

Pieter Omtzigt, MP

## The Magnitsky case in the Council of Europe

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**T**he Council of Europe is the leading human rights watch body in Europe. Forty-seven States signed and ratified the European Convention on Human Rights. These include all EU countries, but also Turkey, Russia and Ukraine.

Under the Convention, every person who feels his fundamental human rights have been violated can lodge a complaint against the State at the European Court of Human Rights. To be able to lodge such a complaint, all domestic remedies must be exhausted. States are bound by the Convention to execute all judgments by the court. Fundamental rights include the right to life, the prohibition of torture, the right to liberty and security and the right to a free trial.

The waiting time for the court is unfortunately rather long. Exhausting all domestic remedies can also take rather a long time. The result is that people can be in prison for quite a long time before their case is judged at the court in Strasbourg.

Mr Magnitsky was held in pre-trial detention and was not tried while alive in Russia. He never had the opportunity to lodge a complaint in Strasbourg. The court is not the place to deal with people who died in pre-trial detention.

A second instrument of the Council of Europe is the CPT (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment), which Russia ratified in 1998. The CPT regularly visits places of detention in the member states. States publish the resulting report, which often contains considerable critique. Russia for a long time refused to publish the results of CPT visits, and the recommendations of the Committee in Russia are not publically known. The CPT did on a number of occasions use its power to make a statement on the prison conditions anyway, however they focused on the North Caucasus and not on other detention facilities. In 2013 Russia did make public a report, for the second time in its history.

The Parliamentary Assembly of the Council of Europe is thus the logical and right place within the Council of Europe to deal with the Magnitsky case. 315 MPs from the 47 member states monitor to what extent the states honour their commitment under the Convention.

Russia has been a problematic country from the moment it ratified the Convention in 1998. It has been under monitoring, the most intensive form of scrutiny, from the beginning of its membership. It had the largest numbers of convictions of the Court going against it in 2012, narrowly beating Turkey.

## **The Magnitsky case**

Ms Sabine Leutheusser-Schnarrenberger (now Minister of Justice in Germany) first included the case of Mr. Magnitsky in her report on “Allegations of politically-motivated abuses of the criminal justice system in Council of Europe member states,” on August 7, 2009. She had asked the head of the Investigative Committee, by letter, about the detention of Mr Magnitsky. In his reply he insisted that that no coercive measures had been taken against Mr Magnitsky. In her report she wrote that: “I am not convinced that I can accept without further questions the additional statement in the reply that “lawyers working for the HSBC/Hermitage company have not been questioned””. She further referred to “prolonged pre-trial detention, in abject prison conditions,” for Mr Magnitsky.

After his death two months later, Ms Leutheusser, who had then become

Minister of Justice, stated on 19 November 2009: “I was shocked to learn of the death of the lawyer Sergei Magnitsky, who had acted in proceedings on behalf of Hermitage. I very much hope that the circumstances of his death in prison will be fully and comprehensively clarified.”

After his death two members issued written questions to the Committee of Ministers. These are answered by the ambassadors of all the member states or the ministers themselves. In 2009, Mrs Chiora Taktakishvili from Georgia used the case to ask two questions of the Committee of Ministers; firstly, that they ask Russia to publish the CPT reports<sup>1</sup>, and secondly what action they were planning to take in order to ensure that those responsible for Mr Magnitsky’s death were held to account<sup>2</sup>.

The reply given by the Committee of Ministers to the last question<sup>3</sup> is rather surprising and strong, especially for the Committee which usually excels in giving non-answers: 1. The Committee of Ministers has been informed that a criminal investigation has been launched in the Russian Federation with a view to identifying those persons responsible for the death of Sergei Magnitsky. It has also been informed of the fact that the Russian authorities have been invited to provide information on the status of this investigation by Special Procedures mandate holders of the United Nations Human Rights Council.

2. The Committee of Ministers expects the investigation to be carried out in a rapid, effective and transparent manner, with a view to clarifying the circumstances surrounding the death of Sergei Magnitsky and ensuring that those responsible are identified and brought to justice.

On 7 September, Ms Marieluise Beck organised a hearing in the committee of Legal Affairs and Human Rights. On such a hearing usually two members of each side of the argument are present. However, nobody from the Russian government side turned up for the round table on the case of Sergei Magnitsky in Paris, and the Committee only heard from Ms Elena A. Panfilova, General Director of the Center for Anti-Corruption Research and Initiative at Transparency International, Moscow, and Ms Yevgenia M. Albats, Editor-in-Chief of The New Times, Moscow.

On 13 December 2011, I tabled a new set of detailed questions<sup>4</sup>. The key question was:

“Does the Committee of Ministers agree on the following issues:

- That the investigation has been anything but rapid, effective and transparent and independent, and that the government should be investigating torture, murder and fraud instead of only medical negligence in this case; and

- That the posthumous case against Mr Magnitsky should be closed immediately and that the victim’s family should be allowed to conduct an independent medical examination.”

The Committee of Ministers usually formulates an answer with unanimity, but has not been able to formulate an answer to this question.

### **Report by the Legal Affairs Committee**

In the meantime on 9 February 2012, 58 members tabled a written declaration in which they stated that, “We call on Russia to immediately prosecute the people named in the Human Rights Council’s report, cease the intimidation of Magnitsky’s family, and allow an independent evaluation of his case.”

Quite annoyed with the total lack of progress on 24 April 2012, I tabled a motion for a resolution, together with 68 colleagues, entitled: “Refusing impunity for the killers of Sergei Magnitsky.”<sup>5</sup> It asks for a dedicated report to fully elucidate this landmark case. It is quite exceptional to write a report on a particular case. Since each committee can only present eight reports a year, reports are generally written on a theme, rather than on an individual case.

The pressure helped: the case was included in the resolution on Russia, which was adopted. In that resolution the Parliamentary Assembly asked Russia inter alia to: “Investigate effectively all cases of alleged ill-treatment and torture by the police and by law enforcement agencies and bring the perpetrators to justice, and in particular elucidate all the circumstances of the death of Mr Magnitsky.”<sup>6</sup>

After a narrow vote, the Bureau of the Parliamentary Assembly then decides to ask the Legal Affairs Committee to draft a report entitled: “Refusing impunity for the killers of Sergei Magnitsky,” and in November 2012 the Committee on Legal Affairs and Human Rights nominated Andreas Gross (Switzerland) as rapporteur.

In June, Mr Gross sent his report to the Committee and during its meeting on 25 June 2013, the Committee held a general discussion and declassified the report and the draft resolution. It issued an invitation for any interested parties – including the Russian authorities – to comment on it. The discussion will be continued at the next committee meeting on 4 September 2013, with a view of approving the draft resolution and the report.

The report is well researched and worth reading. In his report, Mr Gross destroys every story the Russian authorities try to tell him<sup>7</sup>.

Officials in the Ministry of Interior and the Prosecutor General’s office tell him that Mr Magnitsky never complained about detention conditions or the lack of health care provided. He shows evidence that Mr Magnitsky not only did so on numerous occasions in writing, but that all of them were refused with official letters. The log book of the complaints at Butyrka prison did not have a single complaint of Mr Magnitsky, but appeared tampered with. All the entries in the relevant period were written with one pen in one style.

On the death of Mr Magnitsky, Mr Gross writes:

“There is no doubt that some of the causes of Mr Magnitsky’s death were created deliberately, by identifiable persons, others by negligence. The refusal to grant Mr Magnitsky necessary medical treatment was decided by the investigator in charge of the case for which Mr Magnitsky was placed under arrest, Mr Silchenko, precisely at the time at which, according to a previous diagnosis, he should have been given another ultrasound, followed by surgery. Mr Magnitsky had previously given testimony accusing two colleagues of Mr Silchenko of complicity in the crimes he had denounced, and which are now blamed on him.”

He finds that two death certificates exist. The first mentions a “closed

craniocerebral injury”. The second one does not mention this. Two independent autopsy requests by the family were refused. He had not been allowed to talk to his wife and children for almost a year, even though he was in pre-trial detention and thus presumed innocent. They received a body with visible injuries, including bruising on the knuckles of both hands and deep marks on both wrists that could not be explained by the normal use of handcuffs. Just before his death, guards had been officially authorised to use batons against a severely ill person.

In the draft-resolution, Mr Gross proposes that the Assembly asks the Russian authorities to fully investigate the circumstances and background of Mr Magnitsky’s death and the possible criminal responsibility of all officials involved. They should explain the contradictory testimonies, the two versions of the death reports, reasons why Mr Magnitsky was denied prescribed ultrasounds and instead put on transfer. They should further investigate why CCTV footage of the arrival of Mr Magnitsky at Matrosskaya prison on the day of his death is missing, why the ledgers of the complaint files are missing.

And of course they should “investigate the personal relations existing between persons suspected of participating in the criminal conspiracy denounced by Mr Magnitsky, including certain officials and former officials of the Ministry of Interior, of the tax offices involved in the fraudulent tax reimbursement, the owner of the bank used in the laundering of the proceeds, and lawyers involved in the fictitious law suits, including instances of joint travel to Dubai, Cyprus and London as well as the origin of the extreme wealth displayed by retired Interior Ministry and tax officials.”

## **The impact of the Council of Europe**

In several high impact cases a report in the Parliamentary Assembly of the Council of Europe has been the instance which has led countries to admit wrongdoing. The most famous case is probably the secret rendition flights of the CIA in the Marty Report. After the report became public, countries had to admit to taking part and prisons closed down at least in Europe.

A report and a resolution on this topic cannot easily be ignored by a country. So if Mr Gross is able to make a convincing case, the Russian

parliamentarians will have to defend the Russian authorities, in a case in which they secretly know the report by the Human Rights Committee of then President Medvedev was right all along.

1 Written question no 579 to the Committee of Ministers, 15 January 2010, document 12118

2 Written question no 601 to the Committee of Ministers, 11 July 2011, document 12688

3 Document 12805, 5 December 2011

4 Written question No. 609 to the Committee of Ministers, 13 December 2011, Doc. 12809

5 Document 12909

6 Resolution 1896 (2012)

7 [http://www.assembly.coe.int/Communication/ajdoc24\\_2013.pdf](http://www.assembly.coe.int/Communication/ajdoc24_2013.pdf)