

C. INDEPENDENCE AND IMPARTIALITY OF THE COURT

Question 6. Was the court in the applicants' second case "independent and impartial", as required by Article 6 § 1 of the Convention? The Government are invited to comment, in particular, on the applicants' allegation that Judge Danilkin did not write the judgment himself but received the text from the Moscow City Court. Was any sort of inquiry conducted into the statements made by Ms Vassilyeva and others to the press, and, if so, what exactly has been done to verify the truthfulness or otherwise of those allegations? More generally, is there any obligation on the State under the Convention to refute such allegations and, if so, what does that obligation consist of?

SUMMARY OF THE GOVERNMENT'S RESPONSE

C1. The Government state that the allegations made by Ms Vassilyeva and others were adequately investigated (paragraphs 54-55). They argue that Article 6 § 1 requires a court to be independent in the sense of being independent of the executive and from the parties to the proceedings (paragraph 56 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

C2. The applicants accept that the authorities to a certain extent verified the statements made by Ms Vassilyeva and other individuals. However, the verification did not cover a significant number of arguments made by the defence in its statement to the Investigative Committee.¹ In addition, the Court is respectfully reminded that the applicants' case in this regard was not based on Ms Vassilyeva's allegations. The applicants asked the Court to consider a whole series of matters which went to the trial court's lack of impartiality – see in particular paragraphs 302–308 of the November 2011 Memorial.

C3. In summary:

(a) The judge refused to ensure that the prosecution experts were called to be cross-examined;

¹ See Report of a Crime under RF CPC Article 141 filed by the applicants' lawyers, at Volume C, tab C228, of the November 2011 Memorial.

- (b) The judge refused the defence permission to rely on expert (and specialists') evidence;
 - (c) The judge refused to add exculpatory material to the case file;
 - (d) The judge refused to exclude inadmissible evidence;
 - (e) The judge refused defence motions for relevant disclosure to be made;
 - (f) The verdict contains numerous incorrect and false information, all identified and analysed in detail during the trial, which confirms the lack of impartiality of the court (see further paragraph 306 of the November 2011 Memorial); and
 - (g) The overall effect was, as the International Bar Association concluded (on the basis of its trial observers' daily reports from the trial), the impression of the court "*greatly favouring the prosecution.*"²
- C4. Furthermore, the Government's argument that the applicants' complaint is inadmissible as Article 6 § 1 of the Convention refers to a court's independence from the executive and from the parties to the proceedings is misconceived.
- C5. The Grand Chamber made clear in *Kyprianou v. Cyprus* no. 73797/01 § 121 ECHR 2005-XIII that the case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature: where the judge's personal conduct is not at all impugned. The second is of a personal character and derives from the conduct of the judges in a given case.
- C6. Impartiality, within the meaning of Article 6 § 1 of the Convention, normally denotes the absence of prejudice or bias. There are two tests for assessing whether a tribunal is impartial: the first consists of seeking to determine a particular judge's personal conviction or interest in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, for

² See page 35 of *International Bar Association Human Rights Institute*, 'The Khodorkovsky Trial', September 2011, at Volume C, tab C237, of the November 2011 Memorial.

example, *Gautrin and Others v. France*, 20 May 1998, § 58, Reports 1998-III; *Daktaras v. Lithuania*, no. 42095/98, § 30, ECHR 2000-X; *Kyprianou v. Cyprus*, § 118, and *Schwarzenberger v. Germany*, no.75737/01, 10 August, 2006, §§ 38-40).

- C7. In applying the second test the Court has often observed that “*even appearances may be of a certain importance*”, although the standpoint of the accused is not decisive, and what is determinative is whether the fear of partiality may be held to be objectively justified (see *Sutyagin v. Russia*, no. 30024/02, 3 May 2011, § 182). In that regard the Court is asked to pay regard to the unequivocal and thoroughly argued views of the applicants that the trial judge was not impartial. Recognising that their views are not decisive, the Court is asked to pay particular regard to the conclusions of the trial observer from the International Bar Association (who attended the trial every day) and whose conclusions are referred to above and the objective factors identified in paragraph C3 above.