



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

FIRST SECTION

Application no. 39428/12
Aleksandr Georgiyevich GABLISHVILI and
Irina Sergeevna GABLISHVILI
against Russia
lodged on 31 May 2012

STATEMENT OF FACTS

The first applicant, Mr Aleksandr Gablishvili, is a Georgian national who was born in 1981. The second applicant, Ms Irina Sergeevna Gablishvili, is a Russian national who was born in 1987. The applicants, who are a husband and wife, live in the city of Syktyvkar, Komi Republic. They are represented before the Court by Mr E. Mezak, a lawyer practising in Syktyvkar.

A The circumstances of the case

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

On 15 November 2011 the Syktyvkar Town Court found the first applicant liable for an administrative offence proscribed by Article 6.9 § 2 of the Russian Code of Administrative Offence. By virtue of that Article, the use of drugs without a medical prescription by a foreign national constituted an administrative offence punishable by a fine or an administrative arrest of up to fifteen days accompanied by an administrative expulsion from the Russian Federation. The Town Court found it established that on 14 November 2011 the first applicant, a Georgian national, had used desomorphine which had not been prescribed to him by a doctor. In the court hearing the first applicant confessed to the use of the drug and expressed remorse. He was sentenced to a fine of 4,000 Russian roubles and an administrative expulsion from the Russian Federation.

The first applicant's lawyer appealed, having argued that the Town Court had applied an extremely severe sentence. The lawyer stressed that the first applicant had been living in the Russian Federation for almost ten years,

that his wife, who was pregnant with their first child, was a Russian national and that the majority of his relatives lived in Russia. In the lawyer's opinion, the first applicant's expulsion could destroy his family life.

On 1 December 2011 the Supreme Court of the Russian Federation rejected the appeal and upheld the decision of 15 November 2011. Having addressed the lawyer's argument pertaining to the interference with the first applicant's family life, the Supreme Court held as follows:

“The arguments in the complaint by the lawyer Mr Mezak that, given [the first applicant's] family situation, the Town Court had incorrectly applied the supplementary punishment in the form of the administrative expulsion from the Russian Federation cannot be taken into account as the vindicatory part of paragraph 2 of Article 6.9 of the Russian Code of Administrative Offences provides for a mandatory expulsion of a person who had committed that administrative offence, while the main sentence is applied in the form of either of an administrative arrest or a administrative fine; [the administrative expulsion] is not an alternative [sentence].”

In the meantime, on 10 June 2011 the Komi Republican Federal Migration Service annulled the first applicant's residence permit in view of the fact that the first applicant was a drug addict, suffering from an addiction to opium. He was informed of that decision on 9 November 2011 with the order to leave the territory of the Russian Federation within fifteen days.

The lawyer appealed, having argued that the first applicant would be unable to return to Russia for an unidentified period of time as the opium addiction could not be treated, particularly so in the situation when the first applicant was left without the support of his family members living in Russia. The lawyer insisted that the decision amounted to an excessive interference with the first applicant's family life and also subjected the first applicant's life and limb to the risk contrary to the requirements of Articles 2 and 3 of the Convention. The lawyer asked to annul the decision of 10 June 2011 and to restore the residence permit.

On 28 February 2012 the Syktyvkar Town Court partly accepted the claim, having invalidated the decision of 10 June 2012 but having refused to restore the residence permit. The Town Court established that the first applicant had been registered in Russia since May 2001. On 29 May 2008 his residence permit had been extended until 8 May 2013. The first applicant's parents, as well as his pregnant wife, are Russian nationals who live in Syktyvkar. On 10 June 2011 the State Aids Centre had informed the migration authorities that the first applicant had tested positive for the HIV infection during an examination on 27 May 2011. The reason for the test was his use of injection drugs. Having received that information, on the same day the migration authorities had annulled the first applicant's residence permit, in compliance with Article 9 of the Russian Law “On Legal Status of Foreign Nationals in the Russian Federation”. The first applicant had been informed of the decision on 9 November 2011. The Town Court further reiterated the decision of 15 November 2011 concerning the first applicant's administrative offence and noted that the Komi Republican Centre for Drug Addiction had provided information that the first applicant had been under the Centre's supervision as a drug addict since 2008. Having further recalled the principles of the Russian Constitution and the European Convention on Human Rights, in particular its Articles 2, 3 and 8, the Town Court concluded as follows:

“Federal law of 30 March 1995 no. 38-FZ “On Prevention of the Spread of an Illness Caused by the Human Immunodeficiency Virus (the HIV Infection) in the Russian Federation” [hereinafter – the HIV Act] is in force in Russia.

As follows from the preamble of the mentioned law, it was enacted in view of the fact that the illness caused by the human immunodeficiency virus is massively spreading all over the world, remains uncured, leads to the inevitable death, causes serious social, economic and demographical consequences for the Russian Federation, creates a risk to the security of individuals, the society and the state, as well as a risk to the very fact of the existence of the humanity, which in its turn calls for the necessity to protect the rights and lawful interests of the population and to apply modern effective measures of the complex prevention of that disease.

That Federal law applies to nationals of the Russian Federation, to foreign nationals and stateless persons in the territory of the Russian Federation, including to those who permanently reside in the Russian Federation (Article 3); [the law] lays down guarantees for safeguarding the rights and freedoms of HIV-positive persons – nationals of the Russian Federation (Article 5), the grounds for the entry to the Russian Federation of foreign nationals and stateless persons (Article 10) and the consequences of their having been diagnosed with the HIV-infection (Article 11). Those consequences in paragraph 2 of Article 11 include, among others, the deportation from the Russian Federation of foreign national and stateless persons in compliance with the procedure established by the law...

By virtue of Article 9 § 1 (13) of the Federal Law of 25 July 2002 no. 115-FZ “On Legal Status of Foreign Nationals in the Russian Federation” [hereinafter – the Foreign Nationals Act] a residence permit of a foreign national should not be issued, and the earlier issued residence permit should be annulled, if that foreign national: suffers from drug addiction; or does not have a certificate confirming that he does not have an illness caused by the human immunodeficiency virus (the HIV infection) or suffers from an infectious disease which represents danger to others (the list of those [illnesses]... include the HIV infection)...

The restrictions on decisions to issue a residence permit in view of [the first applicant] suffering from a certain illness interferes not only with the rights of [the first applicant] but also with the rights of his family members. The Convention on the Rights of the Child lays down an obligation on the States - Members to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. ... At the same time, the Convention provides that the separation may be a consequence of a decision initiated by a State Party, such as the exile or deportation...

In the cases concerning the deportation of HIV-positive foreign nationals the European Court demonstrates flexibility and individual assessment, taking into account the individual resources of the public health system of a State whose nationality an first applicant holds and the stage of the development of the illness which could lead to the situation that the deportation of the first applicant from the country would run counter to the guarantees of Article 3 of the Convention... The Court also noted that while the right of a foreigner to enter and live in any State by itself is not guaranteed by the Convention, his or her expulsion from the country where his close relatives live may violate his right to respect for family life guaranteed by paragraph 1 of Article 8 of the Convention...

... the norms contained in Article 11 § 2 of the HIV Act and Article 9 § 1 (13) of the Foreign Nationals Act do not exclude that law-enforcement bodies and courts, on humanitarian grounds, take into account the family situation, the state of health of an HIV-positive foreign national or stateless person (including the clinical stage of the illness) and other exceptional important circumstances while deciding whether the deportation of that individual from the Russian Federation is necessary and when

deciding on the possibility of his temporary residence in the territory of the Russian Federation. At the same time that person is not relieved from the obligation to comply with the legally established preventive measures to stop the spread of the HIV-infection.

In the present case, while issuing the disputed decision the [migration authorities] did not examine and consider the humanitarian grounds.

The court lists, among the exceptional circumstances, which should have been taken into account to avoid the violation of [the first applicant's] rights guaranteed by Articles 2, 3 and 8 of the Convention while issuing the decision to annul his residence permit the [following grounds]: his long-term stay in Russia accompanied by the strong family ties (which is confirmed by the statements by his wife and his mother), and his ability to receive medical treatment in Russia with the help and under supervision of his family.

Taking the abovementioned grounds in consideration, the court finds it necessary to invalidate the disputed decision of the [migration authorities] by which the [first applicant's] residence permit had been annulled.

At the same time, the court does not accept [the first applicant's] claim for the restoration of his residence permit as, at the material time, there is a final court decision which had entered into force and which has to be enforced and by which [the first applicant's] administrative expulsion had been ordered, which by virtue of Article 9... of the Foreign Nationals Act does not allow to issue a new residence permit and calls for the annulment of the residence permit.”

The first applicant's lawyer appealed.

On 31 May 2012 the Supreme Court of the Komi Republic reversed the judgment in part. Having fully endorsed the reasoning of the Town Court concerning the decision to invalidate the decision by which the migration authorities had annulled the first applicant's residence permit, the Supreme Court noted that the following logical step could have only been to restore the first applicant's residence permit. The Supreme Court ordered the migration authorities to restore the first applicant's residence permit.

B. Relevant domestic law

For the relevant regulations on the legal status of HIV-positive foreign nationals in the Russian Federation see *Kiyutin v. Russia* (no. 2700/10, 10 March 2011, §§ 16-27).

COMPLAINTS

The applicants complained under Articles 8, 13 and 14 of the Convention that the final decision of 15 November 2011, as upheld on appeal on 1 December 2011, which provides for the eminent administrative expulsion from Russia constitutes an unjustified interference with their family life and discriminates against the first applicant on the ground of his drug addiction.

QUESTIONS TO THE PARTIES

1. What is the current location of the first applicant? Has he been expelled or is he liable to be deported?

2. Did the decision of 15 November 2011 authorising the administrative expulsion of the first applicant, based on the blanket regulation of Article 6.9 § 2 of the Russian Code of Administrative Offence, constitute an interference with the right to respect for the applicants' family life within the meaning of Article 8 § 1 of the Convention? If so, was that interference in accordance with the law and necessary in terms of Article 8 § 2 (see *Üner v. the Netherlands* [GC], no. 46410/99, §§ 54-60, ECHR 2006-XII; *C.G. and Others v. Bulgaria*, no. 1365/07, §§ 37-50, 24 April 2008; and *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 93-129, ECHR 2002-II (extracts), and most recently, *Kiyutin v. Russia*, no. 2700/10, 10 March 2011, §§ 53-74)?

3. Given that the domestic authorities' decision would have the effect of disrupting the first applicant's family life in Russia and having regard to the fact that the sole reason for that decision was his suffering from drug addiction, was the difference in treatment on account of his health status discriminatory for the purposes of Article 14 of the Convention, read in conjunction with Article 8? In other words, did it pursue a legitimate aim and was there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?