

EXPLANATION TO THE PRESIDIUUM OF THE MOSCOW CITY COURT

by the defence lawyer Yu.M. Shmidt

1. In his supervisory submission the author adheres to his intrinsic declaratory and demagogic style: “As one can see from the criminal case the **investigation circumstances made it necessary** to continue the pre-trial investigation in Chita. Therefore, the order determining the venue for preliminary investigation issued by the prosecutor **upon perusing of all the materials of the criminal case and assessment of all the evidence collected in its entirety was a reaction of the prosecutor to the current situation** expressed in a procedural form not conflicting with the law in force.”

What *circumstances* made it necessary to continue the investigation in Chita? What was a specific form for this *necessity* to show itself? What *materials of the criminal case*, what *evidence collected in its entirety*? What was the current *situation*? Why did it require this particular *reaction* and not another one?

“The decision of the prosecutor is in line with the purpose of criminal proceedings since it **helps to respect rights** of both the victims and the accused and their defence lawyers and **speeded up their access to justice** [tenses sic].”

In what way does this decision *help to respect the rights*? What a connection with the defendants who have never left for Chita, and were reviewing the case file materials in Moscow (back then when Chita had been designated as an official venue of investigation)?

2. The author of the submission affirms that reasoning of the order of 03.02.07 meets the requirements of the law as it was issued with a view “**to ensure fullness and objectiveness of preliminary investigation and observance of procedural deadlines**. The Code of the Criminal Procedure of the Russian Federation [CCP RF] does not provide for any other interpretation. The investigator’s order (?) states the **circumstances and grounds** for determination of venue for the pre-trial investigation provided for by Art. 152 CCP RF”.

That is just the order where there are no circumstances and grounds which was pointed out by all the judicial instances hearing an appeal. It just **reproduces the text** of Art 152 para 4 of the CCP RF, but lacks for **grounds to apply in this case an exception** from the rules of territorial jurisdiction, envisaged by this norm. In the context of this case that is nothing more than a cliché lacking specific content. There is not a single word on in what way and at the expense of what “fullness and objectiveness of preliminary investigation” are provided when it is conducted not in

Moscow but in Chita; and these words may be taken nowhere because the affirmation itself is openly mendacious.

3. The supervisory submission says that “*after decision to conduct the pre-trial investigation in Chita had been made, no investigative actions were conducted outside this city except for the forensic accounting. Therefore, designation of Chita as the venue for pre-trial investigation does not delay but rather helps to observe procedural deadlines which is in compliance with the purposes indicated in Art. 152 para 4 CCP RF*”.

What follows from *what*? Once again demagogy involving lies! Within All the period of “investigation in Chita” it was not in this city but in Moscow where **all the important procedural decisions** were taken. One may say that the investigation was conducted “by correspondence”: the defendants and the defence lawyers are in Chita, they review the case, file motions, lodge appeals while the judgments following the results of their hearing are received ... from Moscow where the main part of investigative group is concentrated. Permanently located in Chita investigators of the Oblast Procuracy, who were included in the group, play the role of mediators (or postmen). They can not make any independent decisions at all. Even notices of procedural actions schedule are coming from Moscow.

The arguments on “big amount of investigative actions”, planned to be carried out in Chita, are absolutely invalid. As it had been planned, all the investigation in this city came to presenting several procedural documents, **drawn up in Moscow** and opinions of expert examinations, **conducted in Moscow**.

4. Developing a thought on the need to “*reduce procedural periods*” and “*to speed up access of the accused to justice*”, the author of the submission writes: “*designation of Moscow as the venue for preliminary investigation and the time spent in view of this to the transfer of the defendants (?) would have substantially increased the procedural period and could have led to violation of the right of the accused to a fair hearing of their case within a reasonable time guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms*”.

Our law is still lacking such “**grounds**” as “*the time spent ... to the transfer of the defendants*” to change the jurisdiction. As to Moscow, it should not have been “designated as the venue for preliminary investigation”, because it was such a place for three and a half years without any special “ruling”.

What “*speed up access of the accused to justice*”, what “*reasonable time*” are in question? To start from November 2005, M.B. Khodorkovsky was serving his first sentence. By December 2006 less than five years remained to be served. There was no need to hastily transfer him from the colony to the “**nearest**”, as the submission mentions, investigative isolator. Nothing prevented the Procuracy from quietly conveying him to the venue of investigation, i.e. to Moscow, separating a case and already after that counting new procedural periods. This would have influenced the speed of “*access to justice*” in no way.

Unlawful suspension of case file materials review for the defendants **for more than two and a half months** which in fact resulted in unjustified delay of investigation and detention terms is the best demonstration of the forced and hypocritical character of this reasoning.

On 04.07.2007 the investigator S.K. Karimov issued an order on unconditional refusal to meet the motion by the defender of M.B. Khodorkovsky for review of the case file materials by the defendant at the place of preliminary investigation, i.e. in Moscow.

It follows from this document which is unique in its legal nihilism and demagogic character, that **there was no suspension** of fulfilling the requirements of Art 217 of the CCP RF! “*Being duly notified on the venue and time to review the case*” the unfair defenders “*were systematically ignoring the review [were systematically absent]*”. It turns out that until 17 April 2007 they were attending (which is easy to find out from the record and schedule: not a single working day was missed because of the defenders’ absence), and then suddenly, everyone stopped attending without reason. They were absent for almost two and a half months. While the investigation was a marvel of patience all this time... Actually, the defenders kept paying regular visits to M.B. Khodorkovsky even during this unplanned break. At that it was several times that we addressed the investigators with a request to explain this strange break, to make us familiar with its procedural implementation. As a reply the Chita investigators showed their fingers upwards, demonstrating by this that they were not informed while the “biggies” in Moscow gave no intelligible answer.

5. A new argument not used in the previous texts of the same author appeared in the last variant of the supervisory submission: “*In case at issue, detailed reasoning of the order as demanded by the judges (!) would have involved information constituting investigative secrets and therefore would have resulted in breach of requirements of Art. 161 CCP RF prohibiting disclosure of the secret of pre-trial investigation*”. What is prohibited by Art. 161? Investigative secrets – *from whom? What judges, when and what demanded?* It is difficult to believe that all this could have been written by a jurist of Deputy Procurator General rank...

6. The submission says that the judgment of the Basmany Court and the ruling of the Collegium of the Moscow City Court “*run counter to other judicial findings existing at the time and dealing with the same matter*”.

This affirmation neither corresponds to reality. On 07.02.2007 the Ingodinsky District Court of the City of Chita was hearing another motion of the investigation to choose a measure of restraint for M.B. Khodorkovsky. The judgment of 03.02.07 **was not the subject of the court hearing**. Therefore it just established that *“the venue of preliminary investigation in the criminal case No 18/432766-07 was the city of Chita where the defendant M.B. Khodorkovsky was kept in the investigative isolator whereof a relevant judgement had been issued”*.

On 22.02.2007 the Judicial Collegium for Criminal Cases of the Chita Oblast Court, as the Ingodinsky District Court before, confined itself to a reference to a judgment by the Deputy Procurator General of the RF on designating the city of Chita as a venue of preliminary investigation in the criminal case No 18/432766-07 and its **procedural admissibility**. Lawfulness and reasonableness of this judgment was not verified in the cassational instance court.

On 20.03.2007 a joint appeal by the defenders of M.B. Khodorkovsky and P.L. Lebedev was heard by the Basmany District Court of the City of Moscow. **It was lawfulness and reasonableness of the decision to choose the city of Chita as a venue of preliminary investigation** that were a special subject of the hearing. The court decision is known.

On 03.04.2007 in the course of a court hearing of the Ingodinsky District Court of the City of Chita on the subject of extending the detention period for M.B. Khodorkovsky the defence repeatedly moved to issue a judgment on sending a case in accordance with its jurisdiction to the Basmany District Court of the City of Moscow. The court refused to meet this motion reasoning its decision as follows:

“The reference of the defence lawyer to the judgment of the Basmany District Court of the City of Moscow dated of 20.03.2007 is groundless and invalid because at the moment the said judgment on recognizing the judgment by the Deputy Procurator General of the RF V.Ya. Grin dated of 03.02.2007 according to which pursuant to Art. 152 para. 4 of the CCP RF the city of Chita was designated as a location of the defendant M.B. Khodorkovsky, was not heard following the cassational submission in the cassational instance and did not enter into legal force”.

On 16.04.2007 the Judicial Collegium for Criminal Cases of the Moscow City Court unambiguously resolved both the issue of jurisdiction of the criminal case which as mentioned in the ruling, **“forms the very essence of the appeal”** and the issue of its jurisdiction to the Basmany District Court of the City of Moscow, namely.

On 21.06.2007 the Judicial Collegium for Criminal Cases of the Chita Oblast Court issued a ruling to uphold the appeal by the defence of M.B. Khodorkovsky against the judgment of 03.04.2007 on extending his detention period. The ruling was issued in spite of the defence bringing to the notice of the court the information on the judgment of the Basmany District Court of the City of Moscow

dated of 20.03.2007 entering into legal force and attachment of the copies of the cassational ruling of the Judicial Collegium for Criminal Cases of the Moscow City Court to the case file materials. In such a way, on 21.06.2007 it was **for the first time** that the judicial instance of the city of Chita **directly and deliberately issued a decision running counter to the judgment of the Basmany District Court which had entered into legal force.**

The issue of which decision should be prioritized raises no doubts. The reference by the author of the submission to the decisions of the Chita courts, **issued after the judgment of the Basmany District Court has entered into force**, is inadmissible at all.

7. In an attempt to defile the judicial decisions under appeal the author of the submission shuns no arguments. For example, he affirms that on 26.03.07 the Basmany District Court dismissed an appeal by the defence of M.B. Khodorkovsky against the judgment on his transfer to Chita, not mentioning, with all this going on, that the dismissal was reasoned by “absence of the subject in dispute [negative of the issue]”, because I myself had revoked the appeal believing that after issuing the decision of 20.03.07, its hearing would lose its topicality.

8. In the opinion of the Deputy Procurator General of the RF, the court decision “*was based on a **formal approach** to the resolution of the appeal because it was made without account for the set of **circumstances important for the case** which was also overlooked by the Judicial Collegium for Criminal Cases of the Moscow City Court*”. What circumstances are referred to? This argument is just another “nonentity”.

9. The supervisory submission contains a request to repeal the **adjudicated** decisions and send a case for a new trial. Though, it does not mention what shall be established in the course of a new court hearing. At the same time it is obvious that the reasons and evidence of validity of the decision taken, which miss in the order of 03.02.07, shall not be given because they just do not exist. Otherwise they would have been presented long ago.

10. The author of the submission “*refutes*” the arguments of the court decisions on violation of the defendant’s rights by the order under appeal, including – the right to defence, by the “*fact of filing by the lawyers of detailed and reasoned appeals*”. The judgment of a judge of the Supreme Court of the RF on initiation of supervisory proceedings also says that the finding on violation of the right to defence, granted by Art. 46 para 1 of the RF Constitution, was made “*without taking into account the mere fact of appealing against the said judgment to the Basmany Court of Moscow*”.

Actually, the right to defence is substantially broader than *a possibility to file an appeal* to the court. Art 45 para 1 guarantees **state protection**, while Art. 46

para 1 of the RF Constitution - **judicial protection of rights and liberties**. Each person has the right to reckon on the laws, determining his rights, being observed even in case of holding him criminally liable on reasonable grounds. Art 152 para 1-3 of the CCP sets clear criteria to determine territorial jurisdiction in criminal cases. As it is truly stated in the judgment of the Basmany District Court, exception from this procedure, envisaged by para 4 of the said article, may be applied in strictly determined cases, at that when all the conditions, indicated in the law, are met in their entirety. Unjustified exception from the rules of determining jurisdiction violates the **equality of all the people before the law** (Art 19 of the RF Constitution).

Persistent refusal of the Procuracy General to eliminate the violations, it committed, confirms that the defendant is deprived of state protection of his rights and liberties. Among other things, the state protection means that **all the state power agencies are obliged to observe the laws**. Art 1 para 2 of the CCP RF stresses that “the order for the criminal court proceedings, established by this Code, **is obligatory** for the courts, for the prosecutor's offices, for the preliminary investigation and the inquiry bodies, as well as for the other participants in the criminal court proceedings”.

The ruling of the Constitutional Court of the RF No 180-O dated of 4.07.2002 says: “*when deciding on the issue of a specific case jurisdiction, the procurator may not act arbitrarily and is not released from the duty to follow the provisions of law including those which enshrine the rules to determine territorial jurisdiction*”.

11. The rights of **other participants in the case** are also violated, in particular, those of the defence lawyers. The need to regularly cover long distances between Moscow and Chita impairs effectiveness of the defence. According to the charges brought, the majority of actions alleged to our clients were committed in Moscow. It is in Moscow where there is evidence the collection of which is necessary to properly do the professional duty because, as we had time to see, the investigation was conducted one-sidedly and incompletely. A lot of necessary pieces of evidence are missing from the presented case file materials. This predetermined the need of “**rotational method**” of work when a part of defence lawyers are in Chita while the other one is forced to collect evidence in Moscow. As the areas of responsibility are shared between the defenders, regular are the situations when the defendant needs help of a **specific** defence lawyer and that one is out of Chita and his visit is impossible within quite a long time. It is such situation that arose, in particular, at the end of June 2007. According to a schedule coordinated with the defendant, I did not have to stay in Chita at that time (I had nothing to do there: as mentioned above, there was a long break in meeting the requirements of Art 217 of the CCP RF). However,

suddenly the investigation resumed presentation of the case file materials in Chita without notice, and M.B. Khodorkovsky faced the need to urgently discuss with me, as the head of defenders' group, the form of his procedural reaction. By virtue of absolutely objective circumstances, I could arrive to Chita only in a week

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