



The refusal of a residence permit to a foreigner because he was HIV-positive was discriminatory

In today's Chamber judgment in the case [Kiyutin v. Russia](#) (application no. 2700/10), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

A violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights, taken in conjunction with Article 8 (protection of home and family life).

The case concerned the refusal of the Russian authorities to grant the applicant, an Uzbek national, a residence permit because he tested positive for HIV.

Principal facts

The applicant, Viktor Kiyutin, is a national of Uzbekistan who was born in 1971 in the then USSR (United Soviet Socialist Republics) and has lived since 2003 in the Oryol region of Russia. Mr Kiyutin married a Russian national in July 2003 and had a daughter with her the following year.

In the meantime, Mr Kiyutin applied for a residence permit and was asked to undergo a medical examination during which he tested positive for HIV. His application for residence was refused by reference to a legal provision preventing the issuing of a residence permit to HIV-positive foreigners. He challenged the refusal in court, claiming that the authorities should have taken into account his state of health and his family ties in Russia. The Russian courts rejected his appeals, citing the same legal provision.

Complaints, procedure and composition of the Court

Relying in particular on Articles 8 and 14, Mr Kiyutin complained that the refusal to grant him a residence permit had disrupted his family life. The Court decided to examine the case under Article 14 taken in conjunction with Article 8.

The application was lodged with the European Court of Human Rights on 18 December 2009.

Judgment was given by a Chamber of seven, composed as follows:

Nina **Vajić** (Croatia), *President*,
Anatoly **Kovler** (Russia),

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

Christos **Rozakis** (Greece),
Peer **Lorenzen** (Denmark),
Elisabeth **Steiner** (Austria),
Mirjana **Lazarova Trajkovska** (“the Former Yugoslav Republic of Macedonia”),
Julia **Laffranque** (Estonia), *Judges*,

and also Søren **Nielsen**, *Section Registrar*.

Decision of the Court

Article 14

The Court noted at the outset that the right of a foreigner to enter or settle in a given country was not guaranteed by the Convention. Whereas Mr Kiyutin had been married lawfully in Russia, there was no obligation under the Convention to respect the choice of married couples as to where they would like to live. However, since he had established a family in Russia, his situation had to be considered under Article 8. Accordingly, Article 14 was applicable in conjunction with Article 8 and Russia was under a legal obligation to exercise immigration control in a non-discriminatory manner. Although Article 14 did not list explicitly health or any medical condition among the grounds on which discrimination was prohibited, the Court considered that HIV infection was covered under the “any other status” clause.

Being the spouse of a Russian national and the father of a Russian child, Mr Kiyutin had been in an analogous situation to that of other foreign nationals seeking to obtain a family-based residence permit in Russia. He had been treated differently because of a legal provision, which provided that any application for a residence permit had to be refused if the foreigner could not show that he or she was not HIV-positive.

The Court emphasised that people living with HIV represented a vulnerable group in society which had been discriminated against in many ways in the past, be it due to common misconceptions about the spreading of the disease, or to prejudices linked to the way of life believed to be at its origin. Consequently, if a restriction on fundamental rights applied to such a particularly vulnerable group, then the State’s margin of appreciation was substantially narrower and there had to be very weighty reasons for the restrictions in question.

Only six of the 47 Member States of the Council of Europe, out of 47, required negative HIV results as a pre-condition for granting a residence permit. Only three European States provided for deportation of foreigners who were HIV-positive. Consequently, the exclusion of HIV-positive people from residence did not reflect an established European consensus on the issue and there was little support for that policy among the Council of Europe Member States.

The Court accepted that travel restrictions might be effective in protecting public health but only against highly contagious disease with a short incubation period such as cholera or yellow fever, or – more recently – the severe acute respiratory syndrome (SARS) or “bird flu” (H5N1). However, the mere presence of an HIV-positive individual in the country was not in itself a threat to public health, especially considering that the methods for HIV transmission remained the same irrespective of the duration of people’s stay in Russia or their nationality. In addition, HIV-related travel restrictions were not imposed on tourists or short-term visitors, nor on Russian nationals leaving and returning to Russia. Therefore, there was no justification for such a selective enforcement of restrictions, when it could not be concluded that those other categories of people were less likely to engage in unsafe behaviour than settled migrants. And in addition, the tests would not identify all HIV-positive foreigners if newly infected people were tested during the period when the virus did not manifest itself.

The Court then observed that, while potentially there could be a risk of HIV-positive foreigners becoming a serious financial burden on the public health-care system, that was not a valid consideration in Mr Kiyutin's case, given that in Russia, non-Russian nationals had no entitlement to free medical assistance, except emergency treatment, and had to pay themselves for all medical services.

The Court finally noted that the exclusion of residence of foreigners who were HIV-positive was explicitly provided for in a blanket and indiscriminate fashion in Russian law, which also envisaged the deportation of non-nationals who had been found to be HIV-positive. There was no room for an individualised assessment based on the facts of a particular case and the domestic migration authorities and courts did not consider themselves bound by the Constitutional Court's conclusion that temporary residence permits could be issued on humanitarian grounds.

The Court held that Mr Kiyutin had been a victim of discrimination on account of his health status, in violation of Article 14 taken together with Article 8.

Article 41 (just satisfaction)

Under Article 41, the Court held that Russia was to pay the applicant 15,000 euros (EUR) in respect of pecuniary damage, EUR 350 for costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.