

Absurdity and Abuse: European Court of Human Rights Finds Russia Violated Magnitsky's Rights

October 17, 2019

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By: Irit Weiser

In a judgement released on August 27, 2019 (here), the European Court of Human Rights concluded that Russian had violated various articles of the European Convention on Human Rights (the "Court") (here) in regard to the death of Sergei Magnitskiy in pre-trial detention. The facts of this case fostered what has come to be known colloquially as "Magnitsky ?Acts", the Canadian version of which has been discussed in two articles in this Journal (here) and (here).

The decision of the European Court reflects existing jurisprudence and is not particularly novel in its conclusions or interpretations of Convention articles. Rather, this case is notable because its facts spawned laws in various countries that now target the property of foreign nationals who have committed gross violations of internationally recognized human rights. The case is also a chilling illustration of how laws and due process institutions can be manipulated by government officials in an effort to cloak with legitimacy clear violations of human rights.

Magnitskiy was an auditor and head of the tax practice for a large Moscow legal and audit firm that included among its clients the Russian subsidiaries of the Hermitage Fund, a large foreign investment fund. In July 2007, unbeknownst to Hermitage, a Russian court authorised a change in ownership of three Hermitage subsidiaries. This occurred following a government search of Hermitage offices in respect of a fourth subsidiary, Kameya Limited. It was alleged that during that search, officials from the investigation arm of the Ministry of the Interior seized documents and seals of other Hermitage subsidiaries and used them to fraudulently re-register three subsidiaries in the name of new owners. Hermitage found out about this several months later through lawyers' letters and made repeated requests for an investigation to prosecutors' offices and other authorities, all of which were rebuffed. Shortly afterwards, the new owners of the three subsidiaries applied for and were paid a tax refund of approximately 5.4 billion Russian rubles (about 212 million Canadian dollars). Hermitage's court challenges regarding these actions were all unsuccessful.

Finally, in February 2008, a special investigator of the Investigative Committee of the Prosecutor General's Office began looking into Hermitage's allegations of fraud and embezzlement of tax monies. In June 2008, Magnitskiy spoke with the special investigator, as well as the media, about the allegations and the alleged role of Russian officials.

In July 2008, the head of the Investigative Committee of the Ministry of the Interior joined the Kameya case with three other cases of suspected tax evasion by companies linked to Hermitage. It was alleged that Magnitskiy was an advisor on these matters and in November 2008, he was charged with conspiring to commit aggravated tax evasion and detained. Over the course of the next year, his detention was extended several times. He was also moved on at least twenty occasions between remand facilities and cells within those facilities. On November 16, 2009, he died in custody.

Prior to his death, starting in May 2009, Magnitskiy started to experience severe pain. In July 2009, a prison doctor diagnosed cholelithiasis and chronic cholecystopancreatitis and prescribed drugs, an ultrasound examination and surgery. Instead, Magnitskiy was moved to another detention facility with limited medical facilities and his repeated requests for medical attention went unanswered. After additional delays and worsening health, Magnitskiy was transferred to another facility for treatment on November 16, 2009. While writing up her examination notes, the doctor found that Magnitskiy, who was in a metal cage at the time, was acting in an aggressive manner and she called for reinforcements. Eight guards arrived, Magnitsky was placed in handcuffs and a rubber truncheon was used. An emergency psychiatric team was also called in, but by the time they were allowed into the prison, Magnitskiy lay dead in a cell.

Over the next four and a half year, various investigations were conducted by Russian authorities. All were either abandoned for lack of evidence or for having exceeded the statute of limitations. As a result, no one was found criminally liable in respect of Magnitskiy's detention and treatment. (In fact, as outlined below and in what can only be described as absurd irony, the only person found to be criminally culpable in the overall scenario was Magnitskiy himself!)

Following Magnitskiy's death in November 2009, the tax evasion proceedings against him were discontinued. However, Magnitskiy's family asked for that decision to be overruled. Although they agreed that the criminal proceedings should be discontinued, they asked that it not be based on death, but on the absence of evidence of criminality. The authorities then re-opened the case and in July 2013, Magnitskiy was posthumously convicted of a tax evasion offence.

Two separate applications alleging various violations of the European Convention on Human Rights were brought before the European Court of Human Rights and ultimately joined. The first was lodged by Magnitskiy himself and continued after his death by his wife (no. 32631/09). The second application was brought by Magnitskiy's mother (no. 53799/12). The Court agreed, in all but one circumstance, that Magnitskiy had suffered the alleged violations, which covered the time period from his initial detention to his posthumous trial. Their reasoning and conclusions are summarized below.

Conditions of detention and article 3 (inhuman and degrading treatment)

At the outset, the Court noted that the usual principle of "he who alleges something must prove that allegation" cannot be rigorously applied in the context of conditions of detention because Governments alone have access to the evidence that can corroborate or refute such allegations. Thus, failure by a State to produce relevant evidence may give rise to an inference that applicants' allegations are well-founded (para. 186). The Court also reiterated its previous jurisprudence to the effect that when assessing conditions of detention, account must be taken of the cumulative effects of those conditions.

In the context of this case, the applicants and the State had significantly differing accounts of prison conditions. However, Russia submitted little evidence to support its arguments, stating that the

relevant records and logbooks had been destroyed as the time-limit for keeping them had passed. Noting previous cases regarding the same facility, as well as the applicants' evidence, the Court found that Magnitskiy had shared cells of between 20 and 30 square metres with eight to fifteen other inmates and had not had an individual sleeping place. Accordingly, the Court found that Magnitskiy had been detained in severely overcrowded conditions that amounted to inhuman and degrading treatment, contrary to article 3 of the Convention (para. 193).

Arbitrary arrest and detention and article 5(1) (right to liberty and security of the person)

This is the one ground on which the applicants were unsuccessful. According to the Court's jurisprudence, detention is "arbitrary" where, "despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities". (para. 198) The European Court did not accept Magnitskiy's assertion that his arrest and detention were aimed at having him retract his allegations of corruption against Russian officials, rather than being based on reasonable suspicion of a crime. The tax evasion investigation, on which the arrest was based, was commenced in 2004, long before the events affecting Hermitage. Additionally, the decision to arrest him had been made after investigators learned he had applied for a UK visa, booked tickets to Kyiv and been residing elsewhere than at his registered address. For these reasons, the Court found Magnitskiy's arrest was based on reasonable suspicion of his having committed a criminal offence and did not contravene article 5(1)(c) of the Convention. (para. 202)

Ongoing detention and article 5(3) (right to trial within reasonable time or release pending trial)

Although the Court found there was a reasonable basis for Magnitskiy's original detention, there were insufficient grounds to support his ongoing detention of almost 12 months. Based on its earlier jurisprudence, the Court noted that judges must provide "relevant" and "sufficient" grounds to justify continued detention. (para. 215) The gravity of the charges and/or the severity of the sentence are insufficient in and of themselves to justify long periods of detention. (paras. 216 & 218)

Other grounds relied on by the Russian authorities were the likelihood of Magnitskiy absconding and seeking to influence witnesses; however the information that initially supported this – namely, that he had been preparing to leave Russia and that he had influenced witnesses in the tax evasion case – became less pertinent over time due to countervailing evidence provided by Magnitskiy (e.g., no record of a UK visa, deteriorating health, family circumstances, personality and behavioural traits, etc.). (paras. 219 & 220) Moreover, domestic authorities had inverted the presumption in favour of release by requiring Magnitskiy to demonstrate new circumstances that would warrant overturning the order of pre-trial detention. This effectively moved the burden of proof to the detainee, rather than requiring the State to provide sufficient reasons to support ongoing detention. This practice had been repeatedly criticized by the European Court in previous judgements. (para. 222) For the above reasons, the Court found a violation of the right to trial within a reasonable time or release pending trial in article 5(3) of the Convention.

Failure to provide necessary medical care and article 2 (right to life)

Article 2, according to the Court's jurisprudence, obliges a State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them.

In the circumstances of this case, the Court found that domestic authorities had unreasonably put Magnitskiy's life in danger by depriving him of important medical care. (para. 265) In support of its conclusion, the Court noted the following: doctors' recommendations that he be consulted by a surgeon were repeatedly ignored; the resulting failure to perform surgery may have contributed significantly to his death; he was transferred to a remand facility that was unable to address his medical needs; the emergency situation that resulted in his death was handled inadequately; and there was an absence of proper medical records. (paras. 260-263)

In response to the Government's assertion that no link had been proven between Magnitskiy's death and shortcomings in the medical treatment, the Court noted that article 2 does not require a causal connection. The focus of the inquiry is on whether the State has fulfilled its duty to safeguard life by providing proper medical treatment in a timely manner. (para. 264)

Ill-treatment and effective investigation and article 3 (prohibition of inhuman and degrading treatment)

The Court has established in previous case law that ill-treatment must attain a minimum level of severity to fall within article 3. The assessment of this minimum depends on all the circumstances of the case, including duration of the treatment, physical or mental impacts and, in some cases, the sex, age and health of the victim.

The Court noted that a preliminary inquiry was commenced shortly after Magnitskiy's death, as well as an on-site examination and autopsy. These actions revealed injuries to Magnitskiy's body, as well as evidence of use of a rubber truncheon, all of which should have raised concerns about excessive use of force. However, this issue was not addressed in subsequent investigations, nor was there any effort to address serious discrepancies in official reports regarding the circumstances and cause of Magnitskiy's death. The European Court did not accept the Government's claim that the injuries were self-inflicted in the absence of any evidence or witness testimony to support such an assertion. (paras. 231-239)

Given the intentional nature of the ill-treatment, the types of injuries, and the level of suffering endured by Magnitskiy, the Court concluded that he had been subjected to inhuman and degrading treatment, contrary to article 3 of the Convention. (para. 240)

Effective investigation of death and article 2 (right to life)

In previous article 2 jurisprudence, the Court stated that a corresponding obligation of the right to life is that there be an effective official investigation when a person dies in suspicious circumstances. The investigation must be effective in the sense that it is capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible. The authorities must also take reasonable and prompt steps to secure evidence concerning the incident. Any deficiency in the investigation which undermines the ability to establish the cause of death, or identify those responsible, risks falling afoul of article 2.

In the current case, the Court acknowledged authorities had acted quickly to secure evidence and had promptly opened a criminal case following Magnitskiy's death. However, the autopsy had been perfunctory, authorities had failed to obtain CCTV footage from the prison, and key issues in the case were dealt with in a cursory manner or not at all. Additionally, the effectiveness of the investigation was irreparably damaged when the prosecution of one of the doctors became time-barred. (paras. 267-272) These factors led the Court to conclude that there had been a violation of article 2.

This aspect of the case also raised an interesting admissibility issue regarding the requirement that applicants exhaust domestic remedies prior to bringing a claim before the European Court. The Russian government argued that despite the failures of their criminal investigations, the applicants were obliged to pursue a civil remedy before Russian courts prior to instituting an action under the Convention. The Court disagreed. Relying on its earlier jurisprudence, the Court held that where several remedies are available, the applicant need only select one, normally of his or her own choosing. (para. 252) In the current circumstances, where the applicants had been engaged in the criminal proceedings concerning Magnitskiy's death, it would be excessive to require they bring a civil action after the criminal one failed. (para. 254)

Posthumous trial and article 6 (fair hearing and presumption of innocence)

Although not raised by the State, the Court considered at the outset whether, as a matter of admissibility, Magnitskiy's wife and mother could claim to be victims of the right to a fair hearing and to be presumed innocent until proven guilty. Extrapolating from earlier case law on other articles of the Convention, the Court held that where the death of the direct victim is in circumstances engaging the State's responsibility and precedes the lodging of an application with the Court, any other person with a close link to the victim can commence proceedings under the Convention. Thus, Magnitskiy's wife and mother could rightly allege to be victims of these article 6 rights. (para. 278)

The Court noted that it is a fundamental aspect of the right to a fair trial that criminal proceedings be adversarial and that there be equality of arms between the prosecution and defence. In this regard, the Court stressed the importance of an accused being present and able to participate at trial. A criminal trial of a dead person necessarily runs afoul of these principles. The Court recognized that a judicial examination of the criminal charges faced by a deceased person may be warranted in certain circumstances, such as in the case of rehabilitation proceedings where the purpose is to correct a wrongful conviction. However, a judicial examination must be free of any risk of posthumous

conviction where guilt has not been established by a court during the person's lifetime. (paras. 280-282)

As regards the presumption of innocence, the Court stated as a fundamental principle, that criminal liability cannot survive the person who committed the criminal act. Thus, Magnitskiy's posthumous trial and conviction violated article 6(2). (para. 284)

As indicated above, this decision of the European Court essentially follows its earlier jurisprudence and does not establish new law. It is important however, as a step in a series of efforts by various countries and individuals to address corruption and to hold accountable officials for human rights abuses aimed at silencing those who speak out.

Please cite this article as Irit Weiser, "**ABSURDITY AND ABUSE: EUROPEAN COURT OF HUMAN RIGHTS FINDS RUSSIA VIOLATED MAGNITSKIY'S RIGHTS**" (2019), 3 PKI Global Justice Journal 72

About the author

Irit WeiserIrit Weiser has spent most of her career with the federal Department of Justice. She was Senior General Counsel and Head of Legal Services for Health Canada and the Public Health Agency of Canada. She provided legal, policy and strategic advice to senior levels of government in regard to various health-related matters, including the Canada Health Act, food and drug regulation, quarantine, and tobacco. Prior to heading up Health Legal Services, Irit was General Counsel and Director of the Human Rights Law Section of the Department of Justice. She provided legal and policy advice, and litigation support on the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and international human rights law. Before joining the Department of Justice, Irit worked for the Lawyers Committee for Human Rights in New York. She has also taught International Human Rights at the Faculty of Law of the University of Ottawa. Finally, she has written articles and presented papers on international human rights matters, the Canadian Charter of Rights and Freedoms, and health law. Since retiring, Irit has become involved in a number of *pro bono* activities, including providing legal assistance to private sponsors through the Refugee Sponsorship Support Program. She is also a member of the Research Ethics Board of the Ottawa Health Science Network, the Council of the Royal College of Physicians and Surgeons of Canada, and Royal College International.

Image: Sergei Magnitsky, Public Domain from Voice of America, https://commons.wikimedia.org/wiki/File:Sergei_Magnitsky.jpg

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[1] This surname is very often spelled without the second "i" – that is, "Magnitskiy" versus "Magnitsky". This article employs the same spelling as the European Court, however both spellings are widely used in regard to

the same person.