CM-Public

|  |  |  |  |
| --- | --- | --- | --- |
| **MINISTERS’ DEPUTIES** | Notes on the Agenda | **CM/Notes/1294/H46-23** | 22 September 2017 |

|  |
| --- |
|  |

|  |
| --- |
| **1294th meeting, 19-21 September 2017 (DH)**Human rights**H46-23 Klyakhin group v. Russian Federation (Application No. 46082/99)**Supervision of the execution of the European Court’s judgmentsReference documents[DH-DD(2016)871](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282016%29871), [DH-DD(2017)134](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29134), [DH-DD(2017)880](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29880), [DH-DD(2017)936](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29936), [CM/ResDH(2015)249](https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/ResDH%282015%29249), [CM/Del/Dec(2017)1280/H46-25](https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/Del/Dec%282017%291280/H46-25) |
|  **Application** | **Case** | **Judgment of** | **Final on** | **Indicator for the classification** |
| 46082/99 | KLYAKHIN GROUP (List of cases [CM/Notes/1294/H46-23-app](https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/Notes/1294/H46-23-app)) | 30/11/2004 | 06/06/2005 | Complex problem |

**Case description**

All the cases in this group concern violations of the applicants’ right to liberty and security in the context of detention on remand (Article 5) during the period 1999 to 2011, mostly arising from:

*- Article 5 § 1*: Detention on remand in the absence of a court decision (mainly through repeated extension of detention for the purpose of studying a case-file).

- *Article 5 § 2*: Failure to inform the applicant promptly of the reason for arrest.

- *Article 5 § 3*: Failure of the domestic courts to adduce relevant and sufficient reasons to justify the applicant’s continuing detention on remand (including failure to consider alternative “preventive measures” and collective detention orders without a case-by-case assessment of the grounds for detention); and lack of special diligence.

- *Article 5 § 4*: Excessive length of appeal proceedings.

- *Article 5 § 5*: No enforceable right to receive compensation for violations of Article 5.

Other violations: In some cases, the Court also found other violations, notably unfair criminal proceedings on account of the lack of public hearings, lack of possibility to rebut prosecution witnesses’ statements, lack of access to a lawyer in detention, impossibility to provide alternative expert evidence, unlawful composition of the court (Article 6); violation of property rights as applicants were made personally responsible for corporate taxes (totalling some 17,4 billion roubles) without any legal basis.

Other violations found by the Court were poor conditions of detention on remand (Article 3) and absence of effective remedy (Article 13); poor conditions of detention during transfers in a courthouse and failure of the domestic authorities to provide the applicant with an adequate amount of food and sleep on the days of court hearings (Article 3); humiliating security arrangements in the courtroom (metal cages) (Article 3); excessive length of criminal proceedings (Article 6 § 1) and absence of effective remedy (Article 13); violation of the principle of presumption of innocence (Article 6 § 2); restriction of liberty for reasons other than those permissible under Article 5 (Article 18 taken in conjunction with Article 5); sending the applicants to serve their sentences in remote correctional colonies (Article 8); censorship of prisoners' correspondence (Article 8); hindrance of the right of individual petition (Article 34).

**Status of execution**

At its 1243rd meeting (December 2015) (DH), the Committee welcomed the *individual and general measures* adopted so far by the Russian authorities and decided to close part of the group (13 cases) concerning a number of problems identified by the Court (relating to detention on remand in the absence of a court decision, retroactive application of detention orders, absence of time-limits for the detention period, failure to examine complaints against detention orders, hearings conducted in the absence of the detainee and his counsel).

In response, the authorities indicated that the necessary individual measures had been adopted in most of the cases. This information was noted with satisfaction at the 1259th meeting (June 2016) (DH). The Committee noted, at the same time, that questions remained with respect to individual measures in the cases of *Pichugin* (violations of Article 6) and *Khodorkovskiy and Lebedev (*violation of Article 1 of Protocol No. 1*)*.

As to the case of *Pichugin*, the outstanding question concerned the decision of the Presidium of the Supreme Court of 23 October 2013 to re-open the applicant’s criminal case without, however, deeming it necessary to order any new trial to remedy the violations of the right to a fair and public trial. Consequently, the possibility of further alternative action, whether by the judiciary or the executive, was raised, including a presidential pardon. The allegations of sequestration of the just satisfaction in favour of unknown persons also required clarification. In response the authorities informed the Committee that the sequestrated amount of just satisfaction had been returned to Mr Pichugin’s account as the sums in question had already been paid in the context of other domestic execution procedures (see [DH-DD(2017)208](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29208)).

As to the case of *Khodorkovskiy and Lebedev*, the main outstanding question concerned the refusal of the Presidium of the Supreme Court of 23 January 2014 to cancel the damages award made against the first applicant in breach of the Convention (notwithstanding the European Court’s conclusion that the decision was arbitrary as neither the primary legislation in force at the time nor the case law of the Russian courts had allowed for the imposition of civil liability for unpaid company taxes on a company’s executives), and possible alternative measures to remedy the violation (including a revocation of the payment obligation or an undertaking not to enforce it.) A further question related to the applicants’ allegation that the sums claimed had already been recovered from the Yukos company in the context of its liquidation. Finally, clarification was expected on the allegation of non-payment of the just satisfaction.

On 2 August 2016 the authorities provided a detailed information document (see [DH-DD(2016)871](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282016%29871)) containing an overview of the individual measures adopted in the two cases. In particular, the authorities described in detail the reasons for the Supreme Court’s decisions and informed the Committee that Mr Pichugin’s request for pardon had been refused (see also the summary thereof provided in the Notes prepared for the 1265th meeting (September 2016) (DH) meeting).

On 9 September and 14 November 2016, Mr Pichugin’s representative submitted new communications (see [DH-DD(2016)1005](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282016%291005) and [DH-DD(2016)1280](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282016%291280) respectively).

At the 1265th meeting (December 2016) (DH), as regards the individual measures in the two above-mentioned cases, the Committee noted with concern that the information submitted by the authorities did not demonstrate that the necessary progress had been achieved and called upon them to provide rapidly information on the availability of other avenues of redress, considering the failure of the re-opening procedure and the request for pardon.

As regards the just satisfaction in the *Khodorkovskiy and Lebedev* case, it invited the Russian authorities to provide information as to whether the seizure of the just satisfaction awarded to Mr Khodorkovskiy had been made partially to recover the debt due under the impugned award and, if so, the measures envisaged to remedy the situation.

On 6 February 2017, the authorities submitted an updated action plan (see [DH-DD(2017)134](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29134)). They repeated the findings of the Supreme Court in the reopened proceedings in respect of both the cases of *Pichugin* and *Khodorkovskiy and Lebedev*.

As regards the payment of the just satisfaction awarded by the European Court to Mr Khodorkovskiy, the authorities confirmed that the compensation transferred to his account had been seized by the Federal Bailiff Service in the enforcement proceedings to recover partially the damages awarded against him, as upheld by the Supreme Court in its final decision in the reopened proceedings following the European Court’s judgment. The authorities pointed out that the applicant had not appealed against the decisions and actions of the competent bodies. They also submitted that the seizure of the just satisfaction award was in compliance with the European Court’s case law, citing *Ringeisen v. Austria* (No. 2614/65), *Allenet de Ribemont* *v. France* (No. 15175/89) and *Selmouni v. France* (No. 25803/94).

On 17 February 2017, Mr Pichugin’s representatives submitted a communication (see [DH-DD(2017)175](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29175)) stating, *inter alia*, that on 18 October 2016, in an open letter, Mr Pichugin’s mother had asked the Russian President for clemency in respect of her son.

At the 1280th meeting (March 2017) (DH), the Committee, as regards the *Khodorkovskiy and Lebedev* case, expressed grave concern in respect of the authorities’ confirmation that the just satisfaction awarded to Mr Khodorkovskiy had been seized as part of the enforcement of the domestic court’s damages award that the  European Court had found  arbitrary and without basis in law. It strongly urged the authorities to revoke the obligation to pay the damages or to undertake formally not to enforce the award.

As regards the *Pichugin* case, the Committee deeply regretted that no information had been submitted on the availability of other avenues of redress capable of overcoming the failure of those utilised so far, and strongly urged the authorities to explore further avenues to erase the consequences of the violations found. As regards the issue of sequestration, it noted with satisfaction that the just satisfaction awarded to the applicant had been returned to his account.

On 6 June 2017, the European Court adopted a judgment in respect of the second application brought by Mr Pichugin (No. 38958/07, final on the same date), concerning another set of criminal proceedings against him – the second *Pichugin* case. As a result of these proceedings, Mr Pichugin’s criminal sentence was increased from 20 years’ to life imprisonment. The Court found a breach of the principle of equality of arms and a breach of the presumption of innocence on account of several interviews given to the media by the investigating and prosecution authorities who represented Mr Pichugin’s involvement in the offences as an established fact (violation of Article 6 § 2). The European Court indicated, under Article 41, that a trial *de novo* or the reopening of the proceedings, if requested, would provide adequate redress.

On 6 July 2017, Mr Pichugin’s representative submitted a communication (see [DH-DD(2017)864](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29864)), expressing the view that it would be appropriate to join the examination of the new judgment with the one at issue in the present Notes, as both judgments established fair trial violations arising from one set of events which had been broken up into two domestic trials held immediately one after the other. The joinder was also required because of the link between the consequences of the judgments for the applicant. The representative also stated that the applicant could not be obliged to apply for a further reopening and retrial as he did not believe in the prospect of a fair retrial for several reasons, including the passage of time, the failure of the previous reopening proceedings to provide redress, and systemic deficiencies in the criminal trials and the rights of the defence. It was further submitted that Mr Pichugin’s mother’s request for clemency for her son had been dismissed *ratione personae* and that on 4 May 2017 Mr Pichugin had made a fresh request to the President for pardon.

As regards the individual measures in the other cases in this group, since the last information submitted by the authorities, several judgments have become final and have been added to the group in which the European Court found violations of Article 5 § 3 on account of the applicants’ lengthy detention on remand without sufficient grounds. The Court indicated in these judgments that, according to the information available to it, the detention was on-going, in respect of several applicants.[[1]](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680739e0c#_ftn1) In some judgments no indication of the time-frame of the detention was given by the Court.[[2]](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680739e0c#_ftn2)

The Secretariat has requested information from the authorities in respect of the majority of these applicants. Three applicants[[3]](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680739e0c#_ftn3) have also complained to the Committee of Ministers of their continuing detention on remand despite the finding of the violation of Article 5 § 3 (see [DH-DD(2017)351](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29351) (21 March 2017) and [DH-DD(2017)799](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29799) (7 June 2017)).

On 22 August 2017, the authorities submitted an updated action plan (see [DH-DD(2017)880](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29880)). In respect of the *Khodorkovskiy and Lebedev* case and the first *Pichugin* case, the authorities reiterated their previous submissions. They added, with regard to the possibility for Mr Pichugin to be pardoned, that this issue had not been subject to the European Court’s examination and assessment, that the Convention does not impose any obligations in respect of the use of pardoning, and that the decision to pardon lies within the exclusive competence of the President.

Additional information was submitted in respect of several cases where the Court had found a violation of Article 5 § 3 on account of the applicants’ lengthy detention on remand without sufficient grounds. In the wake of the judgments, the Supreme Court has reopened the proceedings and quashed the decisions to extend the term of detention in respect of a number of applicants. In respect of other applicants, similar proceedings are still pending before the Supreme Court.

On 29 August 2017, the authorities provided yet another updated action plan (see [DH-DD(2017)936](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29936)), concerning the individual measures in several cases belonging to this group. Thus, most of the applicants  whose detention had been indicated by the European Court as pending (see the footnotes above) have in the meantime been released, had their measure of restraint changed or been convicted and are serving sentences.

On 30 August 2017, the applicant’s representative in the *Pichugin* cases submitted a new communication (see [DH-DD(2017)953](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29953)). It stated, *inter alia*, that the regional commission of pardons, after examining the applicant’s new request, had not recommended him for pardoning.

On 1 September 2017, the applicants’ representative in the case of *Khodorkovskiy and Lebedev* also submitted a new communication (see [DH-DD(2017)952](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD%282017%29952)).

**Analysis by the Secretariat**

As regards the recent cases concerning the violations of Article 5 § 3, it is noted that at its last DH meeting, in the light of the information then available, the Committee decided to examine at this meeting only the individual measures required in the cases of *Pichugin* and *Khodorkovskiy and Lebedev*. However, in view of the absence of information on the individual measures required to put an end to the violations of Article 5 § 3 in a number of recent cases and the potential urgency of such measures, it appears appropriate to include them in the examination at the present meeting.

The scope and relevance of the Supreme Court’s decisions quashing earlier decisions to detain on remand is unclear. It is, however, noted that the majority of the applicants have in the meantime been either released or convicted. Information on the situation of 17 applicants, including two of the four applicants who have complained to the Committee of their continued detention despite the European Court’s judgments in their favour, remains urgently awaited.[[4]](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680739e0c#_ftn4)

As regards the outstanding question of redress in response to the *Pichugin* case and the *Khodorkovskiy and Lebedev* case, the Committee has already found that the information on the measures adopted so far had not demonstrated that necessary progress had been achieved (see the decision adopted by the Committee at its 1265th meeting (September 2016) (DH)). The action plans submitted recently provide no new information warranting a departure from this conclusion.

As regards the authorities’ argument in the *Pichugin* case that the Committee is not competent to examine the possibility of a pardon as a measure to overcome the difficulties encountered in the reopening proceedings, it is recalled that the consequences of violations may be erased in a number of different ways, including a reopening of proceedings, pardoning, amnesty, etc. The possibility of pardon has thus been examined by the Committee in a number of cases and the granting of pardon requests has been found a satisfactory answer to violations established. Even if the Convention imposes no obligation to grant a request for a pardon, the handling of such a request clearly falls within the Committee’s competence. Information on the progress in the handling of the applicant’s new request is thus awaited

As regards the new *Pichugin* case recently brought before the Committee, considering the nature of the violations found, the individual measures required and the urgency of such measures, it is proposed to examine it jointly with the first case, by classifying it in the *Klyakhin* group of cases. It is noted that a reopening of the proceedings at issue in the second judgment was indicated by the Court as a means for a domestic court to remedy the violations established. It is recalled, however, that the applicant has expressed reluctance to apply for such a reopening due to his lack of confidence in the domestic courts’ ability to remedy such defects, notably taking into account the failure of the reopening of the proceedings in response to the Court’s judgment in the first *Pichugin case*. The authorities’ position on this issue is awaited.

As regards the *Khodorkovskiy and Lebedev* case, no response has so far been received to the grave concerns expressed by the Committee with regard to the enforcement of the damages award, found by the European Court to have been made arbitrarily and without basis in law, and to the Committee’s call for a revocation of the obligation to pay the arbitrary award or for a formal undertaking not to enforce it.

[[1]](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680739e0c#_ftnref1) *Kalistratov*, *Shcherbinin*, *Soshnev*, *Kuzmin*, *Usubyan* (*Walter and Others*, final on 21/07/2016); *Abdrakhmanov* (*Khamzin and Others,* final on 06/10/2016); *Safin*, *Shadlinskiy and Abramov* (*Bekuzarov and Others*, final on 06/10/2016); *Davlyashova* (*Davlyashova*, final on 18/10/2016); *Nasledkov*, *Mukhametvaliyev* (*Kirilchuk and Others*, final on 03/11/2016); *Bondar*, *Popova*, Kolpikov (*Mayevskiy and Others*, final on 24/11/2016); *Danilenko*, *Paladyan*, *Naydenov*, *Poplavskiy* (*Klepikov and Others*, final on 24/11/2016); *Drozdov*, *Kovach* (*Devyatov and Others*, final on 20/12/2016); *Gantimurov*, *Tsarev* (*Kotov and Others*, final on 16/02/2017); *Vovchenko*, *Fedonin*, *Memetov*, *Kamenev* (*Vikharev and Others*, final on 16/02/2017); *Romanov*, *Cherepanov* (*Nosenko and Others*, final on 06/04/2017); *Kamenev*, *Muchkov* (*Shirokikh and Others*, final on 06/07/2017); *Memetov*, Morkovin, Norov, Pavlyukevich, Posokhin (*Memetov and Others*, final on 6 July 2017); *Razhapov*, *Koryunov* (*Badalov and Others*, final on 06/07/2017)

[[2]](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680739e0c#_ftnref2) *Kavalerov*, *Smulskaya* (*Kavalerov and Others*, final on 04/05/2017); *Andronov*, *Meleshnin* (*Sarbakhtin and Others*, final on 04/05/2017)

[[3]](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680739e0c#_ftnref3) *Moskvitin* (*Klepikov and Others*, final on 24/11/2016); *Meleshnin* (*Sarbakhtin and Others*, final on 04/05/2017); *Rastopchin*, *Seleznev* (*Khasanov and Others*, final on 16/02/2017).

[[4]](https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680739e0c#_ftnref4) *Abramov, Paladyan, Gantimurov, Tsarev, Kamenev, Muchkov, Memetov, Morkovin, Norov, Pavlyukevich, Posokhin, Razhapov, Koryunov, Kavalerov, Smulskaya, Moskvitin* and *Meleshnin*.