

**La CEDU su detenzione preventiva e condanna postuma  
(CEDU, sez. III, sent. 27 agosto 2019, ric. nn. 32631/09, 53799/12)**

La Corte Edu si pronuncia sul caso di Sergei Magnitskiy, revisore dei conti accusato di evasione fiscale, deceduto durante la detenzione preventiva in carcere e condannato per il suddetto reato successivamente alla sua morte.

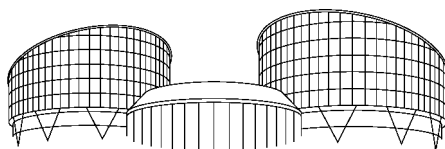
La Corte pur riconoscendo l'esistenza di ragionevoli motivi a fondamento dell'accusa di evasione fiscale nei confronti del signor Magnitskiy, ha tuttavia escluso che tali sospetti potessero giustificare la detenzione preventiva in carcere per più di un anno; né le autorità nazionali avevano fornito ragioni sufficienti a fondamento di una così lunga detenzione, avvenuta, peraltro, in condizioni degradanti per il sovraffollamento delle celle di reclusione e per i maltrattamenti ivi subiti dal ricorrente, che da subito aveva altresì lamentato gravi problemi di salute.

I giudici di Strasburgo hanno riscontrato, in particolare, l'inadeguatezza delle cure mediche fornite al sig. Magnitskiy in carcere, che ne aveva determinato la morte, stigmatizzando anche l'assenza di una efficace indagine successiva a tale evento.

Infine, il procedimento per la condanna del ricorrente successivamente alla sua morte è stato giudicato intrinsecamente ingiusto ed illegittimo.

La Corte Edu ha così dichiarato, all'unanimità, che vi è stata: una violazione sostanziale e procedurale dell'art. 2 (diritto alla vita); una violazione dell'art. 3 (divieto di maltrattamenti) a causa delle condizioni di detenzione del sig. Magnitskiy e per i maltrattamenti subiti da parte delle guardie carcerarie e della mancanza di una indagine efficace su tale questione; una violazione dell'art. 5 § 3 (diritto alla libertà e alla sicurezza) a causa della lunga durata della sua detenzione; una violazione dell'articolo 6 §§ 1 e 2 (diritto a un giusto processo e presunzione di innocenza) a causa del procedimento e della condanna postumi.

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EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

**CASE OF MAGNITSKIY AND OTHERS v. RUSSIA**

(Applications nos. 32631/09 and 53799/12)

JUDGMENT

STRASBOURG

27 August 2019

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

**In the case Magnitskiy and Others v. Russia,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Vincent A. De Gaetano, President,  
Georgios A. Serghides,  
Helen Keller,  
Dmitry Dedov,  
María Elósegui,  
Gilberto Felici,  
Erik Wennerström, judges,  
and Stephen Phillips, Section Registrar,

Having deliberated in private on 2 July 2019,

Delivers the following judgment, which was adopted on that date:

**PROCEDURE**

1. The case originated in two applications against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Russian nationals.
2. The first application (no. 32631/09) was lodged by Mr Sergey Leonidovich Magnitskiy (“the first applicant”) on 11 June 2009. On 24 March 2010 his wife, Ms Nataliya Valeryevna Zharikova (“the second applicant”), informed the Court of her husband’s death on 16 November 2009, indicated her wish to pursue the application and raised additional complaints.
3. The second application (no. 53799/12) was lodged by the mother of the first applicant, Ms Natalia Nikolayevna Magnitskiya (“the third applicant”), on 21 August 2012.
4. Mr Magnitskiy and his widow were initially represented by Mr D. Kharitonov and Ms E. Oreshnikova, lawyers practising in Moscow. The second applicant was then represented by

lawyers from the Open Society Justice Initiative, including its executive director, Mr J. Goldston. They also represented the third applicant.

5. The Russian Government (“the Government”) were initially represented by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

6. The first applicant alleged, in particular, that the conditions of his detention were appalling, and that his detention lacked justification and its length was unreasonable.

7. In addition to reiterating the complaints made by the first applicant, the second applicant complained that Mr Magnitskiy had died because of the absence of medical care in detention and that the criminal proceedings against him had been unfair.

8. The third applicant complained, in particular, that the State had failed to secure her son’s life. She also alleged that he had been ill-treated by prison officers, and that the Government had failed to effectively investigate the circumstances of her son’s death. Lastly, she complained under Article 6 of the Convention about his posthumous conviction, and alleged a violation of the principle of the presumption of innocence enshrined in Article 6 § 2 of the Convention.

9. On 28 November 2014 the Government were given notice of the aforementioned complaints, and the remainder of the two applications was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

## **THE FACTS**

### **I. THE CIRCUMSTANCES OF THE CASE**

10. The first and second applicants were born in 1972. Prior to Mr Magnitskiy’s arrest, they lived together in Moscow. After Mr Magnitskiy’s death, his widow, the second applicant, moved to London.

11. The third applicant was born in 1952 and lives in Moscow.

#### **A. Factual background**

12. The first applicant was the head of the tax practice at the Moscow office of Firestone Duncan, a Moscow-based company providing legal, tax, accounting and audit services to foreign investors in Russia. Its clients included Russian subsidiaries of the Hermitage Fund (“Hermitage”), at the time the largest foreign investment fund in Russia. Its Moscow office was headed by Mr W. Browder.

13. In 2006 three Russian subsidiaries of Hermitage, Parfenion Limited, Rilend Limited, and Makhaon Limited, generated substantial revenue and, as a result, paid taxes in the amount of 5.4

billion Russian roubles (RUB) (approximately 230 million United States dollars (USD)). Firestone Duncan provided legal and accounting services to these three companies.

14. In May 2007 the investigation department of the Ministry of the Interior in Moscow opened criminal case no. 151231 into tax evasion allegedly committed by the head of Kameya Limited (“Kameya”), also a client of Hermitage.

15. On 4 June 2007, in the course of the investigation into the activities of Kameya, several officers from the investigation department, including officer K., searched the Moscow offices of Firestone Duncan and those of Hermitage’s advisers, Hermitage Capital Management. Among other items of evidence they seized corporate documents and company seals not related to Kameya.

16. On 13 June 2007 Major Ka. from the Investigative Committee of the Ministry of the Interior was appointed as the chief investigator of the case and took custody of the materials seized during the search.

17. Hermitage Capital Management challenged the search in a complaint to the Moscow Prosecutor’s Office. Major Ka.’s refusal to return any of the seized documents led to the filing of further complaints by Firestone Duncan.

18. On 16 October 2007 Hermitage’s subsidiaries received letters from a joint-stock company called Logos Plus (“Logos Plus”) informing them that on 30 July 2007 a commercial court had transferred the ownership of the three subsidiaries to another company and that Logos Plus had lodged claims against them for billions of Russian roubles with reference to that judgment.

19. According to the first applicant, the subsidiaries had never had any relations with Logos Plus. He had searched in the Russian Unified State Register of Legal Entities and discovered that pursuant to the judgment of 30 July 2007 and without Hermitage’s knowledge, the three subsidiaries had been registered in the name of the new owner, Pluton Limited.

20. Following the discovery of these legal developments, lawyers acting on behalf of the subsidiaries complained to the chair of the Investigative Committee of the Prosecutor General’s office, the Prosecutor General and the head of the Department of Internal Affairs of the Ministry of the Interior. The complaints contained accusations against the police officers, in particular officer K. and Major Ka., who had seized the documents and seals and had allegedly used them to perpetrate the fraud. The lawyers stated that the re-registration of the three subsidiaries in the name of new owners and the commercial court proceedings against them had been unlawful. They asked the authorities to open a criminal investigation into the misappropriation of the three subsidiaries.

21. On 11 December 2007 the office of the Prosecutor General declined to open any such investigation and forwarded to the local prosecutor’s office in St Petersburg the complaints concerning the allegedly fraudulent court proceedings. On 17 January 2008 the St Petersburg

Prosecutor's Office decided against opening a case on the grounds that no crime had been committed. Similar decisions were taken by other authorities to which complaints had been made.

22. In the meantime, in December 2007 the newly appointed managers of the three subsidiaries applied for a series of tax refunds, arguing that the three companies had made no profits in 2006, that they thus owed no taxes and the taxes paid in 2006 should be refunded.

23. Two applications, for tax liabilities totalling over RUB 1.7 billion (over 47 million euros (EUR)), and another five applications, for a total of over RUB 3.6 billion (more than EUR 100 million), were approved and signed off by the tax authorities.

24. On 26 December 2007 the sum of RUB 5.4 billion was transferred from the Russian Treasury to the subsidiaries' recently opened bank accounts at Universal Savings Bank (USB) and Intercommerz bank. In the first quarter of 2008 the funds were distributed from the USB accounts to the accounts of third parties in various banks in Moscow. Shortly thereafter, USB initiated the procedure for its voluntary liquidation. All its records were destroyed when, according to the Ministry of the Interior, a van transporting them crashed and exploded.

25. In December 2007 and January 2008 lawyers acting on behalf of the three subsidiaries appealed against the judgments involving Logos Plus's claims. In January and February 2008 those judgments were overturned. In addition, an appeal against the judgment of 30 July 2007 transferring the three subsidiaries to new owners was also upheld. Challenges to the re-registration of the companies, with a view to preventing their liquidation and returning control to the former owners, were unsuccessful.

26. On 5 February 2008 a special investigator from the Investigative Committee of the Prosecutor General's office opened a criminal investigation into the allegations made by Hermitage concerning the theft of the three subsidiaries.

27. In June 2008 Hermitage's lawyers obtained the full details of the tax rebate granted in December 2007. The first applicant concluded that the subsidiaries had been stolen in order to embezzle taxes paid in 2006. As a consequence of that discovery, Hermitage and the legal representatives of the three subsidiaries lodged further complaints with the authorities, naming those they claimed were responsible for the embezzlement.

28. On 5 June 2008, in an interview with the special investigator, the first applicant made statements pertaining to the change of ownership and the tax refund in relation to the three subsidiaries, including the alleged criminal misconduct and abuse of office by officer K. and Major Ka.

29. On 21 July 2008 Hermitage lodged a criminal complaint outlining fraudulent acts allegedly committed against the three subsidiaries and the role of Russian officials in perpetrating and

concealing them. Those allegations were made public and the first applicant discussed the complaints with representatives of the mass media.

## B. Arrest and detention of Mr Magnitskiy

### 1. Circumstances preceding the arrest

30. On 23 July 2008 the head of the Investigative Committee of the Ministry of the Interior joined the Kameya case with three other tax evasion cases, suggesting that the investigated offences had been committed by a criminal group.

31. One of the joined cases, which had been opened in 2004, concerned the activity of two companies, Dalnyaya Step Limited (“Dalnyaya Step”) and Saturn Investments Limited (“Saturn”). A tax audit of these companies revealed that they had wrongfully applied exemptions from local and regional taxes, in particular by using sham employment of disabled persons to obtain a 50% income tax discount. Both companies were founded and headed by Mr Browder.

32. On 14 and 17 November 2008 the first applicant, who had allegedly given advice to Mr Browder on legal and tax matters relating to the activity of Dalnyaya Step and Saturn, was summoned as a witness in that criminal case. The investigator who served the summons did not find him at his registered address and left the summons in the letterbox.

33. On 18 November 2008 the Tverskoy District Court of Moscow (“the District Court”) authorised a search of the first applicant’s flat. The search warrant stated that Mr Magnitskiy had assisted Dalnyaya Step and Saturn with the preparation and filing of tax declarations and accounting reports used in illicit tax evasion.

### 2. Arrest and remand in custody

34. On 24 November 2008 the police searched the first applicant’s flat and took him to appear before the investigating authority. On the same day he was arrested on suspicion of having assisted tax evasion and placed in police custody in Moscow.

35. The next day an investigator interviewed him initially as a suspect, and then as an accused. The first applicant was charged with two counts of aggravated tax evasion committed in conspiracy with Mr Browder in respect of Dalnyaya Step and Saturn.

36. The accusations were based on documentary evidence relating to the payment of taxes by those companies and statements by several disabled persons who had confessed to sham work for the two companies. One of them testified that he had been in contact with Mr Magnitskiy, had received money from him and had assisted him in finding other sham employees. He also said that Mr Magnitskiy had told him what to say if questioned by the authorities and had asked him to participate in a tax dispute as a witness.

37. During the interview the first applicant argued that he had neither prepared nor submitted tax declarations on behalf of those companies, that he had not arranged for the employment of the disabled persons and that they had not pretended to work, but had actually worked for the companies.

38. On the same day the investigator applied to the District Court asking it to authorise the detention of the first applicant. In support of the charges the investigator referred to documentary evidence citing the tax audit conclusions and statements by the disabled sham employees (see paragraph 36 above). The investigating authorities noted that during a tax inquiry which had preceded the criminal investigation, Mr Magnitskiy had influenced witnesses, and that he had been preparing to flee abroad. In particular, he had applied for an entry visa to the United Kingdom and had booked a flight to Kyiv. Those allegations were supported by a police report about undue influence on witnesses; the Federal Security Service's report concerning the first applicant's application for an entry visa to the United Kingdom; statements by a travel agent who had booked a flight for him; and other pieces of evidence.

39. On the following day the District Court examined the detention request in the presence of the first applicant and his lawyer, who pleaded that his client had had no intention to obstruct the investigation or to abscond. Having found those assertions rebutted by the material in the case file, the court ordered the first applicant's detention until 24 January 2009. The detention order referred to the gravity of the charges, and the findings that the first applicant had influenced witnesses, had not been residing at his registered address when the investigator had attempted to summon him, and had been preparing to flee abroad. The court also held that if released he could continue tampering with the investigation, abscond or reoffend.

40. On 15 December 2008 the Moscow City Court ("the City Court") upheld the detention order on appeal.

### 3. Extension of pre-trial detention

#### (a) Extension order of 19 January 2009

41. On 19 January 2009, at an investigator's request, the District Court extended the first applicant's detention until 15 March 2009. It stated that the grounds on which he had been placed in detention still remained valid and there were no reasons to alter the preventive measure.

42. After an appeal by the first applicant the Moscow City Court upheld the detention order on 16 February 2009.

#### (b) Extension order of 13 March 2009

43. At the hearing on 13 March 2009 concerning a new detention extension request the defence claimed that the first applicant had not intended to flee from the investigation or the court. That argument was supported by a letter from the British Embassy in Moscow dated 4 March 2009,

stating that the Embassy had no record of a visa request being submitted by or granted to the first applicant. The defence also contended that the investigation had not been carried out with the necessary diligence and that no investigative measures involving the first applicant had been performed for a long time.

44. The investigative authority continued to refer to the risk of the first applicant's absconding, influencing witnesses or otherwise hampering the administration of justice, if released. They also argued that the length of the investigation was justified by the complexity of the case.

45. The District Court dismissed the arguments of the defence. It noted that the letter from the Embassy had not been signed and that credible evidence demonstrated the first applicant's intention to leave Russia. It further noted that the criminal case file was voluminous and complex. There had been no periods of inactivity in the course of the investigation. In conclusion the court stated that the grounds on which the first applicant had been placed in detention still remained valid and that therefore there were no reasons to alter the preventive measure. It extended the first applicant's detention until 15 June 2009.

46. The detention order was upheld on appeal by the City Court on 22 April 2009.

(c) Extension order of 15 June 2009

47. On 15 June 2009, at the hearing concerning the further extension of the first applicant's detention, the parties chiefly repeated the arguments they had raised previously. The defence asked the District Court to consider positive references about the first applicant's personality and also his family situation, namely that he was the breadwinner for two minor children and his wife.

48. In its decision delivered on the same date the court refused to address the argument that there was no risk of the applicant's absconding, having already dismissed that argument in the previous detention orders. It found that the length of the criminal proceedings was justified by the complexity of the case and that the investigating authorities were working on the case with the necessary diligence. Lastly, the court noted the information about the first applicant's personality and his family situation, but concluded that it could not override the risk of his absconding, influencing witnesses or interfering with the course of the investigation. In the light of the above, his detention was extended until 15 September 2009.

49. On 3 August 2009 the Moscow City Court dismissed an appeal by the first applicant against the detention order.

(d) Extension order of 14 September 2009

50. On 14 September 2009 the District Court extended the first applicant's detention until 15 November 2009. The detention order was based on the same reasoning as that employed in the previous extension orders because, according to the court, it still remained valid.



51. The first applicant challenged the above decision on appeal, but died before the hearing in the Moscow City Court scheduled for 2 December 2009.

(e) Extension order of 12 November 2009

52. On 7 October 2009 the investigating authority served the first applicant with a new bill of indictment, having accused him of tax evasion committed in conspiracy with Mr Browder in respect of Dalnyaya Step and Saturn, by means of a fraudulent claim by both companies for tax benefits based on the sham employment of disabled persons and wrongful exemptions from local and regional taxes. Having expressed their intention to invest in the economy of the Kalmykiya Republic, Russia, the companies had allegedly invested RUB 1,000 (approximately EUR 20) while at the same time claiming full relief from tax payment (0% instead of 19% for capital gains tax). Mr Magnitskiy was interviewed and then informed that the investigation had been completed. On 20 October 2009 he started reading the case file.

53. On 3 November 2009, referring to the need for the first applicant to complete his study of the case file, the authorities asked the District Court to extend his detention until 26 November 2009.

54. At the hearing on 12 November 2009 the defence refused to comment on the request, claiming that they had not had time to examine the related materials.

55. The District Court found the defence claim to be ill-founded. Having cited the risks of the first applicant's absconding, putting pressure on witnesses or otherwise tampering with the investigation, and the need for him to complete his study of the case file, the District Court authorised a further extension.

### C. Conditions of detention

56. Following his arrest the first applicant was detained in police detention facility no. 1 and remand prisons nos. 77/1, 77/2 and 77/5 in Moscow. He was moved on at least twenty occasions between various cells in those facilities.

57. The conditions of his detention in the remand prisons were the subject of an internal inquiry carried out in late 2009. Its findings were reflected in a report of 1 December 2009 (see paragraph 100 below).

58. According to the first applicant, from 2 December 2008 to 28 April 2009 he was kept in poor conditions in remand prison no. 77/5. The facility was severely overcrowded. He usually shared cells of between 20 and 30 sq. m with eight to fifteen other inmates. On certain occasions he did not have an individual sleeping place as the number of inmates exceeded the number of bunks. The cells were poorly lit and ventilated and were in a deplorable sanitary condition. A lavatory pan was separated from the rest of the cell by a metre-high partition not offering any privacy. Inmates were allowed to take a shower for ten minutes once a week. They also had a daily walk of no more

than an hour in a small prison yard. The food was of extremely poor quality. On a number of occasions the first applicant found worms in the food.

D. Medical care received by the first applicant in detention

59. On 14 May 2009 Mr Magnitskiy complained to a prison doctor of severe back pain extending as far as his chest and stomach. The pain was particularly sharp if he took a deep breath. Having diagnosed osteochondrosis (degenerative disease of intervertebral discs in the vertebral column) with a pain syndrome similar to that of intercostal neuralgia, the doctor prescribed a spasmolytic, painkillers and diclofenac.

60. According to a medical opinion received at a later stage (see paragraph 128 below), diclofenac was contraindicated in Mr Magnitskiy's case because it could induce acute pancreatitis.

61. Responding to repeated complaints by the first applicant of searing back pain, on 1 July 2009 a physician in remand prison no. 77/1, Mr So., examined him. Having obtained the results of an abdominal ultrasound scan, the doctor noticed gallbladder concrements and an enlarged pancreas and concluded that there were signs of chronic pancreatitis and calculous cholecystitis. Drug treatment and consultation by a surgeon were prescribed.

62. Eleven days later a surgeon from a prison hospital, Mr G., examined the first applicant and diagnosed cholelithiasis and chronic cholecystopancreatitis, confirming the earlier diagnosis. The surgeon prescribed drug therapy, a "control ultrasound examination in a month" and "planned surgical treatment".

63. On 18 July 2009 the first applicant again complained of pain in the upper abdomen. On examination, the abdomen was moderately swollen and there was pain in the gallbladder projection areas and the pit of the stomach.

64. A week later Mr Magnitskiy was transferred to remand prison no. 77/2. According to the applicants, the prison did not have the medical facilities required for Mr Magnitskiy's condition, such as an ultrasound scanning machine and surgical equipment.

65. In remand prison no. 77/2 the first applicant received no medical assistance, while his medical records referred to his suffering from pancreatitis and contained a recommendation for surgery. On the day following his admission Mr Magnitskiy asked the prison director, Mr Kom., in writing for a medical visit. Two weeks later, still waiting for a response to his earlier request to see a doctor and citing his progressively worsening health, the first applicant made a written request for an appointment with the prison director. The request went unanswered. Two days later, on 11 August 2009, he made another written request to see a doctor, noting the delay in performing his medical examination. That request was also left without a response.

66. For the first six weeks of his detention in remand prison no. 77/2, the first applicant was not given any medicines. On 14 August 2009 he asked for permission to receive medicines from his

relatives. When the third applicant brought medicines to the facility on 17 August 2009, they were given to another prisoner by mistake. The medicines she had brought were finally delivered to Mr Magnitskiy on the day following her meeting with the chief of the medical unit in the remand prison, Dr D.K., on 4 September 2009.

67. On 19 August 2009 the first applicant's lawyers complained to the prison director and senior investigator, reminding them of Mr Magnitskiy's diagnosis and requesting an immediate ultrasound scan and a report on the treatment prescribed for their client. The senior investigator rejected that request on 2 September 2009, explaining that a refusal to carry out medical examinations could be appealed against to a prosecutor or a court, but that the law did not impose any duty on an investigator to monitor inmates' health, and that it was for the accused to request medical help in a detention facility. No response from the prison director followed.

68. On 24 August 2009, a month after his transfer to remand prison no. 77/2, the first applicant suffered from a sharp pain coming from the solar plexus region. By that time he was permanently experiencing severe pain which prevented him from lying down. In his diary Mr Magnitskiy described the events of 24 August 2009 as follows:

"The disease has become so acute that I could no longer lie in bed. At approximately 16:00, my fellow inmate began kicking the door, demanding for me to be taken to a doctor. The warder promised to ask a doctor to come but he didn't appear despite the recurrent demands of my cellmate. I was taken to a doctor five hours later. I informed the doctor about my illness and complained that during my confinement in remand prison no. 77/2 I had never been examined by a doctor. She was very displeased ... stating that I had already been given medical care [at facility no. 1] and asking: 'Do you think that we are going to treat you every month?' She advised me to get an appointment with a surgeon."

69. The first applicant asked Dr D.K., the chief of the medical unit in the remand prison, for an examination by a surgeon with a view to a decision on an urgent ultrasound scan and surgery. No response was forthcoming.

70. On 26 August 2009, as Dr D.K. was carrying out a round of the cells, the first applicant complained that he was not receiving treatment. He was told that the prison did not have the equipment for medical examinations.

71. On 31 August 2009 the first applicant again spoke to Dr D.K., insisting on an ultrasound scan and surgery. He was promised the planned surgery after he had been released, as the facility was not under an obligation to perform it.

72. Two days later Dr D.K., who had asked the authorities to transfer Mr Magnitskiy to remand prison no. 77/1 for a medical examination, confirmed that the transfer could take at least another three weeks owing to "transport and security problems".

73. The first applicant's lawyers appealed to the Prosecutor General, complaining that Mr Magnitskiy had been denied a proper medical examination, adequate general medical care and surgery. The complaint was dismissed by an official from the Prosecutor General's office. On 30 September 2009 the senior investigator once again rejected a request for an ultrasound scan.

74. On 7 October 2009, when the first applicant was admitted to the medical unit of the remand prison in view of his steadily worsening condition and for the purpose of carrying out "an examination and treatment", the prison director and the chief of the medical unit issued a certificate to the first applicant's lawyers indicating that he was medically fit to remain in detention.

75. On 11 November 2009 the prison administration issued another certificate stating that Mr Magnitskiy was diagnosed as having gallstones, cholecystitis and acute pancreatitis and that he was being treated in the medical unit of remand prison no. 77/2. The certificate stated that his health was satisfactory and that he could participate in court hearings and investigative measures.

76. On the night of 12 November 2009, after Mr Magnitskiy had returned to the prison from the court hearing, his condition drastically deteriorated. He wrote to Dr D.K., describing intensifying acute pain in the pancreatic gland area, as well as the appearance of a distressing pain in the liver accompanied by vomiting. He again asked for an ultrasound scan.

77. At approximately 10 p.m. on 13 November 2009 the first applicant complained of being in an extremely poor condition. A medical assistant admitted him for inpatient care with the following diagnosis: chronic cholecystitis and chronic pancreatitis with acute exacerbation. He was "prescribed treatment similar to the previous treatment". The prison doctor Ms L., the doctor attending to him, was on leave at the time.

#### E. Circumstances surrounding Mr Magnitskiy's death

##### 1. Transfer to remand prison no. 77/1 and episode of acute psychosis

78. When Dr L. came back to work on Monday 16 November 2009, she examined the first applicant at 9 a.m. She recorded that his condition was moderately severe and that he had complained of girdle pain in the right hypochondrium. He was also reported to be vomiting every three hours. At 9.30 a.m. Dr L. noted the aggravation of cholecystopancreatitis and decided to urgently send the first applicant to the surgical unit in remand prison no. 77/1.

79. An ambulance was called to transfer Mr Magnitskiy at 2.29 p.m. The emergency call chart indicated that the ambulance arrived at the remand prison at 2.57 p.m., but its crew had to wait for an escort into the facility for two hours and thirty-five minutes.

80. The first applicant left remand prison no. 77/2 at approximately 5.10 p.m. He arrived at remand prison no. 77/1 at approximately 6.30 p.m.

81. Upon admission to remand prison no. 77/1, Mr Magnitskiy was examined by a doctor, Ms A.G., in the medical room of the facility reception section. She confirmed the diagnosis of acute calculous cholecystitis and acute pancreatitis and described his status as moderately severe. The first applicant was recommended admission to the surgical department for inpatient treatment.

82. Dr A.G. later described the events of that evening (a similar record was entered in the first applicant's medical history). She was filling in the medical records while the first applicant remained in a metal cage in the same room. She noticed that his behaviour "became inappropriate ... he raised his voice and was aggressive". She moved to the room next door to complete her work, but heard him saying "now they will kill me here, I am innocent in this case, why did they bring me here?" She went back to the room where he was and saw him running around inside the caged area. She was joined by her colleague Dr N. Dr A.G. suspected acute psychosis and ran to the headquarters to tell an on-duty officer to call the reinforcement team. Eight guards arrived at about 7.30 p.m. She also phoned the emergency medical service to request a psychiatric first-aid team, then went back to the room where the patient was still in the cage, with handcuffs put on him by the guards. Another doctor, Mr Ma., joined them at that time. Dr A.G. ordered an injection to the first applicant to alleviate the pain in his stomach. An entry in the medical record at 7 p.m. indicated that his final diagnosis was "acute psychosis and delirium of persecution".

83. Guards present at the scene of the incident later testified that the handcuffs had been removed approximately half an hour later when the first applicant had calmed down and his behaviour had returned to normal.

84. Two official documents, recording that handcuffs and a rubber truncheon had been used, were prepared at the time. The first report signed by officer Kuz. indicated that at 7.30 p.m. Mr Magnitskiy had been handcuffed to prevent suicide or self-harm. The second report signed by the same officer and two witnesses stated that officer Kuz. had used a rubber truncheon against the first applicant to prevent suicide or self-harm. Both reports were approved by the head of the detention facility.

85. Later, officer Kuz. and witnesses to the events claimed that a rubber truncheon had not been used and that it had been mentioned in the report because of a typing error.

## 2. Arrival of a psychiatric emergency team and death of the first applicant

86. The subsequent versions of events put forward by detention facility officials, prison medical personnel and psychiatric team members differ concerning the circumstances of the first applicant's death.

87. In particular, in the course of the proceedings relating to Mr Magnitskiy's death, members of the psychiatric emergency team testified to investigators that when they had been allowed to see him, after having been forced to wait for more than an hour in front of the detention facility building, he was already dead. They had found him, half-dressed, sitting on the floor in a cell with

his back against the bunk, his arms spread out, the left leg stretched out, and the right leg bent at the knee. There had been a large pool of urine under him. They had noticed pronounced traces from handcuffs on his wrists. The doctors concluded that the first applicant had already been dead at least for fifteen to thirty minutes as his corpse was already in partial rigor mortis.

88. The members of the psychiatric emergency team included the following information in their report:

“... the team arrived at the facility’s gates at 8 p.m. on 16 November 2009. [There was] restricted access to the premises. When we entered the medical unit of the facility at 9.20 p.m., officers informed [us] that the patient had died ... Diagnosis: the patient died before the arrival of the emergency team.”

89. Officer Mar. from remand prison no. 77/1 indicated that when the emergency psychiatric team had entered, the first applicant had still been alive but had been sweating and experiencing difficulty breathing. However, on another occasion officer Mar. testified that prior to the arrival of the psychiatric emergency team he had witnessed a medical assistant administering artificial lung ventilation to the first applicant using a bag-valve mask. The first applicant had then been placed on a stretcher and taken to the intensive care ward upon the orders of Dr A.G. He had not met or seen the members of the psychiatric emergency team.

90. A prison medical record drawn up by the prison surgeon stated as follows:

“at 9.15 p.m. [Mr Magnitskiy] was examined again owing to the worsening of his condition. During an examination performed by psychiatrists the patient lost consciousness. A prison medical assistant started resuscitation (closed-chest cardiac massage, artificial ventilation ...).”

According to this record, at 9.20 p.m. the first applicant was transferred to a special medical ward in building no. 7, where for thirty minutes prison staff, including Dr A.G., continued their unsuccessful attempts to revive him. He was declared dead at 9.50 p.m. that evening. The death confirmation statement was signed by Dr A.G., medical assistant V., officer Mar. and two other prison officials, including Captain Pl.

91. Captain Pl. was questioned on 19 January 2010 and stated that at around 9 p.m. on 16 November 2009 he had been warned that a detainee in a serious condition was being transferred to the resuscitation unit of the hospital. Around the same time he had received a call from officer Mar., who had told him to write a report on a detainee’s death. As soon as he had written the report, he had gone to the resuscitation unit and had signed the death confirmation statement.

92. Dr A.G. stated that on 16 November 2009, at about 9.20 p.m., she had received a call and had been told that the first applicant had felt sick. She had gone to the cell, where she had found him lying on the floor. Officer Mar. had been beside him and the medical assistant had been providing resuscitation. On another occasion she stated that the on-duty doctor, N., had run in to perform

resuscitation procedures. In her statement of December 2009 she noted that she had tried to feel a pulse and had only found it on the carotid artery; there had been no pulse on the radial arteries. She had given orders to immediately take the patient to the intensive care ward, which she estimated had taken about five minutes. She stated that together with the duty doctor in the intensive care ward she had attempted intensive care, through closed-chest massage, artificial lung bag-valve mask ventilation, administration of adrenaline and atropine. As part of attempts to resuscitate Mr Magnitskiy and because it was impossible to locate any peripheral veins, Dr A.G. had personally administered injections of adrenaline and atropine to the root of his tongue. They had had no effect and at 9.50 p.m. the patient had been pronounced clinically dead.

### 3. Death confirmation certificate

93. On the day of Mr Magnitskiy's death, Dr A.G., officer Mar., Captain Pl. and several other prison officials prepared the death confirmation certificate. It stated that the first applicant had died at 9.50 p.m. on 16 November 2009 owing to toxic shock and acute cardiovascular insufficiency. It gave the following diagnosis:

"Cholelithiasis. Acute calculous cholecystitis. Acute pancreatitis. Pancreonecrosis? Acute psychosis. Closed craniocerebral injury?"

94. A copy of the certificate provided to the second and third applicants and their lawyers showed that it had been faxed from remand prison no. 77/1 at 12.13 a.m. on 17 November 2009 to a fax number registered for the District Court.

95. The third applicant insisted that a copy of the death confirmation certificate which she had later obtained from investigators appeared to be identical to those described above, but with two important differences. In particular, the document was not stamped and the reference to the closed craniocerebral injury was deleted.

### F. Investigation into Mr Magnitskiy's death

#### 1. On-site examination

96. An investigator from the Investigative Committee arrived at remand prison no. 77/1 and prepared an on-site examination record at 12.30 a.m. on 17 November 2009. He recorded and photographed the first applicant's body lying on the bed with abrasions on the wrists.

#### 2. Autopsy examination

97. In the morning of 17 November 2009 a medical assessor from the Forensic Medical Examination Office performed an autopsy (for her conclusions see paragraph 123 below). Requests from the second and third applicants for an independent medical examination of the body and for access to his blood and tissue samples were dismissed by the investigator.

98. Mr Magnitskiy was buried on 20 November 2009.

### 3. Internal inquiry

99. On 17 November 2009 the Interfax news agency published a news item describing the circumstances of the first applicant's death. On account of that publication the head of the Federal Service for the Execution of Sentences ordered an internal inquiry into the events to be carried out by an ad hoc commission of inquiry headed by his deputy.

100. On 1 December 2009 the commission of inquiry prepared a report focusing on the conditions of Mr Magnitskiy's detention and the quality of the medical care afforded to him. In a summary fashion the report noted that detention conditions in remand prisons nos. 77/1 and 77/5 had fully complied with domestic standards. Detainees were afforded 4 sq. m of floor space each; their cells had been adequately furnished, and had been maintained in good sanitary conditions. No information about the prison cells hosting the first applicant, their floor space and the number of inmates was included in the report. The report further stated that unlike the aforementioned facilities, remand prison no. 77/2 was overcrowded. As a result, for thirty-six days the first applicant had had insufficient personal space. A detailed description of the conditions of his detention in that facility was provided.

101. As regards the quality of medical care in detention, the report said that the authorities had made almost no entries in the first applicant's medical file, particularly from 24 July to 7 October 2009. Therefore, it was difficult to assess the adequacy of his treatment. However, certain failures were obvious. For example, the first applicant had not received the recommended ultrasound examination or the necessary blood tests, and had not been seen by a surgeon.

102. The shortcomings identified were explained by the mismanagement of remand prison no. 77/2, in particular the understaffing of its medical unit and the absence of appropriate supervision by the Moscow prison authorities. The report recommended the disciplinary punishment of the officials responsible.

### 4. Criminal investigation

103. Two days after Mr Magnitskiy's death, on 18 November 2009, BBC Russia published an article citing, in particular, the head of the Moscow office of the Investigative Committee of the Prosecutor General's office, Mr A. Bagmet. According to the reporter, Mr Bagmet stated that "[his] office was carrying out an inquiry into the death of Mr Magnitskiy; however, the grounds calling for the opening of a criminal case ... 'have not yet been identified'."

104. On the following day an investigator from the Investigative Committee of the Prosecutor General's office in the Preobrazhenskiy District of Moscow recommended initiating a criminal investigation into the circumstances of Mr Magnitskiy's death. He stated:



“Taking into consideration the fact that an investigation may reveal evidence of a crime under Article 105 [homicide] and Article 111 § 4 [grave injury to health] of the Criminal Code, I deem it advisable to register the report in the Crime Report Registration Book (KRSP) and to conduct an investigation pursuant to Articles 144, 145 of the Criminal Code of the Russian Federation.”

105. Six days later, on 24 November 2009, the Investigative Committee of the Prosecutor General’s office in the Preobrazhenskiy District of Moscow opened a criminal case against unknown officials from the Moscow prison service. Its scope was limited to offences under Article 124 § 2 of the Russian Criminal Code (negligently failing to render aid to a sick person resulting in death) and Article 293 § 2 of the Code (neglect of duty resulting in the death of a person).

106. At some point later the second and third applicants were granted victim status in the criminal proceedings. The first applicant’s lawyer immediately asked the investigating authority to secure evidence in the case, in particular records from CCTV cameras installed in the remand prisons.

107. In the course of the investigation the authorities interviewed a number of witnesses (see paragraphs 36 and 38 above) and ordered several expert examinations (see paragraphs 123-135 below).

108. On 5 May 2010 the case was transferred to the Central Investigation Department of the Investigative Committee of the Prosecutor General’s office. The head of the Investigative Committee stated in an interview to a “Russian newspaper” on 7 September 2010 that the Committee was working on the case and that they had no grounds to believe that Mr Magnitskiy’s death had been connected to the conduct of officials responsible for his criminal prosecution.

109. In January 2011 the Investigative Committee became an independent body reporting to the President of Russia. It continued the criminal investigation in the case.

110. In February 2011 investigators examined the crime scene and asked the director of remand prison no. 77/1 for CCTV records from 16 November 2009. In March 2011 the prison director responded that there had been no video recording in the facility.

111. Experts from the Centre for Forensic Medical Examinations of the Ministry of Health Care and Social Development of Russia, in their report no. 555/10 of 15 June 2011, established a direct causal link between Mr Magnitskiy’s death and the failure to provide him with adequate medical care. They also concluded that certain injuries to his body could have been inflicted by a rubber truncheon (for more details see paragraph 134 below).

112. On 13 September 2011, on the basis of the above conclusion, the third applicant asked the investigating authority to open a separate criminal case into the ill-treatment of her son. The investigating authorities joined the complaint to the existing case file. Being unsatisfied with the lack of a separate decision on the issue, she applied to the Basmanniy District Court, which

dismissed her complaint on 13 December 2011. The Moscow City Court upheld that decision on appeal on 22 February 2012.

113. In the meantime, on 18 July 2011 the Investigative Committee instituted criminal proceedings against two doctors from remand prison no. 77/2, the chief of the medical unit, Dr D.K., and the first applicant's attending doctor, L. The first case was founded on a charge of neglect of duty, and the second on a charge of negligent homicide owing to the improper discharge by a person of his or her professional duties. These cases were then joined to the one opened on 24 November 2009 (see paragraph 105 above).

114. On 28 October 2011 the Investigative Committee issued two separate decisions charging Dr D.K. with neglect of duty and Dr L. with negligent homicide. The decisions referred to the doctors' failure to take any action in respect of the first applicant's persistent complaints about his deteriorating health from the moment of his admission to remand prison no. 77/22 until his transfer to remand prison no. 77/1, and also their failure to comply with the recommendations for Mr Magnitskiy's diagnosis and treatment. They further stressed that Dr L. was aware that her education and professional qualifications did not satisfy the requirements of her post. She could have foreseen that her inadequate professional qualifications and skills would lead to grave or even irreversible consequences, such as the significant deterioration of the patient's health or even his death. However, she had rashly hoped to avoid those consequences. The investigators concluded that the doctors' failure to perform diagnostic procedures and provide effective and timely medical care had caused Mr Magnitskiy's death.

115. On 31 October 2011 the investigators disjoined the case against Dr D.K. and Dr L. from the original case. At the end of December 2011 the preliminary investigation was completed and the final version of the bill of indictment was served on the doctors.

116. On 2 April 2012 the Investigative Committee issued a decision dismissing all charges against Dr L., given that the statutory limitation period had expired for the specific crimes with which she had been charged.

117. On 24 December 2012, as the trial against Dr D.K. neared its conclusion, the prosecutor who had previously sought the defendant's conviction asked the presiding judge to acquit him. Four days later the District Court acquitted Dr D.K. of all charges. The court concluded that there was no causal link between his conduct and Mr Magnitskiy's death. The Moscow City Court dismissed an appeal lodged by the third applicant and upheld the acquittal on 16 May 2013.

118. In the meantime, on 19 March 2013 the investigation into the first applicant's death was closed for "lack of any crime". The investigators found it implausible that Mr Magnitskiy had been prosecuted in revenge for having exposed fraud by State officials. Neither Mr Kar. nor Mr Kuz. had been involved in the alleged fraud. They had neither opened criminal case no. 151231 into the tax evasion allegedly committed by the head of the Kameya company, nor had they participated in the search and seizure of the corporate documents and company seals. According to an expert

report, fraudulent financial documents had been sealed by seals other than those seized by the police during the search on 4 June 2007. No connections between the police officers and alleged perpetrators of the tax fraud had been established.

119. The decision of 19 March 2013 also mentioned that Mr Magnitskiy's transfers between the detention facilities had been carried out with the sole aim of avoiding his detention in poor conditions and could in no respect have served as an attempt to put pressure on him. No physical force had been used against him. The medical examination had not disclosed any traces of violence on Mr Magnitskiy's body, having thus disproved the suspicion that he had been beaten up with a rubber truncheon on 16 November 2009. The injuries on the wrists had been caused by handcuffs, while bruises and abrasions on the left hand, left shin and right ankle had been self-inflicted when Mr Magnitskiy had behaved aggressively. A bruise on the right ankle had appeared three to six days before the death and had been the result of "domestic trauma". The injuries were minor and had not led to Mr Magnitskiy's death. He had died from acute cardiac failure and cerebral and pulmonary oedema induced by secondary dysmetabolic cardiomyopathy developed on account of diabetes and chronic hepatitis in its active form. Those diseases had not been diagnosed in due time and there was a causal link between Dr L.'s failure to ensure the necessary medical examinations and Mr Magnitskiy's death.

120. In their decision of 19 March 2013 the investigators reiterated that the criminal proceedings against Dr L. had been closed in view of the expiry of the statutory limitation period and that her superior, Dr D.K., had been acquitted by the court on account of the absence of a causal link between his actions and the first applicant's death. The investigators finally stressed that no other individuals whose actions could have led to Mr Magnitskiy's death had been identified.

121. On 14 August 2013 the third applicant complained to the Investigative Committee about the failure to prosecute those responsible for the violation of her son's rights. Several weeks later she received a letter supporting the decision of 19 March 2013.

122. On 5 May 2014 the third applicant filed a complaint with the Investigative Committee against the decision to close the investigation. She cited Resolution 1966 (2014) adopted by the Parliamentary Assembly of the Council of Europe on 28 January 2014 (see paragraph 171 below). Three days later her complaint was dismissed as the impugned decision was considered to be lawful and justified. Her subsequent complaints filed between June and September 2014 were also dismissed.

## 5. Expert opinions

### (a) Autopsy report

123. Mr Magnitskiy's autopsy was carried out by a medical assessor from the Forensic Medical Examination Office at 10.10 a.m. on 17 November 2009. She collected samples of the brain, lung, heart, liver, pancreas, kidney, stomach and small intestine, and also a blood sample, and sent them

for testing. Following the completion of the tests, the expert integrated all the findings into the final autopsy report, dated 31 December 2009.

124. The report indicated that the first applicant had died twelve to fifteen hours before the autopsy had begun. The cause of death was “congestive heart failure developed as a consequence of secondary cardiomyopathy”. The report also listed associated diseases including calculous cholecystitis, fatty degeneration of the liver, lipomatosis of the pancreatic gland, and chronic persistent hepatitis. Finally, it included a description of the external physical injuries on Mr Magnitskiy’s body:

- bruises on the left and right wrists inflicted as a result of the squeezing and sliding action of a blunt hard object or objects with a limited traumatising surface shortly before the death;
- bruises and two abrasions on the left hand, and a vertical oval abrasion on the front surface of the left calf also inflicted shortly before the death as a result of the impact and sliding action of a blunt hard object; and
- a bruise on the inner surface of the right ankle joint inflicted three to six days before the death.

125. The medical assessor concluded that the injuries had no causal link to the death.

(b) First medical expert commission report and preliminary reports

126. On 1 February 2010 the senior investigator of the Moscow City Prosecutor’s Office invited a forensic medical expert commission to formulate an opinion concerning the cause of the first applicant’s death.

(i) Preliminary reports

127. Several preliminary reports for further incorporation in the forensic medical expert commission report were prepared by the Forensic Examinations Bureau of the Moscow Department of Healthcare. In particular:

- A histological report of 25 February 2010 on the tissue samples concluded that there were “signs of cardiomyopathy”, as well as “chronic persistent hepatitis of minimal activity” and “moderate fibrosis and lipomatosis of the pancreas”.
- A report of 22 April 2010 indicated that the death had occurred between 8.30 and 9 p.m. on 16 November 2009, before resuscitation measures had started. An electrocardiogram (“ECG”) on 21 October 2009 had shown signs of cardiomyopathy, but the requisite treatment had not been administered. The report also noted that in its early stages dilated cardiomyopathy could progress without any clinically noticeable symptoms, which could lead to sudden cardiac death in the event of any pressure. Citing the results of the post-mortem examination, the report concluded that the

first applicant had died as a consequence of cardiomyopathy and fatty liver hepatitis, chronic calculous cholecystitis and pancreatitis.

- A report by a gastroenterologist dated 30 April 2010 stated that the first applicant had been correctly diagnosed with cholelithiasis and chronic pancreatitis. The expert further noted that Mr Magnitskiy's complaints were indicative of acute destructive pancreatitis and insisted that those symptoms were not similar to those of any other unidentified disease. The expert listed a variety of tests that should have been performed during the acute stages of cholelithiasis and pancreatitis, and found it particularly significant that the first applicant's medical records contained no indication that even most simple tests, such as clinical blood or urine analyses, had been carried out. The expert stressed that Mr Magnitskiy had not received the most effective treatment for cholelithiasis, a planned cholecystectomy, which should have been performed as it was generally accepted treatment for acute destructive pancreatitis. In the expert's opinion, the evidential material presented gave no impression that the first applicant had any serious heart problems. The expert noted that cardiomyopathy could cause death as a result of an intensive overload, and that Mr Magnitskiy, by all appearances, had not experienced any such signs. As to the cause of death, the expert found that the acute destructive pancreatitis, put forward as a consequence of the cholelithiasis, could have caused Mr Magnitskiy's death if left without proper treatment for several days.

- A brief report of 6 May 2010 by a professor of anaesthesiology and critical care medicine stated that even full-scale resuscitation measures had little effect in a case of cardiomyopathy, irrespective of its nature. However, he was unable to "conclusively assess" the quality of the resuscitation procedures in Mr Magnitskiy's case since there was no proper information describing them (time when the patient's heart had stopped, type of stoppage, number of persons involved in the procedure, and so on). The expert reiterated statements by the doctors from the psychiatric emergency team and expressed serious doubts as to the veracity of the official records from the detention facility, which had described the resuscitation measures. Disputing the findings by the gastroenterologist, the professor concluded that death had been caused by "acute heart failure induced by secondary dilated cardiomyopathy and aggravation of chronic cholecystopancreatitis".

(ii) First medical expert commission report

128. The first report produced by the medical expert commission on 12 May 2010 drew the following conclusions.

(i) During his detention Mr Magnitskiy had had a regular heartbeat and blood pressure. An ECG test on 21 October 2009 had shown no signs of fundamental cardiac abnormalities. However, the patient's complaints in May and October 2009, prompting the diagnosis of osteochondrosis and cardiac disease, had meant that it was necessary to perform repeated ECGs, an ultrasound examination of the heart and a biochemical examination of blood to diagnose, or to rule out, cardiac disease, which had not been done.

(ii) At the time of his death the first applicant had had no aggravations of cholelithiasis or pancreatitis. The autopsy report and related subsidiary tests confirmed that the cause of his death was cardiomyopathy.

(iii) In detention the first applicant had received inadequate health care, in particular given the doctors' failure to prescribe or to perform laboratory tests on blood and urine, as well as cholelithiasis-related surgery. The faults in rendering medical aid, however, had had no causal connection with his death. The report stressed the poor quality of medical record-keeping by the medical specialists at the detention facilities and the insignificant informative value of the records.

(iv) The report also contained an excerpt from a statement by a doctor who had treated the first applicant before his arrest and who had received information from his family as to his condition and treatment in prison. The doctor stated that the first applicant had described "typical symptoms of cholecystitis and pancreatitis" and concluded that the diagnosis was correct, but suggested more advanced drugs and a suitable diet. The doctor expressed particular concern that Mr Magnitskiy had been prescribed diclofenac, a drug which could have had an adverse effect on his condition and could have caused acute pancreatitis.

(c) First cardiology report

129. On 21 June 2010 a committee of cardiologists issued a more specific report. Contrary to the first medical expert commission report, it stated that the first applicant had had no symptoms of cardiomyopathy prior to his death and that his ECG and X-ray exams had shown no abnormal changes in the heart. The committee noted that cardiomyopathy could be asymptomatic, that it could be treated but not cured, and that it was practically impossible to take any steps or to administer complex drug therapy where cardiomyopathy caused sudden cardiac death.

(d) Second cardiology report

130. The second cardiology report drawn up in October 2010 stated that cardiomyopathy could manifest itself for the first time with sudden death. The report indicated that it was impossible to determine how long ago the first applicant had developed heart disease. It found that the ECG records contained no signs of cardiomyopathy, confirming the findings of the first expert medical commission report and of the first cardiology report, and that there was no relationship between cardiomyopathy and the other diseases with which the first applicant had been diagnosed.

(e) Psychological and psychiatric report

131. A report produced on 23 November 2010 in response to an investigator's request concluded that until 7 p.m. on 16 November 2009 the first applicant had not suffered from any mental disorder. It was impossible to say whether he had been in a state of temporary mental disturbance on 16 November 2009 because the information available was inconsistent.

(f) Second medical expert commission report

132. On 15 June 2011 the Centre for Forensic Medical Examinations of the Ministry of Healthcare and Social Development of the Russian Federation produced report no. 555/10. The report concluded that the cause of the first applicant's death was:

“secondary dysmetabolic cardiomyopathy against a background of diabetes and chronic active hepatitis aggravated by ventricular fibrillation with the development of acute cardiac failure, brain and lung oedema with acute intra-alveolar and subarachnoid haemorrhage.”

133. The report also stated that diabetes and chronic active hepatitis had caused the development of secondary dysmetabolic cardiomyopathy. The chronic active hepatitis had developed no later than a month before the death and secondary dysmetabolic cardiomyopathy had occurred no less than six months prior to it. The experts also drew up a list of deficiencies in the medical assistance provided to Mr Magnitskiy in detention. Their conclusion was that the requisite diagnostic procedures which the prison medical personnel had failed to perform could have led to the timely discovery of the illnesses and that adequate healthcare could have prevented the patient's death. The experts found a direct causal link between the death and the lack of proper medical care.

134. Having been asked to assess the nature and cause of injuries discovered on the first applicant's arms and legs, the experts concluded that they had occurred ante mortem and had resulted from at least five blows with a blunt object or from friction. Those blows could have been caused by a rubber truncheon.

(g) Third medical expert commission report

135. On 17 August 2011 the third medical expert commission clarified report no. 555/10. It stated that appropriate medical treatment would have prevented the progress of the first applicant's diabetes and hepatitis, and thus the cardiomyopathy, and would have allowed his death to be avoided. It further stated that shortcomings in the medical services provided on 16 November 2009 had not contributed to the death because it was highly unlikely that someone in his condition could have been saved.

(h) Opinion by Physicians for Human Rights

136. On 28 June 2011, Physicians for Human Rights (a not-for-profit human rights NGO – hereinafter “PHR”) issued a report in which it reviewed the available evidence relating to the first applicant's treatment and death.

137. As to the medical care provided to Mr Magnitskiy in detention, PHR concluded that he had received inadequate medical attention and assessments in view of the differing diagnoses of his ongoing symptoms. Such neglect had been “calculated, deliberate and inhumane”.

138. As to the circumstances of the death, the report stated that the evidence to hand did not permit any conclusive determination of how Mr Magnitskiy had died. Problematic factors included inconsistent and contradictory testimony given by detention facility officials and doctors

in respect of the last two hours of the first applicant's life, as well as the inadequate autopsy examination, which had been deficient in many respects. It was considered to be best practice to collect eyeball fluid and urine for toxicological examination. However, no such samples had been collected in Mr Magnitskiy's case. Complete photographs of the external surfaces of the body, as well as both distant or intermediate-distance and close-up photographs of each injury, had apparently not been taken. The puncture wound on the tongue had not been submitted for toxicological testing. Even though the gallbladder contained gallstones, and its wall had thickened, no histological examination had been performed. Lastly, the histological examination of the heart, brain and lungs had been insufficiently thorough.

#### G. Criminal proceedings against Mr Magnitskiy after his death

139. On 27 November 2009 an investigator discontinued the criminal proceedings against Mr Magnitskiy on account of his death under Article 27 § 2 and Article 24 § 1 (4) of the Russian Code of Criminal Procedure ("the CCrP") (see paragraphs 164 and 165 below). The second applicant was informed of that decision and of her right to appeal.

140. On 11 December 2009 a lawyer acting on behalf of the Magnitskiy family asked the President of Russia, the Prosecutor General of Russia and the investigating authorities to overrule the above-mentioned decision and to discontinue the criminal proceedings owing to the absence of criminal conduct and elements of a crime. No reply was forthcoming.

141. On 30 July 2011, in the light of the Constitutional Court's Ruling no. 16-P of 14 July 2011 ("Ruling no. 16-P") (see paragraph 167 below), the Deputy Prosecutor General decided to reopen the investigation against Mr Magnitskiy. Ten days later the case was reopened.

142. Shortly thereafter the second applicant was summoned as a witness. During questioning on 26 August 2011 she protested against the reopening of the case, saying that it was "illegal, inhuman, and unethical" to carry on the prosecution of her late husband because he was unable to defend himself. She pointed out that posthumous proceedings could only be conducted for rehabilitation purposes with the consent of the family of an accused, and reserved her right to seek rehabilitation in the future. She refused to answer any questions concerning the merits of the case.

143. On 26 August and 28 September 2011 Mr Magnitskiy's widow and mother, respectively, were granted the status of legal representatives of the late accused in the criminal proceedings.

144. In the meantime, on 22 August 2011 the second applicant sent a complaint to the Prosecutor General asking for the prosecution of her late son to stop. On 5 September 2011 she sent two further petitions to the Prosecutor General and the Investigative Committee asking them to stop the prosecution of her late son. A month later the investigators replied that there was no reason to close the case. On 8 November 2011 the Prosecutor General's office likewise rejected her petition to have the case closed, explaining that the proceedings had been resumed to protect the first applicant's rights, including his right to rehabilitation.



145. On 5 September 2011 the second applicant also applied to the District Court, asking it to declare unlawful the reopening of Mr Magnitskiy's criminal case. The complaint stated that only relatives of the deceased, and not State authorities, had a right to decide if a posthumous criminal investigation should be conducted. Such investigation could only be performed for the purpose of the rehabilitation of the accused. A week later the court rejected that complaint, having concluded that the second applicant was not a party to the criminal proceedings, had no right to challenge the preliminary investigation and had not specified which of her rights had been infringed. An appeal by the second applicant against that decision was rejected by the Moscow City Court on 24 October 2011.

146. Between August 2011 and March 2012 the third applicant lodged further complaints seeking to end the posthumous prosecution of the first applicant. In particular, on 11 March 2012 she filed a complaint with the investigator in charge of her late son's case, accusing the authorities of an attempt to cover up their fraudulent actions with the criminal prosecution of the first applicant, carried out under the guise of his rehabilitation. She expressed her refusal to participate in that "illegality", reserving her right to seek the rehabilitation of her son in the future, when the authorities could be trusted.

147. On an unspecified date the third applicant applied to the Ostankinskiy District Court of Moscow challenging the decision to have the criminal proceedings against her late son reopened. She argued that the investigating authority had no right to reopen the proceedings without the consent of the first applicant's family.

148. On 3 April 2012 the Ostankinskiy District Court dismissed her application. The court concluded that the decision of 27 November 2009 to discontinue the proceedings had been unlawful in the light of Ruling no. 16-P, because it had been taken without the consent of the deceased's family. Therefore, the higher authority had been correct in deciding to set it aside. This was particularly so given that the third applicant had sought the rehabilitation of her late son. With that in mind, it could not be said that the reopening had violated her rights. Quite the reverse, it had conferred procedural rights on the third applicant, allowing her to express her view on the criminal charges.

149. An appeal by the third applicant against the above-mentioned decision was dismissed by the Moscow City Court on 21 May 2012.

150. On 28 November 2012 the late Mr Magnitskiy was accused of tax evasion for having fraudulently claimed through Dalnyaya Step and Saturn the equivalent of USD 3 million in tax benefits for the employment of disabled persons, and for the underpayment by those companies of the equivalent of approximately USD 14 million through wrongful exemptions from local and regional taxes. The prosecution insisted that the offences had been committed in conspiracy with Mr Browder, and that Mr Magnitskiy had acted as his accomplice and a criminal leader.

151. In October and November 2012 the investigating authority invited the second and third applicants to study the case file, but they opted not to appear before the investigator.

152. In December 2012 the investigating authority sent the case to the District Court for trial “aimed at possible rehabilitation” of the late accused.

153. The trial of Mr Magnitskiy and Mr Browder began in March 2013. Neither the second nor the third applicant, nor their lawyers took part in those proceedings. The court assigned a lawyer to represent the interests of the late Mr Magnitskiy. The prosecution was represented by a prosecutor and an assistant prosecutor.

154. On 4 March 2013 the court-appointed lawyer asked for the case to be returned to the investigating authority, arguing that there had been no factual or legal basis for the posthumous investigation. The illegal resumption of the prosecution had irreparably damaged the proceedings, and made it impossible to reach any conclusion on the merits of the case. The court dismissed that argument, relying on the judgment of 3 April 2012, which confirmed the lawfulness of the decision to resume the criminal proceedings (see paragraph 148 above).

155. Five days later the second applicant sent a letter to the court stating that the proceedings were “sneering at [Mr Magnitskiy’s] memory” and lacked a legal basis. She called on the other participants not to be involved “in such a disrespectful act”.

156. During the hearings which followed, the District Court heard many witnesses, including colleagues of the first applicant, tax inspectors, and several disabled persons allegedly involved in the tax rebate schemes. It also examined a body of documentary evidence relating to the financial activity of Dalnyaya Step and Saturn.

157. On 11 July 2013 the District Court delivered the final ruling in the case. It found Mr Magnitskiy guilty as charged, with the only exception that he had acted as a criminal leader, and not as Mr Browder’s accomplice. Referring to Ruling no. 16-P, the court held that there were no grounds for the first applicant’s rehabilitation, and that in accordance with Articles 24 and 254 of the CCrP, the criminal proceedings against him should be discontinued. No sentence was imposed on the late Mr Magnitskiy. Neither the court-appointed lawyer nor the second or third applicants challenged that decision on appeal.

158. On 15 July 2013 a lawyer who had not participated in the proceedings challenged the decision on behalf of the second and third applicants. Two weeks later the District Court dismissed the appeal for lack of a power of attorney. As a result the decision of 11 July 2013 delivered in respect of the first applicant became final.

159. Mr Browder was found guilty of tax evasion, sentenced to nine years’ imprisonment and deprived of the right to carry out entrepreneurial activities for three years.

## II. RELEVANT DOMESTIC LAW AND INTERNATIONAL MATERIAL

A. Arrest and preventive measures in criminal proceedings

160. The relevant domestic law provisions concerning arrest and pre-trial detention are set out in the judgments of *Roman Petrov v. Russia* (no. 37311/08, §§ 33-36, 15 December 2015) and *Suslov v. Russia* (no. 2366/07, §§ 46-54 and §§ 63-68, 29 May 2012).

B. Conditions of detention

161. The relevant domestic law and international materials concerning conditions of detention are summed up in the leading case of *Ananyev and Others v. Russia* (nos. 42525/07 and 60800/08, §§ 25-30 and 55-58, 10 January 2012). For international material, see also *Muršić v. Croatia* ([GC], no. 7334/13, §§ 46-65, 20 October 2016).

C. Prohibition of ill-treatment and procedure for examining a criminal complaint

162. For a summary of the relevant domestic legal provisions on the prohibition of ill-treatment and the procedure for examining a criminal complaint, see *Manzhos v. Russia* (no. 64752/09, §§ 21-27, 24 May 2016).

D. Medical care in detention

163. The relevant provisions of domestic and international law on the general healthcare of detainees are set out in *Ivko v. Russia* (no. 30575/08, §§ 55-62, 15 December 2015).

E. Criminal proceedings after the death of the suspect/accused

1. Relevant provisions of the Russian Code of Criminal Procedure (CCrP)

164. Article 24 of the Code lists possible grounds for a decision refusing to institute a criminal case or discontinuing proceedings:

“1. A criminal case cannot be instituted and an instituted criminal case should be discontinued on one of the following grounds:

...

(4) death of an accused or of a suspect, except for cases where it is necessary to continue proceedings for the rehabilitation of the deceased person. ...”

165. Article 27 § 2 of the Code gives a list of grounds which cannot be used for the discontinuance of proceedings against the will of the suspect or accused.

166. The rule mentioned in paragraph 164 above is detailed in Article 354 of the Code:

“A court must discontinue criminal proceedings if:

(1) the circumstances mentioned in sub-paragraphs 3-6 of the first paragraph of Article 24 ... of the Code have been established at a court hearing ...”

## 2. Russian Constitutional Court’s Ruling no. 16-P

167. On 14 July 2011 the Constitutional Court of the Russian Federation examined a complaint lodged by two individuals challenging the constitutionality of sub-paragraph 4 of the first paragraph of Article 24 and the first paragraph of Article 254 of the CCrP. The court concluded that the above-mentioned statutory provisions were unconstitutional, in so far as they provided for the possibility of terminating a criminal case owing to the death of a suspect, or an accused, without obtaining the consent of close relatives of the late suspect or accused. The Constitutional Court held, in particular, as follows:

“2.1 ... respect for fundamental procedural guarantees of individual rights, including presumption of innocence, must also be secured while resolving a question concerning the termination of a criminal case with reference to non-rehabilitating circumstances. When taking a decision refusing to open a criminal case or deciding to terminate it at the pre-trial stage of the criminal proceedings, the competent bodies should accept as a starting-point that persons in respect of whom the criminal proceedings have been discontinued ... [have not been found guilty of an offence] and cannot be viewed as such; in the constitutional sense these persons can only be viewed as having been involved in the criminal proceedings ... owing to the relevant suspicions or accusations ...

At the same time, by discontinuing a criminal case owing to the death of a suspect (or an accused) [the authority] also stops the process of proving his or her guilt, but with this the accusation or suspicion is not being lifted, quite the contrary; in reality [the authority] reaches a conclusion as to the commission of the criminal act by ... a specific person and the impossibility of criminal prosecution owing to that person’s death. By that logic, the person in question, without the adoption or entry into force of any verdict, is declared guilty, and this constitutes a breach by the State of its duty to secure judicial protection of the person’s honour, dignity and good name guaranteed by [various provisions of] ... the Constitution, and – ... it constitutes a breach of the right of access to a court of persons whose interests may be affected by that decision ...

2.2. Turning to the legal nature of the discontinuation of the case on non-rehabilitating grounds ... the Constitutional Court has concluded that a decision to discontinue criminal proceedings does not amount to a criminal sentence, and, consequently, it cannot be regarded as a legal act establishing the guilt of a person within the meaning of Article 49 of the Constitution of Russia [which reads: ‘Everyone accused of committing a crime shall be considered innocent until his guilt is proven according to the rules fixed by federal law and confirmed by the sentence of a court which has come into legal force’] (see Constitutional Court’s Ruling no. 18-P of 28 October 1996) ...

... [in other words,] it is only possible to discontinue a criminal case with a general reference to non-rehabilitating circumstances if the rights of the participants in the criminal proceedings are

respected, which means, in particular, that there is a need to secure the consent of a suspect (or of an accused person) to take [such a decision] ...

... If, however, the person in question objects to [such a decision], he must be entitled to have the merits of the case against him examined by a trial court ...

3. ... [Having analysed the applicable domestic provisions, the Constitutional Court concludes that] the [CCrP] does not permit [relatives of the deceased person in respect of whom the criminal case was discontinued] to protect the rights of their deceased formerly accused relative. Since the interested persons, and first and foremost the close relatives of the deceased, are not allowed to take part in the proceedings, the [relevant] procedural decisions ... are taken by an investigator or a court – without the participation of the defence ...

4. ... Such limitations do not have an objective or reasonable justification and entail a breach of [the constitutional rights of the persons in question] ...

5. ... [The Constitutional Court further decides that] the protection of the rights and legal interests of close relatives of the deceased person ... aimed at his or her rehabilitation should be secured by assigning them the necessary legal status and providing them with the ensuing legal rights within the framework of the criminal proceedings ...

... [The Constitutional Court concludes that the rights provided for by Article 125 of the [CCrP] were insufficient to guarantee an adequate level of judicial protection to the persons concerned ...]

6. ... [Thus, in cases where] close relatives object to the discontinuance of the proceedings as a result of the death of the formerly suspected or accused person, a competent investigative body or a court should proceed with the examination of the case. At the same time, the interested persons should have the same rights as the deceased person [himself or herself] would have enjoyed. ...”

If the continued examination of the case reveals grounds for rehabilitation, the case is to be closed. If not, it is to be sent to a court for examination on the merits in compliance with the general rules of the criminal procedure. In that case, close relatives who insisted on the continuation of the proceedings with a view to obtaining rehabilitation, or their representative, must be summoned to protect the honour and good name of the deceased in court. During the examination of the case the court must establish the circumstances of the case, carry out a legal assessment of them, and also establish whether the accused was guilty, or not, of the alleged offence. Having examined the case in accordance with the general rules of the criminal procedure (with certain exceptions determined by the absence of the accused), the court must either ... acquit the person, or discontinue the proceedings under sub-paragraph 4 of paragraph 1 of Article 24 taken together with paragraph 1 of Article 254 of the CCrP...

With that in mind the federal legislature should amend the law to take account of the requirements of the Constitution and the present ruling. In particular, a list of persons who, along with close

relatives [of the deceased], could ... seek the continuation of the criminal proceedings after the death of a suspect (accused) to have him rehabilitated must be specified. The amendments should set out a special procedure for inviting [the interested persons] to take part in the posthumous criminal proceedings and should describe their status in those proceedings. Lastly, they should set out the special features of the [posthumous] investigation and trial, as well as the requirements for the court decision to discontinue the proceedings on relevant grounds.”

168. In early 2012 the third applicant applied to the Constitutional Court of Russia, asking it to clarify the above ruling. In particular, she asked whether the investigating authority could continue criminal proceedings posthumously if the late accused’s relatives objected.

169. By decision no. 423-O-R of 22 March 2012 the Constitutional stated that its ruling was clear on the issue. It reiterated:

“... rulings of the Constitutional Court of Russia may not be used to justify the continuation of the criminal proceedings by the investigating authority, if [such proceedings] are not aimed at the rehabilitation of the late accused ...”

170. Accordingly, the Constitutional Court held that no clarification was required and rejected the application.

#### F. Documents by the Parliamentary Assembly of the Council of Europe

171. On 28 January 2014 the Parliamentary Assembly of the Council of Europe adopted Resolution 1966 (2014) on “Refusing impunity for the killers of Sergei Magnitsky”, which, in so far as relevant, reads as follows:

“ ...

2. [The Parliamentary Assembly] is appalled by the fact that [the first applicant], a tax and accountancy expert with a Moscow-based law firm, died in pre-trial detention in Moscow on 16 November 2009 and that none of the people responsible for his death have yet been punished.

3. Mr Magnitsky had carried out investigations on behalf of a client on a massive fraud against the Russian fiscal authorities. The suspects he identified had effectively obtained the reimbursement of taxes paid by his client’s companies, which had been fraudulently re-registered in the names of known criminals.

4. The complaints were addressed to senior representatives of Russian law-enforcement bodies, but they were sent for investigation to the same Interior Ministry officials who had been accused of complicity. [The first applicant] had been placed in pre-trial detention, in increasingly harsh conditions, for alleged tax evasion committed in 2001 together with his then client William Browder. After six months in detention, Mr Magnitsky was diagnosed with pancreatitis. Shortly

before his scheduled treatment, he was transferred to another prison without adequate medical facilities.

5. After almost a year in detention, on 16 November 2009, [the first applicant], whose state of health had further deteriorated, was transferred back to a detention centre equipped with relevant medical facilities. Following his arrival, he was beaten with rubber batons and died the same evening. Civilian emergency doctors called in by prison officials were kept waiting for more than an hour, after which they found [the first applicant's] lifeless body on the floor of a holding cell.

6. The precise time and causes of Mr Magnitsky's death are still unclear. Contradictory testimony and official records have not yet been fully investigated.

7. Two prison officials were indicted for negligence. The proceedings against one of them were terminated on 2 April 2012 due to the statute of limitations. The other was acquitted in line with the prosecutor's request on 28 December 2012. None of the people present at the time of [the first applicant's] death, or accused by his family of having orchestrated the pressures he had complained about, was ever indicted.

8. The trial of [the first applicant], who is now accused of having participated himself in the fraud he had denounced and in alleged tax evasion by his client, is being pursued posthumously, despite numerous protests from his widow and his mother. Russian law allows posthumous trials only exceptionally, at the request of the family, for rehabilitation purposes.

...

10. The Russian Public Oversight Committee, mandated by the State to inspect all places of detention in the Russian Federation, carried out an investigation into the circumstances of [the first applicant's] ill-treatment and death in detention. It pointed out numerous inconsistencies, omissions and contradictions in the official records concerning the case.

11. The Presidential Council on Human Rights, on the basis of the Public Oversight Committee's findings, thoroughly evaluated the case of [the first applicant] and urged the competent Russian authorities to hold to account those responsible for his death.

...

14. In view of the above, the Assembly urges the competent Russian authorities:

14.1. to fully investigate the circumstances and background surrounding [the first applicant's] death and the possible criminal responsibility of all officials involved, in particular:

14.1.1. the contradictory testimony by prison officials and other witnesses concerning the events following [the first applicant's] arrival at [remand prison no. 77/1] on 16 November 2009;

- 14.1.2. the existence of two different versions of the 'death report' of 16 November 2009 ...;
  - 14.1.3. the reasons why [the first applicant] was moved to [remand prison no. 77/2] one week before the second ultrasound and surgery scheduled at [remand prison no. 77/1];
  - 14.1.4. the assignation of a mere hygiene specialist to provide medical care for [the first applicant], who had previously been diagnosed with serious diseases, in particular pancreatitis;
  - 14.1.5. the prescription and administration, to [the first applicant], of the drug Diclofenac, which is suspected of, inter alia, aggravating pancreatitis in certain circumstances;
  - 14.1.6. the unavailability of CCTV footage of the arrival of [the first applicant] at [remand prison no. 77/1] on the day of his death, in view of testimony according to which investigators had taken away the recordings;
  - 14.1.7. the incompleteness of the legally required ledger of complaints made during a critical period at [remand prison no. 77/2], in view of testimony that the extracts of the ledger presented during the proceedings appeared to have been rewritten on a single occasion;
  - 14.1.8. the personal relations existing between persons suspected of participating in the criminal conspiracy denounced by [the first applicant], including certain officials and former officials of the Ministry of the Interior and of the tax offices implicated 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;
  - 14.1.9. the origin of the extreme wealth displayed by certain retired Interior Ministry and tax department officials;
  - 14.1.10. the fraudulent law suits before the arbitration courts in St Petersburg, Moscow and Kazan recognising the fictitious debts that purportedly annulled the profits of the fraudulently re-registered companies in preparation for the tax reimbursement fraud denounced by [the first applicant];
  - 14.1.11. the procedure followed by the two tax offices involved in the fraud denounced by [the first applicant] in approving reimbursements amounting to the equivalent of US\$230 million, within twenty-four hours of the application, in particular whether the required background checks with the Interior Ministry had taken place, given that the Interior Ministry had previously received detailed information prepared by [the first applicant] on the fraudulent re-registration of the companies asking for the reimbursement;
- ...
- 14.3. to hold to account for their acts and omissions all those who share in the responsibility for [the first applicant's] death, in particular those who ordered his frequent moves between prisons



and cells, with ever-deteriorating conditions of detention, failure to provide necessary medical treatment, and, just before his death at [remand prison no. 77/1], the beatings and the manner in which [the first applicant] was left alone in a cell in an apparently critical condition;

14.4. to close the posthumous trial against [the first applicant] and cease putting pressure on his mother and his widow to participate in these proceedings;

...

17. The Assembly invites all other member States of the Council of Europe to consider ways and means of encouraging the Russian authorities to hold to account those responsible for the death of [the first applicant] and to fully investigate the crime he had denounced, in the interest of the Russian Federation and of all its hard-working and tax-paying citizens.

18. The Assembly resolves to follow closely the implementation of the above proposals ...”

172. On the same day the Parliamentary Assembly adopted Recommendation 2031 (2014) on “Refusing impunity for the killers of Sergei Magnitsky”, which reads as follows:

“1. The Parliamentary Assembly refers to its Resolution 1966 (2014) on refusing impunity for the killers of [the first applicant], and invites the Committee of Ministers to examine ways and means:

1.1. of improving international co-operation in investigating the ‘money trail’ of the funds originating in the fraudulent tax reimbursements denounced by [the first applicant]; and, in particular,

1.2. of ensuring that the Russian Federation fully participates in these efforts and holds to account the perpetrators and beneficiaries both of the crime committed against [the first applicant] and that denounced by him.”

173. On 22 January 2019 the Parliamentary Assembly adopted Resolution 2252 (2019) on “Sergei Magnitsky and beyond – fighting impunity by targeted sanctions”, which in so far as relevant, reads as follows:

“1. The Parliamentary Assembly reaffirms its commitment to the fight against impunity of perpetrators of serious human rights violations and against corruption as a threat to the rule of law.

...

4. Since [2014], the Russian authorities have still not made any progress in prosecuting the perpetrators and beneficiaries of the crime against Sergei Magnitsky, despite his family’s active engagement in the proceedings. All criminal cases against the officials involved in Mr Magnitsky’s

ill-treatment and killing have been closed; some of these officials were publicly commended by senior representatives of the State, and others received promotions ...”

## **THE LAW**

### **I. JOINDER OF THE APPLICATIONS**

174. Given the similar subject matter of the applications, the Court finds it appropriate to join them, pursuant to Rule 42 § 1 of the Rules of Court.

### **II. PRELIMINARY CONSIDERATIONS: LOCUS STANDI**

175. The Court observes that after the death of the first applicant, his wife, the second applicant, expressed her wish to pursue his application. The Government made no objections in that regard.

176. The Court normally permits the next-of-kin to pursue an application, provided he or she has a legitimate interest, where the original applicant has died after lodging the application with the Court (see *Murray v. the Netherlands* [GC], no. 10511/10, § 79, ECHR 2016; *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII; *Sagvolden v. Norway*, no. 21682/11, § 87, 20 December 2016; and *Larionovs and Tess v. Latvia* (dec.), nos. 45520/04 and 19363/05, § 172, 25 November 2014). In several cases raising issues under Articles 3 and 5 of the Convention it has already found that a close relative of the late applicant had standing to pursue the application (see *Murray*, cited above, §§ 79-80; *Barakhoyev v. Russia*, no. 8516/08, §§ 21-23, 17 January 2017; *Vaščenkovs v. Latvia*, no. 30795/12, §§ 25-30, 15 December 2016; *Sergey Denisov and Others v. Russia*, nos. 1985/05, 18579/07, 21748/07, 21954/07 and 20922/08, §§ 73-75, 19 April 2016; *Yaroshovets and Others v. Ukraine*, nos. 74820/10 and 4 others, § 67, 3 December 2015; and *Koryak v. Russia*, no. 24677/10, §§ 62-68, 13 November 2012).

177. In view of the above and having regard to the subject matter of the application, the Court accepts that the second applicant has a legitimate interest in pursuing the application in the first applicant’s stead, and that she has the requisite locus standi under Article 34 of the Convention.

### **III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF POOR CONDITIONS OF DETENTION**

178. The applicants alleged that the conditions of the first applicant’s detention in remand prison no. 77/5 from 2 December 2008 to 28 April 2009 had been appalling, in violation of Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

#### **A. Submissions by the parties**

##### **1. Submissions by the Government**

179. The Government submitted that in remand prison no. 77/5 in Moscow the first applicant had been detained in four cells which measured 48.4, 33.1, 39.3, and 36.8 sq. m, and housed twelve, eight, ten and nine inmates respectively. Each detainee had had an individual sleeping place and had been afforded around 4 sq. m of personal space. The Government did not submit a copy of the facility logbook or prison population log, stating that they had been destroyed after the expiry of the statutory time-limit for their storage. They referred to the report of 1 December 2009 drawn up in the aftermath of the internal inquiry in the remand prison and asserted that the conditions of detention in the remand prison had been appropriate (see paragraph 100 above).

## 2. Submissions by the applicants

180. The applicants stated that the Government's submissions were groundless in the absence of any material proof, such as records and logbooks. They noted that the authorities should not have destroyed the logbooks, particularly when the applicants had lodged a large number of complaints about the poor conditions. They asked the Court to draw inferences from the Government's failure to submit prison registration logs and other authentic documents and to find a violation of Article 3 of the Convention.

## B. The Court's assessment

### 1. Admissibility

181. The Court reiterates that in the absence of an effective remedy for this grievance, a complaint of inadequate conditions of detention should be lodged within six months of the last day of the applicant's detention (see *Markov and Belentsov v. Russia* (dec.), nos. 47696/09 and 79806/12, 10 December 2013, and *Norkin v. Russia* (dec.), no. 21056/11, 5 February 2013).

182. The period of detention under examination in the present case ended on 28 April 2009. Accordingly, to comply with the six-month rule the complaint should have been lodged no later than 28 October 2009. The first applicant lodged it on 11 June 2009. The second applicant, as the Court has already found, has locus standi to continue the application in Mr Magnitskiy's stead (see paragraph 177 above). However, the third applicant submitted a separate application form on 21 August 2012. Without going into the examination of the third applicant's standing to bring a complaint about the conditions of her son's detention, the Court considers that her complaint is in any event inadmissible for failure to comply with the six-month time-limit set out in Article 35 § 1 of the Convention and must therefore be rejected pursuant to Article 35 § 4.

183. The complaint by the first applicant, pursued by the second applicant, is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds and it must therefore be declared admissible.

## 2. Merits

### (a) General principles

184. The applicable general principles were summarised in *Khlaifia and Others v. Italy* ([GC], no. 16483/12, §§ 163-67, ECHR 2016 (extracts)) and *Muršić* (cited above, §§ 96-141).

(b) Application of the above principles to the present case

185. At the outset the Court notes that the parties provided differing descriptions of the conditions of detention in remand prison no. 77/5. In particular, they did not agree as to whether the first applicant's cells had been overcrowded.

186. The Court has held on many occasions that cases concerning allegations of inadequate conditions of detention do not lend themselves to a rigorous application of the principle "he who alleges something must prove that allegation" because in such instances the respondent Government alone have access to information capable of corroborating or refuting these allegations. It follows that, after the Court has given notice of the applicant's complaint to the Government, the burden is on the latter to collect and produce relevant documents. A failure on their part to submit convincing evidence on material conditions of detention may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations (see *Ananyev and Others*, cited above, § 123; *Gubin v. Russia*, no. 8217/04, § 56, 17 June 2010; and *Khudoyorov v. Russia*, no. 6847/02, § 113, ECHR 2005-X (extracts)).

187. The Court reiterates that the destruction of relevant documents following the expiry of the time-limit for their storage, albeit regrettable, cannot in itself be regarded as an unsatisfactory explanation for the failure to submit such documents (see *Ivakhnenko v. Russia*, no. 12622/04, § 32, 4 April 2013; *Shcherbakov v. Russia*, no. 23939/02, § 77, 17 June 2010; and *Oleg Nikitin v. Russia*, no. 36410/02, §§ 48 and 49, 9 October 2008). The Court also has to look at the timing of that act as well as other relevant factual circumstances. In particular, regard should be had to whether the authorities appeared to have been acting with due care in this respect (see *Shcherbakov*, cited above, and *Oleg Nikitin*, cited above.).

188. Turning to the Government's argument about the destruction of the logbooks, the Court observes that the authorities have failed not only to produce records confirming the destruction, but also to mention the date when the destruction was effected, or what the relevant legal basis for it was. Therefore it is impossible to conclude that the authorities acted with due care in that respect. This is particularly so bearing in mind that the Court has often found that the authorities did not act diligently in handling prison records (see *Ananyev and Others*, cited above, § 125; *Shcherbakov*, cited above, § 78; *Gulyayeva v. Russia*, no. 67413/01, § 154, 1 April 2010; and *Novinskiy v. Russia*, no. 11982/02, §§ 102-03, 10 February 2009).

189. In any event, the destruction of the records does not release the Government from the obligation to support their factual submissions with appropriate evidence (see *Blokhin v. Russia* [GC], no. 47152/06, § 143, ECHR 2016, and *Ananyev and Others*, cited above, § 125).

190. The Court observes that the Government relied on the report of 1 December 2009 (see paragraph 179 above). However, that document is extremely scant on details in respect of remand prison no. 77/5. In particular, the report did not mention the cells in which the first applicant had been detained, their floor space and the number of sleeping places and detainees in each of them. It only contained a brief conclusion that the domestic standard of individual space, that is, 4 sq. m per prisoner, had been complied with (see paragraph 100 above). It remains unclear on the basis of what evidence that conclusion had been drawn, particularly as the authentic documents which could have led to the appropriate conclusions and permitted an assessment of the personal space afforded had been destroyed.

191. In the absence of convincing information from the Government, the Court will examine the issue on the basis of the first applicant's submissions (see *Morozov v. Russia*, no. 38758/05, § 68, 12 November 2015, and *Igor Ivanov v. Russia*, no. 34000/02, § 35, 7 June 2007). Accordingly, it finds it established that on certain occasions he shared cells measuring between 20 and 30 sq. m with eight to fifteen other inmates and did not have an individual sleeping place (see paragraph 58 above).

192. The Court notes that it has already had an opportunity to examine conditions of detention in the same remand prison no. 77/5 in Moscow during approximately the same period. In particular, in the cases of *Mulyukov and Others v. Russia* ([Committee], nos. 31044/08 and 9 others, 12 October 2017) and *Aristov and Others v. Russia* ([Committee], nos. 36101/11, 36831/11, 52683/12, 63745/12, 59337/13, 67679/13, 67943/13, 77397/13, 3251/14, 9694/14, 13257/14 and 19016/14, 21 July 2016), it found that the applicants had been afforded between 1.1 and 2.5 sq. m of personal space.

193. Having regard to its case-law on prison overcrowding (see *Muršić*, cited above, § 124; *Idalov v. Russia* (no. 2), no. 41858/08, §§ 105-09, 13 December 2016, and *Ananyev and Others*, cited above, § 166), and its findings in the similar cases cited above, the Court considers that the first applicant was detained in severely overcrowded conditions which amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

194. There has been accordingly a violation of Article 3 of the Convention on that account.

#### IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

195. The applicants complained that the first applicant had been deprived of his liberty in breach of Article 5 § 1 of the Convention, and in particular that his arrest had not been based on reasonable suspicion of his having committed a criminal offence, and had not been necessary for the purposes of Article 5 § 1 (c), which reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

..."

#### A. Submissions by the parties

##### 1. Submissions by the Government

196. The Government argued that the first applicant had been lawfully arrested on reasonable suspicion of involvement in tax evasion. The "reasonableness" of the suspicion was based on ample evidence, including witness statements. They further noted that the arrest had been justified by a flight risk. Evidence submitted by the investigating authority showed that the first applicant had applied for an entry visa to the United Kingdom, and had asked a travel agency to book a flight to Kyiv.

##### 2. Submissions by the applicants

197. The applicants pointed out that the lack of impartiality on the part of the investigating authority had resulted in a conflict of interests, which had rendered the first applicant's detention arbitrary. Its real purpose had been to force him to incriminate himself, or to retract his allegations of corruption by State officials. The applicants also argued that the suspicion of the first applicant's involvement in a crime had been based on insufficient evidence.

#### B. The Court's assessment

198. The Court would reiterate the general principles governing the notion of arbitrary detention which are set out at paragraphs 77-79 in *Mooren v. Germany* ([GC], no. 11364/03, 9 July 2009). Detention will be "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 (compare with *Saadi v. the United Kingdom* [GC], no. 13229/03, § 69, ECHR 2008, and *Bozano v. France*, 18 December 1986, § 59, Series A no. 111).

199. Furthermore, in the context of sub-paragraph (c) of Article 5 § 1 of the Convention, the reasoning of the decision ordering detention is a relevant factor in determining whether a person's detention must be considered arbitrary. The Court has considered the absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time to be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1 (see *Belevitskiy v. Russia*, no. 72967/01, § 91, 1 March 2007; *Nakhmanovich v. Russia*, no. 55669/00, § 70, 2 March 2006; and *Stašaitis v. Lithuania*, no. 47679/99, § 67, 21 March 2002). Conversely, it has found that an applicant's detention on remand could not be said to have been arbitrary if the domestic court gave certain grounds justifying its continuation (compare

Khudoyorov, cited above, § 131), unless the reasons given are extremely laconic and without reference to any legal provision which would have permitted the applicant's detention (compare Khudoyorov, cited above, § 157).

200. An essential part of the safeguard against arbitrary arrest and detention is the "reasonableness" of the suspicion on which an arrest must be based. Having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (see *Podeschi v. San Marino*, no. 66357/14, § 144, 13 April 2017, and *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182).

201. Turning to the circumstances of the present case, the Court notes that although the alleged conflict of interests could be an argument in support of a finding that the first applicant's detention was arbitrary, it cannot by itself lead to that conclusion. The Court can only reach such a decision if it establishes an element of bad faith or deception on the part of the authorities.

202. It does not discern any such elements in the instant case. The Court observes that the inquiry into alleged tax evasion, resulting in the criminal proceedings against Mr Magnitskiy, started in 2004, long before he complained that prosecuting officials had been involved in fraudulent acts (see paragraph 31 above). The decision to arrest him was only made after the investigating authority had learned of his application for an entry visa to the United Kingdom, and of his having booked tickets to Kyiv, and after it had been unable to find him at his place of residence (see paragraphs 38 and 39 above). On the day following his arrest the first applicant was brought before a competent court, which had to decide on the preventive measure to be applied. That was enough to make his arrest compatible with the "purpose" requirement of Article 5 § 1 (c) of the Convention (see *Merabishvili v. Georgia [GC]*, no. 72508/13, § 188, 28 November 2017). The Court is also mindful of the fact that at the hearing on the preventive measure neither the first applicant nor his lawyer made any allegations of bad faith, or police pressure (see paragraph 39 above).

203. The Court further observes that the first applicant was arrested on suspicion of having been involved in two episodes of tax evasion. The suspicion was based on documentary evidence and statements by several witnesses. One of them testified to the first applicant's having been involved in arranging sham employment, paying money for it and giving instructions on how to behave if interrogated by the authorities (see paragraphs 31 and 36 above). The Court finds that such evidence at the relevant time was sufficient to satisfy an objective observer that the first applicant might have committed the offence he was accused of (compare with *Gusinskiy v. Russia*, no. 70276/01, § 55, ECHR 2004-IV, and contrast with *Kasparov v. Russia*, no. 53659/07, § 53, 11 October 2016; *Rasul Jafarov v. Azerbaijan*, no. 69981/14, §§ 121-32, 17 March 2016; *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, §§ 90-99, 22 May 2014; and *Kandzhov v. Bulgaria*, no. 68294/01, §§ 57-61, 6 November 2008).

204. The Court further observes that the District Court also justified Mr Magnitskiy's detention by reference to the gravity of the charges and the risks of his influencing witnesses, absconding, or

reoffending. Those allegations were based on the finding that he had influenced witnesses, had not been residing at his registered address when the investigator had attempted to summon him, and had been preparing to flee abroad (see paragraph 39 above). This list of reasons for detention was thus specific and sufficiently detailed.

205. In view of the above, the Court concludes that the first applicant's arrest was not arbitrary, and that it was based on reasonable suspicion of his having committed a criminal offence. Accordingly, this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, and must be rejected pursuant to Article 35 § 4.

## V. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

206. The applicants complained that the length of Mr Magnitskiy's pre-trial detention was in breach of the "reasonable time" requirement of Article 5 § 3 of the Convention, which reads:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

### A. Submissions by the parties

#### 1. Submissions by the Government

207. The Government argued that the choice of the preventive measure had been prompted by the first applicant's conduct, in particular his attempts to influence witnesses and abscond. Each detention order had been based on relevant and sufficient reasons justifying his pre-trial detention. The investigating authority had demonstrated "special diligence" when handling the case, and had not protracted the proceedings. The length of the proceedings could be explained by the particular complexity of the case, the extensive volume of the case file and the wide geographical spread of the offences.

#### 2. Submissions by the applicants

208. The applicants insisted that the entire detention period had been based on ill-founded arguments put forward by the court in the first detention order. In the subsequent detention orders the courts had done no more than repeatedly endorse their formulaic and defective reasoning. They had neither properly addressed the arguments submitted by the defence, nor considered any alternatives to detention on remand. As to the investigating authorities, they had failed to act with the diligence required.

### B. The Court's assessment

#### 1. Admissibility



209. The Court notes that the period complained of came to an end on 16 November 2009, when the first applicant died. Accordingly, to comply with the six-month rule the complaint should have been lodged within six months from that day (see, *mutatis mutandis*, *Idalov v. Russia* [GC], no. 5826/03, § 130, 22 May 2012, and *Yaroshovets*, cited above, § 117), that is to say, not later than 16 May 2010.

210. The third applicant only lodged her separate application on 21 August 2012. The Court again finds it unnecessary to rule on her standing to bring a complaint about her son's detention on remand because her complaint under Article 5 § 3 of the Convention is in any event inadmissible for failure to comply with the six-month time-limit set out in Article 35 § 1 of the Convention. It must therefore be rejected pursuant to Article 35 § 4 of the Convention.

211. The complaint by the first applicant, supported by the second applicant in her application, is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds and must therefore be declared admissible.

## 2. Merits

### (a) General principles

212. The applicable general principles were summarised in *Merabishvili* (cited above, § 222-25); *Buzadji v. the Republic of Moldova* ([GC], no. 23755/07, §§ 84-102, 5 July 2016); *Idalov* ([GC], cited above, §§ 115-33); and *Zherebin v. Russia* (no. 51445/09, §§ 49-54, 24 March 2016).

### (b) Application of the above principles to the present case

213. The first applicant was arrested on 24 November 2008 and detained pending investigation until his death on 16 November 2009. The period to be taken into consideration thus lasted almost twelve months.

214. Having regard to this considerable period of detention in the light of the presumption in favour of release, the Court finds that the Russian authorities were required to put forward weighty reasons for keeping him in detention (see *G. v. Russia*, no. 42526/07, § 112, 21 June 2016).

215. Bearing in mind its finding in paragraph 205 above, the Court accepts that the reasonable suspicion that the first applicant had committed the criminal offences persisted throughout the pre-trial investigation. It remains to be ascertained whether the courts gave "relevant" and "sufficient" grounds to justify his continued detention and whether they displayed "special diligence" in the conduct of the proceedings.

216. When extending the first applicant's detention, the courts consistently relied on the gravity of the charges as the main factor. In this connection, the Court would once again stress that the gravity of the charges cannot by itself serve to justify long periods of detention (see *Ramkovski v. the former Yugoslav Republic of Macedonia*, no. 33566/11, § 59, 8 February 2018; *Novruz*

Ismayilov v. Azerbaijan, no. 16794/05, § 53, 20 February 2014; and Zayidov v. Azerbaijan, no. 11948/08, § 59, 20 February 2014).

217. The other grounds for Mr Magnitskiy's continued detention were the domestic courts' findings that he might abscond, interfere with the administration of justice by putting pressure on witnesses, or reoffend.

218. In this connection the Court reiterates that, as regards the existence of such risks, they cannot be gauged solely on the basis of the severity of the sentence faced. The risks must be assessed with reference to a number of other relevant factors which may either confirm their existence or make them appear so slight that they cannot justify detention pending trial (see Zherebin, cited above, § 58).

219. The assertions that Mr Magnitskiy was liable to abscond or interfere with the administration of justice were chiefly based on the information that before his arrest he had been preparing to leave Russia, and that he had influenced witnesses in his case. The Court understands the authorities' concerns when they first received the relevant information. It acknowledges that in view of the gravity of the accusations against the first applicant and the seriousness of the information submitted by the investigating authorities, the courts could justifiably have considered that an initial risk of the first applicant's absconding or witness tampering had been established. However, with the passage of time the mere availability of that information inevitably became less and less relevant, particularly when the first applicant persistently disputed his ability to abscond, alleging that there was no record of his application for a United Kingdom entry visa and referring to his poor health and family situation to confirm that there was no danger of his absconding (see, by contrast, *W. v. Switzerland*, 26 January 1993, § 33, Series A no. 254-A). The Court also does not lose sight of the fact that while authorising yet another extension of his detention the courts remained silent as to why those risks could not have been offset by any other means of ensuring his appearance at the trial (see *Khayletdinov v. Russia*, no. 2763/13, § 96, 12 January 2016; *Zherebin*, cited above, § 59; and *Sergey Vasilyev v. Russia*, no. 33023/07, § 85, 17 October 2013).

220. In connection with the domestic courts' findings that Mr Magnitskiy might tamper with witnesses, the Court is mindful that his employment status and information about his previous encounters with witnesses, when he had allegedly instructed them on how to behave vis-à-vis the authorities, were relevant factors for the courts' determination of whether there was a risk of obstruction. At the same time, the Court entertains doubts as to the validity of that argument to justify the first applicant's continued detention. For the domestic courts to demonstrate that a substantial risk of collusion existed and continued to exist during the entire period of the first applicant's detention, it did not suffice merely to refer to his official position. They should have analysed other pertinent factors, such as the advancement of the investigation or judicial proceedings, the first applicant's personality, his behaviour after the arrest and any other specific indications justifying the fear that he might abuse his regained liberty by carrying out acts aimed

at the falsification or destruction of evidence or the manipulation of witnesses (see *W. v. Switzerland*, cited above, § 36, Series A no. 254-A).

221. The Court further observes that the conclusion that the first applicant was liable to reoffend was not supported by any factual or legal arguments. The authorities did not point to any aspects of his character or behaviour that would justify their finding that he presented such a risk (see *Dudchenko v. Russia*, no. 37717/05, § 139, 7 November 2017, and *Taranenko v. Russia*, no. 19554/05, § 54, 15 May 2014).

222. The Court attributes particular weight to the fact that the domestic authorities inverted the presumption in favour of release (see *Buzadji*, cited above, § 89 with further references) in stating that in the absence of new circumstances the preventive measure should remain unchanged (see paragraphs 41, 45, 48 and 50 above). By overturning the rule enshrined in Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases, they shifted the burden of proof to Mr Magnitskiy, the detained person. This practice has already been criticised by the Court in a number of judgments (see *Zherebin*, cited above, § 60; *Pastukhov and Yelagin v. Russia*, no. 55299/07, § 49, 19 December 2013; *Ilijkov v. Bulgaria*, no. 33977/96, §§ 84-85, 26 July 2001; and *Rokhlina v. Russia*, no. 54071/00, § 67, 7 April 2005).

223. In the light of the above, the Court considers that the authorities extended the first applicant's detention on grounds which cannot be regarded as "sufficient" to justify its duration. There has accordingly been a violation of Article 5 § 3 of the Convention. In these circumstances it is not necessary for the Court to examine whether the domestic authorities acted with "special diligence".

## VI. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION ON ACCOUNT OF ILL-TREATMENT AND INADEQUATE INVESTIGATION INTO THE EVENTS

224. The third applicant complained that Mr Magnitskiy had been ill-treated by prison guards in remand prison no. 77/1 on 16 November 2009 and that there had been no effective investigation into the matter, in breach of Article 3 of the Convention. That Convention provision has been set out above.

### A. Submissions by the parties

#### 1. Submissions by the Government

225. The Government argued that on 16 November 2009 prison officers had handcuffed the first applicant on account of his aggressive behaviour induced by toxic psychosis. However, the warders had not used any other "special-purpose hardware", such as a rubber truncheon. According to the Government, haematomas and abrasions on Mr Magnitskiy's wrists had appeared following the use of handcuffs; abrasions and bruises on his left hand, left shin and right

ankle had been self-inflicted when the first applicant had suffered a psychotic attack; and a bruise on his right ankle had appeared several days before his death and could have resulted from non-violent trauma. The Government referred to statements by several witnesses who had insisted that during the psychotic attack the first applicant had dashed about in the cell and had hit a medical couch against metal bars (see paragraph 82 above).

226. The Government did not comment on the course of the investigation into Mr Magnitskiy's death.

## 2. Submissions by the third applicant

227. The third applicant alleged that prison guards had handcuffed and beaten the first applicant with a rubber truncheon several hours before his death. In support of that assertion she relied on, among other evidence, a report of 16 November 2009 prepared by officer Kuz. (see paragraph 84 above), the death confirmation certificate (see paragraph 93 above), and the second medical expert commission report of 15 June 2011 (see paragraph 132 above). She also cited various inconsistencies and gaps in the explanation of the events by the authorities and alleged that the investigation had not been independent, impartial, prompt or thorough, and had been closed to public scrutiny.

## B. The Court's assessment

### 1. Admissibility

228. The Court notes at the outset that the third applicant may claim to be a victim within the meaning of Article 34 of the Convention of the violation alleged (see *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 88-93, ECHR 1999-IV; *De Donder and De Clippel v. Belgium*, no. 8595/06, §§ 53-62, 6 December 2011; and *Renolde v. France*, no. 5608/05, § 69, 16 October 2008).

229. The Court further notes that the complaint under examination is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### 2. Merits

#### (a) General principles

230. The applicable general principles were summarised in *Bouyid v. Belgium* ([GC], no. 23380/09, §§ 81-88, ECHR 2015) and *Mustafa Tunç and Fecire Tunç v. Turkey* ([GC], no. 24014/05, §§ 169-82, 14 April 2015).

#### (b) Application of the above principles to the present case

##### (i) Credibility of the third applicant's allegation and presumption of fact

231. There is no dispute between the parties that on 16 November 2009, while in custody, the first applicant sustained several bruises and abrasions on his wrists, hands and left leg. According to the medical experts, the injuries were inflicted by a hard, blunt object. It was not ruled out that that object could have been a police truncheon (see paragraph 134 above). Accordingly, the Court considers that the injuries could have arguably been received as a result of beatings by prison officers.

232. The above is sufficient to give rise to a presumption in favour of the third applicant's account of the events and to satisfy the Court that her allegation of ill-treatment in custody is credible. A report on the use of a rubber truncheon cited by the third applicant (see paragraph 84 above) is yet another factor in favour of her version of events and strengthens the presumption referred to in the previous paragraph.

(ii) Whether an effective investigation was carried out into the allegation of ill-treatment

233. The Court is satisfied that a preliminary inquiry started shortly after the first applicant's death and some important investigative steps, such as an on-site examination and an autopsy, took place without undue delay (see paragraphs 96 and 97 above). Both investigative actions revealed injuries on the first applicant's body. The recording of those injuries, as well as of possible head trauma, in the death confirmation certificate (see paragraph 93 above), together with the reference in the records to the use of a rubber truncheon, should have raised concerns as to the use of force against the first applicant.

234. However, this issue was not addressed by the investigating authority. The decision to close the criminal case did not provide any explanation for discarding evidence which supported the allegation of ill-treatment, such as the records on the use of a rubber truncheon and the death confirmation certificate (see paragraph 93 above). The investigating authority did not make any efforts to elucidate the discrepancies between the available evidence and the conclusions in the decision to close the case, for example between the record in which a prison guard had reported the use of a rubber truncheon against the first applicant and the investigator's finding that no special-purpose hardware, save for handcuffs, had been used on Mr Magnitskiy. No answer was given to the question as to why the death confirmation certificate mentioned a closed craniocerebral injury (see, *mutatis mutandis*, *Mikhail Nikolayev v. Russia*, no. 40192/06, § 99, 6 December 2016).

235. The Court is aware that the domestic authorities addressed at least some of the first applicant's injuries. In particular, they concluded that the injuries were "self-inflicted during aggressive and inappropriate behaviour" on the part of the first applicant. The Court does not accept that explanation. The finding was formulated in very broad terms and was not supported by any evidence. Not a single witness questioned during the inquiry saw the first applicant injuring himself. The witnesses only stated that he had dashed about in the cell and had hit a medical couch against metal bars. None of those actions was linked to the possible cause of his injuries.

236. The Court reiterates that the Government did not put forward any arguments regarding the quality of the investigation into the alleged ill-treatment of the first applicant by prison warders. In the light of the above findings and in the absence of any valid arguments by the Government to justify the authorities' omissions, the Court concludes that the investigating authority did not genuinely attempt to shed light on the events which occurred in the hours before Mr Magnitskiy's death. It therefore finds that the investigation was not thorough and effective. Accordingly, the investigation into the alleged ill-treatment of Mr Magnitskiy in prison before his death did not satisfy the requirements of Article 3 of the Convention. The Court does not consider it necessary to assess further whether any other guarantees of that Convention provision were satisfied by the Russian authorities during the investigation (see *Nina Kutsenko v. Ukraine*, no. 25114/11, § 154, 18 July 2017).

(iii) Whether the Government provided an explanation capable of casting doubt on the third applicant's version of events

237. The Government endorsed the conclusions of the investigating authority to the effect that the first applicant's injuries had not been caused by the prison officers but had been self-inflicted as a result of Mr Magnitskiy's own aggressive conduct.

238. In paragraph 235 above the Court has already stressed the inadequacy of such a poor explanation against the credible allegation of ill-treatment. In their observations the Government did not proffer a more convincing or detailed answer on the origin of the injuries.

239. The Court thus considers that Government have failed to discharge their burden of proof. It therefore accepts the third applicant's version of events and finds that on 16 November 2009 Mr Magnitskiy was subjected to ill-treatment by the guards in the remand prison.

(iv) Legal classification of the treatment

240. Taking into account the intentional character of the ill-treatment, the nature of the injuries and the level of suffering to which the first applicant was subjected, the Court finds that the act of violence in question amounted to inhuman and degrading treatment (see *Kondakov v. Russia*, no. 31632/10, § 37, 2 May 2017; *Sitnikov v. Russia*, no. 14769/09, § 42, 2 May 2017; and *Beresnev v. Russia*, no. 37975/02, § 112, 18 April 2013).

(v) Conclusion

241. There has accordingly been a violation of Article 3 of the Convention under its substantive and procedural limbs.

## VII. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

242. The second and third applicants complained under Articles 2 and 3 of the Convention that the authorities had not provided the first applicant with medical care and that they had thus been

responsible for his death. The third applicant also complained that the investigation into her son's death had not met the requirements of the Convention.

243. The Court considers that the above complaints fall to be examined within the scope of the positive obligations under Article 2 of the Convention, the relevant part of which reads:

"1. Everyone's right to life shall be protected by law. ..."

#### A. Submissions by the parties

##### 1. Submissions by the Government

244. The Government argued that the first applicant had received adequate medical assistance in the remand prisons. In particular, on 7 October and 13 November 2009 he had been taken to the prison medical unit. As soon as his medical condition had become critical on 16 November 2009, the prison officers had prepared for his transfer to a prison hospital. In the late evening of the same day his condition had suddenly deteriorated and several hours later he had died.

245. The Government further stated that the investigation into the quality of medical care had been effective and thorough. In particular, more than fifty witnesses had been questioned, and more than twenty expert examinations had been performed. They had revealed several shortcomings on the part of the medical authority. For example, there had been a significant gap in the first applicant's medical history as recorded by the medical staff (the doctors had not made regular entries on the first applicant's state of health); he had not received an ultrasound examination and had not been seen by a surgeon; Dr L. had delayed the proper diagnosis; and Dr A.G. had not given him adequate sedation, intravenous fluid and cardio-stimulation therapy on 16 November 2009. However, Mr Magnitskiy's illness had been difficult to diagnose and there was no causal link between the aforementioned shortcomings and his death. The criminal proceedings against Dr D.K. on a charge of criminal negligence had ended with his acquittal. Dr L., accused of having caused the death of the first applicant, had not been held criminally liable on account of the expiry of the statutory limitation period.

246. The Government noted that it was still open to the second and third applicants to lodge a civil action for damages against Dr L. As they had failed to do so, their complaints under the substantive limb of Article 2 of the Convention should be dismissed for non-exhaustion of domestic remedies.

##### 2. Submissions by the applicants

247. The applicants contested the Government's non-exhaustion objection. Referring to *Petrović v. Serbia* (no. 40485/08, § 80, 15 July 2014), they stated that a civil-law remedy could not afford effective redress in their case. If the State were permitted to confine its response to incidents of wilful deadly acts of ill-treatment committed by its agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible where appropriate, it would be

possible for those agents to abuse the rights of those within their control with virtual impunity. Despite its fundamental importance, the general legal prohibition on killing and torture and inhuman and degrading treatment would become ineffective in practice (*ibid.*).

248. As to the merits of the case, the second and third applicants cited numerous shortcomings on the part of the authorities, stressing in particular the absence of appropriate diagnostic measures and the failure to perform surgery which had been planned. They also drew the Court's attention to the officials' inadequate and belated response to the critical deterioration of Mr Magnitskiy's health on 16 November 2009, including the delayed telephone call to the emergency service, the inability of the psychiatric team to see him immediately after their arrival and the fact that he had been left dying alone in a cage.

249. The applicants argued that the investigation had not met the requirements of impartiality, independence, promptness, effectiveness and transparency. In particular, the investigating authority had not been independent from the officials against whom the first applicant had made accusations of fraud, the investigator had been biased and he had not effectively investigated the incident. The investigator had failed to secure a proper autopsy examination, to obtain CCTV records of the events on 16 November 2009, to question every member of the medical emergency team or to explain discrepancies between various items of evidence.

## B. The Court's assessment

### 1. Admissibility

250. The Court reiterates that where a violation of the right to life is alleged, the Convention institutions have accepted applications from relatives of the deceased (see *Karpylenko v. Ukraine*, no. 15509/12, § 73, 11 February 2016, and *Şemsi Önen v. Turkey*, no. 22876/93, 14 May 2002). The second applicant, Mr Magnitskiy's widow, and the third applicant, his mother, can therefore complain of a violation of Article 2 of the Convention on account of his death in State custody.

251. The Court notes the Government's argument that the applicants should have sought compensation for damage from Dr L. after the criminal proceedings against her had been discontinued.

252. It has previously held that where several remedies are available, the applicant is not required to pursue more than one and it is normally for an applicant to make a choice as to which of the available remedies to pursue (see *Koprivnikar v. Slovenia*, no. 67503/13, § 35, 24 January 2017; *Szkórits v. Hungary*, no. 58171/09, § 23, 16 September 2014; *Abdi v. the United Kingdom*, no. 27770/08, § 50, 9 April 2013; and *Karakó v. Hungary*, no. 39311/05, § 14, 28 April 2009).

253. In the case of *Mostipan v. Russia* (no 12042/09, § 41, 16 October 2014), where the applicant asked the investigating authority to institute criminal proceedings against the alleged perpetrators, the Court accepted that she was not required to file a separate civil complaint regarding the



prosecuting authorities' alleged failure to act. A similar approach was followed in the case of *Rõigas v. Estonia* (no. 49045/13, §§ 73-83, 12 September 2017).

254. In the present case, in which the second and third applicants actively participated in the criminal proceedings concerning Mr Magnitskiy's death (see paragraphs 106, 112, 121 and 122 above), it would be excessive to require a civil-law remedy to be pursued after a criminal one had failed. This is particularly true in the absence of evidence demonstrating that the civil-law remedy pointed out by the Government satisfied the requirements of effectiveness (see, *mutatis mutandis*, *Koryak*, cited above, § 91). The Court therefore dismisses the Government's objection of non-exhaustion of domestic remedies.

255. The Court further notes that the complaint under examination is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## 2. Merits

(a) The State's compliance with its obligation to protect life

(i) General principles

256. The applicable general principles were summarised in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, §§ 130-31, ECHR 2014); *Karsakova v. Russia* (no. 1157/10, §§ 46-49, 27 November 2014); *Geppa v. Russia* (no. 8532/06, §§ 68-72, 3 February 2011); and *Slimani v. France* (no. 57671/00, §§ 27-32, ECHR 2004-IX (extracts)).

(ii) Application of the above principles to the present case

257. At the outset the Court observes that the Government made two points. On the one hand they insisted that the first applicant had received the necessary treatment in the remand prisons, and on the other hand they listed a large number of shortcomings in the medical care given to him (see paragraphs 244 and 245 above), adding that in any event, none of the shortcomings had led to Mr Magnitskiy's death.

258. The Court finds that a considerable body of medical evidence demonstrates that the medical assistance received by Mr Magnitskiy in custody was inadequate.

259. Firstly, the expert opinions show that he did not receive essential medical tests and examinations, including: an ultrasound examination (see paragraphs 101 and 128 above), an ECG (see paragraph 128 before), and blood and urine tests (see paragraphs 127 and 128 above). As a result, the medical personnel learned only belatedly of the seriousness of his medical condition and lost time to effectively address it.

260. Secondly, Mr Magnitskiy was not consulted by a surgeon despite such a consultation having been prescribed on 24 August 2009 (see paragraphs 68 and 101 above). That consultation was particularly important in view of his continuously deteriorating condition, demonstrated through, among other things, intensifying pain. It was for the surgeon to reassess Mr Magnitskiy's state of health and his medical needs, such as the urgency of a cholecystectomy, and thus to adjust, in view of Mr Magnitskiy's acute condition, the decision taken in July 2009 to perform that procedure some time later in "a planned order". In the light of the expert evidence, the lack of a consultation with a surgeon and the resulting failure to perform the surgical procedure in a timely manner may well have contributed significantly to the death of Mr Magnitskiy.

261. Thirdly, the first applicant, a seriously ill person suffering from permanent severe pain and other serious symptoms, was kept in remand prison no. 77/2, which was not able to address his medical needs owing to understaffing (see paragraph 102 above), the lack of medical equipment and the lack of specialised medical training and qualifications among the prison medical staff (see paragraphs 70 and 114 above). No meaningful medical records were maintained and no treatment was given to Mr Magnitskiy for the first six weeks of his stay in that facility (see paragraphs 66, 128 and 245 above). The patient's situation was aggravated by the overcrowding in the prison (see paragraph 100 above).

262. Furthermore, the Court finds particularly inadequate the authorities' attempts to handle the emergency situation on 16 November 2009 culminating in the first applicant's death. The custodial authorities failed to provide an adequate response to that emergency. The Court reiterates that the decision to urgently send Mr Magnitskiy to the medical facility of remand prison no. 77/1 was taken at 9.30 a.m. on 16 November 2009. However, it was not until almost 2.30 p.m. on the same day that an ambulance was called. Although it took the emergency team less than thirty minutes to arrive at facility no. 77/2, it had to wait for an escort into the facility for another two hours and thirty-five minutes. The first applicant only left remand prison no. 77/2 at about 5.10 p.m. (see paragraph 80 above). In the absence of any explanations from the Government, these delays appear to have been unreasonably long and manifestly inadequate in such a grave medical emergency.

263. Lastly, the Court notes the absence of complete and consistent medical records detailing the last hours of the first applicant's life (see paragraphs 128 and 138 above). It also attributes weight to the Government's comment that Mr Magnitskiy did not receive adequate sedation, intravenous fluid and cardio-stimulation therapy (see paragraph 245 above).

264. As regards the Government's assertion that there was no link between the death of the first applicant and any shortcomings in his medical treatment, the Court notes that the object of its examination in the present case is whether or not the domestic authorities fulfilled their duty to safeguard his life by providing him with proper medical treatment in a timely manner, and not the existence of the causal link doubted by the Government (see, for similar reasoning, *Mustafayev v. Azerbaijan*, no. 47095/09, § 65, 4 May 2017).

265. In the circumstances of the case the Court concludes that by depriving Mr Magnitskiy of important medical care, the domestic authorities unreasonably put his life in danger. The State has thus failed to comply with its positive obligation under Article 2 of the Convention.

(b) The State's compliance with its obligation to ensure an effective investigation

(i) General principles

266. The applicable general principles were summarised in *Nina Kutsenko* (cited above, §§ 124-30); *Mustafayev* (cited above, §§ 71-73); and *Geppa* (cited above, § 86).

(ii) Application of the above principles to the present case

267. At the outset the Court observes that several hours after Mr Magnitskiy's death, steps were taken to secure evidence. In particular, an investigator carried out an on-site examination and ordered an autopsy (see paragraphs 96 and 97 above). Unlike in many cases in which the Court has criticised the Russian authorities for their failure to promptly initiate a criminal investigation into allegations of ill-treatment (see *Smolentsev v. Russia*, no. 46349/09, § 73, 25 July 2017; *Sitnikov*, cited above, §§ 36-39; and *Lyapin v. Russia*, no. 46956/09, § 137, 24 July 2014) and despite the fact that the investigating authorities had not initially established elements calling for the institution of criminal proceedings in Mr Magnitskiy's case (see paragraph 103 above), a criminal case was opened within eight days after his death. That delay does not appear to be unreasonable.

268. At the same time, the Court finds that the authorities did not demonstrate the required thoroughness in dealing with the case. Regard being had to the findings in the PHR report (see paragraph 138 above), the Court notes that the autopsy examination, which was of critical importance in determining the facts surrounding the first applicant's death, was perfunctory. For example, eyeball fluid and urine were not collected for toxicological examination, no such examination was performed in respect of the gallbladder and a puncture wound on the tongue, and the examination of the heart, brain and lungs was insufficiently thorough. Thus, important questions were unresolved (compare with *Salman v. Turkey* [GC], no. 21986/93, § 106, ECHR 2000-VII, and *Jaloud v. the Netherlands* [GC], no. 47708/08, §§ 212-16, ECHR 2014). Although certain shortcomings could have been, to an extent, remedied by an additional post-mortem examination, the third applicant's request to that effect was rejected (see paragraph 97 above). In the Court's view, that seriously damaged the efficiency of the investigation as a whole.

269. The Court further observes that on 25 November 2009, the day following the opening of the criminal case, the first applicant's lawyer asked the investigative authorities to secure video recordings of the events of 16 November 2009 (see paragraph 106 above). However, it was not until February 2011 that the investigator asked the remand prison administration to furnish the CCTV footage (see paragraph 110 above). It appears that, as a result, the possibility of acquiring another important piece of evidence was lost (compare with *Sitnikov*, cited above, § 36; *Orlov* and

Others v. Russia, no. 5632/10, § 102, 14 March 2017; and Mutayeva and Ismailova v. Russia, no. 33539/12, § 67, 21 June 2016).

270. The Court also notes the cursory manner in which the decision of 19 March 2013 to close the case addressed the circumstances of Mr Magnitskiy's death. The investigating authority did not properly assess the medical personnel's response to the rapid deterioration of Mr Magnitskiy's health on 16 November 2009. In particular, the investigators disregarded the delays in calling an ambulance and transferring Mr Magnitskiy to remand prison no. 77/1 (see paragraphs 79 and 80 above), as well as in ensuring the access of the psychiatric emergency team to him (see paragraph 87 above). They also failed to establish a sufficiently clear account of the last hours of Mr Magnitskiy's life.

271. Furthermore, the Court interprets the time-barring of Dr L.'s prosecution as one of the most serious indicators of the ineffectiveness of the investigation. The criminal proceedings concerning the charges brought against Dr L. were discontinued even though the domestic authorities found it established that she had failed to adequately address the first applicant's medical needs on account of her lack of the required qualifications (see paragraphs 114 and 116 above). The Court has already found in a number of cases where the authorities' failure to show diligence resulted in the prosecution becoming time-barred that the effectiveness of the investigation was irreparably damaged and the purpose of effective protection against acts of ill-treatment was frustrated (see, among many other authorities, V.K. v. Russia, no. 68059/13, § 189, 7 March 2017; İzci v. Turkey, no. 42606/05, § 72, 23 July 2013; Yazıcı and Others v. Turkey (no. 2), no. 45046/05, § 27, 23 April 2013; Ablyazov v. Russia, no. 22867/05, §§ 57 and 59, 30 October 2012; Nikiforov v. Russia, no. 42837/04, § 54, 1 July 2010; and Beganović v. Croatia, no. 46423/06, § 85, 25 June 2009). As in the aforementioned cases, the expiry of the limitation period irreparably damaged the effectiveness of the investigation in the present case.

272. In the light of the foregoing, the Court finds that the authorities failed to carry out an effective criminal investigation into the alleged medical negligence resulting in the first applicant's death. It therefore concludes that there has been a violation of Article 2 of the Convention under its procedural limb. The Court therefore considers it unnecessary to examine whether the other aspects of the investigation met the requirements of the Convention.

#### VIII. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 2 OF THE CONVENTION

273. The second and third applicants alleged that the criminal proceedings against Mr Magnitskiy and his posthumous conviction had breached Article 6 § 1 of the Convention. In addition, the third applicant argued that the conviction violated the presumption of innocence principle enshrined in Article 6 § 2 of the Convention. The relevant part of the invoked provisions reads as follows:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law ...”

#### A. Submissions by the parties

##### 1. Submissions by the Government

274. The Government argued that the criminal proceedings against Mr Magnitskiy had been revived to protect the interests of the second and third applicants, who had not consented to the discontinuation of the case, had insisted on the wrongful accusations against Mr Magnitskiy being dealt with and had asked for his name to be cleared. The Government stressed that the two applicants could have ended the proceedings against Mr Magnitskiy by consenting to the closure of the case. However, the authorities had not received such consent and therefore had had to carry on with the proceedings.

275. The Government further stated that the investigating authority had had no choice but to remit the case to the trial court because only the latter had been competent to rule on Mr Magnitskiy's guilt or innocence. The two applicants had been given an opportunity to participate in the trial but they had refused. Mr Magnitskiy's rights had been duly secured by a court-appointed lawyer. The two applicants had not appealed against the trial court's judgment. In the light of the above, the Government contended that the complaint was manifestly ill-founded and therefore should be dismissed.

##### 2. Submissions by the applicants

276. The applicants disagreed. They submitted that the posthumous proceedings had been initiated against their will. They had wanted the case to be closed. The posthumous investigation and trial had not been fair and had breached the presumption-of-innocence principle because the first applicant had been unable to present his case, to declare his innocence, to examine witnesses, and so on. The denial of justice was particularly flagrant because Mr Magnitskiy had died while the criminal proceedings against him had still been at the early stages of the investigation. The applicants referred to Ruling no. 16-P of the Russian Constitutional Court, which only allowed posthumous proceedings at the request of a suspect's family for the purpose of rehabilitation. However, the purpose of the criminal proceedings against Mr Magnitskiy had been to find him guilty.

#### B. The Court's assessment

##### 1. Admissibility

277. The Government did not object to the second and third applicants' victim status. However, the Court considers that it is necessary to examine whether they can claim to be victims of the alleged violations.

278. The Court has held that where the death or disappearance of the direct victim in circumstances engaging the State's responsibility precedes the lodging of an application with the Court, any other person with a close link to the victim has standing to lodge such an application, in particular as regards Articles 2 and 3 of the Convention. The Court has also held that the next-of-kin might exceptionally have standing to lodge a complaint under Article 5 § 1 of the Convention if it is connected to a complaint under Article 2 of the Convention relating to the victim's death or disappearance engaging the State's liability (see *Lykova v. Russia*, no. 68736/11, §§ 63-66, 22 December 2015 and *Khayrullina v. Russia*, no. 29729/09, § 91, 19 December 2017). The same logic may be applied to a complaint under Article 6 of the Convention if the aforementioned criteria are met, that is to say if a person died during the criminal proceedings against him or her and if the death occurred in circumstances engaging the State's responsibility.

279. Turning to the circumstances of the present case, the Court notes that it has established that Mr Magnitskiy died in custody after being deprived of important medical care, in breach of the State's positive obligations under Article 2 of the Convention (see paragraph 265 above). His detention took place in the context of criminal proceedings which ended with his posthumous conviction (see paragraph 157 above). The Court finds that the applicants' complaints under Article 6 of the Convention regarding the posthumous trial are sufficiently connected to the death of their relative and that they may therefore claim to be victims of the alleged violations.

## 2. Merits

### (a) Alleged violation of Article 6 § 1 of the Convention

280. It is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and defence. The Court has held that in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial (see *Kashlev v. Estonia*, no. 22574/08, § 37, 26 April 2016; *Lala v. the Netherlands*, 22 September 1994, § 33, Series A no. 297-A; and *Poitrimol v. France*, 23 November 1993, § 35, Series A no. 277-A), and that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see *Stoichkov v. Bulgaria*, no. 9808/02, § 56, 24 March 2005). Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person “charged with a criminal offence” is entitled to take part in the hearing (see *Hermi v. Italy* [GC], no. 18114/02, § 59, ECHR 2006-XII). The refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a “flagrant denial of justice” rendering the proceedings “manifestly contrary to the provisions of Article 6 or the principles embodied therein” (see *Sejdovic v. Italy* [GC], no. 56581/00, § 84, ECHR 2006-II, and *Stoichkov*, cited above, §§ 54-58).

281. A trial of a dead person inevitably runs counter to the above principles, because by its very nature it is incompatible with the principle of the equality of arms and all the guarantees of a fair

trial. Moreover, it is self-evident that it is not possible to punish an individual who has died, and to that extent at least the criminal justice process is stymied. Any punishment imposed on a dead person would violate his or her dignity. Lastly, a trial of a dead person runs counter to the object and purpose of Article 6 of the Convention, as well as to the principle of good faith and the principle of effectiveness inherent in that Article.

282. Turning to the arguments put forward by the Government, the Court accepts that there may be a need for judicial examination of criminal charges even in respect of a deceased person, in particular in the case of rehabilitation proceedings, the purpose of which is to correct a wrongful conviction. The Court reiterates the second and third applicants' arguments that they had never consented to the continuation of the criminal proceedings against the late Mr Magnitskiy and that therefore the authorities' decision to continue with his criminal case had run counter to the provisions of the Code of Criminal Procedure as interpreted by the Constitutional Court in its Ruling no. 16-P (see paragraph 167 above). While acknowledging the important role of the Russian Constitutional Court in laying down rules governing posthumous criminal proceedings, as well as not losing sight of the Constitutional Court's reliance on rehabilitation as the purpose of the continuation of the criminal proceedings (see paragraph 169 above), the Court does not consider it necessary to address the applicants' argument. It is of the view that judicial examination must be free of any risks of posthumous conviction of a person whose guilt had not been established by a court when he or she was alive.

283. In the light of the above observations, the Court concludes that the posthumous proceedings against Mr Magnitskiy which ended with his conviction breached the requirements of Article 6 § 1 of the Convention on account of their inherent unfairness. Accordingly, the Court finds that there has been a violation of the aforementioned provision of the Convention.

(b) Alleged violation of Article 6 § 2 of the Convention

284. The Court notes that it is a fundamental rule of criminal law that criminal liability does not survive the person who committed the criminal act (compare with *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 271-72, 28 June 2018; *Vulakh and Others*, cited above, § 34; *A.P., M.P. and T.P. v. Switzerland*, 29 August 1997, §§ 46 and 48, Reports of Judgments and Decisions 1997-V; and *E.L., R.L. and J.O.-L. v. Switzerland*, 29 August 1997, §§ 51 and 53, Reports 1997-V) and that this rule is a guarantee for the presumption of innocence enshrined in Article 6 § 2 of the Convention (compare with *A.P., M.P. and T.P. v. Switzerland*, cited above, § 48, and *E.L., R.L. and J.O.-L. v. Switzerland*, cited above, § 53). The aforementioned rule was breached in the instant case as the first applicant did not stand trial and was convicted posthumously. Having regard to the above and its finding in paragraph 281 above that a trial of a dead person inevitably runs counter to all the guarantees of Article 6 of the Convention, the Court concludes that there has been a violation of Article 6 § 2 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

285. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### A. Damage

286. The second and third applicants claimed compensation for non-pecuniary damage, leaving the amount of the award to the Court’s discretion.

287. The Government also left the issue to the discretion of the Court.

288. The Court awards the two applicants EUR 34,000 jointly under this head, plus any tax that may be chargeable to them.

#### B. Costs and expenses

289. The applicants did not submit a claim for costs and expenses. Accordingly, the Court will make no award under that head.

#### C. Default interest

290. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

### X. ARTICLE 46 OF THE CONVENTION

291. The second and third applicants also asked the Court to indicate individual and general measures with a view to helping the respondent State fulfil its obligations to abide by the final judgment of the Court. In particular, they invited the Court to ask the respondent State to create an independent commission of inquiry into the circumstances of Mr Magnitskiy’s death; to issue a public apology for the denial of justice; to amend the Russian Code of Criminal Procedure in order to ensure effective access to independent medical examinations, and the preservation of evidence; and to carry out a legislative reform preventing posthumous proceedings from taking place against the will of the accused’s relatives. In so doing they relied on Article 46 of the Convention.

292. The Government did not comment on this issue.

293. Article 46 of the Convention provides, in so far as relevant:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.



2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

294. The Court points out that by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, appropriate individual measures to fulfil its obligations to secure the rights of an applicant (see *Gluhaković v. Croatia*, no. 21188/09, § 85, 12 April 2011, and the cases cited therein).

295. The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment (*ibid.*, § 86, and the cases cited therein).

296. Only exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, will the Court seek to indicate the type of measure that might be taken in order to put an end to a violation it has found (*ibid.*, § 87, and the cases cited therein).

297. Having regard to the circumstances of the present case, the Court does not consider it necessary to indicate any individual or general measures that the State has to adopt for the execution of the present judgment.

**FOR THESE REASONS, THE COURT, UNANIMOUSLY,**

1. Decides to join the applications;

2. Holds that the second applicant has *locus standi* under Article 34 of the Convention to continue the proceedings in the first applicant’s stead;

3. Declares the complaint under Article 5 § 1 of the Convention, and the complaints lodged by the third applicant under Article 3 of the Convention concerning the conditions of Mr Magnitskiy’s detention and under Article 5 § 3 of the Convention about its length, inadmissible, and the remainder of the applications admissible;

4. Holds that there has been a violation of Article 3 of the Convention on account of the conditions of Mr Magnitskiy's detention;
5. Holds that there has been a violation of Article 5 § 3 of the Convention;
6. Holds that there has been a violation of Article 3 of the Convention on account of Mr Magnitskiy's ill-treatment by the prison guards and the lack of an effective investigation in that regard;
7. Holds that there has been a violation of Article 2 of the Convention on account of the authorities' failure to protect Mr Magnitskiy's right to life and ensure an effective investigation into the circumstances of his death;
8. Holds that there has been a violation of Article 6 § 1 of the Convention;
9. Holds that there has been a violation of Article 6 § 2 of the Convention;
10. Holds
  - (a) that the respondent State is to pay the second and third applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 34,000 (thirty-four thousand euros) jointly, plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
11. Dismisses the applicants' claim under Article 46 of the Convention.

Done in English, and notified in writing on 27 August 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips  
Registrar

Vincent A. De Gaetano  
President