for qualifying an act as a tax offence. A person (a legal person or a company) is guilty of a tax offence if it committed the imputed act knowingly or by negligence (§ 1). Article 110 § 4 of the Tax Code reads as follows:

“The fault of the organisation in committing a tax offence is defined depending on the fault of its executives or the representatives of the organisation, whose acts (or omissions) led to the tax offence at issue”.

448. On 4 July 1997 the Plenary Supreme Court issued Decree No. 8 in which it interpreted some provisions of material and procedural law related to the application of provisions of the Criminal Code on tax evasion (Articles 198 and 199). It held, in particular, as follows:

“18. [The lower courts] must pay attention to the strict compliance with the criminal procedure legislation when, together with adopting a judgment, they examine civil claims lodged [within criminal proceedings]. It must be stressed that in the tax evasion cases, along with pecuniary damage in the amount of unpaid taxes ..., it is possible to seek recovery from the culpable (*виновного*) of the amounts of penalties and fines established [in the tax law].”

The term “*vinovniy*” used by the Plenary Supreme Court is quite large. In a criminal-law context it is a criminal offender, a person guilty of a crime. In the civil law it refers to a civil fault and may be translated (depending on a context) as “defaulter”, “liable person”, “tortfeasor”, etc. In the tax-law context it refers to a taxpayer (a legal person or an individual) at fault, the one who is culpable of not paying taxes, or is culpable of other tax offences.

449. On 11 January 2001 the Supreme Court of the Russian Federation quashed the lower courts’ judgments in the case of the *Tax Ministry (North-East District Tax Inspectorate in Moscow) v. I. and K.* Those individuals were executive officers of a limited company “Taros”. In 1999 they were convicted by the Ostankinskiy District Court of Moscow for company tax evasion (under Article 199 of the Criminal Code), for having submitted false information in the tax declaration submitted on behalf of the “Taros Corporation” company. The criminal judgment ordered, in particular, the reimbursement of damages to the State in the amount of unpaid company taxes (company income tax, VAT, etc.). Having analysed that particular issue, the Supreme Court held as follows:

“Under the federal legislation ...those taxes are enterprises and organisations which are legal persons under the law of the Russian Federation ... or [foreign companies and corporations].

Therefore, a taxpayer in respect of those taxes is always a legal person; the duty to pay [the outstanding amount of company taxes in the case at hand] is on “Taros Corporation” Ltd.

Having satisfied the civil claims of the Tax Inspectorate towards I. and K. the [lower courts] de facto shifted the obligation to pay taxes on an inappropriate taxpayer.

Satisfying civil claims of tax authorities related to the taxes not paid by the “Taros Corporation” Ltd within a criminal case under Article 199 of the Criminal Code ... from the personal assets of the individuals who have been convicted under that provision, has no basis in law.

In addition, it was established that the money which must have been paid as taxes were not appropriated by the convicts, were not taken from the assets of “Taros Ltd” and were not used [by the criminal defendant] for personal needs.

In such circumstances the criminal judgment, in the part concerning civil claims, is unlawful; in this part the judgment must be quashed and the civil claim must be re-considered within civil proceedings.

... The Presidium of the Moscow City Court, when considering the supervisory review appeal of the Vice-President of the Supreme Court ... referred to the Decree of the Plenary Supreme Court of 4 July 1997 ... which provides that [in tax evasion cases] pecuniary damage ... in the amount of taxes not received by the State budget ... must be recovered from the culpable.

However, as follows from the materials of the case, de facto the taxes has not been paid by the “Taros Corporation” Ltd. Therefore, the amounts of unpaid taxes must be recovered from “Taros Corporation”.

It follows that the judgment, insofar as it concerned the civil claims ... must be quashed and the case in this part remitted to a civil jurisdiction court.”

450. On 28 December 2006 the Plenary Supreme Court issued a new Decree on the application of provisions of the Criminal Code on tax evasion (Decree no. 64) which replaced decree no. 8. In that decree the Plenary Supreme Court held, in particular, as follows:

“24. Under [the Criminal Procedure Code] the courts’ attention must be drawn to the requirement that ... in the judgments under Articles ... 198, 199 ... of the Criminal Code there should be a decision on the civil claim lodged [by the civil plaintiff]. A civil claim may be lodged on the behalf of the tax authorities ... or State prosecution bodies ..., whereas a civil defendant in such proceedings may be a legal person or a physical person, who is, under the law (Articles 1064 and 1068 of the Civil Code) is responsible for the damage caused by the crime.

Having decided that a civil claim must be granted, the court must indicate in the judgment the amount to be recovered and, depending on the type of the outstanding tax, the level of the budget (federal, regional or municipal) or a State non-budgetary fund where the amount is to go.”

451. In the following years that ruling was repeatedly interpreted by the Russian courts as not allowing the “piercing of the corporate veil” and recovering company taxes from the managers of the company found guilty of tax evasion under Article 199 of the Criminal Code (see the Ruling of the Omsk Regional Court of 4 June 2009, no. 22-1873 in the case of *B.*; Ruling of the Perm Regional Court of 28 May 2012, no. 33-3769 in the case of *Popovtsev*; see also the Decree of the Presidium of the Chelyabinsk

Regional Court of 7 September 2011 “On the analysis of the judicial practice in the Chelyabinsk Region on examination of civil claims within criminal proceedings”, point 3.2.3 (e)).

#### **D. Regime of detention of suspects and of the convicted criminals**

452. Section 40 of the Detention on Remand Act of 1995 (Federal Law on the Detention of Suspects and Defendants, no. 103-FZ of 15 July 1995), as in force at the material time, set rules of detention in isolation cells. Placement in an isolation cell is a punishment for various breaches of prison rules, from the “repeated non-compliance with prison rules” to attacking the prison staff. All contacts, except for contacts with the lawyer, are prohibited for a detainee placed in an isolation cell. He is not allowed to buy foodstuff in the prison shop or receive parcels from his relatives. A detainee cannot read books or magazines or watch TV while in an isolation cell (this limitation was later annulled; at present the detainees can read books and magazines in the isolation cell). He has a right to one one-hour walk per day during daytime.

453. The Russian Code on the Execution of Sentences (CES) provides for five main types of penitentiary institutions for convicted criminals: colony-settlement, general regime colony, strict regime colony, special regime colony and prison. The conditions of serving a sentence in a colony-settlement are the mildest. On the contrary, the regime in prisons is the most severe. The difference between the “strict” regime and “ordinary” regime colonies concern such aspects as the amount of money a detainee has the right to spend, the number of letters and parcels a detainee can receive, the length of meetings with relatives, etc.

454. Under Article 73 of the CES persons sentenced to deprivation of liberty must serve their sentences in the federal entity (region) where they had their residence and where they were convicted. Derogations from this rule are possible only on medical grounds or in order to secure the safety of a detainee, or at his or her own request. Article 73 § 2 provides, however, that should there be no appropriate institution within the given region or if it proves impossible to place the convicted person in the existing penal institutions the convicted person is to be sent to the nearest penal institutions located on the territory of the said region, or, exceptionally, they may be sent to penal institutions located on the territory of the next closest region.

#### **E. Conditions of detention**

455. In the 21<sup>st</sup> General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (CPT/Inf (2011) 28) made certain recommendations on the solitary confinement of prisoners. It noted, in p. 55, that “solitary confinement further restricts the already highly limited rights of people deprived of their liberty. The extra restrictions involved are not inherent in the fact of imprisonment and thus have to be separately justified”. For the CPT, it is appropriate to apply the traditional tests developed by the case-law of the



European Court of Human Rights. In particular, any further restriction of a prisoner's rights must be linked to the actual harm the prisoner has caused in the prison setting. During solitary confinement there should, for example, be no automatic withdrawal of rights to visits, telephone calls and correspondence or of access to resources normally available to prisoners (such as reading materials). Given the potentially very damaging effects of solitary confinement, the CPT considers that the principle of proportionality requires that it be used as a disciplinary punishment only in exceptional cases and as a last resort, and for the shortest possible period of time, no higher than 14 days for a given offence, and preferably lower. Prisoners undergoing solitary confinement as a disciplinary sanction should be entitled to at least one hour's outdoor exercise per day, from the very first day of placement in solitary confinement, and should also be permitted access to a reasonable range of reading material (for further details see *Razvyazkin v. Russia*, no. 13579/09, § 89, 3 July 2012). On the last point the 21<sup>st</sup> General Report reiterated recommendation made in respect of the Russian Federation in the Report on the 2001 visit to the Russian Federation (CPT/inf (2003) 30), made public on 30 June 2003, where it urged the Russian authorities in § 119 to "take steps to ensure throughout the country that prisoners placed in disciplinary cells have access to reading matter."

456. Recommendations contained in the 21<sup>st</sup> General Report developed and supplemented principles of treatment of prisoners contained in earlier documents of the CPT. Thus, for example, the 2nd General Report (CPT/Inf (92) 3) of 13 April 1992 indicated that "the principle of proportionality requires that a balance be struck between the requirements of the case and the application of a solitary confinement-type regime, which is a step that can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible."

457. For more information about the European standards for prison conditions, see *Ananyev and Others v. Russia* (nos. 42525/07 and 60800/08, §§ 55 et seq., 10 January 2012).

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION - CONDITIONS OF DETENTION OF THE SECOND APPLICANT IN THE REMAND PRISON

458. Under Article 3 of the Convention the second applicant complained about conditions of his detention in remand prison *IZ-77/1*. Article 3 of the Convention provides as follows:

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

## A. The parties' submissions

### 1. *The Government's submissions*

459. According to the Government, Russian law provided that conditions of detention on remand must be compatible with human dignity and presumption of innocence. Detention on remand was possible only on the basis of a court order. Criminal prosecution of a suspect inherently entailed limitations of his or her Convention rights which would not be permissible in other situations. One of those limitations concerned the possibility of detaining the suspect; this was done in order to help the State authorities maintain public order and prevent further crimes.

460. The Government informed the Court that sanitary treatment and disinfection of cells in the remand prison had been entrusted to a private subcontractor. They produced copies of service agreements with the subcontractors and certificates of completed work. The cells were examined on a daily basis by the prison medical staff. The cells were treated with special chemical substances every month. In addition, the inmates are required to clean the cells on a daily basis. The sanitary conditions in the cells were inspected by experts from the Moscow Centre of State Sanitary-Epidemic Surveillance and the Centre of Hygiene and Epidemiology, part of the penitentiary system. Heads of regional penitentiary departments and particular penitentiary institutions were responsible for maintaining hygiene standards in the places of detention which would be compatible with the requirements of the Convention.

461. In accordance with the Detention on Remand Act and the prison regulations, the second applicant had a right to one sixty-minute walk per day in one of the remand prison's courtyards. On hearing days the applicant was "placed under the orders" of the escort squad which secured his transfer to the court building and his return to the remand prison. On those days the applicant was able to take walks provided that he was back in the prison before sunset. On hearing days the applicant was given a "dry lunch", which corresponded to the three-course meal which he would otherwise have received in the remand prison, in accordance with the norms established for prison food by the Ministry of Justice. In the courtroom the applicant was given hot water to prepare instant food and make coffee or tea. He was also afforded sufficient time to prepare food and eat. However, the applicant refused to accept the dry food provided by the remand prison. In addition, the applicant had been entitled to take with him food which he had received from his relatives and which was allowed by the prison administration and food from the prison food shop.

### 2. *The second applicant's submissions*

462. The second applicant complained about two specific aspects of his detention. First, he complained about the conditions in the isolation cell where he had been detained between 18 and 25 August 2005. In his words, conditions there were degrading. The reason for his placement in the isolation cell was the fact that he had complained to the Prosecutor General about the actions of Mr Tagiev, the director of the remand prison. Thus, Mr Tagiev, who had submitted the information about the conditions in the

isolation cell, definitely had an interest in providing an untrue account. The applicant believed that the documents appended to the Government's memorandum had been drawn up by persons who were not disinterested. Throughout the entire period of his detention in the isolation cell and in the other cells, there had been no independent examinations of the sanitary and hygiene conditions. The applicant's lawyers were not permitted to see him in the various cells in which he was kept.

463. The second applicant further complained that on the days of court sessions, which had taken place almost every day for more than a year, he had been deprived of hot food and outside walks. The Government's reference to dry "travel rations" that were offered to the applicant on trial days meant that they accepted that he had not been provided with hot food. During the trial the applicant was not able to undertake any physical exercise. The Government's indication that the applicant "had an opportunity to undertake daily outdoor exercise for no less than one hour in daylight time" made it clear that such an exercise regime was necessarily unavailable on court days.

## **B. The Court's analysis**

### *1. General principles*

464. The Court reiterates that in order for a punishment or treatment associated with it to be "inhuman" or "degrading" within the meaning of Article 3, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment or treatment, such as, for example, deprivation of liberty (see, among other authorities, *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX; *Indelicato v. Italy*, no. 31143/96, § 32, 18 October 2001; *Lorsé and Others v. the Netherlands*, no. 52750/99, § 62, 4 February 2003; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 428, ECHR 2004-VII).

465. In assessing whether the treatment inflicted on a prisoner went beyond the "inevitable element of suffering or humiliation" associated with the deprivation of liberty, the Court often took into account the cumulative effect of various aspects of prison life (*Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). In previous cases the Court analysed such factors as access to natural light or air in the cells, adequacy of heating arrangements, compliance with basic sanitary requirements, the opportunity to use the toilet in private and the availability of ventilation (see, for example, *Peers v. Greece*, no. 28524/95, §§ 70-72, ECHR 2001-III; *Babushkin v. Russia*, no. 67253/01, § 44, 18 October 2007; and *Vlasov v. Russia*, no. 78146/01, § 84, 12 June 2008). That list is not exhaustive; other conditions of detention may lead the Court to the conclusion that the acceptable threshold of suffering or degradation has been exceeded and the applicant was subjected to "inhuman or degrading treatment" (see, for example, *Fedotov v. Russia*, no. 5140/02, § 68, 25 October 2005; *Trepashkin v. Russia*, no. 36898/03, § 94, 19 July 2007; and *Slyusarev v. Russia*, no. 60333/00, § 36, ECHR 2010-...). The length of the period during which a person is detained in the particular conditions also has to be considered

(see, among other authorities, *Alver v. Estonia*, no. 64812/01, 8 November 2005).

466. The Court also reiterates that in the case of *Ramirez Sanchez v. France* [GC] (no. 59450/00, § 119, ECHR 2006-IX) it stressed that “the measures taken [in respect of a detainee] must also be necessary to attain the legitimate aim pursued”. In that case the applicant, who was detained in isolation for many years, was considered to be one of the most dangerous terrorists of his time. The Court had to assess whether, in view of the danger he represented, “the measures taken [i.e. isolation] were necessary and proportionate compared to the available alternatives” (§ 136). In *Ensslin, Baader and Raspe v. Germany* (nos. 7572/76, 7586/76 and 7587/76, Commission decision of 8 July 1978, Decisions and Reports (DR) 14, p. 64), the Commission stressed that “in assessing whether [isolation] may fall within the ambit of Article 3 of the Convention in a given case, regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned”.

### 2. *General conditions of detention*

467. Insofar as the second applicant can be understood as complaining about conditions in the ordinary cell where he was detained most of the time, the Court observes that he did not develop this complaint in sufficient detail and did not submit information or documents that would persuade the Court that conditions there were indeed “inhuman and degrading”. The Court concludes that Article 3 was not breached on this account.

### 3. *Conditions in the isolation cell*

468. The second applicant also complained about his placement in the isolation cell between 18 and 25 August 2005, as well as about sanitary conditions there and regime restrictions during his isolation.

469. The Court observes, first of all, that at the relevant time the second applicant’s conviction has not yet been confirmed by the court of appeal. Therefore, in domestic terms he was still detained on remand. In a number of previous cases the Court stressed that “prolonged solitary confinement is undesirable, especially where the person is detained on remand” (see *Ramirez Sanchez*, cited above, § 120 with further references).

470. Secondly, the Court notes that the solitary confinement was imposed on the applicant for his alleged refusal to go for a walk. Some of the submitted documents mentioned that the applicant had refused to go to the shower (see paragraph 57 above). Whatever the real reason for imposing a disciplinary sanction, the Court considers that the applicant’s fault, if any, was not particularly serious and did not probably call for such a measure (see in this respect the CPT’s recommendation that such a serious punishment as solitary confinement should be commensurable to the disciplinary offence for which it was imposed, paragraph 455 above). The Court reiterates that although it is not for the Court to specify which security measures may be applied to prisoners, “the absence of any substantive reasons” for placing a detainee in a solitary confinement cell for a considerable period of time can be a relevant factor for characterising

this form of disciplinary punishment as “inhuman and degrading treatment” (see *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 211, 10 April 2012; see also *Razvyazkin*, cited above, § 107).

471. Thirdly, the Court reiterates that solitary confinement is one of the most serious measures which can be imposed within a prison. Bearing in mind the gravity of the measure, the domestic authorities are under an obligation to assess all relevant factors in an inmate’s case before placing him in solitary confinement (see *Ramishvili and Kokhreidze v. Georgia*, no. 1704/06, § 83, 27 January 2009; *Onoufriou v. Cyprus*, no. 24407/04, § 71, 7 January 2010; and *A.B. v. Russia*, no. 1439/06, § 104, 14 October 2010).

472. That being said, the Court does not consider that the solitary confinement by itself was contrary to Article 3 (see *Messina v. Italy (no. 2)* (dec.), no. 25498/94, ECHR 1999-V, quoted with approval by the Grand Chamber in *Ramirez Sanchez*, cited above, § 12; *Öcalan v. Turkey [GC]*, no. 46221/99, § 191, ECHR 2005-IV). The Court must examine whether other limitations and hardships associated with this disciplinary sanction brought the whole situation within the ambit of Article 3.

473. Some elements in the applicant’s account of the conditions in the isolation cell are not disputed by the Government. In particular, the Court takes it as accepted that the cell had a window measuring 90 x 60 cm. It is questionable whether such a window would provide enough natural light for a cell measuring 5.5 square metres. The permanent electric light in the cell may have been very disturbing for a detainee, and the one-metre distance between the open toilet pan and the sleeping place was clearly insufficient. Furthermore, the applicant had been deprived of all social contacts, could not read books or magazines or watch TV (see paragraph 452 above), and could not lie down on the bunk-bed, since it was unfolded only between 10 p.m. and 6 a.m.

474. Other factual assertions by the applicant concerning the conditions in the isolation cell (poor sanitary condition of the cell, no hot food or walks) are disputed by the Government. However, the Court is not required to resolve this factual controversy on those points. Even if the applicant’s description of the other conditions of detention was accurate, and even if such conditions might indeed be very uncomfortable, it is crucial to note that the situation complained of lasted for only seven days (cf. with *Popandopulo v. Russia*, no. 4512/09, § 95, 10 May 2011, or *A.B. v. Russia*, cited above, §§ 105 et seq., where the applicants’ solitary confinement lasted much longer). The Court concludes that in the circumstances of the present case the degree of suffering to which the applicant was exposed, given its short duration and in view of the applicant’s age and mental and physical condition, did not reach the minimal threshold of severity to amount to “inhuman or degrading” treatment. Consequently, there was no violation of Article 3 on this account.

#### 4. *No walks and no hot meals on court days*

475. Finally, the second applicant complained about the alleged lack of hot food and walks on the days of court hearings.

476. As regards the unavailability of hot food on court days, the Court notes that the Government produced a document, written by the applicant himself, whereby he refused to receive dry meals because he had his own food (see paragraph 60 above). As follows from the Government's explanations, the detainees were allowed to use a kettle in the premises of the Meshchanskiy District Court. It was therefore possible for the applicant to prepare tea, coffee or instant food during the day. Such arrangements, in the absence of any particular medical counter-indications, and where a detainee can afford to buy his own food in sufficient quantities, do not raise any issue under Article 3 of the Convention.

477. The Court will now turn to the alleged lack of physical exercise. The Court has frequently found that a short duration of outdoor exercise, limited to one hour a day, was a factor that further exacerbated the situation of applicants who were confined to their cells for the rest of the time without any kind of freedom of movement (see *Skachkov v. Russia*, no. 25432/05, § 54, 7 October 2010; *Gladkiy v. Russia*, no. 3242/03, § 69, 21 December 2010; and *Yevgeniy Alekseyenko v. Russia*, no. 41833/04, § 88, 27 January 2011). The applicant in the present case claimed that for most of the time he had been deprived even of that short walk. The Government's responses in this respect indicate that walks had been available to detainees only if they left the remand prison some time after sunrise and returned there before sunset. The Court reiterates its factual findings in the case of *Trepashkin v. Russia (no. 2)* (no. 14248/05, § 119, 16 December 2010), which analysed the situation in the same remand prison in the following terms:

"... It is doubtful whether the applicant was able to use the walking yards on the days of the court hearings. Between January and April 2004 the applicant was taken to the courts almost every second working day ... As appears from the evidence in the case file, the logistical arrangements in the remand prison were such that groups of prisoners were dispatched to different courts in Moscow in the same prison van. As a result, the applicant was usually woken up early and returned to the remand prison quite late. This fact is confirmed by, amongst other sources, the letter from the Ministry of Justice concerning the delays in dispatching prisoners to and back from the Moscow courts ...

The Government stated that detainees from the same cell were taken for walks together, normally during the daytime. However, the Government did not explain whether any special arrangements had been made for those returning from the courts in the evening, especially in winter, when the "daytime" is short. In sum, the Court concludes that on the days of the hearings the applicant was repeatedly (if not always) deprived of any possibility of physical exercise, however limited."

478. The Court notes that in 2004-2006 the applicant was taken to the Meshchanskiy District Court more than 160 times (see paragraph 60 above). There is no information as to the exact time that the applicant left the prison and when he was returned there on every particular date. In the circumstances the Court is prepared to assume that on most of the days when the applicant was taken to the court he could not take walks in the remand prison. Furthermore, it is unclear whether the second applicant was able to take advantage of that possibility (the first applicant had this opportunity – see the case of *Khodorkovskiy (no.1)*, § 113).

479. That being said, the Court notes that in the present case the lack of physical exercise was not combined with other negative factors, such as,

for instance, overcrowding in the cell or bad conditions of transportation to and from the court building (cf., *mutatis mutandis*, with *Yevgeniy Alekseyenko*, cited above, or *Moiseyev v. Russia*, no. 62936/00, §§ 124 et seq., 9 October 2008). Furthermore, the applicant was able to take walks on weekends and on those days when there were no hearings. On the whole, the Court is unable to conclude that the absence of the possibility for walks on the days of the court hearings amounted to a breach of Article 3 of the Convention.

### 5. Conclusion

480. Having regard to the above, the Court concludes that material conditions in the remand prison, complained of by the second applicant, did not amount to “inhuman and degrading treatment” within the meaning of Article 3 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION - CONDITIONS OF DETENTION OF THE SECOND APPLICANT IN THE COURTROOM

481. The second applicant further complained, relying on Article 3 of the Convention, cited above, about having been placed in an iron cage during the hearings before the District Court which examined his criminal case from 8 June 2004 to 31 May 2005. In his words, it humiliated him in the eyes of the public and in his own eyes and was physically painful.

### A. The parties' submissions

#### 1. The Government's submissions

482. The Government submitted that security measures applied in the courtrooms were amongst many negative effects which were inherent in the very idea of criminal prosecution. At the time there was no other means of securing public order in the courtroom than placing the applicants in a metal cage. This security arrangement was a part of the standard design of courtrooms according to State building standards. The cage was 2.2 m high and surrounded the defendants' bench. The defendants' bench was intended to seat up to 20 people. In sum, there had been nothing exceptional in such a security measure.

#### 2. The second applicant's submissions

483. During the court hearings the second applicant was obliged to spend long periods of time (up to nine hours a day) in the courtroom, confined within a very narrow iron cage where he was unable even to stretch his legs. Such security arrangements, which might exceptionally be warranted in the case of dangerous defendants, were wholly unjustified in the applicant's case. The applicant was charged with economic crimes and there was no reasonable basis for keeping him in a cage during the trial. He had never been convicted of any criminal offence prior to his trial. The second applicant was a very tall man (almost 2 metres in height), with long

feet (size 47), and a history of knee surgery. The fact that he was kept in a cramped cage for extended periods of time, sometimes for almost the entire day, caused him physical suffering.

484. The applicants' co-defendant, Mr Kraynov, was not held in the iron cage. The second applicant was displayed in the iron cage and, as can be seen from photographs, he was televised and photographed by the media whilst in that cage. On arrival at the court he was surrounded by armed forces and handcuffed. The average observer could easily have believed that an extremely dangerous criminal was on trial. Such public exposure humiliated him and aroused in him feelings of inferiority. There was no real risk of the applicant absconding from the court, where he was under the supervision of numerous guards immediately beside the cage and a significant number of armed guards in the vicinity of the courthouse.

### **B. The Court's assessment**

485. The Court reiterates its earlier findings in the case of *Khodorkovskiy (no.1)*, cited above, §§ 123 et seq. In that case the Court, with reference to its case-law on the matter and in particular to the cases of *Ramishvili and Kokhreidze*, cited above, §§ 98 et seq.) and *Ashot Harutyunyan v. Armenia* (no. 34334/04, §§ 126 et seq., 15 June 2010), decided that the conditions in which the first applicant was detained in the courtroom were degrading. The Court held as follows:

"124. ... In the recent case of *Ramishvili and Kokhreidze* ... the Court, in a very similar factual context, decided as follows:

"... The public watched the applicants [in the courtroom] in ... a metal cage ... Heavily armed guards wearing black hood-like masks were always present ... the hearing was broadcast live ... Such a harsh and hostile appearance of judicial proceedings could lead an average observer to believe that 'extremely dangerous criminals' were on trial. Apart from undermining the principle of the presumption of innocence, the disputed treatment in the court room humiliated the applicants ... The Court also accepts the applicants' assertion that the special forces in the courthouse aroused in them feelings of fear, anguish and inferiority ...

The Court notes that, against the applicants' status as public figures, the lack of earlier convictions and their orderly behaviour during the criminal proceedings, the Government have failed to provide any justification for their being placed in a caged dock during the public hearings and the use of 'special forces' in the courthouse. Nothing in the case file suggests that there was the slightest risk that the applicants, well-known and apparently quite harmless persons, might abscond or resort to violence during their transfer to the courthouse or at the hearings ....

This approach was recently confirmed by the Court in the case of *Ashot Harutyunyan* ..., where the applicant had been kept in a metal cage during the entire proceedings before the Court of Appeal ...

125. In the Court's opinion, most of the decisive elements in the Georgian and Armenian cases referred to above were present in the case at hand. Thus, the applicant was accused of non-violent crimes, he had no criminal record, and there was no evidence that he was predisposed to violence. The Government's reference to certain "security risks" was too vague and was not supported by any specific fact. It appears that "the metal cage in the ... courtroom was a permanent installation which served as a dock and that the applicant's placement in it was not necessitated by any real risk of his absconding or resorting to violence but by the simple fact that it was the seat where he, as a defendant in a criminal case, was meant to be seated" (see



*Ashot Harutyunyan v. Armenia*, cited above, § 127). Furthermore, the applicant's own safety or the safety of the co-accused was not at stake. Finally, the applicant's trial was covered by almost all major national and international mass media, so the applicant was permanently exposed to the public at large in such a setting. As in *Ashot Harutyunyan* the Court concludes that "such a harsh appearance of judicial proceedings could lead an average observer to believe that an extremely dangerous criminal was on trial. Furthermore, [the Court] agrees with the applicant that such a form of public exposure humiliated him in his own eyes, if not in those of the public, and aroused in him feelings of inferiority" (§ 128).

486. Turning to the present case and having examined the parties' arguments, the Court does not see any reason to depart from its findings in the *Khodorkovskiy (no. 1)* case in this regard. Both applicants were detained in the courtroom in identical conditions; their personal profiles, if not identical, were similar in essence. The Court concludes that the security arrangements in the courtroom, given their cumulative effect, were, in the circumstances, excessive and could have been reasonably perceived by the second applicant and the public as humiliating (see also *Piruzyan v. Armenia*, no. 33376/07, §§ 69 et seq., ECHR 2012 (extracts)). There was, therefore, a violation of Article 3 of the Convention in that the treatment was "degrading" within the meaning of this provision.

### III. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION IN RESPECT OF THE SECOND APPLICANT

487. Under Article 5 § 3 the second applicant complained that his detention from 2 July 2003 until 16 May 2005 pending investigation and trial had not been justified and had exceeded a "reasonable time". Article 5 § 3 of the Convention, referred to by the second applicant, provides:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

#### A. The parties' submissions

##### 1. The Government's submissions

488. The Government claimed that the second applicant's continued detention had been based on "relevant and sufficient" reasons. The Government asserted that when selecting a measure of restraint the courts took account of all legally relevant circumstances, as required by law. Under Article 97 of the CCrP detention on remand can be ordered if there is a risk of absconding, re-offending, or interfering with the course of justice. In deciding on the measure of restraint the court must take into account the gravity of the crime imputed to the accused, information about his character, age, health condition, family situation, occupation and other relevant factors.

489. In the Government's submissions, the applicant tried to "avoid meetings with the investigative authorities" of the Russian Federation. Thus, on 27 June 2003 the applicant was summoned for questioning in the building of the General Prosecutor Office. The meeting was scheduled for

10 a.m. on 2 July 2003; however, ten minutes before the start of the interview the applicant's lawyer called the investigator to inform him that the applicant had been taken to hospital. According to a certificate from the Vishnevskiy Hospital, however, the applicant was admitted there at 12.56 p.m., and not at 9.50 a.m. as he had alleged. During his examination at 3.20 p.m. the doctors observed an improvement in his condition, describing it as "satisfactory". The Government concluded that the applicant's hospitalisation had merely been a pretext for evading questioning.

490. Furthermore, on 2 July 2003, at the time of his arrest, the applicant threatened the investigator, in presence of several FSS officers, with criminal liability. He also threatened to begin a press campaign against the officials involved in his prosecution. At the time of his arrest the investigative authorities knew that the applicant had three passports for foreign travel and owned real-estate in foreign countries. Furthermore, they knew from unnamed sources that the applicant's lawyers had assured the applicant that he would be released on bail following a press campaign in his defence.

491. Some of the applicant's subordinates exerted pressure on the witnesses in order to impede the investigation. The Government produced a copy of an interview with a certain Ms Kar., made in 2008. According to Ms Kar., she worked for one of the companies which traded Yukos oil. In 2003 Yukos managers persuaded her to leave Russia for Cyprus and paid for her to stay there. In 2004 she returned to Russia and was arrested. The Government further noted that the applicant's accomplices had left Russia and did not intend to return. According to written testimony by Mr Glb., a Yukos manager, obtained in 2007, in 2003 the first applicant had met him and persuaded him to leave Russia. Later he had been told not to return to Russia. He understood that the Yukos security service had its personnel sent to London and considered that move as a personal threat to his security.

492. The Government concluded that the authorities had assessed the applicant's dangerousness, his personality, character, property, links to his home state and other relevant factors. The applicant had access to private jets at Vnukovo airport, and it would have been relatively easy for him to leave secretly the hospital where he had been admitted. He had access to foreign currency through "the plastic cards emitted by foreign banks". The authorities had also relied on the applicant's position within the company. Given that most of the evidence and testimony in the case could have been obtained only from the company's staff, it had been important to keep the latter out of the applicant's reach.

493. All these reasons were directly set out in the court decisions extending the applicant's detention. The fact that they were repeated in the consecutive detention orders meant only that they continued to exist throughout the term of the applicant's detention. Not only did the reasons which were previously stated in the court's decision not cease to exist, new reasons appeared, which were also set out in the court decisions.

494. During court examination of issues related to the second applicant's detention on remand, his procedural rights had been fully

respected. Thus, the defence was informed about the forthcoming hearings, and were able to prepare their arguments and lodge appeals. The length of the applicant's detention was due to the complexity of the case and the need to examine carefully the arguments of both parties. The defence lawyers protracted the period of detention by deliberately delaying the examination of the case-file. The investigation was closed on 22 August 2003, i.e. two months after the opening of the case; however, the defence finished examining the file only on 25 March 2004, i.e. seven months later. The applicant's health condition did not prevent him from studying the case; his intellectual level and professional skills were sufficient for understanding the evidence against him.

## *2. The second applicant's submissions*

495. For the second applicant, the reasons given by the Russian courts responsible for extending his detention beyond July 2004 were always substantially the same as the previous reasons. Thus, the decisions by the Moscow courts had failed to address any of the points relevant to the applicant's continuing pre-trial detention. The Moscow courts had nowhere acknowledged the principle of the reduced likelihood of absconding the longer the pre-trial detention continued; had failed to identify precisely how the applicant would be able to interfere materially with witness evidence; had nowhere conducted the essential balancing exercise between the ongoing and prolonged deprivation of liberty against the risks involved. House arrest or other alternative measures of restraint had not been considered.

496. The allegation that the applicant had three valid international passports in his possession was refuted by the existence of two passports marked "annulled", attached to his case file. The applicant had not transferred any money to credit cards issued by foreign banks in any manner that could have shed a negative light on his conduct. In addition, it had been established in the case file that the applicant kept most of his money in accounts with Russian banks, while using his foreign bank accounts in strict compliance with Licence no. 32-05-1190/97 of the Central Bank of the Russian Federation. The applicant had not had access to the company's private jets. In any event, owing to his status, the applicant could have used the services of any airline in the world. The issue of border crossing in any place should be under the authorities' control. The applicant could not be blamed for the "powerlessness" demonstrated by the authorities as regards control over crossing of the State's borders.

497. The applicant had not been attempting to avoid meetings with investigative bodies and had been prepared to appear for questioning as a witness. The applicant had not been simulating his illnesses; his hospitalisation had been based on the results of an examination by the head of the Vishnevskiy Military Hospital.

498. The documents referred to by the Government had not been mentioned in the proceedings before the domestic courts, and the corresponding documents had not been produced before the latter. The

Government's argument that the applicant might have bribed witnesses or coerced them into giving false testimony was unsubstantiated.

499. The Government failed to demonstrate why alternative preventive measures were not considered by the domestic courts when deciding on the detention requests by the prosecution. They also failed to point to any facts in the detention decisions which confirmed that the purported risks which were said to initially justify the applicant's detention remained valid in the course of the subsequent investigation and trial. Nowhere in the detention decisions was there a sign of the "special diligence" that is required by a court as it considered whether there continued to be "relevant and sufficient reasons" as the period of pre-trial detention continued.

## **B. The Court's assessment**

500. The Court notes that the second applicant was in custody within the meaning of Article 5 § 3 of the Convention from 2 July 2003 (the day of his arrest) until 16 May 2005 (the day of his conviction), that is, one year, ten months, and 18 days. Given the complexity of the case and the fact that there were no long periods of inactivity in the course of the proceedings, that period does not in itself appear unreasonable. However, the "reasonable time" cannot be assessed *in abstracto*: "continued detention can be justified ... only if there are specific indications of a genuine requirement of public interest, ... which outweighs the rule of respect for individual liberty" (see *W. v. Switzerland*, 26 January 1993, Series A no. 254-A, § 30). In other words, the Court has to look at whether the domestic courts adduced relevant and sufficient reasons for extending the applicant's detention.

### *1. The Court's findings in Lebedev (no. 1) and Khodorkovskiy (no. 1)*

501. On 25 November 2004 in the case *Lebedev (no. 1)* the Court held, in a partial decision on admissibility, that the second applicant's detention in custody from 2 July 2003 until 10 September 2004 had been justified. The Court found that some of the arguments put forward by the Russian courts were questionable, whereas others were "not devoid of merit". Assessing the reasons invoked by the Russian authorities as a whole and having regard to the overall length of the applicant's detention accrued by the time of the examination of the first case, the Court accepted "that the Russian authorities had not failed to give sufficient and relevant justification for the applicant's continued detention." The question before the Court in the present case is whether the reasons adduced by the domestic courts were sufficient to justify the second applicant's detention from 10 September 2004 onwards, i.e. until 16 May 2005.

502. The Court notes that in *Khodorkovskiy (no. 1)* it examined the first applicant's detention from the day of his arrest until his conviction within the same criminal proceedings. In that judgment the Court outlined the general principles of its case-law governing the application of Article 5 § 3 of the Convention (see §§ 182-186). It held, in particular, that when choosing a measure of restraint *for the first time* a court may rely on relatively loose presumptions of fact, and that the existence of a potential

risk, for example, the risk of fleeing, cannot be demonstrated with the same degree of certitude as the existence of a fact that has already occurred (see §§ 188 et seq.). Having examined the first detention order in respect of the first applicant, the Court acknowledged that the domestic authorities had little time to evaluate the possibility for applying alternative measures of restraint, and that, although not flawless, the first detention order provided sufficient justification for the applicant's detention on remand.

503. The Court noted further that in the subsequent period the first applicant's personal situation had evolved, and that some of the risks mentioned in the original detention order ceased to exist. The Court stressed, in particular, that "the Russian courts on two occasions failed to indicate reasons for the continued detention of the [first] applicant, they relied on material obtained by way of a violation of the lawyer-client privilege, and never seriously considered other measures of restraint." On the last point the Court held as follows:

"194. ... The Court observes that at no point during the whole period of the applicant's detention did the District Court or City Court take the trouble to explain why it was impossible to apply bail or house arrest to the applicant, or to accept 'personal sureties'.

195. There is no single standard of reasoning in those matters, and the Court is prepared to tolerate an implicit rejection of the alternative measures at the initial stages of the investigation. However, the time that had elapsed since the applicant's arrest should have given the authorities sufficient time to assess the existing options, to make practical arrangements for their implementation, if any, or to develop more detailed arguments as to why alternative measures would not work. Instead, the Russian courts simply stated that the applicant could not be released ...

196. Further, the context of the case was not such as to make the applicant obviously "non-bailable"... The applicant was accused of a number of non-violent crimes; he did not have any criminal record and he lived permanently with his family in Moscow, where he had his main business interests.

197. In sum, the domestic courts ought to have considered whether other, less intrusive, preventive measures could have been applied, and whether they were capable of reducing or removing completely the risks of fleeing, re-offending or obstructing justice. Their failure to do so seriously undermines the Government's contention that the applicant had to be detained throughout the whole period under consideration".

On the strength of the above the Court concluded that the first applicant's continuous detention was not justified by compelling reasons outweighing the presumption of liberty.

*2. Whether the second applicant's detention after September 2004 was justified*

504. In their submissions the Government described in detail the circumstances of the second applicant's arrest and claimed that his behaviour at that point, as well as his informal exchanges with his lawyers had been indicative of his inclination to flee (see paragraph 489 above). However, the Court notes that these arguments did not constitute part of the domestic courts' reasoning. The Government further referred to the testimony of potential witnesses who had fled the country, allegedly at the insistence of the Yukos management (see paragraph 491 above). The Court

notes that that testimony was collected only in 2007-2008 and, consequently, had not been relied upon by the domestic courts in 2003-2005. The same concerns information about credit cards issued by foreign banks in the applicant's name, real-estate abroad and private jets which had allegedly been at the applicant's disposal at Vnukovo airport: those factual elements were not mentioned in the extension orders under examination. The Court reiterates in this respect that "it is essentially on the basis of the reasons given in [the detention orders] and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3" (see, for example, *Wiensztal v. Poland*, no. 43748/98, § 50, 30 May 2006). In the present case the Court will take into consideration only those arguments and information which were explicitly relied upon by the domestic courts in their decisions (see paragraphs 47 et seq. above) and which the applicant had an opportunity to discuss in the domestic proceedings.

505. During the period under consideration the domestic courts extended the second applicant's detention with reference to two risks: the risk of tampering with evidence and the risk of absconding. As to the former, the Court notes that by June 2004, when the trial started, all documentary evidence had been already seized by the prosecution, all prosecution witnesses and experts had been questioned and their recorded testimony had been submitted to the court. By the end of 2004 the court had completed its examination of evidence collected by the prosecution. These developments significantly reduced the risk of tampering with evidence. Furthermore, throughout 2004 the main assets of Yukos were attached and sold at auction (see the *Yukos* case, §§ 92 et seq.). Thus, the second applicant ceased to exercise *de facto* control over the company; his ability to influence the company's personnel was accordingly reduced. Despite those changes the domestic courts continued to repeat the reasons set out in their earlier detention orders.

506. The other reason justifying the second applicant's detention was, according to the domestic courts, a risk of absconding. However, the existence of that risk was not convincingly demonstrated in the extension orders. Thus, the mention of the second applicant's "international connections" was too vague and was not supported by any evidence. The Court stresses that, given the advanced stage of the proceedings, the domestic courts were in a position to take a closer look at the second applicant's alleged "international connections" and explain it in their decisions (compare *Aleksanyan v. Russia*, no. 46468/06, § 187, 22 December 2008, and *Aleksandr Makarov v. Russia*, no. 15217/07, § 126, 12 March 2009). The reference to the second applicant's character "was not accompanied by any description of the applicant's character or an explanation as to why it made his detention necessary" (see *Polonskiy v. Russia*, no. 30033/05, § 152, 19 March 2009). The fact that other Yukos managers and shareholders had left Russia might probably have been relevant at the initial stage of the investigation, but "the fact that a person is charged with acting in criminal conspiracy is not in itself sufficient to justify long periods of detention; his personal circumstances and behaviour

must always be taken into account” (see *Sizov v. Russia*, no. 33123/08, § 53, 15 March 2011). Furthermore, the Court notes that “the behaviour of a co-accused cannot be a decisive factor for the assessment of the risk of the detainee’s absconding. Such assessment should be based on personal circumstances of the detainee” (see *Mamedova v. Russia*, no. 7064/05, § 76, 1 June 2006).

507. The Court also notes that in ordering the extensions the courts used a stereotyped wording. Such an approach may suggest that there was no genuine judicial review of the need for the detention (see *Yağcı and Sargin v. Turkey*, 8 June 1995, § 50 et seq., Series A no. 319-A) at each extension.

508. Finally, the domestic courts during the period under consideration never considered the alternative preventive measures provided for by Russian law. The Court reiterates that when deciding whether a person should be released or detained the authorities have an obligation under Article 5 § 3 to consider alternative measures of ensuring his or her appearance at trial. This Convention provision proclaims not only the right to “trial within a reasonable time or to release pending trial” but also lays down that “release may be conditioned by guarantees to appear for trial” (see *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000, and *Sulaoja v. Estonia*, no. 55939/00, § 64, *in fine*, 15 February 2005). In the present case the authorities did not consider the possibility of ensuring the second applicant’s attendance by the use of a more lenient preventive measure, such as bail, house arrest, or other measures provided by the Russian law, and “the context of the case was not such as to make the applicant obviously “non-bailable” (see *Khodorkovskiy (no. 1)*, § 196, with further references).

509. The Court concludes that the domestic courts failed to demonstrate that the applicant’s detention during the period under consideration (10 September 2004-16 May 2005) was justified by “relevant and sufficient” reasons. There was therefore a violation of Article 5 § 3 of the Convention on this account.

#### IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 IN RESPECT OF THE SECOND APPLICANT

510. The second applicant complained, relying on Article 5 § 4 of the Convention, that the proceedings in which the lawfulness of his detention had been reviewed, had not offered sufficient procedural guarantees. Article 5 § 4 provides:

“4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

##### A. The parties’ submissions

###### 1. The Government’s submissions

511. As regards the time given to the defence to prepare their replies to the prosecutor’s requests for detention (the requests of 10 September 2004,

14 December 2004 and of 2 March 2005), the Government submitted that virtually all of the detention hearings concerned the same elements: the applicant's financial status and his failure to appear for questioning on 2 July 2003. Thus, the prosecution's arguments were well known to the defence.

512. Concerning the alleged delays in the examination of the second applicant's appeals against the detention orders, the Government submitted that his appeals had been examined as quickly as was possible in the circumstances and that the periods of examination of the second applicant's appeals were reasonable. Further, the second applicant himself had contributed to the length of the proceedings before the second-instance court which was supposed to examine his appeals against the detention orders.

## 2. *The second applicant's submissions*

513. The second applicant complained of a violation of the principle of equality of arms during the detention hearings. Thus, the requests for extension of his detention were made by the prosecutor orally (and thus in violation of the law) on all three occasions: on 10 September 2004, 14 December 2004 and 2 March 2005. The prosecutor had unlimited time to prepare those requests. In contrast, the second applicant's lawyers were forced to submit an *ex tempore* response on each occasion, with very limited time. On 10 September 2004 the defence team was given insufficient time to prepare objections to the state prosecutor's oral request for the extension of the second applicant's detention. On 14 December 2004 the defence team was given two hours and thirty minutes to prepare objections to the state prosecutor's oral request for extension of the second applicant's detention; and on 2 March 2005 the defence team was given no time to prepare. Since the prosecutor's request repeated the previous requests practically verbatim, and it became clear that there was no realistic prospect whatsoever that the court would accept the defence's arguments, the second applicant's lawyers decided not to press the court for time to prepare objections.

514. The appellate court was under an obligation to address the defence arguments, not simply to recite them and then to reiterate the same formulaic and stereotypical conclusions that had been made in the initial detention decisions. The second applicant's appeal (which ran to ten pages) against the extension order of 10 September 2004 cited at least seven separate grounds for quashing the District Court's decision as unlawful and unjustified, but in its ruling of 13 October 2004 the Moscow City Court compendiously rejected all of the defence arguments in just one single sentence. The defence subsequently filed an eight-page appeal against the ruling of the Meshchanskiy District Court of 14 December 2004. Although in its ruling of 19 January 2005 the Moscow City Court cited the defence's arguments, it failed to address them. In the ruling of 31 March 2005, in reply to an eleven pages' appeal against the Meshchanskiy District Court's ruling of 2 March 2005, the appellate court once more failed to engage with the substance of the second applicant's arguments.



515. The second applicant claimed that the time taken to hear his appeals did not meet the requirement of speediness. Thus, the appeal against the ruling of 10 September 2004 had been considered by the second-instance court on 13 October 2004; the appeal against the ruling of 14 December 2004 had been considered by the second-instance court on 19 January 2005. The second applicant argued that there had thus been unacceptable delays in the light of the Court's case-law on this subject.

## **B. The Court's assessment**

### *1. Equality of arms in the detention proceedings*

516. The Court reiterates that when the lawfulness of detention pending investigation and trial is examined, the proceedings must be adversarial and must always ensure equality of arms between the parties – the prosecutor and the detainee (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 59, ECHR 1999-II; see also *Graužinis v. Lithuania*, no. 37975/97, § 31, 10 October 2000). This means, in particular, that the detainee should have access to the documents in the investigation file which are essential for assessing the lawfulness of his detention (see *Lamy v. Belgium*, judgment of 30 March 1989, § 29, Series A no. 151, and *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I). The detainee should also have an opportunity to comment on the arguments put forward by the prosecution (see *Niedbala v. Poland*, no. 27915/95, § 67, 4 July 2000).

517. In the present case the Court has to examine procedures in which the second applicant's detention was extended from 10 September 2004 onwards. According to the second applicant, the defence was not prepared to counter the detention requests lodged by the prosecution. The Government replied that the time given to the defence to counter the detention requests had been sufficient, given that the prosecution had always referred to the same grounds for the continuing detention and the defence had been familiar with their arguments.

518. The Court observes that the complexity of the prosecution requests for extension may be a relevant factor: the more complex and unexpected the requests are, the more time the defence requires to counter them. In such a situation, where a request for extension comes as a surprise, the defence is in a disadvantageous position *vis-à-vis* the prosecution.

519. The Court notes that, by claiming that the extension requests were stereotyped, the Government in fact supported the applicant's complaint under Article 5 § 3 of the Convention (see above): they indicated that, throughout the entire period under consideration, the prosecution's arguments calling for the applicant's detention remained the same.

520. On the other hand, this same factor speaks in favour of the Government's contention under Article 5 § 4 that the defence had sufficient time to respond to the prosecution's requests, in view of their similarity. The Court reiterates in this respect that "Article 5 contains more flexible procedural requirements than Article 6 while being much more stringent as regards speediness" (see *Lebedev (no. 1)*, § 84). The Court observes that the applicant was represented by a group of highly professional lawyers, that the hearings were adjourned for one or two hours

each time when the defence asked for it, and that the defence did not seek extra adjournments (see paragraph 49, 51 and 53 above). The Court concludes that even though the prosecution had more time to develop their arguments, given the nature of the proceedings, this disparity between the parties did not perturb the principle of equality of arms to an extent incompatible with Article 5 § 4 of the Convention.

## 2. *Speediness of review*

521. The second applicant complained that his appeals against the detention orders were not examined speedily by the court of appeal. The Court reiterates that under Article 5 § 4 a detainee is entitled to take proceedings by which the lawfulness of his detention must be decided speedily by a court (see *Rehbock v. Slovenia*, no. 29462/95, §§ 82-88, ECHR 2000-XII, and *G.B. v. Switzerland*, no. 27426/95, §§ 34-39, 30 November 2000). Where domestic law provides for a system of appeal, the appellate body must also comply with the requirements of Article 5 § 4; at the same time, the standard of speediness “is less stringent when it comes to the proceedings before the court of appeal.... The Court would not be concerned, to the same extent, with the speediness of the proceedings before the court of appeal, if the detention order under review was imposed by a court and on condition that the procedure followed by that court had a judicial character and afforded to the detainee the appropriate procedural guarantees” (see *Shakurov v. Russia*, no. 55822/10, § 179, 5 June 2012). In the case of *Mamedova*, cited above, which, like the present case, concerned appeal proceedings, it found that the “speediness” requirement was not complied with where the appeal proceedings lasted thirty-six, twenty-six, thirty-six, and twenty-nine days respectively, stressing that their entire duration was attributable to the authorities (see *Mamedova*, § 96; see also, for longer delays, *Ignatov v. Russia*, no. 27193/02, §§ 112-114, 24 May 2007, and *Lamazhyk v. Russia*, no. 20571/04, §§ 104-106, 30 July 2009). By contrast, the length of appeal proceedings that lasted ten, eleven and sixteen days was found to be compatible with the “speediness” requirement of Article 5 § 4 (see *Yudayev v. Russia*, no. 40258/03, §§ 84-87, 15 January 2009, and *Khodorkovskiy (no. 1)*, § 247). Finally, the Court reiterates that the delay for which the State may be held responsible should not include the time when the defence was preparing their brief of appeal (see *Khodorkovskiy (no. 1)*, § 247), unless the defence was prevented from finalising it through the fault of the authorities (see *Lebedev (no. 1)*, § 100).

522. Turning to the present case the Court reiterates that a similar complaint by the second applicant concerning earlier detention orders has already been addressed in *Lebedev (no. 1)*. In that case the Court held that delays of forty-four and sixty-seven days, of which twenty-seven and forty-seven were attributable to the authorities, constituted a breach of Article 5 § 4 (see §§ 98-108). During the period now under examination the detention order of 10 September 2004 was reviewed within twenty-three days, if calculated from the date when the brief of appeal was introduced (see paragraphs 49 et seq. above). The detention order of 14 December 2004 was reviewed by the City Court within twenty-six days.

The detention order of 2 March 2005 was examined by the City Court within twenty days from the date when the brief of appeal had been introduced, and only twelve days out of this period can be attributed to the State, since the defence requested an adjournment of the appellate hearing.

523. Having regard to the Court's case-law cited above the delays in the examination of the appeals against the extension orders of 10 September 2004 and 2 March 2005 do not amount to a violation of the Convention. Only the review of the extension order of 14 December 2004 warrants the Court's attention. In *Mamedova* a similar delay was found to be in breach of Article 5 § 4, and the Court does not see any reason to hold otherwise in the present case. The Court has not overlooked that the applicant *in casu* introduced his appeal during the period of long public holidays (New Year and Orthodox Christmas). However, public holidays are not a good excuse for delaying the examination of an application for release (see *E. v. Norway*, judgment of 29 August 1990, § 66, Series A no. 181-A).

524. The Court accordingly concludes that the appeal against the detention order of 14 December 2004 was not examined "speedily", as required by Article 5 § 4 of the Convention. There was therefore a violation of that provision in this respect.

### 3. *Failure of the court of appeal to give reasons*

525. The second applicant lastly complained that the court of appeal had not given answers to all of his arguments. The Court reiterates that the absence of reasons in a court decision might in certain circumstances raise an issue of procedural fairness. Usually this question appears in the context of Article 6 § 1 (see *Hiro Balani v. Spain*, 9 December 1994, Series A no. 303-B), but the Court has also examined it under Article 5 § 4 (see *Nikolova*, cited above, § 61). However, the Court considers, in view of its earlier findings under Article 5 § 3, that this aspect of the case does not require a separate examination. The second applicant's main grievance was that the domestic courts at two levels of jurisdiction had failed to explain why his detention had been necessary. The Court has already addressed this problem above under Article 5 § 3. It follows that the applicant's complaint under Article 5 § 4, in so far as it concerned the failure of the court of appeal to give reasons, does not require a separate examination.

## V. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION (IMPARTIAL TRIBUNAL)

526. The first and the second applicants complained of several distinct breaches of Article 6 of the Convention. The first group of their arguments related to the alleged bias of the presiding judge. This complaint will be addressed immediately below, in Section V. The applicants further claimed that the hearing in their case was not "fair", contrary to Article 6 § 1, in particular due to the lack of time and facilities to prepare the defence (Article 6 § 3 (b)), impossibility to enjoy effective legal assistance (Article 6 § 3 (c)), and the applicants' inability to examine prosecution evidence or adduce their own evidence (Article 6 § 3 (d)). These

allegations will be examined in Section VI of the present judgment. Finally, in Section VII the Court will turn to the applicants' allegation that placing them in a metal cage during the trial was contrary to the presumption of innocence guaranteed by Article 6 § 2 of the Convention.

527. The Court will start with the applicants' complaint that Judge Kolesnikova was not impartial. They referred to Article 6 § 1 which, in so far as relevant, provides:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal”

## **A. The parties' submissions**

### *1. The Government's submissions*

528. The Government claimed that Judge Kolesnikova had not been in a situation which might have caused doubts as to her impartiality, as provided by Articles 61-63 of the CCRP, that there had been two other judges on the bench, and that the District Court judgment had later been reviewed at two levels of jurisdiction, including the supervisory review proceedings. None of the procedural decisions taken by her during the trial contained anything which could have been reasonably interpreted as a declaration of the applicants' guilt. Various procedural steps taken by her were solely aimed at securing fair and speedy examination of the case. The law prohibited the judge from expressing her opinion on the substance of the accusation prior to the delivery of the judgment. Further, she was one judge out of three, and the applicants did not express any doubts as to the impartiality of the lay assessors. Finally, the District Court judgment was later reviewed by the judges of the court of appeal, whose impartiality was not contested.

529. As to Ms Kolesnikova's findings in the judgment in Mr Shakhnovskiy's case, the first applicant's name was mentioned in the *Shakhnovskiy* judgment only once, in passing, where the District Court described a note written by Ms Kantovich to the first applicant and to Mr Aleksanyan, the then head of the Yukos legal department. That reference to the first applicant's name concerned assessment of evidence and could not be interpreted as showing the judge's bias against the first applicant.

530. The second applicant's name was mentioned five times in the judgment against Mr Shakhnovskiy. On page 12 of the judgment the court referred to contracts between several leading Yukos executives, including the second applicant, and the firm Status Services; it also mentioned corporate American Express credit cards seized during the search of the applicant's country house. On pages 17 and 19 the court again referred to that evidence as proof of tax evasion. In the Government's opinion, the wording used by Judge Kolesnikova had not contained any declaration of the applicant's guilt; his name had simply been mentioned to identify documents and other evidence against Mr Shakhnovskiy.

531. The crimes of which Mr Shakhnovskiy was found guilty had been committed by him alone and did not contain, as a qualifying element, the element of an “organised group”. That judgment could not therefore be

construed as implicating the applicants in the crimes imputed to Mr Shakhnovskiy. The judgment against Mr Shakhnovskiy was very lenient: he was relieved from serving his sentence and acquitted in respect of part of the accusations. In the Government's opinion, this showed that Judge Kolesnikova had no predisposition against Yukos managers.

532. In their observations on the merits of the case, the Government maintained that law-enforcement bodies did not conduct any inquiries or investigations in respect of Judge Kolesnikova or her relatives over the period 2000-2006.

## 2. *The applicants' submissions*

533. The applicants claimed that in the judgment concerning Mr Shakhnovskiy Judge Kolesnikova not only concluded that Mr Shakhnovskiy had evaded personal taxes, she also made a finding that the second applicant had similarly evaded personal taxes. Furthermore, in her judgment on the *Shakhnovskiy* case, Judge Kolesnikova placed reliance on the first applicant's knowledge of that tax arrangement, as demonstrated by a memo written to Mr Khodorkovskiy on behalf of Mr Aleksanyan by Ms Kantovich. The applicants were subsequently convicted by Judge Kolesnikova of exactly the same offence as Mr Shakhnovskiy.

534. Moreover, Judge Kolesnikova made a series of findings in Mr Shakhnovskiy's trial as to the admissibility of evidence that had been unlawfully seized and which was similarly relied upon in the applicants' trial. In the applicants' trial Judge Kolesnikova once more refused to exclude the evidence as inadmissible. It was irrelevant that Judge Kolesnikova had given Mr Shakhnovskiy a non-custodial sentence: this did not undermine the fact that she had found him guilty and made certain findings of fact.

535. During the applicants' trial Judge Kolesnikova took decisions that were not only unfavourable to the applicants but plainly unlawful and unjustified. Those decisions concerned the extension of their detention on remand, limitation of time for studying materials and innumerable other decisions adverse to the defence, such as ruling against the admissibility of defence expert reports, ruling against the defence requests to cross-examine prosecution witnesses, ruling against the defence applications for disclosure of exculpatory material, etc., while adopting a differing, more favourable approach to deficient evidence produced by the prosecution. Defence motions were often summarily rejected with no substantive reasons given. Judge Kolesnikova refused to grant permission to the Council of Europe Special Rapporteur to see the applicants. Finally, almost two years after the conclusion of the trial Judge Kolesnikova made an order lifting the seizure of Yukos ordinary shares and directing that they be used towards satisfying the civil damages award. The overwhelming effect was a clear impression that the District Court's presiding judge was biased against the applicants.

536. It was Judge Kolesnikova who, as presiding judge, had led court sessions. Throughout the trial, the two other judges (Judge Maksimova and Judge Klinkova) asked only a few questions, while Judge Kolesnikova had a more comprehensive role, examining witnesses and specialists and

adopting procedural and organisational decisions. From media the applicants became aware of the rumour that Judge Kolesnikova and/or her family members were under investigation by the GPO during the trial. The applicants stressed that Judge Kolesnikova had not done anything to disprove those allegations. Furthermore, that allegation had not been commented by the Government in their pre-admissibility observations.

## **B. The Court's assessment**

### *1. General principles*

537. The Court reiterates that impartiality, within the meaning of Article 6 § 1 of the Convention, normally denotes the absence of prejudice or bias. There are two tests for assessing whether a tribunal is impartial: the first consists of seeking to determine a particular judge's personal conviction or interest in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, for example, *Gautrin and Others v. France*, 20 May 1998, § 58, Reports 1998-III; *Daktaras v. Lithuania*, no. 42095/98, § 30, ECHR 2000-X; and *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII).

538. In applying the first test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see, among other authorities, *Padovani v. Italy*, 26 February 1993, § 26, Series A no. 257-B; *Kyprianou*, cited above, § 119, and *Kontalexis v. Greece*, no. 59000/08, § 54, 31 May 2011). In applying the second test the Court often observed that "even appearances may be of a certain importance", although the standpoint of the accused is not decisive, and what is determinant is whether the fear of partiality may be held to be objectively justified (see *Sutyagin v. Russia*, no. 30024/02, § 182, 3 May 2011). The mere disagreement with the procedural decisions taken by a judge does not provide a legitimate reason to doubt his or her impartiality (see *Academy Trading Ltd and Others v. Greece*, no. 30342/96, § 46, 4 April 2000). Similarly, the mere fact that a professional judge had already tried a co-accused and knows the facts of the case is not, in itself, sufficient to cast doubt on that judge's impartiality (see *Miminoshvili v. Russia*, no. 20197/03, §§ 116-120, 28 June 2011).

### *2. Application to the present case*

#### **(a) Procedural decisions taken by Judge Kolesnikova**

539. First, the applicants claimed that procedural decisions taken by Judge Kolesnikova during the trial were indicative of her bias. The Court, however, is not convinced by that argument. In *Morel v. France* (no. 34130/96, §§ 45 et seq., ECHR 2000-VI, with further references) the Court held that the mere fact that a judge had already taken pre-trial decisions could not by itself be regarded as justifying concerns about his impartiality. What mattered was the scope and nature of the measures taken by the judge before the trial. For example, a preliminary analysis of

the available information for the purposes of taking a procedural decision does not mean that the final analysis in the judgment had been prejudged.

540. Turning to the present case the Court notes that many procedural decisions taken by Judge Kolesnikova were indeed unfavourable to the defence. However, this is conceivable without the judge being biased against the defendant. To overcome the presumption of impartiality (see paragraph 538 above), which is a starting point for its analysis under the subjective test, the Court must have a stronger evidence of personal bias than a series of procedural decisions infavourable to the defence. The Court reiterates that it may not necessarily agree with all of the decisions taken by Judge Kolesnikova, and will scrutinise them in more detail below; however, there was nothing in them to reveal any particular predisposition against the applicants (see *Miminoshvili v. Russia*, cited above, § 114).

**(b) Whether Judge Kolesnikova was under investigation herself**

541. The second argument by the applicants concerned inquiries or criminal proceedings which had allegedly been instituted against either Judge Kolesnikova herself or against her relatives. The applicants themselves characterised that information as “rumours”. In their observations on the merits the Government unequivocally denied the applicants’ allegations in this respect. The Court has no proof that such proceedings had indeed been instituted, or that Judge Kolesnikova had been targeted by them directly or indirectly. The Court cannot base its conclusions on rumours, so this argument by the applicants must be dismissed.

**(c) Involvement of Judge Kolesnikova in Mr Shakhnovskiy’s case**

542. There remains the third argument by the applicants, namely the question whether the involvement of judge Kolesnikova in the proceedings against Mr Shakhnovskiy would make an objective observer believe that she was not impartial to judge the applicants’ case.

543. The Court observes that, in a number of cases, it has come to the conclusion that the involvement of the same judge in two sets of proceedings concerning the same events may arguably raise an issue under Article 6 § 1 of the Convention (see *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 59, *Reports of Judgments and Decisions* 1996-III, and *Rojas Morales v. Italy*, no. 39676/98, § 33, 16 November 2000).

544. In more recent cases the Court has clarified its position and held that the mere fact that a judge had already tried a co-accused was not, in itself, sufficient to cast doubt on that judge’s impartiality in that applicant’s case (see *Schwarzenberger v. Germany*, no. 75737/01, §§ 37 et seq., 10 August 2006, and *Poppe v. the Netherlands*, no. 32271/04, § 22 et seq., 24 March 2009). As a matter of practice, criminal adjudication frequently involves judges presiding over various trials in which a number of co-accused persons stand charged. The Court considers that the work of criminal courts would be rendered impossible if, by that fact alone, a judge’s impartiality could be called into question. An examination is needed, however, to determine whether the earlier judgments contained findings that actually prejudged the question of the applicant’s guilt.

545. In *Schwarzenberger*, cited above, the Court emphasised that the assessment of facts in the judgment given against the applicant clearly differed from that in the judgment against the co-accused and that the judgment convicting the applicant did not contain any references to the judgment against the co-accused, showing that the judges had given fresh consideration to the applicant's case. Further, in the judgment against the co-accused, the established facts about the applicant's involvement in the crimes were essentially based on the co-accused's submissions, and thus did not constitute the Regional Court's assessment of the applicant's guilt. In *Poppe*, cited above, the Court found it decisive that the applicant's name had been mentioned only in passing in the judgments against the co-accused and that the trial judges had not determined whether the applicant was guilty of having committed an offence.

546. Finally, in *Miminoshvili*, cited above, §§ 117 et seq. the Court examined a similar situation and found that the applicant's fear of partiality was not objectively justified. In that case the judgment in the applicant's case contained a reference to a judgment rendered earlier in the case of his brother, who was a member of the same gang, but only in passing. There was no direct evidence that the findings of the previous judgment were relied on by the judge in the proceedings against the applicant. What is more, Article 90 of the CCrP clearly stipulated that those findings could not have the force of *res judicata* in the applicant's case. The judge sitting in the applicant's case was required to conduct a fresh examination of the charges against him, relying only on the evidence examined at his trial.

547. In *Miminoshvili* the Court also analysed the judgment in the case concerning the applicant's brother, Mr M., and stressed that the applicant's name was never mentioned there in any incriminating context: the domestic court did not refer to the applicant as a "perpetrator" or "co-offender", in contrast to the situation in *Ferrantelli and Santangelo*, cited above. The court in the case of the applicant's brother did not determine whether the applicant was guilty, and there was no specific qualification of the acts committed by him. The Court further held as follows:

"Indeed, several witnesses named the applicant as the leader of the gang and described his role in some of the episodes imputed to [his brother]. That information was reproduced in the judgment; however, it was presented in the judgment as reported speech, and not as the court's own findings. It can be seen from the judgment that the information about the applicant's involvement in the gang was not a *condition sine qua non* for the conviction of [the applicant's brother]. At least, there is no indication that the Nikulinskiy District Court would not have come to the same conclusions in [the applicant's brother's] case if all references to the applicant's name had been removed. These circumstances lead the Court to conclude that the judgment in [the applicant's brother's] case did not contain findings that actually prejudged the question of the applicant's guilt in subsequent proceedings".

The Court finally took note of the fact that Judge K. was a professional judge and, as such, she was *a priori* more prepared to disengage herself from her previous experience in Mr M.'s trial than, for instance, a lay judge or a juror. The Court concluded that the trial court in the *Miminoshvili* case had been impartial.

548. Turning to the present case the Court finds it similar to *Miminoshvili* in many respects. Thus, in the applicants' case Judge



Kolesnikova, under the Russian law, had been in no way bound by her earlier findings in the case of Mr Shakhnovskiy (see paragraph 387 above). She had to reconsider the whole case with all the issues raised by the case remaining open. Further, the judgment in the applicants' case did not refer to the case of Mr Shakhnovskiy.

549. The *Shakhnovskiy* judgment, in turn, did not contain any finding directly incriminating the applicants: they were not referred to as “perpetrators”, “offenders”, “co-authors” etc. The judgment did not analyse their involvement in the crime imputed to Mr Shakhnovskiy (personal tax evasion) and did not establish the constituent elements of the applicants' criminal liability.

550. The applicants seem to suggest that, while Judge Kolesnikova was not legally bound by her previous findings, she might have at least felt constrained by them. Although the *Shakhnovskiy* judgment did not establish the applicants' guilt, their names were mentioned in a somewhat incriminating context. Thus, the central proposition of the *Shakhnovskiy* judgment was the fictitious character of his relations with Status Services. This was based on a number of other interim factual findings, including the fact that Mr Aleksanyan had given a legal opinion to the first applicant, describing the individual entrepreneur's scheme, the fact that the second applicant had been a chief executive of Status Services, and the fact that an identical service contract had existed between the second applicant and Status Services (see paragraph 142 above).

551. Second, in Mr Shakhnovskiy's trial Judge Kolesnikova had admitted evidence that was later relied upon by her upon in the applicants' trial – in particular, the note of Mr Aleksanyan, evidence related to the credit card in the second applicant's name, and the contract between the second applicant and Status Services. It appears that at least the first two items of evidence were discovered by the prosecution during the searches in the Yukos premises in Zhukovka in October 2003 (see paragraphs 69 et seq. above). The Court notes that the defence in the case at hand tried to obtain the exclusion of materials obtained during those searches (see paragraph 173 above). By admitting that evidence in Mr Shakhnovskiy's proceedings the judge implicitly acknowledged the lawfulness of the searches and seizures which led to the discovery of that evidence.

552. The Court accepts that the *Shakhnovskiy* judgment might arguably be construed as implying that the second applicant had somehow aided Mr Shakhnovskiy in using the “individual entrepreneur scheme”, whereas the first applicant had been at least aware of the situation. That being said, such inferences are not based on the literal meaning of Judge Kolesnikova's findings in the *Shakhnovskiy* judgment.

553. Furthermore, even if those facts may be said to describe the applicants' role in the crimes imputed to Mr Shakhnovskiy, they did not concern the charges against the applicants in their own case. Those facts were mentioned by Judge Kolesnikova in order to illustrate the fictitious character of relations between Mr Shakhnovskiy and Status Services, but they cannot be interpreted as suggesting that the applicants themselves had evaded taxes in a similar way.

554. As to the issue of admissibility of evidence, the Court emphasises that, in adversarial proceedings, the determination of what is admissible and what is not largely depends on the parties' positions and arguments. The Court has no information about the particulars of Mr Shakhnovskiy's defence, but given the brevity of his trial and the lenience of the sentence the Court is prepared to accept that Mr Shakhnovskiy did not challenge the prosecution evidence and their factual assertions as vigorously as the applicants did in their trial. In such circumstances nothing prevented Judge Kolesnikova from departing from her earlier findings as to the admissibility of evidence.

555. Finally, the Court notes that, as a professional judge, Judge Kolesnikova was *a priori* prepared "to disengage herself from her previous experience" in Mr Shakhnovskiy's trial.

556. The Court concludes that the judgment in Mr Shakhnovskiy's case did not contain findings that prejudged the question of the applicants' guilt in subsequent proceedings, and that Judge Kolesnikova was not bound by her previous findings, either legally or otherwise.

557. In sum, the Court concludes there was no violation of Article 6 § 1 of the Convention on account of Judge Kolesnikova's previous involvement in Mr Shakhnovskiy's trial.

## VI. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 OF THE CONVENTION (FAIR HEARING)

### A. Time and facilities for the preparation of the defence

558. The applicants complained that they had lacked adequate time and facilities to prepare their defence. They referred to Article 6 §§ 1 and 3 (b) which, in so far as relevant, provide:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... .

3. Everyone charged with a criminal offence has the following minimum rights: ...

(b) to have adequate time and facilities for the preparation of his defence".

#### 1. *The parties' submissions*

##### (a) **The Government's submissions**

559. The Government maintained that any limitations of the time given to the defence to prepare for the case were explained by the need to conduct proceedings in accordance with the requirement of a speedy trial. The applicants retained several highly professional lawyers, who had access to the materials of the case for almost six months for the first applicant and even longer for the second. The applicants and their lawyers repeatedly signed forms acknowledging that they had been allowed to study the materials of the case without any time restrictions. The applicants' defence teams were allocated special rooms in the remand prison in order to enable them to prepare for the trial. These rooms were equipped with safe-boxes, where the defence was allowed to keep the

materials of the case-file. The applicants were studying the materials in parallel with their lawyers; according to a letter from the head of the remand prison, the defence could ask the administration to make copies of the materials in the case file. In addition, the applicants were entitled to make notes and take materials from the case file to their cells, and transmit written comments to the lawyers, under the conditions established in sections 17, 18, 20 and 21 of the Detention on Remand Act. The second applicant had always had paper, writing accessories and law books at his disposal. The Government denied that the second applicant had not been allowed to use a magnifying glass or a calculator: although, as a rule, detainees could not have such objects, the applicant had been allowed to use them during the court hearings and when he studied the case file.

560. After the start of the trial the lawyers for Mr Kraynov (a co-defendant) asked the court to give them additional time, until 23 August 2004, to study the case file. When the court asked the parties' opinion about a possible adjournment on this ground, the applicants left that question to the court's discretion. When any new material was added to the case file during the trial, the court always adjourned the hearing and provided the defence with an opportunity to study it. Throughout the entire trial the applicants and their lawyers had access to the materials of the case file. They never declared that they were unable to participate in the examination of evidence because they were unfamiliar with the materials of the case. The fact that the applicants were well-aware of the content of the case file was demonstrated by their own detailed requests and motions lodged during the trial.

561. As to the changes in the planning of the hearings, allegedly detrimental to the defence, this was a decision taken by Judge Kolesnikova and within her discretion. If the defendants needed more time to meet their lawyers, they were entitled to ask the court for an adjournment. The court would decide those requests on a case-by-case basis. The Government produced extracts from the trial record which showed that the defence was repeatedly given short adjournments during the hearings to prepare their arguments and examine documents produced by the prosecution.

562. Bearing in mind the professional level of their defence team, the Government concluded that the applicant had sufficient time to prepare their defence.

563. As regards the judge's refusal to attach audio-recordings of the hearings, made by the defence, to the materials of the case, the Government explained that the judge who had examined the defence comments and objections concerning the trial record had dismissed them as unfounded. Since the trial record had been accurate, there had been no need to examine the audio recordings of the hearings. In signing the minutes of the hearing, the judge consciously confirmed the veracity of that document.

**(b) The applicants' submissions**

564. The applicants maintained that the time given to the defence to prepare for the trial had been clearly insufficient. The first applicant's case-file originally comprised 227 volumes, approximately 55,000 pages.

The second applicant's case-file contained 164 volumes, each volume contained 250 pages on average, i.e. there were about 41,000 pages in total. Two bills of indictment constituted another two volumes. At the trial, after the two cases had been joined, the first applicant received 22 working days to study 165 volumes of case materials from the second applicant's case, whereas the second applicant had to study 228 additional volumes within that period. The bill of indictment had covered a period of over ten years, and the case was extremely complex, both legally and factually. Although there was a commonality in the charges faced by the applicants there were also significant differences. It was therefore imperative for the applicant's lawyers to scrutinise the additional materials. Some documents, of course, appeared in both sets of files, but it was necessary to look through all of the volumes to understand which documents had already been studied and which had not.

565. The Government's reliance on the fact that the applicants had not refused to take part in the trial on account of not being prepared for proceedings was entirely without merit, since the applicants could not have done that without risking irreparable harm to their defence. During the trial they did ask for more time to familiarise themselves with the case materials, while the applicants' lawyers commented that they were placed in an impossible situation.

566. As to the conditions in which the applicants had had to study the case file and prepare their defence, the applicants argued that the defence had no place to keep the materials of the case file, and that the Government's assertion that a safe-box had been allocated for that purpose in the detention facility was untrue. In addition, the defence had only been permitted to use certain meeting rooms, even when others were vacant, which was very suspicious. The Government's assertion that the applicant was able to give written comments to his lawyers was misleading, in as much as it omitted to mention the fact that all such comments had had to be passed through a special division of the detention facility - i.e. lawyer-client confidentiality had systemically been violated. The applicants were not allowed to have their own copy of the case file. It is to be noted that they would have been able to have their own copy had they been released on bail rather than detained. The applicants had been entitled to read the case file only in the presence of the investigator. When the applicants wished to discuss the documents in private with their lawyers the investigator had removed the documents. The temporary absence of a magnifying glass and a calculator had seriously impaired the preparation of the defence of the second applicant. The applicants were very largely reliant on the notes that they had made when they were reviewing the case files in the presence of the investigator. They were in theory permitted, upon request, to receive photocopies of the materials in the case file but in fact they were provided with only a very small number of copies of pages from the case materials. They were permitted to keep their notes and very limited extracts from the case file in their cells.

567. At the start of the trial the applicants' respective legal teams were given each one copy of the case file in relation to the co-defendants. Subsequently the applicants' legal team made copies of those case files for

their use. However, the applicants themselves were not permitted to be given a copy of the case files. In the court room, the applicants were entirely reliant on their lawyers showing extracts of the case file to them through the bars of the iron cage in which they were kept. The only way that the applicants were able to access the case materials during the trial was to request an adjournment of the trial. In the applicants' words, such limitations significantly prolonged the time needed to study the case file.

568. As to the timing of the hearings, the court originally instituted a four-day court week so as to allow the fifth day to be used for trial preparation, and the hearings started at 11 a.m. The Government offered no explanation as to why in the middle of the trial, at its most intensive phase, it had suddenly become possible to start earlier in the day. The time available for preparing the case had suddenly decreased. Equally, the Government did not explain why, as the defence phase of the trial progressed, it had become reasonable for the Court to sit five days a week.

569. The applicants asserted that they had never been given access to the entire trial record. The GPO had had access to all 30 volumes, but the defence had access to only 15. The applicants' cells were placed in quarantine after the same infected inmate had been placed successively in both applicants' cells.

570. As to the analysis of inaccuracies in the trial record, the defence's objections had been summarily dismissed. The defence had tried to rectify inaccuracies in the trial record by submitting to Judge Kolesnikova audiotapes containing the audio-record of the entire trial, but on 2 September 2005 Judge Kolesnikova returned all of the audiotapes to the defence on the basis that the case was closed and nothing more could be added. The applicants argued that those audiotapes substantiated the defence objections to the trial record. The audiotapes were lawfully recorded and the CCrP required such tapes to be added to the case materials.

571. According to the applicants, some of the inaccuracies in the trial record identified by the defence were quite significant – for example, the record omitted the requirement for documents to be handed to the judge before being passed to the applicants during the trial and the omission of discussions about sitting on Wednesdays. Other omissions in the trial record concerned serious inaccuracies in the evidence given by witnesses. In the applicants' opinion, dismissing such objections summarily suggested bad faith on the part of the court.

572. The appeal was improperly expedited so as to ensure that the hearing was completed before the expiry of the limitation period for the NIUIF charges (see paragraph 314 above) and before elections to the Duma. The applicants had been regularly denied access to their lawyers and they had been unable to review even the incomplete trial record in the time available and in the cramped conditions of their cells. In addition, seven days prior to expiry of the date set by the court for reading of the trial record, the second applicant had been placed in an isolation cell where it was impossible for him to read the trial record. The defence's request for an adjournment was refused.

## 2. *The Court's assessment*

### (a) **General principles**

573. The Court reiterates that the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1. The Court will therefore examine the relevant complaints under both provisions taken together (see, among many other authorities, *F.C.B. v. Italy*, 28 August 1991, § 29, Series A no. 208-B; *Poitrimol v. France*, judgment of 23 November 1993, § 29, Series A no. 277-A; and *Al-Khawaja and Tahery v. the United Kingdom* [GC], nos. 26766/05 and 22228/06, § 118, ECHR 2011).

574. It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence, which means that both the prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see *Belziuk v. Poland*, 25 March 1998, § 37, *Reports of Judgments and Decisions* 1998-II; and *Dowsett v. the United Kingdom*, no. 39482/98, § 41, ECHR 2003-VII). The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (see *Moiseyev*, cited above, § 220, or *Dolenec v. Croatia*, no. 25282/06, § 208, 26 November 2009). The facilities which should be enjoyed by everyone charged with a criminal offence include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings (see *C.G.P. v. the Netherlands*, no. 29835/96, Commission decision of 15 January 1997, and *Galstyan v. Armenia*, no. 26986/03, § 84, 15 November 2007).

### (b) **Application to the present case**

#### (i) *Preparation for the trial*

575. The Court notes that the second applicant was given access to his case file on 22 August 2003 (see paragraph 119 above). The first applicant obtained access on 25 November 2003 (see paragraph 120 above). The case files were withdrawn from the defence on 13 May 2004 (see paragraph 132 above). It follows that the second applicant had eight months and twenty days to study over 41,000 pages, whereas the first applicant had five months and eighteen days to study over 55,000 pages (see paragraphs 120 and 127 above). In order to go through the case file at least once the second applicant would have to read at a rate of over 200 pages per working day. The first applicant would have needed to read more than 320 pages per working day in order to study the prosecution case. Those figures might be higher if one excludes public holidays, days when the applicants were brought to the court or when they were considering defence evidence.

576. The Court notes that the applicants' case files consisted mostly of financial and legal documentation. Thus, in order to prepare for the trial it was not enough simply to read all of the documents; the applicants had to keep notes and, most probably, re-read some of the documents many times, compare them with other documents and discuss them with the lawyers.

577. The Court also takes note of the conditions in which the applicants had to work with their case files. In the Court's opinion those conditions were uncomfortable at best (see paragraphs 121 et seq. above). Thus, only one copy of each case file was made available to the defence. If one of the lawyers was studying a particular volume of the case-file in the premises of the GPO, the applicants were unable to study that volume at the remand prison. Although the applicants were allowed to take handwritten notes, it was impossible for them to make photocopies. The lawyers, by contrast, were allowed to make photocopies, but mostly for their own use. If they needed to give a copy of a document to the applicants, this was possible only through the remand prison administration and, in any event, the applicants could keep only a limited amount of printed materials in their cells. The second applicant was not allowed to use a magnifying glass and a calculator for some time, which must have slowed down his work. The case file was made available to the defence only in special rooms. The applicants and their lawyers were unable to discuss the case confidentially and, simultaneously, to work with the case file: if they needed to have the case file before them, the presence of an investigator was obligatory. In 2004 the case files were transferred to the remand prison, and, as follows from the applicants' lawyers' complaints to the investigative authorities, this made photocopying of documents impossible. All this made the work of the defence team very difficult.

578. After the joinder of the two cases in June 2004 (see paragraph 143 above) each applicant was given twenty-two days to familiarise himself with the materials related to the co-defendants; this meant that the second applicant, for instance, had to go through 2,500 pages per day related to the first applicant's case, without rest days and without spending time on other tasks.

579. That being said, the Court reiterates that "the issue of adequacy of time and facilities afforded to an accused must be assessed in the light of the circumstances of each particular case" (see *Leas v. Estonia*, no. 59577/08, § 80, 6 March 2012). First and foremost, the Court observes that in the present case each applicant was assisted by a team of highly professional lawyers, many of them of great renown. All of them were privately retained and all had spent a considerable amount of time working with the applicants' cases. The Court reiterates that in *Kamasinski v. Austria* (19 December 1989, § 87, Series A no. 168), which concerned the rights of the accused under Article 6 § 3 (e), the Court held that the system provided for under section 45 § 2 of the Austrian Code of Criminal Procedure which stipulated that the right to inspect and make copies of the court file is restricted to the defendant's lawyer, the defendant himself only having such access if he is legally unrepresented, was not in itself incompatible with the right of the defence safeguarded under Article 6 § 3

(b); see also *Kremzow v. Austria*, 21 September 1993, § 52, Series A no. 268-B).

580. The Court stresses that even where the lawyer has access to the materials of the case, this cannot fully replace personal examination of the case-file by the defendant. The Court reiterates that in *Öcalan*, cited above, §§ 141 et seq.,) it found a violation of Article 6 § 3 (b) because before the start of the trial the applicant had not been permitted to inspect the prosecution case file personally, even though the applicant's lawyers had had access to it. However, the present case must be distinguished from *Öcalan*. In the latter the applicant had no access to the case file whatsoever prior to the start of the trial, whereas in the present case both applicants had the case files at their disposal for several months. When in *Öcalan* the applicant was finally given direct access to the materials of the prosecution case, he had only twenty days to read 17,000 pages. The time given to the applicants in the present case was much longer. Finally, in *Öcalan v. Turkey* (no. 46221/99, § 162, 12 March 2003) "the applicant's lawyers may have been prevented from giving the applicant an assessment of the importance of all these items of evidence by the sheer number and volume of documents and the restriction imposed on the number and length of their visits". No such drastic restrictions were imposed on the applicants in the present case (compare with the description of the conditions in which the applicant had to meet his lawyers in *Öcalan*, cited above, § 26 et seq.).

581. The Court concludes that even if the applicants were unable to study each and every document in the case file personally, that task might have been entrusted to their lawyers. Importantly, the applicants were not limited in the number and duration of their meetings with the lawyers. The defence lawyers had at their disposal portable copying and scanning devices and were thus able to make and keep copies of the most important documents in the case file. The Court is aware that certain restrictions applied to the meetings between the applicants and their respective defence teams, in particular as regards the exchange of notes and documents. Those restrictions will be analysed separately under Article 6 § 3 (c) of the Convention. However, they were not such as to make it impossible for the applicants to obtain the assistance of their lawyers in examining the case file and ascertaining the position of the prosecution before the start of the trial.

582. Secondly, the Court notes that the applicants were able to keep handwritten notes and use them at the trial. Furthermore, at least until the end of 2003 – beginning of 2004 there was a possibility for the defence lawyers to make copies of the materials. The Court previously held that unrestricted use of any notes and the possibility of obtaining copies of relevant documents were important guarantees of a fair trial. The failure to afford such access weighed, in the Court's assessment, in favour of the finding that the principle of equality of arms had been breached (see *Matyjek v. Poland*, no. 38184/03, §§ 59 and 63, 24 April 2007; *Luboch v. Poland*, no. 37469/05, §§ 64 and 68, 15 January 2008; and *Moiseyev*, cited above, § 217). However, the applicants in the present case, unlike in *Matyjek* or *Moiseyev*, were not bound by any rules on State secrets; they could make notes and keep their notebooks with them, and their lawyers



were allowed to make copies of pages from the case file, at least until the end of 2003 – beginning of 2004.

583. Thirdly, the Court notes that both applicants were senior executives of one of the largest oil companies in Russia and had university degrees. Their ability to absorb and analyse information was necessarily above average; they knew the business processes at the heart of the case and were, arguably, more competent in those matters than any other participants in the proceedings. Their professional status is also an additional factor in favour of the Court's finding that the applicants' inability to study every document personally was somehow compensated by their lawyers' participation in examination of the case file: it must have been natural for the applicants, as senior managers, to delegate certain tasks to their lawyers.

584. Fourthly, it is possible that some of the materials in the case files were not directly pertinent to the subject-matter of the case. For example, contracts between Yukos and its affiliates were important only in so far as they contained information about the price of oil and about the parties involved. It follows that the applicants did not need to read every page of such contracts in order to counter the prosecution's arguments. As transpires from the judgment in the applicants' case, a large part of the materials in both cases must have been identical. This means that in reality the number of pages which the applicants needed to scrutinise after the joinder of the two cases was less than the overall number of pages in each co-defendant's case.

585. Fifthly, there is no indication that the applicants' and their lawyers' access to the case file was in any way restricted later on, during the trial itself (see *Fruni v. Slovakia*, no. 8014/07, § 125, 21 June 2011).

586. The above five elements lead the Court to the conclusion that although the defence had to work in difficult conditions at the pre-trial stage, the time allocated to the defence for studying the case file (compare with the judgment in the *Yukos* case, cited above, § 536) was not such as to affect the essence of the right guaranteed by Article 6 §§ 1 and 3 (b). It follows that there was no violation of those Convention provisions on this account.

(ii) *At the trial*

587. As to the "time and facilities" allocated to the defence during the trial, the Court observes that the timing of the hearings during the first stage of the trial proceedings, when the prosecution was presenting their case, was indeed more relaxed and made greater allowance for the preparation of arguments by the parties. However, the timing changed and the hearings became more intensive as soon as the court began examining evidence by the defence. Thus, without any apparent reason the court started hearings much earlier in the day (see paragraph 157 above) and discontinued the practice of Wednesday recesses (see paragraph 158 above).

588. Although that change in the hearing arrangements may have made the task of the defence more difficult, the Court is not persuaded that it was impossible for the applicants to follow the proceedings. The defence was

able to request short adjournments when needed, and there is no evidence that the court did not treat such requests favourably (see paragraph 158 above).

589. The Court is aware of the difficulties which the defence experienced in the courtroom, in particular as concerns the conditions in which the applicants communicated with their lawyers. The Court considers, however, that those aspects of the case should be examined through the prism of the applicants' complaint under Article 6 § 3 (c) of the Convention. The Court concludes that the change of the hearing schedule during the trial was not, as such, contrary to Article 6 §§ 1 and 3 (b) of the Convention.

*(iii) During the appeal proceedings*

590. The Court observes that the appeal proceedings lasted from 31 May 2005 (the date when the Meshchanskiy District Court finished reading out its judgment) to 22 September 2005 (the date when the Moscow City Court upheld the judgment in the main part). The defence obtained a copy of the first-instance court judgment on 7 June 2005; the fifteen volumes containing the hearing record (which ran to over five thousand pages) were made available to the defence on 28 July 2005. The appeal hearing took place on 22 September 2005 (see paragraphs 278, 279 and 306 above). After lodging a preliminary brief of appeal the defence had the opportunity to supplement it (see paragraph 293 above). Thus, the defence team had three months and sixteen days to prepare written pleadings and to prepare for an oral argument, which appears to be a sufficient time, at least on the face of it. The Court's analysis, however, cannot stop here: it must ascertain whether that time was sufficient in view of the specific conditions in which the defence had to prepare their appeal and whether the defence had all necessary facilities for that purpose.

591. The Court reiterates that the conditions of detention of an accused is a relevant, albeit not decisive, factor in assessing his ability to prepare for the trial (see, for example, *Mayzit v. Russia*, no. 63378/00, § 81, 20 January 2005; *Trepashkin*, cited above, § 167). The Court notes that from 8 August 2005 the first applicant was detained in a "common" cell. In *Khodorkovskiy (no. 1)* the Court found that the conditions of detention in that cell amounted to "inhuman and degrading treatment" within the meaning of Article 3 of the Convention (§§ 117 et seq.). On 18 August 2005 the second applicant was placed for one week in an isolation cell where it was impossible to work with the case (see paragraph 473 above). On 15 September 2005 both cells in which the applicants were detained were placed under the quarantine regime (see paragraph 301 above); as a result, the applicants were unable to meet with their lawyers for some time. All that must have impeded the applicants' preparation for the appellate hearing.

592. The applicants further claimed that before finalising their submissions to the court of appeal the defence had to verify the accuracy of the trial record and read materials added in the course of the trial. The Court reiterates that Article 6 § 3 (b) guarantees "adequate time and facilities for the preparation of his defence" and therefore implies that the

substantive defence activity on the accused's behalf may comprise everything which is "necessary" to prepare the trial (see *Yukos*, cited above, § 538). The Court accepts that studying a trial record and other trial materials may be a necessary phase in the preparation of a brief of appeal, especially where, as in the case at hand, the defence questions the lower courts' findings of fact and challenges procedural decisions made during the trial, and where the court of appeal does not conduct a full rehearing of the case but bases its conclusions on written materials contained in the case file (see, *mutatis mutandis*, *Klimentyev v. Russia*, no. 46503/99, § 107, 16 November 2006). The Court will therefore examine whether the defence was given sufficient time to study the trial materials.

593. The Court takes note of the applicants' complaint that they did not receive the original of the trial record but only a copy of it. However, since the applicants did not allege that the copy was not authentic, the Court does not attach any importance to this fact.

594. The Court further observes that on 5 August 2005 the defence was given copies of the hearing record only, i.e. to fifteen out of thirty volumes containing trial materials. The remaining volumes were not available to the defence, apparently because GPO was using them. Those volumes contained a number of the court's procedural rulings and some documentary evidence added during the trial. The remaining volumes were given to the defence some time later, but the applicants were silent on that point and the Government did not comment either. The Court is prepared to admit that the defence had to prepare their appeal initially without having the entirety of the trial materials before them. In the Court's opinion, such a situation may potentially be a serious handicap for the defence.

595. The applicants also alleged that the trial record had been inaccurate and that some important moments of the trial had been either omitted or misrepresented. The Court is not in a position to say whether this was really so. It is, however, worrying that the defence's written submissions on the trial record were dismissed by the domestic judge in a summary manner. The judge refused to consider the audiotapes made by the defence throughout the trial (see paragraph 287 above) and held in essence that she trusted her secretaries and her own memory better than the audiotapes (see paragraph 291 above). The Court accepts that audio-recording is not the only possible method of keeping track of proceedings. However, the case at hand was extremely complex, the trial lasted for nearly a year, seven secretaries were employed to keep the summary record, and hearings were held almost every day. In such circumstances it is difficult to believe that in all 126 pages of the defence's written submissions, based on the audiotapes they had made, there was not a single accurate remark worthy of attention and that the secretaries' diligence and the judge's memory were infallible. In addition, the date of the appellate hearing was set by the Chairman of the Meshchanskiy District Court before Judge Kolesnikova had ruled on the defence's objections to the trial record (see paragraph 290 above). This all leads the Court to the conclusion that the objections to the trial record were not considered

seriously, and that the accuracy of the trial record is, therefore, open to doubt.

596. Indeed, the defence had a possibility of preparing a brief of appeal relying solely on the text of the District Court's judgment, on the case file as it was submitted to the Meshchanskiy District Court in May 2004 and on their own recollections of what had happened in the courtroom. However, such a situation is pregnant with dangers, and any professional lawyer would prefer to have at his or her disposal the entirety of the trial materials before finalising the brief of appeal.

597. The Court thus acknowledges that the defence was in a somewhat disadvantaged position during the appeal proceedings. That "disadvantaged position" need not necessarily be analysed in terms of the equality-of-arms guarantee, primarily because the Court does not know whether the prosecution had any problems with access to and the accuracy of the trial materials. The situation may, however, be assessed alone, in the light of the principle of adversarial proceedings, which means, *inter alia*, that the defence must have a possibility to put arguments on all pertinent points, including "the elements ... which relate to procedure" (see *Dowsett*, cited above).

598. Nevertheless, the Court reiterates that not every disadvantage of the defence leads to a violation of Article 6 § 3 (b) (see, for example, *Kremzow v. Austria*, cited above, § 50). The defence must be able to put relevant arguments so as to influence the outcome of the proceedings. In the circumstances the Court considers that possible inaccuracies in the trial record and the defence's temporary inability to obtain access to part of the trial materials did not make it impossible for the defence to formulate their arguments and did not, therefore, influence the outcome of the appeal proceedings. The applicants' conviction was based on various items of evidence, including a large amount of documentary evidence and statements from dozens of witnesses. Even acknowledging that the trial record may have contained some inaccuracies, the Court is not persuaded that they were such as to render the conviction unsafe. Furthermore, the defence were aware of the procedural decisions that had been taken during the trial and what materials had been added. They had audio recordings of the trial proceedings and could have relied on them in the preparation of their points of appeal.

599. The Court concludes that the difficulties experienced by the defence during the appeal proceedings did not affect the overall fairness of the trial. It follows that there was no violation of Article 6 §§ 1 and 3 (b) on this account.

(iv) *Conclusion*

600. Having regard to its findings above concerning time and facilities which were at the disposal of the defence at the pre-trial investigation stage of the proceedings, during the trial and the appeal proceedings, the Court concludes that there was no violation of the applicants' rights under Article 6 §§ 1 and 3 (b) of the Convention.

## **B. Lawyer-client confidentiality**

601. The applicants complained that their confidential contacts with their lawyers had been seriously hindered. They relied on Article 6 § 3 (c), which provides:

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

### *1. The parties' submissions*

#### **(a) The Government's submissions**

602. The Government claimed that the applicants enjoyed all the rights guaranteed to detainees by the law. During the pre-trial proceedings the applicants' right to meet their defence lawyers had not been limited. Thus, for example, while in the remand prison the second applicant had 505 meetings with his lawyers. As to the searches in the offices of Mr Drel and the personal searches of the lawyers Ms Artyukhova, Mr Baru, and Mr Schmidt, these had been lawful and necessary.

603. The Government stressed that the applicants had been detained on remand, so their meetings with the lawyers had necessarily taken place in the specific context of a remand prison. According to the Government, all correspondence by detainees was subject to “censorship” (perusal). An exception to this rule concerned letters to certain State bodies and to the European Court itself. All “proposals and requests” of a detainee addressed to his lawyer had first go to the prison administration, which had three days to review them and forward them to the addressee. Those rules were intended to “prevent the entry of prohibited items into the territory of the facilities” and thus corresponded to Article 6 § 3 (c) of the Convention. Further, since the applicants were suspected of having committed crimes in an organised group, those measures were aimed at preventing them from putting pressure on the witnesses and committing new crimes.

604. As to the alleged seizure of lawyers' confidential materials by the remand prison officials, the Government submitted that on several occasions the lawyers' belongings had indeed been inspected, and prohibited objects had been seized. On other occasions the lawyers' documents had been seized without inspection of their belongings. The documents were seized from the applicants' lawyers in accordance with sections 16, 18, and 34 of the Detention on Remand Act, point 27 of the Internal Regulations for Remand Prisons, as well as Articles 19.12, 27.1 and 27.10 of the Code of Administrative Offences.

605. The Government commented on the note seized on 11 November 2003 from Ms Artyukhova, the first applicant's lawyer. The Government maintained that “on the basis of factual information, which had been important for the case, and in order to prevent [the defence] from frustrating the investigation by falsification of evidence, which might have been prejudicial for the establishment of the truth, it was decided to seize

the note from Ms Artyukhova”. The Government further stressed that pursuant to point 27 of the Remand Prisons Rules (Decree of the Ministry of Justice of 12 May 2000, no. 148) lawyers were prohibited from accepting “letters of private character” from detainees. In the case at hand it was not a private letter which was seized, but a note which contained instructions to commit unlawful actions. That note had contained a plan of actions for the defence. It described how to exert pressure on the investigative authorities and on the administration of the remand prison. In particular, it had mentioned a hunger strike. In addition, the note had contained the following instructions to the first applicant’s lawyers: “to address the issue with witnesses”; “as to the participation in RTT, Lebedev must give a negative answer”, “to address the issue of fees received for the consulting services”, “to obtain evidence [from the defence witnesses] that there was no criminal intent, and that Mr Lebedev did not give any orders on the methods of investment and taxation”. In other words, in that note the first applicant had tried to induce witnesses to perjury, to obtain false evidence, and to collude with the second applicant, and sought to maintain control of over one hundred defence witnesses who had been former employees of Yukos.

606. As regards the search of Mr Baru, the Government submitted as follows. According to an inquiry conducted by competent authorities in 2010, on 4 December 2003 the second applicant met with one of his lawyers, Mr Baru. Prison officers who supervised the meeting noted that the second applicant, in breach of section 18 (4) of the Detention on Remand Act, gave Mr Baru a handwritten note which was not a part of any procedural document. Mr Baru tore the note to pieces and hid the shreds in the pocket of his trousers. At the end of the meeting prison officer N. informed Mr Baru that all written complaints and requests addressed to the lawyer must first be inspected by the administration of the remand prison and then forwarded to [him] within three days. Mr Baru was invited to hand over prohibited objects but he refused. In such circumstances, and pursuant to section 34 (6) of the Act, the prison officers had grounds to believe that Mr Baru was carrying prohibited objects; they searched his clothes and discovered shreds of the note written by the applicant. Those shreds were seized. As follows from that note, the second applicant was instructing Mr Baru how to impede the investigation.

607. On 11 March 2004 prison officials had seized a handwritten note from Mr Shmidt, who had been about to leave the prison after a meeting with the first applicant. The notes on the sheet had not been made in Mr Shmidt’s hand, so this had given the prison officials sufficient reason to believe that Mr Shmidt had tried to pass a prohibited object – a “private letter”. Mr Shmidt had not been subjected to a personal search. The seizure of that document had been lawful by virtue of sections 16, 18 and 34 of the Detention on Remand Act, and of Decree no. 148 – it was a “prohibited object”. The seizure was also lawful by virtue of Articles 19.12, 27.1, and 27.10 of the Code of Administrative Punishments. Seizure of the document was found to be lawful by a decision of the Preobrazhenskiy District Court of Moscow of 19 May 2005.

608. As to the meeting rooms where the applicants communicated with their lawyers, the Government asserted that the applicants' allegations of eavesdropping were unfounded. Conditions in those rooms complied with the requirements of section 18 of the Detention on Remand Act. Since the case file was very voluminous, the prison administration allocated the applicants several meeting rooms, equipped with safe-boxes for storing the materials of the case, in order to make the defence's task easier. Prison officials were able to see what was happening in the meeting room but not to hear conversations. The Government referred to the record of an interview with the second applicant: according to the record, when the applicant was asked whether he had had an opportunity to consult his lawyers in private, he had replied: "Not always, but, in general, yes". Given that the second applicant otherwise had a very critical attitude towards the investigative authorities, this reply suggested that he had been generally satisfied with the degree of confidentiality of his communication with his lawyers.

609. After the start of the trial the applicants were given an unlimited right to see their lawyers. The court even sent a letter to the administration of the remand prison inquiring about the meetings between the second applicant and his lawyers. This showed that the court did not ignore the defence lawyers' motions concerning meetings with their client. The defence lawyers were capable of communicating with their clients orally during the breaks in the court hearings. Originally the court allocated one day per week for meetings between the applicants and their lawyers. Later that arrangement was changed; however, when needed, the court allowed short breaks and even adjourned proceedings until the following day. The applicants' defence lawyers did not object to such arrangements.

610. The applicants' assertion that they had been unable to obtain documents from their lawyers was untrue. The applicants were not separated from the lawyers by a screen during the meetings in the remand prison. As to the exchange of documents in the courtroom, the head escort officer informed the defence that the applicants were entitled to use their notes, show them to the defence and transmit documents. Pursuant to the law the exchange of objects and documents between the defence lawyers and the defendant had to remain under the supervision of the investigators and the court, in order to exclude collusion. Under Article 275 § 2 of the Criminal Procedure Code the applicants were entitled to use notes, which had to be shown to the presiding judge if he or she so requested. The presiding judge had explained to the defence that all transmitted documents should first be shown to her for inspection, to which Mr Padva, one of the first applicant's lawyers, replied "Sure, by all means". The judge needed to inspect notes transmitted from the applicants to their lawyers in order to decide whether they were related to the criminal proceedings, and in order to prevent the applicants giving their lawyers personal letters and similar documents that were not relevant to the case. The judge did not object to the contacts between the applicants and the lawyers during the breaks and even in the course of the hearing (to the extent that these did not pose a problem for the normal course of the hearing), but insisted on inspecting written documents passed between them. That measure was accepted by

Mr Padva, who had said: “I will print out [those documents and notes] and show them to you”. The second applicant said to the judge that he did not always need to pass documents to his lawyers but at least needed to read them or let them be read. In sum, the procedure for inspection of materials had been decided with the participation of the defence lawyers. The Government concluded that the existing arrangement was accepted by the defendants and did not raise any objections.

611. The rule of preliminary examination of documents passed between the applicants and their lawyers had been introduced at the request of the escort service in order to facilitate their task, which consisted of securing order in the courtroom. That rule did not cover oral communications, which were limited only to the extent required in order to comply with the detention rules. As to the distance between the applicant and his lawyers, which allegedly had not permitted them to communicate in private, the court had refused to examine that issue since it was outside the court’s competence.

612. The Government maintained that Mr Drel had never been questioned in the course of the pre-trial investigation, either as a witness or in any other capacity. Had that occurred, Mr Drel would have kept a supporting document – for example, a copy of summons. However, the applicants failed to produce to the European Court any document in support of his assertion.

613. The Government confirmed that in July and August 2005 Ms Khrunova had indeed been denied access to the first applicant. However, contrary to what the applicant suggested, Ms Khrunova had not been his lawyer. Under Articles 62 and 72 of the Code of Criminal Procedure, the official in charge of the criminal case (an investigator or a judge) must confirm the participation of a lawyer in the case. However, on 15 August 2005 Ms Khrunova did not have the status of the applicant’s legal representative in the proceedings and had not therefore been allowed to visit him. On 23 August 2005, when he obtained confirmation of her status from the Meshchanskiy District Court, she had been allowed to visit the applicant. On 15 and 21 September 2005 the applicant’s lawyers Mr Mkrtychev, Mr Drel and Mr Padva were unable to meet the applicant because on those dates the applicant’s cell had been closed for quarantine because one of his cellmates had fallen ill. Information about the quarantine was sent to the prosecution authorities and to the court, and placed in the reception area of the prison administration.

**(b) The applicants’ submissions**

614. The applicants complained that throughout the proceedings the authorities repeatedly breached the confidentiality of lawyer-client contacts.

615. Thus, Mr Drel, one of the lawyers for the applicants, had been summoned to the GPO for interrogation as a witness in the second applicant’s case at least twice – on 17 and 25 October 2003, but had refused to attend, referring to his professional status.

616. The applicants also complained about the search in the office of Mr Drel on 9 October 2003. The search had been manifestly unlawful.



That search was instigated on the basis of an order from the GPO, and not by a judge, as required by the Advocacy Act. In the course of the search, the investigators seized, and later added to the criminal case file as evidence, documents constituting lawyer's case files for a number of different clients. Those documents were subsequently widely used by the investigators. The files were labelled as containing lawyers' notes relating to the defence of the second applicant, and Mr Drel's role in the case was very well known to the GPO and the investigators. It was indisputably established before the Meshchanskiy District Court that a number of documents were seized directly from Mr Drel, a defence lawyer in the criminal case, shortly before the second applicant's arrest on 25 October 2003; these concerned the first applicant's tax affairs and advice given to the applicant in connection with the case being conducted at that time against the second applicant, who by that time had already been in detention for more than three months. Since the first applicant's name was mentioned in the charges against the second applicant – and the charges subsequently brought against them were virtually identical – Mr Drel, at the first applicant's request, had formulated the applicant's defence position in the event of identical charges being brought against him. Thus, by dint of the search the prosecution knew about the first applicant's likely legal defence strategy in advance of the charges being brought against him.

617. The applicants also complained of the security arrangements in respect of their contacts with their lawyers, especially as regards the exchange of documents and notes. All documents passing between the applicants and their lawyers had to be scrutinised by the authorities of the remand prison. The applicants were only permitted to pass documents to their lawyers, and to receive documents from them, if such documents had been inspected by the remand prison authorities, in the absence of the applicants and in the absence of their lawyers. The applicants submitted detailed testimony about such inspections from one of the first applicant's lawyers, Mr Mkrtychev. In addition, the applicants claimed that the meetings between each of them and their respective lawyers had always taken place in the same meeting rooms, equipped with eavesdropping devices.

618. As to the searches of the applicants' lawyers, the applicants noted that the Government did not deny that incidents of that kind had taken place. The search of Ms Artyukhova had been unlawful and a blatant violation of lawyer/client privilege. The record of the search of Ms Artyukhova indicates that the search was conducted under section 34 (6) of the Detention on Remand Act. According to this section, a search can only be conducted if there are sufficient grounds for suspecting individuals of attempting to smuggle in prohibited items, substances or food. It was claimed in the report following Ms Artyukhova's search that the duty officer saw that "the lawyer and the defendant were repeatedly passing to each other notepads with some notes, making notes therein from time to time". There were thus no legal grounds for conducting a search of Ms Artyukhova, because there was no indication in the report that the officer witnessed any attempt to pass any prohibited items, substances or food.

619. As to the seizure of documents from Mr Schmidt, the Government argued that the documents were seized in accordance with sections 16, 18, and 34 of the Detention on Remand Act, point 27 of the Internal Regulations for Remand Prisons, and Articles 19.12, 27.1 and 27.10 of the Code of Administrative Offences. However, the search of and subsequent seizure from Mr Schmidt occurred when he was leaving the remand prison, and it could not therefore be alleged that the measures were designed to prevent prohibited items being brought into it. The applicants noted that that as a consequence of the search the Ministry of Justice demanded that disbarment proceedings be instigated against Mr Schmidt. The St Petersburg Bar Association subsequently exonerated Mr Schmidt at the disciplinary proceedings and determined that Mr Schmidt was entitled to take the document in and out of the remand prison and that the document was legally privileged.

620. At the hearings the applicants' lawyers were required by the Meshchanskiy District Court to stand at a distance of one metre from the cage in which the applicants were kept. Armed guards regularly stepped between the applicants and their lawyers when they attempted to communicate directly through the bars of the cage. The court declined to intervene, notwithstanding its overriding duty under the CCRP to ensure the fairness of its proceedings. However, the applicants were not violent. They had never attempted to escape. It was difficult to see what possible reason that there could have been for such a restriction, save to ensure that their discussions could be overheard. At a key phase in the trial (when the applicants' defence was being presented) the court eliminated the Wednesday recess, which had been the primary opportunity for the applicants and their lawyers to communicate. The defence complained to the Meshchanskiy District Court about the inability to discuss matters confidentially in the court room on a significant number of occasions. The trial court refused to alter the arrangements in any way, simply stating that the defence were able to discuss matters confidentially during the adjournments. The District Court took the view that the requirement that the defence lawyers stood at least one metre from the applicants in the cage "does not really have anything to do with the case". The defence raised those issues in the brief of appeal, but the Moscow City Court did not even address this aspect of the appeal in its decision.

621. All notes passing between the applicants and lawyers had had to be inspected first by the court, thereby entirely circumventing the lawyer-client privilege. The Government sought to justify the restriction on the applicants' rights by asserting that "the court could not permit the passing of private notes or any other correspondence of such kind". The Government did not suggest that this restriction was mandated by any provision of domestic law. So far as the applicants' lawyers were aware from their own experience, the trial at issue had been the only trial in which the presiding judge imposed such a requirement.

622. As to the alleged impediments on the applicants' meetings with their lawyers during the appeal proceedings, the first applicant argued that the Government did not comment at all on the repeated refusal of access to Ms Mikhailova or on the refusal of access to Mr Prokhorov and to

Mr Padva. As to Ms Khrunova and Ms Mikhailova, they were both authorised by the first applicant to act for him, in relation to the criminal proceedings as well as the applicant's case before the Court. The Government's reliance on Articles 62 and 72 of the CCrP was misconceived. Those provisions related to a lawyer's participation in the trial, and did not govern the right of a lawyer to see his client. Section 18 of the Detention on Remand Act contained the applicable law in relation to access to a lawyer and provided that an accused was permitted to receive visits from his lawyer "with no limitation of their number or duration". Moreover, Section 18 expressly stated that "visits shall be granted to a defence lawyer upon presentation of a lawyer's ID and an authorisation. Demanding other documents from a lawyer is prohibited". There was no requirement under domestic law for the trial court to "validate" a lawyer before he or she was permitted access to a client who had already authorised that lawyer to represent him or her in the proceedings. The remand prison officials' insistence that the applicant's lawyers had to be authorised by the trial court before they were permitted to see the first applicant was particular to his case and was unlawful.

623. As to the period when the applicants were unable to meet their lawyers due to quarantine requirements, the applicants maintained that the Government did not explain why on 15 September 2005 the same infected inmate was placed successively in the first applicant's cell and then in the cell of the second applicant. The timing of such quarantine, in the absence of any explanation and in the context of repeated attempts to hinder access to the lawyers, indicated that the authorities were seeking to impede the applicants' access to their lawyers at a critical stage before the hearing of the appeal.

624. The Government had mistakenly referred in their response to an allegation that during consultations at the remand prison the applicants and their lawyers were separated by a full screen, whilst in fact that complaint related to the first applicant's imprisonment in the penal colony at Krasnokamensk following sentencing. It was there that the first applicant's contact with his lawyers had been permitted only in a room in which he was separated from his lawyers by a screen which ran from wall to wall and floor to ceiling.

## *2. The Court's assessment*

625. The Court takes note of the first applicant's complaint concerning the conditions in which he had to communicate with his lawyers in the Krasnokamensk penal colony. The Court observes that the first applicant's complaint under Article 6 § 3 (c) about the alleged breach of lawyer-client confidentiality concerned criminal proceedings against him. In order to decide whether Article 6 § 3 (c) was complied with the Court does not need to know what happened after those proceedings were over, i.e. after the judgment of the Moscow City Court of 22 September 2005. It follows that this aspect of the case is not material in so far as the first applicant's complaint under Article 6 is concerned. The Court will address only those limitations on written and oral communications between the applicants and

their lawyers which concern the period of pre-trial investigation and the trial.

626. The Court further observes that the applicants did not complain that legal assistance had not been available to them in principle, but that the State had interfered with the confidentiality of their contacts with the lawyers and thus hindered effective legal assistance.

**(a) General principles**

627. The Court reiterates that respect for lawyer-client confidentiality is very important in the context of Article 6 §§ 1 and 3 (c) (see, *mutatis mutandis*, *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 97, 2 November 2010). An accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, "his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective" (see *S. v. Switzerland*, 28 November 1991, § 48, Series A no. 220). Any interference with privileged material, and, *a fortiori*, the use of such material against the accused in the proceedings should be exceptional, be justified by a pressing need and will always be subjected to the strictest scrutiny by this Court (see *Khodorkovskiy (no.1)*, § 198).

628. The State may regulate the conditions in which a lawyer meets his detained client. First, "there are inherent time and place constraints on meetings between a detained person and his lawyer" (see *Orlov v. Russia*, no. 29652/04, § 106, 21 June 2011). Second, there could be legitimate restrictions related to the security risks posed by the defendant. The existence of any "security risk" may be inferred from the nature of the accusations against him, by the detainee's criminal profile, his behaviour during the proceedings, etc. Thus, the Court has tolerated certain restrictions imposed on lawyer-client contacts in cases of terrorism and organised crime (cf. e.g. *Erdem v. Germany*, no. 38321/97, § 65 et seq., ECHR 2001-VII (extracts); and *Istratii and others v. Moldova*, nos. 8721/05, 8705/05 and 8742/05, §§ 97 et seq., 27 March 2007).

629. As to the searches in the lawyer's office and written communications between the lawyer and his client, such situations have more frequently been analysed by the Court under Article 8 of the Convention. However, an interference with the professional secrecy of a lawyer not only affects his or her rights under Article 8; it may also obstruct effective legal assistance to a client and must accordingly be examined by the Court under Article 6 §§ 1 and 3 (c) of the Convention where the client's interests are affected (see *Niemietz v. Germany*, 16 December 1992, § 37, Series A no. 251 B). The Court refers in this respect to its findings in *Campbell v. the United Kingdom*, 25 March 1992, §§ 46-48, Series A no. 233) where it held that "it is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged".

**(b) Application to the present case**

*(i) Confidentiality of the lawyer-client contacts at the pre-trial stage*

630. In the applicants' words, interference by the law-enforcement authorities with the secrecy of the applicants' communications with their lawyers took various forms.

*(α) Summoning Mr Drel for questioning*

631. First, the applicants complained about summonses sent by the GPO to Mr Drel, one of the lawyers for the applicants (see paragraph 75 above). The Court accepts that such summonses may have had a chilling effect on the applicants' defence team, but even if they were unlawful, Mr Drel refused to testify, and that refusal did not lead to any sanctions against him. It follows that, in the particular circumstances of the present case, lawyer-client confidentiality was not breached on account of that episode.

*(β) Searching Mr Drel's office and seizing his papers*

632. The second episode which falls to be analysed under Article 6 § 3 (c) is the search in Mr Drel's office (see paragraph 71 above). The Court stresses that legal professionals are not immune from searches, seizures, wiretapping, etc. (see, in the context of Article 8 of the Convention, *Mulders v. the Netherlands* (no. 23231/94, Commission decision of 6 April 1995; and *B.R. v Germany*, no. 26722/95, Commission decision of 23 October 1997; see also *Tamosius v. the United Kingdom* (dec.), no. 62002/00, ECHR 2002-VIII). At the same time, the Court has repeatedly held that the persecution of members of the legal profession strikes at the very heart of the Convention system (see, for example, *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 669, 13 November 2003). The authorities must have a compelling reason for interfering with the secrecy of the lawyer's communications or with his working papers.

633. Turning to the present case, the Court notes that Mr Drel was not only a lawyer and a member of the Bar – he was also a legal representative of both applicants in the same criminal case within which the searches were ordered (see paragraphs 44 and 61 above), and the investigators could not have been unaware of that fact. From the search record itself it is clear that the investigators knew that they were entering a law firm's office and were seizing the working files of a lawyer who represented the applicants (see, in particular, paragraph 71 above). Thus, by searching in Mr Drel's office and seizing his working files the authorities deliberately interfered with the secrecy of the lawyer-client contacts protected under Article 6 § 3 (c) of the Convention (see *André and Other v. France*, no. 18603/03, § 41, 24 July 2008).

634. The Court sees no compelling reasons for such interference. The Government did not explain what sort of information Mr Drel might have had, how important it was for the investigation, and whether it could have been obtained by other means. At the relevant time Mr Drel was not under suspicion of any kind. Most significantly, the search in Mr Drel's office was not accompanied by appropriate procedural safeguards, for example a

court warrant, as required by the Advocacy Act and confirmed by the Constitutional Court (see paragraphs 398 and 399 above; see also, *mutatis mutandis*, *Aleksanyan*, cited above, § 214; *Golovan v. Ukraine*, no. 41716/06, § 64, 5 July 2012; and *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, ECHR 2007-IV). There were no specific considerations which might have justified the departure from the general rule requiring a court warrant, and this omission strengthens the Court's conclusion that the search and seizure were arbitrary and thus contrary to the requirements of Article 6 § 3 (c) of the Convention.

(γ) Checking the applicants' correspondence with the lawyers

635. Third, the applicants complained about the interference by the authorities with written communications between the detained applicants and their lawyers. They referred, in particular, to several identical episodes with the applicants' lawyers (Ms Artyukhova, Mr Baru, Mr Shmidt), all concerning seizure of their working papers by the prison administration.

636. The Government claimed that at the time all correspondence by detainees was subject to perusal by the prison administration, and that the prison administration could lawfully seize any document which was not submitted through the prison administration. The Government relied on sections 16, 18, and 34 of the Detention on Remand Act, point 27 of the Internal Regulations for Remand Prisons, as well as Articles 19.12, 27.1 and 27.10 of the Code of Administrative Offences (see the "Relevant domestic law" part above, paragraphs 388 et seq.).

637. The Court observes that not only the applicants' letters to their relatives or friends were subject to perusal; also the notes and drafts prepared by the applicants' lawyers and brought to the meetings with their clients were regarded by the prison administration as "prohibited objects" (see, in particular, paragraphs 136 and 137 above) and seized. Such limitations, however, had no firm basis in domestic law. Thus, the legislation referred to by the Government regulated the correspondence of detainees with the outside world ("telegrams [and] letters" or "proposals, declarations and complaints" - see section 20 of the Detention on Remand Act, sections 84, 86, 91 and 99 of the Internal Regulations). It also mentioned "objects, substances and foodstuff" which the detainees were not allowed to have or to use (see sections 18 and 34 of the Detention on Remand Act, and, in particular, section 27 of the Internal Regulations, which associates "objects" with physical objects rather than documents, or Article 19.12 of the Code of Administrative Offences). The Court has doubts as to whether the drafts or notes made by a lawyer during a meeting with his or her client could be qualified as "correspondence" or "prohibited objects" within the meaning of the Detention on Remand Act or the Internal Regulations. The Government did not specify what set of rules applied to the notes and to other written materials which the applicants might have exchanged with their lawyers during the meetings, and the Court cannot accept that the law was applied by extension in such a sensitive area as interference with privileged materials of the defence. The Court reiterates in this respect that any limitations imposed on a detainee concerning his contacts with lawyers should have a lawful basis and that

the law should be sufficiently precise (see, *mutatis mutandis*, *Nolan and K. v. Russia*, no. 2512/04, §§ 98-99, 12 February 2009, with further references).

638. Furthermore, even assuming that the Russian law at the time prevented the defence from keeping and exchanging notes during the meetings, the Court is not persuaded that such a measure was necessary in the applicants' case. Secrecy of written communications is no less important than the secrecy of oral exchanges, especially where the case is factually and legally complex. As follows from the judgment of the Constitutional Court of 29 November 2010 (see paragraph 396 above), notes, drafts, outlines, action plans, etc. prepared by the lawyer for or during a meeting with his detained client are to all intents and purposes privileged material. In addition, as noted by the Constitutional Court, certain exceptions from the general principle of confidentiality are permissible, but only if the authorities have a reasonable cause to believe that the professional privilege is being abused. The Court fully subscribes to this position. The Court reiterates that in *Campbell*, cited above, it stressed that the prisoner's correspondence with a lawyer should not be "susceptible to routine scrutiny". Such correspondence can be opened only when the prison authorities have "reasonable cause to believe that it contains an illicit enclosure". The letter should, however, only be opened and should not be read. The reading of a prisoner's mail to and from a lawyer should only be permitted "in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature" (§ 48).

639. In the present case the authorities took as their starting point the opposite presumption, namely that all written communications between any detained person and his lawyer were suspect. This went so far as to assimilate "correspondence" with written notes made by the lawyers in preparation for the meetings with the client or during them. The only way for the defence to overcome that presumption was to submit their working papers to the prison authorities for inspection, i.e. to reveal their arguments to a body which could hardly be regarded as independent, and which was required by law to communicate all suspicious correspondence to the investigative authorities (see paragraph 392 above).

640. Again, the principle of confidentiality of lawyer-client contacts is not absolute. However, the fact that a criminal defendant is detained is not sufficient to subject all of his written communications with his lawyers to perusal, and that for an indefinite period of time and without any justification specific for that particular case. The Court has repeatedly condemned the practice of "indiscriminate, routine checking of all of the applicant's correspondence" with his lawyer (see *Jankauskas v. Lithuania*, no. 59304/00, § 22, 24 February 2005; see also *Kepeneklioglu v. Turkey*, no. 73520/01, § 31, 23 January 2007). This is *a fortiori* true in respect of papers brought by the lawyer to a meeting with his client or prepared during the meeting. To have a reasonable cause for interfering with the confidentiality of lawyer-client written communications the authorities must have something more than a sweeping presumption that lawyers

always conspire with their clients in disregard of the rules of professional ethics and despite the serious sanctions which such behaviour entails.

641. The Government did not claim that the authorities were aware of what had been discussed in the meeting rooms. There was nothing in the behaviour of the applicants and their lawyers during those meetings to give rise to any reasonable suspicion of abuse of confidentiality; they were not “extraordinarily dangerous [criminals] whose methods had features in common with those of terrorists” (see *S. v. Switzerland*, cited above, § 47, see also *Kröcher and Möller v. Switzerland*, no. 8463/78, Commission decision of 10 July 1981, DR 26, p. 40). The applicants were accused of non-violent economic crimes and had no criminal record (compare with *Castravet v. Moldova*, no. 23393/05, § 58, 13 March 2007). There were no ascertainable facts showing that the applicants’ lawyers might abuse their professional privilege. The Court stresses that the measures complained of were not limited to the first days or weeks after the applicants’ arrest, when the risk of tampering with evidence, collision or re-offending was arguably higher, but lasted for over two years. In the circumstances the Court concludes that the rule whereby working documents of the defence, drafts, notes etc. were subject to perusal and could have been confiscated if not checked by the prison authorities beforehand was unjustified. Accordingly, the searches of the applicants’ lawyers were also unjustified.

(ii) *Confidentiality of the lawyer-client contacts at the trial*

642. After the start of the trial most of the communication between the applicants and their lawyers took place in the courtroom, especially during the second phase of the trial when the court stopped the practice of Wednesday recesses. The Court will examine whether the applicants could have enjoyed effective legal assistance in the courtroom.

643. The Court observes that the rule whereby all written materials had to be checked before being passed to the applicants or received from them continued to apply throughout the trial. However, it was no longer a prison official but a judge who was reading the documents exchanged between the applicants and their lawyers.

644. The Court takes note of the Government’s argument that the defence agreed to such security arrangements (see paragraph 152 above). However, the Court cannot regard this as a valid waiver of the defence’s rights under Article 6 § 3 (c). It reiterates that a waiver of a right must be, amongst other things, voluntary, and must be established in an unequivocal manner (see *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII, with further references; and, more recently, *Vozhigov v. Russia*, no. 5953/02, § 57, 26 April 2007; *Pishchalnikov v. Russia*, no. 7025/04, § 77, 24 September 2009; and *Damir Sibgatullin v. Russia*, no. 1413/05, § 48, 24 April 2012). The “waiver” in the present case satisfied neither of these two criteria. At the trial the defence expressed their concerns about the “security plan” implemented by the escort service in the courtroom. From the judge’s reaction it was clear that she did not consider herself competent to deal with that issue (see paragraph 151 above), and that the judge deferred to the prison authorities in a matter clearly related to legal assistance. Be that as it may, having consulted with the prosecution and the



escort service the judge proposed an alternative solution, namely that all defence documents would be passed through her. The defence seemingly had no other choice but to accept that new rule. Therefore, Mr Padva's remark that he would comply with the new rule cannot be interpreted as an unequivocal and voluntary acceptance of it.

645. The Court accepts that a judge offers better guarantees of independence and impartiality than an escort officer. Nevertheless, in the circumstances the new rule still fell short of the requirements of Article 6 § 3 (c). The Court reiterates in this respect that, first, the applicants' case was not such as to give reason to stringent restrictions on confidential exchanges, and that the authorities did not refer to specific facts which would justify the departure from the general rule of confidentiality of the lawyer-client contacts, including written communications. Second, the Court observes that Judge Kolesnikova, who requested the defence lawyers to show her all written communications, was also a judge of fact and law in the trial. While checking drafts and notes prepared by the defence lawyers or the applicants the judge might have come across information or arguments which the defence would not wish to reveal (see, for example, paragraph 155 above). Consequently, her role in checking the defence papers might have affected her opinion about the factual and legal issues involved in the case (compare, *mutatis mutandis*, with *Erdem*, cited above, § 67) where the Court examined a similar procedure of checking prisoners' correspondence). In the Court's opinion, it would be contrary to the principle of adversarial proceedings if the judge's decision was influenced by arguments and information which the parties did not present and did not discuss at an open trial.

646. The Court further notes the applicants' complaint that the confidentiality of their oral communications with the lawyers was not respected. The Government did not challenge the applicants' description of the conditions in which they had had to speak to their lawyers in the courtroom. In the light of the materials of the case, the Court has no reason to doubt the accuracy of the applicants' account in this respect (see, in particular, paragraphs 151 and 154 above). In particular, the Court notes that the lawyers were not allowed to come closer than 50 cm to their clients when they wished to speak to them, and that escort officers were always standing in close proximity. The Court concludes that their oral exchanges might have been overheard by the convoy officers, at least occasionally.

647. The Court reiterates that not every measure hindering communication between the defendant and his lawyer must necessarily lead to a violation to Article 6 § 3 (c). Thus, for example, in assessing limitations imposed on the defence in the case of *Titarenko v. Ukraine* (no. 31720/02, 20 September 2012), the Court applied a quantitative approach and held as follows (§ 92):

"The security arrangements [i.e. placement of the accused in a metal cage] undeniably limited communication between the applicant and his lawyer during the hearing. These limitations did not, however, amount to a complete lack of communication between the applicant and his lawyer; the applicant did not demonstrate that it was impossible to request that the lawyer's seat be brought closer to his "cage", or that they had been denied an opportunity for private communication when necessary."

In contrast with *Titarenko*, in the present case the applicants did not have “an opportunity for private communication” with their lawyers, due to the permanent presence of escort officers near the metal cage and the minimal distance the lawyers had to respect. The fact that the defence was able to request adjournments during the hearings is irrelevant: it appears that even during those adjournments the lawyers were unable to discuss the case with their clients anywhere but in the hearing room, i.e. in the close vicinity of the prison guards. The Court concludes that even though the applicants benefited from legal assistance by several lawyers, the secrecy of their exchanges, both oral and written, was seriously impaired during the hearings.

*(iii) Conclusion*

648. In conclusion the Court finds that throughout the investigation and the trial the applicants suffered from unnecessary restrictions of their right to confidential communication with their lawyers, and that the secrecy of their communications was interfered with in a manner incompatible with Article 6 § 3 (c) of the Convention. There was therefore a breach of Article 6 §§ 1 and 3 (c) of the Convention on that account.

649. The applicants also complained of other incidents which, in their view, breached their right to effective legal assistance, in particular during the appeal proceedings. However, in view of its findings above, the Court does not need to examine those aspects of the case.

### **C. Taking and examination of evidence**

650. Under Article 6 §§ 1 and 3 (d) of the Convention the applicants complained that their conviction had been based on inadmissible or unreliable evidence, that the judgment had referred to evidence which had not been examined in adversarial proceedings, and that there had been a disparity between the prosecution and the defence in the process of taking and assessment of evidence. Article 6 § 3 (d) provides:

“3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...”

#### *1. The parties' submissions*

##### **(a) The Government's submissions**

651. The Government maintained that it was for the domestic authorities to assess the admissibility, reliability and relevance of evidence and to interpret it. The Russian courts at two instances had examined the objections of the defence as to the admissibility of a large number of items of evidence and dismissed them. The fact that the defence had not been satisfied with the decisions of the domestic courts in this respect did not mean that the principle of equality of arms had been breached.

652. As regards other evidence relied on by the prosecution, the Government asserted that all of the evidence had been obtained lawfully, and that the premises in Zhukovka where the searches had been conducted had not been lawyers' offices and thus protected by lawyers' professional privilege. The Government maintained that the court had verified the admissibility of the evidence obtained during the search and found it to be lawfully obtained. The judgment contained the court's reasoning on that point. The Government further noted that the question of admissibility of evidence had been discussed in the subsequent proceedings on appeal and during the supervisory review appeal. The defence had been able to present their view on the issue of the admissibility of various pieces of evidence. Occasionally, the requests and motions of the defence were satisfied; in other instances the court took the side of the prosecution. The District Court was acting in compliance with the provisions of Article 50 (2) of the Russian Constitution, which provides that unlawfully obtained evidence cannot be used in criminal proceedings. In any event, even when the prosecution objected, the defence had a right to call and question their witnesses.

653. In so far as the questioning of witnesses by the prosecution during the trial was concerned, the Government maintained that several witnesses for the prosecution in the first criminal case had indeed been questioned again within the framework of another criminal case, which had been severed from the first case and investigated separately. Their testimony so obtained had not been used within the criminal case under examination. They denied that such practice amounted to putting undue pressure on the witnesses.

654. With regard to the experts for the prosecution, the Government indicated that witnesses Mr Yeloyan and Mr Kupriyanov had not been witnesses but "expert witnesses" whose appearance at the trial had been requested by the defence in order to calculate the amount of damage allegedly caused by the applicant to the State. Under Russian law, an expert is a person who has specialised knowledge in an area where the judge has no competence.

655. The court decided not to call expert witnesses Mr Yeloyan and Mr Kupriyanov because the defence had failed to show convincingly why their personal appearance had been necessary. In the circumstances the presence of an expert in those matters had not been necessary. Further, questioning of an expert was always preceded by the preparation of a report by that expert. An expert could not be questioned if he had not earlier produced a written expert opinion. At the same time, the law allowed a written expert opinion (report) to be admitted to the materials of the case file without subsequent questioning of the expert who had prepared it. The judge in this case decided that there had been no grounds for calling the experts for questioning. It was the court's task to establish the amount of damage, and the court had all the necessary information for that purpose. The District Court noted that the final assessment of the conclusions of the report by Mr Yeloyan and Mr Kupriyanov could be made only at the conclusive stage of the proceedings, when the court had

deliberated and developed its position. The Government submitted that the same was true in respect of the expert Mr Shulgin.

656. According to the Government, the applicants' defence counsels had not been in any way hindered in obtaining evidence. On 27 December 2004 the defence submitted to the court written answers given by an expert, Mr Prokofiev, in response to a questionnaire prepared by the defence. The court refused to admit that document in evidence by a motivated ruling.

657. In so far as the applicants complained of the refusal by the District Court to admit expert reports prepared at the request of the defence, the Government referred to the Court's case-law and emphasised that the Court should not act as a court of fourth instance and challenge domestic courts' decisions in the area of administration of evidence. The defence had submitted to the District Court expert reports by Mr Shchekin, Ms Petrova, Mr Semenov, and Mr Lubenchenko. Those reports contained analysis of tax and banking legislation and accounting procedures and practices, criticism of the conclusions of the prosecution authorities, analysis of the lawfulness of audit reports issued by the tax authorities in the case in respect of the companies allegedly affiliated with the applicants, etc. The reports of those "expert witnesses" contained conclusions of a legal nature about the applicants' guilt, analysis of the arguments of the prosecution, of evidence, interpretation of the applicable law etc., which was not an expert's task under Russian law. On those grounds the District Court decided not to admit reports from those persons, on the ground that they were "inadmissible evidence".

658. Furthermore, having examined the materials submitted by the defence the District Court ruled that they were inadmissible evidence, since, by virtue of Article 86 of the CCrP the defence was not entitled to gather such evidence as "expert witness reports" (*zaklyucheniye spetsialista*). Furthermore, an "expert witness" had to receive a formal warning about his rights and obligations in the procedure; a defence lawyer could not, by virtue of his status, give such a formal warning, this being the prerogative of an investigator or a judge. Mr Grechishkin, Mr Shchekin and Mr Semenov made their conclusions on the basis of photocopies of documents which had not been "properly certified" as true copies. According to the defence, those documents had been copies from the case file in the applicants' case. However, those "expert witnesses" had not been given access to the originals of the materials in the case file. In addition, as the District Court established in the course of the proceedings, Mr Shchekin had obtained some "additional materials" from the defence lawyers. Expert witnesses Mr Lubenchenko and Ms Petrova prepared their reports on the basis of agreements with the applicants' relatives, who did not participate in the proceedings and were not therefore allowed to commission expert examination of the materials of the case.

659. Nonetheless, Mr Shchekin, Ms Petrova, Mr Semenov, Mr Lubenchenko and Mr Grechishkin were questioned by the court orally. The witnesses for the defence questioned in court were the following: Mr Shchekin (testified orally on 17, 18, 20, 21 January and 14 March 2005), Ms Petrova (testified orally on 24 January 2005), Mr Semenov

(25 January 2005), Mr Bochko (1 and 2 March 2005) and Mr Gage from Ernst and Young (on 4 and 5 March 2005), as well as Mr Lubenchenko, Mr Grechishkin, and Ms Pleshkova (dates not indicated; their testimony was analysed in the judgment). The reasons for not admitting expert evidence were indicated in the judgment.

660. On 20 January 2003 Mr Rivkin (a defence counsel) requested the court to admit in evidence an expert report by Mr Shchekin, who had been previously heard by the court in the capacity of an expert witness (*spetsialist*). At the request of the court, Mr Shchekin enumerated pages of the report which he had prepared personally and those which had not been written by him. Mr Shchekin gave his interpretation of the tax law. On 25 January 2005 Mr Rivkin requested the court to admit in evidence an “expert report” by Mr Semenov. The “expert report” was attached to the materials of the case (without attachments, since they mostly consisted of extracts from the applicable law and decisions of the commercial courts which had not been “properly certified”). Mr Semenov testified about the conditions in which he had prepared his written report. The court, having examined their evidence, concluded in the judgment that those two persons could not be considered as “expert witnesses”, since they did not have the necessary specialist knowledge. Thus, they had never worked in any State tax authority or in an audit firm, with the exception of Mr Shchekin, who had worked as a lawyer for four months in 1996 in a State tax service. Those two persons were in fact lawyers and/or law professors. However, the court did not require their commentaries and interpretations of the law. In addition, Mr Shchekin had been advising Yukos in the proceedings before the commercial courts and therefore had a conflict of interest.

661. On 21 January 2005 Mr Rivkin requested the court to admit in evidence an “expert conclusion” by Mr Gulyaev. The court refused to admit that document in evidence, since it contained analysis of the lawfulness of certain investigative actions and the admissibility of evidence. Such an analysis could not be made by an expert; it was within the court’s exclusive competence to decide whether or not evidence was to be admitted.

662. On 25 January 2005 Mr Krasnov (another defence counsel) requested the court to admit in evidence documents entitled “expert report” and “conclusions of the expert” prepared by Ms Petrova, together with documents concerning Ms Petrova’s education and qualifications. Ms Petrova’s oral testimony focused on accounting procedures and practices. Again, her comments on that topic were not required by the court, and, in addition, they were contradictory. The Government further referred to the parts of her testimony which contradicted each other.

663. On 9 February 2005 Mr Padva (a defence counsel) requested the court to admit in evidence an “expert report” by Mr Lubenchenko. Having heard Mr Lubenchenko the court decided, for broadly the same reasons as those set out above, that his comments on the interpretation of the banking law were not required by the court. In addition, his evidence did not contradict the information which had already been established by the court.

664. On 10 February 2005 the defence counsel Mr Dyatlov requested the court to admit in evidence an “expert witness report” prepared by

Mr Grechishkin. The court granted that request in part, having admitted the “report” and attachments nos. 2, 3 and 4 to it. The court also heard Mr Grechishkin orally. At the same time, the court refused to admit attachment no. 1 since it contained documents which were not “properly certified”. Furthermore, the court noted that the “report” was bound and sealed, but it was not indicated whether the copies contained in it corresponded to the originals and what was the method of copying. Mr Grechishkin was questioned about his methods in preparing the report commissioned by the applicant’s lawyers. He had not been asked about other aspects of the case; as a result, the District Court decided that his evidence was relevant and admitted it to the materials of the case.

665. On 11 February 2005 the court agreed to attach to the materials of the case file 36 documents from the list submitted by the defence on 7 February and 9 documents from the list submitted by the defence on 8 February 2005.

666. On 1 and 2 March 2005 the court refused to admit in evidence audit reports by Ernst and Young and Price Waterhouse Coopers. In addition, it analysed the testimony of the general director of Ernst and Young and the audit report by that firm in the judgment. On 2 March 2005 the court refused to admit in evidence “expert conclusions” by Mr Bochko.

667. On 9 March 2005 the defence requested that the court examine the report of the forensic economic study. However, that study had been prepared within a different criminal case. Furthermore, the defence did not explain what particular study it wanted to obtain. The courts were required to examine only those documents which were submitted within the criminal case under examination. The defence was asking that evidence obtained within a different case be examined. On that ground the court decided not to order the discovery of that report.

668. As regards the remaining evidence produced by the defence or which the defence sought to obtain, the court considered that the existing evidence was sufficient to make conclusions on the merits of the case. Therefore, the documents which were not obtained by the court or were not admitted to the case file had no conclusive force and were not important for rebutting the prosecution evidence.

669. According to the Government, all of the evidence used to support the applicants’ conviction had been examined at the trial. The judgment indeed referred to the American Express credit cards and the contracts between the second applicant and Status Services; however, the judgment always referred to the page of the case file where those documents were contained. The materials of the case file mentioned a cover-letter from the American Express company which confirmed the receipt by the applicant of a corporate credit card which he received as a director of Status Services. Furthermore, the applicant obtained a Visa Gold credit card as a director of Status Services; that card was seized during the search in his house on 3 October 2003 and added to the materials of the case file.

670. The Government indicated that the applicants’ case (no. 18/58-03) had been severed from another case, no. 18/41-03. The proceedings in that case were still pending. Some of the defendants in that other case had fled from the prosecution. In order to establish their whereabouts and the

circumstances surrounding the crimes imputed to them the investigators had to question many witnesses. Some of that questioning took place during the trial in the applicants' case but did not relate to it. The Government also replied that it was not in a position to give names of witnesses questioned by the investigator during the applicants' trial within that other case since, before the completion of the proceedings, the names of the witnesses were secret and their disclosure might be prejudicial for the interests of other participants in the criminal proceedings.

**(b) The applicants' submissions**

671. The applicants contended that the way in which the Meshchanskiy District Court collected and examined evidence was tainted with very serious defects. There had been a fundamental disparity between the prosecution and the defence. The Meshchanskiy District Court had been eager to examine all of the witnesses and documentary evidence presented by the prosecution; on the other hand, many of the witnesses and expert reports proposed by the defence had not been examined.

*(i) Intimidation of witnesses*

672. The applicants drew the Court's attention to the fact that some of the witnesses for the defence had been arrested. The applicants also complained that the prosecution had tried to exert pressure on many witnesses by questioning them in connection with "parallel proceedings" during the first trial. The witnesses had been interrogated by the GPO after the end of the preliminary investigation not only in relation to the subject matter of the first trial but also in relation to the further charges that were brought against the applicants at the start of 2007.

673. For witnesses to be questioned immediately before giving their evidence and especially whilst they had not finished giving oral testimony clearly suggested that improper pressure was being exerted on them. The case materials for the new charges indicated that the State had included interrogation records from eighteen witnesses who were called to give evidence in the applicants' first trial. Two of the witnesses had been called to be questioned immediately before giving oral evidence at the first trial and signed a statement undertaking not to divulge to anyone the contents of that interrogation.

*(ii) Use of unlawfully obtained and/or unreliable prosecution evidence*

674. The applicants claimed that the prosecution case had been based on inadmissible evidence. The impugned evidence comprised, in particular, material obtained through an unlawful search of the office of a Duma deputy, and data obtained from a computer where there was a strong suggestion that additional material had been planted by those carrying out the seizure.

675. The search carried out on 3 October 2003 in building no. 88 in Zhukovka had been conducted in defiance of Russian law. Thus, the investigators started the searches without having produced the decision authorising it and without producing their identity cards. The searches were attended by several attesting witnesses, but they took part in several

investigative actions simultaneously. Thus, it was obvious that none of them could attest to the proper conduct of those investigative actions. The persons who attended the searches did not have their rights explained to them law. Finally, some of the documents and objects seized during that search were added to the case file after the investigation in the criminal case had already been completed.

676. On 12 January 2005 the trial court heard witnesses present during the searches. However, the court did not accept their evidence, because they worked at a firm which serviced the premises. At the same time the court relied upon the testimonies of the two investigators who carried it out (Mr Pletnev and Mr Uvarov).

677. As regards the search in the office of the State Duma deputy Mr Dubov, the applicants maintained that Article 182 (10) of the CCrP had been violated. Thus, the documents seized were presented to the attesting witnesses with a delay. Furthermore, the search was not authorised by a court warrant.

678. Documents obtained from a server that was seized during the search in Zhukovka on 9 October 2003 were also unreliable. The bill of indictment contained contradictory information on the location of servers, and on the type of the recording device where the information had been found. Neither the hard drive itself nor the list of files discovered by the prosecution on it was attached by the GPO to the case materials. The files were copied by the experts to another hard disk, which had been provided by the GPO. Mr Dumnov said in his evidence that the hard disk was “re-writable” – i.e. it was possible to re-write and amend information on it. It could not be ascertained whether the hard disk had information on it before it was submitted to the experts. There was nothing in the case materials which documented the fact of the hard disk’s arrival at the GPO. Investigator Mr Pletnev could not say for certain whether or not the hard disk was new or wrapped in packaging or whether the hard disk had been used by anyone previously. After the expert review was carried out, the hard disk containing the information was returned to the GPO. However, the envelope in which the disk was transferred had not been sealed, but merely placed in a paper envelope.

679. The hard disk was then examined by the investigators at the GPO. This examination was carried out in the presence of attesting witnesses who took part on several occasions in other investigative actions relating to the applicants’ criminal case. When examining the hard disk, the investigators discovered much more files than on the disk examined by the experts.

680. The applicants also sought to exclude the expert examination carried out by Mr Yeloyan and Mr Kuprianov on 16 August 2003. The defence team for the second applicant learned about the decision to order the expert examination only after the expert examination had been carried out. Consequently, they were deprived of an opportunity to challenge the experts and pose their own questions to the experts.

681. The applicants complained of the use of the materials seized from the Trust Investment Bank and from Tax Inspectorate no. 5. The seizures from the Tax Inspectorate were unlawful, in that the investigator had failed



to obtain the prior authorisation of a prosecutor. The seizure in the Trust Investment Bank of 22 October 2003 was sanctioned by the First Deputy Prosecutor General, Mr Biryukov, but on 11 November 2003, the same investigator arrived at the Trust Investment Bank again and carried out another seizure with reference to the order he had already used.

*(iii) Inability to test witnesses for the prosecution*

682. The defence asked for Mr Shulgin and the experts Mr Yeloyan and Mr Kuprianov to be called to give oral evidence to the trial court so that they could be cross-examined. These reports related to two of the charges against the applicants. Mr Shulgin, as the Deputy Minister of the Federal Tax Service, signed the statement of claim for pecuniary damages brought by the Tax Authority against the applicant. Mr Shulgin's written evidence was relied upon by the Meshchanskiy District Court when it ruled that the evidence of Mr Shchekin was unreliable. Furthermore, Mr Shulgin had previously revoked a tax audit because it had failed to take into account a directive from the Ministry of Justice and Ministry of Taxes stating that promissory notes could be accepted in 1999. The applicants were thus unable to challenge the acute discrepancy between the witness's stated position in 2002 as to the acceptance of promissory notes and the position advanced by him in that regard at the trial.

683. Mr Yeloyan and Mr Kupriyanov had been expert witnesses for the prosecution and prepared during the investigation an audit report on the Apatit episode of the accusations. The experts claimed to have studied more than 4,000 pages of financial documents, and yet they completed the report within two days of being appointed by the GPO. Moreover the report was drawn up on the GPO's premises. The defence explained to the court that they wished to cross-examine the two experts on the accounting methods that they had used in their reports, and to identify which original materials the experts had used in preparing their reports and to question them on their conclusions. The Meshchanskiy District Court refused to summon those experts on the basis that the assessment of the experts' opinion would be carried out by the District Court when the judges withdrew to their deliberations room. The testimony of Mr Yeloyan and Mr Kupriyanov was important, since the trial and appeal courts relied on their reports in their judgments.

684. The applicants also complained about their inability to question witnesses Mr Petrauskas, Mr Stankevicius, Mr Surma, Mr Rysev, Mr Kartashov, Mr Spirichev and Ms Karaseva, who had been living abroad and whose testimony had subsequently been relied upon by the District Court in its judgment.

*(iv) Expert evidence proposed by the defence but not admitted by the court  
(written reports and oral evidence)*

685. The defence tried to introduce expert evidence, but it was not admitted for examination by the trial court. The applicants maintained that the expert evidence at issue was relevant, important and admissible. All of the prosecution expert reports were deemed to be admissible by the District

Court, whereas every single expert report from the defence was declared inadmissible.

686. The applicants questioned the findings of the domestic court that the “experts” called by the defence, namely Mr Semenov, Mr Shchekin or Ms Petrova, had insufficient expertise. The applicants gave a detailed description of the credentials and qualifications of the expert witnesses called by the defence, their publications, teaching experience, etc.

687. As for the point made in relation to the defence “experts” evidence, suggesting that they had been improperly commenting on legal issues, the applicants noted that there was no prohibition of such commentary in the CCrP. In dealing with complex tax issues, it was inevitable that expert opinion from auditors, accountants and tax lawyers were sought. There was no reason why a court could not receive expert assistance in relation to questions of legal practice and interpretation. The practice of engaging experts with regard to complex legal matters was confirmed by the Constitutional Court of the Russian Federation which engaged specialists in respect of any case under its consideration and respected their opinion.

688. The applicants asserted that Article 58 of the CCrP did in fact permit the defence to obtain “expert evidence”. The fact that some experts had been paid by one of the applicants’ relatives was irrelevant: all professional experts required payment. The court offered no explanation why it was acceptable for the applicants’ relatives to hire lawyers for them, but not to hire the experts whom those lawyers wished to call.

689. The Government’s argument that the reports by Mr Shchekin, Mr Semenov and Mr Grechishkin were inadmissible because they did not examine certified copies of documents was incorrect. Article 58 of the CCrP did not require that the specialist be provided with certified copies of the case materials. Moreover, the rationale was artificial, because the defence lawyers all attested that the copies provided to the specialists had been accurate and complete and the District Court made no finding to the contrary.

690. The Government were also incorrect when they argued that the reports had been inadmissible because, contrary to Article 58, the experts had not had their rights and duties explained to them by an appropriate person. The court explained to each expert his rights at the start of their testimony.

691. The Government failed to respond to the Court’s question concerning the non-admission of exculpatory material, namely the reports by the audit firms and the UBRAS report. The reports by Price Waterhouse Coopers, Ernst and Young and UBRAS were clearly relevant to the Apatit charges. The independence of the report from the criminal proceedings against the applicants should have enhanced the weight to be attached to it and its admissibility to the court record. Further, the report was independently supported by the State’s own expert investigations at the time. The letter from the Commercial Court of the Chita Region was rejected on purely formal grounds, although it was also important evidence in the defence’s case.

(v) *Non-disclosure of exculpatory material*

692. The applicants made submissions on the non-disclosure of exculpatory material. Many of the documents to which the defence would have liked to have been able to refer had been seized during the searches of lawyers' premises, banks or other organisations but had not been added to the case file. Organisations that the defence lawyers approached with requests for disclosure of documents (such as the Finance Ministry, the Justice Ministry and the Federal Tax Service) either responded with a refusal or did not respond at all.

693. The applicants asked the District Court to assist them in obtaining the correspondence between the President and the then Prime Minister. That correspondence showed that a number of investigations had concluded that no offence had been committed in relation to the acquisition of the 20 per cent share in Apatit. However, Presidential Directive no. Pr-2178 was never disclosed during the trial. The ambit of the Directive was referred to in the first page of the General Prosecutor's reply to President Putin dated April 2003.

694. The applicants sought disclosure of the correspondence from the GPO, the State Property Fund and the Presidential Administration concerning the 2003 Presidential investigations, but all the applications were refused. The court refused the application, stating that it could not see "any reasons" why the motion should be granted. Similarly, the court refused to assist the defence in obtaining information from the Border Guard Service concerning the crossing of the Russian border by the first applicant between 1 January 1994 and 2 July 2003. Some of the GPO documents referred to a "legal and economic expert review" which had been conducted in 2002 in order to assess the activities of the trading companies in Lesnoy. The defence asked the District Court to order the disclosure of those documents but it was refused, although those documents could have been clearly relevant.

(vi) *Documentary evidence not examined at the trial but relied on in the judgment; other materials submitted by the defence but not admitted in evidence*

695. According to the applicants, the following items of evidence were not examined in adversarial proceedings: (a) the second applicant's income and expenditure book for the year 2000; (b) the letter from ZAO Yukos RM of 11 August 2000; (c) American Express credit cards; and (d) alleged contracts between the second applicant and the company Status Services Limited. Despite that, the Meshchanskiy District Court mentioned the content of those documents as a proof of the applicants' guilt, and the court of appeal failed to address that point.

696. On several occasions the defence filed motions for adding to the case a number of items of documentary evidence which they considered as exculpatory. However, those documents were not attached to the case file. The reasons advanced by the Meshchanskiy District Court for refusing the defence motions for adding documents were unfair and formalistic.

## 2. *The Court's assessment*

697. The Court reiterates that the applicants' complaints concerning taking and examination of evidence may be divided into five groups. First, the applicants complained that throughout the proceedings the GPO had tried to manipulate witnesses. Second, the applicants claimed that the evidence produced by the prosecution was improperly obtained and/or unreliable. Third, they maintained that the defence was unable to test some of the evidence relied on by the prosecution. Fourth, the applicants argued that the courts had arbitrarily refused to admit important evidence collected and submitted by the defence. Fifth, they claimed that the courts had not assisted the defence in discovering evidence which had been in the possession of the adverse party, and that the judgment relied on evidence which had disappeared from the case-file or had never existed. The Court will address the applicants' complaints in the same order.

### (a) **Intimidation of witnesses by the prosecution**

698. In the present case the Court is not in a position to establish, beyond reasonable doubt, that the witnesses were intimidated or briefed during those interviews. In the Court's opinion, the prosecution may have had good reasons to question a particular witness again, either within the same criminal proceedings or in connection with another case. As to the reading of a witness's written testimony at the trial, it may sometimes be necessary – for example, to reveal discrepancies in his submissions, to undermine his credibility, to obtain clarifications, etc. Finally, the fact of being a witness does not grant immunity against prosecution or arrest. The impugned actions of the GPO were not illegal on the face, and there is no evidence that the prosecution had pursued other goals and acted in bad faith. It follows that this aspect of the case does not give rise to a violation of Article 6 § 1 of the Convention.

### (b) **Use of prosecution evidence which was, according to the applicants, improperly obtained or unreliable**

699. The applicants maintained that the use of evidence obtained during the searches in Zhukovka and, in particular, in Mr Dubov's office, was contrary to Article 6 § 1 of the Convention. The Court reiterates in this respect that it is not its function to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible (see *Van Mechelen and Others v. the Netherlands*, 23 April 1997, § 50, *Reports of Judgments and Decisions* 1997-III, or *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V). In the present case, even if Mr Dubov enjoyed parliamentary immunity, his professional status was supposed to secure his independence as a Duma deputy, and not to guarantee fairness of the proceedings or reliability of the information obtained from him. In the Court's opinion, the use of evidence obtained through the search in Mr Dubov's office did not amount to any unfairness within the meaning of Article 6 § 1 of the Convention.

700. Further, the applicants criticized searches in Zhukovka on 3 and 9 October 2003 in more general terms. They claimed that not only did the

investigators breach the domestic rules, they also collected evidence in such a way that the data obtained was unreliable. The Court reiterates that it belongs primarily to the national courts to decide whether, on the facts of the case, a particular item of evidence could be considered as a reliable source of information. Nevertheless, where the circumstances in which the evidence was obtained cast doubt on its reliability or accuracy, reliance on such evidence may undermine the overall fairness of the proceedings (see *Jalloh v. Germany* [GC], no. 54810/00, §§ 95 et seq., ECHR 2006-IX; see also *Khan*, cited above, §§ 35 and 37; and *Allan v. the United Kingdom*, no. 48539/99, §§ 43 and 47, ECHR 2002-IX). However, as indicated above, as a general rule admission of evidence is primarily a matter for regulation by national law and remains within the discretion of the domestic courts. What is more important is whether the rights of the defence have been respected. In particular, it must be examined whether the applicants were given the opportunity to challenge the authenticity of the evidence and to oppose its use (see *Jalloh*, cited above, § 95, see also *Bykov v. Russia* [GC], no. 4378/02, § 95, 10 March 2009).

701. In the present case the Court observes the applicants were able to raise a complaint about irregularities in the searches, and cross-examine witnesses who were present during the searches. The court heard those witnesses (see paragraph 245 above), considered the arguments of the defence, and made a reasonable determination of facts. Although the District Court refused to discard the evidence obtained from the searches, in the circumstances it is not the Court's task to re-assess the findings of facts based on a reasonable assessment of evidence.

702. A similar analysis is required in respect of the applicants' criticism of the manner in which electronic data was seized and examined (see paragraph 246 above). Possible discrepancies in the documents describing the amount of data contained on the hard drives, inaccuracies as to the exact location of the computer servers, and other defects complained of may have various explanations. The Court cannot detect any manifest flaw in the process of seizing and examining the hard drives which would make the information obtained from them unfit for use at the trial.

703. As regards the multiple searches conducted on the basis of a single search warrant, the Court considers that nothing in the present case shows that the investigators abused their powers and unreasonably interpreted the ambit of the warrants. The Court concludes that the use of evidence thus obtained did not violate the applicants' right to a fair trial.

704. The second applicant also complained that his lawyers had not been duly informed about the commissioning of the expert examination by the GPO in August 2003 and therefore was unable to formulate questions to the experts (Mr Yeloyan and Mr Kupriyanov). In the Court's opinion, the fact that the prosecution obtained an expert report without any involvement of the defence as such does not raise any issue under the Convention, provided that the defence had subsequently an opportunity to examine and challenge that report before the trial court. As regards the defence's alleged inability to cross-examine Mr Yeloyan and Mr Kupriyanov at the trial, that aspect of the case will be analysed separately (see below).

705. The Court has examined the applicants' other arguments concerning various irregularities in the documentary evidence produced by the prosecution. However, the Court considers that those alleged defects, if any, did not lead to any "unfairness" as such. In sum, the Court considers that the use of documentary evidence produced by the prosecution did not breach Article 6 §§ 1 and 3 (d) of the Convention.

**(c) Inability of the defence to cross-examine witnesses for the prosecution**

706. The Court will now turn to the alleged inability of the defence to obtain cross-examination of several witnesses for the prosecution.

707. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings (see *Lucà v. Italy*, no. 33354/96, § 39, ECHR 2001-II; *Solakov v. "the former Yugoslav Republic of Macedonia"*, no. 47023/99, § 57, ECHR 2001-X; and *Al-Khawaja and Tahery*, cited above).

708. In the context of absent witnesses, the Court has set out two considerations in determining whether the admission of statements was compatible with the right to a fair trial. First, it had to be established that there was a good reason for the non-attendance of the witness. Second, even where there was a good reason, where a conviction was based solely or to a decisive extent on statements made by a person whom the accused had had no opportunity to examine, the rights of the defence might be restricted to an extent incompatible with the guarantees of Article 6. Accordingly, when the evidence of an absent witness was the sole or decisive basis for a conviction, sufficient counterbalancing factors were required, including the existence of strong procedural safeguards, which permitted a fair and proper assessment of the reliability of that evidence to take place (see *Al-Khawaja and Tahery*, cited above, §§ 119 and 147).

709. The Court notes that at the trial the defence sought questioning of, amongst others, Mr Shulgin, Mr Yeloyan and Mr Kuprianov. The first person was the Deputy Head of the Federal Tax Service (see paragraph 171 above). The two others were the experts who had prepared several reports at the request of the prosecution, including a report on the market value of apatite concentrate (see paragraphs 68 and 165 above). However, the court refused to call those persons.

710. The Court observes that by seeking the questioning of Mr Shulgin the defence primarily sought to challenge the discrepancy between his position in 2002 as to the acceptance of promissory notes in payment of taxes and his position advanced as a civil plaintiff in that regard at the trial. The Court reiterates in this respect that, in determining issues of fairness of proceedings for the purposes of Article 6 of the Convention, it must consider the proceedings as a whole, including the decision of the appellate court (see, for example, the *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B). The Court observes that both applicants

were finally acquitted on the company tax-evasion charges in the part concerned payment of taxes with promissory notes (see paragraph 318 above). The applicants also claimed that the District Court relied on Mr Shulgin's testimony in dismissing the report by Mr Shchekin, a defence expert witness, but this does not follow from the judgment. The Court concludes that the absence of Mr Shulgin from the trial did not affect the overall fairness of the proceedings.

711. By contrast, the Court must examine the refusal to hear Mr Yeloyan and Mr Kuprianov, since their evidence was seemingly relevant to the charges on which the applicants were found guilty. The Government argued that Mr Yeloyan and Mr Kuprianov were not "witnesses" within the meaning of Article 6 § 3 (d), but "experts", i.e. persons with specialist knowledge who assisted the court in a particular technical or scientific field. The Court agrees that the role of an expert witness in the proceedings can be distinguished from that of an eye-witness who must give to the court his personal recollection of a particular event. That does not mean, however, that testing of expert evidence is not covered by Article 6 § 3 (d) taken in conjunction with Article 6 § 1. There is an extensive case-law of the Court which guarantees to the defence a right to study and challenge not only an expert report as such but also the credibility of those who have prepared it, through their direct questioning (see, amongst other authorities, *Brandstetter v. Austria*, 28 August 1991, § 42, Series A no. 211; *Doorson v. the Netherlands*, 26 March 1996, §§ 81-82, *Reports of Judgments and Decisions* 1996-II; and *Mirilashvili v. Russia*, no. 6293/04, § 158, 11 December 2008).

712. The Government further claimed that the defence did not show the importance of the personal questioning of Mr Yeloyan and Mr Kuprianov for the outcome of the trial. The Court cannot accept this argument. Both Mr Yeloyan and Mr Kuprianov were hired as experts by the prosecution at the investigation stage and conducted their expert examination at the premises of the GPO, without any involvement of the defence (compare with *Zarb v. Malta*, (dec.), 16631/04, 27 September 2005, with further references, see also *Stoimenov v. "the former Yugoslav Republic of Macedonia"*, no. 17995/02, §§ 39 and 40, 5 April 2007, with further references). Consequently, their position was closer to that of a "prosecution witness". Contrary to the situation with defence witnesses, the accused is not required to demonstrate the importance of a prosecution witness. If the prosecution decides that a particular person is a relevant source of information and relies on his or her testimony at the trial (see paragraph 165 above), and if the testimony of that witness is used by the court to support a guilty verdict (which was the case – see paragraph 271 above), it must be presumed that his or her personal appearance and questioning are necessary, unless the testimony of that witness is manifestly irrelevant or redundant.

713. In the present case Mr Yeloyan and Mr Kuprianov evaluated, *inter alia*, the differences between the market prices of the apatite concentrate and the "internal prices" at which it had been sold by Apatite to its affiliates, allegedly controlled by the applicants. The findings of the report were seemingly important for establishing whether the sales of

apatite concentrate caused any damage to the shareholders of Apatit and therefore went to the heart of the charges described in paragraphs 99 et seq. above. There is nothing in the judgment of the District Court to counter that assumption. The defence explained to the District Court why they had doubts about the reliability of the expert reports and the methods employed by the experts (see paragraph 169 above). The defence took no part in the preparation of the reports by Mr Yeloyan and Mr Kupriyanov and were unable to put questions to them at an earlier stage in the proceedings. In such circumstances the District Court had to consider the motion by the defence carefully.

714. Instead, the District Court decided that it did not need to hear the experts in person because it had their written opinion. That argumentation is unsatisfactory. The fact that the District Court had the expert report did not make the questioning of the experts unnecessary – otherwise there would be no need to question any witness who had given written submissions to the prosecution during the pre-trial investigation. Even if there were no major inconsistencies in the report, questioning of experts might reveal possible conflicts of interests, insufficiency of materials at their disposal, or flaws in the methods of examination.

715. Most importantly, there was no good reason preventing Mr Yeloyan and Mr Kupriyanov from coming to the court and testifying there, such as, for example, the fear of reprisals from the applicants or reasons to keep secret police methods of investigation of crime (see *Al-Khawaja and Tahery* [GC], cited above, § 122, or *Doorson*, cited above, § 70), or the death of the witness (see *Ferrantelli and Santangelo*, cited above, § 52), and neither the domestic courts nor the Government referred to such circumstances.

716. All of the above leads the Court to conclude that the refusal of the domestic courts to hear Mr Yeloyan and Mr Kupriyanov in person at the trial was contrary to the requirements of Article 6 §§ 1 and 3 (d).

**(d) Expert evidence proposed by the defence but not admitted by the court**

717. The next aspect of the case to address is the non-admission of “expert evidence” (both written and oral) proposed by the defence for examination at the trial. The Court will concentrate on “expert evidence” in the broad meaning, i.e. on such sources of information which did not describe particular facts of the case but instead provided scientific, technical, etc. analysis of those facts.

718. The Court reiterates that where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial (see *S.N. v. Sweden*, no. 34209/96, § 44, ECHR 2002-V, with further references to *Bricmont v. Belgium*, 7 July 1989, § 89, Series A no. 158). The domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence, for instance on the ground that the court considers their evidence unlikely to assist in ascertaining the truth (see *Huseyn and Others v. Azerbaijan*,



nos. 35485/05, 45553/05, 35680/05 and 36085/05, § 196, 26 July 2011, with further references).

719. The Court observes that part of the “expert evidence” proposed by the defence was rejected outright by the District Court during the trial (see paragraph 219 above). A number of “experts” were able to testify, but in the judgment the District Court accepted their submissions only in the part concerning the process of preparation of various reports and studies (see, for example, paragraphs 225 et seq., and 258 et seq. above). As to the essence of their comments, the court refused to consider them (see paragraphs 249 et seq. above). Thus, at the end of the day, none of the “expert evidence” relied on by the defence was accepted for consideration.

720. The District Court’s reasons for rejecting “expert evidence” produced by the defence were not always clear. Having examined the judgment and the procedural rulings of March 2005 the Court observes that the District Court’s arguments in respect of that type of evidence can be divided broadly into two groups. Some of those arguments related to relevance, usefulness and reliability of the defence’s “expert evidence”, whereare other related to formal inadmissibility thereof.

(i) *Expert evidence deemed irrelevant or useless*

721. As regards the first group, the Court reiterates that the requirement of a fair trial does not impose an obligation on a trial court to order an expert opinion or any other investigative measure merely because a party has sought it. In the present case, the District Court held that opinions by several “experts” for the defence touched upon legal matters, namely on the interpretation of the Russian legislation and were therefore useless for the court. In the Court’s opinion, and in the light of the nature of the submissions by those “experts”, the irrelevance/uselessness for the court was the central argument for rejecting them. This concerned oral and written submissions by Mr Shchekin, Mr Semenov, Mr Grechishkin, Mr Lubenchenko, Mr Gulyaev, and, to a certain extent, by Ms Petrova, Mr Bochko and Mr Pleshkov (see paragraphs 199 et seq., 214, 222 and 225 et seq.).

722. The Court takes note of the applicants’ argument that the CCrP did not prevent a court from seeking an expert opinion on legal matters. However, the Court is prepared to admit that legal matters are normally within the judge’s competence and experience (*iura novit curia*), and it is for the judge to decide whether or not he needs assistance in a particular field of law. In the Court’s opinion, in this part the rejection by a national court of the “expert evidence” produced by the defense remained within the former’s margin of appreciation.

723. Some other reports and studies produced by the defence also touched, at least to some extent, upon other fields of knowledge, such as economic analysis or accounting. It was the case of Ms Petrova’s submissions and her written report (see paragraph 202), which concerned *inter alia* certain accounting practices, Mr Bochko’s submissions and the UBRAS report (see paragraph 214 above), which evaluated the economic impact of the operation of “trading companies” in the low-tax zones, and Mr Pleshkov’s report concerning, amongst other things, the economic

feasibility of the investment programme of Apatit (see paragraph 222 above). The court rejected those reports in bulk, without distinguishing between various issues touched in those reports. Whereas such an indiscriminate approach is pregnant with dangers, the Court is prepared to admit that the primary reason for not admitting those reports was, again, their irrelevance or uselessness, and that it was within the trial court's discretion to so conclude.

(ii) *Expert evidence rejected as inadmissible*

724. The Court will now turn to “expert evidence” rejected by the District Court for reasons related not to its content but the form and origins.

725. The Court notes that the defence produced to the court the audit reports by Ernst and Young and Price Waterhouse Coopers (see paragraphs 215 and 216 above), but the District Court refused to admit them. The Court reiterates that it belongs primarily to the national court to judge whether adding an item of evidence at the request of the defence would serve any useful purpose (see *H. v. France*, 24 October 1989, §§ 60-61, Series A no. 162-A, and *Fruni*, cited above, § 126). However, it remains the Court's task to ascertain whether the way in which evidence was taken was fair. For example, in exceptional circumstances the need to obtain a second expert opinion on an important aspect of the case may be self-evident and the failure of the court to obtain expert evidence sought by the defence may make the trial unfair (see, for example, *G.B. v. France*, no. 44069/98, § 69, ECHR 2001-X).

726. The Court notes that, unlike the “expert evidence” analysed above, the reports by Ernst and Young and Price Waterhouse Coopers were essentially non-legal. The first evaluated Apatit shares at different periods of time, whereas the second analysed the price of the apatite concentrate. The Court further stresses that these two reports concerned essentially the same matters as the reports produced by the prosecution (see paragraphs 165 and 166 above), which were accepted by the District Court in evidence. In the circumstances the applicants' attempts to obtain opinions of professionals in the fields of accounting, evaluation of assets and market prices were justified. Therefore, the “irrelevance” of those reports could not and should not play any major role in dismissing them.

727. As transpires from the procedural rulings of the Meshchanskiy District Court, those reports were rejected, *inter alia*, due to some defects related to their form (see in particular paragraphs 219 and 220 above). There was, however, no doubt that the reports emanated from the audit firms in question. Those firms were well known; they had their offices in Moscow and followed established practices and procedures. The District Court heard Mr Gage, a partner with Ernst and Young, who testified amongst other things about the preparation of the report by his firm. If the court needed any further information about the names or qualifications of experts involved in the preparation of the reports, it was easy to obtain it. The Court considers that defects as to the form were not a decisive argument for their rejection. The Court has therefore to examine the last

argument, namely the inadmissibility of the reports from the standpoint of Russian law.

728. The District Court decided that those audit reports did not correspond to any type of “evidence” which is admissible under domestic law. For the purposes of the present case the Court is prepared to accept the reading of the CCrP proposed by the Meshchanskiy District Court as reasonable (see *Perić v. Croatia*, no. 34499/06, § 17, 27 March 2008). That being said, the Court stresses that the rules on admissibility of evidence may sometimes run counter to the principles of equality of arms and adversarial proceedings, or affect the fairness of the proceedings otherwise (see, for example, *Tamminen v. Finland*, no. 40847/98, §§ 40-41, 15 June 2004). Although “Article 6 does not go as far as requiring that the defence be given the same rights as the prosecution in taking evidence” (see *Mirilashvili*, cited above, § 225), the accused should be entitled to seek and produce evidence “under the same conditions” as the prosecution (see, *mutatis mutandis*, *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33, Series A no. 274; see also *Perić*, cited above, § 19). Clearly, those “conditions” cannot be exactly the same in all respects; thus, for example, the defence cannot have the same search and seizure powers as the prosecution. However, as follows from the text of Article 6 § 3 (d) the defence must have an opportunity to conduct an active defence – for example, by calling witnesses on its behalf or adducing other evidence.

729. The prosecution in the present case tried to prove a particular point by obtaining expert reports and submitting them to the court. The reports were obtained within the preliminary investigation, i.e. not in adversarial proceedings, and, in this case, without any participation of the defence. Thus, the defence was unable to formulate questions to the experts, challenge the experts or propose their own experts for inclusion in the team, etc. The trial court admitted those reports in evidence because under the CCrP the prosecution had a right to collect them.

730. The defence, on the other hand, had no such right. Under the CCrP, interpreted narrowly, only the prosecution or the courts were entitled to obtain “expert reports” (see paragraph 401 and 409). Indeed, in theory the defence could challenge an expert report produced by the prosecution and ask the court to commission a fresh expert examination. However, to obtain such a fresh examination it was incumbent on the defence to persuade the court that the report produced by the prosecution was incomplete or deficient. The Court notes that the defence was unable to call some of the experts who had prepared the reports at the request of the prosecution, and to cast doubt on their credibility. That fact gave rise to a separate finding of a violation under Article 6 § 3 (d) (see paragraph 716 above) and it undoubtedly made the defence’s task of proving the usefulness of the counter-reports more difficult.

731. Furthermore, the Court stresses that it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Thus, the mere right of the defence to ask the court to commission another expert examination does not suffice. To realise that right effectively the defence must have the same opportunity to introduce their own “expert evidence”.

732. That right is not absolute and the forms in which the defence may seek the assistance of experts may vary. In the present case the defence tried to introduce their own “expert evidence” by proposing to the court two reports which it had obtained from third parties. Those reports were relevant, but the court refused to admit them. In the District Court’s opinion, those reports were not admissible either as “specialist reports” or as “other documents” (see paragraphs 221 and 250 above).

733. The Government did not explain what other options were available for the defence to introduce their expert evidence. The CCrP, as interpreted by the District Court, did not allow the defence to collect written reports by “experts” or “specialists”. The defence lawyers were indeed able to obtain consultations from relevant specialists outside the trial, but this does not suffice to equalise the positions of the prosecution and the defence. Furthermore, in adversarial proceedings evidence must normally be produced directly at the trial.

734. The last option available for the defence was to obtain oral questioning of “specialists” at the trial (see paragraph 411 above). However, it is clear that the status of “specialist” in Russian law is different from that of an “expert”. Although a specialist may “explain to the parties and to the court matters which come within his or her professional competence”, his primary role is to assist the court and the parties in conducting investigative actions which require special skills or knowledge (see paragraph 402 above). In any event, the defence would only be able to rely on oral questioning of the “specialists” at the trial, whereas the prosecution was able to produce written reports prepared beforehand by “experts”. Finally, as transpires from the Meshchanskiy District Court’s reasoning, “specialists” invited by the defence, unlike “experts” for the prosecution, did not have direct access to the original copy of the case file, and the court was not prepared to admit their conclusions based on the copies of materials of the case provided to them by the defence (see paragraph 252 above).

735. In the circumstances the Court concludes that the CCrP, as interpreted by the Meshchanskiy District Court, created a disbalance between the defence and the prosecution in the area of collecting and adducing “expert evidence”, thus breaching the equality of arms between the parties. There was, therefore, a violation of Article 6 §§ 1 and 3 (d) on that account.

**(e) Other allegations concerning the process of taking and examining of evidence**

736. The Court took notice of other complaints by the applicants concerning the admission and examination of evidence during the proceedings. It notes, however, that it has already addressed the most important complaints related to the handling of evidence by the Russian courts. In view of its above findings under Article 6 §§ 1 and 3 (d), the Court considers that other complaints of this nature do not require a separate examination.

**(f) Conclusion**

737. Having regard to the elements discussed above, the Court concludes that there has been a violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (c) and (d) on account of the breach of the lawyer-client confidentiality and unfair taking and examination of evidence by the trial court.

**VII. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION (METAL CAGE ISSUE)**

738. The applicants complained that being tried whilst caged was a means of portraying them to the public as common criminals, contrary to the presumption of innocence guaranteed by Article 6 § 2 of the Convention. This provision reads as follows:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”

**A. The parties’ submissions**

739. The Government argued that the security measures applied in courtrooms were inherent in the very idea of criminal prosecution, that such arrangements had been necessary to secure the safety of other participants in the trial, and of the applicants themselves, to guarantee order in the courtroom, and to exclude the risk of fleeing or putting pressure on witnesses, and that such measures were automatically applicable to all criminal defendants.

740. The applicants argued that there was no basis whatsoever for the assertion that they had been caged to protect themselves or others, or to prevent them from fleeing, influencing witnesses, etc. The applicants were charged with economic crimes and had no previous convictions. The applicants were displayed in the iron cage and, as could be seen in the photographs, they were televised and photographed by the media whilst in that iron cage. On arrival at the court they were surrounded by armed officers and handcuffed. The average observer could easily have believed that extremely dangerous criminals were on trial.

**B. The Court’s assessment**

741. The Court notes that in some previous cases concerning the appearance of an accused before a criminal court in a glass or metal cage no violation of the presumption of innocence was found. Thus, in *Ashot Harutyunyan*, cited above, §§ 138 et seq., which concerned the applicant’s placement in a metal cage akin to that in the case at hand, the Court held, in particular, that “the applicant’s placement in a metal cage [had not made] it impossible for him to communicate confidentially and freely with his lawyers or to communicate freely with the court. ... The applicant [had therefore been] able to defend his case effectively ... “.

742. In that case the Court examined the applicants' complaint under Article 6 § 2 in the light of the more general guarantee of a fair trial and put emphasis on the applicant's ability to enjoy his other procedural rights guaranteed by Article 6 §§ 1 and 3. By contrast, in the case of *Titarenko*, cited above, §§ 58- 64 and 90-93, a similar complaint was examined by the Court solely under Article 6 § 3.

743. The Court reiterates that the various guarantees contained in Article 6 are often interrelated. Indeed, the conditions in which a defendant is held in the courtroom may raise an issue under both Article 3 and Article 6 § 2, and may also affect the defendant's ability to communicate with his lawyers, work with documents and defend himself effectively under Article 6 §§ 1 and 3 (a) and (c). In the present case the Court has already found that conditions in which the second applicant had been detained throughout the trial had been humiliating (see paragraphs 485 et seq. above). A similar finding in respect of the first applicant was made in the *Khodorkovskiy (no. 1)* case, §§ 123 et seq. In the Court's opinion, by holding that such "harsh appearance of judicial proceedings could lead an average observer to believe that an extremely dangerous criminal was on trial" (see paragraph 484 above, with further references) the Court has already addressed the essence of the applicants' complaint under Article 6 § 2. Other aspects of the "metal cage issue", namely the question whether such security arrangements encroached on the applicants' rights under Article 6 §§ 1 and 3 (a) and (c) have already been addressed separately above, in Section VI.

744. Therefore, the Court concludes that it is not necessary to examine the applicants' complaint under Article 6 § 2 of the Convention separately.

### VIII. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

745. Under Article 7 of the Convention the applicants complained that the interpretation of the tax law which led to their conviction for tax evasion had been unforeseeable, and that, as a result, they had been convicted for acts which had not been regarded as "criminal" when they had been committed. Article 7, in so far as relevant, provides:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

746. The applicants' complaint under Article 7 concerned charges of "tax evasion" under Articles 198 (personal tax evasion) and 199 (corporate tax evasion). In particular, the applicants claimed that tax-evasion charges related to the tax cuts obtained by the trading companies and by them personally, as well as to the payment of taxes with promissory notes, were unpredictable. In the opinion of the applicants, the tax minimisation techniques they had used (selling oil through the trading companies registered in the Lesnoy town and receiving consulting fees in the capacity of individual entrepreneurs) had been perfectly legal at the time.

## A. The parties' submissions

### 1. *The Government's submissions*

747. The Government maintained that Russian legislation contained a similar prohibition of retroactive application of criminal law (Articles 3 and 9 of the Criminal Code). Only acts defined as "crimes" in the Criminal Code can be punishable as such. Criminal law cannot be applied "by analogy". Only the law applicable at the moment when the act was committed may be applicable to that act. These provisions must be interpreted narrowly.

748. In their opinion, the applicants were convicted for actions which had been regarded as criminal at the moment when they were committed, and the applicants had been well aware of that fact. Russian criminal law was sufficiently clear on the matter; the relevant legislation had been published in the official mass media and was thus available to the applicants or their legal consultants. The Government stressed that the applicants, as businessmen, could have solicited the opinion of the most experienced lawyers. In addition, the first applicant held two university degrees. It was hard to believe that the applicants had never assessed the risks related to their business activities in Russia, including the risks in the sphere of criminal law. The complexity of the tax-avoidance scheme suggested that it had been designed after a careful analysis of the applicable legislation in order to preserve unlawfully obtained money.

749. Tax evasion, a crime proscribed by Articles 198 and 199 of the Code, was a deliberate act, aimed at the default in payment of taxes and dues in large or very large amounts which led to the partial or complete non-receipt of those taxes and dues by the treasury. There could be different methods of tax evasion. For example, it could occur in the form of a deliberate and knowing indication of false information in the tax declaration or in other documents which the taxpayer must submit to the tax authority in accordance with the law. "Other documents" in this context meant any documents necessary for the calculation of the taxes due. "Deliberate" meant the existence of a direct intent to give false information. "False information" was understood as any incorrect data about the object of the tax (i.e. property, revenue or other operations and status), about the right to tax deductions, credits etc., which could affect the correctness of the calculation of the amount due by the taxpayer. "Indication of the false information" could take the form of the taxpayer's failure to indicate the true amount of his revenues; artificial minimisation of revenues or increase of deductible costs; falsification of data on the time period when certain revenues were received or losses suffered; distortion of physical characteristics of a particular type of business activity, etc.

750. The tax authorities had already revealed other tax-evasion schemes used by other taxpayers. In support of this argument the Government cited the names of several companies which had been using tax evasion schemes, although they had not caused as much damage to the State as the applicants. The Government further referred to the opinion of the Financial Action Task Force on Money Laundering (FATF), which noted that tax-evasion schemes were quite widespread and were constantly

developing, becoming more and more complex and sophisticated, which called for the enactment of new laws penalising particular types of conduct. Their report on money laundering in 1999-98 mentioned the use of offshore companies as a common tax-evasion technique. The Financial Action Task Force continued to discover new forms of tax evasion every year; however, this could not preclude the States from bringing the persons responsible for tax evasion to criminal liability. Although the Criminal Code of Russia contained clear provisions penalising tax evasion, it could not describe in detail all possible schemes.

751. The Government stressed that the domestic courts had established that the applicants intentionally developed various techniques aimed at tax evasion. The very nature of the acts incriminated to the applicants showed that they had been deliberate, and that the applicants must have known about their criminal character.

752. In the Government's opinion, the tax-evasion scheme invented and implemented by the applicants in the present case clearly fell within the scope of Article 199 of the Code. The central question was therefore whether such schemes had been discovered and penalised in any other case before the applicants were brought to trial. The Government asserted that the tax-evasion schemes used by the applicants were "relatively new" and were discovered only in the course of the investigation into the applicants' case. Thus, the sham companies were registered and functioned on the territories enjoying a special taxation regime. However, the ZATO Act clearly established criteria which permitted companies incorporated and registered in those locations to use that special regime. In order to benefit from tax cuts the companies had to have up to 90 per cent of their fixed assets and 70 per cent of their human resources concentrated in those territories. Seventy per cent of the wage-fund was supposed to be paid to locally-hired employees. The companies which were buying oil from Yukos did not correspond to those requirements; consequently, they obtained tax cuts unlawfully and caused damage to the State. The provisions of the Criminal Code of the Russian Federation which applied to the applicants' case were clear and did not change. What changed (or, rather, what had been amplified) was the practice of their application.

753. The Government indicated that Articles 198 and 199 of the Criminal Code were interpreted in Rulings no. 8 of the Supreme Court of 4 July 1997 and no. 64 of 28 December 2006. The Government quoted definitions of tax evasion from those articles and referred to a number of criminal cases concerning tax evasion. In particular, the Government produced copies of judgments in the cases of *Tasoyev* (judgment of the Dolgoprudnyy Town Court of the Moscow Region of 17 December 2002); *Zhuravlev* (judgment of the Dubna Town Court of the Moscow Region of 14 March 2003); *Yakubov* (judgment of 17 March 2004 by the Istra District Court of the Moscow Region); *Simikyan* (judgment of the Belovo Town Court of 26 May 2004); and *Yakimov* (judgment of the Kirovskiy District Court of Kazan of 2 August 2004). Those cases concerned the failure of taxpayers to submit tax declarations to the tax authorities or to indicate in the declarations the real amounts of their income or their turnover.



754. The Government also submitted a copy of the judgment in the case of *Mironov* (judgment of 7 October 2004 by the Basmanniy District Court of Moscow) which concerned the operations of a branch of a foreign firm registered in Cyprus. The defendant in that case pleaded guilty and was convicted for concealing the firm's business activities on the territory of Moscow in 1999–2003. Finally, the Government produced a copy of the decision by the Supreme Court (sitting as a court of appeal) in the case of *Selivanov* (decision of 30 October 2002), which concerned tax evasion and breach of custom regulations. That case concerned the use of “front companies” in 1997-1998 for the purpose of securing a reduction in taxes and customs dues. In the Government's view, those cases described different schemes which could be characterised as “tax evasion”.

755. In addition, the Government referred to several judgments by the commercial courts at different levels which concerned non-payment of taxes by corporate entities. The Government indicated that legal professionals and the general public had access to that case-law.

756. The Government also referred to the answers to the frequently asked questions given by various tax officials and published in legal databases, which explained different situations which could be described as “tax evasion”. They submitted extracts from articles published in the specialised press by legal scholars and tax practitioners on the application of Articles 198 and 199 of the Criminal Code, methods and procedure for tax inspections, powers of the tax police and tax inspectorates, participation by the police in tax inspections, tax offences under the Tax Code, etc. In particular, in one of the articles, published in 1999 in the *Nalogoviy Vestnik* magazine, no. 9, the author wrote that a common form of tax evasion by individual entrepreneurs (p. 68) consisted of the receipt of “consulting fees” under fake consulting agreements which were then re-distributed to the payers of those “fees”. An article published in no. 3 of that magazine in 2002 (p. 126) described such a form of tax evasion as reimbursement of VAT on the ground of an export operation which in fact had not taken place.

757. The Government explained that the use of offshore companies as a specific method of reducing the amount of taxes due was immaterial for the legal characterisation of the act as “tax evasion”.

758. Finally, the allegations of retroactive application of criminal law were examined by the courts at two instances and were dismissed as unfounded.

## 2. *The applicants' submissions*

759. The applicants invited the Court not to take into account its findings in the *Yukos* case, claiming that they touched upon different issues. The applicants stressed in particular that the *Yukos* case was not their case, that conviction of an individual for “knowing” and “intentional” tax evasion under Articles 198 and 199 was not under consideration in that case, and that the *Yukos* case had quite a different focus to the criminal judgments at the heart of the present case.

(a) **Company tax evasion charges (Article 199)**

760. The applicants claimed that the Meshchanskiy District Court had been precluded from examining the case without prior determination of the legality of the tax cuts within separate proceedings. The Constitutional Court in its Judgment no. 9-*P* of 27 May 2003 made clear that the crime of tax evasion was in effect derivative, or sequential to, a prior determination that a tax offence had been committed. A conviction for criminal tax evasion under Article 199 was not autonomous but dependent on a determination, with all its corresponding guarantees, by a civil court properly seized of the matter. The applicants also referred to the Ruling of the Constitutional Court no. 254-*O* in this respect.

761. On the substance of the charges, the applicants observed as follows. The Meshchanskiy District Court contended that Business Oil's tax declarations had been knowingly false because Business Oil "had not carried out any actual activity on the territory of the [town of Lesnoy], as a taxpayer entitled to preferential tax treatment". The actual word used in relation to Business Oil and other trading companies in the criminal judgment was "*podstavnye*" ("sham [legal entities]"). However, that was not a legal term, and was legally undefined. Such a characterisation of trading companies because they were controlled by others, were passive and/or did not own production or transportation assets or the property was without precedent or foundation in Russian law.

762. The applicants explained that the tax minimisation technique with which the criminal judgment was concerned was a simple profit-shifting arrangement (transfer pricing) commonly encountered throughout the commercial world in 1999-2000 (as well as before and since). Not only was the general use of "letter-box companies" absolute commonplace in the Russian Federation, but the acquisition of Yukos' principal subsidiary in the auction by means of which the Russian Government enforced the tax liabilities, was by a company having just such characteristics: Baikal Finance Group, a company with no economic presence whatsoever and purely a "letter-box" function, successfully bought Yugansneftegaz for EUR 7 billion.

763. The Lesnoy trading companies selling Yukos oil were incorporated and had a business address in Lesnoy. The town administration was entitled under the law to grant tax preferences on such terms as the Lesnoy municipal authority thought fit to impose. As from 2 April 1999, the law required that as a condition of any grant of tax preferences Lesnoy registered taxpayers had to have at least 90 per cent of their fixed assets in the region of the ZATO, and at least 70 per cent of their operations and payroll employees permanently resident in the region of the ZATO. The only requirement for eligibility to tax cuts was the literal formal compliance with those conditions. Compliance by Business Oil with the requirements of Article 5 of the ZATO Act (including as amended) had been confirmed by an on-site tax audit conducted from 17 to 29 December 1999 as well as by several desk audits.

764. A company did not need to own the means of storage, refining or transportation in order to be trading oil - all that was needed was a computer screen. The town administration was perfectly aware that

Business Oil and other trading companies were anything other than intermediaries: the tax authorities had their tax declarations disclosing dealings with crude oil in amounts running to several billion RUB, accepted millions of RUB of tax in relation to the same, and conducted an on-site tax audits in the offices of the trading companies.

765. The applicants referred to a number of cases which, in their opinion, confirmed that for trading companies operating in the law-tax zones it was sufficient to comply with formal requirement of Article 5 of the ZATO Act. In particular, they referred to the case of *Pribrezhnoye* which confirmed the entitlement to tax preferences notwithstanding that: (1) the taxpayer's only fixed asset consisted of a single computer situated in the ZATO region (on rented premises); (2) the taxpayer's operations consisted of the trading of crude oil at all times located outside of the ZATO region; (3) the general director of the taxpayer was tax resident outside the ZATO territory and was not on its payroll; and (4) the taxpayer was relying on its employment of a cleaner and a lawyer who worked from home, in order to surmount the 70 per cent ZATO permanently resident worker hurdle. The applicants also referred to several cases decided by the Urals District Federal Commercial Court which concerned ZATOs located in the Urals Federal District (such as Lesnoy town), such as the cases of *Chelpiks*, *Energosintez*, *Kio-Invest*, *Uralkhimtekhprom*, *Transkrud*, and others. The applicants considered that in view of those decisions by the court of cassation, taxpayers could properly have reached the conclusion that they were entitled to tax cuts on the basis of tax agreements entered into in accordance with Article 5 of the ZATO Act literally construed (see the *Siblekon* judgment by the Eastern Siberian District Commercial Court)

766. The Government, on the contrary, failed to produce a single case, let alone one remotely analogous to the criminal judgment in the applicants' case, which made reference to the concept of a sham company. The Government did not comment in any way on the case-law referred to by the applicants. In not a single case decided by the Russian courts was the proportionality of the taxes payable under the preferential tax agreements to the amount of investment made in the local economy of any materiality. The "disproportionately small payments" theory used in the applicants' case was completely unsustainable as a basis for the imposition, let alone the ascertainment of tax liabilities.

767. The applicants stressed that on 6 September 2007, in its pre-admissibility response to the application of the second applicant, the Government stated that the applicants' conviction was based on a "change in practice" as to the manner of application of the provisions of Articles 198 and 199. Contrary to what the Government seemed to suggest, there was nothing self-evident about the subsequent criminalisation of the applicants' conduct.

768. Indeed, Article 40 of the Tax Code then in force enabled the substitution of a different price for tax purposes. However, it was only possible in strictly defined circumstances. Further, Article 40 provided that, as a general rule, the price at which a transaction was effected was to be treated as the market price. In any event, the applicants' conviction was not based on anything to do with Article 40 (2) of the Tax Code – neither

that provision, nor its underlying concept, were invoked in the criminal judgments.

769. At the time there were no specific legal instruments in the Russian law combating transfer pricing arrangements. The Russian Federation was not a signatory to the OECD Convention on Transfer Pricing, and the Russian Tax Code did not, even now, contain general provisions requiring entities to deal with one another at market price. In 1999-2000 there was no general reporting obligation on commercial organisations to disclose the extent to which they were making use of internal market prices in order to channel profits. There was not even an obligation to produce consolidated accounts. On the contrary, the accounting principles upon which the Russian tax system was based precluded the use of consolidated accounts. The Law “On consolidated account reporting” was adopted only in 2010.

770. The applicants repeated that much of the expert evidence that was ruled inadmissible by the Meshchanskiy District Court addressed the fact that the prosecution erred in their interpretation of the tax law and that the concept of a “sham company” was the application of a retrospective penalty. The applicants gave evidence as to their general reliance on professional advice before having recourse to the tax-minimisation techniques described in the criminal judgment as “tax evasion”.

771. The imported concept of the “bad-faith taxpayer”, never previously heard of in connection with taking the benefit of tax cuts conferred by specific legislation, was never identified as a basis for the withdrawal of the benefit of tax preferences conferred by ZATO authorities in any of the decisions referred to by the Government or known to the applicants.

772. The applicants also questioned the District Court’s findings as to their being a member of an “organised group”. No actual factual connection between the applicants and the supposedly criminal filing of tax declarations on the part of Business Oil was established.

773. Finally, the applicants claimed that their conviction on account of unlawful tax refunds was also totally unpredictable and arbitrary: the payment of tax by the use of promissory notes had been lawful at the time.

**(b) Personal tax evasion charges (Article 198)**

774. In so far as the personal tax evasion charges were concerned, the applicants indicated that, like many Russian entrepreneurs, they had made use of the special tax regime, based on the use of a licence (“patent”) and the payment of a single imputed tax. Acting on tax advice, the applicants applied for an appropriate licence, paid for and received it. Obtaining the licence inflated the budget to the extent of its cost. Then they entered into the consulting agreements with an intermediary company. Those agreements were related to a separate arrangement with a non-Russian end-user, tapping into the applicants’ expertise as regards the conducting of business in the Russian Federation. Given the sensitive nature of such arrangements they were indeed genuinely confidential, and it would have been a serious breach of faith for the applicants to have shared such matters with their prosecutors in a publicly conducted trial. Those end-users were not members of the Yukos group of companies. The

interposition of a personal services company between the person performing an actual job and the company seeking his services was a widespread and normal practice.

775. The Government's case was that the payments received by the applicants in 1998 and 1999 were a "salary in disguise", with the result that such income fell to be taxed under the general rules of the Tax Code, without the benefit of special tax regime under the Small Business Act. However, that conclusion was not supported by evidence. The criminal judgment did not put in issue the fact that end-users had made their payments to the Isle of Man companies, or the fact that the income received by the applicants was received by the applicants from those companies. In addition, there was no record of a single case involving any person, other than one connected with Yukos, in which Article 198 had been invoked in order to criminalise the "individual entrepreneur" scheme. As confirmed clearly by the *Vliran* case there was no basis for objecting to their taking advantage of the Small Business Act (see paragraph 443 above).

776. The applicants denied the alleged affiliation between them and the Isle of Man companies. Even if it was true, it was perfectly normal for a businessman, for a number of reasons, to trade with the end-users not directly but through a corporate intermediary established by him. No explanation was attempted in the criminal judgments to explain the basis upon which payments were being received by the Isle of Man companies from end-users, or the basis upon which the applicants were receiving payments if not for consulting. There was no evidence that Rosprom or Yukos Moscow had paid any amounts to the Isle of Man companies. Also passed over was the fact that the applicants had continued to declare general employment income from Rosprom and Yukos Moscow as well as from other sources in amounts of a similar order of magnitude to preceding years. The applicants' income from these sources was nominal before and after entering into the service agreements. The work performed by the applicants fell within the ambit of the activities provided for in the licences.

777. Finally, in the applicants' opinion, even if the sums received under service agreements were attributable to the continuity of their service with Rosprom and Yukos Moscow, this did not render the whole scheme unlawful – it would be a perfectly legal form of tax optimisation for them, which was suggested to them by their lawyers.

## **B. The Court's assessment**

### *1. General principles*

778. The Court reiterates that Article 7 embodies the principle *nullum crimen, nulla poena sine lege*, and the requirement that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy (see *Jorgic v. Germany*, no. 74613/01, § 100, ECHR 2007-III (extracts), or *Kafkaris v. Cyprus* [GC], no. 21906/04, § 138, ECHR 2008).

779. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that

term, a concept which comprises statutes as well as bylaws and case-law and implies qualitative requirements, including those of accessibility and foreseeability. It follows that the offences and the relevant penalties must be clearly defined in law. This requirement is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it or by way of appropriate legal advice, to a degree that is reasonable in the circumstances, what acts and omissions will make him criminally liable (see *Liivik v. Estonia*, no. 12157/05, § 93, 25 June 2009; *Achour v. France* [GC], no. 67335/01, § 42, ECHR 2006-IV). Foreseeability depends to a considerable degree on the content of the law concerned, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Scoppola v. Italy (no.2)* [GC], no. 10249/03, § 102, 17 September 2009).

780. The Court stresses that "in any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances" (see *Moiseyev*, cited above, § 234). The Court also reiterates that "the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. That means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague, and their interpretation and application depend on practice" (see *Scoppola (no. 2)* [GC], cited above, § 100). Furthermore, in most of the member States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, ECHR 2001-II (extracts); and *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010). Even more so: "it is a firmly established part of the legal tradition of the States party to the Convention that case-law, as one of the sources of the law, necessarily contributes to the gradual development of the criminal law" (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A).

781. The question is what degree of scrutiny the Court should apply to the decisions of the domestic courts which develop the existing case-law and interpret provisions of the law in the light of the modern-day conditions. The Court's case-law suggest that its supervisory function consists in considering whether the national court, in reaching its decision, has not unreasonably interpreted, and applied to the applicant, the law concerned. In other words, the Court applies a relaxed standard in such matters, which allows the States to develop their case-law and adjust it to

the changing conditions of modern society (see *Eurofinacom v. France* (dec.), no. 5873/00, ECHR 2004-VII (extracts)).

782. Thus, in the case of *S.W. v. the United Kingdom* (22 November 1995, Series A no. 335-B) the Court was confronted with criminalisation of “marital rape” by means of judicial interpretation of a very ancient legal norm which appeared to exclude criminal liability for such act. The Court did not find a violation of Article 7 in this case referring to the fact that the old distinction between “lawful” and “unlawful” involuntary sexual intercourse was clearly obsolete, that the new interpretation continued “a perceptible line of case-law development” and that “the essentially debasing character of rape” was so manifest that the judicial recognition of such behaviour as criminal was not “at variance with the object and purpose of Article 7 of the Convention” (see §§ 42-44).

783. In a more recent case of *Huhtamäki v. Finland* (no. 54468/09, §§ 50 et seq., 6 March 2012) the Court examined a situation where the Finnish Supreme Court was facing “a new situation in which it had to take a stand for the first time on the issue of whether the right not to incriminate oneself could have effects on other persons connected to the crime in question. Both domestic law and jurisprudence were silent on this point”. In that case the Court found no violation of Article 7 of the Convention, stressing that “it does not question the interpretation and application of national law by national courts unless there has been a flagrant non-observance or arbitrariness in the application of that law (see also *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III and, *mutatis mutandis*, *Lavents v. Latvia*, no. 58442/00, § 114, 28 November 2002)”.

784. Further, in the highly technical spheres, such as, for example, taxation, the Court’s case-law incites businessmen to take “special care” in assessing the risks that their professional activity entails (see *Cantoni v. France*, 15 November 1996, § 35, *Reports of Judgments and Decisions* 1996-V), if need be with the assistance of a lawyer (see *Jorgic*, cited above, §§ 101-102).

785. Finally, the absence of previous identical cases in the domestic judicial practice does not mean that a criminal conviction is contrary to Article 7; it is conceivable that the national jurisdictions have not yet had a chance to be confronted with such situations (see *Soros v. France*, no. 50425/06, §§ 57-58, 6 October 2011).

## 2. *The Court’s findings in the Yukos case*

786. The Court reiterates that in the *Yukos* case it did not address the company’s complaint under Article 7 of the Convention (see § 667). However, it examined whether the bringing of the company to tax liability for evading company taxes was “based on a reasonable and foreseeable interpretation of the domestic law” (see the title above § 576 of the *Yukos* judgment). That allegation was examined under Article 1 of Protocol No. 1 to the Convention. The Court considers that its findings under Article 1 of Protocol No. 1 in the *Yukos* case cannot be automatically applied to the applicants’ complaint under Article 7 in the present case. However, there are many similarities between the applicants’ position under Article 7 and

the company's arguments under Article 1 of Protocol No. 1 to the Convention in the *Yukos* case. Consequently, the Court's findings in *Yukos* are of relevance. The Court will recall the most important elements of its findings concerning the lawfulness of tax reassessment insofar as it applied to the company:

“588. ... The company claimed that ... it used lawful “tax optimisation techniques” which were only subsequently condemned by the domestic courts .... It also complained that any existing legal basis for finding the company liable fell short of the Convention requirements in respect of the quality of the law and that, in any event, the application of the relevant laws contradicted established practice. Accordingly, the Court has to determine whether the relevant tax arrangements were domestically lawful at the time ... and whether the legal basis for finding the applicant company liable was sufficiently accessible, precise and foreseeable. ...

591. ... The company's “tax optimisation techniques” applied with slight variations throughout 2000-2003 consisted of switching the tax burden from the applicant company and its production and service units to letter-box companies in domestic tax havens in Russia. These companies, with no assets, employees or operations of their own, were nominally owned and managed by third parties, although in reality they were set up and run by the applicant company itself. In essence, the applicant company's oil-producing subsidiaries sold the extracted oil to the letter-box companies at a fraction of the market price. The letter-box companies, acting in cascade, then sold the oil either abroad, this time at market price or to the applicant company's refineries and subsequently re-bought it at a reduced price and re-sold it at the market price. Thus, the letter-box companies accumulated most of the applicant company's profits. Since they were registered in domestic low-tax areas, they enabled the applicant company to pay substantially lower taxes in respect of these profits. Subsequently, the letter-box companies transferred the accumulated profits unilaterally to the applicant company as gifts ...

592. The domestic courts found that [the tax minimisation technique applied by the company] was ... unlawful ..., as it involved the fraudulent registration of trading entities by the applicant company in the name of third persons and its corresponding failure to declare to the tax authorities its true relation to these companies .... The tax authorities may have had access to scattered pieces of information about the functioning of separate parts of the arrangement, located across the country, but, given the scale and fraudulent character of the arrangement, they certainly could not have been aware of the arrangement in its entirety ...

593. The arrangement was obviously aimed at evading the general requirements of the Tax Code, which expected taxpayers to trade at market prices ..., and by its nature involved certain operations ... which were incompatible with the rules governing the relations between independent legal entities ... The Court ... is not persuaded by the applicant company's reference to case no. A42-6604/00-15-818/01 ... and its reliance on Article 251 (1) 11 of the Tax Code ...

594. By contrast to the Tax Assessments in issue, the respondent entity in case no. A42-6604/00-15-818/01 was not alleged to have been part of a larger tax fraud and [the Tax Service] failed to prove that it had been sham. The courts established that the entity had some assets, employees and a bank account at the place of its registration and dismissed the claims [by the Tax Service]. ... The Court cannot agree with the applicant company's allegation that its particular way of “optimising tax” had been previously examined by the domestic courts and upheld as valid ... The above considerations are sufficient for the Court to conclude that the findings of the domestic courts that applicant company's tax arrangements were unlawful at the time when the company had used them, were neither arbitrary nor manifestly unreasonable.

595. The Court will now turn to the question whether the legal basis for finding the applicant company liable was sufficiently accessible, precise and foreseeable. ... The



[domestic] courts established that the trading companies had been sham and had been entirely controlled by the applicant company and accordingly reclassified the transactions conducted by the sham entities as transactions conducted in reality by the applicant company.

596. The courts ... changed the characterisation of the sales operations of the sham entities. They decided that these were in reality conducted by the applicant company and that it had been incumbent on the latter to fulfil the corresponding obligation to pay various taxes on these activities. Finally, the courts noted that the setting up and running of the sham arrangement by the applicant company resulted in ... the intentional non-payment of various taxes ...

597. Having regard to the applicable domestic law, the Court finds that ... under the then rules contractual arrangements made by the parties in commercial transactions were only valid in so far as the parties were acting in good faith and that the tax authorities had broad powers in verifying the character of the parties' conduct and contesting the legal characterisation of such arrangements before the courts. This was made clear not only by Article 10 (3) of the Civil Code relied on by the domestic courts in the Tax Assessment proceedings, but also by other relevant and applicable statutory provisions which were available to the applicant company and other taxpayers at the time .... The case-law referred to by the Government indicated that the power to re-characterise or to cancel bad faith activities of companies existed and had been used by the domestic courts in diverse contexts and with varying consequences for the parties concerned since as early as 1997 .... Moreover, in a number of its rulings ... the Constitutional Court [mentioned] possible consequences of a taxpayer's bad faith conduct.

598. In so far as the applicant company complained that the bad faith doctrine had been too vague, the Court would again reiterate that ... many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice ... On the facts, ... the applicable legal norms made it quite clear that, if uncovered, a taxpayer faced the risk of tax reassessment of its actual economic activity in the light of the relevant findings of the competent authorities. And this is precisely what happened to the applicant company in the case at hand.

599. Overall, having regard to the margin of appreciation enjoyed by the State in this sphere and the fact that the applicant company was a large business holding which at the relevant time could have been expected to have recourse to professional auditors and consultants ..., the Court finds that there existed a sufficiently clear legal basis for finding the applicant company liable in the Tax Assessments 2000-2003."

### *3. Application to the present case*

#### **(a) Conviction for the payment of taxes with promissory notes**

787. One of the applicants' complaints under Article 7 concerned their conviction for the payment of taxes with promissory notes. The Court observes in this respect that the Meshchanskiy District Court convicted the applicants for two distinct counts of tax evasion under Article 199. The first count related to the allegedly unlawful tax cuts obtained by the trading companies. The second related to the payment of taxes with promissory notes (see paragraphs 111 et seq. above). The court of appeal (the Moscow City Court) quashed the District Court's judgment in so far as it concerned payment of taxes with promissory notes (see paragraph 318 above). It found that after the 2003 amendments to Article 199, such behaviour ceased to be a crime, since the law no longer referred to "other methods" of tax evasion. That second count was therefore removed from the list of accusations against the applicants, as upheld at final instance. In such

circumstances the Court concludes that the applicants could not claim to be victims of the alleged violation of Article 7 in this respect, since they had not been “held guilty” of a crime within the meaning of that Convention provision.

**(b) Procedural obstacles to prosecuting the applicants for tax evasion**

788. The applicants claimed that, as the law stood in 1999-2000, there were certain procedural obstacles to bringing them to criminal liability for tax evasion. In particular, the applicants referred to the Ruling of the Constitutional Court of 27 May 2003 (see paragraph 43 above) which may be interpreted as requiring that bringing a person to criminal liability for tax evasion must be preceded by establishing his tax liability in separate proceedings. The case of *Chelpiks* decided by the commercial courts of the Urals District implied that it was impossible to sue a taxpayer for the use of tax advantages granted by a preferential tax agreement without previously invalidating that agreement (see paragraph 436 above). However, the applicants in the present case had been brought to criminal liability without the preferential tax agreements being invalidated and before the courts pronounced on the tax liability of the company in separate proceedings.

789. The Court is not persuaded that the applicants’ understanding of the Constitutional Court’s ruling is correct. Similarly, the Urals District commercial court’s decision in the *Chelpiks* case may reasonably have a different interpretation. Be that as it may, the Court reiterates that Article 7 guarantees that criminal offences and the relevant penalties must be clearly defined by substantive criminal law. It does not, however, set any requirements as to the procedure in which those offences must be investigated and brought to trial. The Court reiterates that in the case of *Coëme and Others v. Belgium* (nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 149, ECHR 2000-VII) it faced a somewhat similar claim by the applicants, who argued that Article 7 guaranteed not only the foreseeability of the punishment, but also the foreseeability of the prosecution. In that case the new law had extended the limitation period and thus prolonged the period of time during which prosecutions could be brought in respect of the offences imputed to the applicants. The Court admitted that the application of the new law “detrimentally affected the applicants’ situation, in particular by frustrating their expectations”, but that it did not “entail an infringement of the rights guaranteed by Article 7, since that provision cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation”.

790. A similar reasoning is applicable in the case at hand. The applicants may have expected that the authorities would be unable to prosecute them in a criminal court without going first through separate court proceedings, tax or civil. The Court reiterates that it is not persuaded that this was the only possible scenario for their prosecution. In any event, the alleged “procedural obstacles” did not mean that the acts imputed to the applicants were not defined as “criminal offences” at the moment when they were committed. It follows that there was no violation of Article 7 on this account.

(c) **Novel interpretation of the concept of “tax evasion”**

791. The Court will now turn to the applicants’ conviction under Article 198 and 199 for the use of various tax-minimisation techniques in respect of both company taxes and personal income taxes. The Court observes that “tax evasion” is defined in Articles 198 and 199 of the Criminal Code in very general terms (see paragraph 429 above). The Code describes tax evasion as “knowing” inclusion of “false data” in the fiscal declarations. By itself such a broad definition does not raise any issue under Article 7 of the Convention. Forms of economic activity are in constant development, and so are the methods of tax evasion. In order to define whether a particular behaviour amounts to “tax evasion” in the criminal-law sense the domestic courts may invoke legal concepts from other areas of law, in particular the tax law. The law in this area may be sufficiently flexible to adapt to new situations, without, however, becoming unpredictable.

792. The applicants argued that the declarations of the trading companies did not include any “false” information. The applicants had every reason to believe that those declarations faithfully reflected all the transactions of the trading companies and were thus accurate for the purposes of the ZATO Act. Similarly, the applicants duly reported on the amounts they had been receiving from the Isle of Man companies, in accordance with the Small Business Act. Both acts were formulated very precisely and did not use such concepts as “business purpose”, “sham” or “bad faith”. The Government argued that the then existing case-law developed the concept of “tax evasion” in sufficient detail to make the applicants’ conviction foreseeable.

793. The Court has examined the cases produced by the Government in support of their position. It observes that the Supreme Court’s Ruling no. 8 of 4 July 1997, referred to by the Government (see paragraph 753 above), explained some of the concepts related to the concept of “tax evasion” and of the constituent elements thereof. However, it did not describe such phenomena as “transfer pricing”, “sham” companies or transactions, which were at the heart of the applicants’ criminal case. The use of “frontman” companies as a method of tax evasion was first mentioned explicitly in the Supreme Court’s Ruling no. 64 of 28 December 2006 (see paragraph 434 above). That Ruling cannot support the Government’s case, because the acts imputed to the applicants related to 1998-2000.

794. Other case-law referred to by the Government is, for the most part, irrelevant, since it concerned other forms of tax evasion, such as, for example, the straightforward failure to declare revenues. There were few cases which concerned the use of “front” or “sham” companies, but they were decided in 2002 or even later (see, in particular, the cases of *Mironov* and *Selivanov* summarised in paragraph 754 above). The Court is not aware of any other case-law on the matter contemporary to the relevant period of time. Writings of legal scholars referred to by the Government were scarce and inconclusive. The Court concludes that in the criminal law sphere there was no case-law directly applicable to the transfer pricing arrangements and allegedly sham transactions as those in the heart of the applicants’ case.

795. The Government's next argument was that the illegal character of such arrangements might have been established with reference to general principles derived from other areas of law, in particular the tax and civil law. This argument is not devoid of merit. The Court observes that the position of the authorities in the tax proceedings against Yukos was centred on the concept of "sham transaction". The prosecution in the applicants' case alleged that the applicants were submitting "false" information to the authorities. For many purposes "sham" is a synonym of "false", so the logic of the State authorities in the two cases was broadly similar. A person cannot enter into a "sham" transaction by inadvertence; it is always a deliberate act. In other words, submitting tax declarations based on sham operations can be construed as "knowingly" submitting "false information" to the tax authorities, a situation falling within the ambit of Articles 198 and 199 of the Criminal Code.

796. The concept of "sham transaction" was known in Russian law (see paragraphs 417 et seq. above). The courts had always the power to apply the "substance-over-form" rule and invalidate a transaction as "sham" under Articles 167 and 170 of the Civil Code (see the case-law in paragraphs 422 et seq.). A similar (albeit not identical) legal construction existed in the Tax Code: for example, in certain situations the Code allowed tax authorities to disregard a contract and calculate taxes due by the parties to it on the basis of imputed "market prices" (see paragraph 414 above). Thus, the "substance-over-form" approach also existed in the field of the tax law. The Court emphasises that such an approach exists in many European countries and that the Court does not see anything unreasonable or unusual in it.

797. Turning to the practical application of the "substance-over-form" theory the Court notes the following. Some of the case-law referred to by the parties speak in favour of the Government's position. In particular, in the cases of *Mechel* or *Grin Haus* (paragraphs 422 and 425 above) the courts re-characterised the transactions of taxpayers as "sham" at the request of the Tax Service.

798. The judgments in cases concerning transfer pricing in the low-tax zones were more supportive of the applicants' position. An illustration is the case of the *Tax Service v. OOO Pribrezhnoe* (see paragraph 439 above), analysed in §§ 593-594 of the *Yukos* judgment. In that case a commercial court refused to recalculate taxes due by a company registered in the low-tax zone despite several factual elements indicative of the "sham" character of the operations of that company. Factual elements relied on by the Tax Service in the *Pribrezhnoye* case were very close to those relied on by the prosecution in the criminal case against the applicants. The domestic court accepted the documents submitted by the defendant (contracts, lists of personnel, payrolls, bills, etc.) at face value and rejected the prosecution's arguments about the fictitious character of the impugned operations as unconvincing.

799. A somewhat similar line of reasoning can be found in the case of the *Tax Service v. Energosintez* (see paragraph 437 above), where the commercial court held in favour of the defendant company registered in a ZATO, despite the fact that industrial facilities for processing and

transporting oil (which was the main business of that company) did not belong to the company and were located outside the territory of the ZATO. The court found those arguments irrelevant.

800. The Court notes that the cases of *Pribrezhnoye* and *Energosintez* may create an impression that the courts at the time were reluctant to apply the “substance-over-form” approach to transfer pricing arrangements. However, in the Court’s opinion, those cases were mostly decided on the facts. They cannot be construed as negating the power of the courts to invalidate a particular transaction as “sham”. Rather, the courts in those cases found that evidence produced by the Tax Service was insufficient to reach such a conclusion. The fact that in one or two cases the Tax Service failed to produce sufficient evidence and prove the fictitious character of a taxpayer’s operations does not mean that it would fail in all subsequent cases in respect of other taxpayers.

801. Similarly, the domestic court’s conclusions in the case of *Siblekon* relied on by the applicants (see paragraph 438 above) did not mean that the existence of a preferential tax agreement always relieves the taxpayer from liability for not paying taxes in full. The existence of such an agreement with the ZATO administration is a powerful argument strengthening the presumption that the taxpayer acted *bona fide*, but it does not give absolute immunity from possible re-characterisation of operations based on that agreement as “sham”.

802. In other words, cases like *Pribrezhnoye*, *Energosintez* or *Siblekon* did not proclaim that such transfer pricing operations were immune from possible re-qualification as “sham”. Whether or not a business operation was a “sham transaction” remained ultimately a question of fact. Likewise, in the criminal-law sphere the question of whether a taxpayer knowingly misinformed the tax authorities about his operations is a factual question.

803. The Court reiterates that in this area it is not called upon to reassess the domestic courts’ findings, provided that they are based on a reasonable assessment of evidence. The Court may entertain a fresh assessment of evidence only where the decisions reached by the domestic courts are arbitrary or manifestly unreasonable (see, *mutatis mutandis*, *Ravnsborg v. Sweden*, 23 March 1994, § 33, Series A no. 283-B; *Bulut v. Austria*, 22 February 1996, § 29, *Reports of Judgments and Decisions* 1996-II; and *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports of Judgments and Decisions* 1997-VIII) or where they were issued in “flagrant denial of justice” (compare *Stoichkov v. Bulgaria*, no. 9808/02, § 54, 24 March 2005).

804. In the present case, despite flaws in the domestic proceedings, identified above, the proceedings cannot be characterised as a “flagrant denial of justice”. As to the substantive findings of the Russian courts, those findings were not “arbitrary or manifestly unreasonable”, and that is for the following reasons.

(i) *Charges under Article 199*

805. The Court acknowledges that there are legitimate methods of tax minimisation: a company may organise its business processes in such a way as to benefit from special tax regimes. However, the tax-minimisation

scheme deployed by Yukos was not fully transparent; some of the elements of the scheme were concealed from the authorities. Such behaviour by the taxpayer might have reasonably been construed as amounting to the submission of “false data” to the tax authorities within the meaning of the Criminal Code, which constitutes the *actus reus* of tax evasion.

806. First, the Court observes that tax minimisation was the sole reason for the creation of the network of the trading companies in Lesnoy. It was not claimed by the applicants, neither in the domestic proceedings nor before this Court, that the trading companies were registered in Lesnoy in order to facilitate logistics, save on production costs, hire qualified staff, etc. As the Court put it in the *Yukos* case (§ 593), “the arrangement [i.e. the tax minimisation scheme] was obviously aimed at evading the general requirements of the Tax Code, which expected taxpayers to trade at market prices”.

807. Second, the Court observes that despite the formal domiciliation of the trading companies in Lesnoy, all business activities which generated profit were in fact carried out in Moscow. The trading companies presented themselves as real companies having assets and personnel in the low-tax zone; however, as was established in the domestic proceedings and later confirmed by the Court in the *Yukos* case (see § 591), all of the trading companies had virtually no assets or personnel in the ZATO, and had enjoyed no operational independence whatsoever from the Moscow headquarters. Thus, the trading companies claimed tax cuts as if they were really operating in the low-tax zone, but in reality they were merely registered there for form’s sake, and all the operations were conducted in Moscow.

808. Third, the Court does not find any proof that the applicants ever informed the tax authorities about their true relation to the trading companies. Quite the contrary: the system of oil sales set by Yukos was deliberately opaque. The trading companies were registered in the names of third persons not formally connected to Yukos or its managers, and had been managed by fictional directors. Benefits of the trading companies were returned to Yukos indirectly, through a special fund which received “gifts” from the trading companies. The fact that the Lesnoy town trading companies were wound up in 2001 following audits by the Tax Service, and that immediately afterwards similar entities were registered in other low-tax zones demonstrates that Yukos was not prepared to defend the lawfulness of the tax optimisation technique in courts. Such a coordinated reorganisation implies that it was done in order to render it more difficult for the authorities to scrutinize the business operations of those companies, to trace their assets and their affiliation with other companies and persons. In sum, by organising its sales in this way the applicants evaded application of the provisions of the Tax Code which permitted recalculation of taxes on the basis of “market prices” in the relations between affiliated companies.

809. The Court concludes that the applicants’ behaviour cannot be compared to that of a *bona fide* taxpayer who fails to declare his revenues or submit other relevant information due to some unintended omission or a genuine misinterpretation of the tax law. In the present case, whereas a part

of the tax-minimisation scheme was visible to the authorities, the applicants misrepresented or concealed some important aspects of that scheme which arguably might have been crucial for defining eligibility of the trading companies to tax cuts.

810. The applicants also challenged the finding of the domestic courts to the effect that they (the applicants) had played a leading role in mounting and managing the impugned tax-optimisation scheme. In the opinion of the Court it is difficult to imagine that the applicants, as senior executives and co-owners of Yukos, were not aware of the entire transfer pricing arrangement and did not know that the information included in the fiscal reporting of the trading companies did not reflect the true nature of their operations (see, *mutatis mutandis*, *Soros*, cited above, § 59). Thus, the *mens rea* of the impugned crime was self-evident.

811. The Court is not called upon to develop a comprehensive legal theory explaining the differences between legitimate tax-minimisation techniques and tax evasion. Similarly, it is impossible to set an exhaustive list of criteria for defining a particular operation or a company as “sham”. However, the cumulative effect of the elements discussed was sufficient to demonstrate that the operations of the trading companies were likely to be “sham”, that the reporting based thereon did not reflect the realities of the business operations, and that the applicants therefore “knowingly” submitted “false data” in order to reduce the overall tax burden of the company. Such inferences of fact were not “arbitrary or manifestly unreasonable”.

(ii) *Charges under Article 198*

812. In so far as the personal income-tax evasion is concerned, the applicants claimed that in reality they had rendered consulting services to the two Isle of Man companies, i.e. Status Services and Hinchley and/or to the “end-users”. Again, this is a question of fact which was disputed in the domestic proceedings. If the “consultancy agreements” between the applicants and the Isle of Man companies were indeed “sham” or “fictitious” – and that was the finding of the domestic courts – one can reasonably consider that the applicants had knowingly submitted false data in their declarations, thus committing an offence under Article 198 of the Criminal Code.

813. The domestic courts, after having examined the evidence before them, concluded that the fees received by the applicants under the service agreements were *de facto* payment for the applicants’ work in Yukos and in the affiliated structures – payment which would normally be taxable under the general taxation regime. The applicants’ own explanations concerning their relations with the unnamed “end-users” were quite vague. Even though the applicants were allowed to remain silent, the overall picture of their relations with the two Isle of Man companies and/or “end-users” required some explanation, especially in the light of their parallel work as senior executives of Yukos, work for which they received only a symbolic compensation, and in view of other evidence discovered by the prosecution which showed the links between the applicants and the two Isle of Man companies. The provenance of the money paid by the Isle of

Man companies under the “service agreements” – an element which the applicant considered as important – in the eyes of the domestic courts was not important for establishing the true purpose of those transfers, and the Court does not see any reason to disagree with this. In such circumstances the inferences made by the Russian courts as to the real nature of the payments received by the applicants from the two Isle of Man companies were not unreasonable or arbitrary.

814. Equally, the Court is unable to accept the applicants’ alternative argument, namely that by opting for a licence the applicants simply used a legitimate tax-minimisation technique falling short of tax evasion. The right to choose a particular mode of operation with a view to minimising taxes does not relieve the taxpayer from the obligation to submit true information to the tax authorities. In the domestic proceedings (as well as before this Court) the applicants claimed that they had provided consulting services to various clients, including those not related to Yukos. Apparently, their tax declarations were formulated in similar terms. However, the Russian courts did not accept that assertion, holding that the sums received by the applicants had nothing to do with any consulting services but solely related to their work as senior executives in Yukos. In other words, the applicants did not inform the tax authorities of the true nature of their activities. This was clearly not an unintended or minor omission, or a simple misinterpretation of the tax law. In this respect the applicants’ situation was different from that of the defendant in the *Vliran* case they referred to (see paragraph 443 above).

815. In such circumstances the conclusion of the Russian courts, namely that the applicants knowingly submitted false information about their revenues, was also reasonable.

**(d) Application of a criminal law which was dormant; selective prosecution**

816. The applicants’ last line of argument also concerned their prosecution for tax evasion and the authorities’ attitude to such tax-minimisation schemes during the period when they operated. The applicants’ claimed that they had been the first to suffer from a novel interpretation of the criminal law, and that no other businessmen who had been using similar tax-minimisation techniques had been prosecuted and/or convicted for that. Furthermore, the tax-minimisation scheme operated on the basis of preferential tax agreements, and several tax assessments conducted in respect of the trading companies confirmed the lawfulness of the tax cuts. The applicants concluded they had every reason to believe that their conduct was legitimate.

817. The Court admits that in certain circumstances a long-lasting toleration of certain conduct, otherwise punishable under the criminal law, may grow into a *de facto* decriminalisation of such conduct. However, this was not the case here, primarily because the reasons for such toleration are unclear. It is possible that the authorities simply did not have sufficient information or resources to prosecute the applicants and/or other businessmen for using such schemes. The Court does not exclude that similar “tax-optimisation techniques” might have been known to the tax authorities, for example from the FATF documents (see paragraph 750



above). It is also conceivable that a global analysis of money-flow and sales of Yukos oil might be suggestive of the use of some tax-minimisation techniques. However, there is no evidence that the tax authorities knew exactly what Yukos was doing; as the Court put it in the *Yukos* case (§ 592):

“The tax authorities may have had access to scattered pieces of information about the functioning of separate parts of the arrangement, located across the country, but, given the scale and fraudulent character of the arrangement, they certainly could not have been aware of the arrangement in its entirety on the sole basis on the tax declarations and requests for tax refunds made by the trading companies, the applicant company and its subsidiaries”.

818. As to the tax assessments and preferential tax agreements, they were based on the assumption that the information provided by the trading companies to the authorities was true. It required a massive criminal investigation which involved many searches, numerous seizures, and questionings of hundreds of witnesses to prove that this was not the case. The Court reiterates its finding above that the scheme was organised in such a way as to complicate possible investigations into it.

819. There is no evidence that transfer pricing arrangements used by other businessmen were organised in exactly the same way as the scheme employed by the applicants. In the applicants’ case the GPO had to prove several factual assertions and produce supporting evidence to show that the scheme amounted to tax fraud.

820. In sum, the Court cannot find that the authorities’ attitude towards such practices amounted to a conscious toleration. It could not, therefore, absolve the applicants from criminal liability for tax evasion.

**(e) Conclusion**

821. The Court recognises that the applicants’ case had no precedents. However, the Court reiterates that Article 7 of the Convention is not incompatible with judicial law-making and does not outlaw the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. The applicants may have fallen victim to a novel interpretation of the concept of “tax evasion”, but it was based on a reasonable interpretation of Articles 198 and 199 and “consistent with the essence of the offence”. The Court concludes that there was no violation of Article 7 on account of the applicants’ conviction under this head.

**IX. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

822. The applicants complained that they had been sent to serve their prison terms in very remote colonies situated thousands of kilometres from their homes. In their words, this had seriously hindered their contacts with the outside world, and, in particular, with their families and their lawyers. The applicants referred to Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

## **A. The parties’ submissions**

### *1. The Government’s submissions*

823. The Government maintained that there had been no interference with the applicants’ rights under Article 8 of the Convention. The Government emphasised that any limitation of the applicants’ rights under Article 8 was related to their criminal conviction and was inherent in the very concept of criminal punishment. The Government described the geographical position of the Krasnokamensk colony (where the first applicant had been sent) and the Kharp colony (where the second applicant had been sent) and transport routes linking them to Moscow, where the applicants’ families lived. They concluded that there had been no interference with the applicants’ private lives on account of their placement in those particular penal colonies.

824. Further, the colonies where the applicants were serving their sentences had special facilities for long-term family visits. Those facilities were furnished and equipped with household appliances. The applicants could have had six short-term and four long-term family visits per year. Furthermore, they were entitled to obtain additional family visits as a reward for exemplary behaviour. The relatives were informed about the time of the visits in advance. The administration of the penal colonies had never refused the applicants or their relatives the right to a visit.

825. In any event, even if there had been an interference with the applicants’ rights under Article 8, it was in accordance with paragraph 2 of this Convention provision. Thus, the Government insisted that the measure complained of was lawful. Under Article 73 of the CES a convict was entitled to serve his prison sentence in the same federal constituency where he was convicted (in the applicants’ case, Moscow). However, where this is impossible, the convict was sent to serve his sentence in a penal colony situated in the next closest federal constituency. Several regions of Russia (Moscow, St Petersburg and some republics of the Northern Caucasus) have no general-regime penal colonies. In order to avoid prison overcrowding and comply with the requirements of Article 3 of the Convention, as interpreted in the Court’s case-law in respect to prison conditions in Russia, convicts from those regions were sent to colonies situated in other regions. For example, convicts from Moscow often served their sentences even further from Moscow than the town of Krasnokamensk, where the first applicant had been sent. According to the Government, Article 73 of the CES “was complied with in the majority of the federal constituencies of the Russian Federation”. In many regions new penal colonies were being built. The applicants were treated in this respect

in the same manner as any other convict in a similar situation. There were no grounds for giving the applicants preferential treatment because of their family or financial situation. They were sent to serve their sentences in such distant locations because there was no place for them in other regions of Russia.

826. The Government further maintained that it had been necessary to guarantee the security of the applicants themselves. The Government considered that since the applicants' case had been widely publicised, it had been important to protect them from "unauthorised contacts with journalists, ill-disposed private individuals, in particular those who had suffered as a result of [the applicant's crimes]..., from unauthorised rallies and picketing". Furthermore, the Government noted that the applicants' cellmates could have learned that they had money in foreign banks. That could have put the applicants in danger. In the Government's words, the detainees in the Yamalo-Nenetskiy Autonomous region and in the Chita region were less informed about the details of the applicants' case than those in Central Russia. Therefore, the applicants were more secure where they were.

827. Finally, the Government indicated that if, by derogation from the general rule, the applicants had obtained places in a prison closer to Moscow that would also have disposed their cellmates against them and could have put them in danger.

## *2. The applicants' submissions*

828. In the applicants' words, the location of the penal colony in which they had to serve their sentences was of direct relevance to their rights under Article 8. It was inevitable that serving their sentences in such remote places had interfered with their family life to a greater degree than if they had been sent to a penal colony nearer to Moscow.

829. The applicants described the hardships related to travelling from Moscow to Krasnokamensk and Kharp. In support, the first applicant cited an article written by a group of journalists who had accompanied his relatives on their trip to the penal colony and testimony by his lawyers. As a direct consequence of his transfer to Krasnokamensk, his family had only been able to make use of the "short" visits on one occasion since 2005. Of course, had the applicant been serving his sentence closer to his family, he would have been able to make far greater use of the facility for short visits. On account of the exhausting and demanding nature of the journey, his young twin sons were unable to visit him in Krasnokamensk at all. The children were able to visit the first applicant whilst he was detained in Moscow. The first applicant's elderly father had been able to visit him only once. The fact that the first applicant's family did not use up his full allowance of visits – he had five long visits and only one short visit over 14 months at *IK-10* penal colony – clearly suggested that the enormous distance prevented visits taking place.

830. The second applicant also described the hardships associated with travelling from Moscow to the Kharp colony. In his words, they totally precluded his family – his wife and two daughters, who at the relevant time were two and four years old – from visiting him in the colony because of

the length of the train journey and the difficulties of crossing the river. In any event, visiting the applicant was a time-consuming, nerve-straining and expensive matter, and for young children it was practically impossible.

831. In the applicants' words, such deliberate social isolation did not meet the requirements of Article 8 § 2 of the Convention. Firstly, it had no legal basis. Under the law, it was incumbent upon the Russian authorities to send the applicants to serve their sentences in a colony in Moscow or in the Moscow Region. The Government provided no evidence in support of their assertion that overcrowding in Moscow prisons was such that the applicants could not be sent to a penal colony in the Moscow region. Further, the Government did not challenge the first applicant's assertion that in September 2005 there had been 149,674 available places in penal colonies in the Russian Federation out of a total capacity of 786,753 places. It was for the Government to demonstrate why, of all those available places, it had been the penal colony at Krasnokamensk which had been the "nearest" penal colony that was available, as required by Article 73 of the CES.

832. Furthermore the Government's allegation that it had been done for the applicants' own safety was untrue. First, the authorities had taken into account considerations which were not provided for by Article 73 of the CES. Second, the Government did not explain why the risk allegedly posed by the other inmates would be lower in Krasnokamensk or Kharp than in Moscow. In fact, for more than two years the applicants had been held in remand prisons in the city of Moscow, and there had not been a single incident involving them during that time concerning relations with their cellmates. In addition, the Russian authorities had failed to produce evidence that the applicants had been in danger because of other detainees.

833. The applicants submitted that the domestic courts' dismissal of their complaints against their imprisonment in the remote colonies had not been determinative of the issue of whether the decisions had been "in accordance with the law" as required by Article 8, for the following reasons. First, the domestic courts wrongly accepted the arguments of the representatives of the FSIN that there was no requirement upon them to consider the individual circumstances of the convict. Such a contention was clearly incompatible with Article 8. Second, the domestic courts were similarly wrong in failing to require an explanation as to why it was that the applicants was sent to Krasnokamensk and Kharp, thousands of kilometres from Moscow, despite the fact that there were 149,674 available places in penal colonies in the Russian Federation as at September 2005. The applicants also emphasised that the Government relied on grounds which were not provided for by Article 73 § 2 of the CES, in particular to protect the applicants from possible unauthorized contacts with the representatives of the mass media.

834. The real reason for the applicants' transfer to Siberia had been stated by Mr Shuvalov, then a senior Presidential aid. In an interview with *The Economist* in July 2006 Mr Shuvalov said that the first applicant was sent to a Siberian colony in order to send a warning to Russia's other tycoons. The domestic courts failed to enquire why it was that both applicants had also been sent to a very remote region of the Russian

Federation in apparent disregard of the provisions of the law. The fact that both men had been sent thousands of miles from Moscow was strongly suggestive of improper motives on the part of the State authorities.

## **B. The Court's assessment**

### *1. Whether there was an interference with the applicants' Article 8 rights*

835. The parties disagreed as to whether the fact of serving a sentence in a particular penal colony amounts to an "interference" with one's private life. The Court reiterates in this respect that any detention which is lawful for the purposes of Article 5 of the Convention (and there is no doubt that the applicants' detention following their conviction complied with Article 5 § 1 (a) of the Convention) entails by its nature various limitations on private and family life (see *Silver and Others v. the United Kingdom*, 25 March 1983, § 98, Series A, no. 161). It would be fundamentally wrong to analyse each and every case of detention following conviction from the standpoint of Article 8, and to consider the "lawfulness" and "proportionality" of the prison sentence as such.

836. Thus, as a starting point, the Court accepts that the authorities had a wide discretion in matters related to execution of sentences. However, the Convention cannot stop at the prison gate (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 70, ECHR 2005-IX), and there is no question that a prisoner forfeits all of his Article 8 rights merely because of his status as a person detained following conviction (see *Ploski v. Poland*, no. 26761/95, 12 November 2002). The Court will not turn a blind eye to such limitations which go beyond what would normally be accepted in the case of an ordinary detainee. Thus, for example, it is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in maintaining contact with his close family (see *Messina v. Italy (no. 2)*, no. 25498/94, § 61, ECHR 2000-X). Limitations on contacts with other prisoners and with family members, imposed by prison rules, have been regarded by the Court as an "interference" with the rights protected by Article 8 of the Convention (see *Van der Ven v. the Netherlands*, no. 50901/99, § 69, ECHR 2003-II).

837. Thus, placing a convict in a particular prison may potentially raise an issue under Article 8 if its effects for the applicant's private and family life go beyond "normal" hardships and restrictions inherent to the very concept of imprisonment. As the Commission already observed in *Wakefield v. the United Kingdom* (no. 15817/89, decision of 1 October 1990, DR 66, p. 251): "Article 8 requires the State to assist prisoners as far as possible to create and sustain ties with people outside prison in order to promote prisoners' social rehabilitation. In this context the location of the place where a prisoner is detained is relevant". Furthermore, the right to respect for family life imposes upon states a positive obligation to assist prisoners in maintaining effective contact with their close family members (see *X. v. the United Kingdom*, no. 9054/80, Commission decision of 8 October 1982, DR 30, p. 115). In the context of imprisonment the Commission recognised that the possibility for close family members to

visit a detainee constitutes an essential factor in the maintenance of family life (see *Hacisuleymanoglou v. Italy* no. 23241/94, decision of 20 October 1994, DR no. 79-B, p. 121).

838. The Court reiterates that in the *Wakefield* case the Commission considered that the refusal to allow the applicant a permanent transfer from Yorkshire to Scotland to be near his fiancée had constituted an interference with the applicant's right to respect for private life. In the present case the distances involved were much longer than those in *Wakefield*. Given the geographical situation of the colonies concerned, and the realities of the Russian transport system the Court has no difficulty in accepting that a trip from Moscow to the Krasnokamensk colony or the Kharp colony was a long and exhaustive endeavour, especially for the applicants' young children. Indeed, it was not the applicants themselves but the members of their respective families who suffered from the remoteness of the colonies. Still, the applicants were affected by this measure, albeit indirectly, because they probably received fewer visits than they would have received had they been located closer to Moscow. In sum, the Court finds that this measure constituted an interference with the applicants' Article 8 rights to privacy and family life.

## 2. *Whether the interference was justified under Article 8 § 2*

839. The Court now will turn to the justification for the interference. The Court reiterates that under Article 8 § 2 an interference with family and private life is justified if it is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

### (a) **Whether the interference was "lawful"**

840. Russian law stipulates that, as a matter of principle, a detainee should serve his sentence in the place where he was convicted. Exemption from this rule is possible if there is no physical place available in the local penitentiary institutions; in this case a detainee must be sent to serve his sentence to the nearest region, or, if there is no place there, to the next nearest region (Article 73 of the CES – see paragraph 454 above).

841. The applicants claimed that Article 73 of the CES had not been complied with in their cases. The Court recalls, however, that the principle of subsidiarity dictates that the Court will not overrule interpretations of the domestic law given by the domestic courts, except in specific circumstances (see *Malone v. the United Kingdom*, 2 August 1984, § 79, Series A no. 82; *Kruslin*, cited above, § 29; and *Huvig v. France*, 24 April 1990, § 28, Series A no. 176-B). The Court retains only residual control in this sphere.

842. The Court notes that the Russian courts did not find any breach of the domestic law in the applicants' cases. They considered that the decision taken by the FSIN (the penitentiary service) establishing quotas for distributing the convicts between different colonies constituted a sufficient lawful basis for the applicants' transferral to Krasnokamensk and Kharp

(see paragraphs 329 and 349 above). The Court is aware that the FSIN was the main regulatory body in the penitentiary system and, as such, was competent to decide matters related to transferrals of detainees. In such circumstances, the Court does not consider it necessary to review the findings of the Russian courts as to the lawfulness of the measure complained of. The Court is prepared to accept, for the purposes of the present case, that the interference with the applicants' family and private lives was compatible with the domestic legal provisions.

**(b) Whether the interference pursued a “legitimate aim”**

843. The next question is whether that interference pursued one or several “legitimate aims”. Before the Court the Government argued that sending the applicants to the two remote colonies pursued three aims: (a) preventing “unauthorised contacts with journalists”, and preventing “unauthorised rallies and picketing”, (b) protecting the applicants from other convicts or persons who might wish to take vengeance on them, (c) avoiding overcrowding in the prisons located in Moscow.

844. As to the first aim, the Government did not explain how it was related to any of the “legitimate aims” expressly mentioned in Article 8 § 2 of the Convention. If there was a connection, it was very remote. In any event, that ground for the transferral of a detainee was not mentioned in the domestic law, and was not discussed in the domestic proceedings. It is an *ex post facto* justification which was absent from the domestic decision-making process at all levels, both legislative and judicial.

845. By contrast, the second and third aims mentioned by the Government appear to be genuine. Thus, the Russian law provided for transferral of a detainee from one colony to another when his own safety required it. Furthermore, it is evident that the exception to the “geographical rule” applied to the applicants was aimed at combating prison overcrowding in certain regions. Those aims (guaranteeing safety of the convict and avoiding general overcrowding) are, in the opinion of the Court, “legitimate” under Article 8 § 2 of the Convention since they contribute to preventing “disorder and crime” and securing the “rights and freedoms” of others. It remains to be established whether the measure complained of was proportionate to those aims.

**(c) Whether the interference was proportionate to the legitimate aims**

846. The Government claimed that the applicants' transferral to Krasnokamensk and Kharp had been necessary in order to guarantee their own safety. However, the authorities did not refer to that ground in the domestic proceedings, and the courts consequently did not consider whether the applicants were exposed to any security risks. Furthermore, the Court cannot accept the general assumption that inmates in the Kharp or Krasnokamensk colonies were less dangerous for the applicants since these other inmates did not know who the applicants were: the applicants' trial was the most mediatised trial of the recent decade and the first applicant's wealth was well-known from many sources open to the general public. Finally, the Government's assertion that unnamed “victims” of the applicants' crimes would try to take vengeance on them did not have any

factual basis - the principal victim of the crimes imputed to the applicants was the State itself. It follows that the measure complained of could not have been justified by the applicants' own safety.

847. The third aim invoked by the Government, namely reducing the number of inmates in the prisons located in Moscow or in the nearby regions, needs special attention. The Court is prepared to accept that given the size of the population in Moscow and the corresponding number of convicts from that city there were no free places for the applicants there. However, the rule set by Article 73 of the Code of Execution of Sentences was relatively clear and simple. It allowed sending a convict to the next closest region, not several thousand kilometres away.

848. The Court accepts that it was difficult to decide individually for every detainee from Moscow or another region affected by prison overcrowding where he or she must serve the sentence. It appears that in order to address that problem the FSIN came up with a general plan establishing quotas for the distribution of convicts amongst penitentiary colonies in different Russian regions ("federal constituencies"). The Government submitted to the Court a copy of that plan. However, the Government did not explain how that plan was prepared, and did not describe a method or algorithm of distribution of convicts used by the FSIN to draw that plan. The plan itself does not contain any information to that effect. It is consequently difficult to say to what extent the plan was compatible with the "geographical rule" set out in Article 73 of the CES.

849. On the facts of the present case it is hardly conceivable that there were no free places in any of the many colonies situated closer to Moscow, and that the only two colonies which had free space were located several thousand kilometres away from the applicants' home. Data referred to by the applicants and not contested by the Government suggested that at the time when the applicants were sent to Siberia and the Far North there were free places in the Russian penitentiary system, including in colonies situated in Central Russia (see paragraphs 328 and 347 above). Over thirty-five regions in Russia are closer to Moscow than the Yamalo-Nenetskiy region, and over fifty-five regions are closer than the Chita region. Therefore, it was likely that the FSIN plan did not adhere strictly to the "geographical rule" fixed in Article 73. This may not have led to a breach of the "geographical rule" in all cases, but it is very likely that that rule was not followed in the applicants' case.

850. The Court is aware of the difficulties involved in the management of the prison system. The Court is also mindful of the situation in Russia, where, historically, penal colonies were built in remote and deserted areas, far away from the densely populated regions of Central Russia. There are other arguments speaking in favour of giving the authorities a large margin of appreciation in this sphere. However, that margin of appreciation is not unlimited. The distribution of the prison population must not remain entirely at the discretion of the administrative bodies, such as FSIN. The interests of the convicts in maintaining at least some family and social ties must somehow be taken into account. The Russian law is based on a similar assumption, as the spirit and the goal of Article 73 of the CES was to preserve the applicants' social and family ties to the place where they



used to live before the conviction. However, practical implementation of that law in Russia could lead to a disproportionate result, as the applicants' case demonstrates. In absence of a clear and foreseeable method of distribution of convicts amongst penal colonies, the system failed to "provide a measure of legal protection against arbitrary interference by public authorities" (see *Telegraaf Nederland Landelijke Media B.V. and Others v. the Netherlands*, no. 39315/06, § 90, 22 November 2012). In the applicants' cases, that led to results incompatible with the respect for the applicants' private and family lives.

851. There was therefore a violation of Article 8 of the Convention on that account.

## X. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION IN RESPECT OF THE FIRST APPLICANT

852. The first applicant complained that, having convicted him of corporate tax evasion, the court made an award of damages which overlapped with the claims for back payment of taxes brought against Yukos. The Court considers that this complaint falls to be examined under Article 1 of Protocol No. 1 to the Convention, which provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

### A. The parties' submissions

#### 1. The Government's submissions

853. The Government claimed that the situation at issue was not covered by Article 1 of Protocol No. 1 to the Convention, and that for two reasons. First, the Government indicated that the tax claims were submitted by the authorities within the framework of criminal proceedings against the applicant. Referring to the case of *Ferrazzini v. Italy* [GC] (no. 44759/98, ECHR 2001-VII), the Government submitted that "tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant" (§ 29).

854. The Government further claimed that Article 1 of Protocol No. 1 cannot be applied to the recovery of unpaid taxes. Unpaid taxes were not the applicant's "property", since they were acquired unlawfully. The unlawful origin of that money was duly established by the judgment of the Meshchanskiy District Court of 16 May 2005. The Government acknowledged that the term "possessions" used in this Convention provision had an autonomous meaning. However, in the Government's opinion, their claim that "possessions" did not include unpaid taxes had

foundation not only in national law, but also in international law. It would be outrageous to require from the States that they respect “possessions” that had been acquired unlawfully.

855. Alternatively, if the Court was prepared to admit that the money recovered from the first applicant was his “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention, the Government maintained that the interference with his rights had been compatible with that provision. The Government reiterated the principles established in the Court’s case-law under Article 1 of Protocol No. 1 to the Convention, in particular concerning the wide margin of appreciation enjoyed by the member States, their better knowledge and understanding of local conditions and needs and the Court’s limited role of supervision in that area. The Government also indicated that it was not incompatible with Article 1 of Protocol No. 1 to recover property from a debtor, even if that property did not belong to him but was in his possession.

856. On the facts the Government maintained that the first applicant had been found guilty of various economic crimes, which involved misappropriation of public money and public property. He committed those crimes as a member of an organised group. His criminal activities were premeditated, carefully planned and lasted several years. In such circumstances the amounts recovered from him must be regarded as compensation due to society and the State for the wrongs committed by him. The first applicant was therefore deprived of his possessions in the public interest, which prevails in this context over his private interest. The Government concluded that Article 1 of Protocol No. 1 to the Convention had not been breached in the applicant’s case.

857. According to the Government, Russian law provides for a possibility to examine, within criminal proceedings, civil claims of the victim of the crime towards the perpetrator. Article 110 of the Tax Code provides that the *mens rea* of the corporate taxpayer is defined with reference to the *mens rea* of the managers who acted on its behalf. As a general rule, tax claims concerning unpaid corporate taxes are brought against the corporate taxpayer. However, there are a few exceptions from this rule. Thus, if at the moment when the claim is introduced, the corporate entity still exists but it does not have sufficient assets to satisfy the claim, this triggers the subsidiary liability of the person who was responsible for the tax debt. The same rule applies where the legal entity was liquidated or changed owners at the moment when tax claims were introduced.

858. The recovery of the outstanding tax claims from the first applicant was lawful, since the creation of the sham companies by him and the control of their operations contained elements of the *actus reus* provided by Article 199 of the Criminal Code. It would be inefficient to recover taxes from those sham companies which the first applicant had created, since they were unable to compensate damage caused to the treasury. Russian law did not provide for criminal liability of legal persons. Consequently, in the present case the underlying general rule was that the damage should be compensated by the tortfeasor. The sham companies which participated in the tax evasion scheme have been closed or

reorganised in order to conceal the crimes. However, that should not have prevented the State from recovering damages. The first applicant's reference to the Supreme Court's judgment in the case of *I. and K.* (see paragraph 449 above) was irrelevant.

## 2. *The first applicant's submissions*

859. The first applicant claimed that the Government's objection that Article 1 of Protocol No. 1 was inapplicable to the case was incorrect and their reliance on *Ferrazzini* was misconceived. In *Ferrazzini* the Grand Chamber held that tax disputes fell outside the scope of "civil rights and obligation" for the purposes of defining the applicability of Article 6 § 1, and not of Article 1 of Protocol No. 1. On the contrary, it was the settled case-law of the Court that the collection of taxes involves an interference with the rights protected under Article 1 of Protocol 1. The applicant referred to *Burden v. the United Kingdom* [GC], no. 13378/05, § 59, ECHR 2008; *Orion-Breclav, S.R.O v. the Czech Republic* (dec.), no. 43783/98, 13 January 2004).

860. In the first applicant's opinion, the Court's admissibility decision left open two key questions: (a) whether it was "lawful", as a matter of domestic and/or Convention law for the Meshchanskiy District Court to make a damages award for company tax evasion against an individual; and (b) if so, whether it was correct to do so in the instant case given the rulings of the Commercial Courts in the Yukos tax proceedings.

861. As to the first of those questions, the first applicant alleged that claims for damages in relation to company tax evasion should be brought against the companies that are alleged to have evaded the taxes and thus the Meshchanskiy District Court was not entitled to make any award of damages against him under this charge. Thus in the *I. and K.* case the Russian Supreme Court stated that there was no legal justification for upholding a civil claim filed by the tax authorities for the evasion of taxes that were not paid by a joint-stock company implicated in a criminal case to the private individuals convicted in the relevant case. The principles set out in *I. and K.* were applied by the Moscow Regional Court on 9 October 2002 in its report "On the results of an examination of criminal cases in the economic sphere by the Moscow region courts during 2000 and the first half of 2002":

"Under Article 55 of the [old] Criminal Procedural Code, civil respondents may include, in particular, enterprises, establishments and companies, which, according to law, carry material liability for losses caused by the criminal actions of the accused individual. In a criminal case an individual may be recognised as a civil respondent only on the basis of the tax, which he failed to pay into the budget as a taxpayer paying income tax. But as a company's head or chief accountant, an individual cannot incur tax liability for the company, because the latter, being a separate object of taxation, has its own collection of rights and responsibilities as a taxpayer, particularly as the payer of tax on legal entities or companies, including tax on profit (income), VAT, transactions with securities, tax on profit from stock exchange and insurance operations. Therefore, in this example the company/taxpayer itself must be regarded as the civil respondent in respect of the unpaid taxes and duties. In granting the civil claim submitted by the prosecutor, the court actually shifted the obligation to pay tax arrears to the wrong taxpayer. Granting a civil claim for the collection of tax in a criminal case instigated on the indications specified under Article 199 of the

Criminal Code (company tax evasion), from the personal funds of a private individual convicted under this article, has no basis in law”.

862. In their submissions the Russian Government did not refer to any legislative provisions or case law to support their arguments. They asserted that the Supreme Court decision in *I. and K.* was now “irrelevant” as on 18 December 2002 a new Criminal Procedure Code came into force. However, the Government’s assertions were not supported by reference to any subsequent case-law demonstrating that the case had been challenged, let alone overruled. The Government’s references to the changes in the Criminal Procedure Code introduced in 2002 were equally unsubstantiated: there was no analysis of how the new Code undermined the judgment of the Supreme Court in *I. and K.* in any way. The provisions of the new Code had not altered the basis for the Supreme Court’s findings. In any event, it was impossible to understand how, even if the new Criminal Procedure Code were relevant, it could, consistent with the principle of fair balance, have retrospective effect.

863. As to the second of the issues, namely the possibility for “double recovery” of the same amounts of unpaid taxes from a company and its top-executive, the first applicant claimed that the Government had not addressed this question. In the applicant’s view, the civil damages award was manifestly arbitrary as: (a) the alleged tax arrears had already been collected from Yukos; (b) the promissory notes had all been redeemed in full and there was therefore no loss to the state. Subsequent domestic decisions in related cases had concluded that the promissory notes were redeemed in full: see the judgments of the Sverdlovsk Regional Court in the *Ivannikov* case and the judgment of the Miass City Court of Chelyabinsk Oblast in the *Lubenets* case.

864. The first applicant argued that the decisions of both the trial court and the court of appeal had been entirely unreasoned as to how the damages award had been calculated. The amounts recovered from him by virtue of the judgment of 16 May 2005 were the same as the amounts recovered from the companies affiliated with the first applicant - in particular, Yukos. The Meshchanskiy District Court ordered the first applicant to pay the Federal Tax Service RUB 17,395,449,282 in relation to the latter’s claim for damages arising from the alleged non-payment of taxes by the ZATO trading companies. The total award for damages related to the crime committed under Article 199 of the Criminal Code comprised: (a) damages related to the tax evasion for 1999 in the amount of RUB 5,447,501,388; and (b) damages relating to the alleged tax evasion for 2000 in the amount of RUB 11,947,947,894. On appeal, the Moscow City Court excluded from the total amount of unpaid taxes for 1999 and 2000 the amount of taxes which were paid by the four trading companies in promissory notes. The basis of the Moscow City Court’s decision on this point was that even if one assumed that payment of tax by the Lesnoy companies by using promissory notes had been unlawful in 1999 and 2000, by the time that the first applicant’s case came to trial the wording of Article 199 of the Criminal Code had been amended so as to exclude the possibility of his being convicted under that (or any other) provision of the Criminal Code in respect of such conduct, and the applicant was therefore

entitled to invoke the benefit of that change. As a result, the total amount of unpaid taxes was reduced by the Moscow City Court to RUB 1,217,622,799 for 1999 and to RUB 1,566,046,683 for 2000. Despite this change, the court of appeal refused to reduce the amount of the civil claim.

865. In the Yukos tax proceedings in 2004 the Russian Tax Ministry (the predecessor to the Federal Tax Service) had secured the payment of taxes (plus interest and fines) by Yukos of the same alleged tax arrears for 2000 by the ZATO trading companies. The basis for the award was that the trading companies were said to be sham companies and that the ultimate beneficiary was Yukos. Subsequently, in related cases, it has been accepted that the promissory notes were redeemed in full and that there was no loss.

866. In the first applicant's words, the award by the Meshchanskiy District Court of damages amounting to RUB 17,395,449,282 undoubtedly represented an interference with the peaceful enjoyment of his possessions. The first applicant's assets were sequestered pending resolution of the damages claim. Seized bank accounts and shares have been channelled towards meeting the award of damages.

867. The first applicant further alleged that the award of damages made by the Meshchanskiy District Court had been unlawful. Thus, the Meshchanskiy District Court did not have jurisdiction to make an award of damages against the first applicant since, in any event, the alleged loss to the State had already been recovered in the tax proceedings against Yukos.

868. As regards the striking the fair balance between private and public interest, the first applicant acknowledged that the Court has given a considerable margin of appreciation to States in relation to fiscal matters, provided always that measures did not amount to arbitrary confiscation. Given that the damages award was itself unlawful and that the alleged loss to the State for the year 2000 had already been recovered in the Yukos tax proceedings, the issue as to "fair balance" did not fall to be considered. Moreover, subsequent court decisions had confirmed the first applicant's consistent case that the promissory notes used by the ZATO companies in 1999 had been redeemed in full and thus there had been no loss to the State.

## **B. The Court's assessment**

### *1. General principles*

869. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws" (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II).

870. Further, according to the Court's well-established case-law, an instance of interference, including one resulting from a measure to secure payment of taxes, must strike a "fair balance" between the demands of the

general interest of the community and the requirements of the protection of the individual's fundamental rights. The States, when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation, since decisions in this area will commonly involve the appreciation of political, economic and social questions which the Convention leaves within the competence of the States parties. The second paragraph of Article 1 explicitly reserves the right of Contracting States to enact such laws as they may deem necessary to secure the payment of taxes. In the case of *Gasus Dossier- und Fördertechnik GmbH v. the Netherlands* (23 February 1995, § 59, Series A no. 306-B), the Court stated that “the importance which the drafters of the Convention attached to this aspect of the second paragraph of Article 1 may be gauged from the fact that at a stage when the proposed text did not contain such explicit reference to taxes, it was already understood to reserve the States’ power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation (see Sir David Maxwell-Fyfe, Rapporteur of the Committee on Legal and Administrative Questions, Second Session of the Consultative Assembly, Sixteenth Sitting (25 August 1950), Collected Edition of the Travaux préparatoires, vol. VI, p. 140, commenting on the text of the proposed Article 10A, *ibid.*, p. 68)”. The power of appreciation of the States parties in such matters is therefore a wide one (see *Gasus Dossier- und Fördertechnik GmbH*, cited above, § 60; see also *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 69, Series A no. 52; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, 23 October 1997, § 80, *Reports of Judgments and Decisions* 1997-VII; and *M.A. and 34 Others v. Finland* (dec.), no. 27793/95, 10 June 2003; see also, *mutatis mutandis*, *Bendenoun v. France*, 24 February 1994, § 46, Series A no. 284).

## 2. Application to the present case

### (a) Whether there was an interference with the first applicant's “possessions”

871. The Government claimed, referring to *Ferrazzini*, cited above, that the recovery of unpaid company taxes from the first applicant cannot be analysed in terms of Article 1 of Protocol No. 1 since it was not an “interference” with the applicant's rights guaranteed by this provision. The Court considers, however, that the Government's reading of *Ferrazzini* is misconceived. The question for the Court in the present case is not to define whether the “tax proceedings” are “civil proceedings” for the purposes of Article 6 § 1, but to define whether Article 1 of Protocol No. 1 is applicable to the court order recovering a certain amount of unpaid taxes from a taxpayer. Even if tax proceedings are not civil (cf. *Yukos* judgment, §§ 527 and 528), a pecuniary award made against a taxpayer within such proceedings may still constitute an “interference” with his possessions. As the Court held in *Burden*, cited above, “taxation is in principle an interference with the right guaranteed by the first paragraph of Article 1 of Protocol No. 1, since it deprives the person concerned of a possession,

namely the amount of money which must be paid” (§ 59). The fact that the State enjoys a large margin of appreciation in this sphere does not affect that conclusion.

872. The Government further argued that the amount of unpaid taxes did not constitute the applicant’s “possessions” in the Convention meaning since the applicant withheld it unlawfully. The Court cannot agree with that argument either. The parties disagreed on the meaning of the applicable legal provisions, eligibility of the first applicant and trading companies to tax cuts, and, consequently, on the exact amount of taxes due. Eventually, the courts ruled in favour of the authorities and concluded that Yukos and the first applicant had an outstanding tax debt, but that fact alone cannot remove from the amounts recovered from Yukos and/or from the first applicant the protection guaranteed by Article 1 of Protocol No. 1 to the Convention (see, *mutatis mutandis*, “*Bulves*” *AD v. Bulgaria*, no. 3991/03, §§ 53-58, 22 January 2009; *Intersplav v. Ukraine*, no. 803/02, §§ 30-32, 9 January 2007; *Shchokin v. Ukraine*, nos. 23759/03 and 37943/06, § 49, 14 October 2010; *Wasa Liv Ömsesidigt, Försäkringsbolaget Valands Pensionsstiftelse and others v. Sweden*, no. 13013/87, Commission decision of 14 December 1988, DR 58, p.186; *Provectus i Stockholm AB and Löwenberg v. Sweden* (dec.), no. 19402/03, 16 January 2007).

873. The Court considers the first applicant’s obligation to pay a certain amount of “outstanding taxes” in the present case can be considered as an interference with his possessions falling within the scope of Article 1 of Protocol No. 1. The next question is whether that interference had a lawful basis and was compatible with the proportionality principle inherent in that provision.

**(b) Whether the interference was justified under Article 1 of Protocol No. 1**

874. The first applicant forwarded two main arguments under Article 1 of Protocol No. 1. First, he claimed the State had been awarded the same amount of outstanding corporate taxes twice: first, in the tax proceedings before the commercial courts those taxes were recovered from the company, and then, in the criminal proceedings before the Meshchanskiy District Court, the same tax was recovered from the first applicant himself.

875. The Court, however, does not need to examine this aspect of the case separately, and that is for the reasons related to the applicant’s second argument. Thus, he claimed that, as a matter of principle, Russian law did not provide for the recovery of unpaid company taxes from the managers of that company who had been found guilty of tax evasion under Article 199. In his submissions, only a company which had failed to pay taxes might be a defendant in such circumstances. The interference at issue, therefore, did not have a lawful basis. The Government, on the contrary, argued that the law provided for by the subsidiary liability of managers if the corporate taxpayer had no assets.

876. The Court reiterates that when speaking of “law”, Article 1 of Protocol No. 1 alludes to the same concept to be found elsewhere in the Convention (see *Špaček, s.r.o. v. the Czech Republic*, no. 26449/95, § 54, 9 November 1999). The phrase “subject to the conditions provided for by

law” requires in the first place the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions (see the *Lithgow and Others v. the United Kingdom* judgment of 8 July 1986, § 110, Series A no. 102). The Court’s power to review compliance with domestic law is limited (see, *inter alia*, the *Fredin v. Sweden (no. 1)* judgment of 18 February 1991, § 50, Series A no. 192; with reference to the *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 47, Series A no. 171). However, the Court is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the Court’s case-law (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 190 and 191, ECHR 2006-V).

877. Turning to the present case the Court emphasises that “piercing of the corporate veil” in such situations is not wrong as such. Where a limited liability company was used merely as a façade for fraudulent actions by its owners or managers, piercing of the corporate veil may be an appropriate solution for defending the rights of its creditors, including the State. That being said, there should be clear rules allowing the State to do so – otherwise an interference would be arbitrary.

878. The Court notes that Article 110 of the Tax Code, referred to by the Government, defines the *mens rea* of the company which failed to pay taxes as the *mens rea* of its executives. However, this Article does not permit recovering company tax debts from them and, therefore, does not support the Government’s case.

879. The Government did not refer to any other provision of Russian law which would allow piercing of the corporate veil in such circumstances. Quite the contrary: if unpaid taxes are claimed with reference to the Civil Code as “damages”, as it was the case, Article 1068 of the Civil Code must apply, which provides that damage caused by an employee of the company while performing his official duty must be compensated by that company (see paragraph 446 above), and not by the employee himself. The Government did not explain how their case accommodated Article 1068 of the Civil Code.

880. The Court is mindful of the fact that Russian law provides, in certain circumstances, for the civil liability of a company’s executives for the debts accrued by it – see Article 56 of the Civil Code, quoted in paragraph 444 above. However, the Court does not consider that Article 56 was applicable *in casu*. First, it is questionable whether the Meshchanskiy District Court had the power to grant the claims of the Tax Service against the applicant while the corporate taxpayer still existed (see paragraph 350 above; see also paragraph 18 above). Second, Article 56 of the Civil Code provides for *subsidiary* liability of managers of the insolvent company, whereas the judgment of the Meshchanskiy District Court seemed to order the recovery of the outstanding amount of company taxes from both applicants on the solidarity basis with the company. Third, Article 56 of the Civil Code was not relied on by the domestic courts. The Court concludes that neither the Tax Code nor the Civil Code at the time allowed for piercing of the corporate veil in such circumstances.



881. The Court is mindful that the concept “lawful basis” is not limited to primary legislation; the meaning of laws is often clarified in the secondary legislation or in the judicial practice. Thus, clear, consistent and publicly available case-law may provide a sufficient basis for “lawful” interference with the rights guaranteed by the Convention, where that case-law is based on a reasonable interpretation of the primary legislation.

882. However, the case-law known to the Court does not support the Government’s claim. As from 2001 the Russian courts repeatedly interpreted the law as not allowing for the shifting of liability for unpaid company taxes from the company to its executives – see paragraph 449 above, the summary of the Supreme Court’s findings in the case of *I. and K.* The Court notes that the underlying rules of civil, tax and criminal liability, applied in the case of *I. and K.*, were the same as in the applicants’ case. It follows that the Supreme Court’s reasoning in *I. and K.* was applicable to the applicants’ case; the Government did not produce any argument to the contrary.

883. Furthermore, Decree no. 64 of the Supreme Court of 2006 (see paragraph 450 above) explicitly referred the lower courts to Article 1068 of the Civil Code, which provided for liability of the company for the damage caused by its employees (see paragraph 446 above). After 2006 the Russian courts repeatedly stated that company taxes cannot be recovered from its managers convicted under Article 199 of the Criminal Code (see paragraph 451 above). All these elements speak in favour of the applicant’s assertion that the decision of the Meshchanskiy District Court, in so far as it concerned “civil claims”, had no support either in the law or in judicial practice.

884. Most importantly, the Court observes that the judgment of the Meshchanskiy District Court, in the part concerning the civil claim, was very short and did not refer to any provision of the domestic law, as if it were an insignificant matter (see paragraph 272 above). The Meshchanskiy District Court’s conclusions on a civil claim worth over RUB 17 billion (over EUR 500 million at the time) run to a few lines and contained neither any reference to legal norms, nor any comprehensible calculation of damages (see paragraphs 267 and 268 above). The City Court, while upholding the award made by the District Court, did not refer to any legal provision either (see paragraph 319 above) and was equally laconic.

885. On the strength of the above the Court concludes that neither the primary legislation then in force nor the case-law allowed for the imposition of civil liability for unpaid company taxes on that company’s executives. This leads the Court to the conclusion that the award of damages in favour of the Tax Service was made by the Meshchanskiy District Court in an arbitrary fashion and thus contrary to Article 1 of Protocol No. 1 to the Convention. Therefore, there was a violation of that provision.

## XI. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

886. The applicants complained about the alleged political motivation for their criminal prosecution and punishment. They referred to Article 18

in conjunction with Articles 5, 6, 7 and 8 of the Convention in this respect. Article 18 of the Convention provides:

“The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

## A. The parties' submissions

### 1. The Government's submissions

887. The Government submitted that the applicants' allegations that their criminal prosecution had been politically motivated were not supported by the materials of the case. The Government insisted on the serious and genuine nature of the criminal charges brought against the applicants. They stressed that the investigating and prosecuting authorities had acted *bona fide* and in full compliance with national legislation, which had been proved by the judgment of the Meshchanskiy District Court of Moscow delivered in the applicants' case. The fact of the applicants' conviction by the national courts, upheld by the national supreme judicial authority, was a sufficiently strong argument to rebut the applicants' arguments in relation to alleged violations of Article 18 of the Convention.

888. The Government referred to the Court's findings in the first applicant's case (*Khodorkovskiy (no. 1)*, no. 5829/04) where the Court had not found that the first applicant's prosecution was driven by improper motives. In particular, the Court found that the evidence submitted by the first applicant was not sufficient to conclude that the Russian authorities acted in bad faith and in total disregard of the Convention. The Government asserted that the criminal prosecution of the applicants had pursued a legitimate aim and had been justified and lawful.

### 2. The applicants' submissions

889. The applicants maintained that the proceedings against them and other leading Yukos executives had been driven by political motives.

890. The applicants submitted that, notwithstanding the Court's conclusion in *Khodorkovskiy (no. 1)*, it was open to the Court to find a violation of Article 18 in the current case. First, the first case concerned only the pre-trial issues. Furthermore, the Court in that case did not consider some of the evidence, namely the witness statement by Mr Kasyanov, the former Prime Minister, and the report of the Russian President's expert advisory group, which analysed the applicants' second trial. There was now a clear global consensus, including judgments from the highest courts in Switzerland and Cyprus, that the applicants' prosecution was politically motivated. Finally, the Court's approach to Article 18 in *Khodorkovskiy (no. 1)* was inconsistent with the Convention case-law. The *travaux préparatoires* for Article 18 indicated that the drafters of this provision were concerned to ensure thereby that an individual was protected from the imposition of restrictions arising from a desire of the State to protect itself according “to the political tendency

which it represents” and the desire of the State to act “against an opposition which it considers dangerous”.

891. In contrast to the case-law under Article 18, in *Khodorkovskiy (no. 1)* the former First Section found that an applicant must establish that the reason for his detention is solely prompted by reasons other than those provided for in Article 5 of the Convention and, moreover, that his prosecution “from beginning to end” was infected with “bad faith and in blatant disregard of the Convention”. In no previous case has the Court applied such a test.

892. If Article 18 is to be of any value in protecting individuals from the misuse of power that Article 18 is designed to afford, then the Court must adopt a flexible test that recognises that, once the applicant has established a strong *prima facie* case, he is not required to prove facts “incontrovertibly”, since such facts are primarily within the knowledge of the State. Such recognition is apparent from the Court’s approach to Article 14, which like Article 18, has no autonomous place in the Convention but has a particular character in the case-law (see *D.H. and Others v. the Czech Republic*, no. 57325/00, § 186, 13 November 2007). The former First Section made it almost impossible for an individual to prove a political motive, as the evidence as to the political motive will almost always be held by the Government.

893. According to the applicants, the evidence before the Court led to the conclusion that the applicants’ prosecution was motivated, at the very least in part, by political considerations. In support of their allegations the applicants referred to various documents, namely the findings of the Special Rapporteur of the Parliamentary Assembly of the Council of Europe, endorsed by the Parliamentary Assembly, which had concluded that the circumstances of the first applicant’s case went “beyond the mere pursuit of criminal justice, and include[d] elements such as the weakening of an outspoken political opponent, the intimidation of other wealthy individuals and the regaining of control of strategic economic assets”. They also referred to the European Parliament’s Resolution of May 2009 which labelled the first applicant as a political prisoner. The applicants further referred to the judgment of a London court in extradition proceedings against former Yukos executives, where the judge had concluded that the prosecution of Mr Khodorkovskiy had been politically motivated. A decision of the Swiss Federal Court mentioned a “political component” to the applicants’ case. The applicants also referred to a decision of a Lithuanian court in extradition proceedings and other decisions by the courts and arbitration tribunals which supported their thesis of political motivation for their prosecution.

894. In 2005 Amnesty International stated that it believed there was a “*significant political context to the arrest and prosecution*” of the applicants and other Yukos staff. Several other NGOs made declarations to the same effect.

895. The applicants also mentioned the opinions of various public figures in Russia and abroad who had characterised the proceedings against Yukos executives as political. The applicants relied on statements by the former Prime Minister, Mr Kasyanov, the Economic Development and

Trade Minister, Mr Gref, President Putin's Economic Adviser, Mr Illarionov, Presidential Aide, Mr Shuvalov (see paragraph 373 above), as well as by other senior political figures who had made similar comments (such as the former Minister of Economy, Mr Yasin, and the Chairman of the Federation Council, the higher chamber of the Russian parliament, Mr Mironov).

896. The applicants submitted that the restrictions imposed upon their fair trial rights in the course of their trial and appeal were specifically linked with "other reasons", contrary to Article 18. There were many breaches of their rights which showed bad faith on the part of the authorities. Similarly, the decision that the applicants should be sent to the Chita Region and to the Yamalo-Nenetskiy Region to serve their sentences, thereby greatly impeding their contact with their families and lawyers, was taken for improper reasons. Whilst at the penal colonies the applicants had been targeted with illegal, unfair, disproportionate and discriminatory disciplinary proceedings designed to affect their prospects of release on parole. The applicants further gave an account of what they called "the consistent pattern of harassment and intimidation of the ... lawyers".

### **B. The Court's assessment**

897. At the outset, the Court reiterates that it has already examined and dismissed a similar (albeit not identical) complaint in the first case of the first applicant, and in the case of *Yukos*. In *Khodorkovskiy (no. 1)* the complaint under Article 18 was examined in conjunction with Article 5 of the Convention and related to the first applicant's detention on remand during the first months of the investigation. In *Yukos* the Article 18 complaint was examined in conjunction with Article 1 of Protocol No. 1 and related to the tax proceedings against the company and the ensuing enforcement proceedings. In the present case the applicants invoke Article 18 on account of a different set of facts; these facts are connected with the previous examined cases but are, nevertheless, distinguishable from them. Therefore, this complaint is not the same as that previously examined and the Court may continue examination of it. Nevertheless, the Court cannot ignore its own findings in *Khodorkovskiy (no. 1)* and *Yukos* and will take them into account when assessing the parties' arguments in the present case.

898. Unlike many other Convention provisions, Article 18 is rarely invoked and there have been few cases where the Court declared a complaint under Article 18 admissible, let alone found a violation thereof. Consequently, in view of the scarcity of the case-law under that Convention provision, in each new case where allegations of improper motives are made the Court must show particular diligence.

899. The Court reiterates its foundational statement in *Khodorkovskiy (no. 1)*, § 255, namely that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. That assumption is rebuttable in theory, but it is difficult to overcome in practice: the applicant alleging that his rights and freedoms

were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). Thus, the Court has to apply a very exacting standard of proof to such allegations. The Court was satisfied that such standard was met only in few cases, such as *Gusinskiy v. Russia* (no. 70276/01, § 73–78, ECHR 2004); *Cebotari v. Moldova* (no. 35615/06, §§ 46 et seq., 13 November 2007); or *Lutsenko v. Ukraine*, no. 6492/11, § 108, 3 July 2012; see, as an opposite example, *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 129, ECHR 2007-I).

900. The Court takes note of the opinions on the applicants' case expressed by various political bodies and officials (see paragraphs 374 et seq. above) and, in particular, to the testimony of Russian politicians (see paragraph 370 and, in particular, paragraph 371 above). Furthermore, the Court reiterates its findings in § 260 of *Khodorkovskiy (no. 1)* where it stressed that it did not wish to challenge the findings of the national courts made in the context of the extradition proceedings and other proceedings related to the Yukos case (see paragraphs 363 et seq. above). Their conclusions might have been right in the specific context in which they were made.

901. The Court also accepts that the circumstances surrounding the applicants' criminal case may be interpreted as supporting the applicants' claim of improper motives. Thus, it is clear that the authorities were trying to reduce political influence of "oligarchs" (see paragraphs 24 and 26 above), that business projects of Yukos ran counter to the petroleum policy of the State (see paragraph 21 above), and that the State was one of the main beneficiaries of the dismantlement of Yukos (see §§ 237-238 in the *Yukos* judgment).

902. The applicants in the present case were aware that they did not have direct proof of improper motives (compare to the case of *Gusinskiy*, where there existed a written document disclosing the real aim of the authorities). Consequently, they built their case on contextual evidence and authoritative opinions. In their words, such evidence sufficed to show that there was an "arguable claim" of improper motives, and it was for the Government to prove the contrary.

903. However, the Court cannot accept this approach. It considers that even where the appearances speak in favour of the applicant's claim of improper motives, the burden of proof must remain with him or her. It confirms its position in *Khodorkovskiy (no. 1)* that the applicant alleging bad faith of the authorities must "convincingly show" that their actions were driven by improper motives. Thus, the standard of proof in such cases is high. Otherwise the Court would have to find violations in every high-profile case where the applicant's status, wealth, reputation, etc. gives rise to a suspicion that the driving force behind his or her prosecution was improper. Such prosecutions as those, for example, at the heart of the case of *Streletz, Kessler and Krenz*, cited above, would then become impossible. This is definitely not the result which the drafters of that provision sought to achieve. The Court reiterates its *dictum* in *Khodorkovskiy (no. 1)* that "high political status does not grant immunity."

904. Next, the Court notes the vastness of the applicants' claim under Article 18. Indeed, in some cases applicants have been successful in convincing the Court that a particular action of the authorities (such as arrest or detention, for instance) was driven by improper motives. Examples of such situations can be found in *Khodorskovkiy (no.1)*, § 142, and in *Gusinskiy*, cited above, §§ 76-77 (see also the Court's findings under Article 34 of the Convention below). In *Lutsenko*, also cited above, § 108, the Court held as follows:

"The circumstances of the present case suggest ... that the applicant's arrest and detention, which were ordered after the investigation against the applicant had been completed, had their own distinguishable features which allow the Court to look into the matter separately from the more general context of politically motivated prosecution of the opposition leader. In the present case, the Court has already established that the grounds advanced by the authorities for the deprivation of the applicant's liberty were not only incompatible with the requirements of Article 5 § 1 but were also against the spirit of the Convention ..."

905. However, in the present case the applicants' allegations are much wider and more far-reaching. The applicants did not complain of an isolated incident; they tried to demonstrate that "the whole legal machinery of the respondent State ... [had been] *ab initio* misused, that from the beginning to the end the authorities [had been] acting with bad faith and in blatant disregard of the Convention" (*Khodorkovskiy (no. 1)*, § 260). In essence, the applicants tried to persuade the Court that everything in their case was contrary to the Convention, and that their conviction was therefore invalid. That allegation is a very serious one; it assails the general presumption of good faith on the part of the public authorities and consequently requires particularly weighty evidence in support.

906. The Court does not exclude that in limiting some of the applicants' rights throughout the proceedings some of the authorities or State officials might have had a "hidden agenda". On the other hand, the Court cannot agree with the applicants' sweeping claim that their whole case was a travesty of justice. In the final reckoning, none of the accusations against them concerned their political activities *stricto sensu*, even remotely. The applicants were not opposition leaders or public officials. The acts imputed to them were not related to their participation in the political life, real or imaginary – they were prosecuted for common criminal offences, such as tax evasion, fraud, etc.

907. The Court reiterates in this respect its approach in the case of *Handyside v. the United Kingdom* (judgment of 7 December 1976, Series A no. 24), where the Court found that although there had been a political element in the decision to ban the distribution of the applicant's book, it was not decisive (see § 52 of the judgment), and that the "fundamental aim" of the conviction was the same as proclaimed by the authorities which was "legitimate" under Article 10 of the Convention.

908. The Court's approach to the present case is similar. The Court is prepared to admit that some political groups or government officials had their own reasons to push for the applicants' prosecution. However, it is insufficient to conclude that the applicants would not have been convicted otherwise. Elements of "improper motivation" which may exist in the present case do not make the applicants' prosecution illegitimate "from the

beginning to the end”: the fact remains that the accusations against the applicants were serious, that the case against them had a “healthy core”, and that even if there was a mixed intent behind their prosecution, this did not grant them immunity from answering the accusations. Having said that, the Court observes that the present case, which concerned the events of 2003-2005, does not cover everything which has happened to the applicants ever since, in particular their second trial.

909. In sum, and in so far as the criminal proceedings at the heart of the present case are concerned, the Court cannot find that Article 18 was breached.

## XII. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION IN RESPECT OF THE FIRST APPLICANT

910. The first applicant complained that his access to the Court had been restricted, contrary to Article 34 of the Convention, which provides:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

### A. The parties’ submissions

#### 1. *The Government’s submissions*

911. The Government asserted that the first applicant had had the necessary time and facilities to prepare and submit an application before the Court, and that his many lawyers had assisted him in preparing the application.

912. The law allowed him to meet the lawyers representing him before the European Court. During the first applicant’s detention in the penal colony meetings with his lawyers, including those representing him in the Strasbourg proceedings, took place outside the first applicant’s working hours. At the time such was the requirement of point 83 of the Internal Regulations of the Penal Colonies, enacted by the Order of the Ministry of Justice of 3 November 2005. On 2 March 2006 the Supreme Court of the Russian Federation declared that the Order in that part was unlawful. Since then meetings were also allowed during working hours.

913. In addition, the first applicant knew how to apply to the European Court because, in all the premises where he was detained, notice-boards displayed information for prospective applicants. The first applicant was also able to address questions and complaints concerning proceedings before the European Court to the colony administration and to the FSIN officials. The Government stressed that in accordance with the Court’s case-law the officials of the prison system had been briefed on how to inform detainees about the Court’s procedures and rules, without, at the same time, putting any pressure on them or discouraging them from complaining.

914. The fact that the first applicant submitted a very detailed and complex application form and was assisted by five lawyers showed, in the Government's words, that he had not been hindered in any way by the authorities.

915. As to the episode of 22 July 2005, when Ms Mikhaylova had been denied access to the applicant, the Government asserted that the applicant had misled the Court about her status – she had not been his advocate and had not therefore been entitled to visit him in the remand prison. Article 53 of the CCrP provided that an advocate must be formally admitted to act in the proceedings by the official in charge of the case. Although Ms Mikhaylova had the status of an advocate, she was not on the list of lawyers admitted to participate in that particular criminal case. As a result, she was not allowed to see the applicant in the capacity of his advocate. She could have visited him in her private capacity, but she failed to obtain written permission for such a visit from the investigator. The Russian law distinguishes between the notions of “defence counsel” (*защитник*) and “advocate” (*адвокат*, i.e. a barrister). In order to become a “defence counsel” the advocate must have been admitted to participate in the case in this capacity. Ms Mikhaylova was an “advocate”, but she had not obtained authorisation to participate in the case as the applicant's “counsel”. The same concerned the episode of 27 July 2005, when Ms Mikhaylova and Mr Prokhorov were denied access to the applicant by the remand prison administration. The Government concluded that the applicant's rights under Article 34 had not been breached.

## *2. The first applicant's submissions*

916. The first applicant submitted that the Government failed to address the Court's questions. In particular, they were entirely silent on the fact that applications for visas to travel to see the applicant made by Mr Nicholas Blake QC and Mr Jonathan Glasson, British lawyers acting in these proceedings, were refused. Neither had they been able to see their client. The Government had not commented on the authorities' attempts to disbar the first applicant's lawyers. Both of his Russian representatives in the Strasbourg proceedings had faced disbarment proceedings: thus, in September 2005, immediately after the appeal hearing, the GPO sought the disbarment of Ms Moskalenko; in March 2007 disbarment proceedings were again instigated against Ms Moskalenko. Disbarment proceedings were also taken against Mr Drel following the appeal hearing.

917. The Government claimed that the first applicant had had sufficient time and requisite facilities to draw up his application to the Court, but they entirely overlooked the fact that he had had to ask the Court's permission for a further six months in order to present his substantive application. The first applicant experienced particular difficulties in accessing his lawyers in the period leading up to the expiry on 22 March 2006 of the six-month deadline for submitting his complaint to the Court. On 17 March 2006 the first applicant was placed in the punishment block for drinking tea in the wrong place.

918. The first applicant successfully challenged the rule that he was not permitted access to lawyers in working hours, asserting that it interfered,



amongst other things, with his ability to bring a complaint to the European Court. In a judgment dated 2 March 2006 the Supreme Court stated that the rule was invalid. The Government accepted that prior to the Supreme Court decision access to the first applicant's lawyers had been refused during working hours, but offered no explanation as to why such an unlawful restriction on access had not hindered his right of access to this Court.

919. Moreover, the Government's assertion that access had been permitted after the Supreme Court's decision was, in the first applicant's words, incorrect. The colony administration continued to refuse his lawyers access to him during working hours. The administration gave the excuse that they had not seen the Supreme Court's decision, although the first applicant's lawyers had provided them with a copy of that decision.

920. The Government's arguments that Ms Mikhaylova needed the authorisation of the Meshchanskiy District Court in order to see the first applicant were wrong as a matter of domestic law. Ms Mikhaylova was authorised by the first applicant to act for him both in relation to the ECHR proceedings and in his criminal trial. There was no merit in the Government's argument that she had lacked the necessary court authorisation to gain access to the applicant.

921. Finally, the first applicant maintained that his lawyers had been subjected to harassment and intimidation. In support he referred, in particular, to the conclusions of Senior Judge Workman in the extradition proceedings in the United Kingdom who concluded that "at least some of the lawyers had suffered harassment and intimidation". The first applicant also referred to the words of the President of the Moscow Bar Association who had commented that, to date, the Federal Registration Service had been mainly concerned with requests to deprive the first applicant's lawyers of the right to practice. He said that only two applications from the Service have not been linked to the Yukos case.

922. The abuse of the law-enforcement process in the prosecution of the applicant was seen in the case of Mr Aleksanyan. Mr Aleksanyan was one of the first applicant's lawyers and has also been one of Mr Lebedev's lawyers. On 27 November 2007 the GPO investigator Ms R., in the presence of Mr Aleksanyan's lawyer, put pressure on Mr Aleksanyan to make a false confession and give false testimony against other persons, in exchange for release for medical treatment (Mr Aleksanyan was seriously ill). Mr Aleksanyan had himself explained to the Supreme Court of Russia that this had not been the only instance whereby the GPO offered to release him in exchange for false testimony against the applicants, in particular on 28 December 2006.

923. The particular difficulties faced by the first applicant's Strasbourg lawyers were to be seen in the broader context of the consistent harassment of the first applicant's lawyers and the manifest disregard the authorities had shown for lawyer/client confidentiality. Mr Drel was summoned for questioning the day the applicant was arrested. Within a few weeks of the first applicant having being arrested, one of the applicant's young lawyers (Ms Artyukhova) was searched, two documents unlawfully seized from her, and she was subjected to disbarment proceedings.

## B. The Court's assessment

924. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition guaranteed under Article 34 of the Convention that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Akdivar and Others v. Turkey*, 16 September 1996, § 105, *Reports of Judgments and Decisions* 1996-IV; *Aksoy v. Turkey*, 18 December 1996, § 105, *Reports of Judgments and Decisions* 1996-VI; *Kurt v. Turkey*, 25 May 1998, § 159, *Reports of Judgments and Decisions* 1998-III). In this context, “pressure” includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy.

925. The Court observes that the first applicant submitted a very detailed and well-supported application. Judging by the number of documents collected and submitted by his legal team it is difficult to imagine that the first applicant's lawyers were seriously hindered in preparation of the case file for submission to the Court. Thus, the “end result” speaks in favour of the Government's assertion. However, the Court reiterates that Article 34 may be invoked even if an applicant was able to submit an application, observations, etc. Violations of that provision have been found in many cases where an applicant was successful and the Court found one or several violations of his or her “substantive” rights under the Convention. Thus, the “end-result argument” by itself does not mean that an applicant's right of individual petition under Article 34 was respected.

926. The Court notes that the alleged interference with the right of individual petition by the first applicant is two-fold. First, he claimed that the authorities had hindered the preparation of the application form and additional submissions. He referred in particular to the episodes involving his lawyers Ms Mikhaylova and Mr Prokhorov, who had been denied access to him for some time. Second, the first applicant alleged that the authorities virtually harassed the applicant's lawyers in connection with their participation in the Strasbourg proceedings. The Court will start by examining the second part of his allegations under Article 34.

927. The Court is concerned by the negative position of the law-enforcement agencies vis-à-vis the first applicant's legal team, especially after the end of the first trial. The Court observes that the prosecution made several attempts to disbar his lawyers, including those acting on his behalf in Strasbourg (see paragraph 355 above). Moreover, they were subjected to administrative and financial checks (see paragraph 357 above). Two of the first applicant's foreign lawyers were denied visa (see paragraph 334 above), and one was expelled from Russia in a precipitated manner (see paragraph 358 above). The first applicant claimed that this was all part of an intimidation campaign.

928. The Court reiterates that the threat of criminal or disciplinary proceedings invoked against an applicant's lawyer concerning the contents of a statement submitted to the Court has previously been found to

interfere with the applicant's right of petition (see *Kurt*, cited above, §§ 160 and 164, and *McShane v. the United Kingdom*, no. 43290/98, § 151, 28 May 2002) as has the institution of criminal proceedings against a lawyer involved in the preparation of an application to the Commission (see *Şarli v. Turkey*, no. 24490/94, §§ 85-86, 22 May 2001). The moves made previously by the Russian Government to investigate an applicant's payments to her representatives, even though they did not apparently result in a criminal prosecution, were also considered by the Court an interference with the exercise of the applicant's right of individual petition and incompatible with the respondent State's obligation under Article 34 of the Convention (see *Fedotova v. Russia*, no. 73225/01, §§ 45 et seq., 13 April 2006).

929. The first applicant's lawyers in this case were working under immense pressure. That being said, the authorities' attempts to disbar the first applicant's lawyers were not directly related to their role in the Strasbourg proceedings, at least not formally. Furthermore, some of those proceedings took place after the first applicant had submitted the application form. An extraordinary tax audit of the NGO headed by Ms Moskalenko (one of the leading lawyers in his Strasbourg team) could also be explained by reasons not connected to the Yukos case. Thus, the question before the Court under Article 34 is very similar to that under Article 18, namely what was the real intent of the authorities in the situation complained of.

930. In the Court's opinion, there is a significant difference between the first applicant's allegations under Article 18 and those under Article 34. In so far as his prosecution and trial were concerned, the aims of the authorities for bringing the first applicant to trial and convicting him were evident and did not require further explanation.

931. By contrast, the aim of the disciplinary and other measures directed against the first applicant's lawyers is far from evident. In 2011 the Court specifically invited the Government to explain the reasons for the disbarment proceedings, extraordinary tax audit and denial of visas to the applicant's foreign lawyers, but the Government remained silent on those points.

932. In such circumstances it is natural to assume that the measures directed against the first applicant's lawyers were linked to his case before the Court. Such inference is supported by the specific role played by some of lawyers concerned in the applicant's case. Thus, although Ms Moskalenko was also involved in the first applicant's defence at the domestic level, her main role was to prepare the case for the Strasbourg proceedings. This is *a fortiori* true in respect of the foreign lawyers for the first applicant, namely Mr Glasson, Mr Blake and Mr Amsterdam.

933. In sum, the Court considers that the measures complained of were directed primarily, even if not exclusively, at intimidating the first applicant's lawyers working on his case before the Court. Although it is difficult to measure the effect of those measures on the first applicant's ability to prepare and argue his case, it was not negligible. The Court concludes that the authorities failed to respect their obligation under Article 34 of the Convention.

### XIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

934. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### A. Damage

##### 1. *First applicant*

935. The first applicant did not submit any claim for pecuniary damage. Under the head of non-pecuniary damages, he sought a “deliberately modest” amount of EUR 10,000.

936. The Government left the determination of the amount of just satisfaction at the Court’s discretion.

937. The Court observes that it has found several violations of the Convention in this case in respect of the first applicant. Those violations must have caused the first applicant stress and frustration, which cannot be compensated solely by the findings of violations. The Court, taking into account the cumulative effect of the violations of the first applicant’s rights and making its assessment on an equitable basis, in view of all evidence and information available to it, grants him the amount sought, i.e. EUR 10,000, plus any tax that may be charged on that amount.

##### 2. *Second applicant*

938. The second applicant claimed only pecuniary damages in the amount of EUR 6,800,000, which represented his lost earnings. He submitted his tax declarations for several years to demonstrate the level of his earnings before his arrest.

939. The Government did not submit any specific comments on the second applicant’s claims for just satisfaction but simply restated the principles of the Court’s case-law on awarding just satisfaction.

940. The Court notes that the second applicant’s claim in respect of pecuniary damage is based on the understanding that his conviction was entirely baseless and that it was the sole cause of his loss of earnings. The Court is not persuaded by this argument. Although the Court found several violations of the second applicant’s rights under Articles 3, 6 and 8 in the present case, the loss of his earnings can be attributed to many other factors, primarily to the tax proceedings involving Yukos, which eventually led to its bankruptcy and liquidation. The second applicant’s detention throughout 2004 and 2005 undoubtedly played some part in those proceedings. However, the Court does not need to speculate in this respect. It observes that the link between the violations found in the present case and the loss of the second applicant’s earnings, if any, is too remote and uncertain. The Court concludes that the second applicant’s claims for pecuniary damages are unjustified and must be rejected.

## **B. Costs and expenses**

941. The applicants did not submit any claims for costs and expenses. The Court consequently does not award any amount under this head.

## **C. Default interest**

942. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## **FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Decides* to join the applications;
2. *Holds* that there has been no violation of Article 3 of the Convention on account of the conditions of detention of the second applicant in the remand prison;
3. *Holds* that there has been a violation of Article 3 of the Convention on account of the second applicant's placement in a metal cage in the courtroom;
4. *Holds* that there has been a violation of Article 5 § 3 of the Convention on account of the lack of relevant and sufficient reasons for the second applicant's detention after September 2004;
5. *Holds* that there has been a violation of Article 5 § 4 of the Convention in respect of the second applicant on account of the delayed examination of the detention order of 14 December 2004;
6. *Holds* that there has been no violation of Article 5 § 4 of the Convention in respect of the second applicant on account of the fairness and speediness of the other detention proceedings;
7. *Holds* that it is not necessary to examine separately the second applicant's complaint under Article 5 § 4 concerning the alleged failure of the court of appeal to address his arguments in the detention proceedings;
8. *Holds* that there has been no violation of Article 6 § 1 of the Convention on account of the alleged partiality of Judge Kolesnikova;
9. *Holds* that there has been a violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (c) and (d) on account of the breach of the lawyer-client confidentiality, and unfair taking and examination of evidence by the trial court;

10. *Holds* that it is not necessary to examine separately the applicants' complaint under Article 6 § 2 of the Convention;
11. *Holds* that there has been no violation of Article 7 of the Convention;
12. *Holds* that there has been a violation of Article 8 of the Convention on account of sending the applicants to remote correctional colonies;
13. *Holds* that there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the first applicant;
14. *Holds* that there has been no violation of Article 18 of the Convention in respect of the applicants;
15. *Holds* that the authorities failed to respect their obligation under Article 34 of the Convention;
16. *Holds*
  - (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage, to be converted into Russian Roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
17. *Dismisses* the second applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen  
Registrar

Isabelle Berro-Lefèvre  
President