CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF LEBEDEV v. RUSSIA

(Application no. 4493/04)

JUDGMENT

STRASBOURG

25 October 2007

FINAL

02/06/2008

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

In the case of Lebedev v. Russia,

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

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 4 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 4493/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Platon Leonidovich Lebedev ("the applicant"), on 22 January 2004.

2. The applicant was represented by Mrs Y. Liptser and Mr Y. Baru, lawyers practising in Moscow, Mr W. Peukert, a lawyer practising in Strasbourg, and Messrs Amsterdam and Peroff, lawyers practising in Toronto. The respondent Government were represented by Mr P. Laptev, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that between 31 March and 6 April 2004 his detention pending trial was not based on a court decision; that the detention hearings of 3 July, 26 December 2003 and 8 June 2004 did not offer sufficient procedural guarantees; that the examination of his appeals against the detention orders of 26 December 2003 and 6 April 2004 was too slow. The applicant also alleged that the Government had failed to comply with their obligations under Article 34 of the Convention on account of the fact that his lawyer had been unable to meet him between 22 March and 12 April 2003.

4. On 6 April 2004 the Court decided to grant priority to this case under Rule 41 of the Rules of Court. By a decision of 18 May 2006 the Court declared the application partly admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1956 and is currently serving a prison sentence in the penitentiary institution *FGU IK-3*, situated in the Kharp township of the Yamalo-Nenetskiy Region.

A. Detention of the applicant

1. The applicant's arrest

7. At the time of the events described below the applicant was one of the leading executives of Yukos, a large oil company. On 20 June 2003 a public prosecutor opened an investigation on suspicion of fraud committed in the course of the privatisation of a State-owned company in 1994 by a group of top managers of Yukos and affiliated companies. In the following months some of them were arrested and charged, including Mr Khodorkovskiy, the former head of Yukos; others, in fear of prosecution, left Russia.

8. On 2 July 2003 the applicant was admitted to a hospital in connection with his chronic diseases. On the same day, while in the hospital, the applicant was arrested by the prosecuting authorities as a suspect in the above criminal case. He was taken from there to a pre-trial detention centre.

9. On 3 July 2003 the prosecution charged the applicant and two other persons with fraud and non-compliance with a court order. The prosecution asserted that in 1994 the applicant had deceived the State: he had bought a stake in a large mining company at a privatisation tender, but had not made a return investment in the company even though that was an obligation for the winning bidder. Furthermore, the applicant had later disobeyed a judgment ordering him to return the stake in the company to the State.

10. The applicant's lawyers objected to the arrest and maintained that the applicant's detention was incompatible with his state of health. On the same day, 3 July 2003, the prosecution requested the Basmanniy District Court of Moscow to remand the applicant in custody.

2. Initial detention order

11. The detention hearing was supposed to start on 3 July 2003 at 4.30 p.m. The applicant asked the court to adjourn the hearing in order to allow his lawyers to participate in it. The court dismissed this request on the ground that the lawyers had been properly informed about the detention hearing two hours before but had failed to appear. The court decided to hear the detention request in private.

12. According to the applicant's lawyers, they learned about the time of the detention hearing one hour and forty minutes before it began. When they

arrived at the courthouse they could not participate in the hearing because the judge had locked the room and refused to open it.

13. Having heard the applicant and the prosecution, the court decided to detain the applicant. The court decision did not specify the period of detention. With regard to the absence of the lawyers from the hearing, the court noted as follows:

> "The court finds unfounded and cannot accept [the applicant's] motion to adjourn [the decision] until [his lawyers] may take part in the proceedings. The documents submitted by the investigating authorities prove that [the lawyers] were informed about the time and place of the hearing in advance, namely at 2.52 p.m. on 3 July 2003 [they] were informed that at 4.30 p.m. on 3 July 2003 [the Basmanniy District Court] would examine [the investigating officer's request for a detention order]. In reality, the hearing ... began at 5.50 p.m. on 3 July 2003, but [the lawyers] have still not arrived, nor have they presented valid reasons for their absence..."

14. The defence appealed against the detention order, but on 23 July 2003 the Moscow City Court upheld it. The applicant's lawyers were present at the appeal court hearing; the applicant was absent. In the hearing the prosecution submitted additional evidence in favour of the applicant's detention. The appeal court gave the following reasons for its decision:

> "[The prosecution has submitted] evidence that [the applicant] has three travel passports, that most of [his] money has been [converted into] foreign currency and is deposited in foreign ... bank accounts, that he has real estate abroad, and that his main business is located outside Russia. In the hearing [the applicant's] lawyers did not contest this evidence. [This evidence], together with the fact that [the applicant] heads several commercial banks and maintains international links, supports the [first-instance] court's conclusion that [the applicant], if he remains at large, may abscond from the investigation and trial, influence ... witnesses, destroy evidence, and otherwise obstruct the proceedings...."

Furthermore, the court of appeal found that the applicant's lawyers had been properly informed about the time of the hearing in the District Court but failed to appear in time. The court noted that the applicant's lawyers had been notified about the hearing in the General Prosecutor's office situated a short distance away from the building of the Basmanniy District Court. The defence lawyers had had three hours to get there, but had failed to appear in time. Consequently, the judge had had every reason not to let them in "because when they arrived at the court the hearing had already started and it was closed to those who were not participating in it".

15. On 20 August 2003 the investigation ended. On 22 August 2003 the applicant and his lawyers began to study the prosecution files.

3. Extensions of detention on remand during the investigation

16. The prosecution requested the Basmanniy District Court to extend the applicant's detention three times to let him study the prosecution files. On 28 August 2003 the court extended the detention until 30 October 2003.

The defence lodged an appeal against this decision which was dismissed on 15 October 2003 by the Moscow City Court.

17. On 28 October 2003 the court extended the detention until 30 December 2003. An appeal by the defence against this detention order was dismissed on 23 December 2003 by the Moscow City Court.

18. On 26 December 2003 the court extended the detention until 30 March 2004. The court repeated the reasons for detention, formulated in the detention order of 3 July 2003. The hearing of 26 December 2003 was held in private.

19. On 30 December 2003 the applicant's lawyer, and on 9 January 2004 the applicant himself, lodged summary appeals against the decision of 26 December 2003. According to the Government the record of the hearing of 26 December 2003 was signed on 5 January 2004. However, it was not until 14 January 2004 that the applicant's lawyers obtained it from the registry. The applicant asserted that the record was deposited with the registry of the Basmanniy District Court only three weeks after the hearing. According to the Government, on 22 January 2004 the court received comments on the record of the hearing from the applicant's lawyer; on the same day it dismissed those comments, confirming the accuracy of the hearing record. On 23 January 2004 the applicant's lawyer, and on 5 February 2004 the applicant himself, lodged reasoned appeals against the decision of 26 December 2003. The reasoned appeals reached the court on 6 February 2004. On 9 February 2004 the Moscow City Court upheld the decision of 26 December 2003.

4. The applicant's detention during the trial

20. After the applicant had finished studying the prosecution files, on 26 March 2004 the prosecution submitted the case to the Meschanskiy District Court of Moscow for trial.

21. On 6 April 2004 the Meschanskiy District Court set a preliminary hearing for 15 April 2004 and decided that meanwhile the applicant should stay in detention. No reasons were given for that decision. It appears that the applicant was absent from this hearing; however, his lawyer was present.

22. On 12 April 2004 the applicant's lawyer lodged, by post, an appeal against this decision arguing that the court had failed to hear the applicant and to cite any reasons for the detention.

23. On 15 April 2004 the applicant's lawyer asked the court to release the applicant because no court decision had authorised his detention from 30 March 2004, when the detention had expired, to 6 April 2004, when the court had accepted the case for trial. On the same day, 15 April 2004, the court rejected this request because the prosecution had submitted the case for trial in time, and because from that moment the court had jurisdiction over the applicant (*перечисление за судом*). The court also decided that the applicant should remain in detention during the trial. In support of that

decision the court relied on the reasons stated in the detention orders of 2003. Both the applicant and his lawyers were present at the hearing of 15 April 2004.

24. On 22 April 2004 the Moscow City Court received the applicant's lawyer's appeal against the decision of 6 April 2004, sent by post (see paragraph 22 above). On 26 April 2004 the court sent it to the prosecution for comment. On 14 May 2004 the court received the memoranda from the prosecution and the civil plaintiffs. On 20 May 2004 the memoranda were received by the defence. On an unspecified date the court set a hearing for 27 May 2004. On 26 May 2004 the applicant's lawyer lodged an additional appeal. The court sent the additional appeal to the prosecution for comment. Having received the comments, the court set a hearing for 9 June 2004.

25. On 8 June 2004 the Meschanskiy District Court conducted a preliminary hearing into the criminal case of Mr Khodorkovskiy and Mr Kraynov, the applicant's co-defendants. In the course of that hearing the court decided to join the applicant's case to his co-defendants' cases, assigned the case for trial and confirmed that the applicant should remain in detention. The court also decided that the trial would be public. The applicant and his lawyers were absent from that hearing, whereas the prosecution was there.

26. On 9 June 2004 the Moscow City Court rejected the appeals against the Meschanskiy District Court's decisions of 6 and 15 April 2004. The City Court confirmed the lawfulness of the applicant's detention between 30 March and 6 April 2004; it also decided that the decisions of 6 and 15 April 2004 had been lawful.

27. On 29 July 2004 the Moscow City Court rejected the appeal against the decision of 8 June 2004. The applicant's lawyers participated in the appeal hearing, but the applicant was not there. The City Court held that the Meschanskiy District Court's decision extending the detention had been in conformity with the provisions of the Code of Criminal Procedure and had been based on the material in the case file. Further, the City Court obtained a medical certificate concerning Mr Lebedev from the prison doctor, who described the applicant's state of health as "satisfactory". The court of appeal concluded that the applicant should remain in detention during the trial.

28. At the hearing on 10 September 2004 the prosecutor asked the court to extend the applicant's detention on remand until 26 December 2004, since the previous detention order would expire on 26 September 2004. The defence objected but the court granted the motion and extended the applicant's detention on remand as requested. The reasons given by the District Court in its decision of 10 September repeated the reasons stated in the decision of 15 April 2004 (see paragraph 23 above). On several occasions in the following months the applicant's detention was prolonged by the Meschanskiy District Court.

29. On 16 May 2005 the Meschanskiy District Court convicted the applicant and sentenced him to nine years' imprisonment.

B. The applicant's lawyers' visits to prison

30. On 4 December 2003 and 22 March 2004 Mr Baru, the applicant's lawyer, visited the applicant in prison. During the visit the applicant gave him notes concerning the trial. As Mr Baru was leaving, guards stopped him and confiscated the notes. Later the prosecution returned the notes.

31. On 22 March 2004 Ms Liptser, the applicant's other lawyer, was appointed to represent the applicant before the Court. On 23 March 2004 she tried to visit the applicant in prison. However, the prison administration refused the visit because Ms Liptser had no authority to represent the applicant before the domestic courts. In the following days Ms Liptser was denied access to her client; however, according to the register kept by the detention facility and produced by the Government, the applicant had meetings with his other lawyers. In particular, Mr Baru visited him on 30 March, 1 and 2 April 2004, and 5 to 9 April 2004. On 12 April 2004 Ms Liptser received the appropriate authority and was allowed to visit the applicant. Later she complained about those facts to the Preobrazhenskiy District Court, but on 26 April 2004 the court ruled that it did not have jurisdiction to examine this complaint. In aggregate, within the period under consideration, the applicant had about 20 meetings with Ms Liptser.

II. RELEVANT DOMESTIC LAW AND PRACTICE

32. Article 22 part 2 of the Constitution of the Russian Federation provides that detention should be authorised by a court order. Detention without a court order is permitted only for up to 48 hours.

33. The Code of Criminal Procedure of 2001 provides:

Article 108. Pre-trial detention

"1. Pre-trial detention as a measure of restraint shall be applied by a court only where it is impossible to apply a different, less severe, precautionary measure...

...

3. When the need arises to apply detention as a measure of restraint ... the investigating officer should request the court accordingly...

4. [The request] should be examined by a single judge of a district court ... with the participation of the suspect or the accused, the public prosecutor and the defender, if one takes part in the proceedings. [The request should be examined] at the place of the preliminary investigation, or of the detention, within 8 hours of the receipt of the [request] to the court.... The non-justified absence of the parties, who were notified about the time of the hearing in good time, should not prevent [the court] from

considering the request [for detention], except for the cases of absence of the accused person.

...

7. Having examined the request [for detention], the judge should take one of the following decisions:

1) to apply pre-trial detention as a measure of restraint in respect of the accused;

2) to dismiss the request [for detention];

3) to adjourn the examination of the request for up to 72 hours so that the requesting party can produce additional evidence in support of the request."

Article 109. Time-limits for pre-trial detention

"1. A period of detention during the investigation of criminal offences may not last longer than two months.

2. If it is impossible to complete the preliminary investigation within two months and if there are no grounds for modification or cancellation of the preventive measure this time-limit may be extended by up to six months by a judge of a district or garrison court of the relevant level according to the procedure provided in Article 108 of the present Code. A further extension of this term up to 12 months may be effected in respect of persons accused of committing grave or particularly grave criminal offences only in cases of special complexity of the criminal case, and provided there are grounds for application of this preventive measure, by a judge of the same court upon application of the investigator, filed with the consent of a prosecutor of a subject of the Russian Federation or a military prosecutor of equal status.

3. A term of detention may be extended beyond 12 months and up to 18 months only in exceptional cases and in respect of persons accused of committing grave or particularly grave criminal offences by [a judge] on application by an investigator filed with the consent of the Prosecutor General of the Russian Federation or his deputy.

4. Further extension of the time-limit shall not be allowed. ..."

Article 110. Cancellation or modification of a preventive measure

"1. A preventive measure must be cancelled when it ceases to be necessary, or else changed into a stricter or a milder one if the grounds for application of a preventive measure ... change.

2. The cancellation or modification of a preventive measure should be effected by an order of the person carrying out the inquiry, the investigator, the prosecutor or the judge or by a court decision.

3. A preventive measure applied at the pre-trial stage by the prosecutor or by the investigator or the inquirer upon his written instructions may be cancelled or changed only with the prosecutor's approval."

Article 123. Right to appeal

"Actions (omissions) and decisions of the agency conducting the inquiry, the inquirer, the investigator, the prosecutor and the court may be appealed against according to the procedure provided in the present Code by the participants in the

criminal proceedings and by other persons to the extent that the procedural actions carried out and procedural decisions taken affect their interests."

Article 227. Judges' powers in respect of a criminal case submitted for trial

"1. When a criminal case is submitted [to the court], the judge must decide as follows: either

(i) to forward the case to an [appropriate] jurisdiction; or,

(ii) to hold a preliminary hearing; or,

(iii) to hold a hearing.

2. The judge's decision shall take the form of a resolution...

3. The decision shall be taken within 30 days of the submission of the case to the court. If the accused is detained, the judge must take the decision within 14 days of the submission of the case to the court..."

Article 228. Points to be ascertained in connection with a criminal case submitted for trial

"Where a criminal case is submitted for trial, the judge must ascertain the following points in respect of each accused:

(i) whether the court has jurisdiction to deal with the case;

(ii) whether copies of the indictment have been served;

(iii) whether the measure of restraint should be lifted or changed;

(iv) whether the motions filed should be granted ..."

Article 231. Setting the case for trial

"1. When there are no grounds to take one of the decisions described in subparagraphs (i) or (ii) of the first paragraph of Article 227, the judge should assign the case for trial ... In the resolution ... the judge should decide on the following matters:

...

(vi) on the measure of restraint, except for the cases when detention on remand or house arrest are chosen..."

Article 255. Measures of restraint during trial

"1. During the trial the court may order, change, or lift a precautionary measure in respect of the accused.

2. If the defendant has been detained before the trial, his detention may not exceed six months from the moment the court receives the case for trial to the time when the court delivers the sentence, with exceptions provided by § 3 of this Article.

3. The court [...] may extend the accused's detention on remand. It is possible to extend detention only in respect of a defendant charged with serious crimes or especially serious crimes, and each time for a period of up to 3 months..."

Article 259. The hearing record

"1. During the hearing a record must be kept. ...

6. The hearing record must be made and signed by the presiding judge and the secretary of the court within 3 days after the hearing. ..."

Article 376. Setting the case down for the appeal hearing

"1. Having received the criminal case with the points of appeal ..., the judge must fix the date, time and venue of the [appeal] hearing.

2. The parties must be notified about the date, time and venue [of the appeal hearing] no later than fourteen days before it. The court shall decide whether the convicted detainee should be summoned to the hearing.

3. A convicted detainee who has expressed a wish to be present [at the appeal hearing] shall have the right to be present personally or to submit his arguments by video link. The court shall decide in what form the participation of the convicted person in the hearing is to be secured. ..."

34. On 22 March 2005 the Constitutional Court of the Russian Federation adopted Ruling no. 4-*P* on the complaint lodged by a group of individuals, including the applicant. They complained about the *de facto* extension of their detention after their case files had been sent by the prosecution authorities to the respective trial courts. The Court found that the provisions of the Code challenged by the applicant and other claimants complied with the Constitution of the Russian Federation. However, their practical interpretation by the courts might have contradicted their constitutional meaning. In part 3.2. of the Ruling the Constitutional Court held:

"The second part of Article 22 of the Constitution of the Russian Federation provides that ... detention is permitted only on the basis of a court order ... Consequently, if the term of detention, as defined in the court order, expires, the court must decide on the extension of the detention, otherwise the accused person must be released...

These rules are common for all stages of criminal proceedings, and also cover the transition from one stage to another. ... The transition of the case to another stage does not automatically put an end to the measure of restraint applied at previous stages.

Therefore, when the case is transmitted by the prosecution to the trial court, the measure of restraint applied at the pre-trial stage ... may continue to apply until the expiry of the term for which it has been set in the respective court decision [imposing it]...

[Under Articles 227 and 228 of the Code of Criminal Procedure] a judge, after having received the criminal case concerning a detained defendant, should, within 14 days, set a hearing and establish "whether the measure of restraint applied should be lifted or changed". This wording implies that the decision to detain the accused or extend his detention, taken at the pre-trial stage, may stand after the completion of the pre-trial investigation and transmittal of the case to the court, only until the end of the term for which the measure of restraint has been set.

The prosecution, in its turn, when approving the bill of indictment and transferring the case file to the court, should check whether the term of detention has not expired and whether it is sufficient to allow the judge to take a decision [on further detention of the accused pending trial]. If by the time of transfer of the case file to the court this term has expired, or if it appears to be insufficient to allow the judge to take a decision

> [on detention], the prosecutor, applying Articles 108 and 109 of the Code of Criminal Proceedings, [must] ask the court to extend the period of detention."

In its Ruling the Constitutional Court further held:

> "Since deprivation of liberty ... is permissible only pursuant to a court decision, taken at a hearing ... under the condition that a detainee has been provided an opportunity to submit his arguments to the court, the prohibition on issuing a detention order ... without a hearing should apply to all court decisions, whether they concern the initial imposition of this measure of restraint, or its confirmation."

35. On 22 January 2004 the Constitutional Court delivered decision no. 66-*O* on a complaint about the Supreme Court's refusal to permit a detainee to attend the appeal hearings on the issue of detention. It held:

> "Article 376 of the Code of Criminal Procedure regulating the presence of a defendant remanded in custody before the appeal court... cannot be read as depriving the defendant held in custody... of the right to express his opinion to the appeal court, by way of his personal attendance at the hearing or by other lawful means, on matters relating to the examination of his complaint about a judicial decision affecting his constitutional rights and freedoms..."

36. Article 72 §§ 3 and 4 of the Criminal Code of 1996 provide that the time spent by the accused person in pre-trial detention and detention pending trial is included in the duration of the deprivation of liberty pursuant to the conviction.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS AS REGARDS THE COMPLAINT UNDER ARTICLE 5 § 1 OF THE CONVENTION

A. Non-exhaustion of domestic remedies

37. In their observations on the merits the Government argued that the applicant had failed to exhaust domestic remedies. He had brought proceedings before the Constitutional Court of Russia which had ended with Ruling 4-P of 22 March 2005 in his favour. The Government considered that the matter had not yet been resolved at the national level.

38. The Court notes that the Government's objection can be interpreted in two ways: first, as implying that a complaint to the Constitutional Court was an effective remedy to be exhausted, and, secondly, as suggesting that the Ruling of the Constitutional Court opened before the applicant some

new legal avenues which had not existed before. One way or another, the Court observes that the Government raised this objection for the first time in their additional observations on the merits of 14 September 2006, after the decision on the admissibility of this complaint had been adopted. In such circumstances the first question to answer is whether the Government are estopped from raising such an objection.

39. In principle, the Court has jurisdiction to take cognisance of pleas of non-exhaustion in so far as the respondent State has already raised them before the final decision on admissibility (see, among many other authorities, *K. and T. v. Finland* [GC], no. 25702/94, § 145, ECHR 2001-VII, and *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X). In the context of the present case that means that even if the complaint to the Constitutional Court was an "effective remedy" from the very beginning, the Government are estopped from raising the matter before the Court.

40. The Court accepts that the reason prompting an objection to admissibility may sometimes become known only after the admissibility decision. However, that is not the case here, since Ruling no. 4-*P* was adopted long before the decision on admissibility. The Court reiterates in this connection that where a new legally relevant procedural event occurs in the course of the proceedings before the Court, it is in the interests of the proper administration of justice that the Contracting Party should make any formal objection without delay (see, *mutatis mutandis*, *N.C. v. Italy* [GC], cited above, § 39). Even assuming that the Ruling opened up new legal avenues to the applicant, the Government did not inform the Court about this development until September 2006. The Court cannot discern any exceptional circumstances that could have dispensed the Government from raising this objection in a timely manner (see *Prokopovich v. Russia*, no. 58255/00, § 29, 18 November 2004).

41. In sum, the Court holds that the Government are estopped from raising the objection concerning alleged non-exhaustion of domestic remedies and dismisses it.

B. Victim status

42. Further, the Government argued that the Ruling of the Constitutional Court of 22 March 2005 had deprived the applicant of victim status. A breach of his rights had been openly acknowledged by the Constitutional Court. Moreover, the time spent by the applicant in pre-trial detention had been deducted from his sentence.

43. At the outset the Court notes that an argument in similar terms was dismissed by the Court in the case of *Pavletić v. Slovakia* (no. 39359/98, §§ 60-61, 22 June 2004). As in *Pavletić,* in the present case the Government did not raise that objection at the admissibility stage of the proceedings. On that account, they may be considered in principle estopped from raising it at

this stage (Rule 55 of the Rules of Court; see, *inter alia*, *Amrollahi v. Denmark*, no. 56811/00, § 22, 11 July 2002; *Mansur v. Turkey*, judgment of 8 June 1995, Series A no. 319-B, §§ 47 and 48; and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 44, ECHR 1999-II).

44. In any event, the Court cannot agree with the Government that the applicant has ceased to have standing as a victim within the meaning of Article 34. The Court reiterates in this connection that an applicant may lose his victim status if two conditions are met: first, the authorities should acknowledge the alleged violations either expressly or in substance and, second, afford redress (see *Guisset v. France*, no. 33933/96, §§ 66-67, ECHR 2000-IX). A decision or measure favourable to the applicant is in principle not sufficient to deprive him of his status as a "victim" in the absence of such acknowledgement and redress (see *Constantinescu v. Romania*, no. 28871/95, § 40, ECHR 2000-VIII).

45. Turning to the present case, the Court notes that the Ruling can hardly be regarded as an "acknowledgment" of a violation of the applicant's right. The Constitutional Court did not examine the applicant's individual situation as such but gave a constitutional interpretation of the law.

46. Furthermore, the Ruling by itself did not provide any redress to the applicant in respect of the shortcomings affecting the legality of his detention. It appears that, formally speaking, the Ruling cannot serve as a ground for the reconsideration of the applicant's complaint about his unlawful detention, and from the Government's submissions it is unclear what other effects the Ruling could have had.

47. As regards the fact that the period of the applicant's detention before conviction was included in the term of his sentence, the Court observes that, in principle, the mitigation of a sentence may deprive the individual concerned of his status of victim when the national authorities have acknowledged the breach of the Convention and reduced the applicant's sentence in a measurable manner in order to redress the previous breaches of Article 5 (see, *mutatis mutandis*, *Dzelili v. Germany*, no. 65745/01, §§ 83 et seq., 10 November 2005). However, in the present case the inclusion of the time spent in custody in the overall time to be served by the applicant was not in any way connected to the alleged violation of Article 5 § 1 of the Convention. As follows from Article 72 of the Criminal Code, the time spent in custody is automatically deducted from the final sentence, irrespective of whether or not it was irregular.

48. Therefore, the applicant cannot be said to have lost his victim status within the meaning of Article 34 of the Convention. The Government's objection should therefore be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

49. The applicant complained under Article 5 § 1 (c) of the Convention that between 31 March and 6 April 2004 his detention had not been based on a court decision, and was thus "unlawful". As far as relevant, Article 5 reads:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so..."

A. The parties' submissions

50. The Government argued that this complaint was manifestly ill-founded. Under Article 255 of the Code of Criminal Procedure, detention on remand remained in force during the trial. As soon as the prosecution had passed the case to the court, the applicant was "assigned" to the court (*перечислен за судом*). In such circumstances the District Court had, under Article 227 § 3 of the Code of Criminal Procedure, fourteen days for deciding on the applicant's detention. Hence, the effect of the Basmanniy District Court's decision of 26 December 2003 lasted until 6 April 2004.

51. The applicant insisted on his complaint. According to the Constitutional Court's reading of Article 255, detention always had to be based on a court decision.

B. The Court's assessment

52. The Court notes that several days after the prosecution had submitted the case for trial, the applicant's pre-trial detention expired. Nevertheless, it was not until one week later that the court ruled that the applicant should remain in prison during the trial. The question arises whether during that week his detention was "lawful" within the meaning of Article 5 § 1.

53. The Court reiterates that the terms "lawful" and "in accordance with a procedure prescribed by law" used in Article 5 § 1 of the Convention essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. The Convention requires in addition that any deprivation of liberty should be in conformity with the purpose of Article 5, which is to prevent persons from being deprived of their liberty in an arbitrary fashion (see, among many other authorities,

Erkalo v. the Netherlands, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2477, § 52).

54. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with. A period of detention will in principle be lawful if it is carried out pursuant to a court order (see *Douiyeb v. the Netherlands* [GC], no. 31464/96, §§ 44-45, 4 August 1999). In that connection, the Court would emphasise that, given the importance of personal liberty, it is essential that the applicable national law should meet the standard of "lawfulness" set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Steel and Others v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VII, p. 2735, § 54).

55. Driven by this approach, in a number of cases the Court has condemned the practice of detaining defendants under a bill of indictment alone, without proper court authorisation (see *Baranowski v. Poland* no. 28358/95, §§ 42-58, ECHR 2000-III; see also *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX). In *Baranowski* the applicant's continued detention was the result of a judicial practice established in the absence of any specific legislative provisions or clear case-law on that matter (see, by contrast, *Laumont v. France*, no. 43626/98, §§ 43 et seq., ECHR 2001-XI).

56. The Court notes that in the present case the unsanctioned detention lasted one week – from 30 March to 6 April 2004. Therefore, the time-gap between two valid detention orders in the present case was less important than in *Baranowski* (cited above).

57. However, that specific feature of the Russian system of the pre-trial detention has already been examined in *Khudoyorov v. Russia* (no. 6847/02, §§ 145 et seq., ECHR 2005-... (extracts)). In that case the Court established that detention without a court order or other clear legal ground was incompatible with the standard of "lawfulness", enshrined in Article 5 § 1, even though, according to the Government's interpretation of Article 227 § 3 of the Code of Criminal procedure, the unsanctioned detention could not have lasted more than two weeks. The Court found that during that time "the applicant was in a legal vacuum that was not covered by any domestic legal provision" (*Khudoyorov*, § 149).

58. Further, in the present case the Russian Constitutional Court, upon the applicant's request, condemned this practice as unconstitutional (see the "Relevant Domestic Law" part above). In these circumstances the Court finds that the detention was not "lawful" for Convention purposes.

59. The Court concludes that the applicant's detention between 30 March and 6 April 2004 lacked a legal basis and was therefore "unlawful". Consequently, there has been a breach of Article 5 § 1 in this respect.

III. ALLEGED VIOLATION OF THE PROCEDURAL REQUIREMENTS OF ARTICLE 5 OF THE CONVENTION

60. The applicant complained under Article 5 of the Convention about a number of procedural defects in the proceedings concerning his detention on remand. In particular, the hearings before the Basmanniy District Court of 3 July, 26 December 2003 and 8 June 2004 had been held in private, his lawyers could not participate in the Basmanniy District Court's hearing of 3 July 2003, the Meschanskiy District Court had not summoned him to its hearing of 8 June 2004, and it had taken the Moscow City Court too long to examine his appeals against the extensions of his detention.

The Court has examined this aspect of the application under Article 5 §§ 3 and 4 of the Convention which read as follows:

> "3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The Government's submissions

61. First, the Government argued that this complaint was incompatible with the Convention because Article 5 § 4 did not apply to the hearings in question, and, moreover, the proceedings did not need, under Article 5 of the Convention, to offer the same level of guarantees as the proceedings under Article 6 of the Convention. They referred to the *Neumeister v. Austria* case (judgment of 27 June 1968, Series A no. 8, § 24), where the Court held that "full written proceedings or an oral hearing of the parties in the examination of such remedies would be a source of delay which it is important to avoid in this field".

62. Secondly, the Government argued that the applicant's rights under Article 5 had not been violated. As regards the lack of publicity, under domestic law the Basmanniy District Court had the right to hold these hearings in private, because the lack of publicity did not prejudice the applicant's defence, and because the applicant's trial was in any event public.

63. As regards the absence of the applicant from the hearing of 8 June 2004, the Government pointed out that the applicant had not been summoned to this hearing because it had been conducted within the framework of a different case, namely the case of Mr Khodorkovskiy and Mr Kraynov. However, since in the course of the pre-trial investigation the applicant and his co-defendants had requested that their cases be joined, on 8 June 2004 the court granted this motion. Under the Code of Criminal Procedure, namely Articles 227, 228, 231 and 236 of CCrP, the court, on its own initiative and together with joining the cases, had to re-consider the measures of restraint applied to the accused. Therefore, on that day the court had not imposed or prolonged the applicant's detention but merely confirmed its validity.

64. As to the appeal against the decision of 26 December 2003, the court examined it only four days after the applicant had lodged its final version. As to the appeal against the decision of 6 April 2004, it was the applicant's lawyer who had caused the delay. She had sent the appeal by post instead of lodging it by hand and lodged an additional appeal the day before the first appeal was to be heard. The court had to send the additional appeal to the prosecution for comment, and this necessary formality had caused the delay.

B. The applicant's submissions

65. First, the applicant maintained that Article 5 § 4 was applicable to the proceedings at issue. In his submission, the case-law of the Court had evolved since the *Neumeister* case. He referred to *Winterwerp v. the Netherlands* (judgment of 24 October 1979, Series A no. 33, § 60), where the Court emphasised the following:

> "The judicial proceedings referred to in Article 5 § 4 ... need not, it is true, always be attended by the same guarantees as those required under Article 6 § 1 ... Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty'."

In the later case-law the Court had confirmed this approach. Thus, in *Nikolov v. Bulgaria* (no. 38884/97, § 97, 30 January 2003) and *Migoń v. Poland* (no. 24244/94, § 68, 25 June 2002) the Court had found that detention proceedings must adequately ensure "equality of arms" between the parties.

66. Secondly, the applicant argued that his procedural rights under Article 5 had been breached. The publicity of detention hearings was a core principle of justice. The court had decided to hold these hearings in private without asking the parties and without citing any reasons.

67. As regards his absence from the hearing of 8 June 2004, the applicant maintained that the right to take part in proceedings concerning

detention did not depend on the nature of the proceedings, as the Government had suggested. He referred to the Ruling of the Constitutional Court of the Russian Federation of 22 March 2005, which held that the presence of a detainee at a hearing concerning his detention was required in all circumstances, irrespective of whether the court was imposing, prolonging or confirming the lawfulness of the detention.

68. As to the appeal against the decision of 26 December 2003, it was lodged late because the district court had failed to issue the hearing record in time. As to the appeal against the decision of 6 April 2004, the Moscow City Court could have performed the necessary procedural formalities more speedily.

C. The Court's assessment

1. Applicability of Article 5 §§ 3 and 4 to the detention proceedings

69. The Court will start by examining the Government's first argument, namely that Article 5 § 4 was not applicable to the proceedings at issue. The Court observes that at the admissibility stage this issue was joined to the merits of the case.

70. It is true that Article 5 § 4 guarantees, first of all, the right to take proceedings by which the lawfulness of the detention will be decided by the court. In the *Neumeister* case, referred to in the Government's submissions, the Court found that the term "court" in the context of Article 5 § 4 "implies only that the authority called upon to decide thereon must possess a judicial character, that is to say, be independent both of the executive and of the parties to the case; it in no way relates to the procedure to be followed" (§ 24).

71. However, the Convention is a "living instrument which must be interpreted in the light of present-day conditions" (see, among other authorities, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31). *Neumeister* was one of the first cases under Article 5; in the last three decades the former Commission and the Court have consistently interpreted Article 5 § 4 as providing certain procedural guarantees to a detainee, broadly similar to those under Article 6 § 1 of the Convention (see, for instance, *Winterwerp*, cited above, p. 24, § 60; *Sanchez-Reisse v. Switzerland*, 21 October 1986, Series A no. 107; *Kampanis v. Greece*, 13 July 1995, Series A no. 318-B; and *Ilijkov v. Bulgaria*, no. 33977/96, 26 July 2001, § 103). Thus, in *Nikolov*, cited by the applicant (§ 97), the Court said:

> "The proceedings conducted under Article 5 § 4 of the Convention should in principle meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial."

72. In the Court's opinion, it is of little relevance whether the court decides on an application for release lodged by the defence or a request for detention introduced by the prosecution. Such an approach was adopted in a number of recent cases. For instance, in *Graužinis v. Lithuania* (no. 37975/97, § 33, 10 October 2000) the Court decided that the extension of the applicant's detention on remand by a district court at the request of the prosecution also attracted the guarantees of Article 5 § 4 of the Convention (see also *Telecki v Poland* (dec.) no. 56552/00, 3 July 2003).

73. Furthermore, although the Convention does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, "a State which institutes such a system must in principle accord to the detainees the same guarantees on appeal as at first instance" (see *Navarra v. France*, judgment of 23 November 1993, Series A no. 273-B, § 28, and *Toth v. Austria*, judgment of 12 December 1991, Series A no. 224, § 84). In *Włoch v. Poland* (no. 27785/95, §§ 125 et seq., ECHR 2000-XI), the Court applied Article 5 § 4 to the proceedings before the Cracow Regional Court which prolonged the applicant's detention upon the prosecutor's motion, as well as to the proceedings before the Cracow Court of Appeal which verified the lawfulness of the court order prolonging the applicant's detention. Therefore, Article 5 § 4 is applicable both to the extensions of the applicant's detention and to the appeal proceedings.

74. As regards the complaint about the defects in the detention hearing of 3 July 2003, the Court notes that on 3 July 2003 the applicant was "brought before a judge" within the meaning of paragraph 3 of Article 5. Therefore, the complaint about the detention hearing of 3 July 2003 falls under that Convention provision.

2. Compliance of the detention proceedings with Article 5 §§ 3 and 4

(a) General principles

75. The Court observes that both paragraphs 3 and 4 of Article 5, despite the difference in wording, imply the judicial character of the proceedings (see *De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, p. 40, § 76). Thus, in *Schiesser v. Switzerland* (judgment of 4 December 1979, Series A no. 34, § 31) the Court held:

> "Under Article 5 para. 3, there is both a procedural and a substantive requirement. The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him."

In *Brannigan and McBride v. the United Kingdom* (judgment of 26 May 1993, Series A no. 258-B, § 58), the Court went even further and held:

> "The Court notes that the introduction of a 'judge or other officer authorised by law to exercise judicial power' into the process of extension of periods of detention would not of itself necessarily bring about a situation of compliance with Article 5 para. 3.

> That provision - like Article 5 para. 4 – must be understood to require the necessity of following a *procedure that has a judicial character* [emphasis added], although that procedure need not necessarily be identical in each of the cases where the intervention of a judge is required."

76. Therefore, as a matter of principle, the Court does not see any reason to distinguish between court decisions imposing detention, prolonging it or testing its lawfulness. All such proceedings should offer certain minimum procedural guarantees, and the case-law concerning paragraph 4 of Article 5 of the Convention is, as a rule, applicable to detention proceedings falling under Article 5 § 3. At the same time the Court refers to its finding in *De Wilde, Ooms and Versyp v. Belgium*, where it held that "the forms of the procedure required by the Convention need not ... be identical in each of the cases where the intervention of a court is required" (judgment of 18 June 1971, Series A no. 12, § 78). Therefore, although the principles governing detention proceedings under Article 5 §§ 3 and 4 are broadly similar, the extent of the procedural guarantees may sometimes vary and, in any event, cannot be the same as under Article 6 of the Convention.

77. The Court observes that the applicant's detention in the present case falls within the ambit of Article 5 § 1 (c). In such a situation, when the lawfulness of detention pending investigation and trial is examined, a hearing is normally required (see *Sanchez-Reisse*, cited above, § 51, and *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, § 162, with further references). Furthermore, the proceedings must be adversarial and must always ensure equality of arms between the parties – the prosecutor and the detainee (see *Nikolova*, cited above, § 59; see also *Graužinis*, cited above, § 31). This means, in particular, that the detainee should have access to the documents in the investigation file which are essential for assessing the lawfulness of his detention (see *Lamy v. Belgium*, judgment of 30 March 1989, Series A no. 151, § 29, and *Schöps v. Germany*, no. 25116/94, § 44, ECHR 2001-I). The detainee should also have an opportunity to comment on the arguments put forward by the prosecution (see *Niedbała v. Poland*, no. 27915/95, § 67, 4 July 2000). Some form of legal representation of the detainee may be required, namely when he is unable to defend himself properly or in other special circumstances (see *Bouamar v. Belgium*, judgment of 29 February 1988, Series A no. 129, § 62; *Megyeri v. Germany*, judgment of 12 May 1992, Series A no. 237-A; and *Öcalan v. Turkey* [GC], no. 46221/99, § 70, ECHR 2005-...). Finally, there are certain requirements as to the scope of review under Article 5 § 4 (see *E. v. Norway*, judgment of 29 August 1990, Series A no. 181-A, § 50).

78. The Court further notes that Article 5 § 4 provides that "the lawfulness of the detention shall be decided *speedily*" (emphasis added). The Court will return to that matter below (see paragraphs 95 et seq.). For now, the Court observes that there are two aspects to this "speediness"

requirement: first, the opportunity for legal review must be provided soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter (see *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, p. 24, § 75). Secondly, the review proceedings must be conducted with due expedition.

79. Lastly, the Court stresses that there is an intrinsic link between the "procedural" and "time" aspects of Article 5 § 4. Compliance with the procedural guarantees enumerated in paragraph 77 above should always be assessed in the context of the requirement of "periodic review", discussed in paragraph 78 above. In other words, Article 5 § 4 does not guarantee to the detainee a right to obtain a full review of the detention, with all concomitant guarantees of procedural fairness, whenever he wants it, but only at "reasonable intervals". Whether or not the intervals were "reasonable" should be assessed in the particular circumstances of each case.

(b) Application to the present case

(i) Court proceedings concerning the applicant's detention from 3 July to 28 August 2003

80. The applicant complained that the hearing before the Basmanniy District Court on 3 July 2003 had been held in private, and that his lawyers had been unable to participate in it.

81. The Court observes that on 3 July 2003 the Basmanniy District Court ordered the applicant's detention during the investigation. The proceedings were held in private. The applicant was present, whereas his lawyers were not. The prosecution was present at the hearing. On 23 July 2003, following a hearing at which the applicant's lawyers were present whereas the applicant was not, the Moscow City Court rejected the applicant's appeal against the detention order of 3 July 2003.

82. As regards the fact that the detention hearing of 3 July 2003 was held in private, the Court observes that there is no basis in its case-law to support the applicant's claim that hearings on the lawfulness of pre-trial detention should always be public (see *Reinprecht v. Austria*, no. 67175/01, 15 November 2005, where the Court examined this issue under Article 5 § 4). The Court sees no reasons to depart from its case-law in this respect, and concludes that this aspect of the detention proceedings *per se* does not raise an issue under Article 5 § 3 either.

83. As regards the absence of the applicant's lawyers, the applicant maintained that they had been prohibited from participating in the detention hearing of 3 July 2003. As follows from the Basmanniy District Court's decision of 3 July 2003, and the decision of the Moscow City Court of 23 July 2003, the applicant's lawyers arrived at the court when the detention hearing had already started. The judge refused them permission to enter the

courtroom and participate in the hearing because of their unjustified late arrival.

84. The Court reiterates that detention proceedings require special expedition and Article 5 does not contain any explicit mention of a right to legal assistance in this respect. The difference of aims explains why Article 5 contains more flexible procedural requirements than Article 6 while being much more stringent as regards speediness. Therefore, as a rule, the judge may decide not to wait until a detainee avails himself of legal assistance, and the authorities are not obliged to provide him with free legal aid in the context of the detention proceedings.

85. However, several specific features of the present case incline the Court to depart from this general rule. First of all, the Court notes that the detention hearing took place on the day after the applicant's arrest and on the same day as he was informed about the charges against him, when he was least prepared to counter the arguments of the prosecution.

86. Furthermore, the applicant was brought before the judge almost directly from the hospital where he had been admitted in connection with his chronic diseases. Even if the applicant was able to participate personally in the detention proceedings, he was not in his normal state of health, and some form of legal representation was therefore at least desirable, especially given that the representatives of the prosecution were present in the courtroom.

87. Finally, the Court stresses that, unlike in the *Megyeri* case (cited above), the applicant in the present case had already engaged lawyers who were informed by the investigator about the detention hearing and were prepared to participate in it. Moreover, it appears that the court was in principle prepared to hear the lawyers and waited for them for some time. The situation of the applicant in this respect was closer to that of the applicants in the case of *Istratii and Others v. Moldova* (nos. 8721/05, 8705/05 and 8742/05, 27 March 2007). In that case the meetings between the applicants, who were detained, and their lawyer was arranged in a manner that precluded any confidential contact between them. The Court held that such a measure was not justified in the circumstances of the case (§ 90) and that there was a breach of Article 5 § 4 on that account. The central issue in that case was not the positive duty of the State to secure legal assistance to a detainee, but the negative obligation of the State not to hinder effective assistance from lawyers in the context of detention proceedings (§ 88). In the Court's opinion, this problem is also at the heart of the complaint under examination in the present case.

88. As follows from the decision of the Moscow City Court of 23 July 2003, the judge excluded the lawyers from the proceedings because "the hearing had already started and it was closed for those who did not participate in it". However, this exclusion of the public did not as such apply to the applicant's lawyers. If the exclusion of the lawyers was based

on the non-public character of the proceedings, the decision of the domestic judge was clearly irrational.

89. Further, the Court cannot detect any other reason why the presence of the lawyers at this stage could have been contrary to the interests of justice (see, *mutatis mutandis*, *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports* 1996-I, § 66). The Court accepts that the lawyers might have arrived late, and it might have been acceptable to start the hearing without waiting for the lawyers. However, the Court sees no reason to exclude them from the proceedings when they arrived. Even if their belated arrival could have prolonged the hearing, nothing suggests that there was any particular urgency in obtaining the detention order, given that the applicant was already under arrest. In sum, the Court considers that in the circumstances the domestic judge showed excessive rigour in not allowing the applicant's lawyers to take part in the proceedings.

90. The Court observes that the applicant's lawyers were present before the court of appeal, where they were able, at least in principle, to develop legal arguments calling for the applicant's release. In the context of Article 6 the Court usually examines the proceedings as a whole; however, this rule is not without exceptions, especially when it comes to pre-trial detention. Turning to the present case, the Court notes that the detention order of 3 July 2003 became effective immediately. Therefore, even if the court of appeal ultimately heard the applicant's lawyers, by that time the applicant had already spent twenty days in detention. Given that lapse of time, the Court cannot accept such a retroactive validation of the procedurally flawed detention order issued by the District Court. The Court concludes that the presence of the defence lawyers before the Moscow City Court did not remedy the defects of the procedure before the District Court.

91. In view of the above, the Court finds that the exclusion of the applicant's lawyers from the detention hearing of 3 July 2003, in the particular circumstances of the present case, adversely affected the applicant's ability to present his case and was not justified by the interests of justice. Thus, the applicant's detention between 3 July and 28 August 2003 was ordered as a result of the procedure which did not offer the minimum procedural guarantees implied in Article 5 § 3 of the Convention. The Court therefore finds that there has been a violation of that provision.

(ii) Court proceedings concerning the applicant's detention from 26 December 2003 to 30 March 2004

92. The applicant further complained that the hearing before the Basmanniy District Court on 26 December 2003 had been held in private, and that it had taken the Moscow City Court too long to examine his appeal against the detention order issued on that date by the Basmanniy District Court.

93. The Court notes that on 26 December 2003 the Basmanniy District Court ordered the extension of the applicant's detention until 30 March 2004. That hearing was held in private. The applicant's appeal against the detention order of 26 December 2003 was dismissed by the Moscow City Court on 9 February 2004, that is, 44 days later.

94. As to the fact that the hearing of 26 December 2003 was held in private, the Court does not see any reason to depart from its above finding that there were no special circumstances calling for the detention proceedings to take place in public (see paragraph 82 above). As regards the time in which the applicant's appeal against the detention order was examined, this aspect of the case warrants further attention.

(α) General principles governing the requirement of "speediness"

95. The Court reiterates that Article 5 § 4 of the Convention, in guaranteeing to persons detained a right to institute proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see *Baranowski v. Poland* [GC], no. 28358/95, ECHR 2000). There is a special need for a swift decision determining the lawfulness of detention in cases where a trial is pending, because the defendant should benefit fully from the principle of the presumption of innocence (see *Iłowiecki v. Poland*, no. 27504/95, § 76, 4 October 2001).

96. Where domestic law provides for a system of appeal, the appellate body must also comply with the requirements of Article 5 § 4, in particular, as concerns the speediness of the review by the appellate body of a detention order imposed by the lower court. At the same time, the standard of "speediness" is less stringent when it comes to the proceedings before the court of appeal. The Court reiterates in this connection that the right of judicial review guaranteed by Article 5 § 4 is primarily intended to avoid arbitrary deprivation of liberty. However, if the detention is confirmed by a court it must be considered to be lawful and not arbitrary, even where appeal is available. Subsequent proceedings are less concerned with arbitrariness, but provide additional guarantees aimed primarily at an evaluation of the appropriateness of continuing the detention (see *Tjin-a-Kwi and Van Den Heuvel v. the Netherlands*, no. 17297/90, Commission decision of 31 March 1993). Therefore, the Court would be less concerned

with the speediness of the proceedings before the court of appeal, if the detention order under review was imposed by a court and on condition that the procedure followed by that court had a judicial character and gave to the detainee the appropriate procedural guarantees (see, *mutatis mutandis*, *Vodeničarov v. Slovakia*, no. 24530/94, § 33, 21 December 2000).

97. The Court observes that it has found delays of 23 days for one level of jurisdiction, and 43 days or 32 days for two levels of jurisdiction, to be incompatible with Article 5 § 4 (see, respectively, *Rehbock v. Slovenia*, no. 29462/95, §§ 82-88, ECHR 2000-XII; *Jablonski v. Poland*, no. 33492/96, §§ 91-94, 21 December 2000; and *G.B. v. Switzerland*, no. 27426/95, §§ 34-39, 30 November 2000). On the other hand, in *Rokhlina v. Russia* (no. 54071/00, § 79, 7 April 2005), where the global duration of the proceedings was 41 days for two levels of jurisdiction, the Court found no violation of Article 5 § 4 of the Convention. In that case the Court noted, in particular, that the applicant had requested leave to appear in person at the appeal court, and that because of it the court had to adjourn the proceedings for one week. In another recent Russian case (*Mamedova v. Russia*, no. 7064/05, § 96, 1 June 2006) the Court found the delays of 36, 29 and 26 days to be incompatible with Article 5 § 4, stressing that the entire duration of the appeal proceedings was attributable to the authorities.

(β) Application to the present case

98. The Court notes that the appeal against the decision of 26 December 2003 was examined within 44 days. That period, by itself, is not insignificant (see *Mamedova*, cited above). The Court will now assess to what extent it can be attributed to the applicant, as the Government suggested.

99. The Court observes that the "preliminary appeal" against the decision of 26 December 2003 was lodged by the defence lawyers on 29 December 2006. However, it did not contain detailed reasoning since the hearing record had not yet been made available to the defence. On 23 January 2004, after the court had approved the hearing record, the defence forwarded the final version of the grounds of appeal. The Moscow City Court examined it on 9 February 2004, 17 days later. The Court reiterates in this connection that the lower standard of "procedural guarantees" in matters of detention (as compared with the "fairness" requirement under Article 6 § 1 – see *Reinprecht*, cited above, § 40), should be counterbalanced by a higher standard of speediness (see, *mutatis mutandis*, *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 79, ECHR 2003-IV). The Court concludes that the period between 23 January and 9 February 2004 is fully imputable to the authorities.

100. Further, the applicant claimed that the defence had not been able to lodge the appeal until 22 January 2004, when the first-instance court

dismissed their comments on the hearing record. It is conceivable that without the final version of the hearing record the defence were unable to finalise their points of appeal. Therefore, in principle, this period can be included in the overall duration of the appeal proceedings. The Government argued, however, that the applicant's lawyers were responsible for at least a part of this period. Thus, the hearing record was signed on 5 January 2004, but it was not until 14 January that the applicant's lawyer, Mr Rivkin, obtained a copy of it. Further, the comments of the defence on the hearing record reached the court only on 22 January 2004.

101. However, the Court notes that even though the hearing record was signed on 5 January 2004, it is unclear when it was made available to the defence. In any event, under Article 259 of the CCrP a hearing record should be signed within 3 days; in the present case the court did not comply with this time-limit. It is conceivable that the further delay was to a certain extent attributable to the public holidays. However, public holidays are not a good excuse for delaying the examination of an application for release (see *E. v. Norway*, cited above, § 66). Therefore, even taking into account the Government's argument, the Court considers that at least ten days of the period between 26 December 2003 and 22 January 2004 were attributable to the authorities.

102. In sum, the authorities were responsible for at least 27 days out of the overall duration of the appeal proceedings. The Government did not plead before the Court that complex issues had been involved in the determination of the lawfulness of the applicant's detention. Even if the courts had spent the whole of that period dealing with the case file, that would not exempt them from the obligation to examine the appeal quickly. The Court concludes that the appeal proceedings did not comply with the "speediness" requirement of Article 5 § 4. It therefore finds that there has been a violation of Article 5 § 4 of the Convention.

(iii) Court proceedings concerning the applicant's detention from 6 April 2004 to 8 June 2004

103. The applicant complained that it had taken the Moscow City Court too long to examine his appeal against the extension of his detention ordered on 6 April 2004.

104. The Court notes that on 6 April 2004 the Meschanskiy District Court decided that the applicant should remain in detention during the trial. On 9 June 2004, 67 days later, the Moscow City Court upheld the decision of 6 April 2004. The applicant claimed that the review of the detention order of 6 April 2004 had not been "speedy". The Government argued that the delay had been caused by the applicant's own behaviour, namely by the fact that the applicant had submitted additional arguments on 26 May 2004. As a result, the court of appeal had had to adjourn the hearing until 9 June 2004.

105. The Court notes that the defence lawyers were indeed partly responsible for the delay. Thus, instead of lodging the appeal by hand they sent it by post. Furthermore, nothing suggests that there was a genuine need to lodge additional grounds of appeal on 26 May 2004, instead of raising relevant arguments orally at the appeal hearing.

106. The Court notes, however, that it took the prosecution and the plaintiffs several weeks in aggregate to comment on the applicant's first statement of the grounds of appeal. This was received by the Moscow City Court on 22 April 2004, but it was not until 20 May 2004 that the observations in reply reached the defence lawyers. Furthermore, it took the court another two weeks to obtain the parties' written comments on the additional grounds of appeal lodged by the defence, and to set a new date for the hearing.

107. The Government did not claim that complex issues had been involved in the determination of the lawfulness of the applicant's detention by the second-instance court. Even assuming that the complexity of this case was above average, there is nothing to suggest that there was a need to obtain two sets of written observations from the parties.

108. In sum, the Court concludes that the period from 22 April 2004 until 9 June 2004 (one month and seventeen days) was imputable to the authorities. The Court observes that in *Jablonski* (cited above, § 93) it held that "there is a special need for a swift decision determining the lawfulness of detention in cases where a trial is pending". In view of the above the Court concludes that the time spent on examination of the appeal against the detention order of 6 April 2004 was excessive. Therefore, there has been a violation of Article 5 § 4 of the Convention on that account.

(iv) Court proceedings concerning the applicant's detention from 8 June to 10 September 2004

109. The applicant complained that he had not been summoned to the hearing of 8 June 2004 when the Meschanskiy District Court had decided to extend his detention, whereas the prosecution had been present (see paragraph 25 above). The Government argued that the applicant and his lawyers had not been summoned because the hearing related to another criminal case (that of Mr Khodorkovskiy and Mr Kraynov). However, in the opinion of the Court that fact is of little relevance: even though technically the hearing was held in the context of another criminal case, the court's decision also concerned the applicant directly. There is nothing to suggest that the court could not have anticipated such a development or was unable to adjourn the hearing in order to secure the applicant's personal presence.

110. Further, the Government argued that on 8 June 2004 the court had merely confirmed the validity of a measure imposed earlier. The Government can be understood to be suggesting that the requirements of Article 5 § 4 were satisfied by the review which took place on 6 April 2004.

111. In the Court's view that decision in itself did not deprive the applicant of his rights under Article 5 § 4. Indeed, on 6 April 2004 the Meschanskiy District Court ruled that the applicant should remain in detention pending trial, and that decision constituted a lawful basis for the applicant's continued detention for the ensuing six months (see Article 255 of the CCrP cited in paragraph 32 above). On 15 April 2004 the court dismissed an application for release lodged by the defence.

112. However, with the passage of time the grounds for detention on remand, by their very nature, are susceptible to change, even if the "lawful basis" for the detention continues to exist. In the present case more than seven weeks had elapsed when the Meschanskiy District Court had decided to examine the question of continuing the applicant's detention. Further, the domestic law obliged the court to return *proprio motu* to the issue of detention (see the Government's submissions on this point; see also Article 231 of the CCrP quoted in paragraph 32 above). In such circumstances the Court considers that the applicant was entitled to a proper judicial review of the lawfulness of his detention, with all the guarantees implicitly provided by Article 5 § 4 of the Convention.

113. The Court reiterates that, as a general rule, a detainee should have a right to participate in the hearing where his detention is discussed (see paragraph 77 above). Possible exceptions from this rule are conceivable: the Court observes in this connection that "in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place" (see *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A no. 50, p. 24, § 47). The detainee's personal presence is always required when the court has to assess his personality, the risk of his absconding or his predisposition to further offences, when the court changes the basis for the detention or when it prolongs the detention after a significant lapse of time (see *Graužinis*, cited above, §§ 33-34; see also *Mamedova v. Russia*, cited above, § 75). The Court notes that the decision of 8 June 2004 contained no reasoning in support of the court's decision to extend the applicant's detention on remand. In the circumstances the Court finds that the matters discussed at the hearing of 8 June 2004 required not only the presence of his lawyers but his personal presence.

114. Lastly, the Court notes that the applicant's lawyers were present at the appeal hearing on 29 July 2004. The Court considers that, in principle, it is permissible for the court of appeal reviewing a detention order issued by a lower court to examine only the detainee's lawyer. However, that is true only when the hearing before the first-instance court offered sufficient procedural guarantees. In the present case the applicant was absent from the hearings at both levels of jurisdiction, and his lawyers were present only before the court of appeal. Furthermore, the appeal was examined fifty days after the hearing of 8 June 2004. In such circumstances the Court concludes

that the presence of the applicant's lawyers in the court of appeal did not remedy the situation complained of.

115. In sum, the Court concludes that the applicant was deprived of an effective review of the lawfulness of his continued detention. It therefore finds that there has been a violation of Article 5 § 4 of the Convention.

IV. ALLEGED INTERFERENCE WITH THE RIGHT OF INDIVIDUAL PETITION (ARTICLE 34 OF THE CONVENTION)

116. The applicant asserted that between 22 March and 12 April 2004, while in detention, he was not allowed to meet one of his lawyers, Ms Liptser, who represented him before the Court. He alleged that this had constituted an interference with his right of individual petition, guaranteed by Article 34 of the Convention. Article 34 reads, in so far as relevant, as follows:

> "The Court may receive applications from any person ... claiming to be the victim of a violation ... 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."

117. According to the Government, Ms Liptser requested a meeting with the applicant twice: on 23 and 30 March 2004. However, she did not have a proper authorisation from the court; consequently, the administration of the detention centre did not allow her to have a meeting with the applicant. As soon as she obtained the authorisation she was given access to her client. Furthermore, within that period the applicant had several meetings with his other lawyers, namely Mr Krasnov, Mr Rivkin, Mr Baru, Ms Lvova, Ms Simonova and Mr Sharov. In conclusion, the Government denied any interference with the applicant's rights under Article 34 of the Convention.

118. The Court reiterates that the right of individual petition under Article 34 of the Convention will operate effectively only if an applicant can interact with the Court freely, without any pressure from the authorities (see *Akdivar and Others v. Turkey*, no. 21893/93, *Reports* 1996-IV, § 105). In this context, "pressure" includes not only direct coercion but also other improper indirect acts designed to discourage applicants from pursuing a Convention remedy, such as measures limiting the applicant's contacts with his lawyers (see *Öcalan*, cited above, §§ 197 et seq.) or interfering with their professional activities in other ways. In examining whether or not a particular measure applied by the authorities was in compliance with Article 34, the Court sometimes considered the practical effects of this measure on the applicant's ability to exercise his right of petition (see *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 416 and 417, 6 April 2004). However, in certain cases the Court has found a violation of this provision even in the absence of any visible negative effects of the measure

complained of (see *McShane v. the United Kingdom*, no. 43290/98, § 151, 28 May 2002).

119. Turning to the present case, the Court notes that one of the applicant's lawyers had to obtain certain additional authorisations in order to be able to meet him. In principle, excessive formalities in such matters may *de facto* prevent a prospective applicant from effectively enjoying his right of individual petition. However, it appears that in the present case it was quite simple to comply with the domestic formalities and that the problem was resolved easily. Furthermore, within the period under consideration the applicant had several meetings with his other lawyers, in particular, with Mr Baru, who also represented him in the proceedings before the Court. The limitation complained of lasted less than three weeks, and nothing suggests that it had any negative effects, theoretical or practical, on the proceedings before the Court. In such circumstances the Court concludes that there has been no breach of Article 34.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

120. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

121. The Government objected that the claims for just satisfaction did not contain the name of the applicant or a reference to an application number. The Court notes the Government's objection in this respect; however, despite that omission on the part of the applicant's lawyers, the Court accepts that the claims submitted relate to the present case. It will thus examine the parties' submissions under Article 41 on the merits.

A. Damage

1. Pecuniary damage

122. The applicant claimed 1,055,906 United States dollars (USD) on account of pecuniary damage resulting from his unlawful detention and impossibility for him to carry on his professional activities. The applicant calculated that amount based on his annual revenue declared in 2002, the year before the year of his arrest. In support of his claims he produced a copy of his tax declaration where he indicated that in 2002 he received 30,680,967 Russian roubles (RUB), or USD 974,680, in dividends from a Gibraltar-based company, "Group Menatep Limited".

123. The Government submitted that the applicant's claims were "unsubstantiated and unreasonable". They pointed out that on 25 November

2004 and 18 May 2006 the Court had declared most of his complaints inadmissible. Further, they argued that his method of calculating his pecuniary damage was wrong, and had no relation to his real sources of income.

124. As to the pecuniary damage allegedly caused, the Court does not see a causal connection between the applicant's alleged pecuniary losses and the violations found in the present case. The Court thus decides that the applicant's claims under this head should be dismissed.

2. Non-pecuniary damage

125. The applicant further claimed 300,000 euros (EUR) for non-pecuniary damage. He argued that his right to liberty had been breached by thirteen months of detention in severe conditions. He stressed that his suffering had been exacerbated by his poor health.

126. The Government considered those claims unsubstantiated and excessive. They also pointed out that the time spent by the applicant in detention on remand had been deducted from his sentence.

127. The Court observes that the complaints under Article 3 (concerning conditions of detention and the alleged lack of medical assistance) and Article 5 § 3 (concerning the length of the detention) have been declared inadmissible. On the other hand, the Court finds that it is reasonable to assume that the applicant suffered a certain amount of distress and frustration, caused by the flaws in the remand proceedings, and, especially, by the unsanctioned detention between 31 March and 6 April 2004. Therefore, ruling on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 3,000 for non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

128. The applicant claimed reimbursement of his lawyer's fees in the amount of EUR 28,285. In support of this the applicant produced an agreement between Ms Liptser and Mr Victor Lebedev on the representation of Mr Platon Lebedev before the European Court. The agreement concerned alleged violations of Articles 3 and 5 of the Convention. The applicant also produced a certificate from barristers' office no. 10, confirming that between February and June 2004 Ms Liptser received RUB 990,190 for working on the applicant's case.

129. The Government submitted that the applicant's claims for reimbursement of costs and expenses were not necessary and reasonable, since they went far beyond the "average level of legal representation". The Government also indicated that the agreement with the lawyers was signed not by the applicant himself, but by Mr Victor Lebedev, the applicant's brother.

130. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, for example, *Stašaitis v. Lithuania*, no. 47679/99, §§ 102-03, 21 March 2002; see also *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, § 220).

131. The Court considers that, although the agreement with the lawyer was signed by the applicant's brother, this was done in the applicant's interests. Furthermore, everything suggests that the amount indicated in the agreement (RUB 990,190) was paid for the work done by the applicant's lawyer in the present case. In other words, this sum was "actually incurred". The Court further notes that the overall amount of work done by the applicant's lawyer was considerable. However, most of the applicant's complaints under the Convention have been rejected; in such circumstances the Court considers that the applicant may claim only part of the amount actually paid to his lawyer. Regard being had to the information in its possession, the Court awards the applicant EUR 7,000 plus any tax that may be chargeable.

C. Default interest

132. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objections concerning the exhaustion of domestic remedies and the applicant's victim status;

2. *Holds* unanimously that there has been a violation of Article 5 § 1 (c) of the Convention on account of the applicant's unauthorised detention between 31 March and 6 April 2004;

3. *Holds* by four votes to three that there has been a violation of Article 5 § 3 of the Convention on account of the applicant's detention from 3 July 2003 to 28 August 2003;

4. *Holds* by five votes to two that there has been a violation of Article 5 § 4 of the Convention as regards the delays in the review of the detention order of 26 December 2003 by the Moscow City Court;

5. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention on account of the delays in the review of the detention order of 6 April 2004 by the Moscow City Court;

6. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention on account of the absence of the applicant from the detention hearing on 8 June 2004;

7. *Holds* unanimously that the temporary inability of the applicant to meet one of his lawyers did not amount in the circumstances to a failure by the State to fulfil its obligation under Article 34 of the Convention;

8. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention the following amounts, to be converted into the national currency of the respondent State at the rate applicable on the date of settlement:
      (i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;
      (ii) EUR 7,000 (seven thousand euros) in respect of his legal costs;
      (iii) any tax that may be chargeable on the above amounts.
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 October 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN	Christos ROZAKIS
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) partly dissenting opinion of Mr Kovler, Mr Hajiyev and Mr Jebens;
(b) partly dissenting opinion of Mr Kovler and Mr Jebens.

C.L.R.
S.N.

PARTLY DISSENTING OPINION OF JUDGES KOVLER, HAJIYEV AND JEBENS

To our regret we do not share the opinion of the majority that there has been a violation of the applicant's rights under Article 5 § 3 of the Convention on account of the absence of the applicant's lawyers from the detention hearing of 3 July 2003.

At the outset, we recall that Article 5 § 3 (as well as § 4 of this Convention provision) do not contain any explicit mention of a right to legal assistance, as opposed to Article 6 § 3 (c), cf. Article 6 § 1, which applies when a criminal charge is to be decided upon. It is true that in the recent case of *Öcalan v. Turkey* (cited in the judgment) the Court found that in certain circumstances a detainee should have access to counsel in order to challenge his detention. Thus, in *Öcalan* the Court concluded that the applicant had been in need of legal assistance because he had been kept in total isolation, possessed no legal training and had no possibility of consulting a lawyer while in police custody. Further, Article 5 would call for the presence of a lawyer where the person detained is a minor or mentally ill (see *Bouamar* and *Megyeri*, both cited in the text of the judgment). However, we do not detect any "special circumstances" in the present case which would call for a mandatory legal assistance, as in the cases cited above. Nothing suggests that the applicant's medical condition was such as to prevent his effective participation in the detention proceedings. The applicant was able to consult with his lawyers, at least briefly, when he was formally charged. His state of mind, his education, and his professional background allowed him to understand what was happening in the courtroom and to adduce arguments in his defence.

Indeed, the judge showed a certain degree of rigour by not allowing the lawyers to enter the courtroom when they arrived. Yet such a decision can be reasonably explained by the interests of justice. The Court has repeated on many occasions that detention proceedings require special expedition. The difference of aims explains why Article 5 contains more flexible procedural requirements than Article 6 while being much more stringent as regards speediness. The judge is the ultimate guardian of order in the courtroom, and it is up to him or her to decide whether or not the proceedings should be interrupted or delayed because of one party's failure to appear in time.

In the circumstances we do not think that the judge's decision to proceed with the case was arbitrary. We note that from 2 July 2003 the applicant's lawyers knew that their client faced serious charges and might be remanded in custody by the court. Therefore, they were not unprepared for such a development. The domestic law provides that the public prosecutor's request for detention should be examined by a court within eight hours from

its receipt (see paragraph 33 of the judgment). As follows from the court's decision (cited in paragraph 13 of the judgment), the court waited for the applicant's lawyers and started the hearing only at 5.50 p.m. – one hour and twenty minutes later than scheduled. The applicant did not submit any explanation as to why his lawyers had been unable to ensure their attendance in the circumstances of the case: they had been informed about the hearing about two hours in advance, and nothing suggests that there were any obstacles preventing them from arriving to the court in time. In such circumstances it would be excessive to require more flexibility on the part of the judge. We would like to refer in this respect to the well-known jurisprudence of this Court which affirms that the State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes (see *Kamasinski v. Austria*, judgment of 19 December 1989, Series A no. 168, § 65) or chosen by the accused (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, § 41).

It is true that the recent case of *Istratii and Others v. Moldova* (relied on in the judgment) suggests that interfering with the lawyer-client confidentiality may breach Article 5. However, in our view this case-law is not applicable to the present situation. The applicant's inability to consult with his lawyers resulted not from certain security measures, as in *Istratii and others*, but from the failure of the lawyers to arrive to the court in time.

In sum, we consider that the belated arrival of the defence lawyers to the hearing of 3 July 2003 cannot be imputed to the State. As to the decision of the court not to let the lawyers in, that decision was not unreasonable, and, as such, was within the discretion of the national judge. In our opinion, by challenging that decision of the judge the majority go too far.

For the reasons specified above we believe that the applicant's rights under Article 5 § 3 were not breached.

PARTLY DISSENTING OPINION OF JUDGES KOVLER AND JEBENS

We cannot share the conclusion of the majority that there has been a violation of Article 5 § 4 of the Convention as regards the delays in the review of detention order of 26 December 2003 by Moscow City Court.

First of all we consider that the authorities were responsible only for 14 days and not for 27 days out of the overall duration of the appeal proceedings. The "preliminary appeal" against the decision of 26 December 2003 was introduced by the defence lawyer on 29 December 2003. However it did not contain the detailed reasoning since the hearing record has not been yet made available to the defence. The hearing record was signed on 5 January 2004 but it was not until 14 January that the applicant's lawyer obtained a copy of it. The comments of the defence had reached the court only on 22 January 2004 and were examined on the same day. Thus, about ten days out of this period can be imputable to the authorities. On 23 January the defence lawyers submitted a full version of the grounds of appeal. On 5 February 2004 the applicant himself had submitted additional arguments which were received by the court on 6 February 2004. On 9 February 2004 the Moscow City Court had examined both sets of submissions and dismissed the appeal. Therefore, between 23 January and 9 February only four days can be attributed to the authorities.

Further, we consider that the factual and legal issues examined at the remand hearing of 26 December 2003 were of considerable complexity. The Court observed in this connection that in certain instances "the complexity of ... issues involved in a determination of whether a person should be detained or released can be a factor which may be taken into account when assessing compliance with the Article 5 § 4 requirements (see, *mutatis mutandis*, *Baranovsky v. Poland* [GC], no.28358/95, § 72, ECHR 2000-III, and *Musiał v. Poland* [GC], no.24557/94, § 43, ECHR 1999-II).

Finally, we emphasise that the delay complained of occurred in the proceedings before the second-instance court. The court of appeal was supposed to examine the detention order issued by the first-instance court within a procedure of a judicial character. In our view, the "speediness" requirement under Article 5 § 4 should not apply to the appeal proceedings with the same rigour as to the proceedings before the first instance court. In the circumstances the two weeks which elapsed before the appeal hearing took place did not amount to a breach of Article 5 § 4.