



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

FIRST SECTION

Application no. 31039/11
Mikhail NOVRUK against Russia
and 3 other applications
(see list appended)

STATEMENT OF FACTS

A list of the applicants is set out in the appendix. The facts of the cases, as submitted by the applicants, may be summarised as follows.

A. The case of Mr Novruk

In 2000, Mr Novruk, a Moldovan national, and O., a Russian national, started living together as a couple in Moldova. In 2001, a boy was born to their union; he acquired Russian nationality by birth. Two years later O. and their son moved to Dalnerechensk in the Primorskiy Region of Russia where most of her family lived. In 2005, Mr Novruk joined them in Russia and in the same year they got married. Following their divorce in 2008, he moved to Vladivostok but stayed in good contact with his former spouse and his son whom he continued to support financially.

In 2009, Mr Novruk met S., a Russian national. In March 2010, he travelled to Moldova to renew his passport. On that occasion he found out about his HIV-positive status. Three weeks later Mr Novruk returned to Vladivostok and on 24 April 2010 he and S. got married.

In June 2010, Mr Novruk applied to the Federal Migration Service of the Primorskiy Region for a residence permit. By letter of 8 July 2010, he was informed that his 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.

On 4 October 2010 the Sovetskiy District Court of Vladivostok dismissed the applicant's challenge to that decision, finding in particular that the Federal Migration Service had been required by law to reject his application for residence permit. On 16 November 2010 the Primorskiy Regional Court upheld that judgment on appeal.

B. The case of Ms Kravchenko

In 2003, Ms Kravchenko, a Ukrainian national, married Mr D., a Russian national. They have been living in Moscow. During her pregnancy she was diagnosed HIV-positive. On 4 April 2003 her son F. was born. He acquired Russian nationality by birth.

In 2009, Ms Kravchenko applied for a temporary residence permit. By letter of 22 May 2010, the Federal Migration Service rejected her application by reference to section 7 § 1 (13) of the Foreign Nationals Act and ordered her to leave Russia within fifteen days or else to face deportation. Ms Kravchenko challenged the refusal to a court.

On 23 September 2009 the Zamoskvoretskiy District Court of Moscow found for the claimant, noting in particular that:

“The Moscow division of the Federal Migration Service made the determination, without taking into account such meritorious considerations as the fact that the claimant has a minor child ... who is a Russian national ... and who needs maternal attention and care, and a husband.... a Russian national resident in Moscow. Nor did it take into account the position of the Russian Constitutional Court, as expressed in its decision [of 12 May 2006].”

Further to the District Court’s decision, Ms Kravchenko lodged a new application for residence permit. On 15 January 2010 it was rejected by reference to the same provision of the Foreign Nationals Act.

Ms Kravchenko applied again for a judicial review. By judgment of 3 September 2010, the Zamoskvoretskiy District Court of Moscow granted a stay of enforcement of the Migration Service decision and ordered it to reconsider the matter in the light of the Constitutional Court’s decision of 12 May 2006 and the Convention principles. Ms Kravchenko filed an appeal; she submitted that the District Court should have ruled that the Migration Service refusal had been unlawful.

On an unspecified date the Federal Migration Service issued a further refusal of the application for residence permit, relying on the same legal provision.

On 8 February 2011 the Moscow City Court dismissed Ms Kravchenko’s appeal against the District Court’s judgment, finding that “there were no grounds to vary the judgment because the Moscow division of the Federal Migration Service had actually enforced it”.

C. The case of Mr Khalupa

In 2005, Mr Khalupa, a Moldovan national, married E., a Russian national. Their children, the girl A. and the boy B., were born in 2005 and 2008, respectively. The family has been living in St Petersburg.

In early 2008, Mr Khalupa submitted to a blood test with a view to obtaining a health certificate supporting his application for residence permit. He was found to be HIV-positive. The hospital reported the results of his test to the St Petersburg division of the Federal Migration Service which issued the decision of 4 June 2008 on the undesirability of Mr Khalupa’s stay in Russia on account of “real threat to public health”. On 17 June 2008 the director of the Federal Migration Service ratified the decision.

On 1 August 2008 the decision was notified to Mr Khalupa and he had to leave Russia within three days, as required by law. He took up residence in Dubossary in the “Moldavian Republic of Transdnistria”.

On the day following the pronouncement of the *Kiyutin v. Russia* judgment (no. 2700/10, ECHR 2011), Ms E., acting on Mr Khalupa’s behalf, applied to the St Petersburg division of the Federal Migration Service for quashing of the decision that declared his presence on Russian territory undesirable. She submitted medical documents showing that Mr Khalupa posed no danger to public health because he received appropriate treatment. Her request was forwarded to the legal department of the Federal Migration Service for analysis. In letter of 5 May 2011 addressed to a deputy director of the visas and registration department of the Federal Migration Service, the director of the legal department acknowledged that the decision of 4 June 2008 had not taken fully into account Mr Khalupa’s family ties in Russia. Nevertheless, on 12 September 2011 the deputy director of the St Petersburg division of the Federal Migration Service informed Mr Khalupa and Ms E. that their application for review of the decision of 4 June 2008 had been rejected. His letter did not specify the grounds for rejecting the request.

Mr Khalupa complained to a court. On 30 January 2012 the Basmannyy District Court of Moscow dismissed his complaint, finding firstly that his rights and freedoms had not been interfered with, and secondly that the director of the Federal Migration Service was not competent to review or to set aside a decision by which the individual’s presence in Russia had been declared to be undesirable. That judgment was upheld on appeal on 16 May 2012 by the Moscow City Court. On 12 December 2012 the Presidium of the City Court rejected Mr Khalupa’s cassation appeal.

D. The case of Ms Ostrovskaya

Ms Ostrovskaya was born in 1953 in the Kurgan Region of the Russian Soviet Federal Socialist Republic of the USSR. In 1966 her parents took her and her sister to live in the Uzbek Soviet Socialist Republic of the USSR. In 1972 Ms Ostrovskaya got married and gave birth to a boy. Two years later her sister got married and moved back to Russia. Following the collapse of the USSR, Ms Ostrovskaya acquired Uzbekistani nationality.

After the death of her parents and husband and her son’s move to Russia in 2006, Ms Ostrovskaya stayed alone in Uzbekistan. In September 2011, she decided to move to Russia to live in the same flat as her son’s and her sister’s families. Ms Ostrovskaya’s sister and her husband are Russian nationals; her son and his family are Uzbekistani nationals with valid Russian residence permits.

In November 2011, Ms Ostrovskaya decided to apply for a residence permit and underwent a medical examination. She tested HIV-positive.

By decision of 17 January 2012, the Samara division of the Federal Migration Service rejected her application for a residence permit by reference to section 7 § 1 (13) of the Foreign Nationals Act. On 27 March 2012 the Federal Migration Service upheld the refusal.

By letter of 9 June 2012, the Samara division of the Consumer Protection Authority (see below) notified Ms Ostrovskaya that she should leave Russia

until 30 June 2012 or face deportation. The letter indicated that on 30 May 2012 the director of the Federal Consumer Protection Authority determined that her presence on Russian territory was undesirable.

Ms Ostrovskaya complained to a court. By judgment of 23 July 2012, as upheld on appeal on 17 September 2012, the Samara District and Regional Courts held that the Migration Service decision of 17 January 2012 had been lawful and justified and that Ms Ostrovskaya's arguments concerning her family ties and exceptional circumstances were "without substance". On 6 November 2012 the Regional Court refused her leave to appeal to a cassation instance.

RELEVANT DOMESTIC LAW AND PRACTICE

For a summary of relevant domestic law and practice, see *Kiyutin v. Russia*, no. 2700/10, §§ 16-27, ECHR 2011.

The additional legal provisions, relevant to the present cases, read as follows:

A. Law on the Procedure for Entering and Leaving the Russian Federation (no. 114-FZ of 15 August 1996)

A competent authority may issue a decision that a foreign national's presence on Russian territory is undesirable. Such a decision may be issued if a foreign national is unlawfully residing on Russian territory or if his or her residence is lawful but creates a real threat to, in particular, public order or health, etc. If such a decision has been taken, the foreign national has to leave Russia or will otherwise be deported. That decision also forms the legal basis for subsequent refusal of re-entry into Russia (section 25.10).

The list of authorities competent to take such a decision was approved by Government resolution no. 199 of 7 April 2003. It included, among others, the Ministry of the Interior, the Federal Migration Service and the Russian Consumer Protection Authority.

A foreign national shall be refused entry into Russia if, in particular, a competent authority issued a decision that his or her presence on Russian territory is undesirable (section 27 § 7).

B. Regulations issued by the Consumer Protection Authority

On 14 September 2010 the Federal Authority for the Consumer Protection and Human Well-being Supervision, headed by the Chief Sanitary Inspector of Russia, by Order no. 336, approved the Guidance on the procedure for preparation, submission and examination of materials leading to a decision on undesirability of a foreign national's or stateless person's presence in Russia. The Guidance established that such a decision must be taken by the head of the Consumer Protection Authority or his deputy (section 2) on the proposal of a regional division of the Consumer Protection Authority (section 3).

For implementation of the Guidance, regional divisions of the Consumer Protection Authority and regional public health departments adopted regulations on medical examinations of foreign nationals. The regulations provide in particular that hospitals must report to the regional Consumer Protection Authority information about any foreign national who was found to be infected with a disease dangerous for the public, such as HIV-infection (see, among many others, point 3.8 of Order no. 35 of the Health Protection Department of Moscow issued on 17 January 2013; point 4 of Annex 1 to Order no. 216/1095 issued by the Ryazan division of the Consumer Protection Authority on 15 December 2010; point 2 of Annex 3 to Order no. 21-O approved by the Nizhniy Novgorod division on 19 March 2013; points 9-10 of Annex 5 to Decision no. 1 issued by the Chief Sanitary Inspector for the Perm Region on 29 February 2012).

On 13 February 2012 the Chief Sanitary Inspector of Russia issued a resolution (no. 16) on urgent measures required for countering the spread of HIV infection in Russia. He noted, in particular, as follows:

“In 2011 ... 1,070,887 foreign nationals and stateless persons were tested for communicable diseases. 6,114 persons were diagnosed with diseases dangerous to the public which was the basis for issuing a decision on the undesirability of their presence in Russia. Of those, 1,215 persons tested HIV-positive ...

In 2011, the Russian Consumer Protection Authority issued 1,327 decisions declaring the presence of foreign nationals from 38 countries undesirable in the Russian Federation. 727 migrants left Russia or were deported ...

Nevertheless, further organisational measures need to be taken with a view to detecting foreign nationals and stateless persons infected with diseases dangerous to the public which may be the basis for issuing a decision on the undesirability of their presence in Russia. It is also necessary to enhance control over enforcement of such decisions.

A low rate of detection of sexually transmitted diseases among the migrants in the Vladimir, Tver, Leningrad, Pskov, Samara, Kirov, Pensa ... Regions is a reason for concern. Such a low rate does not correspond to the statistical average and is indicative of an unsatisfactory organisation of medical testing of foreign nationals ...”

According to the protocol of the conference on the epidemiological monitoring of the measures that were deployed in 2012 for the prevention, detection and treatment of HIV-infection and B- and C-type hepatitis (Suzdal, 11-14 March 2013), in 2012, a further 1,357,804 foreign nationals were tested for communicable diseases and 1,403 persons tested HIV-positive.

RELEVANT COMMITTEE OF MINISTERS DOCUMENTS

In the framework of the execution of the *Kiyutin v. Russia* judgment, on 6 February 2012 the Russian Government submitted a report and an action plan (DH-DD(2012)160E). The report indicated that the text of the judgment was translated into Russian and disseminated among law-enforcement officials and courts and that no further action was necessary for the following reasons:

“... the decision of 12 May 2006 by the Constitutional Court of the Russian Federation ... does not prevent law-enforcement authorities and courts, by reference to

humanitarian considerations, from taking into account the marital status, the state of health of the HIV-positive individual and other important considerations for determining the issue whether the deportation of that individual from the Russian Federation is necessary and whether the residence permit should be issued ...

Therefore, the text of section 7 § 1 (13) of the Foreign Nationals Act does not exclude the possibility that an HIV-positive foreign national may be allowed to enter and reside on Russian territory on account of the concrete circumstances of the case and with regard to Article 8 and other provisions of the Convention ...

The legal position of the Constitutional Court, as expressed in the above decision ... is mandatory in the entire territory of the Russian Federation for legislative, executive and judicial authorities, local government bodies, State officials, etc. ...

In consideration of the foregoing, the competent State bodies reached the conclusion that it is not necessary to alter the currently existing legislation of the Russian Federation in connection with the entry into force of the *Kiyutin v. Russia* judgment.

Therefore, the violation of the Convention provisions established in the European Court's judgment *Kiyutin v. Russia* resulted from subjective circumstances, such as violations by the concrete State bodies and national courts which rejected the application for a residence permit without taking into account the requirements of the Russian legislation or the interpretation given by the Constitutional Court ..."

On 20 December 2012 the Russian Government submitted a summary of more than twenty-five cases which were heard by Russian courts in 2011 and 2012 and which concerned the challenges brought by individual claimants against the Migration Service decisions refusing them residence permits on account of their HIV-positive status (DH-DD(2013)273). In a majority of those cases the courts overturned either the Migration Service or the lower courts' decisions and found in favour of the claimants, noting in particular their family ties in Russia and the state of the health. In the other cases the courts upheld the refusal, finding that the claimant had not established any lasting ties in Russia.

COMPARATIVE DATA

At the international level, the situation of people living with HIV with regard to restrictions on their travel, entry or residence has improved since the adoption of the *Kiyutin* judgment. At that time, 124 countries, territories and areas world-wide had no HIV-specific restrictions on entry, stay or residence. In July 2013 there were 132 such countries.¹ Conversely, the number of countries and territories imposing some form of restriction has fallen from 52 to 45.

Within the Council of Europe region, two Member States lifted travel restrictions in the wake of the *Kiyutin* judgment: Armenia did so in July 2011² and Moldova in June 2012.³ At present, Russia is the only Member State that carries on enforcing deportations of HIV-positive foreigners.

1. http://www.aidsdatahub.org/dmdocuments/UNAIDS_CountryList_TravelRestrictions_July2012.pdf

2. <http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2011/july/20110715psarmenia/>

3. <http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2012/june/20120622prmoldova/>

COMPLAINTS

All the applicants complain under Articles 8 of the Convention, taken alone or in conjunction with Article 14 of the Convention, that they were victims of discrimination on account of their health status in the determination of their applications for residence permits.

QUESTIONS TO THE PARTIES

1. Having regard to the principles established in the Court's judgment concerning the refusal of a residence permit to an applicant on account of his health status (see *Kiyutin v. Russia*, no. 2700/10, §§ 53-74, ECHR 2011), was there a violation of each of the applicants' right to be protected against discrimination under Article 14 of the Convention, read in conjunction with their right to respect for their private and family life under Article 8?

2. Do the present cases concerning the refusal of residence permits to HIV-positive aliens reveal the persistence of the problem which was highlighted in the *Kiyutin v. Russia* judgment? Does this situation amount to a structural problem?

APPENDIX

No	Application No	Lodged on	Applicant Date of birth Place of residence Nationality	Represented by
1.	31039/11	10/05/2011	Mikhail NOVRUK 14/09/1972 Vladivostok Moldovan	Irina Vladimirovna KHRUNOVA
2.	48511/11	24/07/2011	Anna Viktorovna KRAVCHENKO 19/01/1982 Moscow Ukrainian	Nadezhda Viktorovna YERMOLAYEVA
3.	76810/12	30/10/2012	Roman KHALUPA 23/04/1974 Dubossary Moldovan	Dmitriy Gennadyevich BARTENEV
4.	14618/13	24/01/2013	Irina Grigoryevna OSTROVSKAYA 14/05/1953 Samara Uzbekistani	Olga Aleksandrovna LEONOVA