

## LITIGATION

# Magnitsky v. Russia: summary of application filed before the European Court of Human Rights

OCTOBER 2012

---

THE FOLLOWING SUMMARY is extracted from the full application, *Natalia Magnitskaya v. Russia*, filed by lawyers from the Open Society Justice Initiative on behalf of the mother of Sergei Magnitsky before the European Court of Human Rights in Strasbourg on October 17, 2012.

## SUMMARY OF THE CASE

- i. Pursuant to Rule 47 and the relevant practice direction, the following summary of the case is provided for the benefit of the Court.

### Victim Status

- ii. Natalia Magnitskaya is an indirect victim on behalf of her son Sergei Magnitsky for violations of Article 2, Article 3, Article 5, Article 6, Article 10, and Article 13, as set out below.
- iii. In addition, she is a direct victim of a violation of Article 3 in respect of the degrading treatment, anguish and distress to which she has been subjected by the Russian authorities in their response to her attempts to ensure an effective investigation into her son's death, and by summoning her to appear as the legal representative of her son in the authorities' posthumous prosecution of him.
- iv. The application was introduced on 21 August 2012, within six months of the exhaustion of domestic remedies which occurred with the decision of the Moscow City Court of 22 February 2012, rejecting Mrs. Magnitsky's attempts to secure an effective investigation of her son's death, and the decision of the Moscow City Court from May 2012 rejecting her complaint as to the posthumous criminal proceedings against her dead son.

### Facts of the Case

- v. *The victim.* Sergei Magnitsky was married with two small children. He was the head of the tax practice at the Moscow office of the U.S.-owned law firm Firestone Duncan. His clients included Russian subsidiaries of the Hermitage Fund (Hermitage), at the time the largest foreign investment fund in Russia. On 4 June 2007, officers from the Main Department (GUVD) of the Moscow City Branch of the Ministry of Interior Affairs (MVD), including from the GUVD's Tax Crimes Department, raided the Moscow offices of Firestone Duncan and of Hermitage Fund's advisor, Hermitage Capital Management (HCM). The search was conducted on the pretext of an investigation into a company called *Kameya*. However, officers seized large numbers of corporate documents and company seals unrelated to *Kameya*.
- vi. *The Fraud.* In late 2007, Mr. Magnitsky and his colleagues uncovered a fraudulent scheme by which a criminal gang including police officers, tax inspectors and organized criminals would arrange a fraudulent tax refund of 5.4 billion roubles (approximately \$230 million). This fraud was conducted through a "corporate raid." As commonly practiced in Russia, a corporate raid is a criminal enterprise through which a criminal gang fraudulently takes control of a company by falsely re-registering it in the name of one or more members of the group, and then steals the company's assets by fabricating legal cases, issuing threats or other measures. In July 2007, using documents seized by the police in the 4 June 2007 raid, the criminal gang at issue gained control of three subsidiary companies of the Hermitage Fund. The criminal gang then created back-dated contracts falsely claiming that these three subsidiaries owed 30 billion roubles (approximately \$1 billion) to empty Russian shell companies. The criminal gang then used those shell companies to sue the three subsidiaries, wiping out on paper their reported profits, and thus their tax liabilities for 2006.
- vii. *The Fraudulent Tax Refund.* In December 2007, the gang reclaimed 5.4 billion roubles in tax that had previously been paid to the Russian government by the three subsidiaries. The gang had re-registered the three subsidiary companies with Moscow Tax Offices 25 and 28, who approved the tax refunds within days. Substantial tax refunds in Russia typically take

far longer to process. Complaints filed by a colleague of Mr. Magnitsky with the prosecution authorities in Russia have made allegations supported by documentation that tax officials involved in approving the fraudulent refund as well as two of the Interior Ministry investigators who seized the documentation subsequently used to execute the theft of the three subsidiaries have acquired millions of dollars' worth of assets, far in excess of their official salaries.

- viii. *Allegations by Hermitage.* When in late October 2007 Hermitage discovered that the three subsidiaries had been stolen and learnt of the fraudulent legal claims, the company investigated the theft and prepared formal complaints that were filed between 3 and 11 December 2007 with the Prosecutor General's Office (PGO), the Investigative Committee of the PGO (IC-PGO), and the Internal Affairs Department of the Interior Ministry (MVD). The complaints detailed the alleged fraud that had been discovered by Mr. Magnitsky and his colleagues, and explained the roles of Lt. Col. Artem Kuznetsov and Major Pavel Karpov, who were among the MVD officers who had seized the documents and the corporate seals in the 4 June 2007 raid, and in whose custody they remained when the fraudulent seizure of control of the three subsidiaries was carried out in July 2007. However, it was not until 5 February 2008 that the Investigative Committee of the Prosecutor General's Office (IC-PGO) opened an investigation into the allegations, too late to prevent the completion of the fraud. Hermitage uncovered the details of the huge tax rebate only in June 2008, and immediately wrote again to the authorities. On 5 June 2008 Sergei Magnitsky gave evidence to the IC-PGO investigator, and named Kuznetsov and Karpov for their roles in seizing the corporate documents used to facilitate the fraud.
- ix. *Conflicts in the Investigation Groups.* On 27 February 2008, three weeks after the IC-PGO had opened a criminal investigation into Hermitage's allegations that officials including Karpov and Kuznetsov were involved in the 5.4 billion rouble fraud, the MVD re-opened a case involving allegations of tax evasion by a different Hermitage subsidiary company in 2001 that had previously been closed in 2005. In November 2008, just one month after Mr. Magnitsky confirmed his testimony implicating officials including Karpov and Kuznetsov in the fraud, the MVD formally appointed an investigative group to investigate the allegations made by Mr. Magnitsky. The group was led by Major Oleg Silchenko. Creating an astounding conflict of interest, the MVD appointed to that investigative group Lt. Col. Kuznetsov and three subordinates, even though Kuznetsov was accused by Mr. Magnitsky of involvement in the fraud that he was now supposed to investigate. Six days later Major Silchenko was appointed to head another group, tasked with investigating the 2001 tax evasion allegations, also supported by the same team including Lt. Col. Kuznetsov and others. Within days this second investigative group obtained from a judge a search warrant for Mr. Magnitsky's home, and issued a summons for Mr. Magnitsky to appear as a witness, to be executed by Kuznetsov. On 24 November 2008 two subordinates of Kuznetsov went to Mr. Magnitsky's house and brought him to the offices of the MVD for questioning. There, Major Silchenko arrested Mr. Magnitsky on suspicion of tax evasion contrary to Article 199 of the Criminal Code. At the time of his arrest, Mr. Magnitsky was in sound medical health.
- x. *Detention.* For the next 12 months the investigative group appointed to investigate the allegations of tax evasion by Hermitage helped ensure that Mr. Magnitsky was kept in custody, relied on spurious grounds to justify his detention, ignored the facts that warranted his release, and failed to demonstrate the special diligence necessary to maintain pre-trial detention for such a long period. Mr. Magnitsky maintained his innocence, and during interrogation and in written complaints accused Kuznetsov and other members of the

Investigating Group of detaining him for the purpose of trying to force a false confession out of him and in retribution for uncovering the fraud.

- xi. *Conditions of detention.* As the leader of the investigative group for the tax evasion allegations, Major Silchenko, and other members of the investigative group, had substantial influence over, not just the duration, but the conditions, of Mr. Magnitsky's detention. In 12 months he was moved between detention centres six times, and between cells at least 20 times, including at night. On several occasions when he made complaints, Mr. Magnitsky was moved to a cell with worse conditions, as the investigators pressured him to falsely confess, to retract his allegations of official fraud and corruption, and/or to implicate either his colleagues or his client in criminal activity. Major Silchenko allowed Mr. Magnitsky only one visit from his wife and mother, on 27 October 2009, after almost a year in detention without having seen them or any other relatives. He denied Mr. Magnitsky even one opportunity to speak with his small children by phone.
- xii. *Diagnosed with Pancreatitis.* In the spring of 2009 Mr. Magnitsky began to experience abdominal pains. On 1 July 2009, while Mr. Magnitsky was detained at Detention Centre No.1 (Matrosskaya Tishina) in Moscow, an ultrasound examination revealed that he had gallstones and pancreatitis. His pancreas was twice its usual size. Mr. Magnitsky had never previously suffered from either of these medical problems. Both the examining physician and later a surgeon agreed that, in order to treat these conditions, Mr. Magnitsky should be given another ultrasound examination in one month's time, to be followed by surgery.
- xiii. *Transfer to Butyrka.* However, the day after Mr. Magnitsky's illness was diagnosed, Major Silchenko issued a written request to transfer him to Butyrka, which did not have either the ultrasound equipment or the surgical facilities needed to treat Mr. Magnitsky. Although Matrosskaya Tishina did have such facilities, Mr. Magnitsky was transferred to Butyrka on 25 July 2009.
- xiv. *Denial of Medical Care and Poor Conditions.* In Butyrka, despite his medical diagnosis, Mr. Magnitsky was prevented from being examined by a doctor for a further four weeks – long past the date when the doctors at Matrosskaya Tishina had prescribed another ultrasound examination and surgery, and then only in a cursory, unrecorded visit. Mr. Magnitsky was not more fully examined by a doctor until 7 October, 2009 – more than three months after the doctors at Matrosskaya Tishina had ordered another ultrasound examination and surgery. Mr. Magnitsky was also denied the medicines that had been prescribed to treat his condition by the doctors at Matrosskaya Tishina. When he complained, Mr. Magnitsky was moved from Cell 267 to Cell 59, which was overcrowded and had very poor conditions, including a broken toilet, which eventually caused sewage to flow into the cell. Mr. Magnitsky filed numerous complaints with the director of Butyrka prison and the head of the medical ward, seeking urgent medical treatment and challenging the conditions of detention, while alleging that his ill-treatment was a deliberate attempt to force him to confess. The authorities then moved him, first, to Cell 35, which had no windows, was cold and damp, and in which the sewage also overflowed, and then to Cell 61, which also had no windows, and from which he was transported to one of the court hearings in very cramped conditions and with no food for the entire day. Mr. Magnitsky filed further complaints with the prison authorities. He was finally moved to what was known as the medical ward, which was not suitably equipped for the treatment Mr. Magnitsky had been prescribed. According to the record prepared by the prison, after a few weeks in the medical ward, Mr. Magnitsky's condition began to improve. However, he still was not provided either the ultrasound examination or the surgery prescribed by the doctor and surgeon on 1 July. Mr. Magnitsky remained in Butyrka's medical ward until 12 November.

- xv. *Final Custody Extension.* On 6 October 2009, the day before he was moved to the medical ward, Mr. Magnitsky was informed that as a result of their investigation, the group investigating allegations of tax evasion by Hermitage had issued a formal accusation against him, alleging that he had prepared inaccurate tax returns in 2001-2002 in respect of a Hermitage subsidiary. On 16 October he was informed that the formal investigation against him had been completed. Mr. Magnitsky was due to be released on 15 November 2009. On 14 October Mr. Magnitsky was interrogated by Investigator Gritsay of the IC-MVD. He denied all of the allegations against him, and accused Kuznetsov and other investigators of stealing the Hermitage company documents and participating in the fraud after having previously made an improper approach to Hermitage, promising to “resolve” “certain issues” if he was “provided with something he was asking for.” However, even though the investigation was complete, and Mr. Magnitsky would, in the ordinary course, have been released on 15 November, on 3 November Lt. Col. Silchenko applied, and on 12 November the court agreed, to extend Mr. Magnitsky’s detention on the basis that Mr. Magnitsky needed further time to study the case file. As a result, Mr. Magnitsky’s release date was delayed until 26 November 2009, one year from his first court appearance, beyond which custody could only be further extended if the time to review the file was insufficient, and if it was an “exceptional case.” Mr. Magnitsky was returned from court to Butyrka prison in the evening of 12 November, and after waiting several hours in a collection cell was placed not in the medical ward, but instead in a new cell – No. 305 – in the general population, in the middle of the night.
- xvi. *Deterioration and transfer.* On Friday 13 November, as described in a written complaint he sent to the chief of Butyrka’s Medical Ward, Mr. Magnitsky experienced acute pains in the pancreatic gland area and liver, and vomiting. Notwithstanding this marked worsening of his health, Mr. Magnitsky was not seen by a doctor for three entire days - until 9 a.m. on Monday 16 November. At that time, Mr. Magnitsky was diagnosed with “aggravation of cholecystopancreatitis” and a decision was made to urgently send him to the medical unit of Matrosskaya Tishina prison. Despite this urgency, an ambulance was not called until 2:30 p.m. Although the ambulance crew arrived by 3 p.m., they had to wait a further two hours and 35 minutes before a special convoy team was formed, and they could transport him. As a result, Mr. Magnitsky did not arrive at Matrosskaya Tishina until approximately 6:30 p.m.
- xvii. *Death in Custody.* According to the testimony of Dr. Alexandra Gaus, the Matrosskaya Tishina prison doctor, on arrival at Matrosskaya Tishina prison, Mr Magnitsky was not immediately hospitalized. Rather, he was seen by Dr. Gaus while confined in a caged area in the nurse’s room of the prison reception area. Dr. Gaus first confirmed the diagnosis of “acute pancreatitis and cholecystitis”, and described the patient’s status as “moderately severe.” However, according to her testimony, Mr. Magnitsky’s condition suddenly deteriorated. He was highly agitated, saying, “they will kill me here. I am innocent under this case, why did they bring me here?” Dr. Gaus then diagnosed Mr. Magnitsky as suffering from “acute psychosis” and called a team of eight prison guards to assist as well as an emergency psychiatric team. The guards handcuffed Mr. Magnitsky and placed him in a cell, where, despite his obvious discomfort and immediate need for medical care, he was left for nearly two hours, without medical attention. The record indicates that, for unexplained reasons, prison guards used a rubber truncheon on Mr. Magnitsky. Although the emergency psychiatric team arrived at the prison at 8 p.m., they were prevented from entering the prison for more than an hour, for no apparent reason. From this point, the versions of events differ considerably. The independent emergency psychiatrist and his assistant later testified that they eventually entered Cell No.4 at about 9:20 p.m. to find Mr. Magnitsky’s body, and that he had been dead for at least 15 minutes. However, the medical

record and numerous prison staff insist that Mr. Magnitsky was still alive and breathing when the emergency psychiatric team arrived, and only lost consciousness as they examined him. According to the evidence of Dr. Gaus, when she arrived at the scene the emergency team had left, and she found a weak pulse in Mr. Magnitsky's neck and ordered resuscitation to be attempted. The lone autopsy the authorities allowed to be undertaken found numerous physical injuries that were inflicted upon Mr. Magnitsky immediately before his death, for which no explanation has been given. A preliminary death certificate issued that day suggested that he may have sustained a "closed cranio-cerebral injury", although the document was later modified to remove those words.

- xviii. Immediately following the death of Mr. Magnitsky, numerous government officials issued public statements denying that there was anything suspicious about the circumstances of his death, and asserting – despite all evidence to the contrary – that he had never filed any complaints about his ill-treatment in custody.

#### **Exhaustion of Domestic Remedies**

- xix. On 24 November 2009 a local district of the Investigative Committee of the Public Prosecutor for Moscow opened a criminal investigation into the death of Mr. Magnitsky. The investigation was limited to medical negligence and did not name any suspects. In May 2010 the case was transferred to the Investigative Committee of the Prosecutor General's Office (IC-PGO). More than a year later, in July 2011, a new investigation was instituted against Dr. Dmitry Kratov, head of the medical ward at Butyrka, and against Dr. Larisa Litvinova, also of Butyrka. At the end of December 2011, they were issued with final official charges. Dr. Kratov was charged with neglect of duty and Dr. Litvinova was charged with negligent homicide. On 2 April 2012 the case against Dr. Litvinova was dropped on the basis that the statute of limitations had already expired for the crime with which she had been charged. The case against Dr. Kratov continues.
- xx. On 13 September 2011, Natalia Magnitskaya filed a petition asking the Investigative Committee of Russia (IC-R – previously the IC-PGO) to open a criminal investigation into the broad range of people involved in the death of Sergei Magnitsky, including members of the MVD investigative group, the judges who extended his detention, prison officials and the Federal Secret Service. The IC-R – in the person of Senior Major Case Investigator Lomonosova – rejected this complaint in October 2011, stating that the ongoing investigation being carried out by the IC-R was independent.
- xxi. On 22 November 2011, Mrs. Magnitskaya filed a complaint with the Basmanny District Court. The complaint asserted that charging only the two doctors and failing to charge other named individuals violated the constitutional protection of the right to life and the prohibition of torture, and that the failure of the IC-R to respond to her earlier complaint on this point also violated her constitutional rights. On 13 December 2011 the Court rejected this complaint.
- xxii. On 22 December 2011, Mrs. Magnitskaya filed a cassation appeal to the Moscow City Court. At a hearing on 22 February 2012 the Moscow City Court decided that there was no evidence that the action or inaction of Senior Investigator Lomonosova of the IC-Russia in failing to charge individuals other than the two doctors harmed the constitutional rights of Mrs. Magnitskaya.
- xxiii. In separate proceedings, on 2 August 2011, two years after Mr. Magnitsky's death, the Prosecutor General's Office announced that the Deputy Prosecutor General had decided to re-open the investigation against Mr. Magnitsky that had been terminated on 27 November 2009, shortly after his death. On 18 August 2011, Mrs. Magnitskaya was

summoned to appear as a witness in the re-opened investigation. Between August 2011 and March 2012, Mrs Magnitskaya filed several complaints with the Russian courts seeking to stop the posthumous prosecution of her son. In April 2012 the Ostankinsky District Court of Moscow rejected her complaint stating that her constitutional rights were not violated. In May 2012, the Moscow City Court rejected her appeal.

### **Alleged Violations of the Convention**

- xxiv. Through the acts and omissions of its agents, the Russian Federation violated the Convention by their treatment of Sergei Magnitsky and Natalia Magnitskaya as follows.
- *A. Article 2: Violation of the Right to Life.* The Russian authorities deliberately killed Sergei Magnitsky, by refusing to provide him with medical treatment and by assaulting him. Given the failure of the authorities to provide a plausible explanation for his death, the Court should make a finding that he was unlawfully killed in breach of Article 2.
  - *B. Article 3: Torture.* The Russian authorities intentionally subjected Sergei Magnitsky to ill-treatment during the nearly 12 months that he was detained prior to his death. The deliberate failure to treat his painful symptoms and the infliction of debilitating physical conditions causing physical and mental suffering in an attempt to obtain a false confession or a retraction amounts to torture.
  - *C. Article 5: Unlawful Detention.* The detention of Sergei Magnitsky was not for any lawful purpose but in order to obtain a false confession from him, to force him to retract his allegations, and to cover up official corruption. There was insufficient evidence upon which to detain him. The hearings at which his detention was considered failed to meet the standards required by Article 5.
  - *D. Articles 2, 3, 5: Failure to Investigate.* The investigation into the death of Mr. Magnitsky was not prompt, impartial, effective, or public. Nor was it capable of bringing about the identification and prosecution of either the material perpetrators or the intellectual authors of his death.
  - *E. Article 10: Whistle-blower Protection.* The prosecution of Mr. Magnitsky for the purpose of silencing his revelation of a 5.4 billion rouble fraud on the Russian treasury by a criminal gang including public officials violates the protection given to whistle-blowers by Article 10.
  - *F. Article 6: Posthumous Prosecution.* The continuation of criminal proceedings against Mr. Magnitsky after his death violates the presumption of innocence and the right to a fair trial protected in Article 6.
  - *G. Article 3: The Persecution of Mrs. Magnitskaya.* The repeated and deliberate obstruction of all attempts by Mrs. Magnitskaya to establish the truth as to her son's death, through false statements, excessive secrecy, and the refusal to conduct simple investigative actions or to allow any independent review, as well as the unique and unlawful posthumous prosecution of her son, for which she was summonsed in his stead by the same investigators who persecuted him, amounts to treatment contrary to Article 3.
  - *H. Article 13: Lack of an Effective Remedy.* Despite extraordinary efforts to challenge the torture and unlawful killing of Sergei Magnitsky and to obtain redress, there was no effective remedy for the violations of the Convention that occurred.

### **Object of the Application**

- xxv. Mrs Magnitsky seeks a declaration from the Court that her rights and those of her late son have been violated under Article 2, Article 3, Article 5, Article 6, Article 10, and Article 13 of the Convention, and a finding that there must be an independent and impartial investigation into his death that is capable of bringing about the prosecution and punishment of all the relevant perpetrators. Mrs. Magnitskaya will also seek just satisfaction under Article 50 (pecuniary and non-pecuniary damages together with legal costs and expenses) as well as general measures to ensure that Russia does not treat others in the same way that they treated Sergei Magnitsky.

**E-mail: [info@justiceinitiative.org](mailto:info@justiceinitiative.org)  
[www.justiceinitiative.org](http://www.justiceinitiative.org)**



---

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Amsterdam, Bishkek, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, Santo Domingo, and Washington, D.C.