



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

THIRD SECTION

CASE OF KHACHATRYAN AND KONOVALOVA v. RUSSIA

(Application no. 28895/14)

JUDGMENT

Art 8 • Family life • Refusal to renew long-term migrant's residence permit for failure to submit medical certificate • Domestic courts' failure to carefully balance interests involved and assess proportionality of measure with due regard to Court's case-law

STRASBOURG

13 July 2021

FINAL

22/11/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Khachatryan and Konovalova v. Russia,

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

Paul Lemmens, *President*,

Georgios A. Serghides,

Dmitry Dedov,

María Elósegui,

Darian Pavli,

Peeter Roosma,

Andreas Zünd, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 28895/14) 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 an Armenian national, Mr Mkrtich Azotovich Khachatryan (“the first applicant”), and a Russian national, Ms Yelizaveta Nikolayevna Konovalova (“the second applicant”), on 26 March 2014;

the decision to give notice to the Russian Government (“the Government”) of the application and the Government of Armenia’s decision not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);

the parties’ observations;

Having deliberated in private on 15 June 2021,

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

INTRODUCTION

1. The present application concerns the domestic authorities’ refusal to renew the first applicant’s long-term migrant’s residence permit for his failure to submit a medical certificate.

THE FACTS

2. The applicants were born in 1958 and 1976 respectively and live in Sosnogorsk. The applicants were represented by Mr E. Mezak, a human rights defender from Syktyvkar, who was granted leave to represent the applicants in accordance with Rule 36 of the Rules of Court, and Mr A. Laptev, a lawyer practising in Moscow.

3. The Government were represented initially by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr A. Fedorov.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

THE CIRCUMSTANCES OF THE CASE

A. Background information

5. The first applicant arrived in Russia in 2001. In 2008 he started cohabiting with the second applicant in Sosnogorsk, in the Republic of Komi. In 2010 the couple had a son, G. Kh. In May 2012 the applicants officially registered their marriage.

6. It appears that between 2001 and 2013 the first applicant resided in Russia on the basis of regularly extended temporary (three-year) residence permits.

7. On 20 February 2013 the first applicant applied for yet another renewal of his temporary residence permit by submitting the relevant application form and furnishing a number of compulsory documents. When submitting the documents, the applicant undersigned an obligation to furnish a missing medical certificate confirming the absence of HIV and other infectious diseases (“the medical certificate”) within the following thirty days. He did not subsequently request an extension of that time frame.

8. On 10 April 2013 the Federal Migration Service of the Komi Republic (“the FMS”) rejected his application as he had failed to enclose the medical certificate. The first applicant received the letter informing him of the refusal to renew his residence permit (“the refusal”) on 22 April 2013.

B. The first applicant’s appeals against the refusal to renew his residence permit

9. On 24 April 2013 the first applicant appealed against the refusal to the Sosnogorsk Town Court (“the Town Court”). He stated that he had been unaware of the obligation to provide the medical certificate, and that the refusal would adversely affect his family life as, in accordance with the regulations in force, he would be obliged to leave Russia for ninety days out of every 180 days until 10 April 2014. Such a situation would disrupt his family life with the second applicant and their son, who was a minor, and would cause the family financial hardship. Together with his application for the appeal, the first applicant enclosed the required medical certificate and requested that the court consider it and overrule the refusal.

10. On 26 June 2013 the Town Court upheld the refusal. It stated that, when filing his application for the renewal of his residence permit, the first applicant had signed an undertaking to provide the medical certificate within thirty days. However, he had neither submitted the document nor requested an extension of the time-limit for its submission. Therefore, the authorities’ refusal to grant the permit had been justified. The fact that the first applicant had presented the required medical certificate at the hearing could not serve as a reason to overrule the refusal. The court acknowledged

in general terms that the refusal represented an interference with the first applicant's right to respect for family life. It examined neither the proportionality of the measure nor its effect on his family life.

11. The first applicant appealed to the Supreme Court of the Komi Republic ("the Komi Supreme Court"). He stated, *inter alia*, that the Town Court had failed to review the negative impact of the refusal on his family life, and stressed that the minor failure of not submitting the medical certificate on time would deprive him of the opportunity to reside with his wife and minor son for one year, and that it would cause psychological and financial hardship for his family.

12. On 26 September 2013 the Komi Supreme Court dismissed the appeal. It stated that the refusal had been issued in compliance with the relevant regulations and international standards, that is, for the protection of public health. The failure to provide the medical certificate had indicated to the authorities that the first applicant might have had HIV and could therefore have posed a danger to the public. Therefore, the refusal had been based on the lack of necessary information. As for the first applicant's allegation regarding the disruptive effect of the refusal on his family life with the second applicant and their child, the court left it without examination; it stated in general terms that the interests of public safety and health prevailed over other interests involved.

C. Subsequent developments

13. According to the applicants, as a result of the refusal the first applicant was obliged to leave Russia at regular intervals between September 2013 and September 2014, as in the absence of a residence permit his stay in the country was authorised only for up to ninety days out of a period of 180 days.

14. On an unspecified date in August or September 2014 the applicant applied for a new residence permit. On 7 October 2014 he was granted a permit valid until 7 October 2017. Then on 16 December 2016 he was granted a five-year residence permit valid until 14 December 2021. The first applicant continues to reside in Russia.

RELEVANT LEGAL FRAMEWORK

15. For a summary of the relevant domestic regulations, see *Guliyev and Sheina v. Russia*, no. 29790/14, §§ 25-30, 17 April 2018.

Article 258 of the Civil Procedure Code in force at the material time, stipulated that the courts could review the legality of a decision taken by a State authority by overruling the impugned decision and ordering steps to be taken to remedy the violations found. Article 8 of the Foreigners Act in

force at the material time stated that a residence permit could be granted to a foreign national after a year of residence in Russia.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

16. The applicants complained that the refusal to renew the first applicant's residence permit had been a disproportionate measure for a minor procedural violation, and that the domestic courts had failed to examine the adverse effect of the refusal on their family life, contrary to Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

17. The Government stated that the application was manifestly ill-founded as the first applicant continued to reside in Russia.

18. The applicants maintained their complaint.

19. The Court notes that the complaint 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.

B. Merits

1. The parties' submissions

20. The applicants submitted that the refusal had interfered with their family life, as without a residence permit the first applicant had had to leave Russia regularly to comply with the relevant regulations, and that he had not been allowed to reapply for another residence permit until a year later. The first applicant's mandatory departures had caused financial and psychological hardship for both applicants and their child. According to the applicants, the domestic authorities, including the courts, had demonstrated a purely formalistic approach and had failed to assess the negative effect of the refusal on their family life.

21. The Government conceded in general terms that the refusal had represented an interference with the applicants' family life. However, that

interference, which was for the protection of public health, had not entailed any negative consequences for the applicants, as the first applicant's subsequent application for a residence permit had been granted and he had continued to reside in Russia. The Government also stated that on several occasions between 2008 and 2010 the first applicant had been fined for violating immigration regulations.

22. The Government further stated that the first applicant had been duly informed about the necessity to furnish the missing document and therefore the consequences of the failure to follow the procedural rules had been clear to him. The Komi Supreme Court had found that, in the absence of the necessary document, the immigration authorities had taken the only decision possible in such a situation, that is to refuse the first applicant's request for extension of his residence permit.

2. *The Court's assessment*

23. For a summary of the relevant case-law, see *Guliyev and Sheina*, cited above, §§ 46-52.

24. The Court notes that the parties did not dispute that there was an interference with the applicants' right to respect for their family life, that it was in accordance with the applicable law, and that it pursued a legitimate aim, namely the protection of public health. The Court must examine whether the decision-making process leading to the measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 92, ECHR 2001-I, and *Buckley v. the United Kingdom*, 25 September 1996, § 76, *Reports of Judgments and Decisions* 1996-IV), and whether the national decision-making bodies assessed the evidence in respect of practicality, feasibility and proportionality, in order to give effective protection and sufficient weight to the best interests of the children directly affected by the removal of a non-national parent (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 109, 3 October 2014; *X v. Latvia* [GC], no. 27853/09 § 96, ECHR 2013; and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010).

25. The first applicant's administrative infractions committed between 2008 and 2010 were not considered by the domestic courts examining his appeals against the refusal. Those details are therefore immaterial for the proceedings before the Court.

26. The Government did not dispute that the first applicant had been a long-term migrant in Russia, that he and the second applicant had had their family life there together with their child, and that the first applicant's prior applications for the renewal of his residence permit had been successful. The Government also did not dispute the fact that, as a result of the refusal, the first applicant was obliged, for a year, to leave his family in Russia

regularly for up to ninety days at a time in order to comply with the relevant immigration regulations.

27. The Court notes that the decision to refuse the renewal of the first applicant's permit was taken by the authorities on formal procedural grounds on account of his failure to furnish on time the document requested. On appeal against the refusal, the domestic courts acknowledged that the measure had in fact represented an interference with the first applicant's right to respect for his family life (see paragraph 10 above). However, they neither carefully balanced the different interests involved – including the best interests of the applicants' child – nor made a thorough analysis as to its proportionality and its impact on the applicants' family life. Consequently, they failed to take into account the considerations and principles developed by the Court and to apply standards which were in conformity with Article 8 of the Convention (see paragraphs 23 and 24 above, as well as *Üner v. the Netherlands* [GC], no. 46410/99, § 57, ECHR 2006-XII).

28. The Court further notes that the domestic courts failed to evaluate why the necessity of producing the missing medical certificate was so critical and decisive for the approval by the FMS of the first applicant's request for the extension of the residence permit, given his lawful residence in Russia since 2001 and his previously successful applications for the residence permit (see paragraph 6 above). In that respect, it should also be kept in mind that determining an application for a residence permit based on an applicant's HIV-positive status has been found to be in breach of Article 14 taken in conjunction with Article 8 (see *Kiyutin v. Russia*, no. 2700/10, §§ 73-74, ECHR 2011, and *Novruk and Others v. Russia*, nos. 31039/11 and 4 others, § 111, 15 March 2016). Finally, the Court notes that the first applicant did submit the missing medical certificate with his appeal against the refusal (see paragraph 9 above) and that in the light of the information received, the domestic courts could have overruled the refusal and ordered the FMS to examine his request anew (see paragraph 15 above).

29. Given the above, the Court finds that the proceedings in which the decisions to refuse to renew the first applicant's residence permit were taken and upheld on appeal fell short of the Convention requirements. They did not address all the elements that the domestic authorities should have taken into account in assessing whether the measure was proportionate to the legitimate aim pursued and "necessary in a democratic society".

30. Accordingly, there has been a violation of Article 8 of the Convention in respect of the applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. 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

32. The applicants did not submit a claim in respect of pecuniary damage. As for non-pecuniary damage, they claimed 15,000 euros (EUR) each.

33. The Government submitted that the claim was excessive and unsubstantiated and that, in any event, it should be rejected as the applicants' rights had not been violated.

34. Having regard to the parties' submissions, the circumstances of the case and acting on an equitable basis, the Court awards the applicants EUR 2,000 jointly in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

35. The applicants claimed EUR 13,500 in total for the costs and expenses incurred before the domestic courts and the proceedings before the Court. The amounts claimed were as follows:

- EUR 3,500 for twenty-eight hours of Mr E. Mezak's services for representation before the domestic courts and submissions to the Court;
- EUR 10,000 for forty hours of Mr A. Laptev's services for preparation of the applicants' observations before the Court and translation of the observations from Russian into English at a rate of EUR 250 per hour.

36. The Government submitted that the applicants had failed to substantiate their claim by enclosing documents showing that the expenses had actually been incurred. The Government pointed out that, given that the applicants' payment for their representation before the Court was conditional upon the Court giving a judgment in their favour, the actual fees had not been incurred.

37. Regard being had to the documents in its possession and to its case-law (see, for example, *Merabishvili v. Georgia* [GC], no. 72508/13, §§ 371-72, 28 November 2017, and *Akçay and Others v. Russia* [Committee], no. 66729/16, §§ 65-66, 11 December 2018), the Court considers it reasonable to award the sum of EUR 1,000 to the applicants' representative Mr E. Mezak, and EUR 1,200 to their representative Mr A. Laptev, plus any tax that may be chargeable to the applicants. The

amounts are to be paid directly into each representative's bank account, as indicated by the applicants.

C. Default interest

38. 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.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;
3. *Holds*, by six votes to one,
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to the applicants jointly;
 - (ii) EUR 1,000 (one thousand euros) to Mr E. Mezak, plus any tax that may be chargeable to the applicants, in respect of costs and expenses; this amount is to be paid directly into the representative's account, as indicated by the applicants;
 - (iii) EUR 1,200 (one thousand two hundred euros) to Mr A. Laptev, plus any tax that may be chargeable to the applicants, in respect of costs and expenses; this amount is to be paid directly into the representative's account, as indicated by the applicants;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

KHACHATRYAN AND KONOVALOVA v. RUSSIA JUDGMENT

Done in English, and notified in writing on 13 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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Milan Blaško
Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Serghides is annexed to this judgment.

P.L.
M.B.

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. As indicated in paragraph 1 of the judgment, the present application concerns the domestic authorities' refusal to renew the first applicant's temporary residence permit as a long-term migrant due to his failure to submit a medical certificate.

2. Regrettably, I disagree with my eminent colleagues in the majority that there has been a violation of Article 8 of the Convention for the following reasons.

3. There is no dispute, and in any event there is no reason to hold otherwise, that: (a) there was an interference with the applicant's rights with respect to family life, and (b) that the said interference was in accordance with the applicable law, and that it pursued a legitimate aim, namely the protection of public health. It therefore remains to be examined whether: (a) the interference was necessary in a democratic society, and, in particular, whether, the reasons invoked by the domestic authorities for the interference were relevant and sufficient, and (b) whether the measure in issue was proportionate to the aim pursued.

4. It is clear from the well-established case-law of the Court, that an interference will be considered "necessary in a democratic society" for the achievement of a legitimate aim if the reasons given by the national authorities to justify it are "relevant and sufficient" and if it is proportionate to the legitimate aim pursued. According to the case-law of the Court, matters of healthcare policy are in principle within the margin of appreciation of the domestic authorities, who are best placed to assess priorities in the use of resources (see *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, §§ 273-75, 8 April 2021).

5. Even though the first applicant contended before the Town Court that prior to the refusal he had been unaware that his failure to furnish the necessary medical certificate might lead to a negative outcome of the examination of his request for the extension of the residence permit, the documents submitted show otherwise (see paragraphs 7 and 9 of the judgment). It should further be underlined that the applicant did not invoke, either in the domestic proceedings or before the Court, any reasons to justify his failure to comply with the obligation to submit the compulsory document (see paragraphs 10, 12 and 20 of the judgment). Consequently, the domestic courts were right that the negative consequences of the failure to submit the necessary document were clear and foreseeable for the first applicant. The documents which had to be enclosed with an application for a temporary residence permit, as well as the grounds for refusing a temporary permit, are clearly spelled out in the member State's law. Section 6(8) of the Foreign Nationals Act (no. 115-FZ of 25 July 2002) and Government Resolution no. 789 of 1 November 2002 specified that an

applicant must enclose a medical certificate showing that he/she is not HIV-positive and section 7(1)(13) of the same Act lists amongst the grounds for refusing a temporary residence permit, or for cancelling a previous permit, an applicant's drug abuse or inability to produce a certificate showing that he or she is not HIV-positive.

6. A person cannot complain that his or her human right is not effectively protected by the domestic law and authorities if he or she does not first comply with the requirements of the relevant law or decision of the domestic authorities, without giving any reasons for his or her failure to do so. It is tenable that such a failure could be a ground for the inadmissibility of an application for lack of an appearance of a violation, and/or for abuse of the right of individual application (Article 35 §§ 3 (a) and 4 of the Convention). However, no issue of inadmissibility was raised by the Government on such grounds. The two parties to the present proceedings did not have the opportunity to discuss this matter before the Court and therefore I decided not to deal with grounds of inadmissibility other than noting that which was raised by the Government (see paragraphs 17-19 of the judgment). I therefore considered, as the judgment did, that the application was admissible. This does not prevent me, however, from observing that an applicant cannot – and should not – take the rule of law into his own hands and then try to seek the protection of the Court.

7. I am unable to contribute to opening Pandora's box by giving the impression that the Court may allow applicants to disobey or disrespect laws, regulations and equitable principles and thereafter try to have their behaviour condoned and seek the protection of the Court. Relevant in this respect are the equitable principles *ex turpi causa non oritur actio* (no action arises out of a wrongful consideration) and *nemo auditur propriam turpitudinem allegans* (no one can be heard whose claim is based on his own wrongdoing). An applicant who comes to court must come with clean hands in order to seek justice and cannot be heard if relying on his or her own wrongdoing. I entirely disagree with the judgment that there was excessive formalism on the part of the respondent State in regulating the issue of renewal of temporary residence permits, an issue which falls within the imperium and exclusive competence of the State concerned. Furthermore, it is to be noted that the applicant should first have produced the required medical certificate and then if his application was refused he could have had recourse to justice. The applicant, although being aware of his obligation to furnish the relevant medical certificate, had not complied with it. In any event, if the applicant had furnished the requisite medical certificate and a medical problem was disclosed, it is uncertain that this, by itself, would have led to a refusal of his permit application. In *Novruk and Others v Russia* (nos. 31039/11 and 4 others, 15 March 2016), where section 7(1)(13) of the Foreign Nationals Act was at issue, the Court referred to the Constitutional Court's statement that the law-enforcement

authorities and courts might – on the basis of humanitarian considerations – take into account the family situation and the state of health of the HIV-positive foreign national or stateless person, and other exceptional but meritorious circumstances, in determining whether the person should be granted temporary residence in Russia. It was also mentioned that, from a summary of twenty-five cases submitted by the Russian Government on 20 December 2012 and heard by Russian courts in 2011 and 2012, it could be seen that in a majority of those cases the Russian courts had overturned the decisions of the Migration Service or the lower courts and found in favour of the applicants, noting in particular their family ties in Russia and state of health.

8. Furthermore, even though the domestic courts did not elaborate in their decisions on the first applicant's complaint about the adverse effect of the refusal on his family life, the Komi Supreme Court did indicate, albeit in general terms, that in a situation where the lack of necessary information concerning the first applicant could have been indicative of his danger to the public, interests of public safety and health prevailed over other interests.

9. It should be noted that even though, as a result of the refusal, the first applicant was obliged, for a year, to leave Russia at regular intervals (see paragraphs 13 and 21 of the judgment), he was later granted a three-year residence permit, which was subsequently extended for another five years (see paragraph 14 of the judgment). Given that he continues to reside in Russia, the consequences of the refusal for his family life with the second applicant (his wife) and their child were not of such a kind and nature as to outweigh his failure to furnish the necessary document and to comply with the relevant regulations.

10. The foregoing considerations are sufficient for me to conclude that the authorities' refusal to extend the first applicant's residence permit, which was decided ultimately due to the applicant's non-compliance with the law, fell within their margin of appreciation and was not disproportionate.

11. In conclusion, it follows that there has been no violation of Article 8 of the Convention and as a consequence I would not make an award for non-pecuniary damage or costs.