

“Human Rights of HIV-Positive People in the Light of the Case of *Kiyutin v. Russia*”



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Introduction

The Kiyutin v. Russia Case

- the landmark case of the European Court of Human Rights concerning the human rights of HIV positive people
- 10 March 2011
- the focal point is the difference of treatment to which the applicant was subjected on account of his health status when applying for a residence permit



Introduction

Historic judgement related to a violation of

- Article 14 of the ECHR– the prohibition of discrimination
in conjunction with
- Article 8 of the ECHR– the right to family life

Art. 8: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

Art. 14: “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination **on any ground such as** sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth **or other status.**”



Relevant Russian law

■ 1995 HIV Prevention Act

“foreign nationals and stateless persons who are in the Russian territory are to be deported once it is discovered that they are HIV-positive”
(Section 11 § 2)

■ 2002 Foreign Nationals Act

- defines the list of documents that must be enclosed with an alien's application for a residence permit - a medical certificate showing that he or she is not infected with HIV (Section 6 § 8)
- contains the list of grounds for refusing a temporary residence permit - if the foreigner is unable to produce a certificate showing that he or she is not infected with HIV (Section 7)

■ 2006 Judgement of the Constitutional Court



Government's submissions

- The refusal of a residence permit did not interfere with the right to family life
- The refusal was in accordance with domestic law
- The refusal was a necessary measure directed at preventing and combating HIV infection
- The courts may, but are not obliged, to take into account the factual circumstances of a specific case (the state of health/the clinical stage of a disease) on the basis of humanitarian considerations.



Relevant international documents

- **The UN Commission on Human Rights' Resolutions nos. 1995/44 and 2005/84 on the Protection of Human Rights in the Context of HIV and AIDS**
 - discrimination on the basis of AIDS or HIV status is prohibited by international human rights standards
 - the term 'or other status' in non-discrimination provisions can be interpreted to cover health status, including HIV/AIDS.
 - the right to privacy
- **The Parliamentary Assembly of the Council of Europe: Recommendation 1116(1989) and Resolution 1536(2007) on AIDS and human rights**
- **The 2001 UN General Assembly Resolution S-26/2 "Declaration of Commitment on HIV/AIDS"**
 - people living with HIV as a vulnerable group
 - need to eliminate all forms of discrimination toward HIV positive people



Relevant international documents

- **The 2004 Joint UN programme on HIV/AIDS/International Organization for Migration statement on HIV/AIDS-related travel restrictions**
 - HIV is not a threat to public health in relation to travel
- **The 2006 International Guidelines on HIV/AIDS and Human Rights, published by the Office of the UN High Commissioner for Human Rights and the Joint UN Programme on HIV/AIDS**
 - No public rationale for restricting liberty of movement or choice of residence on the grounds of HIV status
- **The 2008 UN Convention on the Rights of Persons with Disabilities**
 - Equality and non-discrimination
 - Liberty of movement
 - Respect for home and the family



Relevant international documents

- **The 2008 Report on the International Task Team on HIV-related Travel Restrictions, convened by the Joint UN Programme on HIV/AIDS**
 - No evidence that HIV-related restrictions on entry, stay and residence protect the public health
 - Restrictions are discriminatory
- **The 2009 General Comment on non-discrimination, published by the Committee on Economic, Social and Cultural Rights**
 - Health status and specifically HIV status are expressly included among “other status” grounds



Comparative data

Joint United Nations Programme on HIV/AIDS → *Mapping of Restrictions on the entry, stay and residence of people living with HIV (May 2009)*

- 124 countries have no HIV specific restrictions
- 52 countries impose restrictions
 1. Armenia, Moldova, Russia – deportation
 2. Andorra, Cyprus, Slovakia – testing
 3. Lithuania – declaration on “a disease threatening to public health”
- Canada, USA, UK, Germany, Norway – disability laws include HIV status



Merits

- Whether the facts of the case fall within the ambit of Art. 8?
- Whether the applicant's health status was "other status" within the meaning of Art. 14?
- Whether the applicant was in analogous position to other foreign nationals?
- Whether the difference in treatment was objectively and reasonably justified?



Merits

- **discrimination** means treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations.
- **the difference in treatment** must be **objective** and **reasonable** - it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
- the state enjoys **a margin of appreciation** in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. If a restriction on fundamental rights applies to **a particularly vulnerable group**, then the State's margin of appreciation is substantially narrower.



Concluding observations

1. The Russian Government overstepped the narrow margin of appreciation
2. The applicant was a victim of discrimination on account of his health status (violation of Art. 14 taken together with Art. 8)
3. The potential impact of the judgement extends beyond the Council of Europe, being the first authoritative condemnation of discrimination of HIV positive people by an international human rights adjudicator.

