

PRELIMINARY CONCLUSION

of the working group on the study of circumstances of Sergey Magnitsky's death,
the working group on civic engagement in judicial reform,
the working group on citizen participation in prevention of corruption and
and public safety

1. Conflict of interest during the investigation of Sergey Magnitsky's case.

Currently, the full and thorough investigation of all circumstances of the death of S.L. Magnitsky by competent authorities is not complete. However, it seems that certain preliminary conclusions, both general and specific, can be stated based on the reports of a number of public organizations¹ (see Appendices 1-3) and information which became available to the members of Council's working groups during the investigation of the case in relation to the death of Sergey Magnitsky.

This case was initiated on November 24, 2009. However, nearly a year after, on September 7, 2010, according to the public announcement of the Russia's Investigative Committee of the Public Prosecutor's Office, the investigators haven't found any evidence of guilt of the respective officers and, moreover, any materials justifying Sergey Magnitsky's complaints about failure to receive adequate medical care and interference. Conversely, the officials accused by Sergey Magnitsky of implication in illegal tax refund and involved in the investigation on his case, were not brought to criminal responsibility but promoted afterwards. Moreover, they participated in the investigation of theft of the budget funds which was initiated by the Investigative Committee of the Russian Federation Ministry of Internal Affairs on the same petition of Magnitsky. In September 2010, the Investigative Committee of the Ministry of Internal Affairs announced that new suspects in the case of illegal tax refund were identified, and Sergey Magnitsky was named among them.

Thus, the case against Sergey Magnitsky was investigated by the same officers of the Ministry of Internal Affairs and Investigative Committee of the Ministry of Internal Affairs, against whom he had testified in the illegal re-registration of Riland, Parfenion and Makhaon companies and subsequent illegal tax refund of 5.4 billion roubles. Involvement of the officials of the Investigative Committee of the Ministry of Internal Affairs Kuznetsov, Karpov, Tolchinsky, Krechetov and Drozanov in the investigation of the case against Magnitsky created a situation of obvious conflict of interest, which contradicts the requirements of the law. Despite this, enumerated officials of the Ministry of Internal Affairs were not excluded from the investigation team in the case against Sergey Magnitsky. In this situation, petitions from Magnitsky for their disqualification were rejected by the investigator O.F.Silchenko, his immediate supervisor N.V. Vinogradova and administrative authorities of the Investigative Committee at the Ministry of Internal Affairs of the Russian Federation. Refusal to resolve this conflict of interest may be evidence either of negligence or of particular interest of the investigation's supervisors.

During the ongoing investigation of the circumstances led to Sergey Magnitsky's death conducted by the Working Group of the Council, materials confirming the described conflict of interests were referred to investigation, and Investigative Committee of Russian Federation conducts corresponding proceedings in relation to the review of these materials.

In addition, facts presented in the materials submitted by Hermitage Capital, which refer to clear violations and material personal interest of law enforcement officers and representatives of the judiciary connected with the case of Sergey Magnitsky, are not examined yet. There is no ongoing review of statements on a sudden significant increase in income and assets of some of these officials which has occurred after 2008.

2. Independent investigation of the Moscow Public Oversight Commission

¹ Independent Expert and Legal Council; Moscow Public Oversight Commission; National Anticorruption Committee and Transparency International Russia.

established that the failure to deliver medical aid to Sergey Magnitsky and obstruction of the delivery are connected with action (or failure to act) of a number of investigators and prison system officials.

- Head of the federal detention center 99/1 of the Russian Federal Prison and Punishment Agency (FSIN) I.Prokopenko and investigator of the IC at the Russian Interior Ministry O. Silchenko decided to transfer Magnitsky to the Butyrka prison one week before his scheduled physical examination and surgery in the hospital of the Matrosskaya Tishina detention center. The transfer was reasoned by the necessity of facility repair, which was not even started before the death of Magnitsky. This can be regarded as intentional deterioration of Magnitsky's detention conditions and inhibition of his medical treatment.

- Creation of obstacles so that Sergey Magnitsky could not receive medical aid was also manifested in the decision made by the investigator O.F. Silchenko dismissing the petition of his lawyers about transfer to the hospital of the Matrosskaya Tishina for ultrasound examination. Thus, the investigator Silchenko defiantly refused to comply with requirement of the Article 11 of the Criminal Procedural Code of the Russian Federation (RF CPC) on the obligation to take measures to secure rights of suspects and accused.

- Required medical aid was not provided to Sergey Magnitsky by the personnel of the Butyrka prison as well. Against the established rule, Magnitsky was examined by a physician a month after he was taken there. His requests for the routine physician's visit were denied; medications delivered by Magnitsky's mother were not accepted or even sent to another cell. These and many other facts discovered by the public inquiry suggest not only the negligence of medical personnel of the Butyrka prison, but criminal failure to provide aid to the detainee, i.e. violation of the right to life.

- These conclusions of the public inquiry are confirmed by the circumstances of the actual deprivation of medical aid of Magnitsky in the last days of his life. Transfer from the Butyrka prison was organized only when Magnitsky's condition became critical, three days after the aggravation of his chronic illness. Transportation to the hospital of Matrosskaya Tishina detention center was carried out with a delay of six hours, spent on the coordination with the investigator Silchenko.

At the hospital, physician A.V. Gaus instead of taking prompt measures decided that Magnitsky had a psychotic behavior (as he said that they wanted to kill him) and summoned eight guards with special gear and psychiatric emergency, who handcuffed Magnitsky and took him to a cell. An emergency medical team was not permitted to enter; however, it did not stop Gaus from giving false information that Magnitsky received emergency medical treatment from the emergency team, which, however, did not confirm it.

As a result, Magnitsky was completely deprived of medical care before his death. In addition, there is reasonable suspicion to believe that the death was triggered by beating Magnitsky: later his relatives recorded smashed knuckles and bruises on his body. In addition, there is no medical description of the last hour of his life

According to the Moscow Public Oversight Commission, Investigative Committee under the Prosecution Service of the Russian Federation did not give due attention to the investigation of these officials' guilt in S.L. Magnitsky's death. Discovered by the Commission, false information in testimony of the Matrosskaya Tishina hospital physician A.V. Gaus gives reason to renew the investigation of this episode and must receive a legal assessment from the investigation authorities.

3. Violations of procedural legislation upon the choice of a restriction measure (arrest) and prolongation of the terms of detention.

The decision on placement of S.L.Magnitsky in custody was not based on proved facts as prescribed by Article 97 of the RF CPC and provisions of sub-clause "c", § 1, Article 5 of the European Convention and Part 1, as well as Article 108 of the RF CPC. In the order issued by

the judge of the Tverskoy Court of Moscow, specific actual circumstances proving the existence of grounds for placement in custody, as well as credible evidence of existence of such circumstances were not stated.

As it follows from the order issued by the judge of the Tverskoy District Court of Moscow S.G.Podoprigrorov on November 26, 2008, the following circumstances were stated as the grounds for placement of S.L.Magnitsky in custody:

- 1) Charge with the commission of intentional serious crimes;
- 2) "S.L.Magnitsky took measures to put pressure on the witnesses and tried to impede the performance of investigative actions";
- 3) The accused may try to flee from investigation and the court.

However, the circumstances stated by the court cannot be regarded as the grounds for placement in custody prescribed by the RF CPC due to the following reasons:

Firstly, accusation of a serious crime in itself is not a ground for placement in custody and cannot confirm the intention of accused to flee prosecution. According to Article 99 of the RF CPC such circumstance must only be taken into account by the court subject to the existence of a proved ground for placement in custody, and not instead of it.

Secondly, the court's conclusion that "S.L.Magnitsky took measures to put pressure on the witnesses and tried to impede the performance of investigative actions" is not specific (Part 1, Article 97 of the RF CPC). There is not a single word in the judge's order as to which witnesses exactly the accused tried to put pressure on or the performance of which investigative actions he tried to impede.

Thirdly, the indicated circumstance was substantiated by the documents provided by the investigators which had no procedural value, did not represent the evidence and, moreover, contradicted the specific evidence on the criminal case. Thus, the investigator proves the fact that the accused tried to impede the performance of investigative actions by the report of the senior police investigator A.A.Krechetov which contradicted to the protocol of the search in Magnitsky's apartment, according to which there were no violations on the part of S.L.Magnitsky, and investigator signed that protocol without any remarks.

Furthermore, a special concern is caused by the unchecked by court argument that the accused may try to flee investigation and court, which was confirmed by the investigator O.F.Silchenko by presenting to the court the evidence that S.L.Magnitsky had international passport and was making a visa for departure to Great Britain referring to the certificate of the Economic Security Department of the Federal Security Service of the Russian Federation dated November 24, 2008. However, investigator O.F.Silchenko could not but knew that S.L.Magnitsky's foreign passport was seized during the search in his apartment at the same day, of which fact there is a note in the search protocol.

Therefore, the working groups assume that S.L.Magnitsky was taken into custody without sufficient grounds for application of such restriction measure.

When considering prolongation of the term of Magnitsky's detention in custody, courts violated the provisions of Clause "c", § 1, Article 5 of the European convention, repeatedly referring to the fact that initial reasons for detention of S.L.Magnitsky in custody have not been eliminated. No new grounds for the prolongation of detention were ever given in the orders of the court. Therefore, repeated violations of the specified international legal standard for prolongation of detention of accused were committed.

The court did not take into account the possibility of choosing a less severe restriction measure.

In violation of this provision, in the judge's order on placement of S.L.Magnitsky in custody the conclusion about the impossibility of applying a different restriction measure is not motivated at all.

Another factor pointing at the illegality of placement of S.L.Magnitsky in custody is the court's disregard of the state of his health. The detention of S.L.Magnitsky, considering his

diseases, violated Article 3 of the European Convention, as his treatment there was inhumane and humiliating. Position of the European Court in the decisions on several similar cases it equally applies to the case of S.L.Magnitsky, who for a long period of time was detained in custody in similar conditions, with a serious disease and inability to receive adequate medical aid in the conditions of his detention.

The courts failed to examine the justifiability of the charge brought against Magnitsky.

At the court sessions, when S.L.Magnitsky's arrest and prolongation of his detention were considered, his arguments about the groundlessness of the charge brought against him were not examined; the courts did not oblige the investigator to provide relevant evidence and did not study it at the court sessions, what is a direct violation both of the provisions of Article 108 of the RF CPC and Clause "c" § 1, Article 5 of the European Convention and also contradicts the Clause 2 of Decree No. 22 of the Plenum of the Supreme Court of the Russian Federation of October 29, 2009 "Concerning the court practices of application of restriction measures in the form of placement in custody, pledge and house arrest".

4. Inefficient review of S.L.Magnitsky's complaints by the prosecutor's office and the courts.

Analysis of the provided materials of the criminal case shows that one of the factors which led to S.L.Magnitsky's death was the inefficient review of his complaints, as well as complaints filed by his defense lawyers, in both judicial and extrajudicial proceedings.

Thus, in response to a detailed complaint on 4 pages filed by accused's defense lawyer and addressed to the Prosecutor General of the Russian Federation, which contained specific facts of violation of Magnitsky's rights during his detention at the pre-trial detention center, it has been answered that his rights were not violated. The major part of the arguments provided in the complaint, in violation of Article 124 of the RF CPC, was left without consideration.

Due to violations of S.L.Magnitsky's right to defense caused by his sudden transfer from IZ-77/5 to the Temporary Detention Facility under the Central Internal Affairs Directorate of Moscow, which deprived the accused of the opportunity to use the abstracts from the case during the performance of investigative actions, the defense lawyers filed a respective complaint with the General Prosecutor's Office of the Russian Federation. In the answer of October 09, 2009 given by A.I.Pechegin, the deputy director of the Administration for Supervision of Investigations on Major Cases under the General Prosecutor's Office of the Russian Federation, most arguments given in the complaint were once again left without consideration. The same fate has befallen the other complaints filed by S.L.Magnitsky's defense lawyers and addressed to the Head of the Investigating Committee of the Ministry of Internal Affairs of the Russian Federation, the Prosecutor General of the Russian Federation and other agencies.

The analysis of complaints filed by the defense lawyers of the accused with the courts was equally formal. The majority of the above said complaints filed with the courts were dismissed without a hearing on the merits.

Conclusions and general recommendations

1. In the area of criminal and procedural law and its enforcement

- As it can be seen from S.L.Magnitsky's case, the provisions of Part 1, Article 108 of the RF CPC on the necessity of providing references to specific actual circumstances in the judge's order on placement of an accused person in custody, on the prohibition of referring to the results of investigative activities, which do not conform to the indicia of evidence, are a fiction of law and are not applied in practice.

The only way out of the existing situation is a severe legislative narrowing of the sphere of application of the restriction measure in the form of placement in custody and maximum formalization of grounds for the choice thereof in the criminal procedure legislation.

- Investigator's powers with respect to any aspects of detention of an accused person in custody should not be discretionary, and they also have to be strictly formalized. Refusal to permit such meetings must be substantiated by references to particular circumstances, a list of which is to be formalized in the RF CPC.

- The right of an accused (suspected) person to claim disqualification of persons carrying out the proceedings on the case is absolutely ineffective here. It is a long overdue necessity to formalize in the RF CPC such ground for disqualification as the "bias" of a person carrying out the proceedings on the case. It is necessary to extend the subject matter of other grounds for disqualification, which would eliminate situations similar to S.L.Magnitsky's case, when the investigation was conducted by persons whom the accused himself charged with commitment of corruption-related crimes.

- The studied materials demonstrate the evident inefficiency of the institute of judicial appeals at pre-trial stages of criminal proceedings, which is particularly due to severe narrowing of the sphere of judicial control in Decree No. 1 of the Plenum of the Supreme Court of the Russian Federation of February 10, 2009 "Concerning the practice of consideration of complaints by courts in accordance with Article 125 of the RF CPC".

2. In the area of medical care to detainees

During the time elapsed from the study of circumstances of Sergey Magnitsky's death by the Moscow Public Oversight Commission, public authorities have taken some measures, in particular regarding detention of individuals accused of economic crimes and enumeration of diseases, under which those accused not be taken into custody.

At that, the problem of the illegal and unreasonable interference of investigation in the assignment of detention conditions and delivery of medical aid to persons under investigation remains unsolved. For example, investigators interfered with physicians, investigators and Matrosskaya Tishina officers in a similar way in Vera Trifonova's case (died 04.30.2010 in custody). These practices related to the detention of critically ill and even dying detainees continue to date.

These facts support the need for an independent and competent medical care for those who are in the sphere of responsibility of prison system. Relevant medical institutions may not be related only to the FSIN system and should be within jurisdiction of health authorities as well. Furthermore, a mechanism must be established to provide independent medical examination in custody cases by using, in particular, the proposals developed by the Moscow's human rights ombudsman in collaboration with Moscow Public Oversight Commission.

Appendices:

1. Report of the Moscow Public Oversight Commission for human rights observance in detention centers on the conditions of detention of S.L.Magnitsky in the pre-trial detention centers of Moscow.

2. Conclusion of the Public Anticorruption Committee which has investigated the causal connections led to S.L.Magnitsky's death.

3. Scientific advisory opinion of the Independent Expert and Legal Council.

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