

## **JUDGMENT**

City of Moscow

30 January 2008

Judge of the Basmanny District Court of the City of Moscow N.Ye. Mushnikova with participation of V.A. Lakhtin, a section prosecutor of the Department of the Procuracy General of the Russian Federation for Supervision over Investigation of Criminal Cases in the Central Apparatuses of the Investigative Committee under the Procuracy of the Russian Federation, the Investigative Committee under the Ministry for Internal Affairs of Russia, the Federal Drug Control Service, the Federal Court Bailiff Service and the Federal Customs Service, and appellants: E.L. Liptser, a lawyer, who presented lawyer's ID No. 2998 and authorisation No. 48 of 27 February 2007, Yu.M. Schmidt, a lawyer, who presented lawyer's ID No. 1852 and authorisation No. 405119 of 28 February 2007, and K.Ye. Rivkin, a lawyer, who presented lawyer's ID No. 3827 and authorisation No. 179 of 25 January 2008, in the presence of secretary A.R. Sultangareyev, having considered in an open court session in the procedure prescribed by Art. 125 of the CCP RF an appeal of lawyers E.L. Liptser and Yu.M. Schmidt asking that an order of Deputy Prosecutor General of the Russian Federation of 03 February 2007 determining the venue for preliminary investigation be found unlawful and groundless,

### **established:**

Lawyers E.L. Liptser and Yu.M. Schmidt filed to the court an appeal under Art. 125 of the CCP RF asking that an order of Deputy Prosecutor General of the Russian Federation of 03 February 2007 determining the venue for preliminary investigation be found unlawful and groundless. In substantiation of their appeal, the lawyers state that the order fails to meet the requirements of Art. 152 CCP RF, which says that preliminary investigation shall be conducted at the place of the commission of the crime. As follows from the orders to bring charges against P.L. Lebedev and M.B. Khodorkovsky, it is the city of Moscow that is the venue of the preliminary investigation. There is an exception allowed to the general rule; this exception stipulates that in order to ensure fullness and objectiveness of investigation and observance of procedural deadlines, an investigation can be conducted at the location of the accused. In this case, the location of the accused was designated absolutely arbitrarily in contradiction with the meaning of the law. From 2003 and up to 16 February 2007, when it was announced that investigative actions had been completed, preliminary investigation in the criminal [case – missed in the original] had been in fact conducted in Moscow. The appeal also points out that the city of Chita lacks any specific conditions that would ensure fullness of the investigation. The appellants also point out that designation of Chita as the venue for the preliminary investigation leads to breach of the procedural deadlines rather than to their observance. The order at issue artificially and unlawfully created difficulties for the work of the

lawyers and severely impaired rights of the accused, including their right to defence.

In the court session, lawyers E.L. Liptser and Yu.M. Schmidt supported the arguments of their appeal.

Lawyer Yu.M. Schmidt in his speech pointed out that according to Ruling of the Constitutional Court of the Russian Federation No. 180-O of 04 July 2002, prosecutors cannot act arbitrarily and are not relieved of their obligation to follow law provisions, including those that enshrine the rules for determination of territorial jurisdiction. After the Deputy Prosecutor General of the Russian Federation had issued his order designating the city of Chita as the venue for the preliminary investigation on 3 February 2007, all the investigative actions in the case continued to be carried out in the city of Moscow. The city of Chita always lacked and still lacks any specific conditions that would ensure fullness of the investigation because there is no evidence whatsoever in that city subject to being collected in this criminal case. The allegation made in the order to the effect that it was necessary to carry out a large volume of investigative actions involving the accused is untrue, as is the idea that the city of Chita was designated as the venue for the preliminary investigation in order to ensure fullness and objectiveness of investigation and observance of procedural deadlines. Lawyer Yu.M. Schmidt submitted to the court written explanations, which contested the lawfulness and substantiation of the order of 3 February 2007 on the basis of an analysis of previous court judgments subsequently repealed by the ruling of the Judicial Collegium for Criminal Cases of the Supreme Court of the Russian Federation and of supervisory submissions of the Procuracy General of the Russian Federation. In his written explanations lawyer Yu.M. Schmidt also pointed out that the order at issue breached Art. 19, Art. 45 para 1 and Art. 46 para 1 of the Russian Constitution.

Lawyer E.V. [sic] Liptser in the court session explained that from the moment when the criminal case against P.L. Lebedev and M.B. Khodorkovsky was opened, the investigation has been conducted in the city of Moscow as corroborated by the documents attached to the case-file of the appeal. It is for this reason that the Deputy Prosecutor General of the Russian Federation was unable to cite in his order any information as to how exactly fullness and objectiveness of preliminary investigation and observance of procedural deadlines would be ensured while conducting preliminary investigation in the city of Chita. Lack of this information in the order means that the prosecutor at his own discretion can carry out preliminary investigation not only at the place of the commission of the crime but also at the location of the accused or most of the witnesses, which is at odds with the requirements of the law. The fact that the appeal was

submitted to the court cannot be regarded as a real opportunity to argumentatively contest the conclusions made in the order under appeal due to lack of any reasoning therein.

Lawyer K.Ye. Rivkin supported the arguments of the appeal and pointed out that the criminal procedural law in force does not provide for issuance by the prosecutor of such a procedural document as an order to designate the venue for preliminary investigation, and therefore this order cannot be found lawful.

Prosecutor V.A. Lakhtin objected to granting the appeal of the lawyers submitting that the appeal filed by the lawyers did not meet the requirements of Art. 125 CCP RF to the content of appeals. Pursuant to Art. 125 para 1 CCP RF, appealed to a district court can only be decisions of an investigator that can cause damage to constitutional rights and freedoms of participants of criminal proceedings or hinder their access to justice. It cannot be seen from the content of the appeal how the order under appeal can cause damage to constitutional rights and freedoms of accused P.L. Lebedev and M.B. Khodorkovsky and their defence lawyers or hinder their access to justice. In addition, what is appealed is the order issued by the Deputy Prosecutor General of the Russian Federation, and the defence lawyers demand that the Prosecutor General of the Russian Federation be obligated to redress the flaws allegedly committed. Arguments of the defence lawyers concerning unlawfulness of the order of 03 February 2007 have already been considered by the Ingodinsky District Court of the City of Chita while choosing the measures of restraint in the form of detention against accused P.L. Lebedev and M.B. Khodorkovsky and taken into account by the Judicial Collegium for Criminal Cases of the Chita Oblast Court while issuing rulings on cassation appeals against these decisions of the District Court. All these court judgments have come into legal force; therefore, insisting that this appeal be heard, the defence lawyers are in fact initiating a revision of the court judgments that have come into legal force. Location of the venue of the preliminary investigation in the city of Chita ensures its fullness, objectiveness and observance of procedural deadlines, which is in full compliance with the requirements of Art. 152 para 4 CCP RF. The order of 03 February 2007 under appeal was issued in accordance with the requirements of the criminal procedural law, including with Arts. 152 and 161 CCP RF. The order is lawful, well-substantiated and reasoned in accordance with Art. 7 para 4 CCP RF and with due account for the provisions of Art. 161 CCP RF, which does not allow for disclosure of information concerning preliminary investigation. The order was issued by Deputy Prosecutor General of the Russian Federation upon his consideration of the criminal case file, in an opened criminal case, within the preliminary investigation period and by a proper official within the scope of his authorities provided for by the law. Therefore, the order under appeal has not caused any damage to

constitutional rights and freedoms of accused P.L. Lebedev and M.B. Khodorkovsky or their defence lawyers, and has not hindered their access to justice.

The appeal is heard without accused P.L. Lebedev and M.B. Khodorkovsky, who have been informed about the time and the venue of hearing of the appeal.

As follows from the materials submitted to the court, on 3 February 2007 criminal case No. 18/432766-07 against M.B. Khodorkovsky and P.L. Lebedev charged with commission of crimes described in Arts. 160 para 3 (a, b) and 174 para 3 of the CC RF (as worded by Federal Law No. 63-FZ of 13 June 1996) and Art. 160 para 4 and Art. 174.1 para 4 (as worded by Federal Law No. 162-FZ of 08 December 2003) was separated from criminal case No. 18/41-03 into a separate proceeding in order to complete the preliminary investigation in this case, the term of proceeding in which was extended by Deputy Prosecutor General of the Russian Federation to 72 months, *i.e.* through 02 July 2007.

On 3 February 2007, the order of Deputy Prosecutor General of the Russian Federation V.Ya. Green designated Chita as the venue for preliminary investigation in criminal case No. 18/432766-07 against P.L. Lebedev and M.B. Khodorkovsky.

It can be seen from the order that in view of the need to carry out a large volume of investigative actions involving accused M.B. Khodorkovsky and P.L. Lebedev in the premises of the investigative isolator of the city of Chita in the course of preliminary investigation, in order to ensure fullness and objectiveness of investigation and observance of procedural deadlines the location of the accused – the city of Chita – should be designated as the venue for preliminary investigation in criminal case No. 18/432766-07.

According to Art. 29 para 3 of the CCP RF, in the course of pre-trial proceedings courts have authority to consider appeals against actions (failures to act) and procedural decisions, including those of prosecutors, in the cases and in the procedure stipulated by Art. 125 of the CCP RF.

According to Art. 125 of the CCP RF, orders or actions (failures to act), including those of prosecutors, that can cause damage to constitutional rights and freedoms of participants of criminal proceedings or hinder access of citizens to justice, can be appealed to the district court at the venue of the preliminary investigation.

Since the legislator has not determined the scope of actions (failures to act) and procedural decisions of officials that can be appealed in the procedure at issue, their scope should be determined using the criterion of their ability as a result of fulfilment or non-fulfilment to cause damage to constitutional rights and freedoms of participants of criminal proceedings or to hinder access of citizens to justice.

Having considered the arguments of the appeal and listened to the opinions of the lawyers and of the prosecutor, the court does not find grounds to conclude that the order under appeal causes damage to constitutional rights and freedoms of accused P.L. Lebedev and M.B. Khodorkovsky or their defence lawyers or hinders their access to justice.

Under these circumstances, the court is of the opinion that the lawyers' appeal should not be granted because there is no subject-matter of consideration provided for by Art. 125 CCP RF.

On the basis of the above, pursuant to Art. 125 of the CCP RF, the judge

**adjudged:**

To dismiss the appeal of lawyers E.L. Liptser and Yu.M. Schmidt.

This judgment can be appealed to the Moscow City Court within ten days from the moment of its issuance.

Judge [ground seal of the court] [signature]

[Stamp:  
TRUE COPY]