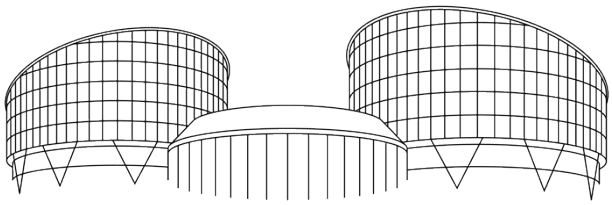

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 11082/06
by Mikhail Borisovich KHODORKOVSKIY
against Russia

The European Court of Human Rights (First Section), sitting on 8 November 2011 as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having regard to the above application lodged on 16 March 2006,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Mikhail Borisovich Khodorkovskiy, is a Russian national who was born in 1963. He is currently serving a prison sentence in a penal colony in the Karelia Region. He is represented before the Court by Mrs Karinna Moskalenko and Mr Anton Drel, both lawyers practising in Moscow, Mr Nicholas Blake QC, Lord David Pannick QC, and Mr Jonathan Glasson, lawyers practising in London, and Dr Wolfgang Peukert, a lawyer practising in Germany.

The respondent Government were initially represented by Mrs V. Milinchuk, the former Representative 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.

The facts of the case, as submitted by the parties, may be summarised as follows.

A. The circumstances of the case

The applicant is the former head and one of the shareholders of Yukos plc (Yukos), which at the relevant time was one of the largest oil companies in Russia. Before working in Yukos, the applicant headed the Rosprom holding and the Menatep bank, and controlled a number of smaller financial and industrial companies.

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 company was reorganised. As a result, it became one of the most successful businesses in Russia and in the world.

In 2003 the General Prosecutor's Office (hereafter "the GPO") started a criminal investigation into the business activities of the applicant and his partners. That investigation led to a trial and the applicant's subsequent conviction.

In 2004 the Tax Service lodged its first demand for tax arrears allegedly owed by Yukos, which led to proceedings before the Moscow Commercial Court. Those proceedings concerned the operation of a "tax optimisation" scheme using trading companies registered in the municipalities with favourable tax regime. 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. (For further details see the statement of facts in the case of *OAO Neftyanaya kompaniya YUKOS v. Russia*, no. 14902/04, admissibility decision of 29 January 2009).

The applicant alleged that the criminal proceedings against him, described in section 2 below, and the tax claims against Yukos, had been politically and economically motivated. In support of that assertion he referred to a large number of events which preceded the criminal proceedings against him. Those facts, in so far as relevant, are summarised below.

1. Events preceding the criminal prosecution of the applicant

(a) Business projects of Yukos

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 applicant, 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.

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 applicant advocated building an oil pipeline along an alternative route to that favoured by the Presidential Administration.

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.

(b) Political activities of the applicant

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 applicant, the renationalisation of the oil and mining industries, which had been privatised by his predecessor in the mid-90s.

In 2001, in order to promote certain values in Russian society, he founded a non-profit NGO the "Open Russia Foundation". Its annual budget in 2003 amounted to approximately 200 million United States dollars (USD). This NGO cooperated with other Russian human rights NGOs, such as Memorial, the Moscow Helsinki Group, etc.

From at least 2002 the applicant openly funded opposition political parties, namely Yabloko and the SPS. 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.

In April 2003 the 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.

On 19 February 2003 the applicant, together with other influential businessmen, met President Putin in the Kremlin. At that meeting the applicant made critical remarks concerning the recent acquisition of a private oil company by the State-owned Rosneft. The applicant implied that that transaction had involved high-level corruption. According to the 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.

On 27 April 2003 the 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 applicant against political activity, namely funding the Communist Party. Mr Nevzlin allegedly received a similar warning from Mr Lesin, the Media Minister.

The 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.

2. Criminal investigation into the activities of Yukos managers

Yukos's business interests were mainly concentrated around the extraction, processing and export of raw materials, such as oil, assist gas, apatite concentrate, etc. Most of the Yukos produce was finally sold abroad; however, Yukos did not trade directly with foreign firms but sold its output to several Russian companies registered in the zones with favourable tax regime, in particular in Lesnoy Town (ZATO). That mode of operation persisted for several years. The authorities suspected that those trading companies were in fact fully controlled by Yukos senior management and that they existed only on paper, in the sense that the real trading activity took place not in Lesnoy Town and similar places, but in Moscow, in the Yukos headquarters.

The trading companies registered in such zones had been paying some of their taxes not with money but with promissory notes from Yukos (those notes were later honoured). Those notes were, however, accepted by the local authorities as a method of payment of taxes. The trading companies

also enjoyed VAT exemption in respect of the oil they were selling abroad. VAT was reimbursed from the budget to those companies.

At the time the applicant was one of the major shareholders of Yukos, and its chief executive officer. His personal income consisted of the salary he received from Yukos and the dividends from the Yukos shares he owned. In addition, the applicant earned money as a self-employed contractor, by providing consulting services to foreign firms. The tax authorities suspected that those firms were affiliated with the applicant and that no services had been provided to them in reality.

In 2002 the GPO opened an investigation into the activities of several trading companies, allegedly affiliated with Yukos and registered in the town of Lesnoy. Those companies enjoyed certain tax privileges and paid taxes to the budget in non-monetary form, namely by Yukos promissory notes. On 29 August 2002 the GPO decided not to proceed with the investigation.

On 29 March 2002 a case was opened to investigate the acceptance by the Lesnoy ZATO 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:

> "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 ZATO Lesnoy as a result of granting tax privileges... Detected violations of the acting legislation by conducting these financial operations may be regarded as the subject matter of administrative and economic legislation".

According to the applicant, in December 2002 President Putin directed Prime Minister Kasyanov and General Prosecutor Ustinov to investigate one of the privatisation deals, and this subsequently became the starting point of the criminal prosecution of the applicant (the Apatit episode – see below). In April 2003 General Prosecutor Ustinov reported to the President that there was no basis for a criminal case. At the same time the Government insisted on the expediency of entering into an agreement with the applicant in order to settle the matter.

On 19 June 2003 a Yukos security official, Mr Pichugin, was arrested and charged with murder.

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

On 2 July 2003 Mr Lebedev, a senior manager in Yukos and the applicant's close friend, was arrested in the context of the Apatit case while in hospital. He was charged with business fraud and on 3 July 2003 was placed in detention on remand.

On 4 July 2003 the applicant was summoned to the GPO and interviewed as a witness. During the interview he was assisted by Mr Drel, one of his lawyers.

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.

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

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.

On 18, 21 and 30 July 2003 the prosecution re-opened several criminal investigations into the activities of Yukos which had previously been closed, namely those concerning tax payments by trading companies registered in Lesnoy.

On 29 July 2003 the prosecution searched the premises of Russkiye Investory plc.

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

On 3 October 2003 the Deputy General Prosecutor, Mr Biryukov, ordered a search of the Yukos premises in the village of Zhukovka, Moscow Region. On 8 October 2003 the Deputy General Prosecutor issued a new warrant authorising a search in Zhukovka.

Based on that warrant, on 3 and 9 October 2003 the investigators carried out several searches in Yukos's premises and in the homes of its senior managers in Zhukovka, including the home of Mr Lebedev. In particular, the offices of Mr Dubov, a Duma Deputy, and the homes of Yukos vice-president Mr Brudno and the applicant's friend Mr Moiseev were searched. On 9 October 2003 the GPO searched the premises of ALM Feldmans, a law firm, and the offices of the applicant's lawyer, Mr Drel. As a result of those searches, a large number of documents were seized, as well as the hard drives of several computers.

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 applicant; they removed from the latter premises a computer server, said by the authorities to hold Yukos financial data.

On 17 October 2003 Mr Shakhnovskiy, a major Yukos shareholder, was charged with personal tax evasion. According to the prosecution, he fraudulently reduced the amount of personal income tax due by using the "individual entrepreneur" scheme (for more details see below, the description of a similar accusation made against the applicant and Mr Lebedev). Mr Shakhnovskiy was convicted by the Meshchanskiy District Court, presided by Judge Kolesnikova, on 4 February 2004. Execution of that sentence was conditionally suspended by the judge.

On 17 October 2005 Mr Drel was summoned to the GPO for questioning in relation to the criminal cases against Mr Lebedev. Mr Drel refused,

referring to his status as advocate and his position as Mr Lebedev's representative in the criminal proceedings at issue.

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 and affiliated companies. On the same day the investigator again searched the premises of the Menatep Sankt-Petersburg bank.

In the early morning of Saturday 25 October 2003 the applicant was arrested by a special task force at Novosibirsk airport. The formal ground for his arrest was that he had not appeared before the investigator who had summoned him for questioning. The applicant was taken to Moscow and questioned as a witness.

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 applicant and Mr Lebedev.

On 25 October 2003 the GPO charged the applicant 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 (for more details on the applicant's detention pending the investigation and trial, see the description of facts in the first application lodged by the applicant, no. 5829/04).

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

On 3 November 2003, following his arrest, the applicant resigned as chief executive of Yukos.

3. Criminal charges against the applicant

The charges against the applicant formulated by the GPO may be summarised as follows:

(a) Misappropriation of Apatit shares

In 1994 the State privatisation authority decided to sell 20% 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.

In order to participate in the privatisation tender, the applicant, together with Mr Lebedev and their subordinates and friends, created several "paper companies" (or "dummy companies"): Volna, Malakhit, Flora, and Intermedinvest. Further, Mr Lebedev, 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 applicant delegated several people working in the Menatep bank and affiliated companies to participate in the privatisation tender on behalf of the "paper companies".

At the tender on 30 June - 1 July 1994 Intermedinvest offered the best conditions (19,900,000 Russian roubles 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.

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 415,803,000 (pre-1998 devaluation) Russian roubles (RUB). 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.

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.

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

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 sham legal entities controlled by the applicant and Mr Lebedev. As a result, the decision of the Commercial Court of Moscow of 1998 remained unenforced and the enforcement proceedings were discontinued.

In March 2002 Mr Lebedev proposed a friendly settlement of the dispute and the State privatisation authority 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, 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 applicant's fault. The prosecution qualified this episode as intentional avoidance of execution of a court judgment.

(c) Misappropriation of Apatit's profits and assets in 1995 – 2002

By 1995 the applicant and Mr Lebedev owned a controlling stake of Apatit's shares (including the 20 per cent acquired through the privatisation tender). On 1 December 1995 the applicant, as a major shareholder, 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 "paper companies" controlled by the applicant and located in "tax havens". Thus, the apatite concentrate was bought by those companies for USD 30-40 per metric ton and then sold to foreign companies for USD 40-78. The companies controlled by the applicant thus accumulated Apatit's profits; the difference between the "internal" and "external" prices was accumulated in foreign bank accounts controlled by Mr Lebedev and the applicant. 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 business fraud.

(d) Misappropriation of NIUIF shares

In 1995 the State privatisation authority decided to sell at tender 44 per cent of 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.

At the time the applicant was head of the Board of Directors of the Menatep bank. In order to take part in the privatisation tender the applicant, together with Mr Lebedev, acting through his subordinates in the Menatep bank, created two "paper companies": Polinep and Walton. Further, he 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.

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.

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 business fraud.

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

In February 1996 Walton sold the NIUIF shares to another three "paper companies" created by the applicant (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.

Further, in order to control the activities of NIUIF, the applicant 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 off-shore company controlled by the applicant and registered in the Isle of Man. That company acted through persons who worked in the Menatep bank or the Rosprom holding (another company affiliated with the applicant). The applicant also delegated his staff to the NIUIF management in order to oversee that company's day-to-day activities.

In 1997 the State privatisation authority learned that Walton had failed to discharge its main obligation under the privatisation contract, namely to invest in NIUIF. The privatisation authority 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.

However, by this time the NIUIF shares had already been sold by Walton, so that that decision could not be executed. In January 1998 the shares were re-sold to several "paper companies", which had also been created by and were controlled by the applicant (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 applicant's operations with the NIUIF shares. The prosecution qualified this episode as intentional avoidance of execution of a court judgment.

(f) Company income-tax evasion

In the 1990s there existed a number of "tax havens" in Russia; one of them was the territory of the Lesnoy ZATO in the Sverdlovsk Region (ZATO – "closed administrative territorial entity"). The applicant, together with Mr Lebedev, registered a number of "bogus" or "paper" companies there (namely Business-Oil, Forest-Oil, Vald-Oil and Mitra). Those companies were not formally affiliated with the applicant or Yukos, but were controlled by them *de facto*. Those companies claimed to operate in Lesnoy, and, on that ground, they qualified for tax advantages. 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, which were exempted from paying certain taxes. Part of the profits of those trading 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. The prosecution qualified this scheme as tax evasion.

(g) Payment of taxes with promissory notes

In addition to obtaining tax relief, the paper companies registered in Lesnoy did not pay taxes in monetary form. Instead, they obtained promissory notes from Yukos plc and then transferred them to the Lesnoy Tax Service. The value of the promissory notes was later offset from the paper companies' tax debt. According to the prosecution, in 1999-2000 the applicant and Mr Lebedev paid taxes in non-monetary form in the amount of (post 1998 devaluation) RUB 17,395,449,282. In the following years the promissory notes were paid off, but only in part: promissory notes amounting to RUB 1,048,391,487 have not been honoured. The prosecution qualified payment of taxes by promissory notes as another count of tax evasion.

(h) Unlawful tax refund

Since the value of some promissory notes was higher than the tax debt, the paper companies obtained a tax refund from the State. In other words, in

2000-2001 the Federal Treasury paid the paper 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.

In 2001, when the regional tax authority started a tax audit of the paper companies registered in Lesnoy, those companies formally discontinued their activities in Lesnoy and merged with another paper company registered in the town of Aginskiy, another "tax haven". 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 against the State budget on account of the hypothetical overpayment of taxes.

According to the prosecution, in 1999-2001 the applicant and Mr Lebedev, through the paper companies, received RUB 407,120,540 from the budget on account of "tax overpayments". The prosecution qualified that situation as business fraud using budget funds.

(i) Money transfers to Mr Gusinskiy's companies

In 1999 and 2000 the 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 Ltd and Greis Ltd) to the bank accounts of companies belonging to Mr Gusinskiy, 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 business fraud.

(j) Personal income tax evasion

Over the period 1997-2000 the applicant registered himself as a private entrepreneur. In the registration form he indicated that he was a private consultant for several foreign firms, and that his income consisted of fees for consulting services. This status permitted the applicant to pay a fixed amount of "imputed" income tax, defined by the legislation, instead of paying personal income tax and making social-security contributions.

In order to confirm his status, the applicant concluded and produced fake agreements on consulting services for the foreign companies Status Service Ltd and Hinchley Ltd, situated in the Isle of Man. The latter company was controlled by Mr Moiseyev, a close friend of the applicant and Mr Lebedev. Under that agreement the applicant received money in the guise of payment for consulting services; however, in reality the money was a wage for his work in Yukos and other large companies. As a result, he paid much lower taxes than if he had received the same sum as his salary. The difference between taxes paid by the applicant and the taxes he would have paid had he not registered as a private entrepreneur for 1998-1999 amounted to RUB 54,532,186. The prosecution qualified this scheme as tax evasion.

4. Statements by public officials

On 12 November 2003 Mr Kolesnikov, the Deputy Prosecutor General, stated in a TV programme that the applicant faced ten years' imprisonment. He added: "Sadly, we cannot give them a longer sentence".

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."

On 9 November 2004 the defence submitted a petition to the court, seeking to have issued an interlocutory ruling in respect of the First Deputy General Prosecutor, Mr Biryukov, who had made the above comments. However, the court rejected the petition, saying that whilst it had a right to issue such an interlocutory ruling it did not see any grounds for issuing one.

On 6 July 2004 the General Prosecutor, Mr Ustinov, stated as follows in an interview with the radio station *Ekho Moskvy*:

> "The scale of fraud, abuse and tax evasion is so large that it is impossible to fit them into one case. This is why other branches of this case were severed into separate proceedings, and they are now pending. This case has a beginning, but it is hard to see where it ends. ...".

While the court was considering its verdict, the GPO announced on the central TV channels that it intended to bring new charges against the applicant and Mr Lebedev in the near future.

5. Preparation for the trial

On 10 November 2003 the applicant was formally charged.

On 11 November 2003 one of the applicant's lawyers, Ms Artyukhova, was searched as she was leaving the applicant's remand prison (SIZO 99/1, otherwise known as "Matrosskaya Tishina"). 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. The content of the note, properly construed,

was entirely innocuous and merely listed the State's witnesses in relation to whom the defence team needed to work in terms of preparation for the trial.

On 25 November 2003 the applicant was informed that the pre-trial investigation was completed, and 227 volumes containing approximately 55,000 pages were served on him and his legal team to study (the "period of trial preparation"). The defence prepared for the trial until 14 May 2004, when the court ordered the trial to be started.

The applicant claimed that he had not had his own copy of the materials of the case. He was entitled to read the case file only in the presence of the investigator. When the applicant wished to discuss the documents in private with his lawyers the investigator removed the documents. In the applicant's words, such limitations significantly prolonged the time needed to study the case file.

Further, during visits to the applicant, the lawyers' confidential documents were examined by employees from the prison both before entry to the investigation room and on exit from it. Thus, for example, in December 2003 attempts were made on numerous occasions to examine confidential materials in the possession of the applicant's lawyers. On 6 January 2004 the applicant's lead lawyer, Mr Padva, filed a formal complaint about this behaviour by the investigator.

The applicant alleged that his discussions with the lawyers had been listened to by the authorities. Thus, the consultations 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).

On 11 March 2004 documents were seized from the applicant's lawyer Mr Shmidt as he left the detention facility after a consultation with the applicant. According to the lead investigator, Mr Karimov, the note seized from Mr Shmidt contained "an instruction on counteracting the investigation by way of influencing the investigation through the mass media".

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 applicant and his defence team. On 23 April 2004 the Basmanny District Court of Moscow gave the defence until 15 May 2004 to finalise its preparations for the trial. The defence challenged that decision, claiming that they needed more time. According to the defence, the applicant was 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, the District Court concluded that the time the applicant had already had, namely five months and twenty days, was enough. That ruling was upheld by the Moscow City Court on 25 May 2004.

On 13 May 2004, that is, before the applicant's appeal against the decision of 23 April 2004 was considered, the GPO withdrew the case file from the defence.

On 14 May 2004 the prosecution submitted the applicant's case to the Meshchanskiy District Court of Moscow for trial.

On 20 May 2004 the Meshchanskiy District Court held a preparatory hearing.

On 8 June 2004 the applicant's case was joined with those of Mr Lebedev (the applicant's business partner, director of the Menatep Bank and subsequently chief financial executive of the companies affiliated with Yukos) and Mr Kraynov (director of Volna, a firm which participated on behalf of Menatep in the privatisation of Apatit). The applicant was given access to a mass of further documents (165 volumes, which comprised the materials in Mr Lebedev's case).

On 23 June 2004 the applicant requested the court to grant him more time to study the materials in Mr Lebedev's case. That request was supported by the applicant's defence lawyers. The court gave the defence until 12 July 2004. In sum, the applicant had 22 working days to study 165 volumes of the materials in the case file.

On 12 July 2004 Ms Moskalenko, one of the applicant's lawyers, filed a formal request before the Meshchanskiy District Court asking for additional time to prepare for the trial. The hearing was adjourned until 16 July 2004.

6. Trial

(a) Presentation of case by the prosecution

On 16 July 2004 the trial was opened and the first hearing on the merits held. The court was composed of three judges: Ms Kolesnikova (presiding judge), Ms Klinkova and Ms Maksimova. The court was assisted by seven secretaries who kept the summary record of the hearing. 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. The defence was represented by Mr Padva, Mr Shmidt, Mr Drel, Ms Moskalenko, Mr Mkrtychev and several others.

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 preparation for the trial. Those arrangements persisted during the first phase of the trial when the prosecution was presenting its case (July – November 2004).

The hearings were public. They took place in a courtroom which held, according to the defence, 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.

The applicant and his co-defendants were held in a metal cage, guarded by armed escorts. Any contact between the applicant and his lawyers during the hearing was prohibited unless authorised by the judge. The Special Rapporteur appointed by the Parliamentary Assembly of the Council of Europe to investigate the fairness of the proceedings against the applicant attended one of the hearings, but she was not allowed to speak to the applicant. The applicant was able to communicate with the defence lawyers through the bars. However, conversations were always within the hearing of the guards and sometimes of the prosecutors. The exchange of written documents between the defence lawyers and the applicant was possible only through the presiding judge.

On 23 August 2004 the applicant's lawyers complained to the court that they were unable to show the defendant case materials in the courtroom and were unable to discuss the case confidentially with him.

On 26 August 2004 the escort guards informed the court that they were willing to allow documents to be passed to and from the applicant during the court session. The court, however, refused to grant permission, requesting that all documents should first be examined by the court before being transmitted.

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

On 31 August 2004 the 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.

In the following months the defence submitted several requests seeking to facilitate contact with the applicant 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 applicant prepared draft written testimony, but on each occasion his lawyers were able to review the testimony only after the court had reviewed the drafts.

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 applicant's lawyers, to allow her to speak to the applicant. However, the court refused permission.

(b) Presentation of case by the defence

In November 2004 the court moved on to examination of the evidence submitted by the defence. The applicant and his co-defendants 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 Mr Lebedev's home in 2003 (see below, in more detail). Finally, the defence asserted that even if some of the financial operations described in the bill of indictment and impugned to the applicant 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.

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 applicant in the court increased while the time available for preparing next day's court session decreased.

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.

On 5 February 2005 the Meshchanskiy Court, presided by Judge Kolesnikova, delivered a judgment in the case of Mr Shaknovskiy, another senior manager in the Yukos group. In that judgment the court found Mr Shaknovskiy guilty of tax evasion. The charges against Mr Shakhnovskiy were similar to some of the charges against the applicant and Mr Lebedev.

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 the Russian law and international treaties. They referred to the one-sided treatment of evidence, serious limitations on contact between the applicant and his lawyers, the unfair denial of adequate time to prepare the case, etc. That application was dismissed, and the court ruled that the proposal to disqualify the judges should not be granted.

(c) Closing submissions and reading out of the judgment

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.

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.

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

Between 16 May and 31 May 2005 the court read out its judgment. In all the trial lasted just under a year and the court sat for 159 days.

7. Taking and examination of evidence by the trial court

(a) Written expert opinions produced by the prosecution

Both the prosecution and the defence sought to rely on expert evidence dealing variously with an analysis of business transactions involving the applicant and the companies affiliated with him and tax payments and tax procedures at the relevant times. Thus, the prosecution relied on a number of experts. They were all appointed as experts 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.

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; a second concerning the personal tax evasion charges against the applicant, and a third concerning the personal tax evasion charges against Mr Lebedev.

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% block of shares in Apatit.

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.

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.

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. 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. However, there was no suggestion that the experts were unavailable or that there was any reason *per se* why they could not be called.

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 Dr Shchekin (in the judgment the court referred to Mr Shulgin's letter as one of the reasons why it did not accept Dr Shchekin's evidence). 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).

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.

(b) Other documentary evidence produced by the prosecution

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.

Thus, at the hearing of 12 January 2005 the defence asked the court to exclude evidence obtained during the searches of the office building 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 were 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.

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, a Duma deputy. 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.

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 at 88, Zhukovka. At that time Mr Drel had been Mr Lebedev's lead representative in the criminal proceedings. He also acted for the applicant and had attended the applicant's meeting with the GPO representatives on 5 July 2003, when the applicant had been questioned as a witness in the criminal case against Mr Lebedev. 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 "On Advocacy and the Bar". 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.

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.

Based on the above arguments, the defence asked the District Court to exclude those materials from the case file. The court subsequently dismissed those arguments in the judgment (see below).

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. Further, the defence referred to various discrepancies in the search reports.

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 was 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 at 9.15 a.m., that is, before the search started.

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" hard drives provided by the GPO and transmitted to the experts without having been properly sealed. Further, the attesting witnesses who were present when the drives were examined by the GPO experts had also participated in other investigative acts, which raised doubts as to their independence, etc.

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.

On numerous occasions the defence requested the District Court to declare prosecution documents inadmissible - for example, because the documents were illegible, were not certified, were not translated from foreign languages, or did not meet the requirements of law (such as the signature, a stamp or an official letterhead). The Meshchanskiy District Court refused to uphold any of the defence applications to that end.

(c) Examination of witnesses for the prosecution

Out of the 72 witnesses for the prosecution who were called, the interview records of 32 witnesses were read out at the prosecution's request, in addition to their oral submissions. Thus, the prosecution insisted on reading out the testimonies of Mr Schavelev, Mr Pozdnyakov, Ms Rashina, Mr Gidaspov, Mr Vostrukhov, Mr Dobrovolskiy, Ms Kuchinskaya, Mr Anilionis and others.

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 Scshavelev, 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.

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.

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

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.

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.

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 applicant, 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.

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.

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.

(d) Written expert opinions and other documentary evidence produced by the defence

The defence submitted to the court written opinions by several experts in the areas of taxation, financial law and book-keeping. In particular, reports by Dr Schekin (a professor at Moscow State University), Prof. Petrova (a qualified auditor since 1994, professor at Moscow State University and General Director of Expertaduit, an audit firm), Mr Semenov (professor of tax law at Moscow State University), Mr Lubenchenko (former Director of

the Legal Department and then Head of the Russian Central Bank, professor of law at Moscow State University) and Mr Grechishkin (director of Audit-Premier Ltd, an audit firm) were produced. Those reports were initially admitted by the court to the materials in the case file. However, the court later declared those reports inadmissible as evidence (see the summary of the judgment below).

Further, in the course of the trial the court decided that certain items were inadmissible as evidence.

Thus, on 27 December 2004 the applicant requested that a letter from the Director of the Achinsky refinery be admitted in evidence. The letter 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.

On the same day the defence requested the court to admit to the case file the written answers of Mr Prokofiev, the 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. However, the court refused to admit his written answers to the materials of the case, referring to the fact that Mr Prokofiev 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.

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

(i) The response of the Lesnoy tax inspectorate, which included a tax review for Business-Oil dated 7 March 2000, concluding that the company had not committed any violations of the Tax Code;

(ii) Correspondence from Lesnoy's Finance Department on how many companies in total paid taxes in non-monetary form in 1998, 1999 and 2000. That stated that, besides the trading companies affiliated with the applicant (Business-Oil, Vald-Oil, Forest-Oil, and Mitra), 71 organizations in 1998 and 55 organizations in 1999 paid taxes in non-monetary form; and

(iii) Confirmation from Lesnoy's Finance Department that it had suffered no damage as a consequence of the payment of taxes by way of promissory notes in 1999.

However, all of the above applications were refused and the documents were not admitted to the case file. The court referred 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.

On 21 January 2005 the defence produced a report by Prof. 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. However, the court refused to attach that report to the case.

On 7 February 2005 the defence petitioned the Meshchanskiy 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 ZATO 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 corporate tax evasion charges faced by the applicant.

On 8 February 2005 the District Court refused the request on the ground that the letter was allegedly incorrectly certified, in that the signature had not been verified by an official seal. The applicant's lawyers 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. 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 Meshchanskiy District 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.

On 8 February 2005 the court accepted from the defence a series of documents in relation to the ZATO 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 ZATO 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 "dummy" entities as alleged by the prosecution, and whether any damage was sustained by the State or municipal budget. However, the court later discounted that evidence in its judgment as unreliable (see below).

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 Ministry 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.

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.

Further, the defence asked the court to admit in evidence reports from the global audit firms Price Waterhouse Coopers and Ernst & Young and from an expert group of economists from the Urals branch of the Russian Academy of Sciences.

The report from Price Waterhouse Coopers 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% 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.

The reports from Ernst & Young valued the 20% stake holding in Apatit as in 1994 and 2002, and analysed the investment programme that the Lesnoy ZATO undertook from 2000 onwards. With that report the defence sought to prove that the ZATO had not suffered any damage.

The report by the Urals Branch of the Academy of Sciences was prepared in 2002 at the request of the local council of the Lesnoy ZATO and concerned taxation in Lesnoy. On 1 and 2 March 2005 the court ruled that none of those reports could be attached to the case materials. The research had been entirely independent of the criminal proceedings against the applicant. The report was seized by the GPO but for some reason it was not attached to the case materials. The experts 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 ZATO's 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 ZATO companies had been entitled to pay tax in advance since this was the "unconditional right of a taxpayer". Further the experts concluded that the ZATOs were 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.

The District Court refused to admit those reports in the materials of the case-file, on the ground that these reports could not be classified as "expert reports" and so were inadmissible. After the District Court's ruling that they were inadmissible as expert reports the defence made a further application to have them admitted 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 District Court rejected the defence application.

(e) Examination of witnesses for the defence

On 17 January 2005 Mr Lebedev'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.

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

Thus, Dr Schekin 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 Dr Schekin by the defence as irrelevant or relating to legal matters in which the court had no need of anyone's opinion.

Prof. Petrova was questioned on 24 January 2005 about the content of her report. Dr Semenov was questioned on 25 January 2005. He commented on the lawfulness of the non-monetary payment of tax, which included payment by promissory notes. However, most of the defence questions to Dr Semenov were dismissed by the court.

On 28 January 2005 the 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.

On 1 March 2005 the defence petitioned the court to summon Mr Shulgin, the Deputy Head of the Federal Tax Service, to give evidence.

Prof. Bochko (Deputy Head of the Institute of Economics of the Urals Branch of the Russian Academy of Sciences) 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 optimisation" schemes used by Yukos and involving companies registered in the Lesnoy ZATO. The defence lawyers first asked the witness whether the Lesnoy ZATO had suffered any damage in accepting payment of taxes by way of promissory notes and, secondly, questioned him on the investment programme in the ZATO. 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), and that the second area was irrelevant.

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.

Mr Gage (a partner with Ernst & Young) was questioned on 4 and 5 March 2005 about the methods he employed while preparing the report on the market evaluation of the 20 per cent block of shares in Apatit.

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.

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

(f) Evidence not disclosed to the defence

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% 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.

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, 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 court refused the application, stating that it could not see any reasons why the motion should be granted.

The defence lawyers requested disclosure of the expert report that had been commissioned by the prosecution in the context of the criminal investigation into the activities of the Lesnoy ZATO's administration (the case which had been closed in 2002). The defence made two applications for the report to be disclosed. The prosecution objected to disclosure of the expert report. On each occasion the court refused to order that the report should be disclosed.

On 9 March 2005 the court held that the defence had not specified what legal and economic review would be obtained from the materials of the aforementioned 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. The judgments of 16 May 2005

On 16 May 2005 the Meshchanskiy District Court delivered two separate judgments.

The first judgment concerned the allegation of misappropriation of Apatit shares (see above, point (a) of the "Criminal charges" part). The court found the applicant 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 applicant from criminal liability. The text of that judgment runs to 90 pages.

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

(a) Findings of the Meshchanskiy District Court as to the merits

In the first part of the principal judgment the Meshchanskiy District Court established the circumstances of the case, listed the evidence it accepted and set out a legal analysis of the facts.

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 "tax havens", as well as the foreign companies which paid fees to the applicant and Mr Lebedev had in fact been "paper" legal entities with no real business purpose. Most of the persons who had set up those companies on their behalf worked at Menatep, Rosprom, Yukos etc., and in that capacity those persons were subordinated to the applicant and Mr Lebedev. Further, the paper companies had no financial resources of their own, but operated with the financial support of Menatep, Rosprom, Yukos and other companies officially affiliated with the applicant. The "paper" 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 "paper" companies were created solely for participation in the sham transactions; they were controlled by the applicant and Mr Lebedev through their personal friends or subordinates.

The conclusive paragraphs of the judgment in respect of the corporate 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 ZATO, obtained a right to preferential taxation. Later, using this circumstance, through the CEOs of the aforementioned companies controlled by them, [the applicant]... arranged

> the filing of the 1999 and 2000 tax returns of the aforementioned companies with the Inspectorate of the Ministry for Taxes 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 applicant and Mr Lebedev] arranged for the payment of taxes by the aforementioned companies using promissory notes from OAO 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 Inspectorate of the Ministry for Taxes and Charges, the filing of which is mandatory under Art. 23 of the Tax Code of the RF, and non-inclusion in the companies' tax returns of the information about the companies' actual tax arrears. By means of the aforementioned actions, [the applicant and Mr Lebedev] organized tax evasion ..."

The Court also found the applicant guilty of other charges, described in sub-section 3 above.

(b) Admissibility of evidence produced by the defence

In the second part of the principal judgment the court analysed the evidence produced by the defence.

The court held that the written expert opinions by Mr Schekin, Ms Petrova, Mr Semenov, Mr Lubenchenko and Mr Grechishkin were inadmissible as evidence. The court's reasons can be summarised as follows. Under Article 86 the defence did not have the right to collect evidence from expert witnesses. Furthermore, the law provided that a prospective expert witness should be notified about his or her rights and obligations. The court noted that the written opinions produced by those persons contained the relevant entries that such rights were known or explained to them by the defence lawyers. However, such notification should not have been given by a defence lawyer. Therefore, even if the lawyers had notified some of those witnesses about their procedural rights, that notification was not valid. As to Mr Schekin, Mr Semenov and Mr Grechishkin, they had reached their conclusions on the basis of materials from the case file which had not been duly certified. Further, those persons gave their opinion on points of law, which was not within their competence. As to Ms Petrova and Mr Lubenchenko, they had been engaged by relatives of the applicant who were not a party to the proceedings and who did not therefore have a right to collect evidence.

The court further ruled that some of the documents submitted by the defence, namely the charter of incorporation of Status Service Ltd, and the list of staff of that company (which had paid Mr Lebedev 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 Mr Lebedev was the head of that company.

The court further dismissed oral testimony by Mr Schekin, Mr Semenov, Mr Lubenchenko and Ms Petrova as inadmissible evidence. The court held it to be inadmissible evidence 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 Schekin had represented Yukos in the commercial courts.

The court admitted evidence from Mr Bochko, who had participated in preparing the report by the Urals Branch of the Russian Academy of Sciences. The court took note of Mr Bochko's testimony, but only to the extent that it concerned his participation in the preparation of that report. However, the court refused to admit in evidence Mr Bochko's testimony concerning the substantive conclusions of the report. The court admitted testimony by Mr Gage about the methods used by Ernst & 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. As to the research by the Urals Branch of the Russian Academy of Sciences, the District Court said that since it had not been specially commissioned for the criminal trial it was inadmissible.

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 relations with the applicant's lawyers.

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 head of the ZATO administration were under criminal investigation for granting improper tax advantages. 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.

The court also examined the documents confirming the payment against 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 applicant. It also noted that the defence had not relied on those documents during the preliminary investigation.

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.

The court finally admitted and analysed a large number of 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) Admissibility of evidence produced by the prosecution

In the third part of the judgment the court analysed the objections raised by the defence as to the admissibility of evidence submitted by the prosecution. The court dismissed all requests by the defence to exclude evidence as inadmissible.

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 was 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 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 technical error by the investigator who had filled in the report on the search. 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. However, the court decided that this was a clear typing error which did not affect the validity of that piece of evidence.

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. 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 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 affiliated with Yukos. The court also noted certain discrepancies in their testimonies and the fact that, although they had been free to make notes in the search report on any irregularity, they had not done so.

As regards evidence obtained from Mr Drel's office in the premises of the ALM-Feldmans law firm, the court indicated that the law did not prohibit searching the premises of a law firm without a court order as the defence suggested. Further, the search was not carried out in respect of Mr Drel personally, but "in the 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 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, one of the investigators who had participated in the search, and Mr Dumnov, one of the experts who had examined the drives at the request of the prosecution.

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 applicant's guilt.

In the fourth part of the judgment the court analysed the arguments of the defence concerning the legal classification of the acts imputed to the applicant, the existence of attenuating or aggravating circumstance, information about the character of the applicant and his co-defendants, etc.

(d) Sentence

In conclusion, the District Court sentenced the applicant and Mr Lebedev to nine years' imprisonment in an "ordinary regime correctional colony".

In addition to sentencing the applicant and Mr Lebedev to imprisonment, the District Court ruled that RUB 17,395,449,282 was to be recovered from them in respect of unpaid taxes. This amount related to the episode concerning the Lesnoy trading companies. As regards the amounts claimed by the tax inspectorate in connection with personal income-tax evasion, those claims were severed; the District Court decided to examine them within a separate set of civil proceedings.

9. Appeal proceedings

(a) Preparation of the brief of appeal

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

On 28 July 2005 the defence was notified by Judge Kolesnikova (the presiding judge) that they could commence studying the trial record in order to check its accuracy. However, the applicant's lawyers were never able to read all of the 30 volumes of the trial record. Between 29 July and 8 August 2005 the defence was only permitted access to volumes 1-15 of the trial record. The applicant's lawyers were told that they could not have access to the remaining volumes as they were being used by the prosecutor.

On 5 August 2005 the defence was given copies of the trial record, prepared by the court on its own initiative, by the Meshchanskiy District Court. However, some volumes were still missing. Moreover, the copies of the transcript were not certified and they had no internal numbering or index. In addition, all the documents attached to the transcript during the court sessions were absent from the copies, as were determinations delivered by the court after retiring to chambers.

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

In early August it became known that the applicant intended to stand for partial election to the State Duma of the Russian Federation. On 8 August 2005 the applicant was transferred to another block in the detention centre, to a cell containing 16 detainees. On the same date he received his own copy of the court record, comprising 15 volumes. In his complaints to the court he claimed that the cramped conditions had made preparation for his appeal more difficult.

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 applicant wrote a letter to Judge Kolesnikova in which he asked for additional time. He maintained that he had to study the record in the remand prison meeting rooms together with his lawyers, or in his cell. However, he could hardly do so in the cell because it contained more than 10 people, who spoke loudly and many of whom were smoking, eating and relieving themselves in the same room. The meeting room was unventilated and the windows were sealed. The room had a small table and two chairs, which was not enough because he was usually visited by up to five lawyers at a time. Meanwhile, adjacent investigative rooms were vacant and contained several chairs. In order to have time to study the transcript the applicant had had to abandon his daily walks, which were conducted from 4 to 5 p.m.

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

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.

On 19 August 2005 the defence submitted to the Meshchanskiy 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.

On 23 August 2003 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.

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).

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.

On 2 September 2005 Judge Kolesnikova issued a decree dismissing all 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".

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 & Young in relation to the investment programme that had been conducted in the Lesnoy ZATO. 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.

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 applicant to have confidential contacts with his lawyers in the courtroom during the hearings and in the prison.

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.

In all, the briefs of appeal submitted by the defence on behalf of the applicant and Mr Lebedev run to about a thousand pages.

(b) Representation of the applicant during the appeal proceedings

In July-August 2005, the director of the detention facility persistently refused to grant Ms Khrunova, one of the applicant's lawyers, a meeting with the applicant, 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.

On 22 July 2005 Ms Mikhailova, who was engaged as the applicant's ECHR lawyer in the absence of Ms Moskalenko, was not allowed access to the applicant by the director of the detention facility. In a letter of 14 January 2008 the then head of detention facility SIZO 99/1 explained that Ms Mikhailova had not been admitted to the proceedings in the capacity of the applicant's lawyers under Article 53 of the CCrP and was therefore denied access to the applicant.

On 27 July 2005 Ms Mikhailova and Mr Prokhorov were denied access to the 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.

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

The 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 concern that his cancer had worsened. The hearing on 14 September 2005 was therefore adjourned until 19 September 2005.

On 15 September 2005 Mr Mkrtychev and Mr Drel, the applicant's lawyers, tried to meet the 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 applicant's cell and then transferred to the cell where Mr Lebedev was detained. As a result, on 16 September 2005 quarantine was imposed in respect of the detainees in those cells. However, after lengthy negotiations with the administration of the remand prison, Ms Levina and Ms Moskalenko obtained the right to visit the applicant.

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.

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

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

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

(c) Appeal hearing of 22 September 2005

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

At the outset of the hearing the defence lawyers requested additional time so that they could take instructions from their client. Mr Padva explained that he had been refused access to the applicant on the previous day. Mr Shmidt also requested time in order to take instructions, and asked for the hearing to be adjourned for at least one day for that purpose. The 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.

The City Court refused the applications for an adjournment but granted a period of time to the applicant to discuss his case with Mr Padva and Mr Shmidt whilst in the courtroom. Their discussions were not therefore confidential, as the guards were still present.

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.

The appeal court examined several requests by the defence to admit evidence into the case file, including documents lodged earlier in writing (see above) 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 & Young reports (evaluating the 20 per cent stockholding in Apatit in 1994 and 2002) and the report from the Urals Branch of the Russian Academy of Sciences on the Lesnoy ZATO. 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."

The City Court heard addresses by Mr Padva, Mr Khodorkovskiy, Mr Shmidt and Mr Shokhin. 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.

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) Decision of 22 September 2005

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. The City Court held that the Meshchanskiy District Court had jurisdiction to hear the case since at least some of the offences with which the applicant was charged had been committed in the Meshchanskiy District of Moscow. As to the merits of the case, the court of appeal upheld the main parts of the judgment by the Meshchanskiy District Court. Thus, in particular, 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.

At the same time 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 1999 was also time-barred. The City Court further found the applicant not guilty in respect of several episodes. Thus, the following charges were dismissed: non-compliance with the commercial court judgments in respect of Apatit and NIUIF, payment of taxes with promissory notes in 1999 and 2000, money transfers to Mr Gusinskiy's companies (the Most Bank episode). Finally, the City Court changed the legal classification of certain episodes with which the applicant had been charged.

As a result, the overall sentence was reduced to eight years' imprisonment. A reasoned decision was delivered by the court of appeal some time later.

10. Serving of the sentence by the applicant

(a) Placement of the applicant in FGU IK-10

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

On 10 October 2005, when the applicant's lawyers tried to visit him in the remand prison, the administration informed them that the applicant had been transferred to a penitentiary institution to serve his sentence.

On 12 October 2005 Ms Moskalenko and Ms Mikhailova, the applicant's lawyers, sent a telegram to the Director of the Federal Penitentiary Service (FSIN) requesting urgent information on the applicant's whereabouts.

On 14 October 2005 Mr Tagiev, the director of the detention facility, refused to provide Ms Mikhailova with information on the applicant's whereabouts. Mr Tagiev claimed that the applicant's relatives had been notified of this by post, and that such information could not be given to lawyers. On 17 October 2005 the applicant's lawyers sent a new letter to FSIN asking about the applicant's whereabouts.

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

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.

According to the applicant, penal colony no. 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

2 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 applicant's lawyers and family to gain access to him, and inevitably some of them were not seeing the applicant as much as they otherwise would. The applicant's lawyers described the journey as "very exhausting and debilitating". Mr Mkrtychev, 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 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 - 10°C, with a freezing and almost unbearable wind. On one of his later visits the temperature dropped to 41°C below freezing point. The short summer was equally oppressive, with blistering heat and swarms of mosquitoes.

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

On 9 January 2006 the defence lodged a complaint challenging the FSIN's decision to send the applicant to Krasnokamensk. They claimed that the decision was unlawful and arbitrary. In addition, the applicant's lawyers pointed out that Mr Lebedev had also been sent to a very remote region of the Russian Federation, in apparent disregard of the provisions of Russian law.

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 the convict; as a result, the applicant was among the five detainees who had been sent to the Chita Region.

On 6 April 2006 the Zamoskvoretskiy District Court of Moscow dismissed the applicant's claim and upheld the FSIN's decision as lawful and justified. On 13 June 2006 the Moscow City Court upheld that decision.

(b) The applicant's contacts with his lawyers

While in the Krasnokamensk colony the applicant continued to work with his lawyers. However, his contacts with his lawyers were seriously limited. Thus, at the beginning of his prison sentence the 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.

On 10 November 2005 Ms Terekhova, one of the applicant's lawyers, was denied access to the applicant. On 15 November 2005 the colony staff seized documents from Mr Mkrtychev. On 16 November 2005 Ms Levina was strip-searched by the colony staff when visiting the applicant. On 17 November 2005 Ms Khrunova was strip-searched. On 18 November 2005 Ms Terekhova was strip-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 strip-searched again.

From 29 November to 1 December 2005 the 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 applicant together but were not permitted to do so. Later the 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 applicant's lawyers access to him during working hours.

During the meetings with his lawyers the applicant was separated from them by a screen which ran from wall to wall and floor to ceiling. Such arrangements have only been introduced in the penal colony in question since the applicant's arrival. The applicant was not permitted to retain legal documents brought to him by his lawyers on legal visits. The 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 applicant was unable to work with lengthy documents, such as the present application.

In November 2005 the applicant's British lawyers, Mr Nicholas Blake and Mr Jonathan Glasson, asked permission to meet the applicant. In February 2006 they applied for a Russian visa.

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

(c) Disciplinary proceedings against the applicant

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

Thus, on 12 December 2005 the applicant left his working 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.

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 applicant and on 24 January 2006 the applicant received a second reprimand for keeping unauthorised printed materials. He was placed in a solitary confinement cell for five days.

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

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

On 13 April 2006 the applicant was the victim of a violent attack by another detainee, who was wielding a home-made knife.

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

On 3 June 2006 the applicant received a fourth reprimand. He was placed in the solitary confinement cell for ten days.

11. Parallel proceedings

(a) Proceedings against the applicant's lawyers

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

Thus, of nineteen lawyers acting for the applicant and associated cases, twelve have been the subject of disbarment proceedings (Ms Artyukhova, Mr Drel, Ms Moskalenko, Mr Shmidt, Mr Mkrtychev and others). Furthermore, in the course of the proceedings five lawyers have been subject to searches (for instance, Mr Drel and Mr Shmidt) and even to strip-searches (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.

The International Protection Centre, which Ms Moskalenko founded, has been subjected to a tax audit of the entirety of its activities.

Early in the morning of 23 September 2005, several hours after the appeal court had rendered its decision, Mr Amsterdam, one of the 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.

The question of harassment of the 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 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".

(b) New criminal case against the applicant and Mr Lebedev

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 applicant and Mr Lebedev were suspected of having misappropriated the profits arising from the output of the companies affiliated with Yukos.

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

(c) Extradition and legal assistance proceedings

Some of the applicant's 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.

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 applicant's trial had been politically motivated. 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".

12. Reaction of international organisations, NGOs and political figures

The applicant's 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 applicant and his colleagues. The applicant submitted documents to that effect.

In particular, the applicant referred to statements by several high governmental officials who either directly confirmed or supposed that the applicant 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.

The applicant strongly relied upon the evidence of Mr Kasyanov, the Russian Prime Minister at the time of the applicant's arrest and detention, given when he was called to testify at the applicant's second trial in May 2010 at the Khamovnicheskiy District Court in Moscow. In particular, Mr Kasyanov testified about his conversation with President Putin that took place on 11 July 2003, after the arrest of Mr Lebedev. According to Mr Kasyanov, Mr Putin told him that the applicant had provided funding not only to Yabloko and SPS political parties which he (Putin) had allowed them to support, but also to communists. Mr Putin was also angry that the applicant had been touring the regions and openly expressing his critical opinions about government policies during those tours. In the applicant's words, Mr Kasyanov's evidence supported that already given by Mr Dubov, a former Duma Deputy. 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.

Several international organisations expressed their concern about a possible political underpinning of the 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).

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 applicant was "a political prisoner".

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 applicant's 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 (now the German Federal Justice Minister) analysed the new trial as an example of a high profile case involving political motivation.

The case attracted the attention of former heads of States (see the letter sent on 15 November 2005 to President Putin by former Czech President V. Havel and several other former heads of States), and of the US Senate and House of Representatives (see US Senate Resolution 322 of 18 November 2005 and the resolutions of the US Senate and the House of Representative of 18 and 26 June 2009 respectively, which declared that the applicant had been denied basic due process rights for political reasons, and that he was subjected to selective prosecution, politicization, and abuse of process). Finally, in 2009 the US President Mr Obama said that it seemed odd to him that the "new charges, which appear to be a repackaging of the old charges, should be surfacing now, years after these two individuals have been in prison and as they become eligible for parole".

B. Relevant domestic law and practice

1. Jurisdiction over criminal cases

Article 32 of the CCrP (Code of Criminal Procedure of 2001) provides:

> "1. A criminal case must be heard by a court that exercises jurisdiction [on the territory] where the crime was committed, with the exceptions defined in Article 35 of this Code.
>
> 2. If a crime was begun in a place covered by the jurisdiction of one court, but completed in a place covered by the jurisdiction of another court, the criminal case must be tried in the court that exercises jurisdiction [over the territory] where the crime was finally completed.
>
> 3. If crimes have been committed in a number of places, the criminal case should be tried by the court that exercises jurisdiction in the location where most of the crimes were committed, or where the most serious of them was committed."

Article 35 of the CCrP provides that the venue [of a trial] can be changed at the request of a party to the proceedings if that party successfully challenge all the judges of a particular court. The venue can also be changed at the request of a party or by decision of the court's president if all the judges of a particular court have been previously involved in the examination of the same case on the merits. If some of the participants in the proceedings live outside the territory under the jurisdiction of a particular court, and all interested parties agree to change the venue, the president may order the transfer of the case to another court.

2. Jurisdiction of criminal court over civil disputes

Russian law permits a plaintiff to bring a civil claim for damages in the course of criminal proceedings. Under Article 31 (10) of the Code of Criminal Procedure, "jurisdiction over a civil claim arising from a criminal case is defined by the jurisdiction over the criminal case".

That rule did not always cover the situation of non-payment of taxes by a legal entity where the management of that entity was found guilty of tax evasion. Such a situation was analysed by the Supreme Court in the case of *I. and K.*, summarised in the Bulletin of the Supreme Court, 2001, No. 8. In that case the Supreme Court held that since the payers of corporate taxes were legal entities, there was no legal justification for recovering the amounts of non-paid taxes and penalties from private individuals who had been convicted for a breach of Article 199 of the RF Criminal Code (corporate tax evasion). The Supreme Court noted, furthermore, that those individuals had not appropriated the amounts which were unpaid in taxes.

On 9 October 2002 the Moscow Regional Court in its report "On the results of examination of criminal cases in the economics sphere by the courts of the Moscow Region in 2000 and the first half of 2001" found:

> "Under Article 55 of the [former] Code of Criminal Procedure, 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 a citizen 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, a citizen 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 taxes 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 RF Criminal Code (corporate tax evasion), from the personal funds of a private individual convicted under that Article, has no basis in law".

3. Withdrawal of a judge

Articles 61–63 of the CCrP describe 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 (for example, as a representative of a party, as a witness, etc.), 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. However, there are no rules governing the participation of the same judge in different, yet related, criminal cases.

4. Confidentiality of lawyer-client contacts in prison

The Pre-trial Detention 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, substance, or food stuff" or to give him "information which may obstruct the establishment of truth in the criminal case or facilitate criminal acts".

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 Pre-trial Detention Act was routinely interpreted by the prison authorities as allowing the former to seize and inspect correspondence between a detainee and his lawyer.

Section 34 of the Pre-trial Detention Act provides:

> "Where there are sufficient reasons to suspect that a person entering or leaving the prison is carrying prohibited objects, substances [or] food stuff, 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."

The Internal Regulations for Remand Prisons, introduced by Decree no. 189 of the Ministry of Justice of 14 October 2005, contained section 146, which established 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).

On 29 November 2010 the Constitutional Court of the Russian Federation interpreted the above provisions of the Pre-trial Detention 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 be proportionate to it. Legitimate aims may include preventing further criminal activity by the accused and preventing him from putting 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, can be checked by the prison administration.

5. Expert witnesses

The CCrP (Articles 57 and 58) distinguishes between two types of expert witnesses: "experts" [*experty*] and "specialists" [*spetsialisty*]. Their role in the proceedings is sometimes very similar, albeit not absolutely identical. Whereas the "experts" are often engaged in making complex forensic examinations prior to the trial (for example, dactyloscopic or medical examinations), a "specialist" is summoned to help the prosecution or court in handling technical equipment, understanding the results of expert examinations, assessing the methods employed by the "experts", their qualifications, etc.

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".

Article 58 (2) of the CCrP stipulates the rights that the specialist has in the proceedings, as well as his or her obligations.

Article 270 of the CCrP provides that the presiding judge shall explain to the specialist his or her rights and responsibilities before questioning.

6. Collecting of evidence by the defence

Under Article 53 (1) 3 of the CCrP the defence lawyer has the right to engage a specialist in accordance with Article 58 of the CCrP.

Article 86 of the CCrP defines the rights of the defence in the process of collecting evidence:

> "3. Defenders are entitled to collect evidence by the following means:
>
> (1) obtaining items, documents and other information;
>
> (2) questioning of persons with their consent;
>
> (3) requesting certificates, letters of reference and other documents from the state and local authorities, public associations and organisations, which are obliged to provide the documents requested or copies thereof".

7. Regime of detention of convicted criminals

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.

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.

COMPLAINTS

A. Complaints under Article 3 of the Convention

Under Article 3 of the Convention the applicant complained that his criminal prosecution had been humiliating because of its political motivation. Further, the applicant asserted that the decision to send him to serve his sentence in Krasnokamensk was deliberately symbolic and was intended to humiliate him.

The applicant also complained that the conditions in the courtroom had been degrading. He was kept in a small iron cage, where he had to sit for long hours on a wooden bench. Exposed to onlookers, he had to instruct his lawyers through the bars. For the eleven months of the trial, whenever the applicant was in court he was fully exposed to the public in a cage. Whenever the applicant left the cage he was handcuffed to guards. On court days the applicant received only dry food, no exercise and no fresh air.

B. Complaints under Article 6 of the Convention

The applicant submitted that he had been denied a "fair hearing", contrary to Article 6 §§ 1 and 3 of the Convention. His complaints may be summarised as follows.

1. Tribunal not established by law

(a) As to the criminal charges against the applicant

Under Article 6 § 1 the applicant complained that the Meshchanskiy District Court had not had jurisdiction under the CCrP to try the criminal case against him, and, therefore, had not been a "tribunal established by law". The decision by the GPO to transfer the case to that court had been taken arbitrarily.

(b) As to the tax authorities' civil claims

Further, the Meshchanskiy District Court did not have jurisdiction to hear the civil claim for damages and fines brought by the Russian Ministry of Taxes and the Tax Inspectorate. Under the applicable domestic law, there was no jurisdiction for a criminal court to make an award of damages against an individual in relation to corporate tax evasion matters.

2. Lack of impartiality and independence

Under the same Convention provision the applicant complained that he had not been tried before an independent and impartial tribunal. In the first place, a series of procedural decisions taken by the Meshchanskiy District Court, in particular as regards unjustified extensions of the applicant's detention, failure to provide him with adequate time and facilities to study the case file and prepare his defence, the unfair administration of evidence, the numerous inaccuracies in the hearing record etc., showed the court's bias against the applicant. Further, the judge's previous involvement in the case of Mr Shakhnovskiy also cast doubt on her impartiality. Finally, the court was subjected to pressure from the GPO. Throughout the trial, Judge Kolesnikova was under investigation by the Regional Prosecutor for an allegation that she had assisted her relatives to acquire property under dubious circumstances. Senior officials from the GPO exerted indirect pressure on the court by making public statements implying the applicant's guilt.

3. Breach of the presumption of innocence

(a) Metal cage issue

Under Article 6 § 2 of the Convention the applicant complained that throughout the trial he had been held behind bars in an iron cage in the courtroom, whereas neither he nor Mr Lebedev had been accused of any crimes of violence. Being tried whilst caged was a means of portraying the applicant to the public as a common criminal, contrary to the presumption of innocence.

(b) Statements by the GPO officials

Under the same Convention provision the applicant further complained that senior officials from the GPO had made public comments before and during the trial that had been highly prejudicial and biased and which had been contrary to the presumption of innocence.

4. Lack of adequate time and facilities

Under Article 6 §§ 1 and 3 (b) the applicant complained that he had lacked adequate time to prepare his defence. He faced trial on a complex indictment alleging economic and taxation crimes over the previous ten years, with a vast mass of material relied on by the State of which he had had no notice prior to his arrest and detention. Further, the applicant had to counter the civil claims related to the alleged failure to pay taxes by the companies he controlled. Even at a rate of studying 200 pages per day and giving instructions on them, this suggested that, in the best of circumstances, a period of over 275 days was needed by the applicant for

studying the prosecution case, not allowing for any rest days or consideration of defence evidence. Instead the court deemed that 100 days in conditions totally unsuitable for effective preparation was adequate time. There was no suggestion by the prosecutor or the courts that the applicant was deliberately delaying the proceedings.

Immediately after his case had been joined with that of Mr Lebedev, the applicant was given wholly insufficient time to consider the additional 165 volumes of evidence with which he was served.

When the defence began to present their case the Meshchanskiy District Court changed the trial arrangements so that it sat one and a half hours earlier and, at the end of 2004, the court eliminated the Wednesday recess: both decisions considerably restricted the ability of the applicant to give confidential instructions to his lawyers and prepare his defence.

Under the same Convention provision the applicant further complained that he had been denied adequate facilities for the preparation of his defence. To prepare effectively for a trial of such magnitude the applicant ought to have been released from detention (for example, on strict terms of house arrest). If not released from pre-trial detention, he needed facilities in prison, including the ability to keep all of the case materials with him, to study the materials at his own leisure and timing, to make notes arising from the case materials, to be able to pass written and oral information to his lawyers, and to have time to prepare adequately for his trial before it began.

The applicant finally complained that the hearing of his appeal to the Moscow City Court was improperly expedited, thereby denying the defence adequate time to prepare.

5. Breach of lawyer-client confidentiality

Under Article 6 §§ 1 and 3 (b) and (c) the applicant complained that his confidential contacts with his lawyers had been seriously hindered. Thus, on 9 October 2003 the offices of Mr Drel were searched, although the investigators knew that they were searching in premises occupied by the applicant's lawyer. On 25 October 2003 (the same date as the applicant was arrested) Mr Drel was summoned for questioning.

During visits to the detention facility the lawyers' confidential documents were examined by officers of the facility, both before entry into the investigation room and on exit from it, and on several occasions were seized. Thus, the applicant's lawyers (Ms Artyukhova and Mr Shmidt) had documents seized from them after a visit to the applicant. The seized documents were adversely (and wrongly) construed by the authorities and used to justify the applicant's pre-trial detention and the request for the disbarment of Mr Shmidt. In fact none of the seized documents were in the applicant's handwriting and none contained anything remotely improper.

The applicant's lawyers were also convinced that their consultations with the applicant in the detention facility were subject to eavesdropping by the

authorities, since they were always obliged to use the same consultation room, even if other rooms were free.

The applicant was entirely unable to have confidential discussions with his lawyers during the trial itself. His lawyers were ordered to stand at a distance of one metre from the cage in which the applicant was kept, although he was not violent and had never attempted to escape. The court also insisted that any documents passed to the applicant had first to be inspected by the court itself.

6. Unfair taking and examination of evidence

Under Article 6 §§ 1 and 3 (d) the applicant complained that the manner in which the prosecution and the court had administered evidence had been fundamentally unfair and against the principle of equality of arms, enshrined in Article 6 § 1 of the Convention. His complaints in that respect can be summarised as follows:

(a) Inability to examine expert witnesses

The court refused to call for questioning a number of key witnesses for the prosecution, namely Mr Shulgin, Mr Yeloyan, Mr Kuprianov and others. Further, the court unfairly limited the questioning of witnesses for the defence, namely Mr Schekin, Mr Semenov, Mr Bochko and others. In the course of the proceedings the judge put pressure on the witnesses so that they would confirm their earlier written statements, made to the prosecution before the trial.

(b) Reliance on inadmissible evidence from the prosecution

The court admitted evidence that had been obtained by the prosecution in breach of the domestic law and in an unfair manner. Thus, the court admitted materials obtained through an unlawful search of a lawyer's office; material obtained through an unlawful search of the house and offices of a Duma deputy; data obtained from a computer, where there was a strong suggestion that additional materials, not originally contained in the computer, had been planted by those carrying out the seizure; documents seized during searches which had been carried out with gross procedural violations and in complete disorder.

(c) Reliance on written testimonies

The prosecution and then the court repeatedly relied on pre-trial interrogations as opposed to oral testimony given at the trial by the witnesses. That was unfair and undermined the purpose of a public trial in the presence of the accused. Further, the only purpose of this approach seemed to be to intimidate the witnesses and apply pressure so that their testimony merely consisted in confirmation of their pre-trial statements.

(d) Exclusion of evidence produced by the defence

Having permitted the prosecution to rely on expert evidence, the court then ruled that all of the expert reports submitted by the defence were inadmissible. The distinction in treatment between the prosecution and the defence was unfair. The expert reports were both relevant and admissible as evidence: relevant – because they touched upon the central issue of fact at the trial, namely whether the state was applying a novel interpretation of financial laws, and admissible – because none of the reasons adduced by the court for their inadmissibility was valid.

Two broad categories of reasons were advanced by the court for refusing to accept the reports by the expert witnesses for the defence. Either the court decided that there was no basis under the CCrP for the defence to commission expert evidence in principle; or the court raised various technical objections to the reports themselves.

As to the first ground for inadmissibility, the applicant claimed that Russian law expressly permitted defence lawyers to collect evidence, including expert opinions.

As to the "technical objections", the Meshchanskiy District Court also asserted that the experts had improperly offered commentary on legal issues and that the offering of such expert commentary was not provided for in the CCrP. However, 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 would be offered to the court to determine whether the acts or omissions complained of complied with applicable financial practice at the relevant time. Such testimony did not usurp the court's ultimate function of evaluating all of the evidence.

The court had also referred to the fact that the experts had not been provided with certified copies of the case materials, and that therefore their conclusions could not be relied upon. However, the defence lawyers all attested that the copies provided to the experts were accurate and complete and the court made no finding to the contrary. Further, as regards Mr Grechishkin's report, the applicant had twice applied for the documents in the case file to be provided to Mr Grechishkin so that he could compare them with the documents he had worked on and confirm that they were identical. However, the court did not provide the defence with such an opportunity.

The Meshchanskiy District Court decided that the expert testimony of Dr Petrova and Prof. Lubenchenko should be excluded because these experts had been engaged by the applicant's relatives. However, there was no basis for such a decision in the CCrP. Moreover, even if such a requirement existed it would make no sense in this case, where the court had frozen the assets of the applicant and he was detained. The court offered no explanation as to why it was acceptable for the applicant's relatives to hire the applicant's lawyers but not the experts those lawyers wished to call.

The court also noted that the specialists had not been duly informed about their rights and obligations. However, it was the court itself which explained to each expert his rights at the start of their testimony in accordance with Article 270 of the CCrP, a fact which was omitted from the judgment but was apparent from the trial record. Further there was no suggestion that the experts were unaware of their duties when they prepared their reports.

The court stated that one of the grounds for excluding the expert testimony of Dr Shchekin was that he had represented Yukos in the commercial courts. However, the court offered no basis for why Dr Shchekin's prior role in the Yukos case was such that his evidence was inadmissible *per se*. If the court had reason to doubt the impartiality of the evidence offered, that was a matter that concerned the weight of the evidence rather than whether it should be received at all.

Finally, the court unfairly refused to admit other documentary evidence which was relevant to the applicant's defence. Thus, in particular, the court excluded the reports from Ernst & Young, PriceWaterhouseCoopers and the Russian Academy of Sciences on the ground they could not be regarded as expert reports and so were inadmissible. After the court's ruling the defence made a further application on the basis that the reports came within the category of "other documents" within Articles 74 part 2 § 6 and 84 of the CCrP; however, the court also rejected that application.

(e) Refusal to disclose exculpatory material

The applicant complained that certain important material collected by the prosecution in the course of the pre-trial investigation had not been included in the materials of the case. This included a report by the Russian Academy of Sciences on the investment programme in Lesnoy; an expert report commissioned by the prosecutor, referred to in the decree by First Deputy General Prosecutor Biryukov, which had concluded that no losses were caused to the federal and municipal budgets by the granting of tax privileges and the payment of taxes by promissory notes; it also concerned the correspondence between President Putin, Prime Minister Kasyanov and General Prosecutor Ustinov in 2003 concerning the Apatit acquisition.

(f) Intimidation of witnesses and parallel proceedings

The applicant complained that the prosecution had intimidated witnesses. The prosecution did so by questioning witnesses outside court after the pre-trial investigation had been closed, and sometimes a few days before their questioning by the court. The prosecution claimed that this had been done in connection with other criminal cases which also concerned the business activities of the applicant's companies. However, the applicant had no information either about those investigations or about the subject-matter of the interviews carried out by the prosecution. In the applicant's view such

questioning was an abuse of process, in that the prosecution conducted more than one investigation into essentially the same alleged misconduct.

7. No effective appeal

The applicant complained that he had not enjoyed the right to effective appeal proceedings, guaranteed by Article 2 of Protocol No. 7 and implied in Article 6 of the Convention.

Thus, the Meshchanskiy District Court deliberately failed to keep an accurate record of its proceedings and then failed to remedy the errors in the trial record, rejecting the applicant's objections to the trial record, based on audio recordings of the trial, on wholly unreasonably grounds. The Meshchanskiy Court thereby hindered any effective appeal.

Further, the defence was given wholly insufficient time and facilities for challenging the accuracy of the trial record and preparing for the appeal. The applicant was regularly denied access to his lawyers and he was unable to review the trial record in the time available and in the cramped conditions of his cell. Furthermore, the copy of the trial record he received was incomplete.

The date of the appeal hearing was set by the first-instance court, which had no jurisdiction to do so. Under Russian law the date of the appeal hearing should have been set by the court of appeal itself.

The appeal was so expedited and summarily dealt with as to be fundamentally unfair. There was no genuine public interest in speeding up the appeal proceedings. The appeal was expedited to prevent the applicant from standing as a candidate for the State Duma, to strip his company of assets and to avoid the expiration of statutory time-limits in respect of some of the charges against the applicant.

C. Complaints under Article 7 of the Convention

The applicant was charged with corporate tax evasion under legislation that failed to identify with precision and certainty what conduct was regarded as criminal at the time it took place. Central to all but one of the charges against the applicant was the concept of a "paper" company, a new concept that had never previously been deployed in criminal proceedings.

The GPO asserted that the transactions involving "paper" companies amounted to "tax evasion". They relied on the motive behind the use of the tax-avoidance scheme. However, such an understanding of "tax evasion" was new and unknown at the relevant time. At the time when the trading companies were operating, the Criminal Code did not penalise the use of "tax minimisation schemes" if trading companies performed particular functions or were established in fiscally advantageous locations. In fact, the trading companies were not "bogus", since they were legal entities, were founded and registered in compliance with company law, were registered

with the tax authorities, owned property, engaged in commercial activities and paid taxes.

Further, payment of taxes by promissory notes was not criminal at the time when these events took place. The laws in relation to tax evasion failed to distinguish clearly, or at all, between the legitimate activity of tax avoidance and the illegitimate one of fraudulent "tax evasion".

Despite that, the court refused to admit or disregarded all evidence produced by the applicant to prove that the offences imputed to him had not been "criminal" at the relevant time.

D. Complaint under Article 8 of the Convention

The applicant complained that the decision to send him to serve his sentence in a remote colony in Krasnokamensk, some 6,900 kilometres from Moscow, to which transport routes were so difficult and tenuous, was contrary to Article 8 of the Convention. According to the applicant, FGU IK-10 was one of the most remote colonies from Moscow. Only 8 out of the then 88 Russian Federation constituent areas had penal institutions located further from Moscow than FGU IK-10. The time difference between Moscow and the penal colony was 6 hours. Travelling to the penal colony from Moscow required a six-hour airplane journey to the nearest city, Chita. It took a further 15 hours by train to travel from Chita to Krasnokamensk.

According to the applicant, the decision to place him in that colony seriously limited his contacts with his family. Thus, the applicant has been unable to receive any short visits from his wife, who resides in Moscow. The detainees were normally allowed four "long" (three-day) family visits and six "short" (four-hour) visits per year. However, it has not been possible for the applicant to make use of the "short" visit system. His family would have to travel 7,000 km in order to see him for a few hours at most. On account of the demanding nature of the journey, as well as their educational commitments, his young twin sons have been unable to visit him in Krasnokamensk at all. The applicant's wife had to leave her children in Moscow for several days at a time when she visited him. The applicant has been unable to receive visits from his elderly father, whose age and state of health have prevented him from travelling by plane.

Furthermore, the regime for family visits at Krasnokamensk was not suitable for prisoners with children. During "long" visits the families were locked in a building for the entire three days. No one was permitted to leave the building during that time, even to go outside for fresh air. There was very little to keep children occupied.

Finally, the applicant's telephone contact with his family has been minimal because it was only possible to make outgoing calls from the colony to telephone numbers within Krasnokamensk itself. Thus, he was

unable to call his family by telephone and they were only able to phone him by prior arrangement.

The applicant's ability to consult with his senior trial lawyers was also severely compromised. His correspondence was delayed. In sum, assigning him to such a place to serve his sentence was not in conformity with domestic law and was manifestly disproportionate.

E. Complaint about the outcome of the civil dispute

The applicant complained under Article 6 § 1 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. This was against the law and fundamental principles of justice.

F. Complaint under Article 18 of the Convention

The applicant alleged that his arrest, detention, trial, conviction, sentencing and imprisonment in Siberia had been politically motivated and that his rights to a fair trial and respect for his private and family life had similarly been improperly restricted for an extraneous purpose, contrary to Article 18 in conjunction with Articles 5, 6, 7 and 8.

G. Complaint under Article 34 of the Convention

The applicant complained that his access to the Court had been severely and unfairly restricted. In particular, access to the applicant's lawyers was especially restricted in the period leading up to the expiry of the six-month deadline for submitting his claim with regard to violation of his right to a fair trial; the authorities had refused to implement a Supreme Court decision allowing the applicant access to lawyers during working hours; it had not been possible to provide a copy of the present application in draft to the applicant to consider in his own time; four of the five lawyers instructed by the applicant to advise him in relation to his ECHR claim had been hindered in obtaining access to the applicant; and the applicant's two Russian lawyers, Mr Drel and Ms Moskalenko, had been subject to intimidatory actions by the State. Both had been threatened with disbarment and the International Protection Centre, which Ms Moskalenko founded, had been subjected to a tax audit of the entirety of its work.

THE LAW

A. Complaints under Article 3 of the Convention

1. Under Article 3 of the Convention the applicant complained that he had been convicted and then sent to Siberia for political reasons. In his view, this was humiliating, and thus degrading treatment prohibited under Article 3, which provides:

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

The Court points out that the complaints concerning the applicant's prosecution for political reasons and his placement in Siberia will be examined separately below. As far as Article 3 is concerned, the issue to which the applicant refers in this part of his application does not fall under that provision. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. The applicant further complained about the conditions in which he had been detained in the courtroom, referring to Article 3 of the Convention, cited above. The Court notes that this complaint has already been addressed in substance in the first case lodged by the applicant (*Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011), where the Court found that those conditions were degrading. It follows that this complaint is essentially the same as the matter that has already been examined earlier and must be rejected pursuant to Article 34 §§ 2 (b) and 4 of the Convention.

B. Complaints under Article 6 of the Convention

1. Tribunal not established by law

(a) As to the criminal charges against the applicant

3. The applicant complained that the Meshchanskiy District Court had no jurisdiction to try his criminal case. He referred in this respect to Article 6 § 1 of the Convention, which provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing by ... tribunal established by law."

The Court reiterates its findings in the admissibility decision in the case of *Lebedev v. Russia (no. 2)*, no. 13772/05, 27 May 2010, where it found that the "given the specific character and complexity of the charges against the applicant, the issue of venue was not obvious. It largely depended not only on the interpretation of the applicable domestic law, but also on the establishment of facts. In both respects the domestic courts were in a better

position than this Court. The Court also notes that the appellate court (the Moscow City Court) unequivocally rejected the applicant's complaint in this respect and decided that the Meshchanskiy City Court had had jurisdiction to hear the case because most of the alleged offences had been committed within that court's territorial jurisdiction. Finally, the applicant himself did not specify what court should have had jurisdiction to hear his case. In such circumstances the Court would prefer to defer to the national judge and consider that the Meshchanskiy District Court was a court "established by law" under Article 6 § 1" (§ 229). The Court has no reason not to follow this approach in the present case. It thus considers that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

(b) As to the tax authorities' civil claims

4. Under the same provision of the Convention the applicant complained that the Meshchanskiy District Court had no jurisdiction to hear the civil claim for damages and fines brought by the tax authorities. In addition, the applicant claimed that the same amounts of taxes were recovered twice: from him and from Yukos.

The Government claimed that the applicant's reference to the case of *I. and K*., summarised in the Bulletin of the Supreme Court of the RF, 2001, No. 8., was irrelevant. That case had been adopted under the provisions of the old CCrP, whereas the applicant's case had been examined under the new CCrP. Further, in view of the changes to the tax legislation and criminal law the Supreme Court's decision referred above was obsolete. Under Article 31 of the Criminal Procedure Code the jurisdiction over the civil claim related to a criminal case is defined by jurisdiction over the criminal case. In addition, the case-law has developed since the judgment in the case of *I. and K*.

The Government further noted that the law applicable during the applicant's trial made the examination of the tax claim dependent upon resolution of the criminal case. As a matter of principle, tax claims related to corporate taxation are brought against corporate taxpayers; however, where the corporate taxpayer has insufficient assets to satisfy the claim, where the legal-entity defendant is liquidated or undergoes a change in ownership, the tax authority may turn to the person responsible for the tax evasion who bears subsidiary liability together with the corporate taxpayer. In the applicant's case, it had been impossible to recover tax payments from the sham entities involved in the transactions imputed to the applicant; therefore, the Tax Service recovered the taxes and fines due directly from the applicant.

The applicant argued that reference to the case of *I. and K.* was relevant, that it had never been overruled. The provisions of the new Code had not altered the basis for the Supreme Court's findings. The Supreme Court's

judgment in *I. and K.,* which was in force at the time when the civil damages award was made, clearly established that the court did not have jurisdiction to make an award of damages against an individual in relation to corporate tax evasion matters. The principles set out in *I. and K.* had been applied by the Moscow Regional Court on 9 October 2002, where that court held that "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 ... under Article 199 of the Russian Criminal Code (corporate tax evasion), from the personal funds of a private individual convicted under this Article, has no basis in law".

The applicant further noted that on 26 May 2004 the Commercial Court of Moscow delivered a judgment in the case brought by the Russian Tax Ministry against Yukos. *Inter alia,* that claim related to the alleged non-payment of taxes by the ZATO trading companies. Thus, even before the start of the applicant's trial, the civil plaintiff - the Russian Tax Ministry - had recovered damages in relation to the allegedly unpaid taxes. The Meshchanskiy District Court could not have been unaware of that fact. During the trial, however, the Meshchanskiy District Court refused to admit tax authority documents which demonstrated that the alleged tax arrears of the ZATO trading companies had already been collected from Yukos in the tax proceedings before the Commercial Court of Moscow. In its judgment the Meshchanskiy District Court did not address the jurisdiction issue but simply granted the civil claim in full. At the appeal stage the Moscow City Court did not consider the question of jurisdiction either, although the *I. and K.* decision had been cited by the defence in their brief of appeal. Nor did it give any reason for rejecting the argument that the civil damages claim should have been refused as the alleged damage to the State had already been recovered in the proceedings brought by the civil plaintiff (tax authorities) against Yukos. The City Court found that the damages were to be collected from the applicant and from Mr Lebedev, as trying to recover the unpaid tax from the ZATO trading companies would "not repair the damage to the State".

The applicant concluded that the Meshchanskiy District Court, having overstepped the limits of its jurisdiction as clearly laid down by the Supreme Court in *I. and K*, could not be considered a "tribunal established by law" within the meaning of Article 6 § 1 of the Convention.

The Court observes that the above complaint can be divided into two distinct questions: first, whether the Meshchanskiy District Court had jurisdiction to examine the pecuniary claims of the Tax Ministry against the applicant, and, second, whether the Tax Ministry obtained the same amount of unpaid taxes and penalties twice: in the criminal case, from the applicant personally, and from Yukos in the civil case in the proceedings before the

Commercial Court of Moscow. The second question should be examined under Article 1 of Protocol No. 1 to the Convention, since it concerns the applicant's pecuniary rights, a possible "piercing of the corporate veil" in such cases and the outcome of the tax claims in both sets of proceedings. The Court will turn to this aspect of the case later.

As to the first question, concerning the proper venue for the determination of tax claims, the Court reiterates that the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society [does] not depend on the discretion of the Executive, but that it [is] regulated by law emanating from Parliament" (see *Zand v. Austria*, application no. 7360/76, Commission's report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80). Nor can the organisation of the judicial system be left to the discretion of the judicial (let alone prosecution) authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation (see *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 98, ECHR 2000-VII). The Court notes that the Russian Code of Criminal Procedure, namely its Article 31(10), established in clear terms that a criminal court which examines charges against the accused is competent to examine, at the same time, pecuniary claims of the injured party against the accused arising from the alleged crime (tax evasion *in casu*). The Russian courts considered that the Meshchanskiy District Court had had competence to examine such claims by the tax authority (the injured party); whatever the substantive findings of the Russian courts might have been, the Court does not consider that the Meshchanskiy District Court was *a priori* not a proper forum for examining the tax authority's claim against the applicant. The Court concludes that in so far as pecuniary claims against the applicant are concerned, they were examined by a "tribunal established by law" within the strict meaning of this concept. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Lack of impartiality and independence

5. The applicant complained that Judge Kolesnikova had not been impartial. The applicant referred to Article 6 § 1 which, insofar 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"

The Government submitted several objections to this complaint, both formal and substantial. First, the Government indicated that the judgment in the case of Mr Shakhnovskiy had been delivered on 4 February 2004, whereas the application form in the present case had been lodged on

16 March 2006, i.e. some two years later. The Government concluded that the applicant had missed the six-month time-limit set out in Article 35 § 1 of the Convention.

Further, the applicant never tried to obtain compensation for the damage caused to his reputation by the statements contained in the Shakhnovskiy judgment. Neither did he bring criminal proceedings for libel. The Government concluded that the applicant had failed to exhaust domestic remedies, as required by the same Convention provision.

On the substance the Government claimed that the applicant's allegations about Judge Kolesnikova's partiality were unsubstantiated. The Government emphasised that Judge Kolesnikova had not been in a situation which might have caused doubt in her impartiality, as provided by Articles 61–63 of the Russian 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. None of the procedural decisions taken by her during the trial contained anything which could have been reasonably interpreted as a declaration of the applicant's 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 before the delivery of the judgment. Further, she was one judge out of three, and the applicant 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.

Further, the applicant did not specify what particular part of the judgment in Mr Shakhnovskiy's case was prejudicial for his presumption of innocence. The applicant's name was mentioned in the Shakhnovskiy judgment only once, *en passant*, where the District Court described a note written by witness K. to the applicant and to Mr Aleksanyan, the then head of the legal department of Yukos. The crimes of which Mr Shakhnovskiy had been found guilty had been committed by him alone and did not contain, as a qualifying element, the element of an "organised group". Therefore, that judgment could not be construed as implicating the applicant 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. That showed, in the Government's opinion, that Judge Kolesnikova had no predisposition against Yukos managers.

The applicant maintained that the defence had complained about the lack of impartiality of Judge Kolesnikova in the motion in March 2005 to recuse the judges. The applicant had also complained about Judge Kolesnikova's participation in the Shakhnovskiy trial in his appeal to the Moscow City Court, which was heard on 22 September 2005. Time for the purposes of Article 35 § 1 of the Convention runs from the dismissal of the applicant's

appeal (that is, 22 September 2005). As this application was lodged with the European Court on 16 March 2006 the claim is within the six-month time-limit.

On the substance the applicant argued that it was not merely the case that Judge Kolesnikova took decisions that were "unfavourable to the applicant": she had unlawfully ordered on her own initiative that the applicant should be kept in prison when she had been first assigned the case and thereafter was persistently biased and unfair towards the applicant. Further, on 23 June 2004 Judge Kolesnikova granted the applicant only 22 working days to study 165 volumes of the materials in the case file. During the trial Judge Kolesnikova made innumerable decisions adverse to the applicant, for example, 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 applicant during the lunchtime adjournment. 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. That order was made without any notice to the applicant and on the court's own motion. The overwhelming effect was the clear impression that the District Court's presiding judge was biased against the applicant.

The applicant emphasised that Judge Kolesnikova had made findings of fact in the Shakhnovskiy case. She had not been a judge sitting with a jury, where the jury then determined the facts in relation to the charges that had been brought. Moreover, Judge Kolesnikova made a series of findings in Shakhnovskiy's trial as to the admissibility of evidence that had been unlawfully seized and which was similarly relied upon in the applicant's trial. In the applicant's trial Judge Kolesnikova once more refused to exclude that evidence as inadmissible. Further, the trial of Mr Shakhnovskiy in February 2004 was the first example of the improper splitting of the myriad cases which have been established by the GPO to investigate the applicant and the other Yukos cases.

In the applicant's words, it was true that the Shakhnovskiy judgment mostly referred to the applicant's co-accused, Mr Lebedev, as an accomplice of Mr Shakhnovskiy, and mentioned the applicant directly only once. However, the passage from the judgment where the applicant's name had been mentioned clearly indicated that Judge Kolesnikova concluded that the applicant had been somehow involved in a scheme to evade insurance and tax contributions. In addition, the cases of the applicant and Mr Lebedev were joined, so the fairness of the resulting trial was prejudiced

by the fact that Judge Kolesnikova had already made a finding of criminal conduct in respect of Mr Lebedev in the context of the Shakhnovskiy trial. 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.

The applicant noted that the Government did not dispute the fact, set out in the Court's Statement of Facts, that throughout the trial the Regional Prosecutor had been conducting inquiries into an allegation that Judge Kolesnikova had assisted her relatives to acquire property under dubious circumstances.

The Court considers that insofar as the applicant complained under Article 6 § 1 of the Convention about the alleged bias of Judge Kolesnikova in the applicant's own trial, the appeal against the judgment of 16 May 2005 was, in the Court's opinion, an effective legal remedy. The court of appeal had power to examine the question of the trial court judge's alleged bias and order a retrial, if those allegations were well-founded. The application was introduced within the six-month time-limit from the date of the appeal court decision of 22 September 2005.

As to the civil-law remedies and libel complaints, referred to by the Government as alternative legal avenues for the applicant, the Court notes that such remedies, at least on an arguable basis, might have protected the applicant's reputation from premature statements about his guilt. However, they were not capable of removing Judge Kolesnikova from the applicant's trial. The Government's objection should therefore be rejected.

As to the substance of the complaint, the Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established.

3. Breach of the presumption of innocence

(a) Metal cage issue

6. The applicant complained, referring to Article 6 § 2 of the Convention, that having been tried whilst caged was a mean of portraying him to the public as a common criminal, contrary to the presumption of innocence. Article 6 § 2 provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"

The Government argued that the applicant's placement behind bars in the courtroom had not been aimed at demonstrating his guilt. Trying the

applicant in an iron cage was compatible both with domestic and international legal norms. Such arrangements were necessary to secure the safety of other participants of the trial, and of the applicant himself, to guarantee order in the courtroom, to exclude the risk of fleeing or putting pressure on witnesses, and to limit the movements of the accused within the courtroom. Such measures did limit the applicant's freedom, but they were inevitable and perfectly normal in the context of criminal prosecution in Russia. The applicant was in exactly the same position as any other accused who stood trial and who had been detained pursuant to a court order. The Government claimed that it was a less restrictive measure than, for example, handcuffing, which had been found by the Court to be a practice contrary to Article 3 of the Convention in the case of *Gorodnitchev v. Russia*, no. 52058/99, §§ 103 et seq., 24 May 2007).

The applicant argued that there was no basis whatsoever for the assertion that he had been kept caged to protect himself or others. The Government did not state from whom or from what the applicant could have required protection; nor had he required protection on his own behalf. The applicant had in fact been handcuffed whenever he had been brought into the courtroom and placed in the iron cage. The Government submitted no evidence in support of their assertion that the measure was necessary so as to prevent the applicant from absconding, influencing witnesses or impeding the trial. The appearance of the applicant caged in such circumstances undermined the presumption of innocence.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established.

(b) Statements by the GPO officials

7. The applicant further complained, under the same Convention provision, that statements of several high-ranking prosecution officials had breached his presumption of innocence.

The Government submitted a formal objection against the admissibility of this complaint. They indicated that the impugned statements had been made in 2003 and in March-July 2004, whereas the application form was lodged with the Court on 16 March 2005. Therefore, the applicant had missed the six-month time-limit provided by Article 35 § 1 of the Convention. Alternatively, the applicant might have brought civil proceedings against the officials claiming damages for the prejudice to his reputation, or might have instituted criminal proceedings against them for libel. The applicant had not done anything; therefore, he had failed to exhaust domestic remedies.

The applicant claimed that his complaint was not time-barred. On 9 November 2004 the defence had submitted a petition to the Meshchanskiy District Court to issue an interlocutory ruling in respect of the comments of the First Deputy General Prosecutor, Mr Biryukov. The District Court rejected the petition. Furthermore, in his brief of appeal he complained, *inter alia*, about the prejudicial remarks of senior figures by the GPO which violated the presumption of innocence. The appeal was dismissed on 22 September 2005 and this application was lodged with the European Court on 16 March 2006, so the claim is within the six-month time-limit.

The parties also made submissions on the substance of this complaint. However, the Court does not need to examine them in detail since this complaint is in any event inadmissible, for the reasons explained below.

The Court observes that the applicant did not deny that he had introduced his complaint about the impugned statements of public officials more than six months after they had been made, and, in so far as the statement by Mr Biryukov is concerned, more than six months after the interlocutory ruling had been issued. The applicant also admitted that he had never initiated any other separate proceedings, civil or criminal, in respect of those statements. However, he raised the issue in the brief of appeal in his own criminal case, which he considered to be an effective remedy. The Court reiterates that in the *Lebedev-2* case it held as follows (§ 256):

> "The Court notes that, unlike Judge Kolesnikova, the prosecution officials were not protected by judicial immunity. Therefore, their statements could have been challenged before a court within separate court proceedings (civil or criminal, by way of a defamation complaint), at least in theory. However, it is unclear what sort of civil suit or criminal complaint the applicant had to use in order to defend his rights under Article 6 § 2 of the Convention. Further, it is questionable whether any legal action of that kind would have had any prospect of success, since the criminal proceedings against the applicant were still pending and the applicant's guilt was ultimately confirmed by the final judgment (see in this respect the facts of the case of *Khuzhin and Others v. Russia*, no. 13470/02, §§ 1 et seq., 23 October 2008). The Government did not submit any information about the state of the Russian courts' practice in that area. In these circumstances the Court is unable to accept the Government's argument that a separate civil suit or a defamation complaint were remedies to be exhausted. On the other hand, the appeal in the applicant's own criminal case, where he was a defendant, was not an effective remedy either: it is unclear what the Moscow City Court examining the applicant's appeal against his conviction could have done about those statements. The Court is unaware of any other remedies the applicant could have used at national level in order to complain about the breach of his right to be presumed innocent. Therefore, the six-month time-limit under Article 35 of the Convention should be calculated from the time when those statements were made."

The Court does not see any reason to depart from that approach in the case at hand. The applicant's of appeal within the "main" criminal case against him cannot be regarded as an effective remedy, in so far as the present complaint about the breach of his presumption of innocence is concerned. Therefore, the date of the interference (when the impugned

statements had been made) must be taken for calculation of the six-month time-limit. The Court concludes that the complaint about the statements of the prosecution officials has been introduced out of time and must be rejected in accordance with Article 35 §§ 1 and 4 of the Convention.

4. Lack of adequate time and facilities

8. The applicant complained that he had lacked adequate time and facilities to prepare his defence (see section B, subsections no. 4, and, partly, no. 7, in the "Complaints" part above). He 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"

(a) The Government's submissions

The Government maintained that the right to have adequate time and facilities under Article 6 § 3 (b) of the Convention must be analysed in conjunction with the right to trial within reasonable time, guaranteed by Article 6 § 1 thereof. They claimed that any limitations of 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.

On 25 November 2003 the investigation in respect of the applicant was completed and the applicant received full access to the materials of the investigation. On 14 May 2004 the case materials were transmitted to the Meshchanskiy District Court. The applicant retained several lawyers, who had access to the materials of the case for almost six months. On 23 April 2004 the Basmanniy District Court decided to limit the time allocated to the defence for examination of the case file in order to ensure that the proceedings did not exceed a "reasonable time".

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 opinion of the parties about a possible adjournment on this ground, the applicant left that question to the court's discretion.

Throughout the entire trial the applicant and his 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 applicant was well-aware of

the content of the case file was demonstrated by the applicant's own detailed requests and motions lodged during the trial.

The applicant was able to make copies of the materials contained in the case file, make notes, take copies to his cell, and transmit written instructions to his lawyers in compliance with the requirements of sections 17, 18, 20 and 21 of the Pre-Trial Detention Act. The defence was provided with a safe box for keeping documents in the detention facility.

As to the changes in the planning of the hearings, allegedly detrimental to the defence, this was a decision taken by Judge Kolesnikova within her discretion. It was true that before 11 November 2004 the hearings started at 11 am. However, this was due to the court's other business, which had to be done before the start of the applicant's trial. From 11 November 2004 the court was able to allocate the entire day to the applicant's case. The court opened at 9 a.m. For this reason, the hearings began at 9.30 a.m. On 31 December 2004 one of the participants of the trial asked the court for an adjournment in order to be able to meet his lawyer; in response to that request the judge ordered that the case be adjourned until 11 January 2005.

Originally there were no hearings on Wednesdays: those days were allocated for meetings between the accused and their lawyers. However, in the course of the trial the judge decided to change that arrangement and conduct hearings on every day of the week. If the defendants needed more time to meet their lawyers, they were entitled to ask the court for an adjournment. When on 18 January 2005 the defence asked the court to restore the practice of Wednesday recesses, the judge refused that motion, having explained to the parties that they could ask for an adjournment at any moment. The court would decide those requests on a case-by-case basis. The defence used that opportunity at least twice: on 25 January and 22 February 2005.

The Government indicated that on 7 June 2005 the applicant had received a copy of the judgment in his case, and, on 8 August 2005, received a copy of the trial record. His objections to the trial record were dismissed on 2 September 2005. Bearing in mind the professional level of his defence team, the Government concluded that the applicant had sufficient time to prepare his defence.

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. Having signed the minutes of the hearing the judge consciously confirmed the veracity of that document.

(b) The applicant's submissions

The applicant maintained that the time given to the defence to prepare for the trial had been clearly insufficient. The case materials originally comprised 227 volumes, approximately 55,000 pages. On 23 June 2004 the applicant asked the court to grant him more time to study the materials in Mr Lebedev's case that had been added to his own when the two cases were combined. The court gave the defence until 12 July 2004. In sum, the applicant had 22 working days to study 165 additional volumes of case materials. On 12 July 2004 a further application was made by the applicant's lawyer for additional time. The lawyer explained that she had managed to familiarise herself with 72 of the 165 additional volumes. The court did not allow any additional time for preparation. The Government's reliance on the fact that the applicant had not refused to take part in the trial on account of not being prepared for proceedings was entirely without merit, since the applicant could not have refused to participate in the trial without risking irreparable harm to his defence. During the trial he did ask for more time to familiarise himself with the case materials, while the applicant's lawyers commented that they were placed in an impossible situation. They had been given insufficient time to study the additional case materials and yet if they requested further time they were extending the period of time in custody for the applicant because of the unreasonable refusal to grant him bail.

As to the conditions in which the applicant had had to study the case file and prepare his defence, the applicant argued, referring to the testimony of one of his lawyers, that the defence had 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 applicant had been entitled to read the case file only in the presence of the investigator. When the applicant wished to discuss the documents in private with his lawyers the investigator had removed the documents. The only way that the applicant was able to access the case materials during the trial was to request an adjournment of the trial. In the applicant's words, such limitations significantly prolonged the time needed to study the case file. The fact that the applicant was permitted upon request to receive photocopies of a small number of the case materials and to keep such copies in his cell did not address the real problem of preparing for a trial based upon 392 volumes of material in the circumstances described above.

According to the applicant, the Government offered no explanation as to why, as the defence case stated, it had suddenly become possible to start earlier in the day. The time available for preparing the case at the most intensive phase of the trial 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, and why such "reasonableness" should prevail over defence rights.

The applicant asserted that he had never been given access to the entire trial record. The applicant had lodged a motion asking for more time for studying the 15 remaining volumes of the trial record, but this had been dismissed. The Government had also failed to address the applicant's complaint at the start of the appeal that his preparation had been yet further hindered when he had been refused all access to the judgment and to the 15 remaining volumes of the trial record because his cell had been placed in quarantine after the same infected inmate had been placed successively in the applicant's cell and in that of Mr Lebedev.

The applicant argued that the failure to provide the defence with all 30 volumes of the trial record prior to the appeal hearing was not denied by the Government. The GPO had had access to all of the 30 volumes but the defence had access to only 15. All requests by the applicant and his lawyers to review all 30 volumes of the trial record were refused or left without consideration.

As to the analysis of the inaccuracies in the trial record, the objections by the defence were summarily dismissed. If the Government's reasoning was correct then there would be no point in the provision under the CCrP allowing the defence to lodge comments to the record, because they could always be met with the simplistic argument that the secretaries must be presumed to be accurate. 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 applicant argued that those audio tapes substantiated the defence objections to the trial record and were therefore materials which needed to be considered by the court. The audio tapes were lawfully recorded and the CCrP required such tapes to be added to the case materials. According to the applicant, 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 applicant 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 applicant's opinion, dismissing such objections summarily and on an equal basis suggested bad faith on the part of the court and demonstrated the lack of fairness in the resulting appeal, which necessarily

proceeded on the basis of an inaccurate trial record. One of the reasons why the court rejected the defence comments so peremptorily was the imperative to expedite the hearing of the applicant's appeal so as to prevent him standing as a candidate for the Duma elections.

The applicant further submitted that the appeal had been heard with undue speed, such that the applicant had been denied sufficient time to prepare for the appeal and to present his case adequately. 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 and before the Duma elections. The applicant also submitted that the appeal had been manifestly unfair: he had been given inadequate time to prepare his defence, he had been regularly denied access to his lawyers and he had been unable to review the trial record in the time available and in the cramped conditions of his cell. Finally, the appeal court had given no apparent consideration to the pre-appeal motions by Mr Padva, which warranted the most anxious scrutiny. The applicant's request for an adjournment was refused. The applicant also noted that facts that the court of appeal had sat until very late in the day and that it had joined with the authorities in seeking the disbarment of the applicant's lawyers.

(c) The Court's analysis

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established.

5. Breach of lawyer-client confidentiality

9. The applicant complained that his confidential contacts with his lawyers had been seriously hindered. Thus, the offices of one of the applicant's lawyers had been searched, and he had been repeatedly summoned for questioning. During visits to the detention facility the lawyers' confidential documents were examined by officers of the facility. On several occasions the officers had searched the applicant's lawyers and seized documents from them. The applicant's meetings with his lawyers in the detention facility were subject to eavesdropping. The applicant was unable to have confidential discussions with his lawyers during the trial, and the court inspected all documents exchanged between the applicant and his lawyers. The applicant relies on Article 6 § 3 (b), cited above, in conjunction with 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"

(a) The Government's submissions

The Government maintained that Mr Drel had never been questioned in the course of the pre-trial investigation of the case either as a witness or in any other capacity.

As regards the applicant's assertion that the detention facility officials inspected confidential documents in the possession of the applicant's lawyers during their visits to the prison, and that in the courtroom such documents had been examined by the judge, the Government claimed that this issue had never been brought to the attention of the "competent authorities", and that the applicant had therefore failed to exhaust domestic remedies.

The applicant's assertion that he had been unable to obtain documents from his lawyers was untrue, since the applicant enjoyed in this respect all the rights guaranteed to detainees by the law. The applicant was not separated from his lawyers by a screen during the meetings, contrary to what he had alleged. As to the exchange of documents in the courtroom, the head escort officer informed the defence that the applicant was entitled to use his notes, show them to the defence and pass them documents. The presiding judge explained to the defence that all documents passed should first be shown to her for inspection, to which Mr Padva, one of the applicant's lawyers, replied "Sure, by all means". The judge needed to inspect notes transmitted from the applicant to his lawyers in order to decide whether they were related to the criminal proceedings, in order to prevent the applicant giving his lawyers personal letters and similar documents that were not relevant to the case. The judge did not oppose the contacts between the applicant and his lawyers during the breaks and even in the course of the hearing (to the extent that these did not pose a problem to 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". Another co-accused 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.

As to the alleged seizure of lawyers' confidential materials by the officials of the remand prison, 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. Thus, on 11 March 2004 remand prison officials seized a page with notes from

Mr Shmidt, but he was not subjected to inspection. That document was seized from the applicant's lawyer 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. On 19 May 2005 the Preobrazhenskiy District Court of Moscow confirmed the lawfulness of the actions of the remand prison authorities in this respect. Mr Shmidt himself failed to explain whose interests had been breached by the seizure of the documents from him and did not complain to the Court about those facts on his own behalf.

According to the Government, all correspondence by detainees is subject to "censorship" (perusal). An exception to this rule concerns letters to certain State bodies and to the European Court itself. All "proposals and requests" of a detainee addressed to his lawyer must first go to the prison administration, which has three days to review them and forward them to the addressee. Those rules are intended to "prevent the entry of prohibited items into the territory of facilities" and thus correspond to Article 6 § 3 (c) of the Convention. Further, since the applicant was suspected of having committed crimes in an organised group, those measures were aimed at preventing him from putting pressure on the witnesses and committing new crimes.

The Government confirmed that in July and August 2005 Ms Khrunova had indeed been denied access to the 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 Mkrtychev, Drel and Padva were unable to meet the applicant because on those dates the applicant's cell had been closed for quarantine because one of his cell-mates fell 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.

As to the meeting rooms where the applicant communicated with his lawyers, the Government asserted that the applicant's 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 applicant 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.

(b) The applicant's submissions

The applicant argued that Mr Drel had been summoned to the GPO for interrogation as a witness in Mr Lebedev's case at least twice – on 17 and 25 October 2003, but had refused to come, referring to his professional status.

Referring to the Government non-exhaustion plea, which concerned the applicant's complaint that it had been impossible to have confidential consultations between the applicant and his lawyers in prison and in the courtroom, the applicant maintained that he had brought that matter to the attention of the authorities. Thus, the applicant and his defence team 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 applicant in the cage "does not really have anything to do with the case". The applicant complained in his appeal that his rights under Article 6 § 3 (c) had been violated because of his inability to communicate in confidence with his lawyers during the trial and the requirement that all communications between the lawyers and the applicant be passed through the presiding judge, but the Moscow City Court did not even address this aspect of the appeal in its judgment. As to the inspection of the materials carried by the applicant's lawyers in the remand prison, the lawyers complained about the searches of lawyers and seizures of documents from Ms Artyukhova and from Mr Shmidt.

On the merits of that complaint the applicant argued that security arrangements in respect of the applicant's contacts with his lawyers, especially as regards the exchange of documents, have been unreasonable. All written documents passing between the applicant and his lawyers had to be scrutinised by the authorities of the remand prison. The applicant submitted a detailed testimony about such searches from one of the applicant's lawyers, Mr Mkrtychev. In addition, the applicant claimed that the meetings between him and his lawyers had always taken place in the same meeting rooms, equipped with eavesdropping devices. At the hearings the applicant's lawyers were required by the Meshchanskiy District Court to stand at a distance of one metre from the cage in which the applicant was kept. However, the applicant was not violent. He 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 his discussions could be overhead.

The Government had mistakenly referred in their response to an allegation that during consultations at the remand prison the applicant and his lawyers were separated by a full screen, whilst in fact that complaint related to the applicant's imprisonment in the penal colony at Krasnokamensk following sentencing. It was there that the applicant's contact with his lawyers was only permitted in a room in which he was separated from his lawyers by a screen which runs from wall to wall and floor to ceiling.

As to the searches (or, as the Government put it, "inspections") of the applicant's lawyers, the applicant noted that the Government did not deny incidents of that kind with Ms Artyukhova and Mr Shmidt.

The search of Ms Artyukhova was 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 is 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 the notepads with some notes, making notes therein from time to time". There were thus no legal grounds for conducting the 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.

The search of and subsequent seizure from Mr Shmidt occurred when he was leaving the remand prison, so it cannot therefore be said that the measure was designed to prevent prohibited items being brought into the remand prison. The applicant noted that that as a consequence of the search the Ministry of Justice demanded that disbarment proceedings be instigated against Mr Shmidt. The St Petersburg Bar Association subsequently exonerated Mr Shmidt at the disciplinary proceedings and determined that Mr Shmidt was entitled to take the document in and out of the SIZO and that the document was legally privileged.

Whilst Mr Shmidt would have been entitled to bring a complaint to this Court in relation to the violation of his rights under Article 8 of the Convention, that is a quite separate issue as to whether the applicant's rights, under Article 6 § 3 (c), have been infringed.

As to the alleged impediments on his meetings with his lawyers during the appeal proceedings, the 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 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 relate to a lawyer's participation in the

trial, they do 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, Article 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 is no requirement under domestic law for the trial court to "validate" a lawyer before he is permitted access to his client, who has already authorised him to represent him 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 applicant was particular to his case and was unlawful.

As to the period when the applicant was unable to meet his lawyers due to quarantine requirements, the applicant maintained that the Government did not explain why it had been that on 15 September the same infected inmate was placed successively in the applicant's cell and then in the cell of Mr Lebedev. The timing of such quarantine, in the absence of any explanation and in the context of repeated attempts to hinder access to the lawyers, leads to the ineluctable conclusion that the authorities were seeking to impede the applicant's access to his lawyers at a critical stage before the hearing of the appeal.

(c) The Court's assessment

As regards the Government's non-exhaustion plea, the Court notes that on 6 January 2004 the applicant's lead lawyer, Mr Padva, filed a formal complaint about the interference with the lawyer's professional privilege by the remand prison officials. Furthermore, at the beginning of the trial, in August 2004, the applicant's lawyers and the applicant himself repeatedly complained to the court that they were unable to exchange documents and to discuss the case confidentially. Finally, the defence complained about limitations on confidential contacts between the applicant and his lawyers in the prison and in the courtroom in their briefs of appeal. The Government have not specified with sufficient clarity what other action or complaint would have been an effective remedy in their view (see *Danilin v. Russia*, no. 4176/03, § 35, 16 September 2010, with further references). In such circumstances the Court cannot accept the Government's assertion that the applicant had never brought his complaint to the attention of competent authorities.

Second, even if at some point one of the applicant's lawyers agreed to follow the rules established by the presiding judge for contacts between the applicant and his lawyers the courtroom, this cannot be regarded as a tacit waiver of the rights of the defence and acceptance of the limitations imposed by that procedure. The Court recalls that "a waiver must, if it is to

be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance (see *Poitrimol v. France*, 23 November 1993, § 31, Series A no. 277-A). In addition, the Moscow City Court in its appeal judgment did not hold that the complaint about limitations of rights of the defence to confidential communication had been belated or otherwise improperly introduced, or that the applicant had waived that right in the earlier proceedings. The Court also notes that the Government did not put forward a formal objection against an identical complaint by the applicant's co-defendant, Mr Lebedev. In such conditions the Court concludes that the Government's objection on those grounds must be rejected.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established.

6. Unfair taking and examination of evidence

10. The applicant complained about the manner in which the prosecution and the court had administered evidence (see the "Complaints" part, complaints nos. 6 (a) – 6 (f)). In his view, administration of evidence in the criminal proceedings against him had been unfair and in breach of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (b), both cited above, and point (d), the latter providing:

> "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 ..."

(a) The Government's submissions

With regard to the experts for the prosecution, the Government started with a general proposition that it was up to the national judge to assess the evidence before him or her. Witnesses Messrs Yeloyan and 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. However, in the circumstances the presence of an expert in those matters had not been necessary. Further, questioning of an expert is always preceded by the preparation of a report by that expert. An expert cannot be questioned if he has not earlier produced a written expert opinion.

At the same time, the law allows a written expert opinion (report) to be admitted to the materials of the case file without subsequent questioning of the expert who has prepared it. The judge in this case decided that there had been no grounds for calling the experts Yeloyan and Kupriyanov 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 Messrs Yeloyan and Kupriyanov could be made only at the conclusive stage of the proceedings, when the court deliberated and developed its position. The Government submitted that the same was true in respect of the expert Mr Shulgin.

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 the Zhukovka village where the searches had been conducted had not been not lawyers' offices, and thus protected by the lawyer's professional privilege.

In so far as the applicant complained of the refusal of the District Court to admit expert reports prepared at the request of the defence, the Government submitted as follows. At the outset, they referred to the Court's case-law and emphasised that the Court should not be a court of fourth instance and challenge domestic courts' decisions in the area of administration of evidence. The defence submitted to the 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 applicant, etc.

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" must receive a formal warning about his rights and obligations in the procedure; a defence lawyer cannot, by virtue of his status, give him such a formal warning, this being a prerogative of an investigator or a judge. Furthermore, 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 applicant's 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 applicant's relatives, who did not participate in the proceedings and were not therefore allowed to commission expert examination of the materials of the case.

Finally, the reports of those "expert witnesses" contained conclusions of a legal nature about the applicant's guilt, analysis of the arguments of the prosecution, of evidence, interpretation of the applicable law etc., which is 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".

At the same time, Mr Shchekin, Ms Petrova, Mr Semenov, Mr Lubenchenko and Mr Grechishkin were questioned by the court orally as expert witnesses. Mr Shchekin gave his interpretation of the tax law. Mr Semenov testified about the conditions in which he had prepared his written report. The court, having examined their evidence, concluded that those two persons could not be considered as "expert witnesses", since they had no 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 need 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.

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.

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.

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.

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.

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 (and which had been brought to trial in 2010). 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.

(b) The applicant's submissions

As regards the inability of the defence to question the prosecution experts and witnesses, the applicant recalled that Messrs Yeloyan and Kupriyanov had been expert witnesses for the prosecution, who had prepared, during the investigation, an audit report on the Apatit episode of the accusations. In relation to the Apatit report the experts needed to study a huge volume of documents running to more than 4,000 pages and yet they completed the report within 2 days of being 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. 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 defence made three applications for Messrs Yeloyan and Kuprianov to be questioned, but all of them were rejected. On the last occasion the Meshchanskiy District Court rejected the application 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. Such an approach entirely overlooked the defendant's right to test the evidence against him in adversarial proceedings by cross-examination. If such reasoning was correct then there would be no need for any oral testimony in a criminal trial. The testimony of Mr Yeloyan and Mr Kuprianov was important, since the Meshchanskiy District Court relied on their reports in its judgment. In reaching its conclusion the District Court did not take into consideration the fact that the defence had been unable to challenge the evidence in cross-examination. The appeal court judgment also relied upon the expert reports of Messrs Yeloyan and Kuprianov.

As to Mr Shulgin, he was the Deputy Minister of the Federal Tax Service. He 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 in its judgment that the evidence of the defence expert, Dr 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. Thus, his evidence went to the heart of the corporate tax evasion charges. The reason cited by the District Court for not requiring him to give oral evidence (namely, that he was a representative of the civil plaintiff) had no support in domestic law. Even if that were the case, it would not obviate the evident unfairness to the applicant in being unable to test the written evidence (ultimately accepted by the trial court) and to challenge the acute discrepancy between the witness's stated position in 2002 (as to the acceptance of promissory notes) and the position advanced both by the prosecutor and the civil plaintiff in that regard at the trial.

As regards the allegedly inadmissible evidence submitted by the prosecution, in the applicant's words it was insufficient simply to rely upon the fact that the domestic court had accepted that the evidence had been lawfully and fairly obtained. The impugned evidence comprised of (a) material obtained through an unlawful search of a lawyer's office, (b) material obtained through an unlawful search of the room of a Duma deputy, and (c) data obtained from a computer where there was a strong suggestion that additional material, not originally contained in the computer, has been planted by those carrying out the seizure of the computer.

The applicant noted that the Meshchanskiy District Court had ruled that the evidence seized from Mr Drel's office on 9 October 2003 had been admissible. However, that search was instigated on the basis of an order from the GPO, and not by a judge, as required by the Advocacy and the Bar Act. The investigators knew that the office belonged to Mr Drel: there was a plate with his name at the entrance, investigator Karimov told Mr Rakhmankulov that he knew that the room at issue was Mr Drel's law office, and, finally, Mr Drel and his fellow defence lawyer Ms Pschenichnaya were not allowed to participate in the search and were forced out of the building.

The files were labelled as containing lawyers' notes related to the defence of Mr Lebedev, and Mr Drel's role in the case was very well known to the GPO and the investigators. The applicant referred to the Russian Constitutional Court's Ruling No. 439-*O* of 8 November 2005, which in his view confirmed that in such situations the investigative authorities ought to have sought a court order. In addition, the Meshchanskiy District Court found that the investigative authorities had not known that a law firm was based on those premises, and that they had discovered it from Mr Moiseyev, who had participated in the search, but who had not produced any document to support his allegation. Even assuming that the GPO investigators did not know that they were conducting a search in Mr Drel's office, the fact remains that 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

applicant's arrest on 25 October 2003; these concerned the applicant's tax affairs and advice given to the applicant in connection with the case being conducted at that time against Mr Lebedev, the applicant's closest business partner, who by that time had already been in detention for more than 3 months. Since the applicant's name was mentioned in the charges against Mr Lebedev - and the charges subsequently brought against the applicant were virtually identical - Mr Drel, at the 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 applicant's likely legal defence strategy in advance of the charges being brought against the applicant. In such a situation, the court, under legislation applicable at the time, should have excluded those documents from admissible evidence.

In so far as the evidence submitted by the defence but not admitted for examination by the trial court was concerned, the applicant maintained that expert reports submitted by the defence and expert witnesses whose testimony the defence had sought to adduce, were relevant, important and admissible evidence. 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. The expert reports were important and relevant to a key issue of fact at the trial, namely whether the State was applying a novel interpretation of financial laws.

The applicant questioned the findings of the domestic court that the experts called by the defence, namely Dr Semenov, Dr Shchekin or Prof. Petrova had insufficient expertise. There was no proper reason why expertise should be limited to work experience in the State tax authorities: academic and legal expertise may be just as pertinent. The applicant further gave a detailed description of the credentials and qualifications of the expert witnesses called by the defence, their publications, teaching experience, etc. As for the point made in relation to the defence experts' evidence, suggesting that they had been improperly commenting on legal issues, the applicant noted that there was no prohibition of such commentary in the CCrP, which simply stated that an expert witness (*spetsialist*) may "explain to parties and to the court matters that come within his professional competence". In dealing with complex tax issues, it is inevitable that expert opinion from auditors, accountants and tax lawyers is offered to the court to determine whether the acts or omissions complained of complied with applicable financial practice at the relevant time. Admission of such testimony does not usurp the court's ultimate function of evaluating all of the evidence. The central issue in the case was whether the applicant, his co-defendant and others working with him were behaving dishonestly or fraudulently or in bad faith in the business practices they adopted. As such, expert evidence was essential.

Further, the applicant asserted that Article 58 of the CCrP did in fact permit the defence to obtain expert witness evidence. The Meshchanskiy District Court's decision to refuse to admit the reports of Prof. Petrova and Prof. Lubenchenko because the experts had been paid by the applicant's relatives was made without reference to any authority and there was no basis for such an assertion in the CCrP. Moreover, even if such a requirement existed it would make no sense in this case, where the court had frozen the assets of the applicant and he was detained. The court offered no explanation why it was acceptable for the applicant's relatives to hire lawyers for him, but not to hire the experts whom those lawyers wished to call. Moreover, there could be no basis for objecting to the fact that the experts were paid: all professional experts require payment and no doubt the experts relied upon by the prosecution were paid for their services by the State.

The Government's argument that the reports of Dr Shchekin, Dr Semenov and Mr Grechishkin were inadmissible because they did not examine certified copies of documents is incorrect. Article 58 of the CCrP did not require that the expert be provided with certified copies of the case materials. Moreover, the rationale was transparently artificial, because the appropriate defence lawyers all attested that the copies provided to the experts had been accurate and complete and the District Court made no finding to the contrary. The exclusion of Mr Grechishkin's report was particularly strange because the court criticised his review of documents printed from a CD of the case file provided to him by one of the defence lawyers. That alleged defect in his report had been raised in the course of Mr Grechishkin's oral testimony, and the applicant had twice applied for facilities for the documents in the case materials to be provided to Mr Grechishkin so that he could compare them with the documents he had worked from, confirm that they were identical and so re-confirm his conclusions. On both occasions the prosecutor objected and the court ruled against the applications.

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 in accordance with Article 270 of the CCrP, a fact which was omitted from its judgment but was apparent from the trial transcripts. Further, as the court accepted, there had been entries in a number of the aforementioned opinions that such rights were explained to those persons.

The applicant noted that the Government had failed to respond to the Court's question concerning the non-admission of exculpatory material, namely the reports by the audit firms and by the Russian Academy of Sciences. The reports by Price Waterhouse Coopers, Ernst & Young and the Urals Branch of the Russian Academy of Sciences were clearly relevant to

the Apatit charges. They could and should have been fairly admitted under the CCrP and the principles of Article 6 of the Convention. The independence of the report from the criminal proceedings against the applicant 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.

The applicant made submissions on the non-disclosure of the exculpatory material. Some of the GPO documents referred to a "legal and economic expert review" which had been conducted in 2002 in order to assess activities of the trading companies in Lesnoy Town. The defence had asked the District Court to order the disclosure of those documents; disclosure had been refused, although those documents could have been clearly relevant. As appears from the official correspondence referring to the report, it had been established that there had been no losses to the local or federal budgets, i.e. there had been no "evasion" of taxes. The District Court refused to order the disclosure of that report since the defence had not given full particulars of the report. Such reasoning was absurd, as the fact that the defence could not identify fully the report was a direct consequence of the prosecutor's failure to disclose it. The District Court's refusal to assist the defence in obtaining disclosure of Presidential correspondence with the GPO and the Prime Minister in connection with the acquisition of the Apatit shares contained no reasons. With reference to the findings of a British court in the extradition case of *Russian Federation v. Chernysheva and Maruev*, the applicant argued that this correspondence showed that his prosecution had been politically motivated.

Finally, the applicant complained that the prosecution had tried to exert pressure on many witnesses by questioning them in connection with "parallel proceedings" during his first trial. The applicant submitted that the case materials related to the second criminal case against the applicant showed that the State authorities had included interrogation records from eighteen witnesses who had been called to give evidence in his first trial. The interrogation records indicated that during the course of the first trial those 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 applicant at the start of 2007.

The applicant further argued that the prosecutors' questioning of witnesses after the end of the pre-trial investigation was unlawful, even though it may have been deceptively cloaked by the prosecutor instituting a series of criminal cases. 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 indicate that the State has included interrogation records from eighteen witnesses that were called to give evidence in the applicant's first trial. Furthermore, it was to be noted that two of the witnesses had been called to be interrogated immediately before giving oral evidence at the first trial. Mr Khv. had been interrogated many times in the two or three weeks before his testimony at trial on 17 and 20 September 2004; Mr Kbz. had been interrogated by the GPO on the very morning he had given oral evidence to the District Court and had been required to sign a statement undertaking not to divulge to anyone the contents of that interrogation, and the defence had therefore been unable to ask any questions about that interrogation.

(c) The Court's assessment

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established.

7. Lack of information about "parallel proceedings"

11. The applicant may also be understood as complaining that he had no information about parallel proceedings which the prosecution initiated against him and his business partners, and that this was an abuse of process (see complaint no. 6 (f) in the "Complaints" part above). The Court has decided to examine this complaint under Article 6 §§ 1 and 3 (a) above, which provide:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him"

The Government argued that the applicant had a detailed knowledge and understanding of the charges brought against him. The final version of the charges against the applicant had been formulated on 10 November 2003 and on the same date submitted to him in written. When the trial started on 16 July 2004 the judge asked the applicant whether he had understood the charges against him: he replied in the positive. The Government added that "if [the applicant] or his defence counsels failed to challenge the above facts they referred to in this part of the application, it should be admitted that the application is inadmissible due to non-exhaustion of the domestic remedies".

The applicant complained that he had not been made aware of the particulars of a parallel investigation which the GPO conducted into other

business activities by the applicant and other managers of Yukos. On 27 December 2004 investigator Karimov informed the applicant by letter that on 2 December 2004 criminal case number 18/325556-04 had been opened against the applicant, under the heads of embezzlement and money laundering. That case had been severed from the main criminal case. However, for several years the applicant was unable to obtain access to the materials of that new case. Only in 2007 were the new charges brought against the applicant. In addition, in June 2006 the secret trial of Messrs Pereverzin, Malakhovskiy and Valdes-Garcia started in the Basmanniy District Court in Moscow. The charges that they were tried upon were almost identical to the charges subsequently brought against the applicant.

The Court notes that the Government did not indicate what specific remedy available to the applicant but not exhausted by him, so the Government's objection in this respect cannot be upheld. At the same time, the Court considers that this complaint must be rejected in any event. The Court reiterates that it has already found in respect of the applicant's co-defendant, Mr Lebedev, that a similar complaint, in so far as it related to the first criminal case against the applicant and Mr Lebedev, was premature (see *Lebedev v. Russia (no. 2)* (dec.), no. 13772/05, § 266, 27 May 2010). The Court does not see any reason to reach a substantially different conclusion in the case at hand. The Court does not see how the disclosure of information about a parallel investigation (which would later turn into the "second case" against the applicant) could have helped the defence to counter the charges related to the first case. Since the Court is called to examine within the present case the fairness of the first criminal case against the applicant, the Court concludes that the applicant's complaint about a lack of information about another investigation is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

8. No effective appeal

12. The applicant complained that he had not enjoyed the right to effective appeal proceedings, guaranteed by Article 2 of Protocol No. 7 of the Convention, and implied in Article 6 thereof, cited above (see complaint no. 7 above). Article 2 of Protocol No. 7 to the Convention, insofar as relevant, provides:

> "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

The Government maintained that the applicant had had a right to appeal and had made use of it. They stressed that the applicant's sentence had been mitigated by the court of appeal and that the conviction in respect of several

episodes had been quashed, which proved that the court of appeal had duly exercised its power of review. They also claimed that the defence had had sufficient time and facilities to prepare for the appeal hearing, that the trial record had been accurate and that the defence had had full access to it (see above, the summary of the Government's observations in respect of the applicant's complaints under Article 6 §§ 1 and 3 (b) of the Convention).

The applicant claimed that the court of appeal had exercised its functions only formally, and that the appeal was not "effective": thus, the appeal proceedings had been unnecessarily expedited, the applicant had been denied adequate time and facilities to prepare for the appeal hearing, he had not been given access to the entirety of the original trial record, the trial record on which the court of appeal had relied had been inaccurate, and Judge Kolesnikova had refused in an arbitrary fashion to rectify the trial record (see above, the summary of the applicant's observations under Article 6 §§ 1 and 3 (b) of the Convention). He also claimed that the appeal proceedings had not been "governed by law" because the date of the appeal hearing had been decided by a first-instance court, which had had no jurisdiction to do so.

The Court notes that the parties' arguments under Article 2 of Protocol No. 7 overlap to a large extent with their submissions which the Court has already considered under Article 6 §§ 1 and 3 (b). The Court reiterates that it declared admissible the applicant's complaints about the alleged unfairness of the criminal proceedings, including the proceedings before the court of appeal. At this stage of the proceedings, there is no need to analyse those matters further.

In so far as the applicant refers to Article 2 of Protocol No. 7 in the context of the appeal proceedings in his case, the Court notes that this provision, if construed narrowly, guarantees the right to a second level of jurisdiction in criminal cases, i.e. it mostly regulates institutional matters (such as accessibility of the court of appeal, scope of review in appellate proceedings, etc. - see, for example, *Pesti and Frodl v. Austria* (dec.), nos. 27618/95 and 27619/95, 18 January 2000; *Krombach v. France*, no. 29731/96, §§ 96 et seq., ECHR 2001-II), but not the "fairness" of the appeal proceedings, which is within the realm of Article 6 of the Convention. *In casu* the applicant had had access to the court of appeal. The scope of review and/or jurisdiction of the court of appeal were not at issue either. In such circumstances the Court does not detect any breach of Article 2 of Protocol No. 7 of the Convention. The Court concludes that the applicant's complaint under the head of this Convention provision is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Complaints under Article 7 of the Convention

13. Under Article 7 of the Convention the applicant complained that the interpretation of the tax law which led to his conviction had been unforeseeable, and that, as a result, he was 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."

1. The Government's submissions

The Government maintained that Russian legislation contains a similar prohibition of retroactive application of criminal law. In their opinion, the applicant was convicted for actions which had been regarded as criminal at the moment when they had been committed, and the applicant had been well aware of that. Russian criminal law was sufficiently clear on the matter, the relevant legislation had been published in the official mass media and was thus made available to the applicant or his consultants. The Government stressed that the applicant, as a businessmen, could have solicited the opinion of the most experienced lawyers. In addition, he held two university degrees. It was hard to believe that the applicant had never assessed the risks related to his 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.

The Government asserted that the tax-avoidance scheme imputed to the applicant himself and to Yukos as a company was relatively new, and had been revealed for the first time only in those cases.

Thus, the "paper companies" were registered and functioned on those territories enjoying a special taxation regime. However, the law 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% of their fixed assets and 70% of their human resources concentrated in those territorial units. 70% 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 tax authorities had already revealed tax-avoidance schemes used by other taxpayers. In support of this argument the Government cited the names of several companies which had been using tax-avoidance schemes, although they had not caused as much damage to the State as the applicant.

The Government further referred to the opinion of the Financial Action Task Force on Money Laundering, which noted that tax-avoidance schemes were quite widespread, and that they constantly developed, 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 1999-1998 mentioned the use of off-shore companies as a common tax avoidance technique. The Financial Action Task Force continued to discover new forms of tax avoidance 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 avoidance, it could not describe in detail all possible tax-avoidance schemes.

The Government stressed that the domestic courts had established that the applicant intentionally developed various techniques aimed at tax avoidance. Finally, the allegations of retroactive application of criminal law were examined by the courts at two instances and were dismissed as unfounded.

2. The applicant's submissions

The applicant claimed that he had been subjected to a novel interpretation of the criminal law. The applicant noted that the Government had submitted no examples of case-law, in relation to either the personal or the corporate tax-evasion charges. Furthermore, although the Government cited the names of a number of companies where it was alleged that tax evasion had been committed, no information was provided concerning the courts' decisions in those cases.

According to the applicant, the basis of the corporate tax evasion charges was the deployment of an entirely novel concept in Russian criminal law: that of the "dummy" ("paper", "bogus", etc.) company. Such a concept did not have any legal definition. In fact the ZATO trading companies were founded and registered in compliance with company law, properly registered with the tax authorities, owned property, and engaged in commercial activities and paid taxes. They had been audited by the relevant authorities and found to be lawful. Contrary to the Government's assertions, they met the requirements of the law on granting tax cuts on the territory of ZATOs.

Much of the expert evidence that was ruled inadmissible by the Meshchanskiy District Court addressed the fact that the prosecution in respect of the ZATO trading companies represented an arbitrary and retrospective criminalisation of a tax-minimisation scheme (see, for example Dr Shchekin's analysis of the question whether the ZATO companies were "dummy" legal entities, and the 2002 report of the Urals Branch of the Russian Academy of Sciences and its 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 trial court thereby deprived itself of material by which it could and should have concluded that the application of the entirely novel concept of a "dummy" company to judge tax evasion in 1999 was the application of retrospective penalty, and that there had been no dishonest intent, as the directors of the impugned ZATO companies had good reason to believe that what they had been doing had been lawful; and that the impugned ZATO companies had been unfairly targeted by comparison with other companies.

The applicant could not have foreseen, even with the benefit of specialist legal and accountancy advice, that tax-minimisation schemes such as those deployed by the ZATO trading companies would be retrospectively criminalised. Dr Shchekin's report demonstrated that court decisions at the applicable time showed that the ZATO trading companies could lawfully be granted tax concessions even where they were only carrying out intermediary activities in the ZATO region. Moreover the ZATO trading companies had been audited by the tax authorities subsequent to 1999 and no violations of the Tax Code had been found. The use of trading companies in ZATOs was widespread and used by a number of large companies. It was only in the related cases of the applicant, Mr Lebedev and Yukos that the trading companies had been retrospectively characterised as criminal. As a Tax Service official told the Special Rapporteur of the Parliamentary Assembly of the Council of Europe in 2004, in 2000 the use of "trading companies" registered in the "internal off-shores" had been regarded as a lawful practice. The Special Rapporteur concluded that Yukos and its leading executives had been arbitrarily singled out by the authorities.

In so far as the personal tax evasion charges were concerned, the applicant indicated that, like many Russian entrepreneurs, he had made use of the special tax regime, based on the use of a licence and the payment of a single tax. That legal regime was subject to review by the tax authorities, which had not questioned its basis. The absence of any claims whatsoever against the applicant in relation to the payment of his personal taxes was confirmed in court by the employees of a tax inspectorate. It had only been in the prosecution of the applicant and of Yukos managers that the authorities had sought to criminalise the special tax regime referred to above.

3. The Court's assessment

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

D. Complaints under Article 8 of the Convention

14. The applicant complained that he had been sent to serve his prison term in a remote colony which seriously hindered his contacts with his family and his lawyers. He also complained he had been unable to make direct telephone calls to his family and lawyers, that the conditions in which he received family visits were very uncomfortable and that correspondence with his lawyers had been delayed. The applicant 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."

1. The Government's submissions

The Government claimed that the applicant had failed to exhaust domestic remedies by addressing his complaint in this respect to the "competent authorities" within the country.

Alternatively, the Government maintained that the applicant's complaint was manifestly ill-founded. In so far as the applicant complained about the place of serving the sentence, the Government asserted that it had not amounted to an interference with the applicant's rights under Article 8 of the Convention, for the following reasons.

Under Article 73 of the CES a convict is entitled to serve his prison sentence in the same federal constituency where he was convicted (in the applicant's case, Moscow). However, where this is impossible, the convict is sent to serve his sentence in a penal colony situated in the next closest federal constituency. Several regions of Russia (Moscow, Saint-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, the 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 applicant had been sent. According to the Government, at present 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 applicant was treated in this respect in the same manner as any other convict in his situation. There were no grounds for giving the applicant preferential treatment because of his family or financial situation. He was sent to serve

the sentence in the Chita Region because there was no place for him in other regions of Russia.

The Government further described the geographical position of the Krasnokamensk colony and transport routes linking it to Chita. They concluded that there had been no interference with the applicant's private life on account of his placement in that particular penal colony.

Alternatively, the Government asserted that the interference was compatible with Article 8 § 2. As to the lawfulness of that measure, it was based on Article 73 of the CES. The aims pursued by the authorities were legitimate. First, the authorities sought to avoid overcrowding in prisons closer to Moscow and thus respect the right of other detainees to appropriate conditions of detention. If the applicant was given a place in a colony situated in Moscow or in the Moscow region, that would be tantamount to preferential treatment of the applicant vis-à-vis other convicts and could have "given rise to bad feelings" amongst other detainees.

Another aim was to protect the applicant himself. According to the Government, the applicant's case was widely publicised, other detainees might have learned that he was a rich man with money abroad, and those detainees could have tried to "put pressure on him". Further, the authorities sought to exclude unauthorised contacts with journalists and persons ill-disposed towards the applicant, including those who had suffered from the applicant's crimes.

Insofar as the limitations on visits in the penal colony were concerned, the Government submitted as follows. Under Article 121 of the CES the applicant had a right to six short-term and four long-term visits per year from his relatives. In addition, for good behaviour and honest working the applicant might have been rewarded with additional visits. The applicant and his relatives used that right on many occasions; the administration of the penal colony had never refused the applicant or his relatives the right to a visit. The relatives had always been informed in advance about the time of the visit. The geographical position of the colony and the transport infrastructure of the Chita region allowed the applicant's relatives to visit him. The Government also indicated that the limitation on the number of visits was not, by itself, a goal of the criminal punishment but was rather an essential part of the deprivation of liberty of that particular type.

The Government maintained that premises for long-term visits in the penal colony were comfortable, adequately equipped with furniture and sanitary equipment, and had necessary house appliances. Those premises were located within the territory of the penal colony; as a result, visitors were confined to the premises for the family visits and were not allowed to move freely around, but this was justified by security considerations.

As to telephone calls, the applicant had a right to ask for a telephone call, by way of a written request addressed to the colony administration, provided that it was technically feasible. It was technically possible to make

long-distance calls from the colony. The applicant had used that right on several occasions, namely on 21 January, 12 April, and 18 November 2006. The Government concluded that the applicant's rights under Article 8 of the Convention were therefore respected.

2. The applicant's submissions

As regards the non-exhaustion plea by the Government, the applicant maintained that he had sought unsuccessfully to challenge the decision to send him to serve his sentence in Krasnokamensk before the courts at two levels of jurisdiction. He complained, *inter alia*, that it was a breach of his rights under Article 8.

On the merits the applicant submitted that, even as a prisoner, he did not lose completely his rights under Article 8 of the Convention, even though the reasonable requirements of imprisonment might have placed limitations upon their enjoyment within the permissible limits of Article 8 § 2. The location of the penal colony in which the applicant had to serve his sentence was of direct relevance to his rights under Article 8. Furthermore, the authorities were under a positive obligation to assist him in maintaining effective contact with his family, in particular by creating a possibility for close family members to visit him.

It was inevitable that serving his sentence in Siberia had interfered with his family life to a greater degree than if he had been sent to a penal colony nearer to Moscow. The applicant described the hardships related to travelling from Moscow to Krasnokamensk. In support the applicant cited an article written by a group of journalists who had accompanied the applicant's relatives on their trip to the penal colony and testimony by his lawyers. As a direct consequence of his transfer to Krasnokamensk, his family has 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 be 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 have been unable to visit him in Krasnokamensk at all. The children were able to visit the applicant whilst he was detained in Moscow. The applicant's elderly father has been able to visit him only once. The fact that the applicant's family did not use up his full allowance of his visits - he had 5 long visits and only 1 short visit over 14 months at IK-10 penal colony - clearly suggested that the enormous distance prevented visits taking place.

As to the lawfulness of the interference, the applicant maintained that his placement in the Krasnokamensk colony had been contrary to the law. In his words, the Government provided no evidence in support of their assertion that overcrowding in Moscow prisons was such that the applicant could not be sent to a penal colony in the Moscow region. Further, the Government did not challenge the applicant's assertion that in September 2005 there

were 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 was the penal colony at Krasnokamensk, some 7,000 km from Moscow, which was the "nearest" penal colony that was available, as required by Article 73 of the CES.

Further, the Government asserted that the authorities had taken into account considerations which were not provided for by Article 73 of the CES. The Government did not explain why the risk allegedly posed by the other inmates would be lower in Chita than in Moscow.

As to the legitimate aim of the interference, the applicant rejected the Government's arguments as to why he had been sent to Krasnokamensk. Moreover, those reasons had not featured in any of the arguments put forward by the authorities in the court proceedings brought by the applicant. In his opinion, the choice of a Siberian penal colony was a deliberate act of humiliation. The true reason for his transfer to eastern Siberia was stated by Mr Shuvalov, then a senior Presidential advisor and recently appointed by Prime Minister Putin as his First Deputy Prime Minister. In an interview with *The Economist* in July 2006 Mr Shuvalov said that the applicant was sent to a Siberian prison camp in order to send a warning to Russia's other tycoons.

The applicant noted that the Government had not disputed his allegation that the regime for family visitors maintained at Krasnokamensk was not one suitable for prisoners who had a young family. Family members were locked in the building for the entire three days and were effectively incarcerated with the inmate. No one was permitted to leave the building during that time, even to go outside for fresh air.

The applicant further stressed that telephone contacts with his family had been minimal. The evidence submitted by the Government indicated that, in total, the applicant had only had three telephone calls with his family. All calls had taken place in the presence of the acting head of the penal colony. On only one of those occasions was it possible for the applicant to phone out from the colony.

3. The Court's assessment

As to the Government's objection on non-exhaustion, the Court notes that in 2006 the applicant challenged the decision of the Federal Penitentiary Service to send him to the Krasnokamensk colony before the Zamoskvoretskiy District Court and then before the Moscow City Court. The applicant's complaint was examined and dismissed on the merits. The Government did not explain what other "competent authority" might have helped the applicant in that situation. Their objection must therefore be dismissed.

As to the merits of the complaint, the Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law

under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established.

E. Complaint about the outcome of the civil dispute

15. The 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."

1. The parties' submissions

(a) The Government's submissions

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).

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.

Alternatively, if the Court was prepared to admit that the money recovered from the applicant was his "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention, the Government maintained that the interference with the applicant's rights had been compatible with that provision. The Government reiterated 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.

On the facts the Government maintained that the 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 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.

(b) The applicant's submissions

The 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 is 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 (he referred to *Burden v. the United Kingdom* [GC], no. 13378/05, § 59, ECHR 2008-...; *Orion-Breclav, SRO v. the Czech Republic* (dec), no. 43783/98, 13 January 2004).

The applicant further maintained that 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 applicant (in particular, Yukos Plc). The Meshchanskiy District Court ordered the 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. It was alleged that there had been "non-payment"

because first, the taxes by those companies had been paid by way of promissory notes rather than by cash; and, second, because the ZATO trading companies were "dummy companies" and so were not entitled to the favourable tax regime in the ZATO.

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 "dummy 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.

In the 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 applicant's assets were sequestrated pending resolution of the damages claim. Seized bank accounts and shares have been channelled towards meeting the award of damages.

The 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 applicant and Mr Lebedev since, in any event, the alleged loss to the State had already been recovered in the tax proceedings against Yukos.

As to the striking the fair balance between private and public interest, the applicant acknowledged that the Court has given a considerable margin of appreciation to States in relation to fiscal matters, provided always that measures do 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 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.

In the instant case, the State had used its right to tax in an arbitrary and oppressive manner and the domestic courts had acquiesced in such unlawful conduct. The State had used its power to tax so as to destroy a political opponent and seize the assets of what had been one of the Russian Federation's most successful businesses.

2. The Court's assessment

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within

the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established.

F. Complaint under Article 18 of the Convention

16. The applicant complained about the alleged political motivation for his criminal prosecution and punishment. He 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."

The Government submitted that the applicant's allegations that his 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 applicant. They stressed that the investigating and prosecuting authorities had acted *bona fide* and in full compliance with national legislation, which was undoubtedly proved by the judgment of the Meshchanskiy District Court of Moscow delivered in the applicant's case. The fact of the applicant's conviction by the national court, upheld by the national supreme judicial authority, was a sufficiently strong argument to rebut the applicant's arguments in relation to alleged violations of Article 18 of the Convention.

The applicant, referring to the admissibility decision in the case of *Khodorkovskiy v. Russia* (no. 5829/04, 7 May 2009) claimed that the existence of a judgment against him was not, by itself, a sufficient argument to refute the allegations of improper motives under Article 18 of the Convention. It was immaterial whether there was evidence justifying the bringing of the prosecution, if, as a matter of fact, it was brought for "other purposes". The applicant maintained that there was an overwhelming international consensus that he had been prosecuted for political and economic reasons. He referred to the statements by various high-ranking governmental officials in Russia and abroad which confirmed that the applicant's criminal prosecution had a political element to it. He also referred to the resolutions of the Parliamentary Assembly of the Council of Europe and the US Senate and to decisions by various European courts in proceedings concerning requests for extradition and legal assistance brought by the Russian authorities. In the applicant's opinion, the fact that he was convicted in no way precluded improper motives in bringing the charges, not least because of the numerous violations of Article 6. The applicant also indicated that whilst at the penal colony he had been targeted with illegal, unfair, disproportionate and discriminatory disciplinary proceedings designed to affect his prospects of release on parole and which resulted in

three periods of solitary confinement for twenty-two days. On 15 October 2007, just 10 days before the applicant would have served half of his eight year sentence and so would have become eligible for parole, he was punished because when he returned from the exercise yard he was said not to have kept his hands behind his back. The combination of the clearly arbitrary imposition of a punishment on 15 October 2007 and the bringing of new charges earlier in 2007 seemed to render hopeless any application for parole.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established.

G. Complaint under Article 34 of the Convention

17. The 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."

1. The Government's submissions

The Government asserted that the applicant had had the necessary time and facilities to prepare and submit an application before the Court, and that his five lawyers had assisted him in preparing the application.

The law allowed him to meet the lawyers representing him before the European Court. During the applicant's detention in the penal colony, meetings with his lawyers, including those representing the applicant in the Strasbourg proceedings, took place outside the 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.

In addition, the applicant knew how to apply to the European Court because, in all the premises where he was detained, information boards displayed information for prospective applicants. The applicant was also able to address questions and complaints concerning proceedings before the European Court to the colony administration and to the officials of the Federal Service of Execution of Punishments. The Government stressed that

in pursuance to 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.

The fact that the 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.

As to the episode of 22 July 2005, when Ms Mikhailova 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 provides that an advocate must be formally admitted to act in the proceedings by the official in charge of the case. Although Ms Mikhailova 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 same concerned the episode of 27 July 2005, when Ms Mikhailova 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.

Finally, the Government indicated that if the applicant did not exhaust domestic remedies in this respect his compliant was inadmissible under Article 35 § 1 of the Convention.

2. The applicant's submissions

The 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 applicant's lawyers. Both of the applicant's Russian representatives in the Strasbourg proceedings have faced disbarment proceedings: thus, in September 2005, immediately after the appeal hearing, the GPO sought the disbarment of Mrs Moskalenko; in March 2007 disbarment proceedings were again instigated against Mrs Moskalenko. Disbarment proceedings were also taken against Mr Drel following the appeal hearing.

The Government claimed that the 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

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 applicant was placed in the punishment block for drinking tea in the wrong place.

The 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 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.

Moreover, the Government's assertion that access had been permitted after the Supreme Court's decision was, in the applicant's words, incorrect. The colony administration continued to refuse the applicant's lawyers access to him during working hours. The administration gave the excuse that they had not seen the Supreme Court's decision, although the applicant's lawyers had provided them with a copy of that decision.

The Government's arguments that Ms Mikhailova needed the authorisation of the Meshchanskiy District Court in order to see the applicant were wrong as a matter of domestic law. Ms Mikhailova was authorised by the applicant to act for him both in relation to the ECHR proceedings as well as 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.

Finally, the 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 UK who concluded that "at least some of the lawyers had suffered harassment and intimidation". The 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 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.

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 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 Messrs Khodorkovskiy and Lebedev, in particular on 28 December 2006.

3. The Court's assessment

As to the Government's formal objection, the Court reiterates that complaints lodged under the second sentence of Article 34 do not give rise to any issue of admissibility, including exhaustion of domestic remedies, under the Convention (see, *mutatis mutandis*, *Ergi v. Turkey*, 28 July 1998, § 105, *Reports* 1998-IV; *Shamayev*, *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 507, ECHR 2005-III; and *Mohammed Ali Hassan Al-Moayad v. Germany* (dec.), no. 35865/03, 20 February 2007).

On the merits of this complaint 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, *Reports* 1996-IV, § 105; *Aksoy v. Turkey*, 18 December 1996, *Reports* 1996-VI, § 105; *Kurt v. Turkey*, 25 May 1998, *Reports* 1998-III, § 159). 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.

Having regard to these criteria, the Court considers that the allegation of hindrance and pressure put on the applicant and on his lawyers in connection with the Strasbourg proceedings raises serious issues of fact and law under the Convention, the determination of which requires its further examination.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the following complaints submitted by the applicant:

- under Article 6 § 1 of the Convention, the alleged partiality of Judge Kolesnikova;

- under Article 6 § 2 of the Convention, the alleged breach of the presumption of innocence with regard to the applicant on account of his placement in a metal cage in the courtroom during the trial;

- under Article 6 §§ 1 and 3 (b), the alleged breach of the applicant's right to adequate time and facilities to prepare his defence;

- under Article 6 §§ 1 and 3 (b) and (c), the alleged breach of the lawyer-client confidentiality;

- under Article 6 §§ 1 and 3 (d), the allegedly unfair taking and examination of evidence;

- under Article 7 of the Convention, the allegation that his conviction was based on an unforeseeable interpretation of the criminal law;

- under Article 8 of the Convention, the alleged breach of his right to family life on account of his transfer to a remote Siberian penal colony and conditions in which he had to meet his family there;

- under Article 1 of Protocol No. 1, that the applicant was ordered to compensate the amount of corporate taxes;

- under Article 18 of the Convention, the alleged political motivation of the criminal proceedings against the applicant;

Decides to continue the examination of the applicant's complaint under Article 34 of the Convention that the authorities impeded his lawyers' work and subjected them to an intimidation campaign in order to prevent the applicant from pursuing his application before the Court;

Declares inadmissible the remainder of the application.

André Wampach
Deputy Registrar

Nina Vajić
President