



Structural problem in Russia: discriminatory legislation against HIV-positive foreigners as regards their rights to entry, stay and residence

In today's **Chamber judgment**¹ in the case of **Novruk and Others v. Russia** (application no. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14) 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 read together with Article 8 (right to private life and family), and

no violation of Article 34 (right of individual petition) of the European Convention.

The case concerned the entry and residence rights of HIV-positive non-Russian nationals.

The Court reiterated that the right to enter or settle in a particular country was not guaranteed by the European Convention. A State had to, however, exercise its immigration policies in a manner which was compatible with a foreign national's human rights, in particular the right to respect for his or her private or family life and the right not to be discriminated against.

The Court notably found that the legislation aimed at preventing HIV transmission, which was used in the present case to exclude the applicants from entry or residence, had been based on an unwarranted assumption that they would engage in unsafe behaviour, without carrying out a balancing exercise involving an individualised assessment in each case. Given the overwhelming European and international consensus geared towards abolishing any outstanding restrictions on entry, stay and residence of people living with HIV, who constitute a particularly vulnerable group, Russia had not advanced compelling reasons or any objective justification for their differential treatment for health reasons. The applicants had therefore been victims of discrimination on account of their health status.

The Court also found that the defective legislation which gave rise to the proceedings in the applicants' case amounted to a structural problem which could generate further repetitive applications. Noting, however, that legislative reform was currently under way in Russia, the Court decided at this stage not to formulate any general measures about the proper implementation of its present judgment.

Principal facts

The applicants are Mikhail Novruk, a Moldovan national who was born in 1972; Anna Kravchenko, a Ukrainian national who was born in 1982; Roman Khalupa, a Moldovan national who was born in 1974; Irina Ostrovskaya, an Uzbek national who was born in 1953; and Mr V.V., a national of Kazakhstan who was born in 1983.

The first three applicants settled in Russia following their marriage to Russian nationals. They all have children who have acquired Russian nationality by birth. The fourth applicant, Ms Ostrovskaya, decided to move to Russia to follow her extended family, which included her son and his family,

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.

Uzbek nationals with valid Russian residence permits, and her sister and her husband, who are Russian nationals. The fifth applicant, Mr V.V. moved to Russia in 2006 to study and has been living since 2007 with his same-sex partner, a Russian national.

To complete their application for Russian residence permits, the applicants were required to have a medical examination which included a mandatory test for HIV infection. After they tested positive for HIV, the migration authorities refused their applications because the relevant legislation prevents HIV-positive foreign nationals from obtaining residence permits. In the cases of Mr Khalupa, Ms Ostrovskaya and Mr V.V., the hospitals reported their test results to the relevant authorities and their presence on Russian territory was pronounced undesirable. Such a decision can be made on the basis of the provisions which mandate deportation of aliens who are discovered to be HIV-positive.

The applicants challenged the decisions denying them residence rights before domestic courts.

Mr Novruk's and Ms Ostrovskaya's challenges were dismissed in November 2010 and September 2012, on the ground that the migration services' decisions to reject their applications had been in compliance with the law. As concerned Mr Khalupa, the courts refused to order a new review of the undesirability decision issued four years ago, arguing that there was no legal provision explicitly providing for the possibility of such a review.

Even though Ms Kravchenko and Mr V.V. obtained favourable decisions in a first round of proceedings, Ms Kravchenko's application for a residence permit was ultimately refused in February 2011 and Mr V.V.'s presence in Russia was pronounced undesirable in March 2013. The applicants' HIV-positive status was cited as the reason for those decisions, once again in view of the applicable legal provisions. In a further round of proceedings concerning Mr V.V. two new grounds for refusing his claim for residence were cited: firstly, in August 2013 the Court of Appeal referred to an increased risk of unsafe behaviour on his part because he had refused to name his former partners; and, in February 2014, the Regional Court found that he could transmit HIV by using shared dormitory facilities in a student hostel. The Supreme Court ultimately refused Mr V.V. leave to appeal to the Supreme Court in April 2014.

Complaints, procedure and composition of the Court

Relying on Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life and the home), all five applicants alleged that they had been discriminated against because they were HIV-positive. Also relying on Article 34 (right of individual petition), Mr V.V. complained that, following the communication of his case by the European Court of Human Rights to the Russian Government, his partner had been summonsed to the prosecutor's office for an interview so as to intimidate the couple.

The application was lodged with the European Court of Human Rights on 10 May 2011, 24 July 2011, 30 October 2012, 24 January 2013 and 14 February 2014.

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

Luis **López Guerra** (Spain), *President*,
Helena **Jäderblom** (Sweden),
Helen **Keller** (Switzerland),
Johannes **Silvis** (the Netherlands),
Dmitry **Dedov** (Russia),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

[Article 14 \(prohibition of discrimination\) read in conjunction with Article 8 \(private and family life\)](#)

The Court found that Article 14 taken in conjunction with Article 8 was applicable in the applicants' case: the first three applicants had all lawfully married Russian nationals and have children born of those marriages and therefore enjoyed "family life" in Russia; Ms Ostrovskaya, who does not have any friends or relatives outside Russia, lives and shares household expenses with her son's family and must be deemed to have established her "private life" there; and, Mr V.V. has been in a stable partnership since 2007 and has led "family life" with his partner.

The Court noted that Russia was under an obligation to provide a particularly compelling justification for the difference in treatment of which the applicants alleged that they had been victims. Firstly, people living with HIV are a vulnerable group facing many medical, professional, social, personal and psychological problems, including deeply rooted prejudice even from among highly educated people. Secondly, as things currently stood, Russia was the only member State of the Council of Europe and one of 16 States world-wide that enforced deportation of HIV-positive non-nationals.

The Court therefore emphasised that, before taking a decision which curtailed the right to respect for an individual's private and family life, there had to be an individualised judicial assessment of all the relevant facts. Where such a decision was based on a predetermined classification of the entire group of vulnerable individuals as a threat to public health solely because of their health status, it could not be considered compatible with the protection against discrimination enshrined in Article 14 of the Convention.

However, the decisions excluding the applicants from entry or residence, aimed at preventing HIV transmission, had been based on an unwarranted generalisation with no basis in fact, namely the assumption that they would engage in unsafe behaviour such as unprotected sexual intercourse or the sharing of contaminated syringes. The applicants, living with their families or partners, had never though been suspected of, or charged with, any such acts. What is more, in Mr V.V.'s case, the Regional Court's findings had been based on a scientifically false ground, namely that he could transmit HIV by using shared facilities in a student dormitory.

In sum, the Court found that, in the light of the overwhelming European and international consensus geared towards abolishing the outstanding restrictions on entry, stay and residence of HIV-positive non-nationals, Russia had not advanced compelling reasons or any objective justification for their differential treatment for health reasons. The applicants had therefore been victims of discrimination on account of their health, in violation of Article 14 taken in conjunction with Article 8.

[Article 34 \(right of individual petition\)](#)

The Court was satisfied that no pressure had been brought to bear on Mr V.V.'s partner and legal representative. Thus, it could not be held that the Russian authorities had hindered Mr V.V. in the exercise of his right of individual petition.

[Article 41 \(just satisfaction\)](#)

The Court held that Russia was to pay each applicant 15,000 euros (EUR) in respect of non-pecuniary damage. For costs and expenses, it awarded Mr Novruk EUR 2,000, Ms Kravchenko EUR 4,000, Mr Khalupa EUR 4,320, and Ms Ostrovskaya and Mr V.V. EUR 850 each.

Article 46 (binding force and implementation)

In so far as the domestic proceedings in the applicants' case stemmed from defective legislation, this amounted to a structural problem which could give rise to further repetitive applications before the European Court of Human Rights. However, in March 2015 the Russian Constitutional Court pronounced the legal provisions which were at the heart of the applicants' 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 their diagnosis. As a result, a draft law implementing that judgment has already been prepared and submitted to the Russian Parliament. It was not for the Court to speculate about the final shape of the proposed draft law and it therefore abstained from formulating any general measures about the proper implementation of its present judgment at this stage. Should the Russian Government's efforts to tackle the underlying Convention problem or the remit of the envisaged reform prove to be insufficient, the Court might, nevertheless, reassess the need to apply the pilot-judgment procedure in the applicants' case.

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.