

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

THIRD SECTION

DECISION

Applications nos. 46280/14 and 75781/14
Vasyl SHVALIA against Russia
and Olga KOSTYCHEVA against Russia

The European Court of Human Rights (Third Section), sitting on 8 March 2016 as a Committee composed of:

George Nicolaou, *President,*
Branko Lubarda,
Pere Pastor Vilanova, *judges,*

and Marialena Tsirli, *Deputy Section Registrar*,

Having regard to the above applications lodged on 16 June 2014 and 2 December 2014 respectively,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

THE FACTS

The applicants were represented before the Court by Mr I. Sharapov, a lawyer practising in Moscow.

The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights.

The Ukrainian and Moldovan Governments, who had been informed of their right to intervene in the proceedings under Article 36 § 1 of the Convention, gave no indication that they wished to do so.

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

A. The case of Mr Shvalia (application no. 46280/14)

The applicant, Mr Vasyl Shvalia, is a Ukrainian national, who was born in 1983. Since 2003 he has been living in St Petersburg with his girlfriend N., a Russian national. On 17 June 2010 they got married and the applicant obtained a temporary residence permit valid through 2 November 2013.

In April 2013, while collecting documents for filing an application for a permanent residence permit, Mr Shvalia underwent testing for HIV in the St Petersburg Centre for AIDS Prevention and Treatment and discovered his HIV-positive status. The Centre reported his diagnosis to the Federal Consumer Protection Authority.

On 22 July 2013 the Consumer Protection Authority approved the decision by which Mr Shvalia's presence in Russia was declared undesirable in accordance with section 25.10 of the Entry and Exit Procedures Act ("the exclusion order"). He challenged the order in court.

On 14 January 2014 the Kirovskiy District Court of St Petersburg dismissed the challenge. It found that Mr Shvalia's presence in Russia posed "a threat to his wife who works with children and to other persons".

On 24 March 2014 the St Petersburg City Court upheld that decision on appeal.

On 26 May 2014 a judge of the City Court refused the applicant leave to appeal to the cassation instance.

B. The case of Ms Kostycheva (application no. 75781/14)

The applicant, Ms Olga Kostycheva, is a Moldovan national, who was born in 1983. In 2007 she moved to the Moscow Region and the following year married Mr A.K., a Russian national, with whom she had a son, also a Russian national.

During her pregnancy Ms Kostycheva tested HIV-positive.

In March 2014 Ms Kostycheva applied to the Federal Migration Service of the Moscow Region for a residence permit, invoking exceptional humanitarian grounds. By letter of 22 April 2014, she was informed that her application was rejected by reference to section 7(1)(13) of the Foreign Nationals Act which restricted the issue of residence permits to foreign nationals who could not show their HIV-negative status.

The applicant challenged the Migration Service's decision before a court.

On 9 June 2014 the Dolgoprudnyy Town Court of the Moscow Region found that the decision was unlawful. In so finding, the Town Court had regard to her family links and to the fact that she was willing and able to receive treatment. The Town Court held that her expulsion from Russia would be in breach of her right to respect of family life and directed the Migration Service to issue a residence permit.

On 8 October 2014 the Moscow Regional Court examined the Migration Service's appeal and quashed the judgment of the Town Court. Its summary reasoning solely relied on section 7(1)(13) of the Foreign Nationals Act, without addressing her arguments in any detail.

C. Developments subsequent to the communication of the cases

The cases were communicated to the Government on 5 November 2014 and 22 January 2015, respectively.

On 12 March 2015 the Constitutional Court ruled on the constitutional challenge brought by Mr Shvalia, Ms Kostycheva, another claimant and their Russian spouses against section 11(2) of the HIV Prevention Act, section 7(1)(13) of the Foreign Nationals Act, and section 25.10 of the Entry and Exit Procedures Act. The Constitutional Court held that the migration laws can lawfully restrict access to Russia by non-Russian nationals whose medical condition may jeopardise public health and pose a threat to national security. It acknowledged the contemporary medical consensus that HIV does not pose a threat to public health because it is not transmitted merely by the presence of the infected individual in the country or through casual contact, airborne particles, food or water. The Constitutional Court held as follows:

> "1. To declare that the closely related provisions of section 25.10 of the Entry and Exit Procedures Act, section 11(2) of the HIV Prevention Act, and section 7(1)(13) of the Foreign Nationals Act are incompatible with the Russian Constitution ... in so far as they allow [the executive authorities] to declare undesirable the presence of a foreign national or a stateless person whose family permanently resides in Russia, to issue a deportation order or an entry ban, to refuse him a residence permit or to cancel a previously issued residence permit solely because that person is HIV-positive, provided that the person has complied with the legal requirements on HIV-positive individuals relating to the prevention of spreading the infection, and provided that no other circumstances would call for such restrictions.
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> 2. The federal legislation should – in the light of the requirements of the Russian Constitution and the position of the Constitutional Court, as expressed in the present judgment – introduce the necessary amendments into the existing corpus of laws which would clarify the grounds and the procedure for making decisions relating to the right of HIV-positive foreign nationals or stateless persons to stay and to live in the Russian Federation."

Pending such amendments, the Constitutional Court directed that the executive and judicial authorities be guided by the position it had formulated in the judgment.

On 23 June 2015 the Kirovskiy District Court of St Petersburg acceded to Mr Shvalia's request to re-open the proceedings on his complaint against the Consumer Protection Authority in the light of the new jurisprudence of the Constitutional Court.

By a judgment of 18 August 2015, the Kirovskiy District Court pronounced the exclusion order of 22 June 2013 unlawful, referring to the Constitutional Court's judgment.

On 1 October 2015 the Consumer Protection Authority annulled the exclusion order of 22 June 2013 and informed the Border Control thereof.

In the parallel proceedings instituted by Ms Kostycheva, the Moscow Regional Court's judgment of 8 October 2014 was set aside. On 13 May 2015 the Regional Court issued a new appeal judgment, upholding the Town Court's judgment of 9 June 2014 in Ms Kostycheva's favour.

It appears from Ms Kostycheva's letter of 7 September 2015 that she has received a temporary residence permit allowing her to stay in Russia.

COMPLAINTS

The applicants complained under Article 8 of the Convention, taken alone and in conjunction with Article 14, about the measures which could possibly result in their separation from their families and about their discrimination on account of their health status.

THE LAW

Given their similar factual and legal background, the Court decides that the applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

The applicants complained about an interference with their right to respect for their family life and about a difference in treatment which they experienced as HIV-positive foreign nationals. Their complaints were communicated under Articles 8 and 14 of the Convention which read as follows:

Article 8. Right to respect for private and family life

"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."

Article 14. Prohibition of discrimination

"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."

The Government denied that there had been a violation of their applicants' rights. The applicants maintained that their rights had been violated and pointed to the most recent decisions by Russian courts which reversed the prior judgments against them.

The Court notes that the measures which could potentially interfere with the applicants' right to respect for their family life have been annulled: the exclusion order against Mr Shvalia was set aside and Ms Kostycheva was issued with a residence permit. It must therefore verify whether it is justified to continue examination of the applications.

Under Article 37 § 1 (b) of the Convention, the Court may "at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that ... the matter has been resolved ..." To be able to conclude that this provision applies to the instant case, the Court must answer two questions: it must determine, firstly, whether the circumstances complained of directly by the applicant still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have been redressed (see *Shevanova v. Latvia* (striking out) [GC], no. 58822/00, § 45, 7 December 2007, and *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 97, ECHR 2007-I, with further references).

As to the first question, it is clear that the interference complained of has ceased to exist. The impugned judicial decisions have been quashed in the re-opened proceedings. The first applicant Mr Shvalia no longer faces the threat of exclusion from Russia in connection with his health condition. The second applicant Ms Kostycheva was able to obtain the residence permit for which she had applied.

On the second question, the Court observes that the period of insecurity and legal uncertainty, which the applicants had to endure in connection with the decision to declare Mr Shvalia's presence in Russia undesirable and the refusal of Ms Kostycheva's application for a residence permit, was relatively short (compare with *Kaftailova v. Latvia* (striking out) [GC], no. 59643/00, § 53, 7 December 2007, in which the applicant lived more than ten years under the threat of deportation). What is more important is that during that time the applicants were effectively able to remain in Russia and that no attempts appear to have been made to remove them or otherwise restrict them in the enjoyment of their family life (see *Borisov v. Lithuania*, no. 9958/04, § 112, 14 June 2011). Consequently, the Court considers that the quashing of the contested decisions and the issuing of a residence permit to Ms Kostycheva constituted adequate and sufficient redress for their grievances.

In the light of the above, the Court concludes that both conditions have been met and that the matter giving rise to the applicants' complaints can

therefore now be considered to have been "resolved" within the meaning of Article 37 § 1 (b).

Finally, before taking a decision to strike out a case, the Court must verify whether respect for human rights as defined in the Convention requires it to continue the examination of the case (Article 37 § 1 *in fine*). The Court's judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 89, ECHR 2012 (extracts), with further references).

The present applications concerned discrimination of HIV-positive non-Russian nationals on account of their health status in the enjoyment of their right to respect for their family life. The Court has examined this issue in the leading judgment *Kiyutin v. Russia* (no. 2700/10, ECHR 2011) in which it set out the applicable legal principles. It follows that the complaints raised in the present application are based on the established case-law of the Court (see, by contrast, *Konstantin Markin*, cited above, § 90, which concerned a novel issue of general interest). In accordance with Article 46 § 2 of the Convention, the Committee of Ministers remains competent to supervise the implementation of the *Kiyutin* judgment.

It is also important that in the period since the communication of the present cases, the Russian Constitutional Court adopted, on 12 March 2015, a judgment representing a milestone for the protection of the rights of people living with HIV. It acknowledged the medical consensus regarding the means of transmission of HIV and pronounced the legal provisions of the Entry and Exit Procedures Act, the Foreign Nationals Act, and the HIV Prevention Act – which were at the heart of the instant case – incompatible with the Russian Constitution in so far as they allowed the authorities to refuse entry or residence or to deport an HIV-positive non-national with family ties in Russia solely on account of his or her diagnosis. The Constitutional Court directed the legislator to make the necessary amendments in the light of its judgment which remained directly applicable pending the legislative reform.

In the light of these developments, the Court is satisfied that the respect for human rights as defined in the Convention (Article 37 § 1 *in fine*) does not require it to continue the examination of the present applications. It decides therefore to strike them out of its list of cases.

Finally, the Court notes that the applicants did not lodge a claim for any costs or expenses they may have incurred in the proceedings. Accordingly, there is no call to make an award under this head (compare *Shevanova*, cited above, §§ 52-56, and *Grüne Alternative Wien v. Austria* (striking out), no. 13281/02, § 33, 29 November 2011).

For these reasons, the Court, unanimously,

Decides to join the applications;

Decides to strike the applications out of its list of cases.

Done in English and notified in writing on 31 March 2016.

Marialena Tsirli Deputy Registrar	George Nicolaou President