

**To the Judicial Collegium for Criminal Cases
of the Chita Oblast Court**

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Cassation appeal

By me in the established procedure is being implemented the defence of P.L. Lebedev in criminal case No. 18/432766-07.

On 30 May of the current year an appeal was directed in the procedure of Art. 125 CCP RF to the Central Court of the City of Chita against a decree of investigator A.V. Amikov of 8 May 2008.

On 6 June, a judge of the Central District Court of the City of Chita issued a judgment «*on refusal to accept for examination*» of the indicated appeal (received 18.06.08 – memo attached).

I consider the judgment of 6 June 2008 unlawful, impinging on the constitutional right of P.L. Lebedev to a defence and subject to reversal on the following grounds.

1. The judgment under appeal contradicts the RF Constitution

1.1. The RF Constitutional Court has on numerous occasions confirmed its universally binding legal position, in accordance with which, *if the corresponding actions and decisions of agencies of investigation not only touch upon criminal-procedural relations as such, but also give rise to consequences that go beyond the bounds thereof, substantially limiting in so doing the constitutional rights and freedoms of the person, postponing the verification of the lawfulness and groundedness of such actions prior to the court examination stage may bring [sic] harm, the replenishment [sic] of which in the future will turn out to be impossible. In these situations, control over the actions and decisions of the agencies of preliminary investigation on the part of the court, taking place only upon the examination by it of the criminal case, i.e. at the next stage of proceedings, is not an effective means for restoring the violated rights* (decrees No. 5-P of 23.04.1999, No. 4-P of 12.03.2001, ruling No. 82-O of 19.04.2000 and others).

The decision under appeal was adopted in spite of the indicated legal position and the unity of judicial practice and must be reversed in cassation procedure.

1.2. The state, guaranteeing each citizen the right to receive qualified legal assistance (Art. 48(1) RF Constitution), has laid upon lawyers the public duty to provide for the defence of the rights and freedoms of a person and citizen (subpara (1) Decree No. 18-P of the RF Constitutional Court of 23 December 1999).

One of the fundamental forms of realisation of the constitutional right to receive qualified legal assistance is the granting (Art. 86 para 3 CCP RF) of the right to a defender to gather evidence. This right is based on the norm of Art. 53 para 1(2) CCP RF, as well as Art. 6 para 3(1-3) of the Federal Law “On the Advocacy and the Bar in the RF”.

The indicated powers of a defender are essential conditions for the realisation of the principles of adversariality and equality of arms (Art. 123 para 3 RF Constitution). In so doing, in Art. 15 para 1 CCP RF, these principles are concretised as applies both to the trial and to the pre-trial stages of judicial proceedings.

In such a manner, the RF Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms, criminal-procedural and other laws, judicial practice, including the precedential practice of the European Court of Human Rights, recognise and guarantee the right of the party of the defence to gather and present evidence.

1.3. The right to adopt a procedural decision on attaching evidence to the case file belongs to the court and the agencies of preliminary investigation. However, corresponding to this right is the duty *«to adopt in established procedural forms all measures depending on them (the court and the investigation) in order that evidence be obtain confirming both the guilt and the innocence of the person of the crime inculcated to him»* (decree No. 13-P of the RF Constitutional Court of 29 June 2004).

At the stage of the gathering of evidence (and what is being spoken of is precisely this stage), the right to gather evidence is had, besides by the investigation, likewise by the accused (para 2) and by his defender (Art. 83 para 3 CCP RF).

However, the court did not approach critically the anti-constitutional attempt of the investigation in the judgment under appeal to monopolise this right.

In such a manner, the court issued the judgment under appeal in spite of the legal position of the RF Constitutional Court, from which it follows that the carrying out by a lawyer of the procedural duties of a defender can not be placed in dependence on the discretion of an investigator, based on circumstances not enumerated in criminal-procedural law, limiting the possibility to implement the powers of the defence (ruling No. 276-O of 07.12.2001).

1.4. A systemic analysis of Art. 48 para 1 RF Constitution, Art. 53 para 1(2) and Art. 86 para 3 CCP RF does not leave doubt that a lawyer’s polling [*sic*] of persons with their

consent is criminal-procedural evidence, by means of which the defence has the opportunity to implement its functions in full measure.

The investigation asserts that the information contained in the polls [*sic*] of D.V. Gololobov and R.R. Burganov does not correspond to the factual circumstances of the case, as it contains references to collegial decisions of the Board of Directors of ZAO «Rosprom» of 03.11.98 and 10.02.99.

However, the facts both of the existence of the Board of Directors as such, and of its sessions on the indicated dates are not contested by the investigation.

1.5. In the court judgment under appeal is contained an assertion that does not square with the facts, that «... *by the investigator ... was adopted a decision on the relevance and admissibility of evidence in the criminal case, to which is had a reference in the judgment as the basis for the refusal to satisfy the petition...*».

The indicated «reference» in the judgment of the investigator is absent, which deprives the court decision under appeal of the right to be called reasoned and lawful, and this means issued in violation of the norm of Art. 120 para 2 RF Constitution and the norms of the CCP RF corresponding thereto (Art. 1 para 2, Art. 7 para 4).

The fact that all the documents about the attachment of which P.L. Lebedev and his defence had petitioned have significance for the given criminal case is confirmed by a decision of the investigation itself on the attachment to the case file of information obtained indirectly from D.V. Gololobov and R.R. Burganov, as well as a decision of the Arbitration Court of the City of Vienna [*sic*] of 31.03.2002. The only difference between the latter document and the decision of the Viennese Arbitration of 01.07.2003 is in that the first was obtained by the investigation and the second – by the defence. Such an approach signifies the application by the investigation of double standards and factual discrimination against P.L. Lebedev, which «*is not admissible not only on the basis of the attributes directly indicated in ...the Constitution, but others as well...the Constitution does not limit the list of attributes on the basis of which any discrimination against citizens is ruled out, but on the contrary, assumes its further concretisation both in legislation and in the practice of the application of the law*» (decree No. 2-P of the RF Constitutional Court of 4 February 1992).

1.6. The right to a defence, besides other articles, is embodied in Arts. 23 (para 1), 46 and 48 RF Constitution. Pursuant to Art. 56 (para 2) RF Constitution **this right shall not be subject to limitation under any conditions.**

The judgment under appeal infringes on the very existence of the right to a defence, leads to a real loss of the opportunity to use it by P.L. Lebedev in the present case, which is inadmissible (Decree No. 15-P of the RF Constitutional Court of 30.10.2003).

2. The judgment under appeal was issued with substantial violations of criminal-procedural law

2.1. The judgment of 6 June 2008 was issued, as is indicated in it, «*being guided by Art. 125 CCP RF*». However, the given article contains an exhaustive list of decisions that a court has the right to issue (para 5 (1) and (2)).

In such a manner, **judge L.A. Likhanova issued a judgment not prescribed by law, which is a violation of the norms of Art. 1 para 2, Art. 7 para 1 and Art. 19 para 1 CCP RF and gives grounds for its reversal in cassation procedure.**

2.2. The judgment under appeal was issued by Judge L.A. Likhanova solely, and, in essence, extramurally, without the participation of the parties, which is a violation of the principles of adversariality, immediacy and openness of criminal judicial proceedings. **Such a procedure for examining appeals in the procedure of Art. 125 CCP RF is not prescribed by the law, and, consequently, could not have been applied by the court.**

2.3. Furthermore, a compulsory component of the right to a court defence is provision to interested parties of the opportunity to present to the court an opinion in substantiation of their position. **Limitation of such a kind of rights and opportunities of criminal judicial proceedings were [*sic*] assessed by the RF Constitutional Court as not being in accord with Arts. 45, 46 and 123 (para 3) of the RF Constitution (ruling No. 285-O of 21.12.2000).**

On the basis of what has above been set forth, being guided by Arts. 377, 378, 379 and 386 CCP RF I ASK:

1. To reverse the judgment of the judge of the Central District Court of the City of Chita of 6 June 2008, as unlawful, and to send the appeal of 30 May 2008 for new examination in another makeup of the court.

Attachments:

1. copy of letter No. 2603 from judge L.A. Likhanova of 10 June 2008 with the attachments enumerated therein – total of 12p.
2. memorandum No. 23 from the Law Partnership «Gauf and Partners» of 19 June 2008 – on 1p.
3. lawyer's authorisation No. 40 of V.N. Krasnov of 20,06.2008 – on 1p.

Lawyer

(signature)

V.N. Krasnov

23 June 2008