

IN THE COMMITTEE OF MINISTERS OF EUROPE

MIKHAIL KHODORKOVSKIY AND PLATON LEBEDEV (2)

v.

RUSSIAN FEDERATION

1. At the Committee of Ministers' 1193th meeting, held from 4-6 March 2014, the judgment in *Khodorkovskiy and Lebedev (No.2) v Russia*, nos. 11082/06, 13772/05 dated 25 July 2013, was classified in the enhanced procedure, together with the *Klyakhin* group of cases (no. 46082/99)¹.
2. In this brief submission Mr Khodorkovskiy provides information to the Committee of Ministers in accordance with Rule 9 of the Rules of the Committee of Ministers² ("the Rules") and asks the Committee to pass an interim resolution pursuant to Rule 16 of the Rules requiring the Russian Federation to explain its complete failure to execute this judgment.

Background

3. Mr Khodorkovskiy is the former head of Yukos Oil Company, which at the relevant time was one of the largest oil companies in Russia and the rest of the world. In 2001, he founded a non-profit NGO, the "Open Russia Foundation". This NGO cooperated with other Russian human rights NGOs, such as Memorial, the Moscow Helsinki Group and was involved in a number of humanitarian and educational projects across the country. From at least 2002 Mr Khodorkovskiy openly funded opposition political parties, namely Yabloko and the SPS (Union of Right Forces). He made public declarations criticising anti-democratic trends in Russian internal politics. A number of his close friends

¹See

[https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2014\)1193&Language=lanEnglish&Ver=immediat&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2014)1193&Language=lanEnglish&Ver=immediat&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864)

² Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (*Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies*)

and business partners became politicians³. Mr. Lebedev is the former head of the international holding company Group MENATEP Ltd. and number of its entities that, among other things, owned a controlling stake in Yukos.

4. In 2003 Mr Khodorkovskiy and Mr Lebedev were arrested by the FSB and in 2004-2005 they were tried for economic crimes. In 2009-2011 they were subjected to a second trial for charges overlapping with the charges in the first trial. Both trials were globally condemned as politically motivated. On 24 May 2011 Amnesty International declared Mr Khodorkovskiy and Mr Lebedev “*prisoners of conscience*”.
5. On 20 December 2013 Mr Khodorkovskiy was unexpectedly released from detention. The petition for pardon by Mr Khodorkovskiy and its grant by President Putin in no way involved, either implicitly or explicitly, any admission of guilt by Mr Khodorkovskiy.
6. Mr Khodorkovskiy has made three applications to the European Court of Human Rights (“the ECtHR”).

(a) The ECtHR delivered its judgment in relation to Mr Khodorkovskiy’s first application (*Khodorkovskiy v. Russia*, no. 5829/04) on 31 May 2011. The ECtHR found violations of **Article 3** (Prohibition of torture or inhuman or degrading treatment in relation to his conditions of detention as well as the conditions in which he was tried) and **Article 5** (Right to liberty and security). The Committee of Ministers is still considering the enforcement of this judgment. Its consideration of the application is under the “enhanced procedure”. It is being considered under that procedure because the judgment raises systemic issues and is being reviewed under the lead cases of *Klyakhin v. Russia*, no. 46082/99, 30 November 2004⁴ and *Kalashnikov v. Russia*, no. 47095/99, 15 July 2002⁵.

³ 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.

⁴ It is being considered as a group of 49 cases concerning unlawful detention, excessive length and insufficient grounds for detention.

⁵ The cases concern poor conditions of pre-trial detention in the remand centres under the authority of the Ministry of Justice in all cases (Art. 3) and lack of an effective remedy in this respect in a number of cases (Art. 13). The

- (b) Judgment in his second application, *Khodorkovskiy and Lebedev (No. 2) v Russia*, no. 11082/06, was given on 25 July 2013. This submission is concerned with the enforcement of that judgment.
- (c) Mr Khodorkovskiy's third application, *Khodorkovskiy and Lebedev (No. 3) v Russia*, no. 51111/07, was communicated to the Russian Federation on 24 March 2014. That application is concerned with Mr Khodorkovskiy's and Mr Lebedev's second trial.

The judgment in *Khodorkovskiy and Lebedev (No.2) v Russia*

7. In its judgment the ECtHR found numerous serious breaches of the Convention. The ECtHR:

- (a) Found fundamental breaches of **Article 6**, the right to fair trial. The Court found significant breaches in the way in which evidence was taken that created a “*disbalance between the defence and the prosecution*” and breached the fundamental requirement that there should be an “*equality of arms*”⁶. The Court's findings of the breach of lawyer-client confidentiality were of especial note: it found, for example, that the search and seizure of materials from the office of Mr Khodorkovskiy's lawyer, Mr Drel, was arbitrary and unlawful⁷. The Court found “*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*”⁸.

Committee's consideration of the issues in those cases led to the pilot judgment in the case of *Ananyev and Others v Russia*, no. 42525/07 and 60800/08, 10 January 2012.

⁶ § 735 of the judgment in *Khodorkovskiy (No. 2)*

⁷ § 634 of the judgment in *Khodorkovskiy (No. 2)*

⁸ § 648 of the judgment in *Khodorkovskiy (No. 2)*

- (b) Ruled that the decision to send Mr Khodorkovskiy to serve his sentence in Krasnokamensk in eastern Siberia had interfered with his right to a family and private life and was not proportionate. In finding a breach of **Article 8**, the right to family life, the ECtHR commented that *“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”*⁹.
- (c) Held, applying to **Article 18** (the prohibition against the restriction of Convention rights for reasons other than those provided for by the Convention¹⁰), very similar reasoning to that deployed in the judgment on the first application, that the inordinately high evidential threshold of *“incontrovertible and direct”* proof had not been established. The ECtHR nonetheless said that it did *“not exclude that in...the proceedings [against Khodorkovskiy and Lebedev] some of the authorities or State officials might have had a ‘hidden agenda’”*¹¹. It also said that it was *“prepared to admit that some political groups or government officials had their own reasons to push for the applicants’ prosecution”*¹². The ECtHR stated that: *“it is clear that the authorities were trying to reduce political influence of ‘oligarchs’, that business projects of Yukos ran counter to the petroleum policy of the State, and that the State was one of the main beneficiaries of the dismantlement of Yukos”*¹³. The ECtHR *“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”*¹⁴. Ultimately, the ECtHR arrived at the opinion that its finding in this application did not preclude it from examining Article 18 in

⁹ § 848 of the judgment in *Khodorkovskiy (No. 2)*

¹⁰ Article 18 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.”

¹¹ § 906 of the judgment in *Khodorkovskiy (No. 2)*

¹² § 908 of the judgment in *Khodorkovskiy (No. 2)*

¹³ § 901 of the judgment in *Khodorkovskiy (No. 2)*

¹⁴ § 900 of the judgment in *Khodorkovskiy (No. 2)*

the subsequent proceedings concerning the conviction in the second criminal case¹⁵.

(d) Unequivocally found a violation of **Article 1 of Protocol No 1** (Protection of property¹⁶) and, therefore, of Mr Khodorkovskiy's property rights due to an illegal damages award in a lawsuit filed by tax authorities whereby he and Mr Lebedev were ordered jointly to pay damages, as the district court phrased it, due to 1999-2000 taxes having been paid by YUKOS affiliates not in cash but with RUR 17.4 bn worth of YUKOS promissory notes. The district court ruled to collect the said RUR 17.4 bn (over €500 million at the time) not from the companies but from Mr Khodorkovskiy and from Mr Lebedev. On appeal, the Moscow City Court arbitrarily amended the charges (abandoning the theory involving YUKOS promissory notes) and significantly, but without any explanation, reduced (by RUR 14.6 bn) the amount of unpaid taxes to RUR 2.8 bn. Despite this change, the court of appeal refused to reduce the amount of the civil claim, leaving the damages award unchanged at RUR 17.4 bn. The ECtHR found that *"the amounts of unpaid taxes, specified as they are across the verdict, do not always conform to other numbers for the same periods of time and in connection to the operations of the same trading companies and do not match the total result as specified in the final paragraphs in the verdict as far as the charge of evading corporate taxes. The verdict provides no explanation for these differences"*. The entirety of this award was found by the ECtHR to be in breach of Article 1 of Protocol No 1. The ECtHR said the Meshchanskiy District Court's judgment *"had no support either in the law or in judicial practice"*¹⁷ and concluded that *"neither the primary legislation then in force nor the case-law allowed for the imposition of civil liability for unpaid company*

¹⁵ § 908 of the judgment in *Khodorkovskiy (No. 2)*

¹⁶ Article 1 of Protocol No. 1 to the Convention 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."

¹⁷ § 883 of the judgment in *Khodorkovskiy (No. 2)*

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."¹⁸

(e) Found a violation of **Article 34** (right of access to the Court) as a consequence of the sustained harassment of Mr Khodorkovskiy's ECHR lawyers. It found that the "*lawyers in this case were working under immense pressure*"¹⁹ and that they were subjected to measures "*directed primarily at intimidating them*" in working on Mr Khodorkovskiy's ECHR case²⁰.

8. The ECtHR noted that Mr Khodorkovskiy "*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.*" The Court went on to grant Mr Khodorkovskiy "*the sum sought, i.e. EUR 10,000, plus any tax that may be charged on that amount*"²¹. The Court's judgment concluded "*that the respondent State is to pay [Mr Khodorkovskiy], 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.*"²²

The execution of the judgment

9. On 31 October 2013 the Registry at the Court wrote to Mr Khodorkovskiy's lawyers informing them that the judgment had become final. It is to be noted that the RF Government did not seek to refer the ECtHR's judgment to the Grand Chamber of the Court.

¹⁸ § 885 of the judgment in *Khodorkovskiy (No. 2)*

¹⁹ § 929 of the judgment in *Khodorkovskiy (No. 2)*

²⁰ § 933 of the judgment in *Khodorkovskiy (No. 2)*

²¹ §§ 938-940 of the judgment in *Khodorkovskiy (No. 2)*

²² Paragraph 16 (a) of the operative conclusions of the judgment in *Khodorkovskiy (No. 2)*

10. Article 413 (2) (2) and (4) (2) of the RF Code of Criminal Procedure provides that a finding by the ECtHR of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms is a ground for resuming proceedings in the criminal case. On 25 December 2013 the Chairman of the Supreme Court of the Russian Federation, V.M. Lebedev, filed a submission “*for the re-opening of proceedings in the criminal case in relation to M.B. Khodorkovskiy and P.L. Lebedev, who were convicted under a verdict of the Meshchanskiy District Court of the city of Moscow of 16 May 2005, in view of new circumstances*”.
11. On 23 January 2014 the Presidium of the RF Supreme Court considered Chairman Lebedev’s submission as well as the supervisory appeals by the defence in relation to the verdict of the Khamovnichesky District Court of the city of Moscow of 27 December 2010.
12. It is to be noted by that time it had become absolutely clear that there was no tax liability to the budget and that the false claim by the tax authorities for RUR 17.4 bn was being intentionally used with improper legal, economic, and political motives in order to cause the most significant damage to Mr Khodorkovskiy and Mr Lebedev. Similar charges had been brought against other individuals by the investigative and tax authorities and it had been found that all the tax claims made against YUKOS and its affiliates in reference to the said period of time had been settled in the course of Arbitrazh proceedings back in 2004 (i.e. before a verdict was issued against Mr Khodorkovskiy and Mr Lebedev in May of 2005), and criminal cases against the other persons were closed²³.

²³ The tax claims against YUKOS had been paid back in 2004 in the course of enforcement proceedings as per judgments of Arbitrazh courts that had taken legal effect prior to the issuance of the Meshchanskiy verdict. This fact was officially and unambiguously confirmed with regard to Mr Khodorkovskiy and Mr Lebedev in a reply by the Federal Tax Service received in May of 2013 in response to a query from their lawyers. The complete background may be summarised as follows:

- (a) A December 12, 2011 order by V.N. Malyshev, the head of the investigative department for special major cases of the Main Investigative Directorate of the RF Investigative Committee, closed criminal case No. 201/713134-11 and the criminal prosecution against I.Ye. Golub. The order stated that “it was established in the case that in 2000 I.Ye. Golub, while acting by previous concert with M.B. Khodorkovskiy and P.L. Lebedev and other unidentified individuals, had arranged tax evasion”. The order goes on, “According to a letter by deputy head of the FTS of Russia dated December 15, 2011, OAO NK YUKOS’ arrears in the form of taxes, fines, and penalties for the year 2000, which arose as a result of tax control measures, **were paid in full** by the Federal Bailiffs Service in execution of enforcement order No. 383729 issued by the Arbitrazh Court of the city of Moscow on May 26, 2004.” (Emphasis added)
- (b) The Zamoskvoretsky court of the city of Moscow examined a criminal case against former CEO of OOO Business-Oil A.V. Spirichev accused of similar tax evasion to the charges against Mr Khodorkovskiy and Mr Lebedev. The Federal Tax Service of Russia that had been recognised as an injured party in the case

13. The RF Supreme Court's Presidium's findings in relation to the ECtHR's findings of a breach of Article 1 of Protocol No 1 were, with respect, opaque if not incoherent:

"The European Court of Human Rights found there had been violations of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, having stated in its judgment that neither the Russian legislation then in force nor the case-law allowed for the imposition of civil liability for unpaid legal entity taxes on that legal entity's (organization) executives; therefore, the collection of unpaid legal entity taxes to the state from NK Yukos officials had been arbitrary and could be regarded as interference with the right to respect of one's property.

Meanwhile, special features of the nature of civil liability of M.B. Khodorkovskiy and P.L. Lebedev as applied to the concrete circumstances of this criminal case are predetermined and conditioned, first and foremost, by the fact that the pecuniary damage was caused to the state by the criminal actions of the convicts who committed tax evasion by unlawful inclusion in the tax returns of the information about tax benefits, acting on behalf of sham legal entities OOO Business-Oil, Mitra, Wald-Oil, and Forest-Oil, rather than on behalf of legitimate legal entities, which is an integral part of objective side of the crime M.B. Khodorkovskiy and P.L. Lebedev were convicted for.

In regard to what has been set out above, the Presidium of the Supreme Court of the Russian Federation finds no grounds for repealing the verdict of the Meshchanskiy District Court of the city of Moscow of 16 May 2005 or subsequent court decisions, including as concerns the resolution of the civil suit."

14. The reasoning of the RF Supreme Court, is, to say the least, sparse and poorly expressed. It wholly fails to engage with the ECtHR's detailed analysis and judgment in relation to the violation of Article 1 of Protocol No 1. It is contradicted by the facts as well as the applicable law. There can be no doubt that by dint of the RF Supreme Court's judgment the Government of the Russian Federation has wholly failed to give effect to this aspect of the European Court's judgment. Such non-compliance, to use the language of Rule 4 of the Rules, has "*grave consequences for the injured party*" because of the enormous size of the falsified damages award in the suit that have been left in place against Mr

against Mr Spirichev but did not pursue a claim for damages against him. RAPSI reported on August 16, 2012, "A representative of the injured party stated at a court session on Monday that 'the FTS does not have any claims against YUKOS or its affiliated entities. The entire YUKOS debt was settled during the company's bankruptcy proceedings' (see http://rapsinews.ru/judicial_news/20120716/263809952.html).

Khodorkovskiy (and Mr Lebedev). It represents a Sword of Damocles hanging over their heads. As a consequence Mr Khodorkovskiy is unable to return to Russia whilst Mr Lebedev has been denied a passport and so cannot leave Russia. Each of them undoubtedly suffers "*grave consequences*" because of the failure to give effect to the European Court's unequivocal findings.

Request

15. The Committee of Ministers has repeatedly stressed the importance of full execution of all judgments of the ECtHR without exception, as well as the dangers inherent in a minimalist approach or the politicisation of cases. The Committee of Ministers thus reaffirmed at its 120th session in May 2010, in the pursuit of the Interlaken process started at the Interlaken High Level Conference in February 2010, "*that prompt and effective execution of the judgments and decisions delivered by the Court is essential for the credibility and effectiveness of the Convention system and a determining factor in reducing the pressure on the Court.*" The Committee added that "*this requires the joint efforts of member States and the Committee of Ministers*"²⁴. Effective execution of the ECtHR judgment is essential as the Convention "*is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective*" (see *Artico v. Italy*, no. 6694/74, 13 May 1980, Series A no. 37 § 33).
16. Full execution of a judgment requires a respondent state to recognise and to act upon breaches of the European Convention. The ECtHR judgment on the violation of Article 1 of Protocol No 1 is clear and unequivocal: there is no need for the Committee of Ministers to exercise its powers to ask for the ECtHR to provide an interpretation of the judgment.
17. The Committee should however ask the RF Government to explain the steps that they intend to take so as to "*ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention*" (Rule 6(2) (b) (i) of the Rules).

²⁴ Supervision of the execution of judgments, Committee of Ministers' 2013 Annual Report, March 2014, p.15

18. Accordingly Mr Khodorkovskiy and Mr Lebedev ask the Committee to pass an interim resolution, pursuant to Rule 16 of the Rules, expressing its concern to the Russian Federation that, despite an unequivocal ECtHR judgment, the award of just satisfaction had not been paid and, critically, that the RF Supreme Court's Presidium has failed to quash the "*arbitrary*" damages award that was made against Mr Khodorkovskiy (and Mr Lebedev) which "*had no support either in the law or in judicial practice*"²⁵.

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²⁵ § 883 of the judgment in *Khodorkovskiy (No. 2)*