H. DETENTION OF THE APPLICANTS IN THE REMAND PRISONS IN CHITA AND MOSCOW

Question 41. Was there an interference with the applicants' "private and family life" in connection to their transfer from the penal colonies where they had been serving their prison sentences to the remand prisons, first in Chita and then in Moscow? In particular, did the regime in the remand prisons permit the detainees to enjoy the same level of family contacts as the regime in the penal colonies?

SUMMARY OF THE GOVERNMENT'S RESPONSE

H1. The Government do not deny that there was an interference with the applicants' private and family life in connection to their transfers to the remand prisons first in Chita and then in Moscow. However, conflating the periods of detention in Moscow with that in Chita, the Government argue that "*taking into account the location of remand prisons in Chita and Moscow and the facts that the applicants met with their relatives, as well as the quantity of visits allowed to them in accordance with the legislation, the transfer of the applicants from remote penal colonies to Chita, and then to Moscow, provided them with more opportunities to communicate with their families. Consequently, the applicants' transfer was not an* ***additional*** *interference with their private and family life*" (paragraph 325 of the Memorandum, emphasis added). Later in the Memorandum, in relation to Question 42, the Government argue the Court's finding of an interference with the applicants' family life and a breach of Article 8 in *Khodorkovskiy (no.2)* was a finding of a "*continuing*" violation of the "*entire period of service of the sentence by the applicants in remote colonies*". On that basis they argue that "*no separate disputable issues arise in the present case under Article 8 of the Convention*" (paragraph 330 of the Memorandum).

H2. The Government provide insufficiently complete and reliable details of the applicants' meetings with their relatives: they make assertions in relation to Mr Khodorkovskiy's meetings with his relatives whilst in the remand prison in Chita and of Mr Lebedev's meetings with his relatives whilst Mr Lebedev was detained in the remand prison in Moscow (paragraph 324 of the Memorandum).

H3. Significantly, the Government do not answer the Court's question "*Did the regime in the remand prisons permit the detainees to enjoy the same level of family contacts as the regime in the penal colonies?*"

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

Did the applicants' detention in Chita constitute an interference with the applicants' private and family life?

H4. This Court has already held that sending the applicants to remote correctional colonies in Krasnokamensk, Chita Region (in respect of the first applicant) and Kharp (in respect of the second applicant) constituted an interference with the applicants' Article 8 rights to privacy and family life[1] that was not justified under Article 8 § 2.[2] In finding a breach of Article 8 the Court commented, "*it is hardly conceivable that there were no free places in any of the many colonies situated closer to Moscow, and that the only two colonies which had free space were located several thousand kilometres away from the applicants' home*."[3] The Court's finding was based on detention in Krasnokamensk and in Kharp and therefore, contrary to the Government's argument, it cannot be said that "*no separate disputable issues arise in the present case*" although undoubtedly the Court's analysis and findings in *Khodorkovskiy (no.2)* are of direct relevance.

H5. Whilst the applicants' transfer to the remand prison in the city of Chita may have removed some of the more time-consuming and arduous aspects of the trips by the applicants' families to their relative places of imprisonment (solely because there are air links between Moscow and Chita), the fact remains that the applicants were incarcerated in a city located over 6,200 km and 6 time zones away from their families, and that this was done not only without any legal grounds but also contrary to the requirements of the law and court rulings.[4]

H6. The Government refer to the first applicant's detention in Krasnokamensk and the second applicant's detention in Kharp as being detention in "*remote penal colonies*" (paragraph 325 of the Memorandum) or "*very remote penal colonies*" (paragraph 330 of the Memorandum) as though detention in the remand prison in Chita was something other than detention in a remote part of Russia. Travel to Chita took 6 hours if by direct plane or over 9 hours if transferring at Ekaterinburg, Novosibirsk or in Bratsk and over

[1] See § 838 of *Khodorkovskiy (no.2)*.
[2] See § 851 of *Khodorkovskiy (no.2)*.
[3] See § 848 of *Khodorkovskiy (no. 2)*.
[4] See the applicants' replies to the Court's Questions in Section A.

4 days if travelling by rail. Accordingly, the distances involved were still much longer than those in the *Wakefield* case, where the Commission found a violation of Article 8 (*Wakefield v. the United Kingdom*, no. 15817/89, decision of 1 October 1990, DR 66, p. 251).[5] Moreover, once the applicants' families had finally reached Chita, the time available to see the applicants on a visit was arbitrarily and significantly reduced.

H7. It is submitted that there can be no doubt but that the applicants' detention in Chita amounted to an "interference" with their Article 8 rights that requires justification under Article 8 § 2.

H8. For reasons set out below, it is submitted that because of the regime in the remand prisons, detention in the remand prison in Moscow also amounted to an interference with the applicants' Article 8 rights.

Did the regime in the remand prisons permit the detainees to enjoy the same level of family contacts as the regime in the penal colonies?

H9. It is notable that the Government declined to answer this question. In fact it can be answered shortly: the regime in the remand prisons very clearly did ***not*** permit the detainees the same level of family contacts as in the penal colony.

H10. The regime for family visits in <u>penal colonies</u> is found in the Code of Execution of Sentences ('CES'). Since the applicants were sentenced to serve their custodial sentences in an 'ordinary regime correctional colony', under CES 121(1)(b) every year they were entitled to 6 'short-term' visits of 4 hours each (in the presence of prison officials) and 4 'long-term' visits of 72 hours each. Long-term visits include the convicted person's right to live together with his or her guest during the visit. A convicted person is also entitled to make telephone calls of 15 minutes in length each, but only during non-working hours and only subject to the availability of facilities.

H11. The regime for family visits in <u>remand prisons</u> is found in the Federal Law on Custody of Suspects and Persons Accused of Committing Crimes (the 'Detention on Remand

[5] See further the Convention case law cited at §§ 835-838 of *Khodorkovskiy (no.2).*

Act'). At the relevant time, Article 18 of the Detention on Remand Act provided that a detainee could, subject to a written permission of the investigator or the court (depending on the stage of the case), have no more than 2 family visits a month of up to 3 hours in length each (as the Government admit in their Memorandum, see paragraph 323). No provision is made for long-term visits.

H12. In sum, the regime at the remand prison allowed for short-term visits of greater frequency but lesser duration, and were always subject to the discretion of the investigator or the judge, and also of the SIZO administration, with the latter setting the duration of each visit. However, no long-term visits were allowed at all.[6] In practical terms, this resulted in a substantial further restriction on family visits during the period of detention in Chita, since the availability of more frequent short-term visits was of little use to the applicants given the distance from Moscow.[7] Once the applicants were transferred to the remand prison in Moscow, this permitted more frequent short-term visits than had been possible previously in Krasnokamensk, Kharp or Chita, but the lack of any opportunity for long-term visits remained. Accordingly, the detention at the remand prisons in Chita ***and*** in Moscow amounted to an interference with the applicants' rights under Article 8 § 1 requiring justification under Article 8 § 2.

[6] Under CES 77.1(3), a convicted person held in a remand prison is permitted a telephone call in place of a long-term visit during his period of detention in the remand prison. This concession, however, is of almost no practical significance given that the detainee is permitted to apply for a telephone call in any event.

[7] Although this complaint was duly raised by the applicants' lawyers as early as 25 January 2007 (see tab 67 to the Reply, found at Vol. 127, pp. 209-211 of the case materials), it was ignored by investigators.

Question 42. **If there was an interference on account of the placement of the two applicants in the remand prisons, was it in accordance with the law and necessary in a democratic society? In particular, what was the aim of transferring the applicants to the Chita remand prison from their colonies in Kharp and Krasnokamensk? Did the authorities pursue "other goals" than those officially stated when placing the applicants in the Chita remand prison? How did the authorities choose the specific remand prisons in which to place the applicants, what was the legal rule applied in the case of each of them and how were the individual decisions in each case formulated? What was the legal basis for detaining the applicants in a remand prison throughout the period concerned, rather than in a penal colony? The Government are invited to comment, in particular, on the applicants' allegation that the choice of a remand prison in Chita as the place for their detention was arbitrary and that there had been gaps between the detention orders imposed during the trial.**

SUMMARY OF THE GOVERNMENT'S RESPONSE

H13. The Government state that the applicants were moved to the remand prison in Chita because it was necessary to complete a "*large number of investigative actions with the participation of the applicants*" (paragraph 329 of the Memorandum). That assertion (even if true, which it is not) does not explain why Chita was chosen. Moreover, it is notable that whilst the Government assert that "*The crimes of which the applicants were accused, had been committed by them and their accomplices in many regions of Russia and in other countries (Samara Region, Tomsk Region, Sverdlovsk Region, Chelyabinsk Region, Tyumen Region, Zabaykalskiy Region, Republic of Mordovia, Moscow, Cyprus, the Netherlands, Luxembourg, United Kingdom and others). Therefore, at the request of the investigative authorities, the preliminary investigation was carried out in all these regions of Russia and in foreign countries at the request of Russian investigative bodies*" (paragraph 328 of the Memorandum) no explanation is provided as to what crime specifically was allegedly committed in Chita. It is to be noted however that the charges presented to the applicants contained no reference to them performing any acts in Chita or in the Zabaykalskiy Region.

H14. The Government fail to explain how the authorities chose "*the specific remand prisons in which to place the applicants, what was the legal rule applied in the case of each of them and how were the individual decisions in each case formulated*".

H15. The Government, once again conflating the periods of detention in Chita with the period of detention in Moscow, assert that detention in Chita and Moscow "*allowed them to participate in the criminal proceedings more effectively, to communicate with their lawyers and discuss the line of defence, to familiarise themselves with the case file, to take part in investigative actions (and, subsequently, in the court proceedings), and to file motions. The procedural rights of the applicants, undoubtedly, could not have been exercised so easily, if they were detained in penal colonies for most of the duration of criminal proceedings. Moreover, the trial in a criminal case implies personal participation of the accused in the court proceedings. Therefore, their transfer from penal colonies in Krasnokamensk and Kharp was required to ensure a fair trial*" (paragraph 332 of the Memorandum).

H16. The Government argue that there "*had been no gaps between the detention orders*" because Article 255(2) of the CCrP provides that detention during the trial shall not exceed six months (paragraph 335, reciting the trial court's decision on 28 April 2009, and paragraph 339 of the Memorandum). They acknowledge that two periods of detention were found to be unlawful by the RF Supreme Court, though neglect to explain to the Court the basis for those findings (paragraph 339 of the Memorandum).

APPLICANTS' REPLY TO THE COURT'S QUESTIONS

H17. These questions are inextricably linked with the Questions earlier in relation to why it was that Chita was chosen to be the venue of investigation notwithstanding that it clearly should have been Moscow, where in fact the investigation team had its base and where the trial was held (see further paragraphs A67 to A73 in response to Question 2 in Section A above). The designation of Chita as the "venue of the investigation" was arbitrary and unlawful, and aimed solely at concealing the equally arbitrary and unlawful transfer of the applicants to a remand prison in Chita, which had been carried out immediately prior to the making of the decision that Chita should be the "venue of the investigation".

H18. Under CES 77.1, a convicted person serving a custodial sentence may be transferred to a remand prison where this is 'necessary' to participate in a pre-trial investigation or a trial as a suspect or an accused person. The period of detention at the remand prison during the investigation shall not exceed 2 months, except where approved by the Chairman of the Investigative Committee, the Prosecutor General or their deputies (as

in the applicants' case), in which case the period of detention on remand shall not exceed 3 months. The transfer order must be supported by reasons, and it must be ensured that the incarceration regime to which the convicted individuals are subjected is consistent with the regime at the penal colony where they had been serving their sentence. During trial, a convicted person may also be detained in a remand prison, but only pursuant to a court order. However, no such order was made in respect of the applicants following their transfer to the Chita remand prison. Instead, their detention in custody was ordered as an interim measure pending trial, even though they were already serving a sentence of imprisonment. Thus their conditions of detention and opportunities to see their families were significantly worsened arbitrarily and unlawfully.

Detention at the remand prison in Chita

H19. On 14 December 2006, the investigator in criminal case no. 18/41-03 (which was being investigated in Moscow) issued orders requiring the applicants' transfer from Krasnokamensk and Kharp to the remand prison in Chita (the 'Transfer Orders').[8] Although the Transfer Orders recited the statutory formula at CES 77.1 (i.e. that there was a "*need to conduct investigative measures with the [applicants'] participation*"), no reason was given for the alleged 'necessity' to conduct the investigative measures in Chita.

H20. On 3 February 2007, the investigator made an order to sever the criminal case against the applicants from criminal case no. 18/41-03 and the severed case was assigned case no. 18/432766-07.[9] The Deputy General Prosecutor ordered that Chita should be the place of the investigation because "*the applicants were being held there*" – as they had been specifically transferred there immediately before the order.[10] According to the order, there was a "*large amount of investigative measures requiring participation of the accused*" that remained to be completed. In reality, however, the applicants were

[8] See Order to transfer a convict in respect of Mr Khodorkovskiy dated 14 December 2006 at Volume C, tab C38, and Note of familiarization signed by Mr Lebedev at Volume C, tab C40, of the November 2011 Memorial. The documents are at Vol. 124, c.f.s. 1-2 of the case materials.
[9] See Order to separate a criminal case dated 3 February 2007 at Volume C, tab C43, of the November 2011 Memorial. The document is at Vol. 1, c.f.s. 291-292 of the case materials.
[10] See Order to separate a criminal case dated 3 February 2007 at Volume C, tab C43. See Vol. 1, c.f.s. 293-294 of the case materials.

only interrogated once in Chita on 5 February 2007, and after this, over a period of two years, they were shown, for familiarisation, case materials that were sent over from Moscow, and their custody periods were extended by the Chita courts on the basis of investigators' petitions drafted in Moscow. All of the investigation team's other activities took place in Moscow.

H21. On 16 February 2007, the investigator declared the investigative measures in case no. 18/432766-07 completed.[11] Nevertheless, the applicants remained in the Chita remand prison for another 2 years, pursuant to a series of court orders, until their transfer to Moscow in February 2009. These court orders only referred to the general statutory grounds for pre-trial detention under the RF CCrP as "justification" for their further detention at the Chita remand prison as a measure of restraint, and stated that they were simultaneously serving a sentence of imprisonment pursuant to a court verdict.

H22. The detention at the Chita remand prison was not 'in accordance with the law', for the following reasons.

H23. First, notwithstanding the investigator's formal reference to CES 77.1, the Transfer Orders gave no specific reasons as to why it was 'necessary' to conduct investigative measures with the applicants' participation specifically in Chita, a breach of CES 77.1. The absence of any such reasons was clearly apparent to the Government.

H24. Second, it appears that the only investigative measures conducted with the participation of the applicants were their own interrogations, which took place on 5 February 2007.[12] Although by that time the Deputy General Prosecutor had issued an order determining Chita to be the "*place of the investigation*" (on 3 February 2007), the only "reason" given for this was the applicants' presence at the Chita remand prison, whereas all the investigation team's other activities were being conducted in Moscow . Since no reason had been advanced for the applicants' detention at the remand prison in Chita in the capacity of accused persons in the first place (given that they were already subject to a

[11] See Vol. 127, c.f.s. 272-273 of the case materials which was at Annex 22 of the original application by Mr Lebedev lodged with the Court on 27 September 2007 and given application number 42757/07 ("Mr Lebedev's originating application"). For ease of reference a further copy is attached at tabs 72 and 73 to this Reply.
[12] See tab 70 to this Reply (which is to be found at Vol. 124, c.f.s. 178-181 of the case materials).

sentence of incarceration), the investigator's order amounted to nothing more than a circular, *ex post facto* "justification", but, essentially, a front for keeping them there. In particular, there was no good reason why the applicants' interrogations could not be conducted in Moscow, the original location of the investigation, the place where the investigators were based and the place where the eventual trial was held. Alternatively, there was no good reason why the interrogations could not be conducted in the penal colonies of Kharp and Krasnokamensk, where the applicants were serving their sentences. If the applicants' interrogations had been conducted in either location, the interference with the applicants' right to respect for their family life would have been far less onerous. Accordingly, there was no 'necessity' in fact for the applicant's transfer to the remand prison in Chita.

H25. Third, the period of the applicants' detention at the remand prison in Chita lasted nearly 2 years longer than the statutory maximum period for which convicted persons may be transferred to a remand prison to take part in investigatory activities, which is 3 months. Moreover, all investigative measures were already declared completed on 16 February 2007[13]. No doubt being aware of the lack of any lawful basis for continuing to hold the applicants at the remand prison, the investigator on many occasions applied to the court to keep the applicants at the Chita remand prison with reference to the different, general time limits for holding accused persons in custody in Article 109 RF CCrP. These time limits, however, relate exclusively to the court extending pre-trial detention as a measure of restraint where there are sufficient grounds under RF CCrP Article 97(1).[14] which moreover must be justified with reference to specific facts showing that no other less severe measure of restraint is possible (RF CCrP 108). They have no lawful or rational application in circumstances where the accused is already serving a custodial sentence, and his transfer to the pre-trial detention centre is governed by CES 77.1. Moreover, the period of the applicants' detention on remand exceeded even the general statutory time limit of 18 months for pre-trial detention (RF CCrP 109(3)).

[13] Although investigators continued to prepare their bill of indictment after this date, and therefore the pre-trial investigation formally remained open, this did not require the 'participation' of the applicants and therefore was not a relevant reason for detaining the applicants further at the remand prison under CES 77.1.

[14] These grounds are that there is a sufficient risk the accused will (a) abscond, (b) interfere with the course of justice or (c) commit further offences, i.e. they broadly reflect the grounds for pre-trial detention recognised in the Court's case-law with respect to Article 5 § 3 of the Convention.

H26. Fourth, even assuming (which is not admitted) that the general statutory time limits under RF CCrP 109 could lawfully be applied in the applicants' situation, the reasons given by the courts for their further detention at the Chita remand prison were neither 'relevant nor sufficient' for purposes of Article 5 § 3 of the Convention, and therefore the conditions of their detention cannot be regarded as '*necessary in a democratic society*' for purposes of Article 8 § 2 of the Convention. In particular:

(a) Many of the court's decisions did not invoke any of the statutory grounds under RF CCrP 97, or simply repeated the mantra that the grounds remained 'unchanged' without further analysis. Those few decisions that actually did invoke the relevant statutory grounds failed to identify any factual basis for their application other than the seriousness of the crimes for which the applicants had been accused and/or convicted and their 'extensive ties abroad'. This, however, provided no legal and rational basis to keep the applicants in the Chita remand prison when they were already serving custodial sentences in even more remote and isolated penal colonies, and because of this fact, could not possibly have absconded or influenced the course of the 'investigation' (although in fact no actual investigation was being carried out – see above). Yet the sole legal objective of imposing a pre-trial measure of restraint is to prevent these precise risks;

(b) One of the detention orders (dated 7 February 2007) additionally referred to the prospect that the first applicant might be released on parole. This reasoning was illegal and wholly spurious. The first applicant did not qualify for parole at the time the detention order was made, nor was he due to qualify for the duration of the detention order.[15] Moreover, under Article 79 of the Criminal Code parole itself can only be granted by a court order and only if the court is satisfied that prison is no longer necessary as a corrective measure. Accordingly, there was no need for the court to take pre-emptive action and, in any event, the prospect that the first applicant might qualify for parole on some future date would only serve to refute rather than support a need for detention on remand;

[15] Under Article 79(3)(b) of the Criminal Code, a person convicted of a serious crime will not qualify for parole until he serves at least half his sentence. Since the first applicant was first arrested on 25 October 2003, and was sentenced to 8 years in prison, he would not have qualified for parole until 25 October 2007.

(c) Finally, the primary (and in many cases, the only) reason given for most of the detention orders was that (a) this would be more effective for the purposes of completing the investigation and (b) it would also allow the applicants and their lawyers time to complete their examination of the case file. Neither of these reasons, however, provides any lawful basis to continue detention on remand in the absence of the underlying substantive grounds for applying a measure of restraint (RF CCrP 97, 108, 109(2, 3)).[16] In particular, the RF Constitutional Court has specifically held that affording an accused time to examine the case file is not of itself sufficient grounds to detain him further on remand.[17] Obviously, the Government are well aware of this binding legal position of the RF Constitutional (and now also that of the RF Supreme) Court, yet in a continued display of deliberate bad faith toward the applicants, the authorities ignored this position at the time and now neglect to draw it to the Court's attention. Nor was there any need for the applicants to be held at the remand prison in Chita to continue their examination of the court file. Krasnokamensk, Kharp and the Khamovnicheskiy District of Moscow (where the applicants' trial was held) all had prosecutor's offices and investigation offices and premises in prison camps of their own where the examination could have taken place.

H27. In sum, there were no sufficient grounds in domestic law for the applicants' detention at the remand prison in Chita, nor was this necessary and in accordance with the principles of a democratic society. For purposes of contact with the outside world, the most material difference between detention at a remand prison and incarceration at a penal colony was to deprive the applicants of any possibility to receive 'long-term' visits from their family members. Accordingly, the resulting restriction on the applicants' right to respect for their family life was unnecessary and disproportionate to any aim the investigators may have sought to achieve, and a violation of Article 8 § 2.

[16] See also *Case of Yestafyev,* Constitutional Court, 6 June 2003, no. 184-O, § 2. A copy is at tab 50 of this Reply.
[17] For example, the Ruling of the RF Constitutional Court of 25 December 1998 No. 167-O at Volume C, tab C5, of the November 2011 Memorial reads: "*...familiarisation with the case file, being a condition sine que non for extension of an arrest period, cannot serve as its ground, let alone [a] ... sufficient one....extension of a period of ...keeping a person in detention because other co-accused continue their familiarisation with the case file should be regarded as an arbitrary application of arrest going beyond the limits of possible restriction of rights and liberties established by the Constitution.*" Currently (when the Government's replies were drafted and provided to the Court) these generally binding explanations are contained in Resolution no. 41 of the RF Supreme Court Plenary Session dated 12 December 2013.

Detention at the remand prison in Moscow

H28. On 14 February 2009, the Deputy Prosecutor General referred the criminal case against the applicants to the Khamovnicheskiy District Court of Moscow for a "jurisdiction hearing."[18] No explanation was given as to why the trial would be in Moscow rather than Chita. The only reasonable inference to be drawn is that the State had always been aware that the only proper place for both the preliminary investigation and trial was Moscow, and yet, for improper reasons, it had deliberately kept the applicants in isolation for many years in the most remote areas of the country contrary to Article 8 and to Article 18 of the Convention.

H29. On 18 February 2009, Judge Danilkin of the Khamovnicheskiy District Court issued an order for the applicants' transfer to Moscow for purposes of their trial.[19] On 21-22 February 2009, the applicants were moved to remand prisons in Moscow, namely remand prison no. 99/1 (for Mr Khodorkovskiy) and remand prison no. 77/1 (for Mr Lebedev), which both form part of the larger facility known as 'Matrosskaya Tishina.'

H30. On 17 March 2009, Judge Danilkin at the Khamovnicheskiy District Court issued an order to schedule a court session based on the results of a preliminary hearing, which decided *inter alia* that the measure of restraint chosen for the applicants should be left "*without a change*."[20] The detention period set by a court judgment at the preliminary investigation stage for Mr Khodorkovskiy expired on the night of 17-18 March at midnight, and for Mr Lebedev on the night of 2-3 April at midnight (by virtue of provisions of Articles 108, 109 and 128 (2) of the RF CCrP).[21] Subsequently, the applicants were unlawfully held in detention without a court order, despite the fact that detention without a court order as required by law had already been ruled illegal by the RF Constitutional Court upon a complaint of, *inter alia*, Mr. Lebedev (Decree no. 4-p

[18] See letter at Vol. C, tab C93, of the November 2011 Memorial. This is to be found at Vol. 189, c.f.s. 1-3 of the case materials.
[19] See tab 85 to this Reply. It is to be found at Vol. 189, c.f.s 31-32 of the case materials.
[20] See copy of the Khamovnicheskiy District Court's decision at Volume C, tab C97, of the November 2011 Memorial.
[21] See copies of Articles 108, 109, and 128 of the RF CCrP at Volume C, tab C8, of the November 2011 Memorial.

of 22 March 2005) and by this Court in *Lebedev (no. 1) v. Russia,* no. 4493/04, 25 October 2007 at §§ 52-59.

H31. The Government's argument that Article 255 (2) of the RF CCrP does not require the period of time to be set is misconceived. In the case of *Yudayev v. Russia*, no. 40258/03, 15 January 2009, §§ 59-61, where the applicant had been kept in custody for seventeen days in the absence of any judicial order with a mere reference to Article 255 § 2 of the Russian Code of Criminal Procedure, the Court held as follows:

> "... for the detention to meet the standard of 'lawfulness', it must have a basis in domestic law. The Government, however, did not point to any legal provision which permitted a defendant to continue to be held in custody once the authorised detention period had expired. The Russian Constitution and the rules of criminal procedure vested the power to order or prolong detention on remand in the courts … No exceptions to that rule were permitted or provided for. Even though, as indicated by the Government, the domestic courts interpreted Article 255 § 2 of the Code of Criminal Procedure as permitting a six-month detention "during the trial" without a court order, that interpretation was condemned by the Russian Constitutional Court as incompatible with the Constitution and Article 5 § 1 of the Convention … As noted above, in the period from 5 to 22 January 2004 there was no judicial decision authorising the applicant's detention. In these circumstances the Court finds that the detention was not 'lawful' for Convention purposes" (*ibid,* § 60).[22]

H32. The applicants remained at the remand prisons for the duration of the trial pursuant to a series of court orders.[23] None of those court orders identified any of the statutory grounds justifying a measure of restraint (as opposed to simply allowing them to continue serving their sentences at a penal colony), nor did the court make any relevant findings of fact that would support such grounds in principle, apart from a general statement that circumstances remained 'unchanged', without further analysis.[24] Rather, the orders simply referred to the court's power to determine matters concerning the applicants' detention. In this respect, it is noteworthy that over 4 years earlier the Constitutional Court had already held that such 'automatic' extensions during trial are unlawful, and that in each case the court is required to review whether there are relevant grounds for further detention on remand and set a specific period of detention.[25]

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[22] See also *Isayev v. Russia*, no. 20756/04, 22 October 2009.
[23] See Annexe Three to the November 2011 Memorial that documents the detention orders.
[24] See *Sarban v. Moldova*, no. 3456/05, § 101, 4 October 2005.
[25] See §§ 3.2, 3.3 of the judgment in the *Case of Biryuchenko and Others*, 2 March 2005, no. 4-P, in which the second applicant was one of the complainants and which was examined at §§ 52-59 of the judgment in *Lebedev v.*

H33. Further, the detention extension orders of 14 May 2010 and 16 August 2010 were flagrantly unlawful as they explicitly contradicted a legislative amendment to RF CCrP 108(1.1) precluding the use of detention on remand in the event of charges involving certain economic crimes, including all the charges brought against the applicants. The protracted history of challenging those orders is detailed at paragraphs 123-143 of the applicants' November 2011 Memorial. Both these orders were later ruled illegal and quashed by the RF Supreme Court.

H34. Finally, the applicants were detained without any court order at all from 17 November 2010 (the date when the detention extension order of 16 August 2010 expired[26]) and 27 December 2010, when the Khamovnicheskiy District Court handed down its verdict.

H35. Accordingly, there has been a violation of Article 8 in respect of the applicants' detention at the remand prison in Moscow as well.

Russia, no. 4493/04, 25 October 2007. Currently (when the Government's replies were drafted and provided to the Court) this requirement is contained in Resolution no. 41 of the RF Supreme Court Plenary Session dated 12 December 2013.

[26] See Order to Extend Detention dated 16 August 2010, at Volume C, tab C184, of the November 2011 Memorial. This is to be found at Vol. 260, pp. 14-18 of the case materials.