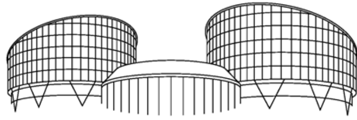

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Court finds breaches of rights of former Yukos executives over second trial and also rejects several complaints

The case of [Khodorkovskiy and Lebedev v. Russia (no. 2)] (application nos. 51111/07 and 42757/07) concerned the second trial of former Yukos executives Mikhail Khodorkovskiy and Platon Lebedev.

In today's **Chamber** judgment[1] the European Court of Human Rights held **unanimously** that there had been breaches of the applicants' right to a fair trial under **Article 6 § 1 and Article 6 § 3 (c) and (d)** of the European Convention on Human Rights because of the trial judge's refusals to allow the defence to examine prosecution and defence witnesses and to submit important expert or exculpatory evidence.

However, the Court **unanimously** found **no violation of Article 6 § 1** concerning the independence and impartiality of the trial judge and **no violation of Article 6 § 2 (presumption of innocence)** with regards to comments during the trial made by Vladimir Putin, prime minister at the time.

By five votes to two, the Court held that the applicants had suffered an unforeseeable application of the criminal law to their detriment, in breach of **Article 7 (no punishment without law)**. It **unanimously** held that there had been a violation of **Article 8 (right to private and family life)** because of a lack of long-term family visits when the applicants were on remand before the trial.

The Court **unanimously** held that there was no need to examine the applicants' complaints under **Article 18 (limitation on use of restrictions on rights)** in conjunction with **Articles 6** and **7** and **Article 4 of Protocol No. 7 (right not to be tried or punished twice)**, and, **no violation of Article 18 in conjunction with Article 8.**

Principal facts

The applicants were Mikhail Borisovich Khodorkovskiy and Platon Leonidovich Lebedev, Russian nationals born in 1963 and 1956 respectively.

After being convicted of tax evasion in 2005 and sent to penal colonies, Mr Khodorkovskiy and Mr Lebedev, former senior executives at the Yukos oil company, faced fresh criminal charges in 2009. A new trial began in March 2009 and ended with their conviction for a second time in December 2010 for the misappropriation or embezzlement of oil and for laundering illicitly gained profits.

In essence, the trial court found that the applicants had used their influence and position to get Yukos production entities to sell their crude oil cheaply to Yukos trading companies, which had then exported it for a higher price on world markets. The profits had then been sent to Russian and foreign corporate accounts controlled by the applicants.

During the trial, when the applicants were held in glassed-in boxes, the judge refused to call several witnesses for the defence and rejected requests for finance and oil market specialists to come and testify in the applicants' favour on the expert reports which had been part of the prosecution case.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On appeal, the trial court's verdict was upheld but the applicants' sentence was reduced to 13 years' imprisonment from 14. The appeal court rejected the applicants' arguments that, among other things, they were not guilty of stealing because the transactions between the production and trading had been legal and valid; that the trial judge's taking of evidence had been one-sided; that they had been tried twice for the same offence; and that their prosecution had been politically motivated.

Three sets of supervisory review proceedings reduced their sentences further. Mr Khodorkovsky was pardoned in December 2013 while Mr Lebedev completed his sentence in January 2014.

Vladimir Putin, prime minister at the time of the second trial, made various public statements during the proceedings, referring to Mr Khodorkovsky and the Yukos case. Some current and former employees of the trial court also made allegations in the media about the judge's independence and impartiality, however, the investigative committee decided against beginning criminal proceedings.

Complaints, procedure and composition of the Court

The applicants complained under Article 6 (right to a fair trial), mentioning in particular the trial court judge's impartiality and independence; a lack of confidential contact with their lawyers; the taking and examination of evidence; and a breach of the presumption of innocence.

Under Article 7 (no punishment without law), they complained that they had been convicted for conduct that was not criminal and that their sentences had been wrongfully calculated.

Relying on Article 8 (right to respect for private and family life), they submitted that their family lives had been adversely affected by their transfer from penal colonies to remand prisons.

Under Article 4 of Protocol No. 7 (right not to be tried or punished twice), they alleged that they had been tried twice for the same offence. The applicants also argued that there was a political motivation for their prosecution, trial and conviction, relying on Article 18 (limitation on use of restrictions on rights) in conjunction with other Articles of the Convention.

The applications were lodged with the European Court of Human Rights on 16 March 2007 and 27 September 2007 respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Paul **Lemmens** (Belgium), *President*,
Georgios A. **Serghides** (Cyprus),
Helen **Keller** (Switzerland),
Dmitry **Dedov** (Russia),
María **Elósegui** (Spain),
Gilberto **Felici** (San Marino),
Erik **Wennerström** (Sweden),

and also Stephen **Phillips**, *Section Registrar.*

Decision of the Court

Article 6 § 1

The Court rejected as inadmissible a complaint by the applicants that the trial court had not had territorial jurisdiction over their case. It also found no violation of Article 6 § 1 on account of the trial judge's conduct, which the applicants alleged had shown a lack of impartiality and independence.

Article 6 § 1 in conjunction with Article 6 § 3 (c) and (d)

The Court noted that the applicants had raised a general issue about the fairness of the trial and about specific aspects of its conduct. It examined the complaints under the two provisions together.

Confidentiality of lawyer-client relations

The Court observed that the trial judge had decided to first review all the documents which the applicants' defence lawyers had wished to show them. It noted that it had found a violation of the Convention over similar circumstances in the applicants' first trial owing to an interference with the secrecy of the applicants' communications with their lawyers and that the Government had not made any argument that persuaded it to conclude differently in this case.

The Court also noted that the applicants had been held in a glass dock, which had reduced their direct involvement in the trial and had separated them from their lawyers, which had made confidential contact impossible. The use of that measure had been a matter of routine, not of security or order in court. The judge had not recognised the impact of those arrangements on the applicants' defence rights or taken any measures to compensate such limitations.

Their rights to participate effectively in the trial and to receive effective legal assistance had been restricted in a way that was neither necessary nor proportionate, in breach of Article 6 §§ 1 and 3 (c). The Court did not find it necessary to deal further with the complaint under those provisions.

Adversarial proceedings and examination of witnesses

The Court examined in turn six groups of complaints about the taking and examination of evidence and of a breach of the principle of equality of arms.

It found violations of Article 6 §§ 1 and 3 (d) as the applicants had not been able to cross-examine witnesses for the prosecution; the trial court had refused to admit most of the defence's proposed expert evidence; and they had not been able to obtain the questioning of various defence witnesses, both in Russia and abroad. Furthermore, it found a violation because of the court's refusal to admit exculpatory material to the case file or to order the disclosure of exculpatory material.

In particular, the Court noted that the prosecution had presented expert reports which had been important to its case, but that the defence had never been able to question the experts who had drafted them to challenge their opinions. Furthermore, the court, in a restrictive interpretation of the Code of Criminal Procedure, had prevented the defence from calling its own specialists.

The defence had also made reasoned and relevant requests to call witnesses in Russia and abroad who could have strengthened the applicants' case, however, the trial court had rejected those requests in formulaic terms, without providing proper reasons. It had also failed to take sufficient steps to ensure the presence in court of defence witnesses whom the court had agreed to hear.

The Court also held that there had been a breach Article 6 § 1 as the trial court had relied on judgments delivered in other, related cases. In particular, the applicants had not been able to contest the witness statements read out from those earlier judgments or to rebut facts that had been established in them. Furthermore, the court had relied on a finding of guilt in one of the earlier judgments, in a case to which the applicants were not parties, in a way that was prejudicial.

Taking those considerations into account, the Court found a violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) and (d) on account of a breach of the guarantees of a fair trial.

Article 6 § 2

The applicants complained that Mr Putin's public statements in 2009 and 2010 had breached their right to the presumption of innocence. The Government contested that allegation.

The Court reiterated that this provision aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with the proceedings.

It noted that Mr Putin had alluded to the applicants being complicit in murders for which the head of Yukos's security service had been convicted. However, the applicants had never been charged over those crimes and the Court held that Mr Putin's comments on that question did not give rise to any Article 6 § 2 issues. Nor did references by Mr Putin to cases involving U.S. fraudster Bernard Madoff, a hacker, and gangster Al Capone appear to have a connection to the applicants' second trial.

Mr Putin had referred to Mr Madoff again in December 2010, conflating the crimes charged against Mr Khodorkovsky in the first and second trials and mentioning another – fraud – which he had never faced. However, Mr Putin had later clarified his remarks such as to dispel any confusion.

The Court thus held that there had been no violation of Article 6 § 2. It did not find it necessary to consider the applicants' complaints under Article 6 §§ 1 and 3 (a) and (b).

Article 7

The applicants complained of being subjected to an extensive and novel interpretation of the criminal law and of the unlawful imposition of a criminal penalty.

They argued in particular that as under domestic law "misappropriation and embezzlement" constituted a type of "stealing", their actions had not fallen within the statutory definition of "stealing" as the transfer of oil from Yukos's production entities to the trading companies had taken place under lawful purchase-sale transactions. The Government contested that argument.

The Court examined whether the courts had carried out a reasonable analysis and whether the applicants could have foreseen that their acts could count as misappropriation or embezzlement.

The Court noted that the contracts for the production entities' sale of oil to the trading companies had been valid under civil law at the time and, indeed, remained so. It was thus difficult to understand how a reciprocal transaction that was valid under civil law could amount to "the unlawful and uncompensated taking... of another's property", the definition of "stealing" in domestic law.

Furthermore, the notion of "deceit", mentioned in the domestic judgments as the way the applicants had obtained approval for the oil sale agreements, did not appear as a qualifying element in either the offence of "misappropriation or embezzlement" or that of "stealing". The acts imputed to the applicants therefore were not punishable under the criminal provisions applied by the courts.

The offence of which the applicants had been charged had therefore been extensively and unforeseeably construed to their detriment. They could not have foreseen that their entering into the oil sale transactions in question could have constituted misappropriation or embezzlement. Nor could they have foreseen that the profits from the sale of the oil from the production entities to the trading companies would be found to constitute the proceeds of a crime, the use of which could amount to money laundering. The Court concluded that there had been a breach of Article 7 and did not consider it necessary to examine the applicants' complaint about the calculation of their prison terms.

Article 8

The applicants argued that there had been a violation of this provision because their transfer to remand prisons in Chita and Moscow before the trial had deprived them of the long-term family visits that were possible in the penal colonies where they had been serving their sentences after the first trial. The Government argued that the transfer to remand prisons had facilitated family visits.

The Court observed that it had found a violation of Article 8 in the 2018 case of *Resin v. Russia* owing to the legislative bar on long-stay family visits for convicted prisoners who had been taken to a remand prison from a correctional facility during an investigation.

The Government had not submitted any information or arguments to enable the Court to depart from those findings in Mr Khodorkovsky and Mr Lebedev's case and there had been a breach of Article 8 because of the lack of long-stay visits in their remand prisons.

Article 4 of Protocol No. 7

The Court examined whether the second set of criminal proceedings had arisen from facts which were substantially the same as those which had led to the applicants' first conviction.

The second judgment had mentioned the sale of oil by Yukos's production entities to its trading companies, which had also been referred to in the first trial. However, the Court noted that the applicants had been running a large-scale oil business involving many different companies and so an argument that both convictions had concerned the sale of oil within the Yukos group was too general and could not lead it to conclude that the two convictions had arisen from the same facts.

The applicants had also pointed more specifically to the fact that both judgments had referred to the setting up of four trading companies in particular. However, the Court was not convinced that mentioning certain details related to the organisation of the applicants' business in both judgments was sufficient to show that both convictions had arisen from the same facts.

The Court concluded that the applicants had not been prosecuted or convicted in the second set of criminal proceedings on the basis of facts that were substantially the same as used in the first conviction and it rejected this complaint as manifestly ill-founded.

Article 18

The applicants argued that they had been prosecuted and convicted for political reasons, a submission which the Government rejected. The Court had regard to earlier cases involving the applicants and noted that it had dismissed their allegations of a politically motivated prosecution.

Examining their second trial, it saw no separate issue under Article 18 in conjunction with Articles 6, 7, and Article 4 of Protocol No. 7, and could not find that the law on prison visits in regard to Article 8 had been applied for an ulterior motive. There had thus been no violation of Article 18 in this case.

Just satisfaction (Article 41)

The applicants did not make a claim for just satisfaction and the Court held that the finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage they had sustained.

Separate opinions

Judges Lemmens and Dedov expressed a joint partly dissenting opinion which is annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.