Санкт-Петербургский государственный
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БАЛАГУРА Арсений

Выпускная квалификационная работа

Лексико-грамматические особенности перевода судебных решений Европейского суда по правам человека (на материале англо-русских переводов)

Уровень образования: магистратура
Направление *45.04.02 «Лингвистика»*
Основная образовательная программа *ВМ.5645.2020 «Юридический перевод»*

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Санкт-Петербург
2022

ОГЛАВЛЕНИЕ

ВВЕДЕНИЕ

Настоящая работа представляет собой исследование лексических и грамматических характеристик юридического перевода на основе судебных документов, а именно постановлений Европейского суда по правам человека, которые содержатся в базе данных HUDOC и на сайте Генеральной прокуратуры Российской Федерации.

Актуальность работы заключается в том, что изучение юридического перевода позволяет достигнуть адекватного и идентичного перевода юридического документа, помогает найти эквиваленты в различных языках. Понимание всех особенностей юридического текста и адекватный подбор эквивалентов в языке перевода представляет исключительную важность, так как юриспруденция является неотъемлемой частью человеческой жизни. Интерес к юридическому переводу обусловлен, в первую очередь, развитием международных отношений. Юридические документы затрагивают все сферы жизни общества, поэтому они требуют максимум внимания и опыта для обеспечения адекватного юридического перевода, так как юридический перевод всегда представляет собой перевод из одной правовой системы в другую. Кроме того, актуальность работы обусловлена тем, что она выполнена в русле таких современных направлений лингвистики, как юридическая лингвистика, теория перевода, юридический перевод.

Новизна работы в том, что современный юридический перевод изучен сравнительно мало как в отечественной, так и в зарубежной литературе, поэтому данная тема не теряет своей актуальности и в настоящее время .

Теоретическая значимость работы заключается в том, что настоящее исследование уточняет и дополняет положения общей и специальной теории перевода и юридической лингвистики.

Практическая значимость работы заключается в использовании результатов исследования работы в практической деятельности переводчиков

в области юриспруденции, а также результаты, основанные на анализе конкретного языкового материала, а также при разработке курсов по юридическому переводу.

Предметом исследования выступают особенности лексико-грамматической структуры судебных документов на английском языке, **объектом** исследования являются тексты постановлений Европейского Суда по правам человека, как единица речевого общения.

Цель настоящей работы - выявить и проанализировать лексические и грамматические особенности перевода решений Европейского суда по правам человека.

В связи с поставленной целью определились **следующие задачи**:

- определить понятие юридического перевода, как составной части международного правового дискурса и акта международной коммуникации;
- описать особенности языка судопроизводства, как разновидности официально-делового стиля;
- выявить основные проблемы перевода судебных решений;
- описать лексические особенности перевода судебных решений;
- описать грамматические особенности перевода судебных решений.

Основным источником языкового материала послужили судебные постановления Европейского суда по правам человека «Дело «Ходорковский против Российской Федерации»», «Дело «Мхчян против Российской Федерации»», и их переводы на русский язык.

Теоретическую базу исследования составляют работы отечественных и зарубежных исследователей: В.В. Алимов, К.Я. Авербух, Л.М. Алексеева, Л.С. Бурхударов, А.В. Винников, А.Л. Зурабов, В.Н. Комиссаров В.Н., А.В. Федоров, И.В. Резник, Я.И. Рецкер, В.В. Сдобников, Шлепнев Д.Н., Швейцер А.Д. и другие.

В данной работе используется **комплексная методика исследования**,

которая включает в себя теоретический анализ необходимой литературы, сопоставительный анализ юридической документации в английском и русском языках, переводоведческий анализ, контекстный анализ.

Структура работы: настоящая работа состоит из введения, двух глав, разделенных на параграфы, заключения, списка использованной литературы и приложений.

Глава 1. Юридический перевод как разновидность межъязыковой и межкультурной коммуникации

1.1. История развития юридического английского языка

В настоящее время юридический английский язык стал востребованным в связи с усилением глобализации, укреплением экономических связей и расширением возможностей для тех специалистов, которые знают английский язык на хорошем уровне. Всемирный экономический кризис и санкции несколько приостановили процессы взаимодействия и интеграции с зарубежными странами, однако эти процессы временны, а развитие навыков, которые помогут специалистам стать конкурентоспособными, должно иметь место на постоянной, регулярной основе.

Юридический английский или «Legal English» - это формализованный язык, основанный на правилах логики, который отличается от обычного естественного языка лексикой, морфологией, синтаксисом и семантикой, а также другие лингвистическими особенностями, направленными на достижение согласованности, достоверности, полноты и надежности, сохраняя при этом преимущества человеческого языка, такие как интуитивное исполнение, полное, означающее и открытое обновление (Курчинская-Грассо 2020: 177 – 182).

Таким образом, современный правовой или юридический английский основан на стандартном (общем) английском языке. Тем не менее, он содержит ряд необычных особенностей, которые в основном связаны с терминологией, грамматическими структурами и пунктуацией.

Юридический английский традиционно был прерогативой юристов из англоязычных стран (США, Англия, Ирландия, Канада, Австралия, Новая Зеландия, Кения и Южная Африка), которые разделяют традиции Общего

права (Common Law). Однако из-за распространения Legal English в качестве основного языка международного бизнеса, а также его роли в качестве юридического языка в Европейском Союзе, Legal English в настоящее время является глобальным явлением (Курчинская-Грассо 2020:177 -182).

Основы юридического английского языка тесно связаны с его историческими истоками. Юридический язык и правовая традиция изменились с волнами завоевателей на протяжении следующих столетий.

В доисторической Британии традиционное общее право обсуждалось на народном языке. Юридический язык и правовая традиция изменились с волнами завоевателей на протяжении следующих столетий. Римская Британия (после завоевания, начавшегося в 43 г. н.э.) следовала римской правовой традиции, и ее юридическим языком была латынь. После ухода римлян из Британии около 410 г. и англосаксонского вторжения в Британию преобладающей традицией вместо этого был англосаксонский закон. После нормандского вторжения в Англию в 1066 году, англо-нормандский французский стал официальным языком судебных разбирательств в Англии на период почти 300 лет (Курчинская-Грассо 2020:177 -182).

В судебных процессах англо-нормандский язык превратился в «Law French», от которого произошли многие слова в современном юридическом английском языке. Из нормандского в английский язык перешли такие слова, как, например: property (недвижимость), estate (имущество), chattel (движимое имущество), lease (аренда), executor (исполнитель), tenant (арендатор) (Мамулян, Кашкин 1993: 35)

Использование юридического французского языка в этот период оказало стойкое влияние на общий лингвистический регистр современного юридического английского языка. Это использование также объясняет некоторые сложные лингвистические структуры, используемые в юридической письменной форме.

В 1362 г. был принят «Претензионный статут», согласно которому все судебные разбирательства должны вестись на английском языке, однако письменно фиксировались на латыни. Однако, использование французского языка в судебных спорах продолжалось в XVII веке в некоторых областях права. Влияние латинского языка сохранилось в ряде слов и фраз, таких как ad hoc (по особому случаю), de facto (фактически), bona fide (добросовестно), ultra vires (вне компетенции), которые по-прежнему используются в настоящее время в юридическом письме (Rylance 1994: 31).

Английский язык был принят как официальный для различных видов юридических документов в разные эпохи. Завещания начали писать на английском языке примерно в 1400 году. Уставы писались на латыни примерно до 1300 года, на французском языке до 1485 года, на английском и французском языках в течение несколько лет, и только на английском языке с 1489 года. Согласно «Закону о судах» 1730 года латынь была заменена английским языком (Garner 2002: 47).

В результате появились новые отрасли права, например, такие как коммерческое право, и стали развиваться исключительно на английском языке. В средневековый период юристы использовали смесь латыни, французского и английского языков.

1.2. Особенности юридического английского языка

Для письменных форм юридического английского языка используется термин legalese, который означает особую письменную форму английского языка.

Основными характеристиками письменного юридического английского языка является его устойчивость и насыщенность клишированными структурами. Как уже было отмечено, в письменной форме используются слова латинского и французского происхождения, расширенная номинализация, пассивные глаголы и длинные предложения (Курчинская-Грассо 2020: 177 - 182).

Далее следует привести главные особенности юридического английского языка, которые достаточно полно приведены Н.О. Курчинской – Грассо в своей научной статье, которые заключаются в следующем:

1) предложения часто имеют явно своеобразные структуры, которые уходят корнями во французский письменный язык, что следует учитывать при переводе;

2) недостаточное использование пунктуации, особенно в документах международной торговой системы. Исторически сложилось широко распространенное среди юристов представление о том, что значение юридических документов содержится только в используемых словах и их контексте. В современном правовом оформлении пунктуация используется для уточнения их значения;

3) иностранные фразы иногда используются вместо английских фраз (например, inter alia вместо among others);

4) более старые слова, такие как herof, its, where (и другие производные, включая -at , - in , - after , - before , - with , - by , - above , - on , - upon) используются в юридическом английском языке, прежде всего, чтобы избежать повторения имен или фраз. Например: the parties here to (стороны

настоящего соглашения) вместо the parties to this contract (стороны этого договора) (Бхатия 2013: 4);

5) Использование таких модификаторов, как the same, the said, the aforementioned (тот же, упомянутый, вышеупомянутый) и т.д., в юридическом тексте интересно тем, что очень часто они используются в качестве прилагательных к определению существительного, не заменяя его. Например: the said John Smith - упомянутый Джон Смит. (Бхатия 2013: 4);

6) юридический английский язык содержит некоторые слова и названия, такие как: employer and employee (работодатель и работник); lessor and lessee (лизингодатель и лизингополучатель) и т.д. В них взаимный и противоположный характер отношений обозначается использованием альтернативных окончаний: - er, - or, и –ee (Garner 1995: 228);

7) фразовые глаголы часто употребляются в исключительно юридическом контексте. Например: put down deposits - внести вклад , serve [documents] upon other parties - подать [документы] другим сторонам, write off debts - списать долги (Cutts 1980: P.42).

Можно сделать вывод, что юридический язык сложен для понимания, из-за употребления большого количества сложных слов и фраз. Кроме того, юридический английский язык использует сложную терминологию, которая незнакома неспециалисту (например, waiver (отказ), restraint of trade (ограничение торговли), restrictive covenant (ограничительный пакт). Большая часть юридического английского, как сложилось исторически, происходит от французского и латинского языков. Эти термины включают в себя обычные слова, используемые с особыми смыслами. Так, например, термин consideration (рассмотрение) относится, в юридическом английском языке к контрактам и означает «акт, снисхождение или обещание одной из сторон договора», «договор, который представляет собой цену» (Oxford Learner's Dictionaries).

Следует согласиться с Н.О. Курчинской – Грассо, что рассмотрение особенностей английского юридического языка дает право утверждать, что сегодня, в эпоху, когда взаимодействие между (юридическими) субъектами стало правилом, перевод приобретает особую значимость. Право – это негибкая и непримиримая социальная наука, характеризующаяся точностью и однозначностью, устанавливающая, таким образом, границы внешние и границы внутренние для переводчика.

Этот поиск точности и однозначности вступает в противоречие с самой природой языка, которая, как правило, содержит многозначность и неопределенность контекста. Как уже было отмечено, знание лингвистических особенностей английского языка и происхождения юридического его варианта позволяет выявить эти границы и создать адекватный его перевод. Соответственно, с лингвистической точки зрения перевод юридических англоязычных текстов является законом, и может трактоваться как устойчивая система, которая требует знаний переводчика-юриста.

1.3. Юридический перевод как составная часть международного правового дискурса

В современной науке под правовым (или юридическим) дискурсом понимается юридический текст в динамике, в процессе его толкования и разъяснения.

Юридический перевод, как и вообще перевод, зарождается в глубокой древности. Как указывает С. Сарчевич, перевод юридических текстов – это практика с многолетней историей и такие переводы одними из старейших и важнейших в мире (Sarcevic 1997: 56).

Наиболее известными из дошедших до наших дней образцов юридического перевода, которые М. Галдиа называет «the best known artefacts in this field» (самые известные артефакты в этой области), являются мирный договор между Египтом и Хеттским царством, заключенный в 1271 году до н.э., и перевод Свода римского гражданского права (Corpus Juris Civilis). Собрание римских законов и сочинений юристов, составленное в 6 в. по распоряжению византийского императора Юстиниана I, на протяжении многих веков служило главным источником права большинства европейских стран (в т. ч. в России) и вплоть до настоящего времени остается основой европейского, так называемого романо-германского, или континентального, права (Galdia 2003: 1-4).

Корпус гражданского права был изначально переведен на греческий, а затем и на другие языки. Именно «с помощью перевода были обеспечены преемственность римского и византийского права, становление и развитие европейского континентального права и других правовых систем мира. Российское право в период своего становления в XVIII в. носило преимущественно рецептивный характер, заимствуя многие положения из западноевропейского (германского) права», что позволяет говорить о

юридическом переводе как о важнейшей составляющей международного правового дискурса (Левитан 2011: 45).

Со всей остротой проблема юридического перевода встала в ходе Нюрнбергского процесса в 1945-1946 гг., открыв ярчайшую страницу в истории этого вида перевода. Русские, немцы, англичане, американцы, французы, итальянцы, японцы и представители других национальностей, говорившие на разных языках мира, став военными (и отчасти юридическими) переводчиками, столкнулись с непривычными условиями перевода, с новыми для них речевыми жанрами и типами текстов, новыми регистрами языка, а также с особыми требованиями к переводу. Они смогли иначе оценить такие базовые характеристики перевода, как адекватность, эквивалентность, верность, точность, вольность, буквальность и другие, вошедшие впоследствии в категориальный аппарат теории перевода (Некрасова 2013:132).

В современном мире в условиях глобализации, международной интеграции и расширения экономического и финансового сотрудничества как на межгосударственном уровне, так и на уровне предприятий и компаний, юридический перевод приобретает особую важность и актуальность. Большое количество реализуемых в настоящее время трансграничных сделок и проектов, являющихся предметом юрисдикции нескольких государств, требует не только квалифицированной юридической поддержки, но и комплексного лингвистического сопровождения, предполагающего профессиональный перевод юридической и финансовой документации.

Эту же тенденцию отмечают и зарубежные исследователи: «В связи с возрастающим спросом на свободное перемещение людей, товаров и капитала юридический перевод так или иначе затрагивает всех нас. Международная торговля, например, не может функционировать без юридического перевода» (Sarcevic 1997), «Из-за увеличения международного перемещения людей и товаров, а также растущего значения международных правительственных и

неправительственных организаций спрос на перевод юридических документов постоянно растет» (De Groot 1987: 793-812).

Поскольку в переводе в такой сфере профессиональной коммуникации, как право, задействованы самые разные юридические документы или - шире - юридические тексты, нам представляется целесообразным привести классификацию юридических документов, а также показать различия в определениях юридического документа и юридического текста.

1.3.1. Лингвистические особенности юридических документов

Под юридическим (правовым) документом понимается «документ, содержащий правовую информацию» (Черданцев 1993: 362).

В зависимости от характера правовой информации все юридические документы можно подразделить на пять основных групп:

1. Нормативные документы. К ним относятся все нормативные правовые акты как источники права;

2. Документы, содержащие решения индивидуального характера, имеющие властно-обязательный характер, влекущие правовые последствия, т. е. устанавливающие, изменяющие и прекращающие субъективные права и юридические обязанности. Сюда относятся индивидуальные решения как государственных органов (решения высших органов государственной власти и управления; решения, приговоры, постановления судов, решения арбитражных органов, приказы министров, руководителей предприятий и учреждений, решения государственных инспекций, акты следствия и дознания и т. д.), так и органов общественных организаций и отдельных лиц, когда их решениям в общем или индивидуальном плане придается юридически обязательное значение (решения комиссий по трудовым спорам профсоюзных комитетов, третейского судьи и т. д.);

3. Документы, фиксирующие юридические факты, в зависимости от характера которых документы подразделяются на следующие виды:

- документы, фиксирующие факты, определяющие правовой статус субъектов (паспорт, военный билет, документы об образовании, документы, удостоверяющие служебное положение, свидетельства о рождении, браке, усыновлении и т. д.);
- документы, фиксирующие факты, от которых зависит правовой режим объектов права (технический паспорт автомашины, счета в сберкассе и сберегательные книжки и т. д.);
- документы, фиксирующие факты-волеизъявления субъектов права (сделки, договоры, доверенности, жалобы, заявления и т. д.);
- документы, фиксирующие факты-события (акты о порче или об уничтожении посевов, скота, строений, средств транспорта и иного имущества в результате стихийных бедствий и т. п.);
- документы, фиксирующие факты движения товарно-материальных и иных ценностей (приходно-расходные финансовые документы, приходно-расходные документы на прием-передачу товарно-материальных ценностей от одной организации другой и т.п.)

4. Деньги (бумажные деньги в виде банковских билетов являются юридическими документами, удостоверяющими имущественное право лица) и ценные бумаги (являющиеся документами, фиксирующими имущественные права их обладателей, и включающие облигации, банковские сертификаты, чеки, акции, векселя и др.);

5. Документы, фиксирующие факты-доказательства, используемые для обоснования (доказывания) фактов, имеющих юридическое значение (юридических фактов). К ним относятся различного рода процессуальные документы как источники доказательств: протоколы, составляемые в процессе следствия и дознания (осмотра места происшествия, допроса, очной

ставки, обыска, выемки документов), заключения экспертизы, протоколы судебных заседаний (Черданцев 1993: 362).

Юридический текст понимается, как структура, способная формализовать события жизни, приводя их к форме юридического факта (Кулинич М.А., Кострова О.А. 2020:124).

Как отмечают Н.М. Абишева и С.А. Никитина, «перевод события в форму юридического факта обусловлен требованием, предъявляемым к оформлению официальных документов, то есть требованием предельной формализации документов: на форму, содержание и язык юридических текстов накладывается система ограничений» (Абишева, Никитина 2004).

Как справедливо отмечает В.В. Виноградов, различные типы юридических текстов имеют различную степень юридизации (Виноградов 1977: 162-189).

Высшая степень юридизации отличает, по словам Н.М. Абишевой и С.А. Никитиной, «максимально терминологизованные тексты» (Абишева, Никитина 2004). К таким текстам относятся, прежде всего, тексты законов, высокая степень юридизации которых обусловлена самим статусом закона.

М.Г. Гамзатов отмечает, что юридические тексты неоднородны по своей стилистике (Гамзатов 2004: 4). Данное обстоятельство необходимо учитывать в переводе для обеспечения функционально-стилистического соответствия переводного текста оригиналу.

В зависимости от ситуаций употребления в языке права можно выделить различные стилистические разновидности, которые приводятся Е.А. Панкратовой:

1.Язык юридических документов, используемый при составлении законов, судебных решений, договоров и т.д. Характерными чертами данного языка являются жестко детерминированный набор лексико-грамматических средств и определенная текстовая организация.

2.Язык досудебных процедур (полицейский допрос, предварительное слушание по делу, юридическая консультация и пр.) при общении профессионала с профессионалом и профессионала с непрофессионалом.

3.Язык судебных заседаний (вопросы/перекрестные вопросы, выступления судьи, речь обвинителя и защитники и пр.). Для этого языка характерно сочетание традиционных форм и клише с элементами разговорного стиля, юридических терминов и стандартных юридических формул и со специальными средствами воздействия (Панкратова 2003: 351-354).

Как указывает М.Г. Гамзатов, переводчик, работающий в профессиональной сфере юриспруденции, должен хорошо знать приемы построения юридического текста различной стилистической разновидности. Только в этом случае может идти речь о том, что переводчик владеет техникой юридического перевода (Гамзатов 2004: 4).

1.3.2. Юридический перевод как акт межкультурной коммуникации

Далее предлагается возможным определить специфику юридического перевода как акта межкультурной коммуникации.

Юридический перевод - особая область перевода, находящаяся на междисциплинарном стыке, на пересечении юриспруденции, лингвистики и переводоведения. Как указывает М. Моррис: «Перевод любых юридических текстов, от статутов до договоров и показаний в зале суда, является практикой, находящейся на пересечении трех областей теоретических исследований: теории права, теории языка... и теории перевода» (Morris 1995: 69).

Также следует привести взгляд М. Харвея, полагающего, что в юридическом переводе сочетаются «изобретательность художественного

перевода с терминологической точностью технического перевода» (Harvey 2002: 177-185).

Правовая составляющая играет в этом виде перевода первостепенную роль. Как указывает Као Д.: «Юридический перевод – это особая и специализированная область переводческой деятельности. Это связано с тем, что юридический перевод связан с правом, а такой перевод может иметь и часто производит не только лингвистическое, но и юридическое воздействие и последствия, а также с особой природой права и юридического языка» (Cao 2007: 14).

Юридический перевод является актом не только и не столько межъязыковой, сколько межкультурной коммуникации, поскольку предполагает перевод «национальные, языково-специфические категории и правовые институты на другой язык» (Vespaziani 2008: 547-574).

Даже как акт межъязыковой коммуникации, он обладает спецификой в силу того, что предполагает не просто перевод с одного языка на другой язык, а перевод с юридического языка одной правовой системы на юридический язык другой правовой системы, о чем указывает Ж.Р. де Гроот: «...процесс перевода с юридического языка конкретной правовой системы на юридический язык конкретной другой правовой системы» (De Groot 1987:793-812).

Многие авторы указывают на специфику и объекта юридического перевода. При переводе юридических текстов «переводятся не только слова на странице, но и лежащая в их основе правовая система» (Beyer 1995:145-177).

Как справедливо замечает Х. Миккельсон: «юридические переводчики (и интерпретаторы) должны передавать значение не только слов, но и правовой системы, которая диктует писателю выбор этих слов» (Mikkelson. 1998). Особой эту область перевода делает и ответственность, которая лежит на переводчике, выполняющем перевод юридического документа.

1.3.3. Проблемы юридического перевода

Сложности, возникающие при юридическом переводе, обусловлены целым комплексом причин. К основным причинам М.Г. Гамзатов относит:

1. Сложности, обусловленные языковой природой термина;
2. Сложности, связанные со специфическими характеристиками юридического термина;
3. Сложности, возникающие из-за несовпадения юридических систем государств, следовательно, из-за расхождения объемов понятий, передаваемых терминами-аналогами, существования специфичных для одной терминосистемы единиц и отсутствия переводческих соответствий в другой;
4. Сложности субъективного характера, обусловленные недостаточной подготовкой лиц, занимающихся переводческой деятельностью (Гамзатов 2004:11).

Следует согласиться с тем, что основные сложности объясняются причинами терминологического порядка. Сложность юридической терминологии вообще и своеобразие юридической терминологии, используемой в той или иной правовой системе, отмечают и зарубежные исследователи. Так, Де Грод указывает: «специфические проблемы перевода юридической терминологии обусловлены системной спецификой юридического языка» (De Groot 1987: 793-812).

Следствием непохожести правовых систем и своеобразия используемой в каждой правовой системе терминологии является отсутствие терминов-эквивалентов в языках, обслуживающих разные правовые системы.

Как указывает Ванг К.: «В связи с тем, что правовая система не во всех странах одинакова, в некоторых случаях юридические понятия не имеют эквивалента на языке перевода. Кодексы и законы были созданы для соответствия конкретной стране или культуре, и когда юридический термин

не имеет эквивалента в языке перевода, переводчику необходимо «воссоздать» концепцию и всю идею, связанную с юридическим выражением» (Wang). Даже так называемые термины-аналоги оказываются наполненными разным правовым содержанием.

Отсутствие совпадения между понятиями и даже между принятыми там и здесь правовыми категориями представляет собой одну из самых больших трудностей для юриста, желающего провести сравнение различных правовых систем (Давид 1988). Следует добавить мысль Р. Давида, что это является одной из самых больших трудностей и для юридического переводчика.

Круг проблем юридического перевода достаточно широк и включает, по мнению С. Поммер, следующие: «...асимметрия правовых систем, вытекающая из этого относительность юридической терминологии, непоследовательность категоризаций и классификаций между различными отраслями и отраслями права, разграничение терминологического и понятийного уровней, а также сложности понятийного и терминологического изменения» (Pommer 2008: 17-21).

Вышеуказанные сложности указывают на то, что юридический переводчик должен обладать рядом профессиональных компетенций, которые включают не только высокий уровень владения иностранным языком (включая язык в такой сфере профессиональной коммуникации, как юриспруденция), но и основательную лингвострановедческую и лингвокультрологическую подготовку, глубокие правые знания, аналитические умения, логическое мышление.

Как указывает Л.П. Галанза, для успешного перевода кодекса, учебника или монографии далеко недостаточно только хорошего знания иностранного языка. Необходимы специальные знания в данной науке, ибо научные термины требуют особенно точного перевода (Галанза 1966: 120-126).

Поскольку в юридическом переводе за единицу перевода, как правило, принимается юридический термин, который можно назвать ключевым звеном

юридического текста, то знание юридической терминологии является одной из базовых компетенций юридического переводчика (Гамзатов 2004: 11).

Следует согласиться с Т.Б. Назаровой, которая выделяет три метода для освоения юридической терминологии:

1) Концептуализация, которая «предполагает формирование навыков толкования или определения того, что тот или иной ключевой бизнес-термин значит; имеется в виду соотнесение термина с обозначаемым им понятием, например: company - a group of persons legally incorporated under company law; компания - объединение нескольких лиц, зарегистрированное в соответствии с законодательством о компаниях»;

2) Категоризация, которая «группирует и организовывает термины, т.е. распределяет их по тем или иным тематическим/ассоциативным/ концептуальным рубрикам, типичным для мира бизнеса, например: company оказывается в одном ряду с такими терминами, как corporation, enterprise, firm, concern, conglomerate, multinational, transnational, private company, public company, global company, small business, big business, etc»;

3) Приоритизация, которая «выявляет те из объективно существующих, и возможных, ассоциативных взаимосвязей и взаимоотношений, которые для понимания мира бизнеса оказываются наиболее существенными, а значит более приоритетными по сравнению с другими». (Назарова 2006: 35-36).

Таким образом, юридический переводчик имеет дело с правовыми реалиями, то для него особую важность имеет широта юридического кругозора, знакомство с основами права, знание правовых систем исходного языка и переводящего языка, умение ориентироваться в базовых понятиях и концепциях, которыми оперируют эти системы.

Как указывают иностранные авторы: Де Грут «...юридические переводчики должны иметь представление о структуре правовых систем, с которыми связаны их переводы...для выполнения точных переводов

юридические переводчики должны разбираться в различных правовых системах, а также в конкретных областях права, таких как уголовное право, коммерческое право, право собственности и т. д.» (De Groot 1987: 793-812).

Также следует отметить, что для правильного юридического перевода одним из источников является сравнительное правоведение.

Сравнительное правоведение подразумевает сравнительный анализ двух или нескольких правовых систем путем сопоставления их отдельных аспектов с целью выявления общих и (или) отличительных свойств. Преимущества сравнительного правоведения К. Осакве видит в том, что оно облегчает понимание зарубежных правовых систем, способствует изучению собственного права, повышает культурный уровень (Осакве 2008: 4). Именно поэтому в юридическом переводе чрезвычайно важны умения и навыки сравнительно-правового анализа.

Юридический электронный словарь определяет сравнительное правоведение следующим образом: сравнительное правоведение – это отрасль юридической науки, изучающая правовые системы различных государств путем сопоставления одноименных государственных и правовых институтов, систем права, их основных принципов и т.д. (Словари и энциклопедии на Академике).

Для юридического переводчика сравнительное правоведение является, прежде всего, методом и одним из важнейших научных средств изучения правовых явлений, без которого невозможен квалифицированный юридический перевод.

По мнению К. Осакве, владение этим методом позволяет специалисту прийти к правильным заключениям об истинной природе сравниваемых правовых систем вообще ... или отдельных отраслей и институтов права в сравниваемых правовых традициях, а переводчику оно позволяет найти верное решение. Имея в распоряжении такой инструмент, как сравнительно-правовой анализ, он может выявить общее, особенное и единичное в правовых

системах, сопоставить концептуальные юридические картины мира в разных языках и подобрать адекватный вариант перевода (Осакве 2008: 4).

Исследователи в основном сходятся во мнении, что наибольшие сложности в юридическом переводе возникают тогда, когда задействованные языки обслуживают принципиально разные правовые системы, которыми являются, в частности, система общего права и система континентального права: «Очень трудно найти эквивалентность между двумя терминами, если оба юридических языка относятся к разным правовым системам» (Wang). «Там, где исходный язык и целевой язык относятся к разным правовым системам… виртуальная полная эквивалентность оказывается проблемой» (De Groot 1987: 793-812).

И, наконец, представляется, что такой юридический перевод следует назвать межсистемным переводом. Как указывает К. Осакве, сопоставление правовых систем двух или более правовых семей считается межсистемным, а двух или более правовых систем внутри одной правовой семьи – внутрисистемным (Осакве 2008: 4).

В этом смысле юридический перевод с русского на английский и с английского на русский является ярким примером именно межсистемного перевода со всеми сложностями, обусловленными несходством разнотипных правовых систем, которые обслуживают данные языки.

Россия и англоязычные страны принадлежат к разным правовым семьям, которые Ж.Р. де Гроот определяет как ««группы правовых систем, имеющих много общего по структуре и социально-политико-историческому фону» (De Groot 1987: 793-812).

Россия относится к странам романо - германской, или континентальной, системы права (continental law jurisdictions), в которых юридическая наука сложилась на основе римского права, а англоязычные страны, прежде всего, Англия и США, относятся к странам общего права (common law jurisdictions).

Следует согласиться с Р. Давид, который указывает, что различия в системе и структуре права непосредственным образом влияют на перевод (Давид 1988).

Из данного утверждения следует сделать вывод, что для правильного адекватного перевода необходимо знание системы и структуры права того государства, что юридические документы подлежат переводу.

1.4. Язык судопроизводства и особенности перевода судебных документов

1.4.1. Язык судопроизводства и текст судебного решения

Язык судопроизводства судебной системы не только является одним из важнейших принципов организации судебной системы, но и представляет собой разновидность государственного языка, действующего во всех сферах публичной деятельности какой-либо страны.

На территории Российской Федерации языком межнационального общения исторически стал русский язык. Статус русского языка, как государственного языка закреплен в ч. 1 ст. 68 Конституции РФ и предусматривает обязательное его использование в деятельности федеральных органов государственной власти, органов государственной власти субъектов РФ, иных государственных органов, органов местного самоуправления, организаций всех форм собственности, в том числе в деятельности по ведению делопроизводства, при подготовке и проведении выборов и референдумов, в конституционном, гражданском, уголовном, административном судопроизводстве, судопроизводстве в арбитражных судах, делопроизводстве в федеральных судах, судопроизводстве и делопроизводстве у мировых судей и в других судах субъектов РФ.

Также часть 2 статьи 19 Конституции РФ гарантирует равенство прав и свобод человека и гражданина независимо от языка. Законом РФ «О языках народов Российской Федерации» предусмотрено, что судопроизводство и делопроизводство в федеральных судах общей юрисдикции может вестись также на государственном языке республики, на территории которой находится соответствующий суд. Судопроизводство и делопроизводство у мировых судей и в других судах субъектов РФ, а также делопроизводство в правоохранительных органах субъектов РФ ведется на государственном языке

РФ или на государственном языке республики, на территории которой находится соответствующий суд или правоохранительный орган. Лица, участвующие в деле и не владеющие языком, на котором ведутся судопроизводство и делопроизводство в судах, а также делопроизводство в правоохранительных органах, вправе выступать и давать объяснения на родном языке или на любом свободно избранном ими языке общения, а также пользоваться услугами переводчика. Аналогичные права на использование родного языка декларируются и в уголовно-правовом законодательстве.

Поскольку язык судопроизводства определен в каждом государстве, возникает необходимость судебного перевода.

В зависимости от того, в какой степени мысль, порожденная на одном языке, передана средствами другого языка, в теории перевода выделяют три вида эквивалентный (адекватный), буквальный и вольный перевод. В сфере судопроизводства может применяться только эквивалентный (адекватный) перевод, поскольку при вольном и буквальном переводе искажается информация, содержащаяся в исходном тексте. Так, например, перевод в уголовном судопроизводстве должен отвечать требованиям точности, полноценности, правдивости и объективности (Зеленский, Швец 2014:124-126).

Судебный перевод, являясь разновидностью специального перевода, представляет собой один из видов языкового посредничества. Такой перевод - это процесс формирования формы и содержания подлинника, представленного в виде письменной судебной документации, устных высказываний участников процесса либо иных юридически значимых документов на языке перевода (Зеленский, Швец 2014:124–126).

Профессиональный судебный перевод – это особая языковая деятельность – переводческая деятельность, направленная на воссоздание подлинника юридического документа либо факта на другом языке. Эта деятельность требует специальной подготовки, навыков и умения. Она

предполагает не только совершенное владение иностранным и родным языком, знание культуры, но и владение юридической терминологией, особенностями речи делового общения, а также знание применимого законодательства.

В настоящей работе представляется необходимым рассмотреть особенности перевода письменных судебных документов, и, в первую очередь, перечислить некоторые основные особенности судебных документов и текстов юридической направленности в целом.

Официальная стилистика юридических текстов отличается нейтральным изложением фактов, практически полностью отсутствующими эмоциональными элементами, во избежание возникновения двойственности толкований и дополнительных ассоциаций (Берг 2003:15-17).

Основными чертами судебных текстов являются: лаконичность, информативность, четкость, точность и ясность формулировок, формализованность, а также особая структурированность и использование специализированных лексических единиц – юридических понятий.

Говоря о структуре предложений текстов судебных документов, важно отметить, что они характеризуются многосложностью, присутствием большого количества пассивных конструкций. Тексты судебных документов отличаются спецификой лексических конструкций, наличием особых лексических шаблонов, а также не могут рассматриваться без учёта языковых реалий (Берг 2003:15-17).

Относительно конкретных судебных документах, следует указать, что их перевод также обладает рядом особенностей. Как элемент коммуникации, текст судебного решения несёт в себе следующие функции: социальную, системную и регулятивную. Путем реализации данных функций осуществляется, прежде всего, регулирование результативности речевой коммуникации на определённом этапе судопроизводства. Иными словами – обеспечивается адекватное восприятие информации всеми участниками

процесса.

В структуре текстов судебных решений ярко выражена особенность построения текста – его композиция, а также специфический синтаксис. Используются предложения с однотипными оборотами, как правило, объемные по своей структуре и содержанию. Логической особенностью таких текстов является оформление предложений, несущих единый содержательный смысл, в виде абзаца, с целью облегчения восприятия излагаемого материала (Берг 2003:15-17).

Результатом деятельности любого суда становится письменный текст судебного решения. Именно письменный текст судебного решения, как совокупный результат разрешения существующих противоречий и речевых баталий сторон в процессе его разработки, приобретает форму итогового правоприменительного документа, и вследствие этого представляет интересный объект для комплексного лингвистического исследования.

Текст судебного решения является отражающим общественное явление речевым произведением информативно-предписывающего характера, представленным в форме официального письменного документа, которое характеризуется интенсивно выраженной социальной обусловленностью использования языковых средств и наличием сложной структурной композиции (Винник 2009:54).

В структуре текстов судебных решений ярко выражена особенность построения текста – его композиция, а также специфический синтаксис. Композиционно используются предложения с однотипными оборотами, как правило, объемными по своей структуре и содержанию. Логической особенностью таких текстов является оформление предложений, несущих единый содержательный смысл в виде абзаца с целью облегчения восприятия излагаемого материала.

Синтаксические особенности проявляются в том, что при переводе необходимо учитывать наличие в текстах судебных решений большого

количества сверхфразовых единств. Стоит отметить, что сферхфразовое единство представляется сложным синтаксическим целым, в форме последовательности двух и более самостоятельных предложений, объединённых общностью темы в смысловые блоки. (Берг 2003:15-17).

Каждое сверхфразовое единство в тексте судебного решения имеет такое структурно-логическое оформление, которое обеспечивает его полное подчинение общему суммарному и надсуммарному смыслу текста.

Текст судебного решения представляет собой единство информативного характера, имеющее целевую и прагматическую установку, однозначный смысл и основными признаками которого являются цельность, связность, информативность, логичность и структурно-логическая завершенность.

Функционально стилистические и жанровые особенности текста судебного решения реализуются в письменной речи и наблюдаются как в построении, так и в стилистических приемах развития темы и основной мысли. Стиль текста судебного решения рассматривается как элемент официально-делового функционального стиля и находит свое воплощение в текстах правоприменительных документов определенного направления (Берг 2003:15-17).

К отличительным чертам текста судебного решения, характеризующим выполнение текстом функций координации деятельностей сторон в правоприменительной сфере, относятся: ярко выраженная терминологичность; наличие непосредственной связи-зависимости между стилистическим оформлением текста и типовой, стилистически замкнутой ситуацией применения текста; использование языковых средств, строго регламентируемых условиями общения.

Поскольку перевод юридических документов является разновидностью специального перевода, он имеет свои особенности, поскольку судебные документы – это категория юридических документов, исходящих от суда.

К таким документам относятся решения, определения или

постановления судов первой, кассационной либо надзорной инстанции, протоколы судебных заседаний, а также документы, используемые в приказном и исполнительном производстве.

По своей стилистике судебные документы относятся к официально-деловому стилю изложения.

Форма реализации данного стиля преимущественно письменная, что связано с необходимостью придания деловому тексту статуса закона, правовой значимости, что достигается с помощью особого типового построения и оформления документа.

1.4.2. Язык судопроизводства как разновидность официально-делового стиля

Официально -деловой стиль обладает рядом особенностей, отличающих его от других функциональных стилей. Прежде всего, это точность, не допускающая двусмысленности. Документ должен толковаться только однозначно, поэтому используется специальная терминология, употребляются лексические повторы, исключаются каламбуры и прочее.

Другая черта официально-делового стиля - стандартизованность, объясняющаяся регламентированностью делового общения. Предполагается включение в текст определенных штампов, стандартных формулировок, готовых языковых формул, что облегчает коммуникацию в административно-социальной и правовой сфере, в составлении документов.

Отсюда вытекает еще одна специфическая черта - единообразие в графическом оформлении материала. Части текста расположены в определенной логической последовательности, имеются устойчивые формы расположения материала, включаются цифровые обозначения.

Еще одна черта данного стиля - объективность, способствующая намеренному обезличиванию делового текста. Это проявляется в отсутствии

местоимений и глаголов в форме 1-го или 2-го лица, во включении в текст отглагольных существительных, в использовании неопределенно-личных предложений, страдательных оборотов. Такой текст отличается неличностным характером, так как исключено отношение автора документа к передаваемой информации.

Официально-деловому стилю присуща нейтральность изложения материала, предполагающая использование только нейтральной книжной лексики или функционально маркированной лексики. Эмоционально-оценочные слова, экспрессивные конструкции и изобразительно-выразительные средства не включаются в текст.

Кроме того, в официально-деловом языке встречаются часто повторяющиеся стереотипные выражения, готовые речевые формулы, которые принято называть клише. Широкое использование клише в языке официально-делового стиля следует признать вполне правомерным явлением.

Наконец, строгое соблюдение литературной нормы. Она зафиксирована в словарях, справочниках, академических грамматиках, учебниках по русскому языку. Соответствие норме в официально-деловом стиле обязывает отказаться от использования просторечий, диалектизмов, жаргонизмов, вульгаризмов, разговорных синтаксических конструкций и т.п. Кодификация норм (т.е. получение силы закона) делает обязательным требование, чтобы они соблюдались в письменной и устной речи. Именно норма отграничивает сферу литературного языка, разновидностью которого является, в том числе, и официально-деловой стиль, от некодифицированной сферы национального языка (Мильков, Параскевова 2009; Голуб 2002).

При работе с судебными текстами, необходимо учитывать особенности юридической терминологии.

Применительно к судебной документации, используется специальный юридический понятийный аппарат (сторона защиты, сторона государственного обвинения, заявитель, defence, prosecution, applicant и т.д.).

1.4.3. Межъязыковая асимметрия в юридической терминологии

Как указывает Т.А. Фесенко, юридическая терминология существенно отличается от терминологии, принятой в общем употреблении, поскольку имеет ярко выраженную социальную окраску. Сложность восприятия применимого понятийного аппарата юридической направленности в английском языке выражается в том, что многие слова общего употребления приобретают в юридической речи особое значение, отличное от общепринятого (Фесенко 2006: 150).

Например, suit – иск, to assist (smb) – представлять интересы (кого-либо), to request – ходатайствовать, case – дело. Однако, важно отметить, что в судебных документах значения одного и того же слова иногда могут различаться, в зависимости от контекста. Так, существительное arrest может трактоваться как – приостановление, прекращение, арест. Данную особенность изложения информации в судебных документах необходимо иметь ввиду, во избежание двусмысленностей в тексте перевода.

Несмотря на то, что при употреблении определённой терминологии, существует строгая регламентация, некоторые из них, могут иметь юридические синонимы, использование которых обусловлено как стремлением избежать тавтологии, так и стилистическими особенностями конкретного судебного документа (Фесенко 2006: 150). Например, адвокат или защитник может быть выражен такими понятиями как lawyer, legal advisor, counselor, defendant, assistant.

А.В. Федоров в процессе перевода термина определяет два этапа:

1) выяснение значения термина в контексте,

2) перевод значения на родном языке (Федоров 2002: 86-99).

Изучение лексического состава законодательных текстов ограничивается проблемами терминологии, так как юридическая терминология считается основным, наиболее информативным пластом

лексики языка законодательства, способствующим точному и ясному формулированию правовых предписаний. Основной задачей перевода как общеупотребительной, так и специальной (терминологической) лексики является поиск в языке перевода слова-эквивалента, или термина-эквивалента соответственно. Термин-эквивалент переводного языка и оригинальный термин должны быть семантически тождественными лексическими единицами **(**Бархударов 1975; Рецкер 1982).

Это также указывает на то, что при переводе судебных документов, следует избегать вариативности языкового выражения, поскольку многие применяемые формулировки являются фиксированными, и имеют строго определённые значения, например: закрытое судебное заседание – hearing to be held in camera; государственный обвинитель – public prosecutor.

Эквивалент – постоянное лексическое соответствие, которое точно совпадает со значением слова. Термины, которые имеют эквиваленты в родном языке, играют важную роль при переводе. Они служат опорными пунктами в тексте, от них зависит раскрытие значения других слов, они дают возможность выяснить характер текста. Поэтому нужно уметь находить соответствующий эквивалент в родном языке и расширять знания терминов-эквивалентов (Власенко 2006).

Ж.А. Катаева к языковым особенностям судебных документов относит следующее:

1. Большая насыщенность юридических материалов юридической лексикой, основную часть которой составляют юридические термины, многие из которых переводятся на русский язык словосочетаниями и описательно (remedy – средство судебной защиты, deterrence – средство удержания от совершения преступных действий посредством устрашения, indictment – обвинительный акт и т.д.);

2. Наличие особых идиоматических выражений и фразеологических сочетаний, не употребляемых или редко употребляемых в общелитературном

языке (to make default – 1. не исполнять обязанности, 2. не являться в суд; Marshal of the court – судебный исполнитель; to meet – оспаривать иск и т.д.);

3. Наличие некоторых стилистических отклонений от общелитературных норм, иногда довольно значительных. Сюда можно - отнести: - широкое применение в английском языке эллиптических конструкций (сокращенных, без артиклей), особенно в периодически составляемых типовых документах, форма и содержание которых изменяются в небольших пределах (сводки, сообщения, решения, заключения); - наличие оборотов официально-канцелярского стиля в документах, посвященных общим или административно-хозяйственным вопросам; - строго регламентированное употребление глагольных форм и оборотов речи специальной терминологии в определенных юридических документах;

4. Применение латинских выражений в юридических текстах: mens rea – виновная воля, вина; stare decisis – обязывающая сила прецедентов и т.д.;

5. Наличие сокращений, большинство из которых используется только в юридических текстах и документах: (англ.) ALJ – Administrative Law Judge – судья административного суда; CtApp – Court Appeal – апелляционный суд и т.д. (Катаева).

Термины «клише» и «штамп» не полностью идентичны в системе рассматриваемых языков. Слово «клише» этимологически восходит к французскому cliché и означает, по определению Советского энциклопедического словаря, стереотипное выражение, механически воспроизводимое в типичных речевых контекстах и ситуациях; шаблонную фразу, например, вопрос ждет своего решения. Штамп» (от итальянского stampa – печать) определяется Словарем русского языка, как принятый образец, которому слепо подражают, шаблон. Во французском языке русский термин «штамп» не имеет полного эквивалента и переводится обычно как cliché или lieu commun (общее место, избитое, банальное выражение).

Кроме того, при переводе судебных текстов не следует забывать, что каждая страна имеет свою юридическую систему, соответствующую юридическую терминологию и свои реалии (Казанцев).

Стиль изложения документа должен соответствовать стилю такого же материала на языке, на который делается перевод. При переводе судебных текстов следует помнить, что многие обычные слова в юридических текстах могут иметь терминологическое значение и, чтобы избежать интерференции, в данном случае вмешательства каких-то известных значений слов и выражений общего или специального значения в юридический текст, необходимо пользоваться соответствующими словарями и справочниками (Алимов 2005:14).

На основании вышеизложенного в настоящем параграфе можно сделать вывод, что для того, чтобы какой –либо судебный документ был переведен правильно, переводчику необходимо не только хорошо владеть обоими языками, но знать их в сочетании с правовыми требованиями и условиями, действующими в стране, на язык которой выполняется юридический перевод.

1.5. Теория закономерных соответствий

Категория лексических соответствий относится к числу наиболее важных понятий теории перевода. Теория закономерных соответствий зародилась в отечественном переводоведении в середине 20 века. Автором этой теории по праву считается Я.И. Рецкер, который опубликовал статью «О закономерных соответствиях при переводе на родной язык» (Рецкер 1950: 156-183).

Необходимость обращения к этой теме объясняется тем, что теория закономерных соответствий не потеряла своего значения и сегодня. Знакомство начинающих и практикующих переводчиков с её основными положениями может в определённой мере способствовать повышению качества создаваемых переводов.

Как указывает Я.И. Рецкер, перевод немыслим без прочной лингвистической основы. Такой основой должно быть сравнительное изучение языковых явлений и установление определенных соответствий между языком подлинника и языком перевода. Эти соответствия в области лексики, фразеологии, синтаксиса и стиля и должны составлять лингвистическую основу теории перевода» (Рецкер 1950:156).

На основе анализа разнообразных текстов оригиналов и их переводов Я.И. Рецкер выделяет три категории закономерных соответствий:

1) эквиваленты;

2) аналоги;

3) адекватные замены.

Под эквивалентом понимается постоянное равнозначащее соответствие, которое для определённого времени и места уже не зависит от контекста.

Аналогом является результатом перевода по аналогии посредством выбора одного из нескольких возможных синонимов.

К адекватной замене прибегают в тех случаях, когда для точной передачи мысли переводчик должен оторваться от буквы подлинника, от словарных и фразовых соответствий и искать решение задачи, исходя из целого: из содержания, идейной направленности и стиля подлинника (Рецкер 1950:158).

Последователем Я.И. Рецкера является А.В. Федоров, который заложил под теорию закономерных соответствий более глубокий теоретический фундамент. Он выделил три наиболее характерных случая в передаче значения слова при переводе:

1) в языке перевода нет словарного соответствия тому или иному слову подлинника;

2) соответствие является неполным, т. е. лишь частично покрывает значение иноязычного слова;

3) различным значениям многозначного слова подлинника соответствуют разные слова в языке перевода.

Наиболее редким случаем, по утверждению А.В. Федорова, является наличие твердо однозначного (абсолютного) соответствия слову подлинника. (Федоров 1953: 122).

Теория закономерных соответствий получила своё дальнейшее развитие и в работе З.Е. Рогановой, которая подразделяет эквиваленты следующим образом:

1. По структуре:

1) простые эквиваленты (эквиваленты, состоящие из одного слова);

2) сложные эквиваленты (эквиваленты, состоящие из словосочетания (фразеологического или свободного);

3) макроэквиваленты (эквиваленты, состоящие из целого предложения);

4) гиперэквиваленты (соответствие в переводе, состоящее более чем из одного предложения).

2. По признаку стабильности: 1) постоянные или абсолютные (постоянное языковое соответствие, равнозначное и функционально тождественное); 2) окказиональные, или контекстуальные (языковое соответствие, выступающее в роли эквивалента в определённом контексте).

3. По критерию обязательности или необязательности использования того или иного эквивалента: 1) факультативные эквиваленты (языковое соответствие, использование которого по условиям контекста возможно, но не обязательно).

4. С точки зрения их взаимозаменяемости: 1) коэквиваленты (равнозначные по значению и стилистической функции постоянные или окказиональные эквиваленты) (Роганова 1971.34-39).

В дальнейшем Я.И. Рецкер несколько видоизменил предложенную им классификацию соответствий и выстроил три группы соответствий:

1) эквиваленты (полные и частичные, абсолютные и относительные), установившиеся в силу тождества обозначаемого, а также отложившиеся в традиции языковых контактов;

2) вариантные и контекстуальные соответствия;

3) все виды переводческих трансформаций (дифференциация, конкретизация, генерализация значений, смысловое развитие, антонимический перевод, целостное преобразование, компенсация потерь в процессе перевода) (Рецкер 1974:38-63).

1.6. Переводческие трансформации и их виды

Проблемы перевода до относительно недавнего времени сводились, в основном, к сложности перевода отдельных терминов, к передаче их грамматических, лексических и синтаксических особенностей. Термины определялись как единицы, присущие той или иной отрасли. Трудность перевода термина заключалась в поиске иноязычного эквивалента соответствующего субъязыка, а личности переводчика отводилась роль не мыслящего субъекта, а лишь «передающего устройства», раскрывающего семантику другого языка путём определения инвариантных отношений между переводимым и исходным. С течением времени оказалось важным понятие субъективности, когда перевод текста зависит от понимания и степени освоения переводчиком специального знания, содержащегося в переводческом тексте.

Как указывает А.А. Солдатова, в условиях межкультурной коммуникации исследование факторов перевода любого текста строится с учётом основных особенностей языковой культуры, типа и механизма социального кодирования родного и иностранного языков. Такой подход позволяет наилучшим образом решить практические задачи, связанные с проблемами перевода, в частности, юридического текста (Солдатова 2010:5).

По причине неполной общности и различия языков происходят переводческие трансформации (замены).

Л. С. Бархударов указывает, что переводческие трансформации – это те многочисленные и качественно разнообразные преобразования, которые осуществляются для достижения переводческой эквивалентности («адекватности») перевода вопреки расхождениям в формальных и семантических системах двух языков (Бархударов 2008:190).

Согласно А. Д. Швейцеру термин «трансформация» используется в переводоведении в метафорическом смысле. На самом деле речь идет об

отношении между исходными и конечными языковыми выражениями, о замене в процессе перевода одной формы выражения другой (Швейцер 1985:118).

В. Н. Комиссаров полагает, что переводческие трансформации – это преобразования, с помощью которых можно осуществить переход от единиц оригинала к единицам перевода в указанном смысле. И, поскольку переводческие трансформации осуществляются с языковыми единицами, имеющими как план содержания, так и план выражения, они носят формально-семантический характер, преобразуя как форму, так и значение исходных единиц (Комиссаров 1990:172).

В настоящее время в теории перевода приводится большое количество переводческих трансформаций и нет единого научного взгляда на количество приёмов переводческой трансформации, большинство исследователей, таких как Л.С. Бархударов, Л. К. Латышев, А.Л. Семенов, Я.И., Рецкер, В.Н. Комиссаров, А.М. Фитерман, Т.Р. Левицкая, А.Д. Швейцер, Р.К. Миньяр-Белоручев и др., разделяют мнение о том, что переводческие трансформации делятся на лексические, грамматические и комплексные (лексико-грамматические) (Бархударов 2008; Коммисаров 1980; Латышев, Семенов 2003; Левицкая, Фитерман 1963; Миньяр-Белоручев 1996; Рецкер 1974; Швейцер 1985).

В настоящей работе далее приводится две классификации переводческих трансформаций, приведенные В.Н. Комиссаровым и Л.С. Бархударовым.

В своем труде «Язык и перевод» Л.С. Бархударов все виды преобразований или трансформаций, осуществляемых в процессе перевода, подразделяет на четыре типа:

1) Перестановки
2) Замены
3) Добавления

4) Опущение (Бархударов 2008:190).

Перестановка – это изменение последовательности языковых элементов в тексте перевода по сравнению с текстом подлинника. Такой перестановке могут подвергаться слова, словосочетания, части сложного предложения, а также самостоятельные предложения в текстовом строе. Наиболее распространенным случаем в процессе перевода является изменение порядка слов и словосочетаний в структуре предложения. (Бархударов Л.С. 2008:191).

Замены – это наиболее распространенный и многообразный вид переводческих трансформаций. Замене могут подвергаться как грамматические единицы (формы слов, части речи, члены предложения, типы синтаксической связи и т.д.), так и лексические, из чего следует, что существуют грамматические и лексические замены. Более того, заменяться могут не только отдельные единицы, но и целые конструкции, тогда речь идет уже о комплексной лексико-грамматической замене. (Бархударов 2008:191).

Все замены Л.С. Бархударов подразделяет на:

- замены форм слова (число у существительных, время у глаголов и др.);
- замены частей речи – распространенный тип (существительное на местоимение и обратно, отглагольное существительное на глагол в личной форме, имени деятеля на русскую личную форму глагола, прилагательное на существительное и т.д.);
- замены членов предложения, т.е. перестройка синтаксической структуры предложения (пассивная конструкция на активную, страдательный залог на действительный, подлежащее на обстоятельство);
- синтаксические замены в сложном предложении. Наиболее часто наблюдаются следующие виды синтаксических трансформаций: - замена простого предложения сложным, - замена сложного предложения простым; замена главного предложения придаточным и наоборот; замена подчинения сочинением и наоборот; - замена союзного типа связи бессоюзным и наоборот (Бархударов 2008:205).

Лексические замены, т.е. замена отдельных лексических единиц иностранного языка лексическими единицами языка перевода, которые, однако, не являются их словарными эквивалентами, иначе говоря они имеют иное референциальное значение, нежели передаваемые ими в переводе единицы иностранного языка.

Лексические замены можно подразделить на:

- конкретизацию (замена более широкого значения в иностранном языке на более узкое). Например: He told me to come right over, if I felt like it/Велел хоть сейчас приходить, если надо);

-генерализацию (обратна конкретизации), например: (He comes over and visits me practic all every weekend /...Он часто ко мне ездит, почти каждую неделю);

- замену, основанную на причинно-следственных отношениях;

(I don't blame them/ Я их понимаю (я их не виню потому, что я их понимаю));

- антонимический перевод, т.е. трансформации утвердительной конструкции на отрицательную и наоборот, при которой происходит замена одного из переводимых слов иностранного языка на его антоним в языке перевода (Stradlater didn't say anything / Стрэдлейтер промолчал);

- компенсацию – передачу информации добавочными средствами, если в языке нет эквивалентов элементу текста на иностранном языке (You could tell he was very ashamed of his parents and all, because they said 'he don't' and 'she don't' and stuff like that / Сразу было видно, что он стесняется своих родителей, потому что они говорили «хочут» и «хочете», и все в таком роде) (Бархударов Л.С. 2008:277).

Добавление – это восстановление опущенных в иностранном языке так называемых «уместных слов». Добавление можно также рассматривать как ввод в предложение тех или иных элементов при перестройке предложения. Оно же используется и при передаче в тексте перевода грамматических явлений иностранного языка, которых нет в языке перевода (Бархударов 2008:227).

И, наконец, опущение – полная противоположность добавления. Как указывает Л.С. Бархударов, при переводе опущению подвергаются чаще всего слова, являющиеся семантически избыточными, то есть выражающие значения, которые могут быть извлечены из текста и без их помощи. Такое явление часто используется при опущении при переводе парных синонимов (just and equitable treatment/справедливое отношение) (Бархударов Л.С. 2008:228).

Далее приводится классификация переводческих трансформаций В.Н. Комиссарова.

В.Н. Комиссаров выделяет лексические, грамматические и лексико-грамматические трансформации.

Лексические трансформации описывают формальные и содержательные отношения между словами и словосочетаниями в оригинале и переводе (Комиссаров 2002:158).

К формальным преобразованиям автор относит переводческую транскрипцию / транслитерацию, а также переводческое калькирование. (Комиссаров 2002:159).

Прием транскрипции заключается в том, что при переводе воспроизводится звучание слова оригинала (имена собственные, географические названия, названия фирм, терминов и т.д.).

В современной переводческой практике преобладает явление транскрипции, иногда все же можно наблюдать и явление транслитерации. При этом большое количество отклонений от принципа транскрибирования связано с существованием традиционных наименований, которые прочно вошли в обиход не носителей языка.

Прием калькирования заключается в переводе составляющих слово или словосочетание элементов, а затем в объединении отдельных частей в целое, при этом в словосочетании порядок слов может подвергаться изменениям.

К лексико-семантическим заменам В.Н. Комиссаров относит конкретизацию, генерализацию и модуляцию (Комиссаров 2002:159-160).

Прием смысловой конкретизации заключается в том, что переводчик для перевода слова на языке оригинала выбирает единицу с более конкретным значением в языке перевода.

Прием генерализации является противоположностью конкретизации и заключается в замене слова на иностранном языке, имеющем более узкое значение, на слово на языке перевода с более широким значением.

Модуляцией (смысловым развитием) называется прием, заключающийся в замене слова или словосочетания на иностранном языке единицей на языке перевода, значение которой логически выводится из значения исходной единицы.

Среди грамматических трансформаций наиболее частыми приемами В. Л. Комиссаров называет дословный перевод, членение предложений, объединение предложений и грамматические замены (Комиссаров 2002:161-163).

Дословный перевод, или нулевая трансформация заключается в замене синтаксической структуры на иностранном языке на аналогичную структуру на языке перевода.

Прием членения предложения заключается в его разбивке на два и более предложения в переводе.

Прием объединения предложений является противоположным приему членения предложения и заключается в том, что два и более предложения оригинала соответствуют одному предложению в переводе.

Грамматической замене может также подвергаться грамматическая категория, часть речи, член предложения, предложение определенного типа. Обычно при переводе категория числа существительного сохраняется, за исключением тех случаев, когда форме единственного числа в одном языке соответствует форма множественного числа в другом языке, или же замена

может производиться в соответствии со стилем или узусом. Достаточно распространенным видом грамматической замены при переводе является замена части речи (существительное глаголом, прилагательное существительным и т.д.) (Комиссаров 2002:165).

Наиболее распространенными лексико-грамматическими трансформациями являются приемы антонимического перевода, прием описательного перевода и прием компенсации (Комиссаров 2002:166).

Антонимический перевод - замена утвердительной формы в оригинале на отрицательную форму в переводе и наоборот, при этом происходит замена лексической единицы на иностранном языке на единицу на языке перевода с противоположным значением, при этом в антонимическом переводе единица на иностранном языке может заменяться в языке перевода другими словами и словосочетаниями, содержащими противоположную мысль.

Описательный перевод - замена лексической единицы на иностранном языке словосочетанием, раскрывающим ее значение на языке перевода.

При компенсации элементы смысла, опущенные при переводе, передаются в тексте каким-либо другим средством, при этом они могут не находиться в том же самом месте, что и в оригинале.

Выводы по первой главе

Современный правовой или юридический английский основан на стандартном (общем) английском языке. Тем не менее, он содержит ряд необычных особенностей, которые в основном связаны с терминологией, грамматическими структурами и пунктуацией.

Основными характеристиками письменного юридического английского языка является его устойчивость и насыщенность клишированными структурами.

Юридический английский сложен для понимания, из-за употребления большого количества сложных слов и фраз.

Кроме того, юридический английский язык использует сложную терминологию, которая не знакома неспециалисту, а знание лингвистических особенностей английского языка и происхождения юридического его варианта позволяет выявить эти границы и создать адекватный его перевод.

В современном мире в условиях глобализации, международной интеграции и расширения экономического и финансового сотрудничества как на межгосударственном уровне, так и на уровне предприятий и компаний, юридический перевод приобретает особую важность и актуальность. Переводчик, работающий в профессиональной сфере юриспруденции, должен хорошо знать приемы построения юридического текста различной стилистической разновидности. Только в этом случае может идти речь о том, что переводчик владеет техникой юридического перевода

Также для правильного адекватного перевода необходимо знание системы и структуры права (правовой системы) того государства, чьи юридические документы подлежат переводу.

Язык судопроизводства судебной системы не только является одним из важнейших принципов организации судебной системы, но и представляет собой разновидность государственного языка, действующего во всех сферах публичной деятельности какой-либо страны. Поскольку язык судопроизводства определен в каждом государстве, возникает необходимость судебного перевода.

Поскольку перевод судебных документов является разновидностью специального перевода, он имеет свои особенности, поскольку судебные документы – это категория юридических документов, исходящих от суда. По своей стилистике судебные документы относятся к официально-деловому стилю изложения.

Официально - деловой стиль обладает рядом особенностей, отличающих его от других функциональных стилей. Прежде всего, это точность, не допускающая двусмысленности. Документ должен толковаться только

однозначно, поэтому используется специальная терминология, употребляются лексические повторы, исключаются каламбуры и проч.

При переводе судебных документов, следует избегать вариативности языкового выражения, поскольку многие применяемые формулировки являются фиксированными, и имеют строго определённые значения. Стиль изложения документа должен соответствовать стилю такого же материала на языке, на который делается перевод.

При переводе судебных текстов следует помнить, что многие обычные слова в юридических текстах могут иметь терминологическое значение и, чтобы избежать интерференции, в данном случае, вмешательства каких-то известных значений слов и выражений общего или специального значения в юридический текст, необходимо пользоваться соответствующими словарями и справочниками.

Категория лексических соответствий относится к числу наиболее важных понятий теории перевода. Следствием непохожести правовых систем и своеобразия используемой в каждой правовой системе терминологии является отсутствие терминов - эквивалентов в языках, обслуживающих разные правовые системы.

При переводе необходимо применять переводческие трансформации, то есть те многочисленные и качественно разнообразные преобразования, которые осуществляются для достижения переводческой эквивалентности («адекватности») перевода вопреки расхождениям в формальных и семантических системах двух языков.

Применение переводческих трансформаций необходимо, прежде всего, для максимально полной передачи информации, заложенной в языке оригинала, с соблюдением всех норм языка перевода.

На практике переводчики вынуждены обращаться к трансформациям по причине различий в лексическом составе, а именно в понятийной сфере и смысловом объеме слов различных языков. Грамматическая система языков

также различна: отличаются сочетаемость и порядок слов в предложении, структура самих предложений, их использование и виды. Все вышеперечисленное обязывает переводчика адаптировать исходный текст к нормам родного языка, используя трансформации.

Глава 2. Лексические и грамматические особенности перевода судебных решений Европейского суда по правам человека

2.1. Международно-правовая природа и международно-правовой статус Европейского Суда по правам человека

Юридическая природа международного суда - это совокупность определенных признаков (особенности учредительного акта, компетенции, структуры и т.п.), характеризующих его «принадлежность» к той или иной системе правового регулирования (международному праву или иному правопорядку). Юридическая природа международного суда, в том числе и Европейского суда по правам человека является международно-правовой.

Международно-правовой статус международного суда можно определить, как установленную нормами международного права совокупность его прав и обязанностей. Соотношение поименованных выше двух понятий можно выразить как соотношение целого (юридической природы) и части (статуса). Юридическая природа институции всегда определяет совокупность ее прав и обязанностей, то есть ее международно-правовой статус.

В то же время исследование международно-правовой природы Европейского Суда по правам человека и иных международных судов имеет ключевое значение для понимания процессов, происходящих в современном международном праве. Именно с развитием международных институций (учреждений), к числу которых относятся и международные суды, связывается становление новой (поствестфальской) концепции международного права (Gerhard Hafher 2004: 849-863).

На международные судебные учреждения с самого начала их создания было возложено выполнение одной из основных задач международного права - предотвращения споров и стабилизации международного правопорядка.

Выполнению этой задачи способствовали особые свойства международной судебной процедуры по сравнению с иными средствами международного контроля - постоянное действие, независимость судей, использование в качестве юридической основы разрешения дел норм общего международного права - и, соответственно, большая объективность в процессе рассмотрения и разрешения дел, обязательная сила решений и т.д.

Особое развитие международные суды получили после окончания Второй мировой войны. Ее итоги, создание ООН привели к развитию и усилению такого сравнительно нового института международного права, как «международный контроль», который является наиболее эффективным средством обеспечения соблюдения международных договоров.

Профессор Р.А. Каламкарян справедливо отмечает, что «эффективность права определяется, в конечном итоге, степенью жесткого реагирования органов беспристрастного и независимого правосудия на ту или иную неадекватность в поведении субъектов права» (Каламкарян 2004: 7-8).

Особое развитие международный контроль получил в сфере зарождавшегося международного права прав человека, где в качестве контрольных мер предусматривалось создание особых контрольных органов, полномочных в том числе рассматривать жалобы частных лиц (индивидуальные жалобы) на несоблюдение в отношении них обязательств, принятых государством на основании международного правового акта (Лукашук 2005:18).

Таким образом, международные суды, ранее выполнявшие лишь функцию содействия разрешению межгосударственных споров, получили новое назначение в качестве основных гарантов соблюдения государствами своих обязательств по соглашениям в области прав человека. Первым международным судом, наделенным контрольными полномочиями в сфере прав человека, стал Европейский Суд по правам человека.

Большинство ученых относят Европейский Суд по правам человека к наднациональным судебным органам, берут за основу такие признаки, как обязательность исполнения его решений государствами-участниками Конвенции, являющимися сторонами по делу, и возможность непосредственного обращения индивидуальных заявителей с жалобами в Европейский Суд по правам человека (Улётова 2007: 27).

В то же время сами же исследователи отмечают, что государства-участники Конвенции выразили свое согласие на обязательную юрисдикцию в отношении жалоб индивидуальных заявителей и обязательность решений Европейского Суда по правам человека. То есть, «наднациональность» обусловлена соответствующим волевым актом государств-участников Конвенции.

Профессор В.А. Карташкин отмечает, что созданный в соответствии с Конвенцией «механизм контроля является, по сути дела, наднациональной властью». Приведенный довод он обосновывает тем, что решениями Европейского Суда по правам человека, имеющими характер прецедента, руководствуются в повседневной практике судебные органы государств-участников Конвенции и что Европейский Суд по правам человека, «отвергая законность национальных судебных решений, побуждает законодателя пересматривать законодательство и практику его применения» (Карташкин 2007: 27).

В то же время, как справедливо отмечает проф. К.А. Бекяшев, «наднациональности нет и быть не может», так эта концепция противоречит основам международного права, а обязательное действие некоторых актов международных организаций осуществляется только в связи с выражением на это в учредительном акте организаций соответствующей воли ее государств-участников (Бекяшев 2007: 27).

Следует согласиться с точкой зрения Б.Л. Зимненко о том, что одним из признаков прецедента является то, что он должен содержать в себе правовую

норму. Европейский Суд по правам человека же создавать новые правовые нормы не уполномочен. Его правотворческая деятельность противоречила бы Конвенции и принципу суверенного равенства государств, а сами решения содержат лишь прецеденты толкования (Зимненко 2006:306-309). Опора Европейского Суда по правам человека на собственную практику является вполне естественной в практике и международных судебных учреждений, и национальных судов и способствует установлению правовой определенности в применении правовых норм и стабильности правопорядка.

Хотя судьи Европейского Суда по правам человека и выступают в личном качестве и являются независимыми от государств-участников Конвенции, выносимые ими решения (решения и постановления), по нашему мнению, не имеют прямого действия в правопорядках государств-участников Конвенции (ст. 46 Конвенции).

Утверждение о том, что национальные суды (включая и суды России) при вынесении судебных актов и постановлений ссылаются на практику и тем самым прямо руководствуются установленными судом прецедентами и применяют их, не соответствует действительности, по крайней мере, российской.

Решения Европейского Суда по правам человека выступают для российских судов не прецедентом, а авторитетным источником информации о содержании (средством установления содержания) тех или иных прав, закрепленных в Конвенции, практики толкования ее положений и практики их применения государствами-участниками.

Суд, принимая решения, не осуществляет вмешательство в вопросы внутренней компетенции государств-членов, так как государства сами приняли его юрисдикцию, и в каждом государстве существует разработанный самим же государством порядок исполнения решений. Выбор способов исполнения судебных актов Европейского Суда по правам человека также остается за государствами.

Для уяснения международно-правовой природы Европейского Суда по правам человека необходимо установить его институциональную природу.

В зарубежной международно-правовой науке международные суды и трибуналы полноправно рассматриваются как одни из элементов международного институционального права или права международных организаций (за исключением проф. Г. Шермерса, рассматривающего международное институциональное право исключительно как внутреннее право международных организаций) (Shermers Henry 2004: 5-8).

М. Прост и П.К. Кларк полагают, что международные суды либо являются органами международных организаций, либо сами являются международными организациями (приводя в пример последнего Международный уголовный суд) (Prost, Clark 2006:344).

Среди отечественных юристов относительно места международных судов в системе международного права наблюдается плюрализм мнений, а, точнее, отсутствие, за небольшим исключением, достаточно обоснованной точки зрения.

Е.А. Шибаева отмечала, что международные суды являются одним из видов мирного разрешения международных споров и лишь условно могут быть причислены к международным органам, это специфические институты международного права, назначением и правовым положением существенно отличающиеся от других международных органов (Шибаева 1986: 21).

Таким образом, основной отличительной чертой международных судов от международных организаций являются их цели и функции, напрямую влияющие на объем прав и обязанностей перечисленных международных учреждений. Одной из основных функций международных организаций является участие в создании или создание норм международного права, в которых бы выражалась общая воля мирового сообщества. Основной же функцией международных судов является разрешение международных

споров и контроль за соблюдением государствами определенных международных обязательств.

Учредительным актом Европейского Суда по правам человека является Конвенция, международный договор. Суд самостоятельно разрабатывает и утверждает нормы своего внутреннего права, свой регламент, что свидетельствует о наличии у него самостоятельной воли.

Европейский Суд по правам человека является самостоятельным международным судом, в том числе, посредством которого осуществляется выполнение одной из основных целей деятельности Совета Европы.

Теперь перейдем к рассмотрению международно-правового статуса Европейского Суда по правам человека. Примечательно, что сам Суд, сравнивая себя с Международным Судом ООН, в одном из дел указал на две свои отличительные особенности по сравнению с другими международными судами: это ограничение компетенции надзорными функциями за соблюдением положений Конвенции и безусловность принятия юрисдикции контрольных органов Конвенции (без отсылки к принципу взаимности) (Loizidou v. Turkey. Judgment of 23 March 1995: 84-85).

При рассмотрении международно-правового статуса международных судов необходимо опираться на их отличительные от иных международных институций признаки. В доктрине выделяют следующие отличительные черты международных судов:

1) учреждаются на основании международно-правового акта;
2) действуют на постоянной основе, то есть их создание не должно быть обусловлено возникновением какого-либо конкретного спора;
3) при рассмотрении дел основываются на положениях учредительного акта и общем международном праве;
4) рассматривают дело на основании правил процедуры, принятых не по конкретному случаю и которые не могут быть изменены сторонами;

5) принимают юридически обязательные решения для сторон разбирательства (Christian Tomuschat 1987: 290-312).

Европейский Суд по правам человека был учрежден в соответствии с международным договором, Конвенцией о защите прав человека и основных свобод 1950 года. Конвенция является особым нормоустанавливающим договором, «конституционным актом европейского публичного порядка в сфере прав человека». Основной целью ее создания было установление единого общественного порядка свободных демократий в Европе с целью охраны их общего наследия, политических традиций, идеалов, свободы и законности.

Во-вторых, Европейский Суд по правам человека действует на постоянной основе (ст. 19 Конвенции).

В-третьих, при рассмотрении и разрешении жалоб Суд применяет не только нормы Конвенции, но и иные нормы и принципы общего международного права.

В-четвертых, при рассмотрении жалоб Суд руководствуется не только материальными и процессуальными нормами Конвенции, но и разработанным им самим Регламентом (Rules of Court (July 2006)).

В-пятых, согласно ст. 46 Конвенции «Высокие Договаривающиеся Стороны обязуются исполнять окончательные постановления ЕСПЧ по делам, в которых они являются сторонами», и контроль за исполнением постановлений возлагается на Комитет министров Совета Европы.

Следовательно, Европейский Суд по правам человека является полноценным международным судом, одним из подвидов международных судебных учреждений, являющихся, в свою очередь, видом международных учреждений (объединений государств, не являющихся международными).

Далее в рамках данной работы представляет интерес язык судопроизводства Европейского Суда по правам человека.

Согласно ст. 38 Регламента Европейского суда по правам человека «Официальными языками Суда являются французский и английский. В случае, если жалоба подана на основании статьи 34 Конвенции, до того момента, когда жалоба будет коммуницирована заинтересованному Государству, вся переписка с заявителем или его представителем, а также любые устные или письменные замечания, представленные заявителем или его представителем, должны даваться или быть составлены на одном из официальных языков государств – участников Конвенции, если они не даны или не составлены ни на одном из официальных языков Суда. Если заинтересованное Государство уведомлено или ему коммуницирована жалоба в соответствии с настоящим Регламентом, жалоба и любые приложенные к ней документы направляются данному Государству на том языке, на котором они были представлены заявителем в Секретариат Суда (Европейский суд по правам человека).

На сегодняшний день в России не существует официальных переводов на русский язык постановлений Европейского Суда по правам человека.

Неофициальные же переводы не обладают каким-либо статусом и осуществляются в хаотичном порядке.

Переводы, размещенные в справочных правовых системах, в системе HUDOC, на сайтах государственных органов, например, Генеральной прокуратуры РФ, также помечены как неофициальные.

Если не указано иначе, переводы на неофициальные языки, включая русский, не проверяются Секретариатом Суда на их точность и языковое качество. Переводы публикуются в системе HUDOC только для информации, и Суд не несет какой-либо ответственности за их качество или содержание. В отношении всех переводов на русский язык авторские права защищены. Эти переводы не могут быть воспроизведены или опубликованы в электронном, печатном или любом другом виде без предварительного разрешения обладателя авторских прав. Этот аспект поднимает дополнительные вопросы

использования переводов в практике юристов и работе государственных органов.

Представляется, что надлежащий перевод постановлений Европейского Суда по правам человека позволяет избежать ошибок при применении судьями в конкретном деле актов, что способствует принятию законного, обоснованного и мотивированного постановления в судопроизводстве Российской Федерации.

2.2. Общая характеристика судебных решений Европейского суда по правам человека (на материале англо-русских переводов)

В настоящем параграфе следует осветить ключевые особенности (трудности) перевода текста судебного решения Европейского суда по правам человека на русский язык.

В первую очередь официальный документ на иностранном языке соответствует законодательству конкретного государства, поэтому он содержит уникальные формулировки.

Неотъемлемым признаком любого жанра является композиция, предполагающая использование таких средств, как смысловые составляющие, структурные единицы и реквизиты.

Композиция любого судебного решения состоит из вступительной, описательно-мотивировочной и заключительной части.

К числу основных смысловых составляющих судебного решения Европейского Суда по правам человека относятся: Состав Суда, Procedure, Facts, Law, резолютивная часть.

Части Procedure, Facts, Law, в свою очередь, подразделяются на составляющие более мелкого порядка.

Например, Facts подразделяется на circumstances of the case и relevant domestic law (and practice), Law подразделяется на alleged violation of Convention, application of article of Convention и др.

Заголовок каждой смысловой составляющей имеет специфическое графическое оформление, которое, безусловно, должно быть сохранено при переводе.

Так, крупные составляющие Procedure, Facts, Law не нумеруются и пишутся прописными буквами более крупным по сравнению с остальным текстом шрифтом.

Более дробные составляющие, такие как circumstances of the case и

relevant domestic law (and practice), alleged violation of Convention, application of article of Convention нумеруются римскими цифрами и пишутся прописными буквами, но кегль шрифта меньше.

Если эти составляющие дробятся на ещё более мелкие, то заголовки могут быть выделены жирным шрифтом или курсивом, могут иметь нумерацию арабскими цифрами или буквенное обозначение, причем как строчными, так и прописными буквами. Иными словами, графика текста оригинала имеет большое значение и значительно облегчает поиск в тексте необходимой информации. Поэтому при переводе сохранение формы текста приобретает не меньшую значимость, чем сохранение содержания.

Далее приведем анализ перевода заголовков смысловых составляющих.

Перевод заголовков частей Procedure, Facts, Law не вызывает разночтений и выглядит в переводах, как «Процедура в Европейском Суде», «Факты» и «Вопросы права», соответственно.

Что касается составляющих более мелкого порядка, то, несмотря на универсальность формулировок заголовков смысловых составляющих в английском языке, в переводе на русский язык не всегда наблюдается единство. Так, при переводе первой части заголовка relevant domestic law (and practice) были использованы следующие формулировки в русском языке: «соответствующее национальное право», «соответствующее национальное законодательство», «имеющие отношение к делу нормы национального законодательства».

Вторая часть заголовка and practice в переводе выглядит или как «практика его применения», или как «правоприменительная практика». То есть не наблюдается единства в выборе переводческого эквивалента для универсальной единицы оригинала.

Не наблюдается единства и в переводе формулировки alleged violation of Convention. Проведенное нами исследование выявило четыре возможных варианта перевода этого заголовка, а именно: «По вопросу о предполагаемом

нарушении требований статьи Конвенции», «О предполагаемом нарушении статьи Конвенции», «Вопрос о предполагаемом нарушении статьи Конвенции», «О предполагаемом нарушении требований статьи Конвенции». Вышеперечисленные варианты перевода и первого и второго заголовка отличаются только синтаксическим построением и, безусловно, имеют право на существование в качестве переводческих эквивалентов.

С другой стороны, хотелось бы отметить, что при высокой востребованности переводов судебных решений Европейского суда по правам человека и единообразии формулировок в тексте на английском языке в переводе на русский язык также необходимо стремиться к универсальности. Добиться такой универсальности и существенно облегчить задачу переводчикам, помогло бы системное исследование жанра «судебное решение» и систематизированный переводческий глоссарий терминов и формулировок Европейского суда по правам человека.

Что касается формулировок вводной и резолютивной частей, то они универсальны как в оригинале, так и в переводе. Абсолютная последовательность наблюдается также при переводе названия ключевой структурной единицы судебного решения Европейского суда по правам человека – paragraph. В переводе на русский язык она выглядит как «пункт».

В связи с тем, что практика Европейского суда по правам человека является прецедентной, в тексте судебного решения также встречаются ссылки на предыдущие дела, по которым Суд уже вынес постановления. Оформляются они следующим образом: «see, inter alia, …»

Анализ переводов показывает, что реквизиты дела, используемые в ссылках, полностью переводятся на русский язык, однако стороны дела также указываются в оригинальном написании в квадратных скобках. В оригинальном написании остается и аббревиатура Европейского Суда по правам человека.

В части circumstances of the case встречается большое число названий

разного рода инстанций, должностей, внутренних нормативных актов, обзоров судебной практики, не говоря уже о географических названиях и именах лиц, участвовавших в судебном разбирательстве на той или иной стадии.

В качестве примера отсутствия единства переводческих решений в отношении реалий ниже приводятся переводческие эквиваленты слов, обозначающих лиц юридической профессии: Solicitor – солиситор, поверенный, Counsel – адвокат, советник, юрист, Adviser – советник, консультант.

Другими словами, для корректного перевода реалий переводчику необходимо иметь фоновые знания о правовой системе, существующей в той или иной стране, об иерархии судов, об органах исполнения наказания и др.

Текст судебного решения отличается высокой степенью терминологизации. В судебном решении Европейского суда по правам человека используется, в первую очередь, терминология Европейской Конвенции по правам человека и Регламента Европейского суда по правам человека.

Ключевыми терминами в этой сфере являются application, applicant, Government, judgment имеющие в переводе устоявшиеся однозначные термины-эквиваленты: жалоба, заявитель, государство-ответчик, постановление, соответственно.

Кроме того, в тексте судебного решения встречается терминология, относящаяся к сфере предмета спора, а это может быть абсолютно любая сфера человеческих отношений.

Например, в судебном решении поднимаются вопросы экстракорпорального оплодотворения (дело «Эванс против Соединенного Королевства»), хранения образцов ДНК и отпечатков пальцев (дело «S. и Марпер против Соединенного Королевства»), налогообложения и наследования (дело «Бёрдены против Соединенного Королевства») и многие другие (Европейский суд по правам человека). В этой связи переводчик

сталкивается с необходимостью перевода так называемой технической терминологии, то есть, не являющейся собственно юридической, а затрагивающей различные области знаний, но используемой в юридическом тексте. Перевод такой терминологии требует знакомства со сферой её функционирования. Наконец, как уже отмечалось выше, судебному решению свойственна клишированность.

Анализ переводов позволяет выявить типичные эквиваленты различного рода стандартизированных оборотов и клише, например, declare the application admissible – объявить жалобу приемлемой для дальнейшего рассмотрения по существу, deliver a judgment – вынести постановление по делу, the applicant complained under Article… – заявитель, со ссылкой на статью…, жалуется в Европейский Суд, on the basis of the material available to the Court – из имеющихся в распоряжении Европейского Суда материалов и др.

Поэтому для качественного перевода переводчику приходится жертвовать вариативностью языкового выражения, чтобы сохранить строгую фиксированную формулировку.

Официально-деловой стиль является самым замкнутым стилем, поэтому юридическим текстам присуща информационная определённость, то есть однозначность толкования. Административно-правовая деятельность, а также отношения между субъектами права являются сферами функционирования официально-делового стиля. Каждый юридический документ заключает в себе сообщение с последующим побуждением к действию.

Официально-деловому стилю присуща чёткая и ясная форма содержания, отсутствие эмоционально окрашенных слов, диалектизмов и просторечной лексики, также ограничен набор неологизмов, в первую очередь это только новая терминология. Для данного стиля характерен прямой порядок слов, наличие аббревиаций, устойчивых словосочетаний и включение номенклатурной лексики

Таким образом, при переводе постановлений Европейского суда по правам человека следует учитывать некоторые языковые особенности.

В первую очередь официальный документ на иностранном языке соответствует законодательству конкретного государства, поэтому он содержит уникальные формулировки.

Любой юридический документ, в том числе и постановление суда, обладает специфической терминологией, которая создаёт определенные трудности при переводе. Многие юридические термины переводятся на русский язык либо описательно, либо словосочетанием.

В юридических текстах можно встретить изобилие идиоматических выражений и фразеологических сочетаний, которые не употребляются в других текстах кроме юридических.

Одной из особенностей также является частотное употребление иностранных выражений, так как латинский и французский языки в средневековье являлись официальными. Это создает трудности для перевода, так как сложно найти эквивалент.

Насыщенность языковыми штампами встречается как в английском, так и в русском языках.

В любых юридических текстах предпочитают употреблять сложные предложения со сложными грамматическими конструкциями.

Формы клише различны в русском и английском языке. Поэтому для качественного перевода переводчика приходится жертвовать вариативностью языкового выражения, чтобы сохранить строгую фиксированную формулировку.

Использование сокращений также является особенностью юридического документа, при этом большинство из сокращений употребляются только в юридической сфере. Например, CID – Criminal Investigation Department в русском языке соответствует отделу уголовного розыска (Окулова).

Ещё одной отличительной особенностью решений суда является употребление абсолютного настоящего времени и пассивных конструкций.

Это связано с тем, что настоящее время передаёт объективность, постоянность действия, а пассивная конструкция обобщает и указывает на само действие, а не обращает внимание на деятеля.

Решение суда выполняет предписывающую функцию, которая выражается в употреблении модальных глаголов или глагольных структур со значением модальности. Одним из часто употребляемых модальных глаголов является глагол «shall». Как известно, изначально данный глагол употреблялся наравне с «will», обозначая при этом будущность действия, но благодаря языковым изменениям глагол «shall» приобрёл для себя новое значение, уступив свои позиции глаголу «will» в функции будущего времени.

В юридическом языке «shall» имеет несколько функций, которые должны быть учтены при переводе. Одно из первых значений – это долженствование, приказ и принуждение, в этом случае глагол «shall»близок к «must» и «must not». Также «shall» сближается с модальным глаголом may в значении разрешения или возможности в силу закона совершать какое-то действие. Иногда «shall» не несёт смысловой нагрузки и придаёт тексту только «канцелярский стиль». Например, «as shall be necessary», в данном примере модальный глагол не имеет стилистической функции. Переводчик не должен забывать, что «shall» в юридических текстах не выражает будущее время, так как все документы должны быть представлены в настоящем времени и это не зависит от момента времени вступления в силу.

Например, выражение «shall have effect» переводится на русский язык как «имеет юридическую силу», и не в коем случае «будет иметь юридическую силу» (Крапивкина).

Кроме глагола «shall»в юридических документах также используются такие глаголы как « may» в значении позволения выполнения какого-либо действия, а также возможность выполнения или не выполнения, этот

модальный глагол часто используется в безличных предложениях. Глаголы «should» и «would» могут употребляться как вспомогательные глаголы, например, при согласовании времени в придаточном дополнительном предложении для выражения будущего времени, а также их можно встретить при образовании аналитической формы сослагательного наклонения. Модальные глаголы «will» и «would» в большинстве случаях используются в качестве выражения намерения, решимости или готовности к чему-то (Крапивкина).

Отдельно следует более подробно остановиться на клише и штампах, а также на клише – кальках.

Как указывалось ранее, к клише относятся готовые обороты, которые легко воспроизводятся в определённой ситуации и употребляются для быстрого и точного составления документа и точности языка права, а к штампам относятся отдельные слова или выражения.

Клише-кальки характеризуются в первую очередь использованием аналогичных языковых форм в языке оригинала и языке перевода.

Анализ постановлений Европейского суда по правам человека позволяет привести следующие примеры.

«He was charged» переносится в язык дословно «он был обвинен». Это одна из тех фраз, которая не имеет другой интерпретации при переводе судебного постановления.

Следующим распространённым выражением является «it follows from the case-file material», в русском языке для него есть эквивалент «из материалов дела следует, что» (European Court of human right. CASE OF PISHCHALNIKOV v. RUSSIA (Application no. 7025/04)).

Также часто встречаются такие клише, как «under Artikel» и «under the agreement», в этом случае «under» переводится как «в соответствии с», то есть «в соответствии со статьей» и «в соответствии с договором».

«The Court extended the applicant's detention» на русский язык переводится, как «Суд продлил срок содержания заявителя под стражей» (European Court of human right. CASE OF NASRULLOYEV v. RUSSIA (Application no. 656/06)).

Выражение «within ten days of the judgment's becoming final» на русский язык переводится соответствующим штампом: «в течении 10 дней с момента вступления постановления в законную силу».

Фраза «It falls to be examined» имеет соответствующее клише в русском языке и переводится как «дело подлежит рассмотрению». А выражение «the Court sees no reason» переводится как «Суд не видит оснований» (European Court of human right. CASE OF UMAYEVY v. RUSSIA App. No(s). 47354/07)).

Поскольку в любом постановлении часто имеет место указание на какую – либо статью, одним из употребляемых выражений является «by virtue of», которое на русский язык следует перевести, как «согласно» или «на основании».

Следующим клише является «to join to the case», которое переводится в соответствии с англо-русским юридическим словарем «привлечь кого-то к участию в деле».

Клише «judgment delivered by the court of first instance» на русский язык переводится как «постановление, вынесенное судом первой инстанции».

Выражение «the Court rejects» имеет соответствующий штамп в русскомязыке и переводится как «Суд отклоняет».

Во фразе «to schedule another hearing of the applicant's case» представленный глагол «schedule» не следует переводить дословно, как «заносить в список» или «прилагать документ». В данном случае в русском языке есть устоявшееся выражение, которое в точности соответствует английскому варианту: «назначить очередное слушание по делу».

Глагол «order» в русском языке соответствует выражению «вынести постановление».

Глагол «to uphold» на русский язык следует переводить, как «оставить в силе» или «удовлетворять», поэтому фраза «uphold the decision» переводится как «оставить в силе постановление суда» (European Court of human right. CASE OF DALLOS v. HUNGARYRequête(s) 29082/95).

«To institute enforcement proceedings» в русском языке соответствует штампу «возбудить исполнительное производство».

Следующим клише является «according to», которое переводится «согласно», «с точки зрения».

Ещё одним штампом является выражение «with effect», которое в русском языке соответствует следующему штампу: «вступает в силу».

Одним из часто употребляемых выражений является «to grant the request», то есть «удовлетворить ходатайство».

Фраза «in the light of the foregoing» имеет соответствующий штамп в русском языке и переводится как «на основании вышеизложенного».

Таким образом, можно сделать вывод, что большинство клише на английском языке в постановлениях Европейского суда по правам человека имеет эквивалент в русском языке, что сильно облегчает работу переводчика. Также в переводах постановлений Европейского суда по правам человека можно обнаружить множество смысловых клише, которые базируются на использовании идентичных сем и выражении одинаковых значений различными способами. Здесь применяются трансформации на синтаксическом уровне, то есть остаются в первозданном виде синтаксические компоненты, но используются различные формально-структурные средства (Казанцев А.И. 2002: 66).

Одним из примеров смыслового клише можно привести «an investigation started into», которое при дословном переводе получается, как «началось расследование», однако по смыслу необходимо применять штамп «возбуждено уголовное дело по факту».

Следующее смысловое клише «The District Court held as follows» на русский язык следует переводить, как «Районный суд постановил».

Выражение «to be communicated» должно быть переведено не как «передавать сведения», а с точки зрения юридической лексики «довести до сведения», которое и является соответствием английской конструкции в русском языке.

Другим примером клише является «the prosecuting authorities terminated the criminal proceedings». В некоторых переводах встречается такая интерпретация: «органы обвинения сняли обвинение», однако правильно следует переводить «Уголовное дело было прекращено».

В юридических текстах часто встречаются безличные предложения, которые не допускают дословного перевода и сохранения порядка слов английской конструкции. Так «it has not been established in the court hearing» на русский переводится как «в ходе заседания не было установлено» (The case law of the european court of human rights on evidentiary standards in criminal proceedings).

2.3. Лексические и грамматические особенности переводов Постановлений Европейского суда по правам человека

2.3.1. Характеристика материала исследования

В настоящем параграфе материалом исследования послужили:

- Постановление Европейского суда по правам человека от 31.05.2011 года «Дело «Ходорковский (Khodorkovskiy) против Российской Федерации»(жалоба N 5829/04)». По делу обжалуются условия содержания заявителя в следственных изоляторах, и в помещении суда во время судебного разбирательства, а также незаконность его задержания и последующего содержания под стражей в период следствия. По делу допущено нарушение требований статьи 3, подпункта «b» пункта 1, пунктов 3 и 4 статьи 5 Конвенции о защите прав человека и основных свобод. Перевод постановления осуществлён Г.А. Николаевым и опубликован в №3 периодического издания Российская хроника Европейского Суда, 2012 год (Российская хроника Европейского Суда, 2012, № 3) (см. Приложение №1).
- Постановление Европейского суда по правам человека от 07.02.2017 года «Дело «Мхчян (Mkhchyan) против Российской Федерации» (жалоба N 54700/12)». По делу обжалуется нарушение права собственности заявителя на принадлежащий ему гараж, построенный в 1996 г. вдоль железной дороги, который, по его мнению, был незаконно снесен властями без выплаты какой-либо компенсации. По делу требования ст. 1 Протокола N 1 к Конвенции о защите прав человека и основных свобод нарушены не были. Перевод постановления осуществлён Г.А. Николаевым и опубликован в №4 периодического издания Российская хроника Европейского Суда, 2017 год (Российская хроника Европейского Суда, 2017, № 4), (см. Приложение №2).

Первоначального внимания заслуживает способ оформления, изложения текстов данных судебных постановлений Европейского суда по правам человека, а также некоторые дискурсивные особенности.

В тексте выделяются отдельные смысловые части: это состав Суда – не имеет особого наименования, и начинается с названия дела, а заканчивается перечислением состава Суда: "In the case of Khodorkovskiy v. Russia / In the case of Mkhchyan v. Russia. The European Court of Human Rights (Former First Section), sitting as a Chamber composed of:.." , вводная часть – Procedure, обстоятельства дела – Facts, нормативно-правовая база – Law, резолютивная часть – также не имеющая заголовка.

Части Procedure, Facts, Law, разделены на части. Так, в разделе Facts можно видеть такие части, как: The circumstances of the case, Relevant domestic law and practice. The Law – часть, содержащая в себе раздел alleged violation of Convention – с указанием на конкретные нарушения положений Конвенции.

При переводе текста постановления необходимо сохранять исходное графическое оформление. При этом следует отменить, что при работе с данным видом текста и его специфическим оформлением, прослеживается его существенное отличие от оформления судебных решений в российском судопроизводстве.

Учитывая достаточно объемные тексты постановлений ЕСПЧ в работе приводятся отдельные фразы и предложения, которые представляют особый интерес в рамках настоящего исследования.

2.3.2. Лексические особенности

При анализе материала предлагается классификация степеней переводческой эквивалентности на уровне лексических единиц, сформулированная Я.И. Рецкером. На её основании можно выделить три вида переводческих соответствий, выделяемых в текстах судебных постановлений:

полные соответствия, частичные соответствия, а также безэквивалентные термины, у которых нет соответствий в языке перевода.

Полные переводческие соответствия

Рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины:

«… The defence requested a public hearing, but the court, on an application by the prosecutor, decided to hold *the hearing in camera*, referring to a need to guarantee the defendant's rights…he had no personal knowledge of the *summons*. The defence pleaded in favour of the applicant's release on bail. However, as the Government indicated, the defence did not indicate the amount of the proposed *bail*» (абзац 27).

«Защита просила об открытом заседании, но суд по ходатайству прокурора решил провести закрытое заседание в интересах прав обвиняемого. Суд заслушал прокурора, заявителя и защитника заявителя и рассмотрел некоторые документы из материалов дела, предоставленных стороной обвинения… он не был уведомлен о повестке лично. Защита просила освободить заявителя под залог. Однако, как отметили власти Российской Федерации, защита не указала размер предложенного залога».

Рассмотрим перевод термина **the hearing in camera**:

in camera (or «in chambers») indicates that the case, or the rest of the case, is to be heard in the judge's private chambers – excluding the public (LEGAL DICTIONARY).	**закрытые судебные заседания или закрытые судебные разбирательства** **–** судебные заседания, где не предполагается участие слушателей, не относящихся к делу, именуются (ст. 241 Уголовно- процессуального кодекса РФ).

Как видно из словарных дефиниций, объем значений этих терминов полностью совпадает, поэтому они являются полными эквивалентами.

Далее рассмотрим перевод термина **«personal knowledge of the summons»**: Во-первых, необходимо рассмотреть понятие **summons**.

Summons (UK law) – an official order requiring a person to attend court, either to answer a charge or to give evidence (LEGAL DICTIONARY).	**Повестка** – документ, с помощью которого лицо вызывается на допрос, где указывается кто и в качестве кого вызывается, дата, время, место явки, а также последствия неявки без уважительных причин (ст. 188 Уголовно- процессуального кодекса РФ).

Таким образом, перевод многокомпонентного термина «personal knowledge of the summons» возможен с помощью эквивалента \ соответствия «быть уведомленным лично о повестке».

Наконец рассмотрим однокомпонентный термин **bail**:

Bail (Criminal prosecutions) – the objective of bail in criminal actions is to prevent the imprisonment of the accused prior to trial while ensuring her or his appearance at trial (LEGAL DICTIONARY).	**Залог** состоит во внесении или в передаче подозреваемым, обвиняемым либо другим физическим или юридическим лицом денег, ценностей в целях обеспечения явки подозреваемого либо обвиняемого к следователю, дознавателю или в суд, предупреждения совершения им новых преступлений, а также действий, препятствующих производству по уголовному делу (ст. 106 Уголовно- процессуального кодекса РФ).

На основании сравнения словарных дефиниций можно сделать вывод, что данные термины являются полными эквивалентами, поскольку объем значений этих терминов полностью совпадает без дополнительных пояснений.

Рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины:

«On 11 November 2003 the Moscow City Court *upheld* the *detention order*» (абзац 34).

«11 ноября 2003 года Московский городской суд постановление о заключении заявителя под стражу оставил без изменения».

Здесь термин, который заслуживает внимание - **«to uphold»:**

To uphold – to defend or keep a principle or law, or to say that a decision that has already been made, especially a legal one, is correct (LEGAL DICTIONARY).	Одно из полномочий суда апелляционной инстанции – оставить решения суда первой инстанции **без изменения** (ст. 389.20 Уголовного процессуального кодекса РФ).

На основании сравнения дефиниций по отношению к термину «detention order» (содержание под стражей) можно сделать вывод, что данные термины являются полными эквивалентами, поскольку объем значений этих терминов полностью совпадает без дополнительных пояснений.

Далее, рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины.

Plots of land adjacent to railway tracks or intended for the placement of such tracks are classified as railway rights of way, as is land occupied by or intended for the placement of railway terminals, water drainage and protective facilities along railway tracks, communication lines, electric power supply facilities, production and other *buildings, constructions, structures*, equipment and other rail transport facilities

«Полоса отвода железных дорог - земельные участки, прилегающие к железнодорожным путям, земельные участки, занятые железнодорожными путями или предназначенные для размещения таких путей, а также земельные участки, занятые или предназначенные для размещения железнодорожных станций, водоотводных и укрепительных устройств, защитных полос лесов вдоль железнодорожных путей, линий связи, устройств электроснабжения, производственных и иных зданий, строений, сооружений, устройств и других объектов железнодорожного транспорта».

Здесь интерес представляют следующие термины: **«buildings, construction, structures»**:

Buildings - a structure with walls and a roof, such as a house or factory,	**Здание** - архитектурное сооружение, наземная постройка для проживания людей, производственной деятельности, хранения продукции, содержания животных,
Construction - the particular type of structure, materials, etc. that something has, **Structures** - something that has been made or built from parts, especially a large building (DICTIONARY.CAMBRIDGE).	**Строение** - здание, постройка; взаимное расположение частей, составляющих одно целое, структура, **Сооружение** - всякая значительная постройка (различного вида и назначения) (Толковый словарь Ожегова).

Данные термины довольно сложно разграничить, руководствуясь словарями, для того, чтобы найти нужные эквиваленты. Более правильно следует переводить «здание, строение, сооружение», то есть данные термины являются полными эквивалентами, поскольку их объем значений этих терминов полностью совпадает без дополнительных пояснений.

Рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины.

«..the applicant claimed that the interference with his right under Article 1 of Protocol No. 1 to the Convention had imposed on him an excessive *individual burden*..» (абзац 59).

«Наконец, заявитель утверждал, что вмешательство в осуществление его права согласно статье 1 Протокола № 1 Конвенции наложило на него чрезмерное индивидуальное бремя».

Представляется необходимым исследовать термин **«burden»**:

Burden - something difficult or unpleasant that you have to deal with or worry about (DICTIONARY.CAMBRIDGE).	**Бремя** – тяжелая ноша; нечто трудное, требующее затрат; затраты на содержание имущества, которые несет собственник имущества (Толковый словарь Ожегова, Юридический словарь)

Данные термины являются полными эквивалентами, поскольку их объем значений этих терминов полностью совпадает без дополнительных пояснений, в связи с чем многокомпонентный термин «excessive individual burden» следует перевести как «чрезмерное индивидуальное бремя» или «индивидуальное и чрезмерное бремя».

Рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины.

«…In the decision of 15 January 2004 the Moscow City Court held, *inter alia*, that the lower court had had evidence that the applicant had tried to exert pressure on witnesses» (абзац 53)

«…В определении от 15 января 2004 г. Московский городской суд, в частности, указал, что нижестоящий суд имел доказательства того, что заявитель пытался оказывать давление на свидетелей».

«…The applicant therefore claimed that he had been *a bone fide* purchaser…» (абзац 54).

«…Поэтому заявитель утверждал, что он был добросовестным покупателем…»

Inter alia (latin) – among other things – is often found in legal pleadings and writings to specify one example out of many possibilities (DICTIONARY.CAMBRIDGE)	В частности, среди прочего (LEGAL DICTIONARY)
Bone fide - real and honest (DICTIONARY.CAMBRIDGE)	Добросовестно (LEGAL DICTIONARY)

Так, inter alia – в частности, среди прочего равнозначно «among other

things».

«Bona fide» указывает на латинское происхождение, которую следует перевести на русский язык, как «добросовестный», а «purchaser» перевести не как «покупатель», а «приобретатель». То есть полностью данный термин должен быть переведен, как «добросовестный приобретатель».

Здесь можно увидеть, что тексты на языке оригинала имеют латинские термины, которые нельзя оставить без перевода на русский язык. Данный факт объясняется тем, что в отличие юридической лексики судопроизводства Европейского суда по правам человека, где данные термины встречаются часто и не требуют перевода, в русской юридической лексике их большинство не заимствовано, перевод данных терминов путем транслитерации («бона фиде», интел алия) не будет нести смысловой нагрузки, в связи с чем они требуют подбора подходящего эквивалента на русский язык.

Частичные переводческие соответствия

Частичные соответствия составляют большинство в корпусе юридических терминов и часто вызывают определенные трудности при переводе.

Рассмотрим следующий отрывок из текста.

«This argument ... shall not be *examined on the merits*, since the criminal case is still at the stage of the pre-trial investigation, and the court cannot express its opinion as to the guilt [of the applicant], proof of his guilt or the correctness of the legal qualification of Mr Khodorkovskiy's acts» (абзац 29).

«Этот довод... не подлежит рассмотрению по существу, поскольку уголовное дело находится на стадии предварительного следствия, и суд не может высказывать мнение о виновности (заявителя), доказательств его вины или правильности правовой квалификации действий Ходорковского».

Интерес по тексту исследуемого постановления представляет словосочетание **«examined on the merits»**.

Рассмотрим термин **«merits»**:

Merits (UK law) – the strict legal rights of the parties to a lawsuit. A judgment on the merits is the final resolution of a particular dispute. (LEGAL DICTIONARY).	**Рассмотрение дела по существу** – основная стадия судебного разбирательства, по результатам которого суд приходит к определенным выводам (Шейфер)

Таким образом, учитывая, что для передачи правильного смысла перевода требуются дополнительные пояснения, объемы понятий не совпадают, поскольку термин «merits» представляет собой окончательный результат рассмотрения дела, а «рассмотрение дела по существу» обозначает стадию рассмотрения дела, где исследуются все доказательства сторон, данные термины относятся к частичным переводческим соответствиям.

Рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины.

«On 6 November 2003 the applicant's lawyers *appealed against* the detention order. They asserted, among other things, that the reasons for the detention were insufficient, that the hearing in camera had been unlawful and that the applicant had not committed any *criminal offences*» (абзац 33).

«06 ноября 2003 года постановление о заключении заявителя под стражу было обжаловано его адвокатами. В числе прочих доводов ими утверждалось, что причины для заключения под стражу не были достаточными, проведение закрытого судебного заседания противоречило нормам законодательства, а также что преступлений заявителем не совершалось».

Представляется необходимым исследовать термины: **«appealed against, criminal offences»**:

Appeal against – to attempt to change a legal decision; to ask a court of appeals to change a ruling made by a lower court,	**Обжалование** – подача жалобы на принятое решение (Толковый словарь Ожегова)

Criminal offence – a violation of a law in which there is injury to the public or a member of the public and a term in jail or prison, and/or a fine as possible penalties. (LEGAL DICTIONARY).	**Преступлением** признается виновно совершенное общественно опасное деяние, запрещенное Кодексом под угрозой наказания (ст. 14 Уголовного Кодекса РФ).

На основании сравнения дефиниций терминов можно сделать вывод, что терминам «Appeal against» и «Criminal offence» в русском языке подходят частичные эквиваленты, такие как «обжалование» и «преступление», соответственно, поскольку в русском юридическом языке дословный перевод «подать апелляцию против» не употребляется, а термин «правонарушение» можно отнести только к административным проступкам, а не преступлениям.

Рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины.

«C. The applicant's *apprehension* and detention pending investigation and trial».

«Задержание заявителя и его содержание под стражей в период следствия и суда».

«First *detention order*» (абзац 2)

«Первое постановление о содержании под стражей»

В названии данного раздела встречаются такие понятия как **«apprehension»** и **«detention»**. Для определения эквивалента также необходимо рассмотреть объем данных понятий в английском языке и соотнести их с понятиями, наиболее подходящими по смыслу в русском языке:

Apprehension (legal) – is the seizure and arrest of a person who is suspected of having committed a crime (DICTIONARY.CAMBRIDGE).	**Задержание подозреваемого** - мера процессуального принуждения, применяемая органом дознания, дознавателем, следователем на срок не более 48 часов с момента фактического задержания лица по подозрению в совершении

	преступления (ст. 5 Уголовно-процессуального кодекса РФ). **Арест** заключается в содержании осужденного в условиях строгой изоляции от общества и устанавливается на срок от одного до шести месяцев. В случае замены обязательных работ или исправительных работ арестом он может быть назначен на срок менее одного месяца (ст. 54 Уголовного кодекса РФ).
Detention (legal) – is the act of keeping back, restraining, or withholding, either accidentally or by design, a person or thing (A. Martin, Jonathan Law. 2009). **Order** – is direction of a court or judge normally made or entered in writing, and not included in a judgment, which determines some point or directs some step in the proceedings (LEGAL DICTIONARY).	**Заключение под стражу и срок содержания под стражей** – мера пресечения по судебному решению в отношении подозреваемого или обвиняемого в совершении преступлений, за которые уголовным законом предусмотрено наказание в виде лишения свободы на срок свыше трех лет при невозможности применения иной, более мягкой, меры пресечения (ст. 108 Уголовно-процессуального кодекса РФ).

Таким образом, сравнив объем понятий, можно сделать вывод, что термину «apprehension» следует подобрать эквивалент в русском языке «задержание», поскольку термин «арест» в российском законодательстве является мерой наказания, тогда как в данном контексте речь идет о мере процессуального принуждения; термин «Detention», а также «Detention order»

наиболее близок к термину «содержание под стражей». То есть в русском языке данным терминам применяются частичные эквиваленты.

Рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины.

«The applicant would have acquired title to garage no. 169 had it not been *an unauthorised construction*»

«У заявителя возникло бы право собственности на гараж N 169, если бы он не являлся самовольной постройкой»

Рассмотрим определения компонентов следующего термина:

Unauthorised - without someone's official permission to do something or be in a particular place, **Construction** - the work of building or making something, especially buildings, bridges, etc. (DICTIONARY.CAMBRIDGE)	Самовольная постройка - здание, сооружение или другое строение, возведенные или созданные на земельном участке, не предоставленном в установленном порядке (то есть не в соответствии с правилами) (ст. 222 Гражданского кодекса РФ).

Изначально термин «unauthorised construction» переводился как «незаконная постройка», однако согласно Гражданскому кодексу Российской Федерации данное словосочетание соответствует «самовольной постройке», термин «незаконная постройка» не употребляется. Таким образом для передачи правильного смысла перевода требуются дополнительные пояснения, объемы понятий не совпадают, данные термины относятся к частичным переводческим соответствиям.

Рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины.

«The Court reiterates that the concept of «possessions» referred to in the first part of Article 1 of Protocol No. 1 to the Convention has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as *«property rights»*, and thus as *«possessions»* for the purposes of this provision» (абзац 60).

«Суд подтверждает, что понятие «право владения», упомянутое в статье 1 Протокола № 1 Конвенции, имеет автономное значение, которое не ограничивается собственностью материальных товаров и не зависит от формальной классификации в национальном праве: некоторые другие права и интересы, составляющие активы, также могут рассматриваться в качестве «права собственности», и в силу этого как «право владения» в целях настоящего положения».

Possessions - something that you own or that you are carrying with you at a particular time, **Property rights** - the rights of people and companies to own and use land, capital, etc. and to receive a profit from it (DICTIONARY.CAMBRIDGE).	**Право собственности** включает в себя владение, пользование и распоряжение (ст. 209 Гражданского кодекса РФ).

Определенную сложность представляет собой термин «possession», которое согласно англо-русскому юридическому словарю переводится как «собственность, владение, достояние» (MULTITRAN DICTIONARY). Однако в контексте данного постановления необходимо употреблять термин «право владения» с целью разграничения понятий «possession» и «property rights», и следовательно, для передачи правильного смысла перевода требуются дополнительные пояснения, объемы понятий не совпадают, данные термины относятся к частичным переводческим соответствиям.

Рассмотрим следующий отрывок из текста постановления и встречающиеся в нем термины.

«An interference with the peaceful enjoyment of possessions must therefore strike *a fair balance* between the general interests of the community and the individual's rights».

«Вмешательство в пользование правом владения должно установить справедливое соотношение между общими интересами общества и прав личности».

Здесь интерес представляют следующие термин **«a fair balance»:**

Fair - acceptable or right **Balance** - a situation in which the correct amount of importance is given to each thing so that a situation is successful (DICTIONARY.CAMBRIDGE).	«…справедливое соотношение частных и публичных интересов..», «…справедливое соотношение прав участников процесса..» и дт. (КОНСУЛЬТАНТ ПЛЮС).

Многокомпонентный термин «a fair balance» дословно переводился, как «справедливый (правильный) баланс», однако согласно реалиям действующего российского законодательства более правильным эквивалентом является «справедливое соотношение». Таким образом для передачи правильного смысла перевода требуются дополнительные пояснения, данный термин относятся к частичным переводческим соответствиям.

Также может возникнуть ряд сложностей с юридическими названиями документов. Термин **«certificate»**, которое имеет большое количество вариантов перевода, но исходя из контекста всего постановления наиболее приемлемым вариантом перевода станет «свидетельство», вместе с тем термин **«cadastral certificate»** следует перевести, как «кадастровый паспорт».

Термин **«town-planning assignment»**, который не имеет полного соответствия в словарях, однако при исследовании похожих ситуаций дела, следует указать эквивалент данному термину: «градостроительное заключение».

Безэквивалентные термины

Одним их приемов, который используется при передаче безэквивалентных терминов является транскрипция и транслитерация.

Рассмотрим пример перевода названий организаций.

«[The applicant] owns a large stake in *Group Menatep Ltd.*, a company registered in Gibraltar ...» (абзац 34).

«(Заявитель) владеет крупной долей в «Груп Менатеп Лтд.» компании, зарегистрированной в Гибралтаре...»

Group Menatep Ltd. – оригинальное название компании.	**Груп Менатеп Лтд** Перевод осуществлен с помощью транслитерации – буквенного восприятия лексической единицы исходного текста с помощью алфавита языка перевода.

В данном случае «Group Menatep Ltd.» – это оригинальное название компании, поэтому нет необходимости переводить его на русский язык.

При переводе названия организаций необходимо учитывать языковые реалии, так как зарегистрированные на территории РФ компании, как правило, в документах на английском языке переводятся с помощью транскрибирования, в случае если их название изначально не указано на английском языке.

Рассмотрим следующий пример.

«The terms of the friendly settlement had been approved by the Prime Minister, Mr Kasyanov. Although Apatit and its affiliates had been subjected to various penalties and financial sanctions in the past, and a new *audit* was underway, the General Prosecutor's Office did not see any reason to start criminal proceedings in this respect» (абзац 16).

«Условия мирового соглашения были одобрены Председателем Правительства России М.М. Касьяновым. Налоговые платежи постоянно контролировались Министерством по

налогам и сборам. Хотя "Апатит" и его аффилированные лица ранее подвергались различным штрафам и финансовым санкциям и продолжался новый аудит, Генеральная прокуратура России не усмотрела оснований для возбуждения уголовного дела в этом отношении».

Audit - an examination of all the financial records of a company by an independent person in order to prod uce a report	**Аудит** Перевод осуществлен с помощью транскрипции – пофонемного воспроизведения лексической единицы исходного текста посредством фонем языка перевода.

Рассмотрим пример перевода русских названий партий на английский язык:

«В то же время заявитель занимался политической деятельностью. В начале 2003 года он заявил, что предоставит значительные средства для поддержки оппозиционных партий *«Яблоко» и СПС (Союз правых сил)»* (абзац 9).

«At the same time the applicant became involved in politics. At the beginning of 2003 he announced that he would allocate significant funds to support the opposition parties *Yabloko and SPS (Soyz Pravykh Sil)»* (абзац 9).

Партия «Яблоко» и СПС (Союз правых сил)».	Yabloko and SPS (Soyz Pravykh Sil)» Перевод осуществлен с помощью транслитерации – буквенного восприятия лексической единицы исходного текста с помощью алфавита языка перевода.

2.3.2. Грамматические особенности

Одной из главных трудностей при переводе является сложная структура английского предложения в юридическом тексте, так как предложения

насыщенны большим количеством придаточных, деепричастных и причастных оборотов:

Having assessed all the evidence in the case, taking into consideration that the defendant did not acquire property rights in respect of the plot of land classified as federal property and located within a railway right of way, on which the disputed garage is situated, that the plot was provided for temporary use, and that it is being used at the present time without any contractual basis, the court comes to the conclusion that the rights of the RZD have been violated in that the plaintiff is prevented from using the land in accordance with itsintended purpose.	Оценив все доказательства по делу, учитывая тот факт, что ответчик не приобрел право собственности на земельный участок, относящийся к федеральной собственности и расположенный на полосе отвода железной дороги, на которой находится оспариваемый гаражный бокс, также тот факт, что земельный участок был предусмотрен для временного пользования и в настоящее время используется без какой-либо договорной основы, суд приходит к выводу, что права ОАО «РЖД» были нарушены тем, что истец не имеет возможности использовать земельный участок в соответствии с его прямым назначением.

В данном тексте применено синтаксическое уподобление (дословный перевод), то есть способ перевода, при котором синтаксическая структура оригинала преобразуется в аналогичную структуру языка перевода. На это указывает перевод «Having assessed» / «Оценив все»; «taking into» / «учитывая тот факт»; «that the plot» / «также тот факт», то есть сохранена структура предложения на языке оригинала.

Также имеется инверсия порядка слов в предложении «on which the disputed garage is situated» / «на которой находится оспариваемый гаражный бокс».

В тексте оригинала имеется указание «RZD», что грамматически правильно следует перевести, как ООО «РЖД», то есть применив добавление.

Другую проблему представляет перевод предложных сочетаний, а также устойчивых юридических словосочетаний:

«for the relevant provisions of domestic law» «the time-limit for using that remedy had expired»	«в рамках положений национального законодательства» «истечение срока исковой давности».

Данные структуры переведены с помощью соответствующих штампов в русском языке. Как было сказано в параграфе 2.2. настоящей работы, языковые штампы являются характерной чертой официально делового стиля и юридического языка, в частности.

Далее рассмотрим перевод, где можно проследить особенности перевода модального глагола **«have to»**.

The unauthorised construction *had to* be demolished by the person who had built it, or at his or her expense, with the exception of cases stipulated by paragraph 3 of the present Article.	Самовольная постройка подлежит сносу осуществившим её лицом или за его счет, за исключение случаев, предусмотренных пунктами 3 и 4 настоящей статьи.

В данном контексте модальный глагол «have to» не переводится, как «необходимо» или «следует», также во избежание усложнения русского предложения в русском языке принято употреблять нейтральное слово «лицо».

Рассмотрим перевод модальных глаголов **«shall»** в контексте судебных решений:

In such a case, the person in respect of whom the court recognised his or her ownership of an unauthorised construction *shall* reimburse the person who has built it all the relevant expenses in an amount to be determined by the court.	В этом случае лицо, за которым признано право собственности на самовольную постройку, возмещает осуществившему ее лицу расходы в размере, определенном судом.

Здесь модальный глагол «shall» не имеет стилистической функции и только придаёт тексту деловой стиль. В связи с этим он не переводится.

Но встречаются предложения, в которых модальный глагол shall» несет на себе смысловую нагрузку и приравнивается к модальному глаголу «may».

«No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law» (абзац 34)	«Никто не может быть лишен своего имущества иначе, как в интересах общества и на условиях, предусмотренных законом и общими принципами международного права».

А что касается глагола **«will»**, то в большинстве случаев не переводится.

«The requisite balance *will be* upset if the person concerned has had to bear "an individual and excessive burden (абзац 67).	«Необходимый баланс нарушается, если заинтересованному лицу пришлось нести «индивидуальное и чрезмерное бремя»».

Далее следует пример грамматической замены:

«As to absence of registration of the applicant's title to the garage in the State register, the applicant submitted that the requirement of mandatory State registration appeared later, after the State Registration of Real Estate Titles and Transactions Act (Federal Law no. 122-FZ of 21 July 1997) had entered into force (абзац 54)».	«Что касается отсутствия регистрации права собственности заявителя на гаражный бокс в государственном реестре, то заявитель утверждал, что требование об обязательной государственной регистрации появились позже, после вступления в законную силу закона «О государственной регистрации прав на недвижимое имущество и сделок с ним» (Федеральный закон от 21 июля 1997 № 122-ФЗ)».

В данном тексте применена грамматическая замена частей речи «had entered into force» / «после вступления в законную силу закона».

Выводы по второй главе

Международные суды имеют свое назначение в качестве основных гарантов соблюдения государствами своих обязательств по соглашениям в области прав человека. Первым международным судом, наделенным контрольными полномочиями в сфере прав человека, стал Европейский Суд по правам человека.

Европейский Суд по правам человека является самостоятельным международным судом, в том числе, посредством которого осуществляется выполнение одной из основных целей деятельности Совета Европы.

Языком судопроизводства Европейского Суда по правам человека являются французский и английский. На сегодняшний день в России не существует официальных переводов на русский язык постановлений

Европейского Суда по правам человека. Неофициальные же переводы помечаются, как неофициальные, в связи с чем они обладают каким либо статусом и осуществляются в хаотичном порядке

Представляется, что надлежащий перевод постановлений Европейского Суда по правам человека позволяет избежать ошибок при применении судьями в конкретном деле актов, что способствует принятию законного, обоснованного и мотивированного постановления в судопроизводстве Российской Федерации.

В исследовательской части работы были выявлены особенности перевода решений Европейского суда по правам человека. Особенности соотношения объёма понятий и категорий уголовного законодательства в английском и русском языках являются важным аспектом судебного перевода, и требуют не только переводческой, но и юридической подготовки.

Различия в речевых оборотах юридической и деловой лексики также усложняют задачу, стоящую перед специалистом, от него требуется не только знание языка, но и юридическая эрудированность. Особое внимание требуется уделить соотношению понятий применяемой процессуальной терминологии в языке оригинала и языке перевода. Для этого необходимо не просто ориентироваться в применяемом понятийном аппарате, но и учитывать языковые реалии, в данном случае реалии судебного процесса и судопроизводства в целом.

Большинство исследованных клише на английском языке в постановлениях Европейского суда по правам человека имеет эквивалент в русском языке, что сильно облегчает работу переводчика. При переводе клише и штампов необходимо искать аналог в языке перевода, и нет необходимости в полной мере сохранять иностранную конструкцию, которая будет неуместна в русском языке. При переводе терминологии в основном используется подбор аналогичных или эквивалентных терминов, но при этом они могут отличаться количеством компонентов. Также используется

поэлементный способ перевода, не так часто используется калькирование и описательный перевод.

На основе приведенных в работе примеров можно сделать вывод, что большинство терминов имеют точные или частичные эквиваленты в языке перевода, несмотря на тот факт, что иногда значение компонентов на английском языке намного уже, чем в русском.

Изучив ряд грамматических особенностей можно сделать вывод, что большинство трудностей при переводе возникает в первую очередь из-за наличия большого количества придаточных, преобладания пассивных конструкций и наличие модальных глаголов, которые изменяют своё значение в зависимости от вида документа.

При изучении решений были выявлены повторяющиеся одинаковые грамматические особенности, ряд основных, в частности, касающихся модальных глаголов и конструкций предложений был приведен в работе.

В общем и целом, перевод судебного решения Европейского суда по правам человека – это кропотливый труд, требующий умения применять уже имеющиеся и устоявшиеся переводческие соответствия из официальных документов и умения принимать свои собственные переводческие решения, основываясь на знании особенностей практики Европейского Суда и жанровых особенностей судебного решения как такового.

ЗАКЛЮЧЕНИЕ

Первой задачей являлось определить особенности юридического английского языка (Legal English), дать понятие юридического перевода, как составной части международного правового дискурса, определить язык судопроизводства, описать особенности языка судопроизводства, как разновидности официально-делового стиля, выявить основные проблемы перевода судебных решений, описать лексические проблемы перевода судебных решений, описать грамматические проблемы перевода судебных решений. Данные задачи выполнены, по итогам проведенного исследования можно сделать следующие выводы.

Юридический английский или «Legal English» является формализованным языком, основанным на правилах логики, который отличается от обычного естественного языка лексикой, морфологией, синтаксисом и семантикой, а также других лингвистических особенностях, направленных на достижение согласованности, достоверности, полноты и надежности, сохраняя при этом преимущества человеческого языка, такие как интуитивное исполнение, полное, означающее и открытое обновление.

Основными характеристиками письменного юридического английского языка является его устойчивость и насыщенность клишированными структурами. В письменной форме используются слова латинского и французского происхождения, расширенная номинализация, пассивные глаголы и длинные предложения.

Юридический английский язык трудно понять, из-за употребления большого количества сложных слов и фраз. Кроме того, юридический английский язык использует сложную терминологию, которая незнакома не специалисту.

В современном мире в условиях глобализации, международной интеграции и расширения экономического и финансового сотрудничества как

на межгосударственном уровне, так и на уровне предприятий и компаний, юридический перевод приобретает особую важность и актуальность. Большое количество реализуемых в настоящее время трансграничных сделок и проектов, являющихся предметом юрисдикции нескольких государств, требует не только квалифицированной юридической поддержки, но и комплексного лингвистического сопровождения, предполагающего профессиональный перевод юридической и финансовой документации

Юридический перевод является в большей мере актом межкультурной коммуникации, чем собственно межъязыковой коммуникации, поскольку в переводческий контакт вступают разные правовые системы и культуры, несходством которых объясняется проблемность многих юридических терминов для перевода. На структуру термина и, как следствие, на его перевод на другой язык может оказывать значительное влияние разница в построении систем различных отраслей права в странах исходного и переводящего языков.

Язык судопроизводства судебной системы не только является одним из важнейших принципов организации судебной системы, но и представляет собой разновидность государственного языка, действующего во всех сферах публичной деятельности какой-либо страны.

Поскольку язык судопроизводства определен в каждом государстве, возникает необходимость судебного перевода**.** Профессиональный судебный перевод – это особая языковая деятельность – переводческая деятельность, направленная на воссоздание подлинника юридического документа либо факта на другом языке. Эта деятельность требует специальной подготовки, навыков и умения. Она предполагает не только совершенное владение иностранным и родным языком, знание культуры, но и владение юридической терминологией, особенностями речи делового общения, а также знание применимого законодательства.

Результатом деятельности любого суда становится письменный текст судебного решения. Именно письменный текст судебного решения, как

совокупный результат разрешения существующих противоречий и речевых баталий сторон в процессе его разработки, приобретает форму итогового правоприменительного документа, и вследствие этого представляет интересный объект для комплексного лингвистического исследования. В условиях межкультурной коммуникации исследование факторов перевода любого текста строится с учётом основных особенностей языковой культуры, типа и механизма социального кодирования родного и иностранного языков.

Такой подход позволяет наилучшим образом решить практические задачи, связанные с проблемами перевода, в частности, юридического текста.

При юридическом переводе важную роль имеют переводческие трансформации, а именно многочисленные и качественно разнообразные преобразования, которые осуществляются для достижения переводческой эквивалентности («адекватности») перевода вопреки расхождениям в формальных и семантических системах двух языков.

Второй задачей работы являлось определение международно-правовой природы и международно-правового статуса Европейского Суда по правам человека, составление характеристики судебных решений Европейского суда по правам человека (на материале англо-русских переводов), исследование лексических и грамматических особенностей переводов Постановлений Европейского суда по правам человека на примере Постановлений «Дело «Ходорковский против Российской Федерации»», «Дело «Мхчян против Российской Федерации»». Данные задачи выполнены, по итогам проведенного исследования можно сделать следующие выводы.

Основными чертами судебных текстов Европейского суда по правам человека являются: лаконичность, информативность, четкость, точность и ясность формулировок, формализованность, а также особая структурированность и использование специализированных лексических единиц – юридических понятий. В текстах судебных документов присутствуют особые лексические шаблоны, специфические лексические

конструкции, многосложность предложений, наличие большого количества пассивных конструкций. В структуре текстов судебных решений ярко выражена особенность построения текста – его композиция, а также специфический синтаксис. Композиционно используются предложения с однотипными оборотами, как правило, объемными по своей структуре и содержанию. Логической особенностью таких текстов является оформление предложений, несущих единый содержательный смысл в виде абзаца с целью облегчения восприятия излагаемого материала. Важно иметь в виду тот факт, что тексты судебных решений не могут рассматриваться без учёта языковых реалий.

При переводе Постановлений Европейского суда по правам человека необходимо чётко определить степень соотношения объёма понятий законодательства в английском и русском языках. Для этого требуется не только переводческая, но и юридическая подготовка специалиста. При проведении настоящего исследования изучалось законодательство Российской Федерации, языковые реалии, которые имеют важную роль в выполнении наиболее эквивалентного перевода. Рассматриваемые понятия уголовного, уголовно-процессуального, гражданского, гражданско-процессуального законодательства имеют различные объёмы в законодательстве РФ и в законодательстве, применяемом Европейским судом по правам человека, что несомненно требует особого внимания, поскольку вызывает серьёзные трудности.

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ПРИЛОЖЕНИЕ №1

CASE OF KHODORKOVSKIY V. RUSSIA

(Application no. 5829/04)

In the case of Khodorkovskiy v. Russia,
The European Court of Human Rights (Former First Section), sitting as a Chamber composed of:
Christos Rozakis, President,
Nina Vajić, Anatoly Kovler, Khanlar Hajiyev, Dean Spielmann, Giorgio Malinverni,
George Nicolaou, judges,
and Søren Nielsen, Section Registrar,
Having deliberated in private on 10 May 2011,
Delivers the following judgment, which was adopted on that date:
PROCEDURE

1. The case originated in an application (no. 5829/04) 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 Mikhail Borisovich Khodorkovskiy ("the applicant"), on 9 February 2004.

2. The applicant was represented by Ms K. Moskalenko, a lawyer practising in Moscow, Mr Wolfgang Peukert, a lawyer practising in Strasbourg, Mr Nicholas Blake, and Mr Jonathan Glasson, lawyers practising in London. The Russian Government ("the Government") were represented by Mr P. Laptev and Ms V. Milinchuk, the former Representatives of the Russian Federation at the European Court of Human Rights, and subsequently by their Representative, Mr G. Matyushkin.

3. The applicant alleged, in particular, that conditions in the remand prisons where he was detained and in the courtroom during his trial were contrary to Article 3 of the Convention, that his arrest and subsequent detention pending investigation and trial was contrary to Article 5 of the Convention, and that the criminal proceedings against him were politically motivated, contrary to Article 18 of the Convention.

4. By a decision of 7 May 2009 the Court declared the application partly admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1) on the merits. The Chamber having decided that no hearing on the merits was required (Rule 59 § 3 in fine), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1963. He was detained in a penal colony in Krasnokamensk, Chita Region, and he is currently detained in Moscow in connection with another criminal case pending against him.

A. The applicant's business and political activities

7. Before his arrest in 2003 the applicant was a businessmen and one of the richest persons in Russia. Thus, he was a board member and the major shareholder of Yukos, a large oil company (hereinafter "the company", liquidated in 2007). He also controlled several other mining, industrial and financial companies affiliated with Yukos (hereinafter referred to as "the Yukos group"). Most of those companies were created as a result of the privatisation of State-controlled enterprises in the mid-1990s.

8. In the period 2002-2003 the Yukos group was pursuing a number of large-scale business projects. Thus, Yukos was engaged in merger talks with Sibneft, another large Russian oil company, and with the US-based company Exxon Mobil. Yukos was also planning to build a pipeline to the Arctic Ocean in order to export natural gas to the western part of Europe. Lastly, Yukos and the State company Rosneft were involved in a public struggle for control of certain oilfields.

9. At the same time the applicant became involved in politics. At the beginning of 2003 he announced that he would allocate significant funds to support the opposition parties Yabloko and SPS (Soyz Pravykh Sil) He also made certain public declarations criticising alleged anti-democratic trends in Russian internal policy. The applicant funded a non-profit NGO, "Open Russia Foundation" in order to promote certain political values in Russian society.

B. The Apatit case

10. One of the companies affiliated with Yukos was Apatit, a large mining enterprise, producing apatite concentrate. Yukos controlled a 20 % shareholding in Apatit.

11. Apatit was privatised in 1994. In the following years the authorities made several attempts to return Apatit to State control, claiming that the money due under the privatisation contract had not been paid by the buyers. In March 2002 Mr Lebedev, one of the top managers in the Yukos group and the applicant's personal friend, proposed a friendly settlement of the dispute on behalf of the buyers. The State privatisation authority having accepted that offer, on 19 November 2002 a friendly settlement was reached. It was approved by a commercial court.

12. In November 2002 the governors of the Smolensk Region, the Tula Region and the Tambov Region wrote a letter to the then General Prosecutor of the Russian Federation, Mr Ustinov. In that letter they complained that Apatit was abusing its dominant position on the apatite concentrate market and boosting prices of phosphate fertilisers, which, in turn, increased food prices. They also alleged that Apatit was using various schemes to evade or minimise taxes. They urged General Prosecutor Ustinov to return Apatit to State control and to apply anti-trust measures in order to make Apatit reduce prices.

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

14. On 16 December 2002 the then President Putin issued Directive No. Pr-2178 requiring reports to be obtained in relation to the acquisition of the Apatit shares. In particular, he inquired whether there had been "violations of the existing legislation committed during the sale of shares in Apatit plc" and whether the State had suffered any loss as a consequence of the friendly settlement that had been approved by the Commercial Court of Moscow in 2002.

15. A wide ranging investigation then took place involving the Prime Minister, the General Prosecutor, the Ministry of Finance, the Ministry of Natural Resources, the Ministry of Industry and Science, and the Ministry of Taxes. In January 2003 the General Prosecutor wrote to the President that the privatisation of Apatit and its business activities had been suspicious, and that further inquiry was needed.

16. On 28 April 2003 the General Prosecutor wrote to the President informing him that the General Prosecutor's Office (GPO) had concluded that there was no need to take further action. The inquiry had not established that Apatit had been abusing its position on the market or that the amount of the friendly settlement reached with the State privatisation agency had been unfair. The terms of the friendly settlement had been approved by the Prime Minister, Mr Kasyanov. Apatit's tax payments had been constantly monitored by the Ministry of Taxes; although Apatit and its affiliates had been subjected to various penalties and financial sanctions in the past, and a new audit was underway, the General Prosecutor's Office did not see any reason to start criminal proceedings in this respect.

17. Nonetheless, on 20 June 2003 a criminal case was opened against Apatit; the situation concerning the acquisition of the Apatit

shares later formed one of the main charges against the applicant. In the following months the scope of the investigation was broadened: the investigative team discovered evidence of tax evasion and business fraud in the business activities of the companies affiliated with Yukos.

18. On 2 July 2003 Mr Lebedev was arrested in connection with the Apatit case.

19. On 4 July 2003 the applicant was summoned to the General Prosecutor's Office and interviewed as a witness in the Apatit case.

20. In the summer and autumn of 2003 the prosecution carried out several searches of the premises of Yukos and the offices of the applicant's lawyer, Mr Drel, and also searched the headquarters of the political party Yabloko. Further, several leading executives of Yukos and affiliated companies were arrested; several others left Russia. Some of those who had left then settled in the United Kingdom. The prosecution authorities sought their extradition to Russia, but the British courts refused on the grounds that their prosecution was politically motivated and they would not receive a fair trial in Russia. The applicant produced copies of the decisions of the British courts in those extradition proceedings.

21. At the same time senior officials in the General Prosecutor's Office publicly declared that charges might be brought against other senior managers of Yukos and affiliated companies. The applicant did not leave the country and continued his activities, including business trips in Russia and abroad.

C. The applicant's apprehension and detention pending investigation and trial

1. The applicant's apprehension in Novosibirsk on 25 October 2003

22. On 23 October 2003, whilst the applicant was away from Moscow on a business trip to eastern Russia, an investigator summoned him to appear in Moscow as a witness on 24 October 2003 at noon. The summons was delivered to the applicant's office on 23 October at 3 p.m. by investigators Mr F. and Mr Sh. The applicant's staff told them that the applicant was away from Moscow until 28 October 2003. Yukos staff also sent the General Prosecutor's Office a telegram explaining the reasons for the applicant's absence from Moscow.

23. On 24 October 2003 Mr F. and Mr Sh. wrote a report to the leading investigator, Mr K., in which they informed Mr K. about the applicant's absence. On the same day, the applicant having missed the appointment, the investigator K. ordered his enforced attendance for questioning and instructed the police to implement that order.

24. In the early morning of 25 October 2003 a group of armed law- enforcement officers approached the applicant's aeroplane on an airstrip in Novosibirsk, apprehended him, and flew him to Moscow.

25. The applicant's lawyer complained about the enforced attendance order to the Basmanniy District Court of Moscow. He asserted that the applicant had had a good reason for missing the interview: he had been out of town on a business trip and had not personally received the summons. As a witness he had been free to travel. On 27 January 2004 the court dismissed the complaint. The court stated that it had been impossible to hand over the summons of 23 October 2003 directly into the applicant's hands, so the applicant had been notified about the questioning through the Yukos headquarters. The court concluded that the decision of 24 October 2003 to bring the applicant to Moscow for questioning had been issued in compliance with the Code of Criminal Procedure and the Constitution.

2. First detention order (25 October 2003)

26. Once in Moscow the applicant was brought before the investigator at 11 a.m. on 25 October 2003. The investigator explained to the applicant why he had been apprehended and interviewed him as a witness in connection with the applicant's personal income tax payments for the years 1998-2000. Thereafter the applicant was informed that he was being charged in connection with a number of crimes, namely the fraudulent acquisition of the Apatit shares in 1998, misappropriation of the Apatit proceeds, misappropriation of Yukos assets and corporate tax evasion and personal tax evasion schemes allegedly used by Yukos and the applicant personally in 1999-2000. The investigator drew up a charge sheet describing the essence of the charges against the applicant. It was 35 pages long and was read out to the applicant at 2.20 p.m. The applicant was then interviewed as a defendant in that case but refused to testify since one of his lawyers was absent. Following the interview, at 3 p.m. on 25 October 2003 the investigator requested the Basmanniy District Court to detain the applicant pending investigation. The request was nine pages long and, according to the applicant, had been prepared in advance.

27. The court heard this request at 4.35 p.m. The applicant was assisted by one of his lawyers, Mr Drel. The prosecution requested the proceedings to be held in camera, referring to the materials of the case file which should not be disclosed. The defence requested a public hearing, but the court, on an application by the prosecutor, decided to hold the hearing in camera, referring to a need to guarantee the defendant's rights. The court heard the public prosecutor, the applicant and the applicant's counsel and examined certain documents from the case file produced by the prosecution. The defence submitted that the applicant had attended promptly for questioning when he had first been requested to do so, in July 2003, and that he had been unable to attend the second questioning for legitimate reasons, as he had had no personal knowledge of the summons. The defence pleaded in favour of the applicant's release on bail. However, as the Government indicated, the defence did not indicate the amount of the proposed bail.

28. At the end of the hearing, which lasted about five hours, the court issued a detention order, referring to Articles 108 of the Code of Criminal Proceedings (see the "Relevant domestic law" part below). The court summarised the charges against the applicant, the arguments put forward by the parties and the procedural history of the case. The main reasons for the detention were as follows:

"[The applicant] is accused of serious crimes punishable by over two years' imprisonment, committed in concert with others and over a long period. The circumstances of the crimes, [the applicant's] personality, and his position as head of Yukos suggest that, if he remained at large, the applicant may influence witnesses and other participants in the trial, hide or destroy evidence ..., or commit further crimes.

[The applicant's] accomplices have fled from the prosecution. [The applicant] might also flee because he has a travel passport and money in foreign banks".

29. The court referred to the applicant's family situation, his residence in Moscow and his health condition, and found that there was no reason for choosing a milder measure of restraint. As to the applicant's assertion that the prosecution had produced no evidence of his implication in the impugned crimes, the court noted as follows:

"This argument ... shall not be examined on the merits, since the criminal case is still at the stage of the pre-trial investigation, and the court cannot express its opinion as to the guilt [of the applicant], proof of his guilt or the correctness of the legal qualification of Mr Khodorkovskiy's acts".

30. The court order did not establish the duration of the applicant's pre-trial detention.

31. On 3 November 2003 the applicant resigned from his position as Chief Executive of Yukos.

32. On 5 November the applicant's lawyer handed over the applicant's foreign travel passports to the prosecution.

33. On 6 November 2003 the applicant's lawyers appealed against the detention order. They asserted, among other things, that the reasons for the detention were insufficient, that the hearing in camera had been unlawful and that the applicant had not committed any criminal offences.

34. On 11 November 2003 the Moscow City Court upheld the detention order. The hearing took place in camera, without the applicant but in the presence of his lawyers. The city court expanded on the district court's reasons:

"[The applicant] owns a large stake in Group Menatep Ltd., a company registered in Gibraltar ..., has financial influence, [and] enjoys prestige with public bodies and companies. Employees of companies controlled by [the applicant] depend on him financially and otherwise...."

35. The City Court also found that the materials of the case file contained sufficient evidence to suspect the applicant of having committed the impugned offences. It established, further, that the domestic law allowed the detention hearing to be held in camera, in order to keep the materials of the pre-trial investigation secret and protect the interests of the defendant. The City Court also failed to fix the duration of the period of detention.

3. Seizure of a written note from the applicant's lawyer

36. On 10 November 2003 the applicant was charged with a number of additional crimes, including abuse of trust, misappropriation of property, tax evasion, large-scale fraud and forgery of official documents.

37. On 11 November 2003 Ms Artyukhova, one of the applicant's lawyers, visited him in prison. As she was leaving, guards searched her and seized a handwritten note with ideas about the case she had prepared overnight and a typed draft of the legal position in Mr Lebedev's case.

38. According to the Government, Ms Artyukhova had received a note from the applicant entitled "Written directions to the defence". These "directions" contained the following instructions (it appears that the Government quoted from this note): "to ensure that Mr Lebedev gives negative or vague answers about the participation in the RTT, to speak to the witnesses about their testimony of 6 November 2003, to check the testimonies of the defence witnesses to ensure that they do not contain any indication as to intent". It also contained directions as to investment activities and tax ayments. The prison officials also seized from Ms Artyukhova a 16-page typewritten memo entitled "Preliminary criminal- law analysis of the charges in the case of Mr Lebedev P.P.".

39. The Government produced a report dated 11 November 2003 by a prison officer who had participated in the search. According to the report, the search had been ordered by inspector B. In the report inspector B. indicated that he had ordered the search because he had sufficient grounds to believe that Ms Artyukhova was carrying prohibited goods. The Government also produced a report by inspector F., who informed his superiors that he saw that the applicant and Ms Artyukhova "exchanged a notebook with some notes, and also made notes in it" during their meeting.

40. According to the applicant, the handwritten note was drafted by Ms Artyukhova It stated as follows:

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

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

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

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

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

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

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

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

1) absence of intention;

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

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

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

41. On 25 November 2003 the applicant's lawyers were informed that the pre-trial investigation had finished. The defence was given access to the materials of the investigation file for examination and preparation for the trial.

42. The Government produced a copy of a report by investigator Mr. K. to Mr B., the Head of the General Department of the Ministry of Justice, concerning the episode of 11 November 2003. Mr K. informed Mr B. about the content of the note seized from Ms Artyukhova According to Mr K., that note contained the applicant's instructions to the defence team as to the tactics of the defence and, in particular, was aimed at ensuring coordination with Mr Lebedev, the applicant's co-accused. According to Mr K., the applicant "dictated" the note to Ms Artyukhova. Mr K. concluded that this note had evidentiary value in the applicant's criminal case.

4. Second detention order (23 December 2003)

43. On 28 November 2003 the defence made an application to the General Prosecutor for the measure of restraint to be changed, arguing that as the pre-trial investigation had finished and all the witnesses had been questioned there was no longer even a theoretical possibility that the applicant might interfere with the proceedings. They also argued that there was no reason to believe that the applicant would resume his alleged criminal activities or that he would flee jurisdiction. Sureties and bail were also offered. On 3 December 2003 the prosecution dismissed the application for release.

44. On 17 December 2003 the prosecution requested the Basmanniy Court to extend the applicant's detention until 30 March 2004. The prosecution referred to the "note seized from one of the lawyers [of the applicant] containing instructions from Khodorkovskiy to exert pressure on witnesses for the prosecution". The prosecutor was apparently referring to the note seized from Ms Artyukhova. The prosecution's application for an extension was lengthy and carefully reasoned; it ran to over three hundred pages.

45. In the evening of Friday 19 December 2003 the applicant's lawyers learned that the court would hear the request at 10 a.m. on Monday, 22 December 2003. The lawyers did not receive a copy of the request before the hearing.

46. The hearing began at 3.05 p.m. on 22 December 2003. The defence sought an adjournment of the hearing to 24 December, but the court instead allowed the lawyers a two-hour break to prepare their pleadings. During those two hours the lawyers stayed in the courtroom and took instructions from the encaged applicant in the presence of guards and court staff.

47. The court decided to hold the hearing in camera. The applicant's lawyers objected, referring, in particular, to the fact that the General Prosecutor had previously publicly stated that there was nothing in the applicant's case that would lead to the necessity for any hearings in camera. The court refused the applicant's request that the hearing be in public, without giving any reasons.

48. In the course of the hearing the defence produced documents in support of their view that the applicant was no longer a board member of Yukos, that he had no shares in Yukos or other companies which, according to the prosecution, had been involved in the impugned scam operations, and that before his arrest he had permanently resided in the Moscow Region. On that basis, the defence asserted that the applicant would not abscond. However, the court refused to examine the documents provided by the defence.

49. In the evening of 22 December 2003 the hearing was adjourned. It was resumed on 23 December 2003. On that day the defence obtained a copy of the prosecution's request for an extension of the detention. At the same time the prosecution filed with the court new pieces of evidence, including the note seized from Ms Artyukhova. The court admitted Ms A's note in evidence. The defence sought an adjournment for a day to examine those documents. They also contested their admissibility, claiming that the documents had been obtained in breach of the privilege pertaining to lawyer-client communications. They claimed, further, that they had not enough information about the origin of this document. However, the court ruled that a one-hour adjournment would suffice.

50. The next day the applicant's representative, Ms Moskalenko, requested the court to adjourn the hearing for one day in order to allow the defence to study new materials submitted by the prosecution. The court ordered a one-and-a-half hour break but refused to adjourn the hearing to the next day.

51. On 23 December 2003 the court extended the detention until 25 March 2004, essentially for the same reasons it had relied on before. The District Court examined the applicant's family situation, and the "personal sureties" proposed by several individuals who guaranteed the applicant's appearance at the trial. However, those elements did not persuade the District Court that the applicant could be released. The District

Court referred to the fact that the applicant's presumed accomplices had fled from trial, and that the applicant controlled business structures which were implicated in the alleged crimes and could therefore use them to continue his criminal activities or influence witnesses who worked in those structures. The court noted that the applicant had a foreign passport and personally owned shares in a foreign company and through a trust company. In addition, the court stated that the applicant had tried to intimidate witnesses. It did not refer directly to Ms A's note in its analysis, although it mentioned it when summarising the submissions by the prosecution. The court also had regard to the necessity of carrying out further investigative actions. It concluded that, if released, the applicant might flee from justice, influence witnesses and continue his activities.

52. On 30 December 2003 the applicant's lawyers appealed against this decision. The appeal was received by the Moscow City Court from the first- instance court on 14 January 2004.

53. On 15 January 2004 the Moscow City Court upheld it. The hearing in the Moscow City Court took place in public in the presence of the applicant's lawyers. The applicant was absent from that hearing. From that moment on the detention hearings in the applicant's case were held in public. In the decision of 15 January 2004 the Moscow City Court held, inter alia, that the lower court had had evidence that the applicant had tried to exert pressure on witnesses.

5. Third detention order (19 March 2004)

54. On an unspecified date the prosecution requested the Basmanniy District Court to extend the applicant's detention again because the applicant needed more time to study the prosecution files. In support of his request the prosecutor mentioned in his submissions the "seizure from one of the defendants of the written notes containing the instruction of Khodorkovskiy to put pressure on the witnesses for the prosecution".

55. On 19 March 2004 the court held a hearing. The defence lawyers complained that they had been unable to see the applicant in private to take instructions as the applicant had only been informed that day of the hearing

and had had insufficient time to review the new case materials submitted by the prosecutor. They themselves had only been informed of the hearing on the previous day. They asked for an adjournment of three days. They also submitted to the court an expert handwriting analysis report showing that the document seized from Ms A had been written by her and not by the applicant. The defence claimed, further, that the applicant would not abscond. In support of that claim, the defence referred to one of the co- accused, Mr K., who had signed a written undertaking not to leave his city of residence and had not absconded. The defence indicated that the applicant's passports had been handed over to the prosecution and that his family were once again offering to put up bail for him. In the opinion of the defence it was absurd to suggest that the applicant would continue with criminal activity, since he was not charged with crimes of violence but with economic crimes: it would be impossible for him to commit such crimes if bailed on condition of house arrest. The prosecution objected to the applicant being granted bail on the condition of house arrest.

56. After having examined the materials of the case file and having heard the parties, the court extended the detention until 25 May 2004 essentially for the same reasons as before. In support of its conclusions, the court referred to the fact that some of the applicant's co-defendants had fled from Russia, that the applicant had several foreign passports, that he owned a considerable amount of shares in a foreign company, and that he had tried to exert pressure on the prosecution witnesses. The court also referred to the fact that some of the witnesses were dependent on the applicant. In the detention order the court did not, however, refer to the risk that, if released, the applicant would engage in criminal activities. The District Court also held that the detention could not be replaced by personal sureties because the court was not entitled to take such a decision under Article 109 of the CCrP.

57. The Government maintained that the applicant's appeals against the detention order of 19 March 2004 were received by the District Court on 25 March (appeal by Mr Padva) and 2 April 2004 (appeal by Ms Moskalenko). On 27 April 2004 the materials of the case were forwarded by the District Court to the Moscow City Court. The parties were informed of the date and venue of the appeal court hearing. On 12 May the Moscow City Court upheld the decision of 19 March 2004.

6. Detention orders of 20 May and 8 June 2004; application for release of 16 June 2004

58. On 14 May 2004 the prosecution submitted the case to the Meshchanskiy District Court for trial.

59. On 20 May 2004 the Meshchanskiy District Court decided to hold a preliminary hearing on 28 May and ordered that the applicant should stay in prison. The decision was taken in camera and without the attendance of either the applicant or his lawyers or the prosecution. No reasons for the continued detention of the applicant were given and the period of detention was not specified.

60. On 26 May 2004 one of the applicant's lawyers, Ms Moskalenko, lodged an appeal against the decision of 20 May 2004. She complained, inter alia, that the detention hearing had been held without the applicant or his lawyer, and that the decision extending the detention did not contain any reasons. After having obtained a reply from the prosecution, the Meshchanskiy District Court forwarded the appeal to the Moscow City Court. The applicant's appeal against the decision of 20 May 2004 was dismissed by the Moscow City Court on 21 June 2004. It appears that neither the applicant nor his lawyers were present at the hearing of 21 June 2004. According to the Government, the summons was sent to six lawyers representing the applicant; however, the summons was not sent to Ms Moskalenko, as her power of attorney did not entitle her to represent the applicant before the appeal court. The Government did not produce copies of the summons. The Moscow City Court found that the decision of 20 May 2004 had been taken by a competent court in compliance with the relevant legislation. It did not specify the reasons for extending the applicant's detention.

61. Preliminary hearings in the trial court took place on 28 May and 8 June 2004. On the latter date the court decided to open the trial on 16 June 2004 and to join the cases of the applicant and Mr Lebedev. It also ordered that the applicant should stay in prison pending trial. No reason for that decision was given and the court did not specify the period of detention. Ms Moskalenko appealed against that decision, claiming, inter alia, that the decision of 8 June 2004 to detain the applicant had not been reasoned. On 29 July 2004 the detention order of 8 June 2004 was upheld by the Moscow City Court. The City Court in its decision indicated that it had reviewed the materials of the case file, examined the submissions of the parties, and concluded that the detention order by the first-instance had not violated the criminal procedure law. The City Court also indicated that, taking into consideration the materials available in the case file, the first-instance court had not found any grounds to reverse or modify the measure of restraint in the form of detention pending trial. According to the applicant Ms Moskalenko was unable to participate in the hearing on medical grounds. However, the applicant, several of his lawyers and the lawyers representing Mr Lebedev were present at that hearing.

62. On 16 June 2004, when the trial started, the applicant's lawyer requested the trial court to release the applicant because he was detained unlawfully. The court dismissed that request. In its ruling the court established that during the investigation the detention had been ordered and extended by the Basmanniy District Court. The Meshchanskiy District Court declared itself incompetent to reassess those detention orders. The Meshchanskiy District Court further noted that on 20 May 2004, following receipt of the case file from the prosecution, it had maintained the measure of restraint imposed earlier. That decision was later confirmed on 8 June 2004. Those decisions were not quashed, and only an appeal court could examine the lawfulness of previously imposed detention orders. The court concluded that it did not detect any "breaches of the existing legislation that would prevent the applicant's detention".

63. Ms Moskalenko appealed against that ruling, but on 29 July 2004 the Moscow City Court upheld both the above decision and the earlier decision of the same court of 8 June 2004 (cf. above).

7. Detention orders of 1 November 2004, 28 January 2005, and 24 March 2005

64. On an unspecified date the prosecution requested the court to extend the applicant's detention because the trial was continuing.

65. On 1 November 2004 the Meshchanskiy District Court held a public hearing, in the presence of the applicant and his lawyers. During the hearing the applicant's lawyers asked the court to consider alternative measures of restraint. Having examined the parties' submissions

the District Court extended the applicant's detention until 14 February 2005, essentially for the same reasons that the Basmanniy Court had given earlier, at the pre-trial stage (without, however, mentioning the applicant's property abroad). The detention order indicated that there was a risk that the applicant would try to put pressure on witnesses, and that the detention was the only appropriate option.

66. On 9 November 2004 the applicant appealed against the extension order. The appeal was rejected by the Moscow City Court on 1 December 2004.

67. On 28 January 2005 the Meshchanskiy District Court extended the applicant's detention until 14 May 2005, repeating the reasons given in the earlier decisions in that regard. The court repeated in particular that the applicant had tried to influence witnesses in the case, that many witnesses worked in companies affiliated with him, that the applicant had international connections, and that other suspects had fled Russia. The applicant's lawyers during the hearing asked the court to consider alternative preventive measures. The applicant's appeal against that decision was rejected by the Moscow City Court on 17 February 2005.

68. On 24 March 2005 the court extended the applicant's pre-trial detention until 14 July 2005, again with essentially the same reasoning. In the detention order the District Court noted that by that time both parties had completed presenting their evidence and the proceedings were reaching the stage of oral pleadings (preniya), which would then be followed by the closing address of the accused persons and the court's deliberations. However, it was still possible for the court to re-open the judicial examination of evidence, if need be. Further, the court assumed that the pleadings, addresses and deliberations could take a long time, given the complexity of the case and the number of parties involved. The appeal by the applicant against this decision was also unsuccessful, as the Moscow City Court rejected it on 21 April 2005.

69. On 31 May 2005 the applicant was found guilty of the charges brought against him and sentenced to nine years' imprisonment. On 22 September 2005 the Moscow City Court upheld the judgment in the main, excluded several charges and reduced the sentence to eight years. Some time afterwards the applicant was transferred to a correctional colony in the Chita Region, where he is currently serving his sentence.

D. Conditions of detention; contacts with the applicant's lawyers

1. Conditions in remand prisons nos. 99/1 and 77/1

70. From 25 until 27 October 2003 the applicant was detained at remand prison no. 77/1 in Moscow, known as "Matrosskaya Tishina". From 27 October 2003 until 8 August 2005 the applicant was detained at remand prison no. 99/1 in Moscow, which is a special-purpose block of the "Matrosskaya Tishina". Thereafter, and until his transferral to the penal colony the applicant was again detained at remand centre 77/1. On 9 October 2005 the applicant was sent to serve his sentence at penal colony FGU IK-10 in the town of Krasnokamensk, Chita Region.

(a) The applicant's account

71. The applicant indicated that from 27 October 2003 to 18 June 2005 he had been held in cells 501, 503 and 506. In those cells the partition dividing the toilet from the rest of the cell was no more than 85 cm high. The applicant insisted that the partition was not high enough to ensure his privacy when using the toilet. He insisted that the toilet had not been separated or soundproofed and allowed inmates to see and hear everything happening in the toilet. The smell from the toilet pervaded the cell. The applicant had to eat his meals in the cell in such conditions. The prison authorities did not supply curtains to separate the toilet from the rest of the cell. He noted that no such curtain (or curtain mark) was visible in the photographs of cells 501, 503 and 506 provided by the Government. The applicant's bed was very close to the lavatory. It was only on 18 June 2005, after the end of the trial and the applicant's conviction, that he was transferred to the refurbished cell no. 610, where the partition was 175 cm high.

72. According to the applicant, his cell in remand centre no. 99/1 housed four or five persons. Thus, each detainee had at the most four square metres

of space in the cell, which contained beds, a worktable that also served as a dining table and the toilet bowl and washbasin. The applicant was incarcerated in such a cell for 23 hours a day for almost two years. At remand centre 77/1 the applicant shared a cell with about fifteen people.

73. In summer the unventilated cells of the remand centres became too hot – over 30 degrees – and in winter too cold – about 18 degrees. The effect of the lack of ventilation was particularly acute on the applicant because he was a non-smoker and was constantly forced to inhale tobacco smoke. On many days the applicant was unable to have his one-hour walk as he had to attend court. Moreover the walking areas were totally enclosed roofed yards at the top of the remand centre. The applicant therefore never had any access to fresh air on these walks. The dimensions of some of the walking areas were very small: between twelve and sixteen square metres. Additionally, the applicant was only permitted weekly washing facilities.

74. The applicant further submitted that the authorities had consistently denied independent observers the opportunity to inspect the conditions of his detention. Thus, the authorities had refused to grant permission to the PACE Special Rapporteur to visit the applicant; the head of the remand centre had refused a Russian member of Parliament access to visit the applicant and inspect the conditions of his detention. On 22 January 2004 a Russian Member of Parliament, Mr Stolyarov, sent a request to the then Head of IZ-99/1 asking to inspect the "incarceration conditions of Mikhail Borisovich Khodorkovskiy". Under Russian law members of parliament have an unfettered right to visit remand prisons and penal colonies. However, when Mr Stolyarov visited the remand centre on 30 January 2004 the head of the remand prison unlawfully refused him access to the applicant. Further, the applicant was denied access to his doctors in connection with his gastric problems.

75. On 9 November 2004 and 7 February 2005, in his appeals to the Moscow City Court against the decisions of 1 November 2004 and 28 January 2005 extending his detention pending trial, the applicant described the poor conditions in which he was detained. On 1 December 2004 and 17 February 2005 the Moscow City Court dismissed the applicant's complaints. Those decisions did not contain any analysis of the applicant's allegations about the conditions of his detention. The applicant also described the conditions of his detention in his cassation appeal against the judgment of the Meshchanskiy District Court of 31 May 2005.

(b) The Government's account

76. According to the Government, in remand centre IZ-77/1 the applicant was detained in cells nos. 276 and 144. Cell no. 276, where the applicant was placed for three days after his arrival, measured 20.44 square metres. The applicant was detained there with four other people. Cellno. 144 measured 52.7 square metres. The applicant was detained there between 8 August 2005 and 9 October 2005 with thirteen other people.

77. The cells in remand centre no. 99/1 were also not overcrowded. In remand centre no. 99/1 the applicant had an individual sleeping place and 4.4-5.9 square metres of personal space in each cell where he was detained. They produced a report indicating the surface area and number of sleeping places in each cell in which the applicant was detained. According to the information provided by the Government, an average cell measured approximately 3 metres by 5 metres. The applicant was detained in cells nos. 501, 503 and 506. On 18 June 2005 the applicant was transferred to newly refurbished cell no. 610.

78. Each cell had windows, electric lighting, hot and cold water, a lavatory and a toilet pan. Although the electric light was on during the night, it was of a lesser intensity than the daytime lighting. The toilet pan was separated from the rest of the cell by a partition measuring 175 cm (cell no. 610) and 85 cm (cells nos. 501, 503, 506), so that the person using the toilet pan was not seen by his cellmates or from the spy-hole in the door. The Government submitted photos of the cells in which the applicant had been detained and of the toilet cubicles. In their post-admissibility submissions the Government indicated that in all cells the partition was at least one metre high.

79. All the cells were equipped with a TV-set, a fridge, an electric kettle and a ventilator, in addition to the standard furniture (bunk beds, stools, table, food locker, coat-hanger, garbage bin, and washing bowls). The cells were properly heated, and ventilated through open windows and through a forced ventilation system, which was always in order. The cells were inspected on the daily basis by the prison staff, who checked that all systems functioned properly. The applicant did not make any complaints about temperature or ventilation in the cell where he was

detained.

80. The applicant was given bed linen and cutlery and was allowed to have his own bed linen.

81. The applicant could have a one-hour daily walk in one of the ten courtyards equipped with a metal shelter and benches. When he had arrived at the remand prison late after the court hearings, he had been unable to take exercise. According to the information provided by the Government, remand centre no. 99/1 had ten walking yards (the smallest measured

15.9 square metres, the largest 36.6 square metres; the average area was about 29 square metres). Each walking yard was equipped with a roof and benches. The Government also produced several reports showing the number of people from each cell who could have a walk outside; these reports concerned about two dozen cells and were dated 18-19 November 2003, 28-29 April, and 30-31 July, 28-29 September 2004 and 6-7 August 2005. The Government also produced documents on the quality and quantity of food distributed to detainees. They submitted, further, a copy ofthe applicant's medical history showing that the applicant, while in detention, had not had major health problems, although there had been some medical incidents and the applicant had on many occasions been examined by doctors.

82. The applicant could also take a shower for fifteen minutes once a week, and, for additional payment, take a shower more often, go to a fitness room, wash his underwear and bed linen, and receive other extra services. Thus, he visited the fitness room of the prison 59 times. In the fitness room he was also able to take a shower. The last visit to the fitness centre was dated 23 July 2005.

83. Three times a day he was given hot food of an appropriate standard. On court days the applicant received dry food or, alternatively, was allowed to take food sent to him by his relatives.

84. The Government indicated that while in the remand centres the applicant had been examined by a doctor with the use of special medical equipment. In particular, doctors examined him in order to define whether further examination of the internal organs was necessary.

85. In support of their submissions the Government also submitted reports from prison officials, dated 2006, which certified the above information on the sanitary conditions in the cells where the applicant had been detained. The Government also submitted a copy of the applicant's personal cash account, which showed that he had been receiving money from his relatives and was able to spend it on, among other things, food, extra visits to the shower room or the sports room or renting additional equipment.

2. Conditions in the courtroom

During the trial the applicant sat on a wooden bench in a small cage in the courtroom. He had to instruct his lawyers through the bars, while a convoy officer was always present next to him. Whenever the applicant left the cage, he was handcuffed to convoy officers. According to the applicant, on court days he received little food, no exercise, and no fresh air. The Government submitted that on court days the applicant had been unable to have a walk because he had regularly arrived at the remand centre late, when all the walking yards had been closed. The applicant was always provided with hot food, and, depending on the time of his departure from the remand centre, with a travel ration.

E. Reaction of international organisations, NGOs and political figures to the criminal prosecution of the applicant

The applicant's case attracted considerable public attention in Russia and abroad. In the course of the trial and afterwards many prominent public figures and influential organisations expressed their doubts as to the fairnessof the criminal proceedings against the applicant and his colleagues. The applicant submitted documents to that effect.

Thus, according to the applicant, his allegations were endorsed by the comments of leading Russian politicians and foreign governments; the findings of the Special Rapporteur of the Parliamentary Assembly of the Council of Europe; the Parliamentary Assembly, which concluded that the circumstances of the applicant's case went "beyond the mere pursuit of criminal justice, and include elements such as the weakening of an outspoken political opponent, the intimidation of other wealthy individuals and the regaining of control of strategic economic assets" (Resolution 1418 (2005), adopted on 25 January 2005); the judgment of the London Extradition Court in the case of Chernysheva and Maruev v. Russian Federation, in which the judge concluded that "it is more likely than not that the prosecution of Mr Khodorkovskiy is politically motivated" and that "President Putin had directed that ... Mr Khodorkovskiy should be prosecuted"; the granting on 6 April 2005 by the United Kingdom authorities of political asylum to other individuals closely linked to the applicant who had also been granted refugee status. The applicant also referred to the decisions of the Nicosia District Court (Cyprus) of 10 April 2008 in an extradition case concerning former Yukos managers, and to some other European jurisdictions. The applicant considered that in those proceedings the courts had established that his prosecution and that of his colleagues was politically motivated.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Pre-trial detention

86. The Code of Criminal Procedure of 2001 provides:

Article 101. Rulings on application of a measure of restraint

"1. Having chosen a measure of restraint ... the court ... renders a ruling which should specify the charges against the suspect or accused persons, and the grounds for applying the measure of restraint."

Article 108. Pre-trial detention

"1. Pre-trial detention shall be applied as a measure of restraint by a court only where it is impossible to apply a different, less severe precautionary measure ... When the court decides to apply pre-trial detention as a measure of restraint it should specify in its ruling the specific facts which lead the court to reach such a decision. ...

3. Where it is necessary to apply detention as a measure of restraint ... the investigating officer shall apply to the court accordingly...

4. [The request] shall be examined by a single judge of a district court ... with the participation of the suspect or the accused, the public prosecutor and defence counsel, if one has been appointed to act in the proceedings. [The request shall be examined] at the place of the preliminary investigation, or of the detention, within eight hours of receipt of the [request] by the court.... The non-justified absence of parties who were notified about the time of the hearing in good time shall not prevent [the court] from considering the request [for detention], other than in cases of absence of the accused person. ...

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

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

(2) dismiss the request [for detention];

(3) 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. ...

9. Repeated requests to extend detention of the same person in the same criminal case after the judge has given a decision refusing to apply this measure of restraint shall be possible only if new circumstances arise which constitute grounds for taking the person into custody."

Article 109. Time-limits for pre-trial detention

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

2. If it is impossible to complete the preliminary investigation within two months and there are no grounds for modifying or lifting the preventive measure, this time- limit may be extended by up to six months by a judge of a district or military garrison court of the relevant level in accordance with the procedure provided for in Article 108 of the present Code. This period may be further extended up to 12 months 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 that there are grounds for application of this preventive measure, by a judge of the same court upon an application by the investigator, filed with the consent of a prosecutor...

3. The period 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 an 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. ...

13. Examination of [the prosecution's] request for extension of the detention is not allowed, except where the suspect or accused is undergoing in-hospital psychiatric examination or in other circumstances which exclude his participation in the court hearing, which should be supported by appropriate documents. In any event the participation of the defendant's lawyer is mandatory."

Article 110. Lifting or modifying a preventive measure

"1. A preventive measure shall be lifted when it ceases to be necessary or replaced by a stricter or a more lenient one if the grounds for application of a preventive measure ... change.

2. A preventive measure shall be lifted or modified 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, the investigator or the person carrying out the inquiry, on his written instructions, may be lifted or modified only with the prosecutor's approval."

Article 113. Enforced attendance

"1. If a witness fails, without reasonable excuse, to attend court when summoned ... he or she may be brought forcibly.

2. Enforced attendance ... shall consist of the person being brought by force before the inquirer, the investigator or the public prosecutor, or the court.

3. If there are reasons preventing their appearance in response to the summons at the designated time, the persons mentioned in paragraph 1 of this Article shall immediately notify the authority by which they have been summoned accordingly.

4. A person who is to be forcibly brought before the relevant authority shall be notified accordingly by an order of the person carrying out the inquiry, the investigator, the public prosecutor or the judge, or a ruling of the court, and this notification shall be confirmed by his signature on the order or ruling.

5. Enforced attendance cannot be carried out at night-time, except in circumstances when the matter cannot wait.

6. Underage persons who have not reached fourteen years of age, pregnant women and sick persons who cannot leave their place of residence on account of poor health, which shall be certified by a doctor, shall not be forced to attend. ..."

Article 123. Right of appeal

"Actions (omissions) and decisions of the agency conducting the inquiry, the person conducting the inquiry, the investigator, the prosecutor or the court may be appealed against in accordance with the procedure set forth in the present Code by participants in the criminal proceedings or other persons, to the extent that the procedural actions carried out and procedural decisions taken affect their interests."

Article 188. Procedure for issuing a summons for questioning

"... 3. A person who is summoned for questioning shall attend at the appointed time or notify the investigator in advance of any reason preventing him from attending. If aperson summoned for questioning fails to appear without any valid reasons he may be brought forcibly ..."

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 shall decide 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 an order...

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

(iv) whether any applications filed should be granted ..."

Article 231. Setting the case down for trial

"1. When there are no grounds to take one of the decisions described in sub- paragraphs (i) or (ii) of the first paragraph of Article 227, the judge shall set the case down for trial ... In the order ... the judge shall decide on the following matters: ...

(vi) The measure of restraint, except for cases where pre-trial detention or house arrest are applied..."

Article 255. Measures of restraint during trial

"1. During the trial the court may order, modify, 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 time the court receives the case for trial to the time when the court delivers the sentence, subject to the exceptions set forth in § 3 of this Article.

3. The court ... may extend the accused's detention during trial. It is possible to extend detention only in respect of a defendant charged with a serious crime or an especially serious crime, and each time for a period of up to 3 months..."

Article 376. Setting the case down for the appeal hearing

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

2. The parties shall be notified of the date, time and venue [of the appeal hearing] no later than fourteen days beforehand. 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. ..."

Article 241. Public nature of the trial

"1. Trials of criminal cases in all courts shall be public, with the exception of the cases indicated in the present Article.

2. Judicial proceedings in camera are admissible on the basis of a determination or a ruling of the court in the event that:

(i) proceedings in the criminal case in open court may lead to disclosure of a State or any other secret protected by the federal law;

(ii) the criminal case being tried relates to a crime committed by a person who has not reached sixteen years of age;

(iii) the trial of criminal cases involving a crime against sexual inviolability or individual sexual freedom, or another crime where the trial may lead to disclosure of information about the intimate aspects of the life of the participants in the criminal proceedings or of humiliating information.

(iv) this is required in the interest of guaranteeing the safety of those taking part in the trial proceedings and that of their immediate family, relatives or persons close to them;

Where a court decides to hold a hearing in camera, it shall indicate the specific circumstances in support of that decision in its ruling on this point. ..."

87. On 8 April 2004 the Constitutional Court of the Russian Federation delivered decision no. 132-O in which it held that Articles 108 and 109 of the CCrP should be interpreted as guaranteeing to the accused the right to participate in any detention hearing, in particular when the judge sets down the case for the trial under Article 231 of the Code.

88. On 22 March 2005 the Constitutional Court of the Russian Federation adopted Ruling no. 4-P. In particular, the Constitutional Court held:

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

89. 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, which regulates the presence of a defendant remanded in custody before the appeal court ... cannot be interpreted 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..."

B. Confidentiality of lawyer-client contacts in prison

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

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

92. Section 34 of the Pre-trial Detention Act establishes as follows:

"Where there are sufficient reasons to suspect that a person entering or leaving the prison carries prohibited objects, substances [or] food stuff, the prison officials maysearch their clothes and belongings ... and seize the objects, substances and food stuff... which [detainees] are not allowed to have or to use."

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

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE CONDITIONS OF THE APPLICANT'S DETENTION

95. The applicant complained about the conditions in remand centres nos. IZ-99/1 and IZ-77/1 in Moscow where he was detained from 25 October 2003 until 9 October 2005. He referred to Article 3 of the Convention, which provides:

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

A. The Government's observations

96. The Government claimed in their observations that the applicant had been detained in appropriate conditions (see their account of the conditions of detention in the "Facts" part above). They also claimed that the applicant had not lodged any complaint with the bodies mentioned in section 21 of the 1995 Pre-trial Detention Act. The Government indicated that the conditions in the cells were appropriate both before and after the renovation works carried out in 2005. The repairs of 2005 were of a purely cosmetic character; their goal was to change the decorative appearance of the cells.

97. As to the refusal to allow the PACE Special Rapporteur and a Russian Member of Parliament permission to visit the applicant to inspect the conditions of his detention, the Government maintained as follows: the request of the PACE Special Rapporteur was addressed to the Ministry of Justice, which was in charge of remand prisons. However, the Ministry of Justice was not supposed to allow a visit to a detainee without the approval of the investigator or other body which is responsible for the criminal case against that detainee. The PACE Special Rapporteur had no special status under the domestic law that would allow her to visit the applicant without prior authorisation. In such circumstances the Meshchanskiy District Court rightly considered that she should not be allowed to visit the applicant. As to the alleged refusal to allow a member of parliament to visit the applicant, the Government claimed that throughout the period under consideration the administration of the penitentiary institution had never received any requests from any MP to allow a visit to the applicant.

B. The applicant's observations

98. The applicant submitted that the toilet facilities, cramped accommodation and lack of ventilation in his cell were such as to be described as degrading. He referred in this respect to Popov v. Russia, no. 26853/04, 13 July 2006, and Peers v. Greece, application no. 28524/95, §§ 70-72, ECHR 2001-III. The Government's account was based on an inspection made in 2006, after the refurbishment of the cells.

99. The applicant further claimed that he had exhausted domestic remedies by lodging the complaints of 9 November 2004 and 7 February 2005 with the Moscow City Court. The applicant had also described theconditions of his detention in similar terms in his cassation appeal against the judgment of the Meshchanskiy District Court.

100. The applicant was left with no means of obtaining independent verification of his cell conditions. The applicant's lawyers were not permitted access to the cells in which the applicant was detained. Members of the Russian parliament, members of the European Parliament, and the Special Rapporteur of the Parliamentary Assembly of the Council of Europe had similarly been denied access to visit the applicant.

C. The Court's analysis

1. General principles

101. As the Court has held on many occasions, legitimate measures depriving a person of his liberty may often involve an element of suffering and humiliation. Yet it cannot be said that detention on remand in itself raises an issue under Article 3 of the Convention. What the State must do under this provision is to ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see Valašinas

v. Lithuania, no. 44558/98, § 102, ECHR 2001-VIII.). When assessing conditions of detention, one must consider their cumulative effects as well as the applicant's specific allegations (see Dougoz v. Greece, no. 40907/98,

§ 46, ECHR 2001-II).

102. The Court reiterates that in certain cases the lack of personal space afforded to detainees in Russian remand prisons has been found to be so extreme as to justify, in its own right, a finding of a violation of Article 3 of the Convention. In several previous cases against Russia where the applicants were held in cells with less than three square metres of personal space the Court found a violation of Article 3 on that account alone (see, for example, Kantyrev v. Russia, no. 37213/02, §§ 50-51, 21 June 2007; Andrey Frolov v. Russia, no. 205/02, §§ 47-49, 29 March 2007; Mayzit v. Russia, no. 63378/00, § 40, 20 January 2005; and Labzov v. Russia, no. 62208/00,

§ 44, 16 June 2005). In addition, such factors as access to natural light or air, adequacy of heating arrangements, compliance with basic sanitary requirements, the opportunity to use the toilet in private and the availability of ventilation are relevant to the assessment of whether the acceptable threshold of suffering or degradation has been exceeded (see, for example, Vlasov v. Russia, no. 78146/01, § 84, 12 June 2008; Babushkin v. Russia, no. 67253/01, § 44, 18 October 2007; and Peers v. Greece, no. 28524/95,

§§ 70-72, ECHR 2001-III). That list is not exhaustive; other conditions ofdetention may lead the Court to the conclusion that the applicant was subjected to "inhuman or degrading treatment" (see, for example, Fedotov

v. Russia, no. 5140/02, § 68, 25 October 2005; Trepashkin, cited above,

§ 94; and Slyusarev v. Russia, no. 60333/00, § 36, ECHR 2010-...).

2. Application to the present case

(a) Conditions in remand prison IZ-77/1 (25-27 October 2003)

103. The Court notes that on the day of his arrest the applicant was placed in cell no. 276, measuring 20.44 square metres, which he shared with three other detainees. Thus, the applicant had over five metres of personal space in that cell. The applicant was detained there for less than three full days. Given the shortness of his detention in that cell, the Court considers that there was no breach of Article 3 of the Convention on account of the conditions of his detention during that period.

(a) Conditions in remand prison IZ-99/1 (27 October 2003 – 8 August 2005)

104. From 27 October 2003 the applicant was detained in another remand prison, no. IZ-99/1. He claimed that he had had slightly over 4 square metres of personal space in that remand prison. He acknowledged at the same time that the number of inmates had not exceeded the number of sleeping places. The Government produced different figures: they maintained that the applicant had had from 4.45 to over 5 square metres of personal space, depending on the cell. In support of their claims, the Government submitted the exact measurements the cells and indicated the number of sleeping places in each of them. The Court has no reason to distrust those documents, at least in so far as the data on the size of the cells and the number of inmates is concerned. The Court thus accepts the figures provided by the Government. The Court does not lose sight of the fact that the applicant's cells were equipped with some furniture and contained such fittings as a toilet, beds, etc, which must have further reduced the floor space available to him (see Andreyevskiy v. Russia, o. 1750/03, § 85, 9 January 2009). However, even taking into account that factor the Court cannot conclude that the cells in which the applicant was detained in remand prison IZ-99/1 were seriously overcrowded, and that the applicant was affected by the general overpopulation problem that exists in many Russian remand prisons. It has therefore to be ascertained whether the other conditions of his detention were compatible with the requirements of Article 3 of the Convention.

105. As regards the sanitary and hygienic conditions in the cells, the parties' descriptions differed significantly. Thus, the applicant complained of insufficient ventilation, inadequate temperature control and the lack of privacy in using the toilet facilities, whereas the Government denied those allegations. The applicant also complained about the conditions in the walking yards.

106. The first question for the Court to decide in this respect concerns the establishment of the facts. The applicant's own words are insufficient to prove his allegations. In practice it may be very difficult for a detainee to collect evidence about the material conditions of his detention, and the Court has already observed the difficulties experienced by applicants in substantiating their grievances in respect of the conditions of pre-trial detention in Russia (see Shcherbakov v. Russia (no. 23939/02, § 81, 17 June 2010). Generally, a detainee cannot question witnesses, take photos of his cell, measure the levels of humidity, temperature, etc. Such inspections are usually made either by the prison authorities themselves or by special bodies supervising the prisons. Ideally, the material conditions of detention should be assessed by independent observers. That being noted, the Court does not consider that the refusal of the State to allow independent observers to visit the applicant (irrespective of whether that refusal was lawful or not) gave rise to a separate problem under the Convention. At the same time, had such an inspection taken place, it could have helped the Government to refute the applicant's allegations. The Court reiterates that in the context of complaints about conditions of detention it is permissible, under certain circumstances, to shift the burden of proof from the applicant to the Government (see, among other authorities, Zakharkin v. Russia, no. 1555/04, § 123, 10 June 2010; Kokoshkina v. Russia, no. 2052/08, § 59, 28 May 2009, and Ahmet Özkan and Others v. Turkey, no. 21689/93, § 426, 6 April 2004). A failure on the part of a Government to submit convincing evidence on conditions of detention may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see Gubin v. Russia, no. 8217/04, § 56, 17 June 2010; Timurtaş v. Turkey, no. 23531/94, § 66 in fine, ECHR 2000-VI).

107. The Court notes that poor sanitary and hygienic conditions in various Moscow remand prisons have been at the heart of a large number of cases before it. The Court has examined several cases where the applicants presented very similar complaints to those of the applicant in the case at hand (see, for example, the case of Andreyevskiy v. Russia, cited above,

§§ 30 et seq.; see also Gubin v. Russia, cited above, §§ 20 et seq., 17 June 2010; Starokadomskiy v. Russia, no. 42239/02, § 23, 31 July 2008; Popov

v. Russia, no. 26853/04, §§ 50 et seq., 13 July 2006; Denisenko and Bogdanchikov v. Russia, no. 3811/02, §§ 37 et seq., 12 February 2009; Sudarkov v. Russia, no. 3130/03, §§ 17 and 22, 10 July 2008; Belashev

v. Russia, no. 28617/03, § 35, 4 December 2008; and Trepashkin v. Russia (no. 2) (dec.), no. 14248/05, 22 January 2009). Most of the cases cited above concerned remand prison no. 77/1, whereas at least one application concerned the conditions in remand prison no. 99/1, where the applicant in the present case was detained (Vlasov v. Russia, no. 78146/01, §§ 53 et seq.,

12 June 2008). The Court observes in this respect that both remand prisons (nos. 77/1 and 99/1) belong to the same detention centre commonly known as "Matrosskaya Tishina". Furthermore, in a number of Russian cases the Court has examined complaints about conditions in the walking yards of various remand prisons (see, for example, Moiseyev v. Russia, no. 62936/00, § 125, 9 October 2008, Trepashkin v. Russia (no. 2), cited above, Mamedova v. Russia, no. 7064/05, § 43, 1 June 2006; Khudoyorov v. Russia, no. 6847/02, § 67, ECHR 2005-X (extracts); and Kokoshkina v. Russia, no. 2052/08, § 56, 28 May 2009).

108. The Court is mindful that those other cases do not concern exactly the same remand prison, the same cells, or the same time-period. Therefore, they cannot be a decisive element in the Court's analysis in casu. However, they create a certain factual context which adds

credibility to the applicant's description of the conditions of detention in remand prison IZ-99/1 in 2003-2005. The Court further notes that the applicant complained about the conditions of his detention to the Moscow courts, but received no meaningful answer to his complaints (see paragraph 75 above). In such circumstances, and given the consistency of the applicant's submissions, the Court deems it possible to shift the burden of proof to the Government.

109. The Court notes that the Government, in order to rebut the applicant's account, produced photos of the cells and reports by prison officials. In the Court's opinion the photos are not very persuasive – either they are incapable of refuting the applicant's account, or they were taken after the completion of the renovation works and, therefore, do not necessarily reflect the situation existing at the relevant time. This is true in so far as the conditions in cells no. 501, 503 or 506 are concerned, where the applicant was detained before his transferral on 18 June 2005 to newly refurbished cell no. 610.

110. Likewise, the reports by the prison officials were drafted several years after the end of the period under consideration (2003–2005). It appears that those reports were not based on any exact measurements or inspections conducted at the relevant time, or any other source material. The Court would reiterate that on several previous occasions it has declined to accept the validity of similar certificates on the ground that they could not be viewed as sufficiently reliable given the lapse of time involved and the absence of any supporting documentary evidence (see Kokoshkina, cited above, § 60; Sudarkov v. Russia, no. 3130/03, § 43, 10 July 2008; Belashev

v. Russia, no. 28617/03, § 52, 13 November 2007; and Zakharkin, cited above, § 124). Their evidentiary value is therefore relatively low. In other words, the applicant's account of the sanitary conditions in the cells is not refuted by any reliable reports of examinations contemporary with the situation complained of.

111. In such circumstances the Court is prepared to conclude that the Government failed in its duty to refute the applicant's account of thesanitary and hygienic conditions in the cells. It follows that for over a year and a half the applicant was detained in cells with poor ventilation, that the applicant, as well as his co-detainees, did not have sufficient privacy in using the toilet facilities (at least until 18 June 2005, when the applicant was transferred to cell no. 610, where conditions were admittedly better). As to the system for temperature control, the Court cannot share the applicant's view that a temperature of 18 C (the minimum temperature in the cell) was clearly unacceptable, although it can be admitted that the cell was occasionally too hot in the summer.

112. These conclusions do not, however, automatically lead to a finding of a violation of the applicant's rights under Article 3 of the Convention. First, the Court observes that the applicant shared the cells with two or a maximum of three other people. This means that the sanitary and hygienic conditions in those cells were not as bad as where the number of people detained together in the same cell was significantly higher.

113. Second, it follows from the documents submitted by the Government that the applicant was able to make use of extra services provided in the remand prison for a fee, namely to exercise in a fitness room. From the documents submitted by the Government it follows that the applicant used that opportunity regularly, and the applicant did not seem to contest that information. Thus, he was not confined to his cell 23 hours out of 24, as was the case for many other prisoners in Russia, who only enjoyed a forty-minute walk or so in a small walking yard (cf. with the case of Andreyevskiy, cited above, § 86). The Court reiterates in this respect that, in the context of conditions of detention in correctional colonies, the Court, while assessing the sufficiency of personal space in the dormitory, takes into account the greater freedom of movement enjoyed by detainees (as compared to the remand prisons) (see Solovyev v. Russia (dec.), no. 76114/01, 27 September 2007; Nurmagomedov v. Russia (dec.), no. 30138/02, 16 September 2004; and Valašinas v. Lithuania, no. 44558/98, §§ 103 and 107, ECHR 2001-VIII).

114. It is worth noting that the applicant was also able to receive food and medicine from his relatives, in addition to the free meals distributed in the prison, and to take a shower on request, i.e. more often than once a week as provided by the general regime (cf. with Nedayborshch v. Russia, no. 42255/04, § 32, 1 July 2010, or Skachkov v. Russia, no. 25432/05, § 54, 7 October 2010). Those extra services were most probably not available to most detainees, but this was not the applicant's case, and the Court cannot disregard this factor.

115. Finally, the Court notes that during the period under consideration the applicant did not have any serious health problems or grave medical incidents which could have been exacerbated by poor ventilation, inadequate hygiene, etc.

116. In conclusion the Court notes that the conditions of the applicant's detention during the period under consideration were indeed very uncomfortable, but not so harsh as to reach the threshold of severity required to bring the situation within the ambit of Article 3 of the Convention. It follows that Article 3 was not breached on account of that period.

(a) Conditions in remand prison IZ-77/1 (8 August 2005 – 9 October 2005)

117. The Court notes that on 8 August 2005 the applicant was transferred back to remand prison IZ-77/1, where he was placed in cell no. 144. It appears that conditions in that remand prison were much worse than those in remand prison no. IZ-99/1. Thus, in cell no. 144 the applicant had slightly over 4 square metres of personal space and was detained with thirteen other people. In practice, the personal space available to each detainee in that cell was even less than 4 metres, if one considers the space occupied by the furniture, toilet, and other equipment listed by the Government in their submissions.

118. Furthermore, as follows from the documents submitted by the Government, during that period the applicant ceased to visit the fitness room, probably because remand prison no. IZ-77/1 did not have one. There is no information on whether the applicant was able to use a shower cabinet on request, as in prison no. IZ-99/1. Since the applicant was awaiting examination of his appeal during this period, he was not taken to the court as often as previously, and, consequently, was confined to his cell most of the time. The applicant also complained of deplorable sanitary and hygienic conditions in cell no. 144. That assertion was not rebutted by the Government convincingly, with reference to reliable source materials or reports contemporary with the situation complained of (see the Court's analysis above, concerning the conditions of detention during the previous period). The applicant was detained in such conditions for two months. The Court concludes that conditions of his detention during that period were much worse than those in remand prison no. IZ-77/1 and amounted to "inhuman and degrading treatment" within the meaning of Article 3 of the Convention. There was thus a violation of that provision in respect of the last period of the applicant's detention pending trial.

(a) Conclusions

119. To recapitulate the above findings, the Court concludes that the conditions of the applicant's detention from the moment of his arrest on 25 October 2003 until his transferral to remand prison no. IZ-77/1 on 8 August 2005 were not incompatible with Article 3 of the Convention. In contrast, between 8 August 2005 and 9 October 2005 the applicant was detained in conditions which amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF THE CONDITIONS IN THE COURTROOM

120. The applicant complained that during the court hearings he was placed in a metal cage and was exposed in this manner to the public and the media. He referred in this respect to Article 3 of the Convention, cited above.

121. The Government claimed that such arrangement in the court room had been justified by security considerations.

122. The applicant maintained that there had been no proper reason to conduct the trial with the applicant placed inside a cage. He had been accused of economic crimes and had no previous criminal record or any history of violence. The decision to try the applicant whilst caged had humiliated him in his own eyes, and had been perceived by the public as a humiliation. The applicant had been brought in the courtroom handcuffed, and had always been guarded by armed men.

123. The Court notes that the practice of placing a criminal defendant in a sort of a "special compartment" in a court room existed and probably continues to exist in several European countries (Armenia, Moldova, Finland). In some countries (such as Spain, Italy, France or Germany) the accused are sometimes placed in a glass cage during the hearing. Such a practice has occasionally been examined in the context of

the guarantee of the presumption of innocence under Article 6 § 2 of the Convention (see Auguste v. France, no. 11837/85, Commission Report of 7 June 1990, D.R. 69, p. 104; see also Meerbrey v. Germany, no. 37998/97, Commission decision of 12 January 1998). In recent years the Court has begun to examine the practice also from the standpoint of Article 3 of the Convention. Thus, in the case of Sarban v. Moldova (no. 3456/05, § 90, 4 October 2005) the applicant was brought to court in handcuffs and held in a cage during the hearings, even though he was under guard and was wearing a surgical collar (see, a contrario, the case of Potapov v. Russia ((dec.), no. 14934/03, 1 August 2006). A violation of Article 3 of the Convention was found in a case where the applicant was unjustifiably handcuffed during public hearings (see Gorodnichev v. Russia, no. 52058/99, §§ 105-109, 25 May 2007). Handcuffing of the applicant gave rise to a violation of Article 3 of the Convention in a situation where no serious risks to security could be proved to exist (see Henaf v. France, no. 65436/01, §§ 51 and 56, ECHR 2003-XI; Istratii and Others v. Moldova, nos. 8721/05, 8705/05 and 8742/05, §§ 57 and 58, 27 March 2007).

124. Lastly, in the recent case of Ramishvili and Kokhreidze v. Georgia, (no. 1704/06, §§ 98 et seq., 27 January 2009) the Court, in a very similar factual context, decided as follows:

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

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

This approach was recently confirmed by the Court in the case of Ashot Harutyunyan v. Armenia (no. 34334/04, §§ 126 et seq., 15 June 2010) where the applicant had been kept in a metal cage during the entire proceedings before the Court of Appeal, and where the Court found a violation of Article 3 of the Convention on that account.

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

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

126. In sum, the security arrangements in the courtroom, given their cumulative effect, were, in the circumstances, excessive and could have been reasonably perceived by the applicant and the public as humiliating.

There was, therefore, a violation of Article 3 of the Convention in that the treatment was degrading within the meaning of this provision.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 (b) OF THE CONVENTION

127. Under Article 5 of the Convention the applicant complained that his apprehension in Novosibirsk on 25 October 2003 was contrary to Article 5 § 1 (b) of the Convention, which provides:

"1. 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:

(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; "

A. The Government's observations

128. The Government indicated in their observations that the applicant had been summoned to the General Prosecutor's office on 24 October 2003. They maintained that the applicant had failed to appear before the investigator without good reason. As a result, the investigator had decided that the applicant should be brought to him for questioning by 5 p.m. However, the applicant had not been at his usual place of residence. As chief executive of his company, the applicant had been capable of organising his working time in such a way as to arrive in time for questioning. Moreover, an aircraft was always at his disposal. His absence from Moscow for business reasons was not an adequate excuse for his failure to attend the General Prosecutor's Office for questioning.

129. The Government further argued that the applicant had not been "arrested" but merely "conveyed" before the investigator, or "subjected to attachment", or enforced attendance (privod), since Russian law did not provide for the "arrest" (arest) of witnesses. The Government concluded that this measure fell outside the scope of Article 5 of the Convention. The Government denied that the applicant had been brought to Moscow by FSB officers.

130. The Government also noted that on 27 January 2004 the Basmanniy District Court had confirmed the lawfulness of the decision of the investigator to subject the applicant to enforced attendance.

B. The applicant's observations

131. In the applicant's words, being seized at gunpoint at an airport and forcibly returned to Moscow clearly amounted to a deprivation of liberty. If this deprivation was not for a purpose recognised by Article 5 § 1 then there had been an infringement of that Article.

132. The applicant insisted that he had been arrested by FSB officers. The Government's assertion that the FSB had not played any part in arresting him had been contradicted by the ruling of investigator B., which had been sent to the Deputy Director of the FSB, Mr Z., for enforcement. Moreover, at the hearing of 25 October 2003 Mr L., the State prosecutor, had explicitly stated that the ruling had been enforced by FSB officers.

133. Further, it was incorrect to assert that the applicant had been repeatedly summoned and had failed to attend for questioning. He had been summoned once, on 4 July 2003, when he had attended as requested and answered questions. Thereafter he had consistently stated that he would not leave Russia and that he was prepared to answer the GPO's questions. After being questioned in July 2003, the next time that he was summoned for questioning was on Friday 24 October 2003. However, the applicant had left Moscow on Tuesday 21 October 2003 on a highly publicised tour of the Russian regions. On the day the applicant was summoned he had been in a meeting with the Governor of Nizhny Novgorod Region and representatives of President Putin's administration. Staff at the applicant's offices noted on the summons for questioning, issued on 24 October 2003, that the applicant would not be back in Moscow until Tuesday 28 October 2003. A fax to the same effect was also sent by his office to the investigator. By supplying that information the applicant had clearly established legitimate reasons for being unable to appear on the dates requested. In the applicant's view, it was apparent that summoning someone to appear in Moscow at short notice when it was known that he was attending a governmental meeting elsewhere in the country was absurd, and not a bona fide attempt to obtain assistance from a witness. He was not assigned to residence and was perfectly entitled to travel anywhere in the country on business.

C. The Court's assessment

134. The Government claimed in their observations that the applicant had not been “arrested” but merely “subjected to attachment”. However, this distinction is irrelevant, since, for the purposes of the Convention, he was deprived of his liberty: the “attachment” lasted many hours, excluded any possibility for the applicant to leave, and served the purpose of bringing him for questioning. In Convention terms he was thus deprived of liberty in order “to secure the fulfilment of an obligation prescribed by law”. That situation thus falls to be examined under Article 5 § 1 (b).

135. This deprivation of liberty must be “lawful”. “Lawful” means essentially compliant with domestic law (see Nowicka v. Poland, no. 30218/96, § 58, 3 December 2002). The Court observes that a Russian court found the apprehension lawful: the law permits a witness who fails to turn up for no good reason to be seized, and the court rejected the reason provided by the applicant, namely a business trip. That conclusion is not unreasonable. The Court accepts that domestic authorities have a certain margin of appreciation in assessing such matters. The Court thus concludes that the applicant’s apprehension had a basis in the Russian law.

136. At the same time, the Court reiterates that Article 5 § 1 requires in addition that any deprivation of must respect the guarantees provided by Article 5, and to protect individuals from arbitrariness. An arrest will only be acceptable in the Convention terms if “the obligation prescribed by law” cannot be fulfilled by milder means (see McVeigh and Others v. the United Kingdom, nos. 8022/77, 8025/77, and 8027/77, Commission’s report of 18 March 1981, Decisions and Reports (DR) 25, p. 15). Or, to paraphrase the case of Vasileva v. Denmark, there must be a balance between the public interest in complying with the obligation, and the private interest in staying free (no. 52792/99, § 37, 25 September 2003).

137. The Court accepts that where a witness fails to turn up for questioning for no good reason, he may be brought to the investigator or to the court by force. However, the decision-making process in such matters, where the person’s liberty is at stake, should not be overly formalistic, and should take into account all relevant circumstances of the case. Thus, the same reason (a business trip, an illness, a family event, etc.) may be a valid excuse in one context and not in another.

138. The Court finds it established that the applicant was informed about the summons and had 21 hours to return to Moscow, but did not do so. Formally speaking, he missed the questioning, so there was an unfulfilled obligation incumbent on the applicant (see Nowicka v. Poland, cited above,

§ 60). But the Court is not persuaded that this was a sufficient reason for bringing him forcibly to Moscow on the following morning, and for doing so in the manner chosen.

139. First, it is hard to see why the investigator could not wait. By 25 October 2003 the investigation had lasted for several months. The investigator had previously interviewed the applicant, and he would have returned to Moscow in three days. The applicant’s previous behaviour did not give rise to any legitimate fear that he would evade questioning on his return. Finally, in case of urgency, the investigator could have asked his Siberian colleagues to interview the applicant on the spot or sent a member of the investigation team there.

140. Secondly, the manner in which the apprehension occurred was unusual. The applicant was arrested like a dangerous criminal rather than a simple witness: an entire police operation involving a group of armedofficers was mounted within a very short time, the applicant was traced to Novosibirsk and arrested on the airfield in the early morning. The Court reiterates in this respect that an arrest must not be punitive (see Vasileva, cited above, § 36).

141. Finally, the timing of the events is worth attention. No sooner had the investigator interviewed the applicant as a witness than he charged him and lodged a 9-page application with the Basmanniy District Court of Moscow requesting the applicant’s detention. Such speed suggests that in fact the investigator had been prepared for such a development and wanted the applicant as a defendant, not a witness.

142. The Court reiterates in this respect that an arrest may be unlawful if its outer purpose differs from the real one (see Bozano v. France, 18 December 1986, Series A no. 111, § 60). In the present case, if the applicant had been arrested as a suspect in Novosibirsk, he would have been taken to a local court. Instead, as a witness he was forced to return to Moscow where the General Prosecutor’s Office could then be assured that he would be tried in the Basmanniy District Court for the purpose of the detention proceedings. The circumstances of the applicant’s arrest show that, albeit formally, he was apprehended as a witness, and despite complying with the letter of the national law, the investigator’s real intent was to charge the applicant as a defendant and, thus, to change the venue of the eventual detention proceedings to a more convenient one.

143. In sum, the Court concludes that the applicant’s apprehension in Novosibirsk on 25 October 2003 was contrary to Article 5 § 1 (b) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 (c) OF THE CONVENTION

144. The applicant further complained that his detention pending investigation and trial (i.e. between 25 October 2003 and 31 May 2005) had not been imposed or extended by the courts in accordance with a procedure prescribed by law as required by Article 5 § 1 (c) of the Convention. This provision reads:

“1. 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 Government’s observations

145. The Government maintained that the domestic courts had not breached the domestic law when ordering or extending the applicant’s pre- trial detention. As regards the initial detention order (that of 25 October 2003), and the subsequent extensions, it is true that they did not specify the time-period for the detention. However, under Article 109, section 1 of the CCrP pre-trial detention is imposed for a period of up to two months. The law also specified the maximum duration of any extension thereof. The fact that the courts had not indicated the periods of detention did not mean that the applicant had been subjected to an unlimited deprivation of liberty.

146. Furthermore, Article 241, section 2, point 1 of the CCrP allowed the court to conduct proceedings behind closed doors. The prosecutor requested to close proceedings, explaining that some of the materials of the case had to remain secret, that some of the applicant’s accomplices were still at large and that they might put pressure on the participants in the trial and thus impede the proceedings. Having discussed the request with the parties the court decided to grant it, in order to protect the rights of the defendant. As from 15 January 2004 the detention hearings were open to the public and since then the course of the proceedings has been widely publicised.

147. As regards the decision of 20 May 2004, the Government indicated that, under the Code of Criminal Procedure, after having received the case from the prosecution, the court had to decide on the measure of restraint to be applied to the accused person during the trial. The Code did not stipulate that the accused or his lawyer had to be present at that stage of the proceedings. On 20 May 2004 the court decided to extend the applicant’s detention. That decision was based on the information available from the case file. In addition, the applicant and his defence lawyers had not asked the court to modify or lift the measure of restraint. The Government insisted that the court did not apply the measure of restraint or extend it, but merely decided that it should remain the same.

148. The Government indicated that on 8 June 2004, as a result of the preliminary hearing, the court had made several orders. Among other things, the court decided that there were no grounds to modify the measure of restraint applied to the applicant. Again, this was not a formal extension of the applicant’s detention but a mere confirmation of the decision taken earlier. At the hearing of 8 June 2004 the defence did not make an application for release.

149. As to the decision of the Constitutional Court of 8 April 2004 (no. 132-O), the Government indicated that it had been published in the Rossiyskaya Gazeta (the official daily newspaper) only on 9 June 2004. Therefore, the constitutional interpretation of the relevant provisions of the

CCrP became publicly available only after the detention orders by the Meshchanskiy District Court had been delivered.

150. The Government claimed that on 20 May and 8 June 2004 the Meshchanskiy District Court had not imposed or extended the measure of restraint but simply decided that it should have been maintained for a further six months.

151. The Government claimed that on 16 May 2004 the Meshchanskiy District Court had examined the applicant's application for release, but had refused to reconsider the earlier decisions of the Basmanniy District Court, in order not to act as a court of appeal vis-à-vis the latter court.

B. The applicant's observations

152. The applicant maintained that the first detention order (that of 25 October 2003) had been contrary to the domestic law in a number of respects. It had been issued following a hearing that, for no valid reason, had been conducted in camera. The detention order had not specified the period of detention or explained why it was impossible to impose a less severe measure of restraint. Further, the appeal against the detention order had also been unlawfully heard in camera. The second detention order of 23 December 2003 had been deficient for the same reasons.

153. The detention order of 20 May 2004 had been imposed on the initiative of the court and had therefore been contrary to the law. The court's jurisdiction to order detention arose only when an appropriate request had been made by the investigating officer or prosecutor. Furthermore, contrary to rulings of the Constitutional Court of Russia, the authorities had not secured the applicant's presence at the hearing of 20 May 2004. The order had not contained any reasons for his detention. Nor had the detention order of 8 June 2004 contained any reasons.

C. The Court's assessment

154. The main grievance of the applicant in respect of the first two detention orders (of 25 October 2003, confirmed on 11 November 2003 by the court of appeal, and of 23 December 2003) concerns the fact that the hearings in which those orders were imposed were held in private. The Court reiterates its findings in the case of the applicant's co-defendant, Mr Lebedev (Lebedev v. Russia, no. 4493/04, 25 October 2007) where, in reply to a similar complaint by the applicant, the Court ruled as follows:

"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 departfrom 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."

155. That being said, the Court notes that it was a requirement of Russian law that the hearings (including the detention hearings) should be in principle public, with exceptions provided by Article 241 of the CCrP, referred to by the Government. In other words, the question of the public nature of the detention proceedings in the case at hand is raised in connection with the "lawfulness" requirement of Article 5 § 1 of the Convention, and not the "procedural fairness" requirement inherently contained in Articles 5 §§ 3 and 4 thereof (see Lebedev v. Russia, cited above, §§ 75 et seq.). In particular, in needs to be established whether the "procedure prescribed by law" allowed the court to hear the detention hearing in private.

156. In many cases the Court has reiterated that the logic of the system of safeguards established by the Convention sets limits on the scope of the review by the Court of the internal "lawfulness" (see Kemmache v. France (no. 3), 24 November 1994, Series A no. 296-C, § 37). Not each and every disregard of the domestic formalities automatically entails a breach of the Convention under Article 5 § 1 – the core task of the Court is to detect manifest cases of arbitrariness (see Ječius v. Lithuania, no. 34578/97, § 56, ECHR 2000-IX, and Baranowski v. Poland, no. 28358/95, §§ 50-52, ECHR 2000-III). A period of detention will in principle be "lawful" if it is carried out pursuant to a court order (see, among recent authorities, the case of Matyush v. Russia, no. 14850/03, § 68, 9 December 2008), provided that the trial court "had acted within its jurisdiction ... [and] had power to make an appropriate order" (see Korchuganova v. Russia, no. 75039/01, § 62, 8 June 2006).

157. In order to define the standard of assessment of the domestic lawfulness the Court proposed to distinguish between "ex facie invalid" detention orders and other potentially flawed orders, sometimes referring to a comparable distinction existing under English law (cf. Benham, Benham

v. the United Kingdom, 10 June 1996, §§ 43-46, Reports of Judgments and Decisions 1996-III; and Lloyd and Others v. the United Kingdom, nos. 29798/96 and others, §§ 102, 105 et seq., 1 March 2005). Only such breaches of the domestic procedural and material law which amount to a "gross or obvious irregularity" in the exceptional sense indicated by the case-law should attract the Court's attention. The notion of "gross or obvious irregularity" does not lend itself to a precise definition: depending on the circumstances it may include excess of jurisdiction (Marturana v. Italy, no. 63154/00, § 78, 4 March 2008), failure to hear the detainee (Khudoyorov, cited above, § 129, Tám v. Slovakia, no. 50213/99, §§ 58-59, 22 June 2004), failure to give reasons for the detention (Stašaitis v. Lithuania, no. 47679/99, § 67, 21 March 2002), bad faith on the part of the authorities, etc. (see the recapitulation of the applicable principles in the case of Mooren v. Germany [GC], no. 11364/03, §§ 72 et seq., ECHR 2009-...).

158. Turning to the present case the Court notes that the courts at two instances decided to close the proceedings in order to protect the applicant's own interests. The applicant consistently objected to the closure; in other words, his perception of his interests was quite different from the view of the domestic courts on that point. The Court fails to understand what "interests" the courts sought to protect by excluding the public from the proceedings. The applicant was not a minor or a rape victim; he did not fear publicity, but, on the contrary, sought it. The decision of the domestic courts to hold the proceedings in private was therefore dubious at best, and the courts failed to interpret the relevant legislation correctly.

159. Nevertheless, this did not necessarily make the detention proceedings "unlawful" within the meaning of Article 5 § 1 of the Convention. The Court reiterates that the Convention itself does not require detention proceedings to be public (see the Reinprecht and Lebedev cases, cited above). The standards under Article 5 §§ 3 and 4 cannot automatically be extrapolated to Article 5 § 1: Article 5 paragraph 1 and its paragraphs 3 and 4 are separate provisions and the non-observance of the latter does not necessarily entail also non-observance of the former (compare, for instance, Winterwerp v. the Netherlands, 24 October 1979, § 53, Series A no. 33, and Douiyeb v. the Netherlands [GC], no. 31464/96, § 57, 4 August 1999). The Court cannot overlook the fact that the Convention case-law itself does not include the requirement of a public hearing in the list of "core" procedural guarantees inherent to the notion of "fairness" in the specific context of detention proceedings. By analogy, even if the domestic courts erred in their interpretation of the domestic law and held the proceedings in camera for no good reason, this did not amount to a "gross or obvious irregularity" invalidating the proceedings. It follows that the exclusion of the public from the detention hearings of 25 October and 23 December 2003, and from the appeal hearing of 11 November 2003 did not amount to a breach of Article 5 § 1 of the Convention.

160. The next issue raised by the applicant was the allegedly insufficient reasoning of the three detention orders under examination and the court's failure to indicate the periods for which the detention was imposed and prolonged. The Court reiterates in this respect that both the Convention and the domestic law require that the reasons for detention should be given and other preventive measures should be considered by a court deciding on whether a criminal suspect should be detained or released. The absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time is incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1 (see Stašaitis

v. Lithuania, cited above), especially when coupled with the failure of the court to indicate a time-limit for the detention, directly or by reference to theapplicable provisions of the domestic law (see Nakhmanovich v. Russia, no. 55669/00, § 71, 2 March 2006).

161. The Court observes that the detention orders under examination contained some reasoning. Even if that reasoning was flawed or, in the applicant's opinion, insufficient, those orders cannot be characterised by any standard as "arbitrary" (see Moskovets v. Russia, no. 14370/03, § 59, 23 April 2009). The sufficiency and relevance of the reasons relied on by the domestic courts will be discussed below from the standpoint of Article 5 § 3 of the Convention, but this does not deprive the detention orders of their "lawful" character under Article 5 § 1 of the

Convention.

162. The Court finally observes that no time-limits for the applicant's detention were set out in the court's detention orders of 25 October and 23 December 2003. Furthermore, those decisions did not refer explicitly to Article 109, section 1 of the CCrP, which fixes the maximum duration of the pre-trial detention and any extension thereof. That omission is regrettable. However, in the circumstance it did not amount to a "gross or obvious irregularity", especially given that the applicant was well- represented and the maximum duration of a detention order could have been easily ascertained from the law, which was accessible to the applicant.

163. In sum, the Court concludes that the applicant's detention imposed on 25 October 2003, and extended on 23 December 2003 and 19 March 2004, was lawful, and was imposed in accordance with a procedure prescribed by law. There was no violation of Article 5 § 1 of the Convention on that account.

164. As regards the applicant's detention after 20 May 2004, the Court notes that, unlike the first three detention orders, the detention order of 20 May 2004 did not contain any reasoning at all. In principle, depending on the type of detention involved and other relevant factors, the absence of reasoning in a detention order may give rise to a violation of Article 5 § 1 of the Convention (see Nakhmanovich v. Russia, cited above; see also Belevitskiy v. Russia, no. 72967/01, § 91, 1 March 2007; and Bakhmutskiy v. Russia, no. 36932/02, §§ 111 et seq., 25 June 2009; cf. with Liu v. Russia, no. 42086/05, § 81, 6 December 2007).

165. That being said, the Court notes that the applicant's complaint under Article 5 § 1 overlaps to a large extent with his complaint under Article 5 § 3 about the authorities' failure to adduce relevant and sufficient reasons justifying the extensions of his detention pending criminal proceedings. The Court reiterates that Article 5 § 1 (c) is mostly concerned with the existence of a lawful basis for a detention within criminal proceedings, whereas Article 5 § 3 deals with the possible justification for such detention. The Court deems is more appropriate to deal with this complaint under Article 5 § 3 of the Convention. In so far as the applicant complained that the detention proceedings in his case were incompatible with the procedural requirements of the domestic law, the Court will addressthose complaints under Article 5 § 4 of the Convention, which guarantees the right to judicial review of the lawfulness of the detention.

V. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

166. The applicant complained that his detention was not justified and had thus exceeded the "reasonable time" requirement of Article 5 § 3 of the Convention. This provision reads:

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

A. The Government's observations

167. The Government submitted that the applicant's pre-trial detention, ordered by the judge on 25 October 2003, had been warranted by his status as the head of Yukos. In that capacity he was able to influence witnesses and other participants in the proceedings and to destroy or conceal evidence, and thus hinder the normal course of the trial or continue his criminal activities. In the subsequent detention orders the courts relied on various reasons which warranted the applicant's detention and supported them with relevant facts. The Government indicated when and on what grounds the applicant's detention pending investigation and trial had been extended. In total it had lasted one year, six months and twenty-one days. Having regard to the amount of materials in the case (434 volumes) the applicant's detention had not exceeded the "reasonable time" requirement of Article 5 § 3 of the Convention.

168. As to alternative measures of restraint, the Government admitted that on 25 October 2003 the applicant's lawyer had asked the court to release the applicant on bail, without, however, indicating its amount. The Basmanniy District Court found that there was no reason to apply that measure of restraint. In the proceedings of 22 December 2003 the defence lawyers did not propose bail.

169. The fact that the applicant's co-defendant, Mr Kraynov, had been released pending trial was, in the Government's opinion, irrelevant. The courts had to assess each individual case separately; having examined the personal situation of Mr Kraynov and the charges against him (which had been less serious than those in respect of the applicant), the court had assessed the risks accordingly and decided to release him.

170. In so far as the use of Ms Artyukhova's note in the detention proceedings was concerned, the Government made the following comments. They confirmed that the documents seized from Ms Artyukhova. in the remand prison after the meeting with her had been added to the case file and referred to by the court as proof of the applicant's intention to exert pressure on witnesses. However, Ms Artyukhova had breached the law and was not therefore covered by the lawyer-client privilege. In the Government's words, the applicant's "written directives" had been de facto aimed at distorting testimonies and other evidence, which could not be regarded as a part of the defence's normal function.

171. The Government referred to Article 34 of the Pre-trial Detention Act which provided that prison officials had a right to search the applicant's lawyer. In the Government's words, the administration of the remand prison had had sufficient reasons to believe that Ms Artyukhova and the applicant's another lawyer, Mr Schmidt (who had been searched on 11 March 2004), were carrying "materials which contained information which could have obstructed the establishment of truth in the criminal case or facilitated criminal acts". The notes seized by the prison officials from Ms Artyukhova and Mr Schmidt, in the Government's words, were therefore "prohibited goods" within the meaning of Article 34 of the Pre-trial Detention Act.

172. The Government confirmed that a convoy officer was always placed near the applicant in the courtroom. Such a practice was authorised by virtue of the directions issued by the Ministry of Justice. The role of the convoy officer was to observe the applicant, to prevent the applicant from contacting other persons or taking and giving them letters, notes, and other objects. During the breaks in the hearing the applicant was allowed to speak to his lawyers; however, the convoy officer was always present nearby. The applicable rules did not establish any minimal distance between the defendant and the convoy officer in the courtroom.

B. The applicant's observations

173. The applicant submitted that as from the first detention order of 25 October 2003, the reasons put forward for refusing him bail did not meet the "relevant and sufficient" standard of Article 5 § 3. In particular, the detention orders did not address the following submissions by the applicant: that there had been no evidence that he had any reason to abscond; that he had not absconded when his colleagues had been arrested and detained and his offices had been searched; that he had publicly declared that he would face the prosecution and answer questions rather than be forced into exile; that the State had failed to meet the requirement under both domestic and Convention law to explain why less severe measures of restraint were inopportune.

174. The continued detention of the applicant after the preliminary investigation had closed on 25 November 2003 (when the alleged risk of the applicant interfering with witnesses had necessarily abated), was also contrary to Article 5 § 3.

175. As to the second detention order (that of 23 December 2003), the court had failed to meet its statutory obligation to review the necessity for detention when the pre-trial stage of the proceedings had been concluded. It had also failed to address the defence's strong arguments that bail would be appropriate. The applicant's co-accused, Mr Kraynov, had remained at large, and the applicant considered that he should not have been treated differently. The applicant had offered to abide by strict conditions of house arrest, yet the court had failed to consider such a possibility at all in its judgment.

176. As to the admission of Ms Artyukhova's note, the applicant submitted as follows. In his words, the Government claimed that the note indicated that she was to carry out actions which were intended to falsify evidence. However, the applicant, referring to the text of the note, considered that such an interpretation was arbitrary. The note recorded the steps that would reasonably be expected to be undertaken by a lawyer in preparing the case and identifying the issues on which she had to work in the performance of her professional obligations.

177. The applicant alleged that the search of Ms Artyukhova had been unlawful and a blatant violation of the lawyer-client privilege. The record of the search of Ms Artyukhova indicated that the search had been conducted under section 34 of the Pre-trial Detention Act.

In accordance with that section, a search could only be conducted if there were sufficient grounds for suspecting individuals of attempting to smuggle in prohibited items, substances or food. It was claimed in the report following Ms Artyukhova's search that the duty officer had seen "the lawyer and the defendant repeatedly passing to each other notepads with some notes, making notes therein from time to time". There had thus been no legal grounds for conducting the search of Ms Artyukhova because there had been no indication in the report that the officer had witnessed any attempt to pass any prohibited items, substances or food.

178. At the hearing the prosecutor had alleged that the note had been written by the applicant. Thus, at the hearing on 22 December 2003 the prosecutor had argued: "new information has been obtained that Mr Khodorkovskiy passed a note via the lawyer Ms Artyukhova in which he instructs those of his accomplices at liberty to influence witnesses who have made incriminating statements against him". However, the handwritten note had not been written by the applicant, contrary to the assertions of the prosecutor, as had been conclusively proved by the independent evidence of three handwriting experts.

179. As to the detention orders of 20 May and 8 June 2004, the applicant noted that they did not contain any reasons at all and were thus contrary to Article 5 § 3 of the Convention.

180. On 1 November 2004 the Meshchanskiy District Court ordered that the applicant should be detained for a further three months. In its ruling the court appeared to place very considerable reliance upon the earlier decisions to refuse bail, despite its continuing duty to review the appropriateness of pre-trial detention. There was once again a formalistic recital of matters which the court was said to have considered. Once again there was no reasoned analysis of why it was impossible to apply a less severe measure of restraint. In particular, there was no consideration of the fact that the danger of absconding necessarily receded as the period of detention was extended, of the fact that the trial was under way, and that it was not sufficient to rely on a reasonable suspicion against the applicant. In the next decision the Meshchanskiy Court ordered that the applicant should be detained for a further three months, reciting stereotypical reasoning and failing to address the applicant's arguments.

C. The Court's assessment

181. The Court notes that the applicant's pre-trial detention lasted from 25 October 2003 until 31 May 2005, thus amounting to one year, seven months and six days. Given the complexity of the case and the pace of the proceedings, this period does not look unreasonable in itself. However, the issue of whether a period of detention is reasonable cannot be assessed in abstracto. The Court has to examine how the domestic courts justified that period.

1. General principles

182. The Court reiterates that a person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify the continued detention (see, as a classic authority, Wemhoff v. Germany, 27 June 1968, Series A no. 7, § 12; Yagci and Sargin v. Turkey, 8 June 1995, Series A no. 319-A, § 52).

183. Under Article 5 of the Convention the presumption is in favour of release. As the Court has consistently held, the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require him to be released provisionally once his continuing detention ceases to be reasonable (see, for instance, Castravet v. Moldova, no. 23393/05, § 30, 13 March 2007; McKay v. the United Kingdom [GC], no. 543/03, § 41, ECHR 2006-...; Jablonski v. Poland, no. 33492/96, § 83, 21 December 2000; and Neumeister v. Austria, 27 June 1968, Series A no. 8, § 4).

184. The Convention case-law has developed four basic acceptable reasons for refusing bail (or any other measure of restraint not related to deprivation of liberty): the risk that the accused will fail to appear for trial (see Stögmüller v. Austria, 10 November 1969, Series A no. 9, § 15); therisk that the accused, if released, would take action to prejudice the administration of justice (see Wemhoff, cited above, § 14) or commit further offences (see Matznetter v. Austria, 10 November 1969, Series A no. 10, § 9) or cause public disorder (see Letellier v. France, 26 June 1991, Series A no. 207, § 51).

185. Further, the Court has reiterated that shifting the burden of proof to the detained person in matters of detention is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases (see Rokhlina v. Russia, no. 54071/00, § 67, 7 April 2005, and Ilijkovv. Bulgaria, no. 33977/96, §§ 84-85, 26 July 2001). The national judicial authorities must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty, and must set them out in their decisions. Arguments for and against release must not be "general and abstract" (see Clooth v. Belgium, 12 December 1991, § 44, Series A no. 225), but contain references to the specific facts and the applicant's personal circumstances justifying his detention (see Panchenko v. Russia, no. 45100/98, § 107, 8 February 2005). Thus, the danger of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention. In this context regard must be had in particular to the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts (see W. v. Switzerland, 26 January 1993, Series A no. 254-A, § 33, with further references).

186. The Court further stresses that the existence of a particular risk which may hinder the proper conduct of the proceedings (even if that risk was sufficiently established) does not necessarily mean that the suspect must be detained. The domestic authorities should consider having recourse to other, less intrusive preventive measures or, "at the very minimum, seek to explain in their decisions why such alternatives would not have ensured that the trial would follow its proper course" (see Mishketkul and Othersv. Russia, no. 36911/02, § 57, 24 May 2007; see also see Sulaoja v. Estonia, no. 55939/00, § 64, 15 February 2005, and Jabłoński v. Poland, no. 33492/96, § 83, 21 December 2000).

187. The Court finally reiterates that in order to assess the "relevance" and "sufficiency" of the reasons for preventive detention (i.e. detention under Article 5 § 1 (c)) it uses a dynamic approach. Thus, for example, as regards the suspect's presumed potential to interfere with the establishment of the truth, "with the passage of time this ground inevitably becomes lessand less relevant" (see Panchenko cited above, § 103; see also Mullerv. France, 17 March 1997, § 40, Reports 1997-II; and Debboub alias Husseini Ali v. France, no. 37786/97, § 44, 9 November 1999) and even disappears completely with the passing of time (see Letellier v. France, 26 June 1991, § 39, Series A no. 207).

2. Application to the present case

188. The Court observes that the applicant was arrested as a criminal suspect on 25 October 2003. In the first detention order the Basmanniy District Court referred to three particular risks the applicant's release might have posed, namely the risks that the applicant might abscond, interfere with the course of justice, and continue his criminal activity. The facts, referred to by the domestic courts as a proof that such risks existed, were the following: the applicant faced a long prison sentence, he had allegedly been involved in organised criminal activity for a long time, he was a very influential person, he had money abroad and a passport for foreign travel, his presumed accomplices had fled Russia, and the applicant still controlled companies where prospective witnesses continued to work. Furthermore, the court referred to the applicant's personality (without, however, explaining what particular features of the applicant's character increased the likelihood of him fleeing, exerting pressure on witnesses, etc).

189. The Court acknowledges that the logic of the District Court was not flawless (see, for example, the cases of Lind v. Russia, no. 25664/05, § 81, 6 December 2007, with further references, and Korshunov v. Russia, no. 38971/06, § 51, 25 October 2007, where the Court criticised the Russian courts for relying on broadly the same arguments as in the case at hand). However, the Court considers that in choosing a measure of restraint for the first time the courts may rely on relatively loose presumptions (such as the gravity of charges, the suspect's position in society, the nature of the impugned offences, etc.). Furthermore, the exceptional character of the case at hand, where the applicant was one of the richest persons in the country and, unofficially, a politically influential person, should not be disregarded. The Court is aware that the existence of

a potential risk, for example, the risk of fleeing or re-offending, cannot be demonstrated with the same degree of certitude as the existence of a fact that has already occurred. This is a fortiori true at the beginning of a criminal investigation, when the prosecuting authorities have less information about the suspect, his connections, the circumstances of the case, etc. It explains why the Court's standard of review of the original detention order is usually quite relaxed (see in this respect the partial inadmissibility decision in the case of the applicant's co-defendant, Lebedev v. Russia, no. 4483/04, 25 November 2004; see also the Court's finding in the case concerning another Yukos top executive, Aleksanyan v. Russia, no. 46468/06, §§ 184-190, 22 December 2008; see also the case of Aleksandr Makarov v. Russia, no. 15217/07,

§ 125, 12 March 2009). Having applied this standard, the Court concludes that the District Court cannot be considered as having erred in its assessment of the evidence but, taking into account the cumulative effect of the elements before it, came to a reasonable conclusion as to the potential risks posed by the applicant.

190. As to the possible alternative measures of restraint, it is regrettable that the District Court did not develop this point further, and did not explain why it was impossible to apply bail, house arrest, etc. However, the Court is mindful that the Russian courts faced the applicant for the first time, and, admittedly, the prosecution had little time to prepare detailed submissions on this point, and in particular, to evaluate the applicant's assets and to define a reasonable amount of bail. In such circumstances the Court is ready to consider the brevity of the formula used by the Basmanniy District Court as an implicit rejection of all alternative preventive measures provided by the domestic legislation.

191. In sum, the Court is prepared to admit that the combination of the above arguments could justify the applicant's detention as a suspect in the criminal proceedings for some time. The question arises whether the arguments adduced by the courts were sufficient to justify the whole period of the applicant's detention in custody.

192. First, the Court observes that the two subsequent detention orders were justified by reference to broadly the same risks as the first one. However, the applicant's personal situation during that period had evolved: he had ceased to exercise managerial functions within the Yukos group and had submitted his travel passports to the investigator. Furthermore, by that time the pre-trial investigation was already over. The closure of the investigation excluded virtually any risk of tampering with material or documentary evidence, and significantly reduced the ability of the applicant to exert pressure on the witnesses, who had already been questioned by the prosecution (see Aleksanyan v. Russia, cited above, § 191). Nevertheless, the Court is prepared to assume that the risks of tampering with evidence existed for some time after the start of the proceedings, at least until the witnesses testified before the court. Furthermore, bearing in mind its subsidiary role in fact-finding, the Court accepts that the applicant remained a rich and influential person with international connections and property abroad, which would have made it relatively easy for him to live in another country.

193. That being said, the Court is struck by the fact that the detention order of 20 May 2004, as well as the decision of 8 June 2004 by which the detention order of 20 May 2004 was confirmed, were not supported by any reason at all. The Court reiterates that it is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (see, for example, Weinsztalv. Poland, no. 43748/98, § 50, 30 May 2006). As a matter of principle, the Court should not guess what the reasons behind a particular detention order could have been – those reasons should be set out in the detention order, especially at the moment when the case passes from the investigation to the trial stage. In the absence of any reasoning in the detention order of 20 May and in the decision of 8 June 2004 the Court concludes that those extensions of the applicant's detention were unjustified.

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

195. There is no single standard of reasoning in those matters, and the Court is prepared to tolerate an implicit rejection of the alternative measures at the initial stages of the investigation. However, the time that had elapsed since the applicant's arrest should have given the authorities sufficient time to assess the existing options, to make practical arrangements for their implementation, if any, or to develop more detailed arguments as to why alternative measures would not work. Instead, the Russian courts simply stated that the applicant could not be released. The District Court' reference in the detention order of 19 March 2004 to the fact that Article 109 did not provide for personal sureties was irrelevant: Article 109 concerns extensions of pre-trial detention and it is thus natural that it does not mention other preventive measures. The reference to Article 109 only shows that the court did not seriously consider any preventive measures other than detention.

196. Further, the context of the case was not such as to make the applicant obviously "non-bailable". The Court reiterates its findings in McKay v. the United Kingdom [GC], no. 543/03, § 46, ECHR 2006-X), where it held that "the Court's case-law has not yet had occasion to consider the very early stage of pre-trial detention [in the context of the 'reasonable length' requirement of Article 5 § 3], presumably as, in the great majority of cases, the existence of suspicion provides a sufficient ground for detention and any unavailability of bail has not been seriously challengeable". The Court acknowledges that in some circumstances, for example where the suspect allegedly belongs to a gang implicated in violent crimes, or, probably, in terrorist cases, the "unavailability of bail" can be self-evident (see, mutatis mutandis, the case of Galuashvili v. Georgia, no. 40008/04, §§ 6 et seq., 17 July 2008; see also Kusyk v. Poland, no. 7347/02, § 37, 24 October 2006, and Celejewski v. Poland, no. 17584/04, §§ 35-37, 4 May 2006), although even in such circumstances detention should not be automatic. However, this approach cannot be applied in casu. The applicant was accused of a number of non-violent crimes; he did not have any criminal record and he lived permanently with his family in Moscow, where he had his main business interests.

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

198. Third, the Court is struck by the unqualified reliance by the District Court in the second detention order on the note seized from the applicant's lawyer, Ms Artyukhova. The Court reiterates that respect for lawyer-client confidentiality is equally important in the context of both Article 6 §§ 1 and 3 (c) and Article 5 §§ 3 and 4 of the Convention (see the case of Castravet, cited above; see also, mutatis mutandis, Sakhnovskiy v. Russia [GC], no. 21272/03, § 97, 2 November 2010; see also the Court's findings under Article 8 in the case of Campbell v. the United Kingdom, 25 March 1992, § 48, Series A no. 233). Any interference with privileged material, and, a fortiori, the use of such material against the accused in the proceedings, either detention proceedings or at the main trial, should be exceptional, be justified by a pressing need and will always be subjected to the strictest scrutiny by this Court.

199. As transpires from the wording of the detention order of 23 December 2003 and from the report of the investigator on that incident (see paragraph 42. above), the note was written by Ms Artyukhova during Ms Artyukhova's interview with the applicant and concerned the applicant's criminal case. For any reasonable observer that note should have been a privileged material, at least a priori (see, mutatis mutandis, in the context of searches in lawyers' offices, the cases of Iliya Stefanov v. Bulgaria, no. 65755/01, § 41, 22 May 2008, and Niemietz v. Germany, 16 December 1992, § 37, Series A no. 251-B).

200. Any assumption to the contrary must have been based on some knowledge of the content of that note or of the applicant's conversation with Ms Artyukhova. However, the Government did not claim that the authorities had been aware of what had been discussed in the meeting room. Nor did the behaviour of the applicant and his lawyer during the meetings give rise to any reasonable suspicion of abuse of confidentiality. It is also doubtful whether the prison officials had the power under the domestic law to search the lawyer and in what circumstances. The Court reiterates that any limitations imposed on a criminal defendant in the remand prison, including those concerning his contacts with lawyers, should have a lawful basis and that the law should be sufficiently precise (see, mutatis mutandis, Nolan and K. v. Russia, no. 2512/04, §§ 98-99, 12 February 2009, with further references; see also the judgment of the Russian Constitutional Court of 2010 which makes the same point). The Government did not refer to any provision of Russian law prohibiting a lawyer from keeping notes during meetings with his client, or the client

from dictating instructions tohis lawyer or studying materials prepared by the defence lawyer. Various provisions of the Pre-trial Detention Act concerning the perusal of the detainees "correspondence", and the search of "visitors" carrying "prohibited objects" do not seem to apply to the meetings between the defendant and his lawyer.

201. The Court concludes that Ms Artyukhova's note was to all intents and purposes privileged material, that the authorities had no reasonable cause to believe that the lawyer-client privilege was being abused, and that the note was obtained from Ms Artyukhova deliberately and in an arbitrary fashion. Despite the fact that the seizure of the note constituted an encroachment on Ms Artyukhova's professional secrecy and on the applicant's right to effective legal assistance, the note was admitted in evidence and used by the court to substantiate the second detention order without any discussion as to its admissibility and reliability. Against this background, the question of whether the note objectively contained any unlawful instructions to the applicant's lawyers is not so important.

202. In conclusion the Court finds that in the present case the proceedings in which detention was extended were flawed in many respects: the Russian courts on two occasions failed to indicate reasons for the continued detention of the applicant, they relied on material obtained by way of a violation of the lawyer-client privilege, and never seriously considered other measures of restraint. In such circumstances the Court concludes that the applicant's continuous detention was not justified by compelling reasons outweighing the presumption of liberty. There was therefore a breach of Article 5 § 3 of the Convention on this account.

VI. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION ON ACCOUNT OF PROCEDURAL FLAWS IN THE DETENTION PROCEEDINGS

203. The applicant complained of various defects in the proceedings concerning his detention, namely the detention orders of 25 October 2003, 22-23 December 2003, 20 May, 8 and 16 June 2004. He referred to Article 5 §§ 3 and 4 in this respect. The Court considers that this complaint falls to be examined under paragraph 4 of Article 5 of the Convention, which provides:

"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 observations

204. The Government submitted that, since the applicant's detention had been ordered and extended in accordance with the domestic law, it had also been in compliance with the procedural requirements of Article 5 of the Convention. In particular, the courts had taken a lawful and justified decision to close the detention hearing to the public at the initial stages of the proceedings; during the trial the detention hearings were held openly.

205. The Government maintained that the defence had had sufficient time to read the case file and prepare for the detention hearing of 22 December 2003. They had learned of the hearing on 19 December 2003; in addition, they had had two hours during the hearing of 22 December 2003 to read the materials of the case file and speak to the applicant. As could be seen from the record of the hearing, the applicant's lawyers had been perfectly aware of all of the documents produced by the prosecution. On the second day of the hearing, on 23 December 2003, the defence had been given an extra one and a half hours to allow them to read additional documents produced by the prosecution. The Government listed fifteen documents which constituted a "major part" of the detention request lodged by the prosecution. According to the Government, the defence had been given access to those documents well in advance of the hearing. The fact that the defence was able to formulate an application for release at the hearing of 23 December 2003 shows that it was perfectly prepared for the hearing.

206. The Government further maintained that the applicant had not complained to the court that he did not have enough time to meet with his lawyers. One of his lawyers had complained in the appeal brief that the applicant was unable to meet the lawyers in the remand prison where he was detained. However, he had received such an opportunity in the courtroom. In general, during the period under consideration the applicant had 505 meetings with his lawyers, which lasted 906 hours in aggregate. He was meeting them almost on a daily basis, except for holidays. In addition, the applicant had 36 visits from his relatives which lasted 40 hours in aggregate. The head of the remand prison refused the applicant permission to meet his lawyers Ms M. and Mr Pr. because de facto they had not been involved in the applicant's legal representation before the first instance court or before the court of appeal.

207. As to the detention proceedings pending trial, the Government maintained as follows. Under the Code of Criminal Procedure, after having received the case from the prosecution, the court must decide on the measure of restraint to be applied to the accused person during the trial. The Code did not stipulate that the accused or his lawyer should be present at this stage of the proceedings. On 20 May 2004 the court had decided to extend the applicant's detention. That decision had been based on information available from the case file. In addition, neither the applicant nor his defence lawyers had asked the court to modify or lift the measure of restraint. The Government insisted that the court had not applied the measure of restraint or extended it, but merely decided that it should remain the same.

208. The Government indicated that on 8 June 2004, as a result of the preliminary hearing, the court had made several orders. Among other things, the court had decided that there were no grounds to alter the measure of restraint applied to the applicant. This was not a formal extension of the applicant's detention, but a mere confirmation of the decision taken earlier. In addition, the applicant could always have lodged a complaint about that decision.

209. As to the absence of the applicant's lawyer, Ms Moskalenko, at the appeal hearings of 21 June and 29 July 2004, the Government confirmed that, indeed, neither she nor the applicant had been present. However, the applicant himself had failed to indicate in his appeal that he had wished to take part in the appeal proceedings in person, although the law (Article 372 part 2 of the CCrP) provided that such an explicit request was necessary. The same was true with regard to appeals lodged by Ms Moskalenko – she did not request in her appeals to be present at the hearing. Nevertheless, Ms Moskalenko was informed about the first appeal hearing by summons, sent to her by fax. The fax was received by one of the lawyers working in her office. On the day of the hearing the court of appeal received a letter from Ms Moskalenko's office, informing it that she was on a business trip to Strasbourg. Given that Ms Moskalenko did not lodge any written request for her personal presence at the appellate hearing, or for the adjournment of the appeal hearing, it was decided to hold it in her absence. As regards the appeal hearing of 29 July 2004, the Government indicated that Ms Moskalenko had been informed about it by telephone. The authorities had not been informed of the reasons which prevented Ms Moskalenko from attending the second hearing. At the same time, other lawyers for the applicant were present at that hearing, namely Ms Liptser, Ms Lvova and Mr Rivkin.

B. The applicant's observations

210. The applicant maintained his complaints that the detention hearings in his case had not complied with the minimum procedural requirements. More specifically, as regards the second detention order, the GPO's request to extend the term of detention had been filed with the court (though not served on the applicant's lawyers) on Tuesday, 16 December 2003; the applicant's lawyers had been told at the close of business on Friday, 19 December 2003, that there would be a hearing on Monday, 22 December 2003. The GPO request had run to over three hundred pages. Theapplicant's lawyers had not received a copy of the request until the second day of the bail hearing, that is, 23 December 2003.

211. The District Court had initially indicated that it wished to move the proceedings to the remand prison. The court had refused to hear the request in public. The court had refused the applicant's requests for a relatively short adjournment until 24 December 2003. Mr Padva, for the applicant, had explained that he had been unable to meet with his client and had not been given sufficient opportunity to review the prosecutor's request. Ms Moskalenko, also for the applicant, had explained that the necessity for an adjournment was even greater for her as she had only been retained that day. The applicant had himself addressed the court and asked for an adjournment so that he could consult with his lawyers and review the prosecution materials. The judge had refused to adjourn the hearing to 24 December 2003 and had granted only a two-hour adjournment. No reasoning had been given at all for that decision. The very short adjournment had not permitted the applicant to consult his lawyers in private; nor had it allowed sufficient time for his lawyers to review the prosecution material.

212. The applicant, contrary to the principle of equality of arms, had been unable to prepare written submissions in response to the very detailed and lengthy prosecution petition and documents. Thus, Ms Moskalenko's written submissions to the court had remained incomplete.

213. The applicant further noted that the Government had not challenged his claim that during the adjournment he had had to speak to his lawyers in the presence of guards and the district court personnel. These difficulties had been compounded by the fact that the applicant was incarcerated in an iron cage.

214. As to the hearing on 20 May 2004, the applicant submitted that it had not complied with domestic law and that the absence of his lawyers had inevitably meant that the proceedings were not adversarial. The applicant considered that Article 5 § 4 was applicable to the hearing on 20 May 2004, contrary to what the Government seemed to be suggesting. As to the appeal hearings on 21 June and 29 July, the applicant submitted that his lawyer's absence from them necessarily led to the conclusion that they were incompatible with the requirement of adversarial proceedings.

215. Moreover, he submitted that he had wished to be represented at the hearings by his lawyer. The Ruling of the Constitutional Court of Russia of 22 March 2005 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 or extending the detention or confirming its lawfulness. On 21 June 2004 (the hearing of the appeal against the 20 May 2004 detention order), the applicant's lawyer, Ms Moskalenko, had been absent from the appeal hearing as she had been working in Strasbourg for two days. The court had been notified of that fact, but had nonetheless decided to proceed in her absence. The Government had submitted the notification from Ms Moskalenko's office informing the Court that Ms Moskalenko was in Strasbourg. The purported endorsement on the certificate to the effect that Ms Moskalenko did not have a lawyer-client agreement was incorrect. Further, the identity of the signatory to the endorsement was unclear and the identity had not been provided by the Government. The court had proceeded to hear the appeal filed by Ms Moskalenko in her absence and, in the absence of the applicant but in the presence of the prosecutor, who had advanced oral arguments. In such circumstances, the applicant submitted that the hearing had been incompatible with the requirement of adversarial proceedings and equality of arms.

216. On 19 July 2004 Ms Moskalenko had attended the Moscow City Court and provided proof of her authority to act. The Moscow City Court had adjourned the hearing of Ms Moskalenko's appeal against the detention order of 8 June 2004. The hearing had resumed on 29 July 2004 but had been heard in the absence of both the applicant and his lawyer, Ms Moskalenko, notwithstanding the fact that the court had been notified that Ms Moskalenko had been taken into hospital. The Moscow City Court had heard oral argument from the prosecutor. Accordingly, the applicant submitted that the hearing had been manifestly incompatible with the requirement of adversarial proceedings and equality of arms.

217. The applicant further maintained that the detention orders of 20 May and 8 June 2004 had not contained any reasoning. For the applicant, it was axiomatic that for there to be an effective appeal the accused had to know the reasons for the decision at first instance.

218. As to the court's decision of 16 June 2004, the applicant made the following submissions. The Meshchanskiy District Court had dismissed the applicant's application for release, stating that it had no jurisdiction under Article 255 of the CCrP to alter the decision of the Basmanny District Court that the applicant should be detained. However, Article 255 of the CCrP expressly permitted the trial court to select or modify the measure of restraint. Further, the Constitutional Court had made clear in its Decree of 22 March 2005 that the domestic courts had a continuing duty, throughout the pre-trial period, to determine the appropriate measure of restraint. Even if, contrary to the express provisions of the CCrP and the guidance of the Constitutional Court, there was a jurisdictional bar, such a limitation would be contrary to Article 5 § 1 (see Jecius v Lithuania, no. 34578/97, 31 July 2000, § 60-63). The applicant maintained his argument that the decision of 16 June 2004 was contrary to Article 5 of the Convention.

C. The Court's assessment

219. Article 5 § 4 has been consistently interpreted by the Court as providing certain minimal procedural guarantees to a detainee while thecourt decides on whether the preventive detention should be imposed, extended or cancelled. The outline of the case-law in this respect was made in the Lebedev case, cited above, §§ 75 et seq., which mostly concerned the same detention proceedings as those at the heart of the present case, so the Court will not repeat them.

1. Detention hearing of 25 October 2003

220. Insofar as the first of the two detention hearings is concerned, the applicant complained that it was held in camera. The Court reiterates that there is no basis in the Court's case-law to support the applicant's claim that hearings on the lawfulness of the pre-trial detention should be public (see Reinprecht v. Austria, no. 67175/01, 15 November 2005; see also Lebedev v. Russia, cited above, § 82). Therefore, this aspect of the detention proceedings does not raise any issue under the Convention.

221. The second grievance of the applicant in respect of that first detention hearing concerned the fact that the applicant's lawyer had had little time to prepare written observations. This situation might be regrettable, but it did not put the defence at a significant disadvantage vis-à- vis the prosecution (see, mutatis mutandis, Sanchez-Reisse v. Switzerland, cited above, § 51), because the defence was at least able to present their arguments orally. The nature of the first detention hearing is such that the time to examine the case file and prepare the arguments may be reduced to the very minimum, in order to allow the court to take the decision "speedily", as Article 5 requires.

222. The applicant further suggested that the courts at two instances had failed to address his arguments militating in favour of his conditional release. In Nikolova v. Bulgaria [GC] (no. 31195/96, ECHR 1999-II) the Court concluded that the courts should not disregard arguments of the defence, insofar as they refer to "concrete facts ... capable of putting in doubt the existence of the conditions essential for the 'lawfulness' ... of the deprivation of liberty". On the other hand, the right to a reasoned decision is not absolute: this guarantee "cannot be understood as requiring a detailed answer to every argument" (Van de Hurk v. the Netherlands, 19 April 1994, Series A no. 288, § 61). In the Court's view, having in mind that the proceedings were at their earliest stage, the relative conciseness of the court's analysis of the circumstances of the case did not make its decisions unintelligible or arbitrary.

223. In sum, the Court concludes that the first detention hearing in the applicant's case was compatible with the minimal procedural requirements inherently contained in Articles 5 § 4 of the Convention.

2. Detention hearing of 22-23 December 2003

224. As regards the second detention hearing (22-23 December 2003), it was also held in private. The Court repeats that, by itself, this characteristic of the detention proceedings is not incompatible with the requirements of Article 5 of the Convention. Furthermore, the detention order of 23 December 2003 was confirmed on 15 January 2004 by the appeal court in a public hearing. Therefore, the Court does not detect any unfairness in respect of this aspect of the proceedings. Other aspects, however, require closer examination.

(a) Access to the prosecution file

225. The applicant claimed that the defence had obtained a full copy of the prosecution's request for detention (which was 300-page long) only on the second day of the hearing. The time allowed by the court (one hour) to examine it and additional documents filed by the prosecution in the course of the first day of the hearing was clearly unsufficient.

226. The Court reiterates that in Lamy v. Belgium the Court found a violation of Article 5 § 4 because the defence had no access to documents which would have enabled the applicant to challenge his detention (judgment of 30 March 1989, § 29, Series A, no. 151). In Garcia Alva

v. Germany (no. 23541/94, § 42, 13 February 2001), the Court held that "information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer". In this context the duty of disclosure is not

the same as under Article 6 of the Convention; however, the "essential" materials should be made available to the defence some time in advance.

227. The Government in the present case do not seem to contest the applicant's assertion that the file submitted by the prosecution for the detention hearing had run to over three hundred pages. Furthermore, they implicitly acknowledged that while the defence had learned about the prosecution request on 19 December 2003, on Friday, they did not see the file until the day of the hearing (Monday 22 December 2003). Since week- end meetings were not allowed in the remand prison, the defence lawyers could have consulted with their client only in the courtroom. Finally, it is uncontested that the prosecution submitted additional evidence on the second day of the hearing, and the defence obtained only a one-hour adjournment to study it.

228. The Court accepts, in line with the Government's argument, that the defence was aware of the content of some of the documents submitted by the prosecution, for example, of the applicant's own testimonies. Nevertheless, it is difficult for a lawyer to defend his client's interests where the former has only a vague idea of what could be in the materials relied on by the prosecution and submitted to the court. Furthermore, as transpiresfrom the Government's submissions, the file contained some other documents, not available to the defence earlier.

229. The Court is also mindful of the fact that the applicant was represented by a group of skilful lawyers, and that the hearing lasted two days. Most likely, at the end of the second day the defence learned about the main arguments forwarded by the prosecution and became aware of the content of the materials submitted by them. Furthermore, it is also conceivable that not all of the documents in the 300-pages long detention request were strictly relevant. However, in order to ascertain whether that was so the defence team had to work under tremendous time pressure. That time constraint cannot be explained by the urgency of the situation. Whereas in the original detention proceedings the Court was prepared to tolerate some haste (see above, the Court's analysis of the detention proceedings of 25 October 2003), it is not so where the subsequent detention orders are concerned, especially where, as in the case at hand, the preliminary investigation was closed and the case was ready to be transferred to the trial court.

(b) Conditions in which the applicant had to communicate with his lawyers

230. The applicant also complained that during the detention hearings the defence lawyers had been able to communicate with him only in presence of a convoy officer and through the bars of the cage. The Government did not dispute that assertion. They claimed that it was a part of a standard security arrangement taken in every trial pursuant to the instructions of the Ministry of Justice.

231. The Court observes that although the Russian law provided that prison officials should not be able to hear a conversation between a detainee and his lawyer during their meeting in prison, no similar provision existed insofar as the contacts between a defendant and his lawyer in the courtroom were concerned. At least, the Government did not point at any rules or instructions to that end. Quite the contrary, the rules referred to by the Government did not define a minimal distance between the defendant and the convoy officer, leaving it at the officer's discretion. The Court does not know about any specific security considerations which would justify a departure from the general rule of confidentiality of lawyer-client contacts. The Court considers that such a situation, where the conversation between the lawyer and his client in the courtroom can be overheard by a law- enforcement official, irrespective of the particulars of the case, can be an issue under the Convention in itself.

232. Effective legal assistance is inconceivable without respect for lawyer-client confidentiality, which "encourages open and honest communication" between them (see Castravet v. Moldova, no. 23393/05, § 49, 13 March 2007). Moreover, "an interference with the lawyer-client privilege ... does not necessarily require an actual interception or eavesdropping to have taken place. A genuine belief held on reasonable grounds that their discussion was being listened to might be sufficient, in the Court's view, to limit the effectiveness of the assistance which the lawyer could provide" (ibid, § 51). In the present case the applicant had every reason to believe that his conversation with the lawyers might be overheard. Such arrangements represented a serious obstacle for effective legal assistance during the detention proceedings.

(c) Effect of the appeal proceedings

233. Finally, the Court cannot disregard the fact that the detention order of 23 December 2003 was confirmed by the court of appeal at the hearing of 15 January 2004. By that date the defence were well informed about the content of the prosecutor's request for detention, and they had, most likely, met with their client in normal conditions. However, the Court considers that this did not cure the defects of the hearing before the Basmanniy District Court. In the Lebedev judgment the Court noted that the detention order tainted with procedural defects became effective immediately, and it took the appeal court twenty days to review it. Given that lapse of time, the Court refused to accept such a retroactive validation of the procedurally flawed detention order. The same logic applies here. In view of the delays involved (more than two weeks), the appeal hearing of 15 January 2004 was unable to cure the defects of the detention order of 23 December 2004, at least retrospectively.

(d) Conclusions

234. The Court notes that the detention hearing of 22-23 December 2003 was marked by the belated receipt of the detention request and by the defence lawyers' inability to communicate freely with their client. Taking those defects in conjunction, it placed the defence at a serious disadvantage vis-à-vis the prosecution. In such circumstances the Court concludes that the judicial review of the applicant's detention was not compatible with the minimal procedural requirements of Article 5 § 4 of the Convention.

3. Detention hearing of 20 May 2004

235. The Court notes that the detention hearing of 20 May 2004 was held without the attendance of either the applicant or his lawyers or the prosecution. The Court notes that by that time the Constitutional Court in its decision no. 132-O had already interpreted the relevant provisions of the CCrP as giving the accused a right to participate in a hearing where the question of his further detention might eventually be decided. That approach was later confirmed in the Constitutional Court's Ruling no. 4-P of 2005 (both authorities are cited in the "Relevant Domestic Law" part above). The Government claimed that on 20 May 2004 that interpretation had not been known to the Meshchanskiy District Court, since the decision of the Constitutional Court of 8 April was published only on 9 June 2004. However, this argument is irrelevant for the Court's analysis under Article 5 § 4. It is not so important when the position of the Constitutional Court of Russia on the matter became known to the authorities, since the situation under examination was in any event contrary to the requirement of Article 5 § 4 of the Convention. The Court notes that at the hearing of 20 May 2004 the District Court extended the applicant's detention for up to six months, in the first detention order after the receipt of the case-file by the court for the upcoming trial. In such circumstances the applicant should have been given an opportunity to plead his case, either personally, or at least through his lawyers, if not both. As transpires from the materials of the case the applicant was not given such an opportunity, for reasons which remain unknown. The Court concludes that there was a breach of Article 5 § 4 of the Convention on this account.

4. Detention hearing of 8 June 2004

236. It appears that at the hearing of 8 June 2004 the applicant and his lawyers were present and were capable of making submissions. The Court does not detect any other major procedural irregularity which would make this hearing "unfair" within the meaning of Article 5 § 4 of the Convention. The fact that the District Court gave no reasons at that hearing for its decision to keep the applicant in detention has been addressed under Article 5 § 3 above. The Court concludes that the hearing of 8 June 2004 was compatible with Article 5 § 4 of the Convention.

5. The application for release of 16 June 2004

237. At the hearing of 16 June 2004 the applicant lodged an application for release with the Meschanskiy District Court, but the court refused to consider it. The Meschanskiy District Court ruled that it was not competent to review the lawfulness of the detention ordered and extended by the Basmanniy District Court during the investigation and by the Meschanskiy District Court itself on 20 May and 8 June 2004.

238. The Court notes that, indeed, the District Court did not have the competence to review previous detention orders retroactively, as a court of appeal would do. However, nothing prevented the District Court from assessing the need for the applicant's continuing and future detention, since the reasons initially warranting detention might have ceased to exist, and the two previous detention orders contained no reasons at all.

239. The Court observes in this respect that no limitations on the right of review of the continued detention could be derived from the applicable law (see Article 255 of the CCrP, quoted in the "Relevant Domestic Law" above). The CCrP does not establish how often the trial court should returnto the issue of a defendant's pre-trial detention. In principle, the defence may lodge as many applications for release as it wishes.

240. The Convention only guarantees review of the detention "at reasonable intervals" (see, mutatis mutandis, Musiał v. Poland [GC], no. 24557/94, § 43, ECHR 1999-II). However, such intervals were not established in the domestic law, and the applicant therefore had no clear indication as to when it would be appropriate to lodge a new application for release. Under Russian law the court was entitled to impose detention for up to six months during the trial, but that provision cannot be reasonably construed as establishing a mandatory period of detention. To be detained under Article 5 § 1 (c) for such a long period of time without any possibility for review would be contrary to Article 5 § 4 of the Convention, especially in circumstances where, as in the present case, the two previous detention orders (of 20 May and 8 June 2004) were clearly deficient and did not contain any reason for the continuing detention.

241. The Court concludes that in such circumstances the Meschanskiy District Court ought to have considered the application for release of 16 June 2004, at least in so far as the need for the continuing detention was concerned. By failing to do so the District Court breached the applicant's right under Article 5 § 4 of the Convention.

6. Conclusions

242. The Court finds that the detention hearings of 25 October 2003 and 8 June 2004 were compatible with the minimum procedural guarantees required under Article 5 § 4 of the Convention. In so far as the hearings of 22-23 December 2003, 20 May and 16 June 2004 are concerned, the authorities failed to provide the applicant with an adequate review of the lawfulness of his detention. There was therefore a breach of Article 5 § 4 on that account.

VII. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION ON ACCOUNT OF DELAYS IN THE APPELLATE REVIEW OF THE DETENTION ORDERS

243. The applicant further complains that it took the Moscow City Court too long to hear his appeals against the original detention order (of 25 October 2003) and its two extensions (of 23 December 2003 and 19 March 2004). He referred to Article 5 § 4 of the Convention, cited above.

A. The parties' observations

244. In the Government's opinion, there were no unjustified delays in the examination of the applicant's appeals against the detention orders,given that his appeals had always been sent to the prosecution for comments. The applicant's appeals against the detention orders extending his detention pending trial had always been considered within less than one month of their receipt by the court, that is, within the time-limits stipulated in the domestic legislation. In four instances the appeals had been examined within ten to twenty days of their receipt by the appeal court; in two instances these delays had been longer, but that had been justified in the circumstances.

245. The applicant argued that, contrary to the requirements of domestic law, there had been a significant delay in the appeal hearings concerning the first, second and third detention orders. According to the applicant, consideration of the defence's appeals against the first three detention orders had lasted 17, 23 and 54 days respectively.

B. The Court's assessment

246. The Court reiterates that under Article 5 § 4 a detainee is entitled to take proceedings by which the lawfulness of his detention shall be decided speedily. The Court has already addressed the problem of delays in the appellate review of the detention orders in a number of Russian cases, including the case of Lebedev, cited above (§ 95). When determining whether an application for release was decided "speedily" the Court applies the same approach as with the reasonable time guarantees of Articles 5 § 3 and 6 § 1: it must be determined in the light of the circumstances of the individual case. What is taken into account is the diligence shown by the authorities, the delay attributable to the applicant and any factors causing delay for which the State cannot be held responsible (cf. the cases of 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).

1. Speediness of review of the detention orders of 25 October and 23 December 2003.

247. Turning to the present case the Court notes that the applicant calculated the delays in the examination of his appeals starting from the dates of the respective detention order by the Basmanny District Court. However, it is more appropriate to calculate the time elapsed from the moment when the defence lodged the appeal, because the preceding period cannot be attributed to the State. It follows that, insofar as the first two detention orders are concerned, the Government is responsible for delays of five and sixteen days respectively. The Court notes that it is called to consider the speediness of the appeal proceedings, where the original detention order was imposed by a judicial authority. In such circumstancesit concludes that delays of five and sixteen days do not amount to a breach of the "speediness" requirement of Article 5 § 4.

2. Speediness of review of the detention order of 19 March 2004.

248. As regards the third delay, which amounted to one month and nine days (i.e. between 2 April 2004, the date when the last brief of appeal was lodged, until 12 May 2004, the date when the appeal hearing was held), the Government explained it by the need to obtain written submissions from the prosecution. The Government did not invoke any other objective cause which might have delayed the examination of the appeal. The Court considers in the circumstances that the delay involved in the examination of the appeal against the third detention order was excessive (see the case of Lebedev, cited above, § 102, where the period of 27 days was found excessive in similar circumstances). The Court thus concludes that there was a violation of Article 5 § 4 on this account.

VIII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

249. The applicant complained under Article 18 that the State had used the criminal prosecution for a political end and in order to appropriate the company's assets. Article 18 of the Convention provides:

"The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

A. The parties' observations

250. The Government submitted that the applicant's allegations that his criminal prosecution had been politically motivated were not supported by the materials of the case. The Government referred to the judgment delivered in the applicant's case as proof that the charges against him were serious and genuine. They also described the events which had preceded the start of the investigation into the activities of the Yukos management, especially with regard to the Apatit case.

251. The applicant maintained his allegation that his criminal prosecution had been politically motivated. The applicant submitted that the above materials were powerful evidence of ulterior purposes contrary to Article 18. He had at the very least adduced "prima facie evidence pointing towards the violation of that provision" (Oates v. Poland (dec.), no. 35036/97, 11 May 2000), which the Government had entirely failed to address. The fact that he had been convicted in no way precluded improper motives in bringing the charges. Further, as a matter of Convention law, it was immaterial whether there was evidence justifying the bringing of theprosecution, if, as a matter of fact, it was brought for "other purposes" (see Gusinskiy v Russia, no. 70726/01, 19 May 2004). Indeed, the fact that he had received a long sentence supported the inference of political motivation. The travaux préparatoires for Article 18 indicated that the drafters of this provision were concerned to ensure that an individual was thereby protected from the imposition of restrictions arising from a desire of the State to protect itself according "to the political tendency which it represents" and the desire of the State to act "against an opposition which it considers dangerous". The applicant maintained his argument that his arrest and consequent detention on 25 October, just a few weeks before the Duma elections on 7 December 2003 and shortly before the completion of the Sibneft/Yukos merger, had been orchestrated by the State to take action against an opposition which it considered "dangerous",

contrary to Article 18.

252. The applicant asserted that those activities had been perceived by the leadership of the country as a breach of loyalty and a threat to national economic security. As a counter-measure the authorities had undertaken a massive attack on the applicant and his company, colleagues and friends.

253. In support of his allegations the applicant submitted reports from international and Russian media, various governmental and non- governmental organisations, the PACE report "On the circumstances surrounding the arrest and prosecution of leading Yukos executives" (published on 29 November 2004 by Mrs Leutheusser-Schnarrenberger, the Special Rapporteur for the Parliamentary Assembly of the Council of Europe), the US Senate resolutions on this subject, European Parliament reports, documents of the UK House of Commons, decisions by the UK courts in cases of extradition of several former Yukos managers to Russia, and decisions by the Cypriot, Dutch, and Swiss courts to the effect that the prosecution of the applicant was politically motivated. In particular, the applicant referred to the words of the Swiss Federal Tribunal, which in August 2007 found that the facts, if analysed together, "clearly corroborate the suspicion that criminal proceedings have indeed been used as an instrument by the power in place, with the goal of bringing to heel the class of rich 'oligarchs' and sidelining potential or declared political adversaries". The applicant also quoted public statements by several high-ranking Russian officials who had acknowledged that "the Yukos case" had political overtones (Mr Gref, Mr Illarionov, Mr Shuvalov, Mr Mironov, Mr Kasyanov and some others). The applicant produced witness statements by several former Yukos managers. He further referred to his submissions within the case Khodorkovskiy v. Russia (no. 2), no. 11082/06, which contain a more detailed analysis of his political activities and business projects.

B. The Court's assessment

254. The Court reiterates that it has already found that, at least in one respect, the authorities were driven by improper reasons. Thus, the Court found that the applicant had been arrested in Novosibirsk not as a witness but rather as a suspect. However, the applicant's claim under Article 18 is different from his grievances under Article 5. The applicant maintained that the entire criminal prosecution of Yukos managers, including himself, had been politically and economically motivated. The Court reiterates in this respect that "Article 18 of the Convention does not have an autonomous role. It can only be applied in conjunction with other Articles of the Convention" (Gusinskiy v. Russia, no. 70276/01, § 75, ECHR 2004-IV). In the light of the above the Court will consider the applicant's allegations under Article 18 of the Convention in conjunction with his complaints under Article 5 of the Convention, cited above.

255. The Court reiterates that the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith. Indeed, any public policy or an individual measure may have a "hidden agenda", and the presumption of good faith is rebuttable. However, an applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed (or as can be reasonably inferred from the context). A mere suspicion that the authorities used their powers for some other purpose than those defined in the Convention is not sufficient to prove that Article 18 was breached.

256. When an allegation under Article 18 is made the Court applies a very exacting standard of proof; as a consequence, there are only few cases where the breach of that Convention provision has been found. Thus, in Gusinskiy v. Russia (no. 70276/01, § 73–78, ECHR 2004-... (extracts), the Court accepted that the applicant's liberty was restricted, inter alia, for a purpose other than those mentioned in Article 5. The Court in that case based its findings on an agreement signed between the detainee and a federal minister of the press. It was clear from that agreement that the applicant's detention was applied in order to make him sell his media company to the State. In Cebotari v Moldova (no. 35615/06, §§ 46 et seq., 13 November 2007) the Court found a violation of Article 18 of the Convention in a context where the applicant's arrest was visibly linked to an application pending before the Court. However, such cases remain rare (see, as an opposite example, Sisojeva and Others v. Latvia [GC], no. 60654/00, § 129, ECHR 2007-II). Particularly, the Court notes that there is nothing in the Court's case-law to support the applicant's suggestion that, where a prima facie case of improper motive is established, the burden of proof shifts to the respondent Government. The Court considers that the burden of proof in such a context should rest with the applicant.

257. In the case at hand the applicant referred to various sources which confirm his allegations of "improper motive". First, he invited the Court to consider the facts surrounding his business and political activities, as well as the major policy lines adopted by the President's administration at the relevant time. Indeed, those facts cannot be ignored. In particular, the Court acknowledges that the applicant had political ambitions which admittedly went counter to the mainstream line of the administration, that the applicant, as a rich and influential man, could become a serious political player and was already supporting opposition parties, and that it was a State-owned company which benefited most from the dismantlement of the applicant's industrial empire.

258. On the other hand, any person in the applicant's position would be able to make similar allegations. In reality, it would have been impossible to prosecute a suspect with the applicant's profile without far-reaching political consequences. The fact that the suspect's political opponents or business competitors might directly or indirectly benefit from him being put in jail should not prevent the authorities from prosecuting such a person if there are serious charges against him. In other words, high political status does not grant immunity. The Court is persuaded that the charges against the applicant amounted to a "reasonable suspicion" within the meaning of Article 5 § 1 (c) of the Convention.

259. Nevertheless, the combination of the factors mentioned above have caused many people to believe that the applicant's prosecution was driven by the desire to remove him from the political scene and, at the same time, to appropriate his wealth. The applicant strongly relies on those opinions; in particular, he relies on resolutions of political institutions, NGOs, statements of various public figures, etc. The Court took note of those opinions. However, it must recall that political process and adjudicative process are fundamentally different. It is often much easier for a politician to take a stand than for a judge, since the judge must base his decision only on evidence in the legal sense.

260. Finally, the Court turns to the findings of several European courts in the proceedings involving former Yukos managers and Yukos assets. Those findings are probably the strongest argument in favour of the applicant's complaint under Article 18 of the Convention. However, the evidence and legal arguments before those courts might have been different from those in the case under examination. More importantly, assuming, that all courts had the same evidence and arguments before them, the Court reiterates that its own standard of proof applied in Article 18 cases is very high and may be different from those applied domestically. The Court admits that the applicant's case may raise a certain suspicion as to the real intent of the authorities, and that this state of suspicion might be sufficient for the domestic courts to refuse extradition, deny legal assistance, issue injunctions against the Russian Government, make pecuniary awards, etc.

However, it is not sufficient for this Court to conclude that the whole legal machinery of the respondent State in the present case was ab intio misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention. This is a very serious claim which requires an incontrovertible and direct proof. Such proof, in contrast to the Gusinskiy case, cited above, is absent from the case under examination.

261. In such circumstances the Court cannot find that Article 18 was breached in this case.

IX. APPLICATION OF ARTICLES 41 AND 46 OF THE CONVENTION

262. 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."

Article 46 of the Convention, insofar as relevant, provides:

"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

A. Damage

263. The applicant did not claim any pecuniary damage, although, in his words, his pecuniary losses due to his arrest and

subsequent criminal prosecution were very considerable. As to non-pecuniary damage, the applicant claimed EUR 10,000, which he characterised as a "deliberately modest" claim. The Government insisted that even such a claim was excessive and that, if the Court found any violation of the Convention, a simple finding of a violation would suffice.

264. The Court observes that it has found several violations of Articles 3 and 5 of the Convention in this case. Those violations caused the applicant certain stress and frustration, which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, it awards the applicant the amount claimed, i.e. EUR 10,000 under this head, plus any tax that may be chargeable.

B. Costs and Expenses

265. The applicant claimed EUR 14,543 under the head of costs and expenses incurred by the participation in the proceedings of one of his lawyers, Ms Moskalenko. The applicant submitted a copy of the agreement between the applicant's wife, Ms Khodorkovskaya, and Ms Moskalenko, concerning the representation of the applicant's interests before the European Court, as well as several receipts confirming payment to Ms Moskalenko of the sums due under the contract. The overall amount due from the applicant for the services of Ms Moskalenko was 500,000 Russian Roubles (which corresponded to EUR 14,543 at the time when the agreement was concluded).

266. The Government claimed that the costs claimed by the applicant were unsubstantiated.

267. Having regard to the documents submitted by the applicant, to the subject matter under the Convention, and to the procedure adopted before the Court in this case, the Court finds that the amount claimed by the applicant was both necessarily incurred and reasonable as to quantum. In such circumstances the Court considers it reasonable to award the applicant the whole amount claimed for the costs and expenses incurred by the applicant's legal representative, namely EUR 14,543, plus any tax that may be chargeable to the applicant.

C. Default interest

268. 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.

D. Specific individual measures

269. Referring to the Court's case-law under Article 46 of the Convention, the applicant finally asked the Court to indicate to the Russian Government certain specific individual measures, as the Court had done in several previous cases. In particular, he asked the Court to direct the Government to ensure that the applicant is not kept in a cage of any sort during subsequent proceedings and that international observers be allowed to visit him in prison, if needed, to investigate the conditions of his incarceration. The Government did not make any specific submissions in respect of this claim by the applicant.

270. The Court reiterates in this respect that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention. The Court will seek to indicate the type of measure that might be taken only exceptionally, for example to put an end to a systemic problem, as in Broniowski v. Poland [GC] (no. 31443/96, § 194, ECHR 2004-V), or to discontinue a continuous situation, as in Hasan and Eylem Zengin v. Turkey (no. 1448/04,

§ 84, ECHR 2007-XI; see also L. v. Lithuania, no. 27527/03, § 74, ECHR 2007-X). In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see Assanidze, referred to above; see also Abbasov v. Azerbaijan, no. 24271/05, §§ 35 et seq., 17 January 2008, and Aleksanyan v Russia, no. 46468/06, § 240, 22 December 2008). Finally, in some situations the Court indicated to the respondent Government how to remedy a violation found in the applicant's case, for example, by way of reopening of the proceedings which had been fundamentally unfair (see Maksimov v. Azerbaijan, no. 38228/05, § 46, 8 October 2009), or by transferring the applicant's pension rights to a specific pension fund (see Karanović v. Bosnia and Herzegovina, no. 39462/03, §§ 28 et seq., 20 November 2007).

271. Turning to the present case the Court considers that the applicant's request for specific measures does not belong to any of these categories. The applicant did not request the Court to indicate to the Government how past violations should be remedied but rather asked the Court to prevent future possible violations of the same kind. However, the Court's primary role is to examine facts, and not to make assumptions for the future, especially where those assumptions would depend on a multitude of factors and be, therefore, speculative. The Court considers that the circumstances of the present case are different from those of Broniowski, Hasan and Eylem Zengin or Aleksanyan, referred to above. The Court considers that in casu there is no need to indicate any specific measure under Article 46 of the Convention to the respondent Government other than the payment of the just satisfaction award. The determination of other measures, in pursuance to the substantive findings of the Court in this case, is therefore left to the discretion of the Committee of Ministers.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been no violation of Article 3 of the Convention in respect of conditions of the applicant's detention in remand prison IZ- 77/1 between 25 and 27 October 2003;

2. Holds that there has been no violation of Article 3 of the Convention in respect of the conditions of the applicant's detention in remand prison IZ-99/1 between 27 October 2003 and 8 August 2005;

3. Holds that there has been a violation of Article 3 of the Convention in respect of the conditions of the applicant's detention in remand prison IZ-77/1 between 8 August 2005 and 9 October 2005;

4. Holds that there has been a violation of Article 3 of the Convention in respect of the conditions in the courtroom before and during the trial;

5. Holds that there has been a violation of Article 5 § 1 (b) of the Convention in respect of the applicant's apprehension in Novosibirsk on 25 October 2003;

6. Holds that there has been no violation of Article 5 § 1 (c) of the Convention;

7. Holds that there has been a violation of Article 5 § 3 of the Convention in that the applicant's continuous detention was not justified by compelling reasons outweighing the presumption of liberty;

8. Holds that there has been no violation of Article 5 § 4 of the Convention on account of the procedure in which the detention was imposed on the applicant on 25 October 2003;

9. Holds that there has been a violation of Article 5 § 4 of the Convention on account of the procedure in which the applicant's detention was extended at the hearings of 22-23 December 2003;

10. Holds that there has been a violation of Article 5 § 4 of the Convention on account of the procedure in which the applicant's detention was extended on 20 May 2004;

11. Holds that there has been no violation of Article 5 § 4 of the Convention on account of the procedure in which the extension of the applicant's detention was confirmed on 8 June 2004;

12. Holds that there has been a violation of Article 5 § 4 of the Convention on account of the Meschanskiy District Court's refusal to consider the applicant's application for his release on 16 June 2004;

13. Holds that there has been no violation of Article 5 § 4 of the Convention on account of the speediness of review of the detention orders of 25 October and 23 December 2003;

14. Holds that there has been a violation of Article 5 § 4 of the Convention on account of the speediness of review of the detention order of 19 March 2004;

15. Holds that there has been no violation of Article 18 of the Convention;

16. Holds

(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 Russian Roubles at the rate applicable at the date of settlement:

(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 14,543 (fourteen thousand five hundred and forty-three euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(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;

17. Dismisses the applicant's request for indication of specific measures under Article 46 of the Convention;

ПРИЛОЖЕНИЕ №2

CASE OF MKHCHYAN v. RUSSIA

(Application no. 54700/12)

In the case of Mkhchyan v. Russia,

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

Luis López Guerra, *President,*
Helena Jäderblom,
Helen Keller,
Dmitry Dedov,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*

and Stephen Phillips, *Section Registrar,*

Having deliberated in private on 17 January 2017,

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

PROCEDURE

1. The case originated in an application (no. 54700/12) 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 Sergey Tatevosovich Mkhchyan ("the applicant"), on 6 August 2012.

2. The applicant was represented by Mr E. Markov, a lawyer practising in Strasbourg. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights.

3. The applicant alleged, in particular, a violation of Article 1 of Protocol No. 1 to the Convention.

4. On 1 December 2014 the above complaint was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1933 and lives in Moscow.

6. On 15 March 1994 the Russian Ministry of Railways ("the MPS") approved the construction of garages alongside the Oktyabrskaya railway in Moscow. The decision read as follows:

> "Taking into consideration that the garages on [a 1.3 km] stretch of the Oktyabrskaya railway must carry out the function of a noise shield, the Moscow testing section of the Oktyabrskaya railway of the Ministry of Railways approves the construction of garages 5.5 metres away from the outer rail, on the following conditions:
>
> 1. the garages shall be built alongside the railway using reinforced concrete, in a line;
> 2. the construction of the garages shall be in strict compliance with technical safety rules for construction works in a railway zone;
> 3. 10% of the garages shall be allocated to railway employees as compensation for the use of railway territory."

7. On 14 April 1994 the Main Directorate for Architecture and Planning of the Architecture and Urban Development Committee of the Government of Moscow *(Главное архитектурно-планировочное управление комитета по архитектуре и градостроительству г. Москвы)* (hereinafter "the Moscow architecture and planning directorate") issued a town-planning assignment *(градостроительное заключение)* for the design and construction of garages alongside the Oktyabrskaya railway. The document mentioned, in particular, that the land on which the garages were to be built belonged to the City of Moscow *(Горземфонд)* and that the garages were intended to serve as a noise shield along the railway line.

8. On 31 October 1994 the local administration *(Управление муниципального округа "Марфино" Северо-Восточного административного округа Правительства Москвы)* confirmed that they had no objections to assigning the land in question for the construction of garages by garage-building cooperative "Kashenkin Lug" (garage owners' partnership, "the GSK"), in accordance with the town-planning assignment.

9. On 3 December 1994 the applicant joined the GSK and paid his share for a garage (6,500 United States dollars (USD) at the material time).

10. The garages were constructed accordingly, and on 30 December 1996 the local administration's inspection board certified that one-storeyed capital (immovable) garages built by the GSK were ready for use. On 31 December 1996 the prefect of the local administration gave his approval.

11. Garage no. 169 was allotted to the applicant. The local administration issued him with a certificate attesting to his possession of the said garage as from 3 December 1994 *(свидетельство о владении гаражным боксом)*. The applicant, however, never had his property rights to the garage registered in the real estate register.

12. On 13 January 2000 Moscow Land Committee concluded a lease agreement with the GSK in respect of the land occupied by the garages. The lease provided that the land plot was allocated for further use of 324 garage boxes and 86 open parking spaces situated on it. That lease agreement remained in force until 31 August 2004.

13. On 3 March 2003 the Federal State unitary enterprise "Oktyabrskaya Railway of the MPS" ("the Oktyabrskaya Railway of the MPS") concluded a lease agreement with the GSK in respect of the land occupied by the garages. Under the agreement the lease was valid until 28 February 2004. The parties subsequently extended the validity of the agreement on three occasions: until 28 July, 30 September and 31 December 2004 respectively. Thereafter they tacitly renewed the agreement for an indefinite duration. The GSK continued to pay the rent due under the lease until 31 July 2007.

14. Under clause 1.3 of the lease agreement, the land plot was allocated for placement of garage boxes. Clause 2.2.5 of the agreement proscribed the construction of permanent structures on the land and provided that temporary structures could be built only upon written approval by the Oktyabrskaya Railway of the MPS. Clause 2.2.10 stipulated that at the end of the lease, all temporary structures were to be removed. Clause 5.2 provided that the lease could be terminated unilaterally in the event of breach of the terms of the lease agreement by the GSK or failure to pay the lease for two months, and in the event that the land in question was required for the purposes of the railway, with one month's prior notice. Clause 6.2 stipulated that the GSK had no right to modify federal ownership of railway rights of way.

15. In the meantime, on 18 September 2003 the Russian Government decided to establish an open joint stock company called "Russian Railways" ("the RZD"), to succeed the MPS.

16. On 5 March 2008 the Federal Agency for State Property Management responsible for Moscow signed a lease agreement with the RZD in respect of the plot of land on which the garages were situated.

17. On 14 July 2010 the RZD notified the GSK of the unilateral termination of the lease agreement, with reference to a need that had arisen to use the land in question for the purposes of the railway. The RZD invited the GSK to vacate the plot by 20 August 2010.

18. The GSK refused to do so and provided the RZD with a list of its members, from which it transpired that the applicant was the owner of garage no. 169.

19. On 25 April 2011 the RZD notified the applicant of the necessity to vacate the garage. The applicant refused to comply.

20. On 27 September 2011 the RZD brought court proceedings against the applicant seeking the removal of garage no. 169 from the plot in question.

21. On 21 November 2011 the Ostankinskiy District Court of Moscow ("the District Court") granted the above claim and ordered the applicant to remove the garage within ten days of the judgment becoming final. The District Court further authorised the RZD to remove the garage on their own if the applicant failed to comply with the court's decision. The District Court held as follows:

"It follows from the case-file material that on 3 March 2003 the Federal State unitary enterprise "Oktyabrskaya Railway of the MPS" and the GSK signed a lease agreement in respect of a plot of land situated within a railway right of way [*полоса отвода железной дороги*] for the purposes of reimbursement of its maintenance costs, valid until 28 February 2004, which was subsequently extended on the basis of additional agreements. Pursuant to clause 1.3 of the above lease agreement the land was allocated for the construction of garage boxes. The construction of permanent structures on the land was prohibited (clause 2.2.5). At present the lease agreement has been terminated, which is confirmed by notifications of 14 July and 26 August 2010 on the unilateral termination of the lease agreement with reference to the necessity to use the plot in question for the purposes of the railway.

The case file contains a certificate provided by the plaintiff to the effect that the GSK had [paid rent under the lease] until 31 July 2007, and that since then no payments had been made for the use of the plot of land.

The procedure for the use of land plots classified as federal property is determined by the Government of the Russian Federation in accordance with section 9 of Federal Law no. 17-FZ of 10 January 2003 on the Railway System in the Russian Federation.

Government Resolution no. 264 of 29 April 2006 stipulates that the use of land classified as federal property and provided to the RZD must be based on a land lease agreement between the Federal Agency for State Property Management (its territorial body) and the RZD.

Pursuant to Federal Law no. 17-FZ of 10 January 2003 on the Railway System in the Russian Federation, railway land is land used or intended for maintaining the activities of rail transport organisations and/or for buildings, constructions, structures and other rail transport facilities, including plots of land situated within railway rights of way and safety areas.

Plots of land adjacent to railway tracks or intended for the placement of such tracks are classified as railway rights of way, as is land occupied by or intended for the placement of railway terminals, water drainage and protective facilities along railway tracks, communication lines, electric power supply facilities, production and other buildings, constructions, structures, equipment and other rail transport facilities.

The plot of land with cadastral number 77:02:21017:032 is intended for the operation and development of the railways, [it] is situated within a railway right of way ...

Before the lease agreement in respect of the railway right of way [between the RZD and the Russian Federation] was signed, the plot of land with cadastral number 77:02:21017:032 was classified as rail transport land in accordance with the Transport Land Act approved by decision no. 24 of the Council of Ministers of the Union of Soviet Socialist Republics of 8 January 1981; decision no. 3020-1 of the Supreme Soviet of the Russian Federation of 27 December 1991 on the division of State property in the Russian Federation; and Federal Law no. 153-FZ of 25 March 1995 on the Federal Railway System.

MPS decree no. 26 "Ts" of 15 May 1999 approved the procedure for the use of federal railway land within railway rights of way.

In accordance with this procedure, the size of a right of way is determined in accordance with standards and rules for the design of railway rights of way, approved by the MPS, as well as with design and budget documentation and general schemes for the development and reconstruction of federal rail transport facilities and stations.

The revision of the borders and size of rights of way, the withdrawal of temporarily unused plots of land and their reclassification from one category to another is carried out by the competent authorities with the agreement of the railways, pursuant to the legislation of the Russian Federation.

...

The court has established that on part of the plot of land with cadastral number 77:02:21017:032 in the right of way of the Oktyabrskaya railway ... there are garages, including garage no. 169. ...

No information has been provided from the Consolidated State Register of Real Estate Titles and Transactions in respect of the garage. No documents have been provided by the defendant or the GSK confirming their right to use the land underneath the garage either.

The RZD is the user of the plot of land in question. By virtue of Article 305 of the Civil Code of the Russian Federation it is entitled to seek the elimination of violations of its rights, namely the removal of the [applicant's] garage from the plot.

...

To support his assertion about the lawfulness of his possession of the disputed garage, the defendant submitted to the court a certificate issued by the GSK confirming that he had paid in full his share for the garage. Also, at the request of the defendant the court joined to the case file the following evidence: a copy of the act certifying that the garages were ready for use; notification from the federal service for State registration, inventory and cartography responsible for Moscow about the absence of any information in the Consolidated State Register of Real Estate Titles and Transactions about the disputed plot; the approval by the prefect of [the local administration] of the inspection certificate issued in respect of the garages; correspondence from the Moscow section of the Oktyabrskaya railway of 25 November 1993 on the approval of the construction of the garages within the railway right of way; the town-planning assignment issued by the Moscow architecture and planning directorate on 13 April 1994; the decision of the federal service for State registration, inventory and cartography of 27 April 2011 refusing to issue a cadastral certificate for the disputed plot.

However, these documents do not prove that the applicant acquired property rights in respect of the garage, nor do they prove the lawfulness of the use of the land underneath it. The defendant's garage [is] an unauthorised construction because it was built on a plot of land that was not allocated for that purpose in accordance with the procedure provided for by law and in the absence of permission issued by a competent authority, whereas a railway right of way can be used exclusively for the construction of rail transport facilities. The [documents provided by the defendant] do not prove that the garage was not an unauthorised construction, because the construction was carried out on land within a railway right of way and therefore was not intended for the building of garages. The approval by the prefect of the local administration of the inspection certificate does not confirm the existence of permission by the federal authorities to use the plot of land in question for building garages, regard being had [to the fact] that the owner of the plot is the Russian Federation and not the City of Moscow.

The management of land owned by the State, including giving permission for construction of immovable property, can be done only by the competent federal authority.

A garage for parking a car by an individual is not a rail transport facility, therefore a plot of land within a railway right of way cannot be considered to be intended for the construction of such a garage (garages).

Besides, the defendant has failed to submit evidence to the effect that the competent federal authority issued an administrative act on the transfer of a part of the land situated within a railway right of way to the defendant. It therefore follows that the plot of land was not provided to the defendant by the owner, and therefore at the present time the defendant has no legal grounds to use federal property.

...

The applicant would have acquired title to garage no. 169 had it not been an unauthorised construction.

...

Having assessed all the evidence in the case, taking into consideration [the fact] that the defendant did not acquire property rights in respect of the plot of land classified as federal property and located within a railway right of way, on which the disputed garage is situated, that the plot was provided for temporary use, and that it is being used at the present time without any contractual basis, the court comes to the conclusion that the rights of the RZD have been violated in that the plaintiff is prevented from using the land in accordance with its intended purpose. The court therefore considers that there are lawful grounds for granting the plaintiff's claim for removal of garage no. 169 from the plot of land with cadastral number 77:02:21017:032 ..."

22. The applicant appealed. He claimed, in particular, that he was entitled to compensation.

23. On 10 February 2012 the Moscow City Court upheld the above judgment on appeal. The City Court held that the law did not provide for the possibility of claiming compensation for the demolition of an unauthorised construction.

24. On 3 April 2012 the Ostankinskiy District bailiffs' service in Moscow instituted enforcement proceedings. The applicant was notified on 12 April 2012.

25. As the applicant refused to comply voluntarily with the judgment of 21 November 2011, as upheld on appeal on 10 February 2012, the RZD proceeded to demolish his garage.

26. On 13 June 2012 the Ostankinskiy District bailiffs' service was informed accordingly.

27. On 19 June 2012 the enforcement proceedings were terminated.

28. According to the Government, in August 2013 the construction of the fourth main track of the Oktyabrskaya railway between Moscow and Khimki was completed on the land previously occupied by the garages of the GSK and was opened for circulation of the suburban electric train. In December 2014 noise-reduction barriers were installed along the Oktyabrskaya railway line in the area of the Marfino residential district.

II. RELEVANT DOMESTIC LAW

A. Rail transport land

29. For the relevant domestic law, see paragraph 21 above.

B. Review of judgments delivered by the courts of first instance

30. For the relevant provisions of domestic law as from 1 January 2012, see *Abramyan and Others v. Russia* ((dec.), nos. 38951/13 and 59611/13, §§ 29-45, 12 May 2015).

C. Grounds for acquiring property rights

31. Under Article 218 § 4 of the Civil Code a member of a housing construction cooperative, garage cooperative or any other consumer cooperative who has paid in full his or her share for a flat, garage or any other premises provided to him or her by the cooperative, acquires property rights on the said property.

D. Unauthorised construction

32. Under Article 222 §§ 1 and 2 of the Civil Code, as in force at the material time, an unauthorised construction was a house, building, other construction or other immovable property built on a plot of land not allocated for that purpose under the law, or without the requisite permission, or with substantial violations of town-planning and building norms and rules. Anyone who had built an unauthorised construction could not acquire ownership rights in respect of it and thus had no right to sell, donate, lease or enter into any other agreements in respect of the construction. The unauthorised construction had to be demolished by the person who had built it, or at his or her expense, with the exception of cases stipulated by paragraph 3 of the present Article.

33. Under Article 222 § 3 of the Civil Code, as in force at the material time, the right of ownership of an unauthorised construction may be recognised by the court in respect of a person who has inherited life-long possession or the right of permanent use of the plot of land on which the unauthorised construction has been built. In such a case, the person in respect of whom the court recognised his or her ownership of an unauthorised construction shall reimburse the person who has built it all the relevant expenses in an amount to be determined by the court. The right to own an unauthorised construction cannot be recognised if keeping the unauthorised construction infringes the rights and lawful interests of other persons or creates a threat to the life and health of others.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

34. The applicant complained that he had been deprived of his property in circumstances which were incompatible with the requirements of Article 1 of Protocol No. 1 to the Convention, which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

A. Admissibility

1. Exhaustion of domestic remedies

35. The Government submitted that the applicant had failed to exhaust domestic remedies by not having had recourse to the cassation and supervisory-review procedures provided for by domestic law as from 1 January 2012.

36. The applicant argued that the remedy suggested by the Government could not be considered effective.

37. The rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against a State to use first the remedies provided for by the national legal system, thus allowing States the opportunity to put matters right through their own legal systems before being required to answer for their acts before an international body. In order to comply with the rule, applicants should normally use remedies which are available and sufficient to afford redress in respect of the breaches alleged (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

38. In the context of Russia, the Court has consistently held that the final judicial remedy to be exhausted prior to lodging an application with the Court was an appeal to a regional court, and that applicants were not required to submit their cases for re-examination by higher courts by way of a supervisory review procedure, which constituted an extraordinary remedy (see *Tumilovich v. Russia* (dec.), no. 47033/99, 22 June 1999; *Denisov v. Russia* (dec.), no. 33408/03, 6 May 2004; and *Martynets v. Russia* (dec.), no. 29612/09, 5 November 2009). It was not until very recently that, following the legislative amendments reforming the Russian civil procedure with effect from 1 January 2012, the Court held that the new cassation procedure was no longer affected by the previously existing uncertainty, and that any individual who intended to lodge an application in respect of a violation of his or her Convention rights should first use the remedies offered by the new cassation procedure (see *Abramyan and Others v. Russia* (dec.), nos. 38951/13 and 59611/13, §§ 76-96, 12 May 2015). By contrast, the Court affirmed its consistent approach to the supervisory-review procedure, which it does not consider an effective remedy to be exhausted (ibid., § 102).

39. It is observed, however, that the issue of whether domestic remedies have been exhausted is normally determined by reference to the date on which the application was lodged with the Court (see *Shalya v. Russia*, no. 27335/13, § 16, 13 November 2014, and *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V (extracts)). In cases where the effectiveness of a given remedy was recognised in the Court's case-law after the introduction of an application, the Court deemed it disproportionate to require the applicants to turn to that remedy for redress a long time after they had lodged their applications with the Court, especially after the time-limit for using that remedy had expired (see *Ridić and Others v. Serbia*, nos. 53736/08, 53737/08, 14271/11, 17124/11, 24452/11 and 36515/11, § 72, 1 July 2014, and *Pikić v. Croatia*, no. 16552/02, §§ 29-33, 18 January

2005; and contrast with *Nogolica v. Croatia* (dec.), no. 77784/01, ECHR 2002-VIII, in which the applicant could still avail himself of a new remedy).

40. In the present case, the applicant lodged his application with the Court on 6 August 2012, that is, before the Court recognised the cassation appeal procedure as an effective remedy. Moreover, the Government have not alleged that at the time of the events under consideration, there was relevant domestic case-law allowing the applicant to realise that the new remedy met the requirements of Article 35 § 1 of the Convention and to anticipate the new exhaustion requirement, rather than following the approach applied by the Court until very recently (see paragraph 38 above). In such circumstances, the Court considers that the applicant was not required to pursue that procedure prior to lodging his application with it. Moreover, it notes that the applicant can no longer avail himself of the remedy in question, as the time-limit for using it has expired.

41. Accordingly, the Court rejects the Government's objection as to non-exhaustion of domestic remedies (see *Novruk and Others v. Russia*, nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, §§ 70-76, 15 March 2016, and *Kocherov and Sergeyeva v. Russia*, no. 16899/13, §§ 64-69, 29 March 2016).

2. Compatibility ratione materiae

42. The Government further submitted that the garage in question had not constituted the applicant's "possession" for the purposes of Article 1 of Protocol No. 1 to the Convention and therefore his complaint was incompatible *ratione materiae* with the provisions of the Convention.

43. The applicant disagreed with the Government.

44. The Court considers that the Government's objection is closely linked to the merits of the applicant's complaint. It will therefore deal with the objection in its examination of the merits below (see *Ivanova and Cherkezov v. Bulgaria*, no. 46577/15, § 67, 21 April 2016).

3. Conclusion as to admissibility

45. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

46. The Government submitted that the plot of land on which the applicant's garage had been built belonged to the category of land intended for operation and development of the railways and was federal property. The domestic court established that the RZD had been the user (lessee) of the land in question and had therefore been entitled to bring a claim before the courts for the protection of its rights. The garage in question was an unauthorised construction, as it had been built on land that was not allotted for that purpose, in breach of the relevant legislation and in the absence of a construction permit issued by a competent body. In particular, the land in question could only be used for construction related to the railway system, which did not apply to the applicant's garage. Furthermore, permission for the construction of immovable property could only be given by the competent federal authorities.

47. The applicant did not qualify as a person in respect of whom the court could recognise his ownership of the garage under Article 222 § 3 of the Civil Code (see paragraph 32 above). As such, the applicant's arguments regarding the length of time he had owned the garage were irrelevant. Having paid his share in full, the applicant would have become the owner of garage no. 169 had it not been constructed without authorisation.

48. The applicant failed to prove that he had acquired property rights in respect of the garage: his ownership of the garage was never entered in the Consolidated State Register of Real Estate Titles and Transactions (*Единый государственный реестр прав на недвижимое имущество и сделок с ним*), nor was it acknowledged by the domestic courts. No proof was provided by the applicant to the effect that the use of the land on which the garage stood had been lawful, namely that the plot of land at issue had been assigned for the construction of immovable property.

49. In the light of the foregoing, the Government argued that the applicant had not had a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention.

50. The Government further submitted that the interference with the applicant's right to the peaceful enjoyment of his possessions, in the form of control of use, had been lawful since the plot of land in question was federal property. The applicant's garage situated on it was found, for the reasons outlined above, to be an unauthorised construction, and the legal consequences outlined in the domestic law for unauthorised constructions had been applied by the domestic courts. The documents provided by the applicant in support of his application (see paragraphs 7, 8 and 10 above) were incapable of disproving that garage no. 169 had been constructed without authorisation. The fact that the local administration had certified the garage as ready for use did not confirm the existence of permission by the competent federal authorities to use the plot of land in question for the construction of garages. Such permission had been required given that the owner of the plot was the Russian Federation and not the City of Moscow.

51. The Government further submitted that not only had the interference been lawful, but it had also pursued a legitimate aim in the public interest – the need to use the land on which the applicant's garage stood for the purposes of the railway – and had not imposed an excessive individual burden on the applicant. In the latter respect, the Government submitted that the legal nature of the plot of land in question had been clearly defined in the lease agreement, which explicitly prohibited the construction of permanent structures on the land in question (clause 2.2.5) and stated that on termination of the lease all temporary structures were to be removed (clause 2.2.10). Therefore, taking into account the fact that the applicant's garage was located within a railway right of way and the explicit prohibition on constructing permanent structures on such land, there were no grounds to doubt that the applicant knew that the land belonged to the State. He must also have known that he had no right to acquire title to immovable property built on that land in disregard of the explicit prohibition on doing so. If the applicant was unaware of that, it was as a result of his own carelessness. Moreover, since 31 July 2007 the GSK had been breaching its obligation under the lease agreement to pay maintenance costs for the land occupied by the garages. The applicant should therefore have foreseen all the legal consequences and could not be considered as having suffered an excessive individual burden.

(b) The applicant

52. The applicant submitted that his garage had been lawfully built and certified as ready to use by the local administration in 1996, in accordance with the procedure which existed at the material time. Having paid his share for the garage, the applicant had become its owner. Since then he had been using his garage and paying all the necessary maintenance fees.

53. The applicant argued that the ban on the construction of permanent structures on the plot of land at issue contained in the 2003 lease agreement could not be applied to him, since his garage had already been constructed on that land in 1996.

54. The applicant further argued that the garage constituted his "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention. His title to the garage and the existence of the required permits for its construction were confirmed by several documents: (i) the approval of the construction of garages alongside the Oktyabrskaya railway in Moscow issued in March 1994 by the Moscow testing section of the Ministry of Railways' Oktyabrskaya railway; (ii) the town-planning assignment issued by the Moscow architecture and planning directorate in April 1994; (iii) the approval of the assignment of the land in question for the construction of garages, in accordance with the town-planning assignment by the garage-building cooperative, "Kashenkin Lug" issued by the local administration in October 1994; (iv) the inspection board's certification that the garage was ready for use issued in December 1996; (v) the certificate confirming that the applicant had paid in full his share for the garage in December 1994; and (v) the certificate of possession of garage no. 169 issued by the local administration, mentioning 3 December 1994 as the date on which he had acquired the garage. As to the absence of registration of the applicant's title to the garage in the State register, the applicant submitted that the requirement of mandatory State registration appeared later, after the State Registration of Real Estate Titles and Transactions Act (Federal Law no. 122-FZ of 21 July 1997) had entered into force.

55. In so far as the Government argued that the plot of land on which the garage had been built had been federal property and therefore any construction on it required authorisation by the competent federal authorities, the applicant submitted that it had not been his task but that of the State and local authorities to establish the right owner. Even assuming that the domestic authorities which had approved the building of the garages on the land at issue had breached the applicable procedures, it should not have been for the applicant to bear the responsibility. He had had no reason to suspect any non-conformity with the legal requirements, since the acquisition of title to a garage through the buying of a share in a garage-building cooperative had been common practice at the material time. The applicant therefore claimed that he had been a *bone fide* purchaser. He concluded that even assuming that his title to the garage might be put into question, there was no doubt that he had at least a substantive proprietary interest in continuing to use his garage, which qualified as a "possession" for the purpose of Article 1 of Protocol No. 1 to the Convention.

56. The applicant further disagreed with the Government that the interference with his right to the peaceful enjoyment of his possessions had been in the form of control of use. He submitted that the interference had rather been in the form of deprivation of possessions.

57. As regards the existence of a public interest behind the interference, the applicant submitted that the Government had failed to provide evidence of the construction of the fourth main track of the Oktyabrskaya railway between Moscow and Khimki and noise-reduction barriers on the land previously occupied by the garages of the GSK. They had therefore failed to show that the applicant's garage could not have been left untouched during those works. In the absence of such proof, the applicant considered that there had been no public interest at stake.

58. The applicant further claimed that the interference had not been in accordance with the law. The garage had not been an unauthorised construction and therefore the legal circumstances outlined in the domestic law for such a construction could not have been applied in his case. The garage had been constructed with the consent of the Ministry of Railways (a federal authority) and with all the necessary permits issued by the local authorities; the construction had complied with existing building standards and had not violated anyone's rights; whether the applicant had legal title to the garage was dependent not on State registration but on the fact that he had paid his share in the GSK in accordance with the law applicable at the material time. In any event, the interference had not been foreseeable on the basis of the law in force at the time he had acquired the garage.

59. Lastly, the applicant claimed that the interference with his right under Article 1 of Protocol No. 1 to the Convention had imposed on him an excessive individual burden. Apart from the inconvenience caused by the interference to his daily life, he had not been compensated for the price he had paid for the garage. The domestic courts had dismissed his arguments and disregarded the documents related to the construction and acquisition of the garage. They had also dismissed his claims that he was a *bona fide* owner of the garage, without providing comprehensible reasons.

2. The Court's assessment

(a) The existence of a "possession"

(i) General principles

60. The Court reiterates that the concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 to the Convention has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II; *Öneryıldız v. Turkey* [GC], no. 48939/99, § 124, ECHR 2004-XII; and *Depalle v. France* [GC], no. 34044/02, § 62, ECHR 2010).

61. The concept of "possessions" is not limited to "existing possessions" but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and legitimate expectation of obtaining effective enjoyment of a property right. A legitimate expectation of being able to continue having peaceful enjoyment of a possession must have a "sufficient basis in national law" (see *Depalle,* cited above, § 63).

62. The fact that the domestic laws of a State do not recognise a particular interest as a "right" or even a "property right" does not necessarily prevent the interest in question, in some circumstances, from being regarded as a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention (see *Depalle,* cited above, § 68).

(ii) Application of the general principles in the present case

63. The Court observes that in the present case the applicant joined the GSK in December 1994 and paid his share for a garage in the amount of USD 6,500. Once the local administration had certified that the garages were ready for use in December 1996, the applicant was allotted garage no. 169, in respect of which the local administration issued him with a certificate attesting to his possession of the said garage. In November 2011 the District Court found that the applicant had not acquired property rights in respect of the garage because it had been constructed on land intended exclusively for the purposes of the railway system and without a permit issued by a competent federal authority. However, at the very least, the applicant became a member of the GSK co-operative and had been issued with a certificate that he "possessed" the garage in question. In the Court's view, the applicant in the present case enjoyed at least a long-standing right of use amounting to "possessions" for the purposes of Article 1 of Protocol No. 1 to the Convention (for a case in which a "right of use" amounted to a possession, see *Chiragov and Others v. Armenia* [GC], no. 13216/05, §§ 144-49, ECHR 2015; for cases in which long-term occupation amounted to a possession, see *Hamer v. Belgium*, no. 21861/03, § 76, ECHR 2007-V (extracts), and *Depalle*, cited above, § 68; see also *Öneryıldız,* cited above, §§ 124-29).

64. Accordingly, the Court rejects the Government's objection as to the applicability of Article 1 of Protocol No. 1 to the Convention.

(b) Compliance with Article 1 of Protocol No. 1 to the Convention

(i) General principles

65. The Court reiterates that, according to its case-law, Article 1 of Protocol No. 1 to the Convention, which guarantees in substance the right of property, comprises three distinct rules: the first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule (see *Depalle*, cited above, § 77, with further references).

66. In order to be compatible with the general rule of Article 1 of Protocol No. 1 to the Convention, an interference must comply with the principle of lawfulness and pursue a legitimate aim by means reasonably proportionate to the aim sought to be achieved (see, among other authorities, *Beyeler v. Italy* [GC], no. 33202/96, §§ 108-14, ECHR 2000-I).

67. An interference with the peaceful enjoyment of possessions must therefore strike a fair balance between the general interests of the community and the individual's rights. This means that a measure must be both appropriate for achieving its aim and not disproportionate to that aim. The requisite balance will be upset if the person concerned has had to bear "an individual and excessive burden" (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98). However, the High Contracting Parties enjoy a margin of appreciation in this respect, in particular in choosing the means of enforcement and in ascertaining whether the consequences of enforcement would be justified. When it comes to the implementation of their spatial planning and property development policies, this margin is wide (see *Ivanova and Cherkezov*, cited above, § 73, with further references).

68. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference, and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 to the Convention only in exceptional

circumstances (see *Nastou v. Greece (no. 2)*, no. 16163/02, § 33, 15 July 2005; *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 111, ECHR 2005-VI; and *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A).

(ii) Application of the general principles in the present case

69. The Court observes that on 21 November 2011 the District Court found the applicant's garage to be an unauthorised construction and obliged him to remove it from the plot of land on which it had been built within ten days of the judgment's becoming final. The District Court further authorised the RZD to proceed with the removal of the garage if the applicant failed to comply with the judgment voluntarily. Consequently, the applicant's garage was demolished. This constituted an interference with his "possession".

70. The Court notes that the parties have diverging views on whether the interference in question amounted to a deprivation of a possession within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1 to the Convention, or control of the use of property in accordance with the general interest within the meaning of the second paragraph of that Article. The Court considers that, being meant to ensure compliance with the general rules concerning the prohibition on any construction not related to the railway system on railway rights of way, the interference amounted to "control [of] the use of property" (see *Saliba v. Malta*, no. 4251/02, § 35, 8 November 2005; *Hamer*, cited above, § 77; and *Ivanova and Cherkezov*, cited above, § 69). It therefore falls to be examined under the second paragraph of Article 1 of Protocol No. 1.

71. As regards the lawfulness of the interference, the Court, considering that its power to review compliance with domestic law is limited (see *Stolyarova v. Russia*, no. 15711/13, § 45, 29 January 2015, and *Allan Jacobsson v. Sweden (no. 1)*, 25 October 1989, § 57, Series A no. 163), sees no reason to doubt that the interference complained of was in accordance with Russian law since it had a clear basis in Article 222 of the Civil Code. Under that provision, anyone who has erected an unauthorised construction may not acquire ownership rights in respect of it and is obliged to demolish it (see paragraph 32 above). Nothing shows that this provision has been interpreted or applied by the domestic courts in an arbitrary manner. The Court therefore concludes that the measure complained of satisfied the requirement of lawfulness within the meaning of Article 1 of Protocol No. 1 to the Convention.

72. The Court observes that the demolition order was aimed at re-establishing the rule of law by removing the unauthorised construction from the land situated within a railway right of way, in view of a necessity that had arisen to use the land for railway purposes (see paragraphs 17 and 21 above). The Court notes in this connection that, according to the Government, in August 2013 the construction of the fourth main track of the Oktyabrskaya railway between Moscow and Khimki was completed on the land previously occupied by the garages of the GSK and was opened for circulation of the suburban electric train; and that in December 2014 noise-reduction barriers were installed along the Oktyabrskaya railway line in the area of the Marfino residential district (see paragraph 28 above). In the absence of any evidence to the contrary, the Court finds that the measure complained of pursued a legitimate aim which corresponded to the general interests of the community, as envisaged in Article 1 of Protocol No. 1 to the Convention.

73. It remains to be determined whether the benefit for proper town and country planning and development and ensuring that no structures that were not related to the railway system were located within railway rights of way can be considered proportionate to the inconvenience caused to the applicant by the removal of his garage.

74. The Court observes that in March 2003 the GSK concluded a lease agreement with the Oktyabrskaya Railway of the MPS in respect of the land occupied by the garages. The terms of the agreement contained an explicit prohibition on construction of any permanent structures on the land plot in question and stipulated that at the end of the lease all temporary structures were to be removed. They further provided for the possibility of terminating the lease unilaterally in the event that the land in question was required for the purposes of the railway, with one month's prior notice, and impossibility for the GSK to modify federal ownership of railway rights of way (see paragraphs 13-14 above).

75. The Court considers that, as the applicant was a member of the GSK partnership, he must have been aware of the above lease agreement, and it was not unreasonable for the domestic authorities to assume that he was bound by its terms, which were very clear about the land plot in question being federal property, the temporary nature of the structures allowed on it and the consequences of termination of the lease agreement.

76. In such circumstances, and being also mindful of the fact that no payments were made in accordance with the above lease agreement by the GSK from July 2007, and that the applicant did not have property title to the garage as he never had it registered in the real estate register, the Court considers that the applicant cannot be said to have borne an individual and excessive burden as a result of the removal of his garage without compensation. The Court also observes that the sum that the applicant invested in the GSK allowed him to enjoy the use of the garage for the period of fifteen years. The Court considers therefore that in the particular circumstances of the present case the benefit for proper town and country planning and development and ensuring that no structures that were not related to the railway system were located within railway rights of way can be considered proportionate to the inconvenience caused to the applicant by the removal of his garage.

77. There has accordingly been no violation of Article 1 of Protocol No. 1 to the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the Government's objection as to the applicability to the applicant's complaint of Article 1 of Protocol No. 1 to the Convention and *rejects* it;

2. *Declares* the complaint under Article 1 of Protocol No. 1 to the Convention admissible;

3. *Holds* that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 7 February 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips — Registrar

Luis López Guerra — President