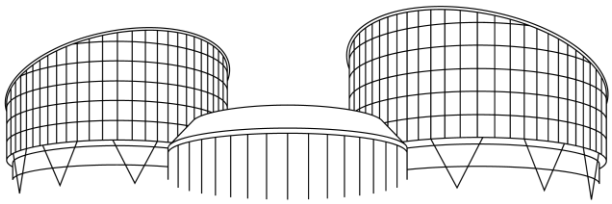

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KIYUTIN v. RUSSIA

(Application no. 2700/10)

JUDGMENT

STRASBOURG

10 March 2011

FINAL

15/09/2011

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Kiyutin v. Russia**,**

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

Nina Vajić, *President*,
Anatoly Kovler,
Christos Rozakis,
Peer Lorenzen,
Elisabeth Steiner,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges*,
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 17 February 2011,

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

PROCEDURE

1. The case originated in an application (no. 2700/10) 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 a national of Uzbekistan, Mr Viktor Viktorovich Kiyutin ("the applicant"), on 18 December 2009.

2. The applicant was represented by Ms L. Komolova, a lawyer practising in Oryol. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that he had been the victim of discrimination on account of his health status in his application for a Russian residence permit.

4. On 5 May 2010 the President of the First Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

5. Written submissions were received from Interights, which had been granted leave by the President to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in the Uzbek Soviet Socialist Republic (SSR) of the Soviet Union in 1971 and acquired citizenship of Uzbekistan following the collapse of the Union of Soviet Socialist Republics (USSR).

7. In October 2002 his brother bought a house with a plot of land in the village of Lesnoy in the Oryol Region of Russia. In 2003 the applicant, his half-brother and their mother came from Uzbekistan to live there.

8. On 18 July 2003 the applicant married a Russian national and they had a daughter in January 2004.

9. In the meantime, in August 2003 the applicant applied for a residence permit. He was required to undergo a medical examination during which he tested positive for HIV. On account of that circumstance, his application for a residence permit was refused. The refusal was upheld at final instance by the Oryol Regional Court on 13 October 2004.

10. In April 2009 the applicant filed a new application for a temporary residence permit. Following his application, on 6 May 2009 the Federal Migration Service determined that he had been unlawfully resident in Russia (an offence under Article 18.8 § 1 of the Code of Administrative Offences) and imposed a fine of 2,500 Russian roubles.

11. By a decision of 26 June 2009, the Federal Migration Service of the Oryol Region rejected his application for a residence permit 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 decision indicated that the applicant was to leave Russia within three days or be subject to deportation. The applicant challenged the refusal in court.

12. On 13 August 2009 the Severniy District Court of the Oryol Region rejected his complaint, finding as follows:

> "Taking into account that Mr V.V. Kiyutin is HIV-positive, the court considers that his application for temporary residence in the Russian Federation was lawfully rejected."

13. The applicant lodged an appeal, relying on the Constitutional Court's decision of 12 May 2006 (see paragraph 24 below) and the relevant United Nations documents on Aids prevention. On 16 September 2009 the Oryol Regional Court rejected his appeal in a summary fashion.

14. On 20 October 2009 the applicant underwent a medical examination at the Oryol Regional Centre for Aids Prevention. He was diagnosed with the progressive phase of HIV, and hepatitis B and C, and was prescribed "highly active antiretroviral therapy" (HAART) for life-saving indications.

15. On 25 November 2009 the Oryol Regional Court refused to institute supervisory-review proceedings and upheld the previous judgments as lawful and justified, finding:

> "In his application for supervisory review, Mr Kiyutin argued that the courts did not take into account his family situation and state of health when deciding on his application for a residence permit, which was at variance with the Constitutional Court's decision of 12 May 2006. This argument is not a ground for quashing the judicial decisions.
>
> The applicable laws governing the entry and residence of foreign nationals in Russia do not require the law-enforcement authorities or the courts to determine the state of health of HIV-infected foreign nationals or the clinical stage of their disease for the purpose of deciding whether a residence permit may be issued.
>
> When deciding on the issue of temporary residence for an HIV-positive individual, the courts may, but are not obliged, to take into account the factual circumstances of a specific case on the basis of humanitarian considerations.
>
> In addition, a foreign national who applies for a residence permit in Russia must produce a certificate showing his HIV-negative status; if his status is HIV-positive, the law prohibits the said permit from being issued."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The HIV Prevention Act (no. 38-FZ of 30 March 1995)

16. The relevant parts of the Preamble to the HIV Prevention Act read as follows:

> "Recognising that the chronic disease caused by the human immunodeficiency virus (HIV)
>
> – is spread widely throughout the world,
>
> – has grave socio-economic and demographic consequences for the Russian Federation,
>
> – poses a threat to personal, public and national security, and a threat to the existence of humankind,
>
> – calls for the protection of the rights and lawful interests of the population ..."

17. Pursuant to section 4(1) of the Act, the State guarantees free medical assistance to Russian nationals who are HIV-positive.

18. Section 11(2) provides that foreign nationals and stateless persons who are in the Russian territory are to be deported once it is discovered that they are HIV-positive.

B. The Foreign Nationals Act (no. 115-FZ of 25 July 2002)

19. Section 5 of the Foreign Nationals Act provides that foreign nationals who do not require a visa to enter the Russian Federation may stay in Russia for a period not exceeding ninety days and must leave Russia upon expiry of that period.

20. Section 6(3)(4) and (6.2) establishes that an alien who is married to a Russian national or who has a Russian child is eligible for a three-year residence permit, independently of the professional quotas determined by the Government.

21. Section 6(8) and Government Resolution no. 789 of 1 November 2002 define the list of documents that must be enclosed with an alien's application for a residence permit. Among other documents, an applicant must produce a medical certificate showing that he or she is not HIV-positive.

22. Section 7 contains the list of grounds for refusing a temporary residence permit or annulling a previously issued residence permit. In particular, an application for a residence permit will be refused if the foreigner is a drug abuser or is unable to produce a certificate showing that he or she is not HIV-positive (section 7(1)(13)).

C. The provision of medical assistance to foreign nationals

23. According to paragraph 3 of the Rules on the Provision of Medical Assistance to Foreign Nationals in the Russian Territory (Government Resolution no. 546 of 1 September 2005), only emergency treatment may be provided to foreign nationals free of charge. Paragraph 4 stipulates that other medical assistance may be provided on a fee basis

D. The case-law of the Constitutional Court

24. On 12 May 2006 the Constitutional Court rejected a constitutional complaint introduced by a Ukrainian national, Mr X., who was HIV-positive and lived in Russia with his Russian wife and daughter (decision no. 155-O). Mr X. complained that section 11(2) of the HIV Prevention Act and section 7(1)(13) of the Foreign Nationals Act violated his right to respect for his family life and his right to medical assistance and were also discriminatory.

25. The Constitutional Court held that the contested provisions were compatible with the Russian Constitution as the restriction on temporary residence of HIV-positive foreign nationals had been imposed by the legislature for the protection of constitutional values, the principal one being the right to State protection of public health (see paragraph 3.3 of the Constitutional Court's judgment).

26. Referring to the United Nations Declaration of Commitment on HIV/Aids of 27 June 2001, the resolutions of the United Nations Commission on Human Rights and other international instruments prohibiting HIV-related discrimination, as well as this Court's case-law on the expulsion of foreign nationals in general and HIV-positive foreigners in particular, the Constitutional Court emphasised the principle of proportionality in respect of the measures adopted in pursuance of constitutional aims and noted:

> "It follows that, confronted with a conflict between equally protected constitutional values, the law-enforcement authorities and courts may take into account, on the basis of humanitarian considerations, the factual circumstances of a specific case in determining whether an HIV-positive individual is eligible for temporary residence in the Russian Federation.
>
> Thus, the provisions of section 11(2) of the HIV Prevention Act and section 7(13) of the Foreign Nationals Act do not exclude the possibility that the law-enforcement authorities and courts may – on the basis of humanitarian considerations – take into account the family situation, 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 deported from the Russian Federation and whether he or she should be admitted for temporary residence in the Russian territory. In any event, the individual concerned should comply with the obligation to respect the legally imposed preventive measures aimed at curtailing the spread of HIV." (See paragraph 4.2 of the Constitutional Court's judgment.)

E. The Criminal Code

27. Article 122 of the Criminal Code provides for criminal liability for knowingly infecting another person with HIV or for knowingly exposing someone to the risk of HIV infection. These acts are punishable by deprivation of liberty of up to one year.

III. RELEVANT INTERNATIONAL MATERIALS

28. On 27 June 2001 the United Nationals General Assembly adopted the Declaration of Commitment on HIV/Aids (Resolution S-26/2) which provides, in particular:

> "1. We, Heads of State and Government and representatives of States and Governments, assembled at the United Nations ... to review and address the problem of HIV/Aids in all its aspects, as well as to secure a global commitment to enhancing coordination and intensification of national, regional and international efforts to combat it in a comprehensive manner;
>
> ...
>
> 13. Noting further that stigma, silence, discrimination and denial, as well as a lack of confidentiality, undermine prevention, care and treatment efforts and increase the

impact of the epidemic on individuals, families, communities and nations and must also be addressed;

...

16. Recognising that the full realisation of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/Aids pandemic, including in the areas of prevention, care, support and treatment, and that it reduces vulnerability to HIV/Aids and prevents stigma and related discrimination against people living with or at risk of HIV/Aids;

...

31. Affirming the key role played by the family in prevention, care, support and treatment of persons affected and infected by HIV/Aids, bearing in mind that in different cultural, social and political systems various forms of the family exist;

...

HIV/Aids and human rights

...

58. By 2003, enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/Aids and members of vulnerable groups, in particular to ensure their access to, *inter alia*, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic;

..."

29. The United Nations Commission on Human Rights first spoke out against HIV/Aids-related discrimination and stigma in its Resolution no. 1995/44 on the protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (Aids), which was adopted at its 53rd meeting on 3 March 1995. The relevant parts of the resolution read as follows:

"1. Confirms that discrimination on the basis of Aids or HIV status, actual or presumed, is prohibited by existing international human rights standards, and that the term 'or other status' in non-discrimination provisions in international human rights texts can be interpreted to cover health status, including HIV/Aids;

2. Calls upon all States to ensure, where necessary, that their laws, policies and practices, including those introduced in the context of HIV/Aids, respect human rights standards, including the right to privacy and integrity of people living with HIV/Aids, prohibit HIV/Aids-related discrimination and do not have the effect of inhibiting programmes for the prevention of HIV/Aids and for the care of persons infected with HIV/Aids;

...”

The United Nations Commission on Human Rights upheld its stance against discrimination in the context of HIV/Aids in its subsequent Resolution no. 2005/84, adopted at its 61st meeting on 21 April 2005.

30. Article 2 § 2 of the United Nations International Covenant on Economic, Social and Cultural Rights guarantees that the rights recognised therein “will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. In its General Comment no. 20 of 2 July 2009 on non-discrimination in economic, social and cultural rights, the United Nations Committee on Economic, Social and Cultural Rights expressly included health status and specifically HIV status, among “other status” grounds referred to in Article 2 § 2 of the Covenant:

> “33. Health status refers to a person’s physical or mental health. States Parties should ensure that a person’s actual or perceived health status is not a barrier to realising the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person’s health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum. ...”

31. The Parliamentary Assembly of the Council of Europe has touched upon the subject of HIV/Aids in a number of documents. Recommendation 1116 (1989) on Aids and human rights emphasised the following points:

> “3. Noting that, although the Council of Europe has been concerned with prevention ever since 1983, the ethical aspects have been touched upon only cursorily;
>
> 4. Considering nevertheless that it is essential to ensure that human rights and fundamental freedoms are not jeopardised on account of the fear aroused by Aids;
>
> 5. Concerned in particular at the discrimination to which some Aids victims and even seropositive persons are being subjected;
>
> ...
>
> 8. Recommends that the Committee of Ministers:
>
> A. instruct the Steering Committee for Human Rights to give priority to reinforcing the non-discrimination clause in Article 14 of the European Convention on Human Rights, either by adding health to the prohibited grounds of discrimination or by drawing up a general clause on equality of treatment before the law;
>
> ...
>
> D. invite the member States of the Council of Europe:
>
> ...

3. not to refuse the right of asylum on the sole ground that the asylum-seeker is contaminated by the HIV virus or suffers from Aids;

...”

Resolution 1536 (2007) on HIV/Aids in Europe reaffirmed the Parliamentary Assembly’s commitment to combating all forms of discrimination against people living with HIV/Aids:

“9. While emphasising that the HIV/Aids pandemic is an emergency at the medical, social and economic level, the Assembly calls upon parliaments and governments of the Council of Europe to:

9.1. ensure that their laws, policies and practices respect human rights in the context of HIV/Aids, in particular the right to education, work, privacy, protection and access to prevention, treatment, care and support;

9.2. protect people living with HIV/Aids from all forms of discrimination in both the public and private sectors ...”

32. The United Nations Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008 and which Russia signed but has not ratified, provides, in particular:

Article 5
Equality and non-discrimination

“2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds. ...”

Article 18
Liberty of movement and nationality

“1. States Parties shall recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

...

(b) are not deprived, on the basis of disability, of their ability to obtain, possess and utilise documentation of their nationality or other documentation of identification, or to utilise relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

...”

Article 23
Respect for home and the family

"1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others ..."

33. The UNAIDS/IOM (Joint United Nations Programme on HIV/Aids/International Organization for Migration) statement on HIV/Aids-related travel restrictions of June 2004 contained the following recommendations:

"1. HIV/Aids should not be considered to be a condition that poses a threat to public health in relation to travel because, although it is infectious, the human immunodeficiency virus cannot be transmitted by the mere presence of a person with HIV in a country or by casual contact (through the air, or from common vehicles such as food or water). HIV is transmitted through specific behaviours which are almost always private. Prevention thus requires voluntary acts and cannot be imposed. Restrictive measures can in fact run counter to public health interests, since exclusion of HIV-infected non-nationals adds to the climate of stigma and discrimination against people living with HIV and Aids, and may thus deter nationals and non-nationals alike from coming forward to utilise HIV prevention and care services. Moreover, restrictions against non-nationals living with HIV may create the misleading public impression that HIV/Aids is a 'foreign' problem that can be controlled through measures such as border controls, rather than through sound public health education and other prevention methods.

...

3. Restrictions against entry or stay that are based on health conditions, including HIV/Aids, should be implemented in such a way that human rights obligations are met, including the principle of non-discrimination, *non-refoulement* of refugees, the right to privacy, protection of the family, protection of the rights of migrants, and protection of the best interests of the child. Compelling humanitarian needs should also be given due weight.

4. Any health-related travel restriction should only be imposed on the basis of an individual interview/examination. In case of exclusion, persons should be informed orally and in writing of the reasons for the exclusion.

5. Comparable health conditions should be treated alike in terms of concerns about potential economic costs relating to the person with the condition. Those living with HIV/Aids who seek entry for short-term or long-term stays should not be singled out for exclusion on this financial basis.

6. Exclusion on the basis of possible costs to health care and social assistance related to a health condition should only be considered where it is shown, through individual assessment, that the person requires such health and social assistance; is likely in fact to use it in the relatively near future; and has no other means of meeting such costs (e.g. through private or employment-based insurance, private resources, support from community groups); and that these costs will not be offset through benefits that exceed them, such as specific skills, talents, contribution to the labour

force, payment of taxes, contribution to cultural diversity, and the capacity for revenue or job creation.

7. If a person living with HIV/Aids is subject to expulsion (deportation), such expulsion (deportation) should be consistent with international legal obligations including entitlement to due process of law and access to the appropriate means to challenge the expulsion. Consideration should be given to compelling reasons of a humanitarian nature justifying authorisation for the person to remain. ...

..."

34. The relevant parts of the International Guidelines on HIV/Aids and Human Rights (2006 consolidated version), published by the United Nations Office of the High Commissioner for Human Rights and UNAIDS, read as follows:

"102. The key human rights principles which are essential to effective State responses to HIV are to be found in existing international instruments ... Among the human rights principles relevant to HIV/Aids are, *inter alia*:

– the right to non-discrimination, equal protection and equality before the law;

...

– the right to freedom of movement;

...

104. Under international human rights law, States may impose restrictions on some rights, in narrowly defined circumstances, if such restrictions are necessary to achieve overriding goals, such as public health, the rights of others, morality, public order, the general welfare in a democratic society and national security. ...

105. Public health is most often cited by States as a basis for restricting human rights in the context of HIV. Many such restrictions, however, infringe on the principle of non-discrimination, for example when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum. ...

...

127. There is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status. According to current international health regulations, the only disease which requires a certificate for international travel is yellow fever [footnote omitted]. Therefore, any restrictions on these rights based on suspected or real HIV status alone, including HIV screening of international travellers, are discriminatory and cannot be justified by public-health concerns.

128. Where States prohibit people living with HIV from longer-term residency due to concerns about economic costs, States should not single out HIV/Aids, as opposed to comparable conditions, for such treatment and should establish that such costs would indeed be incurred in the case of the individual alien seeking residency. In

considering entry applications, humanitarian concerns, such as family reunification and the need for asylum, should outweigh economic considerations."

35. The report of the International Task Team on HIV-related Travel Restrictions, convened by UNAIDS in 2008, contained the following findings:

"The Task Team confirmed that HIV-specific restrictions on entry, stay and residence based on HIV status are discriminatory, do not protect the public health and do not rationally identify those who may cause an undue burden on public funds. In particular, the Task Team made the following findings:

– The Task Team found no evidence that HIV-related restrictions on entry, stay and residence protect the public health and was concerned that they may in fact impede efforts to protect the public health.

...

– Restrictions on entry, stay and residence that specify HIV, as opposed to comparable conditions, and/or are based on HIV status alone are discriminatory.

– Exclusion or deportation of HIV-positive people to avoid potential costs of treatment and support should be based on an individual assessment of the actual costs that are likely to be incurred, should not single out HIV, and should not override human rights considerations or humanitarian claims."

IV. COMPARATIVE DATA

36. In May 2009 UNAIDS published the survey "Mapping of restrictions on the entry, stay and residence of people living with HIV". The latest version of the survey, updated in May 2010, is available on its website.

37. According to the survey, 124 countries, territories and areas worldwide have no HIV-specific restrictions on entry, stay or residence. The other 52 countries, territories or areas impose some form of restriction on the entry, stay and residence of people living with HIV based on their HIV status. The latter category includes seven Council of Europe member States.

38. None of the Council of Europe member States refuses to issue a visa or allow entry for a short-term stay on account of the individual's HIV status. Three States (Armenia, Moldova and Russia) may deport individuals once their HIV-positive status is discovered. Those States and three others (Andorra, Cyprus and Slovakia) require the person applying for a residence permit to show that he or she is HIV-negative. Finally, Lithuania requires a declaration as to whether the individual has a "disease posing a threat to public health".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

39. The applicant complained under Articles 8, 13, 14 and 15 of the Convention that the decision to refuse him authorisation to reside in Russia had been disproportionate to the legitimate aim of the protection of public health and had disrupted his right to live with his family. The Court notes that the focal point of the present application is the difference of treatment to which the applicant was subjected on account of his health status when applying for a residence permit. Having regard to the circumstances of the case and bearing in mind that it is master of the characterisation to be given in law to the facts of the case (see *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I), the Court considers it appropriate to examine the applicant's grievances from the standpoint of Article 14 of the Convention, taken in conjunction with Article 8 (compare *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 70, Series A no. 94). Those provisions read as follows:

Article 8

"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

"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."

A. The parties' submissions

1. The Government

40. The Government submitted that the applicant still lived in the Oryol Region and that, given his family ties and health condition, he had not been deported. The refusal of a residence permit did not interfere with his right to respect for his family life and, even assuming that it did, such interference had a legal basis in section 7(1)(13) of the Foreign Nationals Act. It was also justified by the Russian authorities' concerns about the massive spread of the HIV epidemic and its socio-economic and demographic consequences in the Russian Federation, the threat it posed to personal, public and national security and to the existence of humankind, and the need to ensure the protection of the rights and lawful interests of the population. The refusal of a residence permit was a necessary measure directed at preventing and combating HIV infection.

41. The Government pointed out that the applicant had the right to remain in the Russian territory as long as he complied with the regulations on the entry, exit and stay of foreign nationals. As he was not eligible for a residence permit but did not need a visa to enter Russia for a period of up to ninety days, he could leave Russia every ninety days and then return. Moreover, the refusal of a residence permit did not prevent the applicant from conducting his family life in Uzbekistan, where his wife and daughter could join him (the Government referred to the cases of *Slivenko v. Latvia* [GC], no. 48321/99, ECHR 2003-X, and *Abdulaziz, Cabales and Balkandali*, cited above).

42. In their additional observations, the Government submitted that the potential danger which the applicant presented for the general public was confirmed by the prevalence of the HIV infection in the world and also by the fact that he had been convicted of serious and particularly serious criminal offences in Uzbekistan. The domestic courts were not required to examine his individual situation or the information on his state of health or lifestyle because such considerations were legally irrelevant in determining the present case.

2. The applicant

43. The applicant disputed the Government's submission that the domestic authorities had taken into account his state of health and family situation. He pointed out that these circumstances had not been mentioned in the domestic judgments and that the Constitutional Court's decision of 12 May 2006 had remained a mere declaration without practical effect. He believed that he had not yet been deported solely because of the "wait and see" attitude of the Russian authorities, who had initially awaited the outcome of the domestic proceedings and were now waiting for the

Strasbourg Court's judgment. In addition, when referring to his health condition, the Government did not specify whether they meant the HIV infection in general or its recent related complication in the form of aggravated tuberculosis, which required in-patient treatment and rendered him unfit for travel.

44. As regards the existence of an interference, the applicant submitted that section 5 of the Foreign Nationals Act limited his lawful stay in Russia to ninety days and that no further extension was possible by virtue of section 7, which required him to produce a certificate showing that he was HIV-negative. He learnt of the infection only after he had moved to Russia and married a Russian national and he could not therefore have foreseen that he would not be able to obtain residence in Russia. His entire family, including his mother, was in Russia and his wife and daughter were born there. He had solid social, economic and personal connections in Russia, whereas he had no relatives, work or accommodation in Uzbekistan. In the applicant's opinion, these elements distinguished his case from that of *Slivenko* (cited above), in which the Russian authorities had provided the head of the Slivenko family with a flat in Kursk.

45. As to the proportionality of the alleged interference with his family life, the applicant emphasised that the Russian courts had proceeded from the presumption that he presented a grave danger to the Russian population's health. They had not analysed his lifestyle or explained why it could lead to an epidemic or pose a threat to the national security, public order or economic well-being of Russia, or undermine the rights and freedoms of others. He did not engage in promiscuous sexual contacts or in drug abuse and he respected the security measures appropriate for his health condition. That the Russian courts did not heed these circumstances was indicative of inadmissible discrimination on account of his health status.

3. The third-party intervener

46. Interights, as the third-party intervener, submitted firstly that the general non-discrimination provisions of the key universal and regional human rights treaties were interpreted as prohibiting discrimination on the basis of HIV or Aids status, actual or presumed. This interpretation had been adopted by the United Nations Human Rights Committee, the United Nations Committee on Economic, Social and Cultural Rights, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the United Nations Committee on the Rights of the Child. In the Declaration of Commitment on HIV/Aids adopted by the United Nations General Assembly in August 2001, member States set out their commitment to adopt and enforce legislation aimed at eliminating all forms of discrimination against people living with HIV/Aids. At European level, the Parliamentary Assembly of the Council of Europe had called for reinforcement of Article 14 of the Convention with respect to people living

with HIV/Aids and for their enhanced protection in both the public and private sectors.

47. Secondly, Interights argued that, in addition to the general anti-discrimination standards existing under international law, people living with HIV/Aids should benefit from the prohibition of discrimination on account of disability existing in the Court's case-law and in other legal systems. The applicability of the disability anti-discrimination framework established under the United Nations Convention on the Rights of Persons with Disabilities to people living with HIV/Aids was endorsed by the United Nations Office of the High Commissioner for Human Rights, the World Health Organization and UNAIDS in their joint report "Disability and HIV policy brief" (2009). The disability-based approach to HIV was further supported by the legislation and practice of many countries that had expressly or implicitly extended their disability laws to include HIV status (Canada, Germany, Norway, the United Kingdom and the United States of America). In *Glor v. Switzerland* (no. 13444/04, § 80, ECHR 2009), the Court also recognised that Article 14 of the Convention protected against discrimination based on disability.

48. International law did not recognise a right to settle in a foreign country and travel restrictions might not be illegitimate *per se* when applied in a neutral fashion; however, those same restrictions would be in breach of anti-discrimination standards if they singled out persons living with HIV for differential treatment without an objective justification. In assessing whether a difference of treatment was justified, the Court had identified a number of particularly vulnerable groups – for instance, Roma, homosexuals, persons with mental disabilities – that had suffered a history of prejudice and social exclusion, in respect of which the State had a narrower margin of appreciation. In the third party's submission, people living with HIV formed one such group, as they had suffered from widespread stigma and ostracism, including in certain regions of the Council of Europe, and the State should be afforded only a narrow margin of appreciation in choosing measures that subject persons living with HIV to differential treatment.

49. Interights identified two possible justifications for differential treatment on account of HIV status: one related to public-health concerns and the other related to public-cost concerns. With regard to public-health concerns, it pointed to the existing consensus among experts and international bodies working in the field of public health that such measures were ineffective in preventing the spread of HIV (reference was made to documents and statements by the World Health Organization, the United Nations Office of the High Commissioner for Human Rights, the IOM, the Office of the United Nations High Commissioner for Refugees, the World Bank, the International Labour Organization, the European Parliament and the European Commission). In 2008 the UNAIDS International Task Team

on HIV-related Travel Restrictions found no evidence that HIV-related travel restrictions protected public health. Although HIV was a transmissible disease, it was not contagious in the sense of being spread by airborne particles or by casual contact, but rather by specific behaviour, such as unprotected sexual relations or the use of contaminated syringes, which enabled HIV-negative persons to take steps to protect themselves against transmission. The public-health justification was further undermined by the argument that travel restrictions did not apply to leaving and returning nationals or short-stay foreign tourists. Such measures could also be harmful to the public health of the country's own nationals because they created a misplaced sense of security by portraying HIV/Aids as a foreign problem and underplaying the need to engage in safe behaviour and because they prompted migrants to avoid HIV screening and to remain in the country illegally, which cut them off from HIV prevention and care services.

50. In the third party's view, national immigration policies demonstrated that most countries in the world shared the understanding that HIV-related travel restrictions were not an efficient measure to protect public health. This was implicitly borne out by the fact that a majority of States did not enforce any such restrictions and that a number of countries had recently lifted such restrictions after recognising that HIV did not pose a threat to public health (China, Namibia and the United States of America). Other countries had considered the possibility of implementing HIV-related travel restrictions but had ultimately rejected it, thereby reflecting the absence of a rational connection between such measures and effective prevention (Germany and the United Kingdom). Moreover, it was acknowledged that less restrictive but more effective alternatives for the protection of public health were available, including voluntary testing and counselling, and information campaigns.

51. On the issue of preventing excessive spending in publicly funded health-care systems, Interights pointed to the Court's finding in *G.N. and Others v. Italy* (no. 43134/05, § 129, 1 December 2009), in which it held that in the context of health policies insufficient resources cannot be used as a justification for adopting measures based on arbitrary criteria. Immigration restrictions that single out HIV while omitting other equally costly conditions such as cardiovascular or kidney disease appear to be arbitrary and discriminatory. Furthermore, public cost-related restrictions should be based on the individualised assessment of a person's health and financial circumstances rather than on the mere presence of a certain medical condition. The third party referred in this connection to the recommendations contained in the UNAIDS/IOM statement (see paragraph 33 above) and the case-law of the Supreme Court of Canada, which held that if the need for potential services were considered only on the basis of the classification of the impairment rather than on its particular

manifestation, the assessment would become general rather than individual and would result "in an automatic exclusion for all individuals with a particular disability, even those whose admission would not cause, or would not reasonably be expected to cause, excessive demands on public funds" (*Hilewitz v. Canada (Minister of Citizenship and Immigration)*, and *De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, § 56).

B. Admissibility

52. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. *Applicability of Article 14 of the Convention taken in conjunction with Article 8*

(a) Whether the facts of the case fall "within the ambit" of Article 8

53. The Court reiterates at the outset that the right of an alien to enter or to settle in a particular country is not guaranteed by the Convention. Where immigration is concerned, Article 8 or any other Convention provision cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory (see *Gül v. Switzerland*, 19 February 1996, § 38, *Reports* 1996-I). Neither party contests this. However, although Article 8 does not include a right to settle in a particular country or a right to obtain a residence permit, the State must nevertheless exercise its immigration policies in a manner which is 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 subject to discrimination (see *Abdulaziz, Cabales and Balkandali*, cited above, §§ 59-60, and *Nolan and K. v. Russia*, no. 2512/04, § 62, 12 February 2009).

54. As regards protection against discrimination, the Court notes that Article 14 only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence because it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among many other authorities, *Sahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII). The application of Article 14 does not necessarily presuppose the violation

of one of the substantive rights protected by the Convention. What is necessary, and also sufficient, is that the facts of the case fall "within the ambit" of one or more of the Articles of the Convention or its Protocols (see *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II).

55. The applicant is an Uzbek national of Russian origin who has been living in Russia since 2003. Admittedly, not all settled migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy "family life" there within the meaning of Article 8 (see *Maslov v. Austria* [GC], no. 1638/03, § 63, ECHR 2008). However, the concept of "family life" must at any rate include the relationships that arise from a lawful and genuine marriage (see *Abdulaziz, Cabales and Balkandali*, cited above, § 62), such as that contracted by the applicant with his Russian spouse and in which their child was born. In these circumstances, the Court finds that the facts of the case fall "within the ambit" of Article 8 of the Convention.

(b) Whether the applicant's health status was covered by the term "other status" within the meaning of Article 14

56. Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 61 and 70, ECHR 2010, and *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23). It lists specific grounds which constitute "status" including, *inter alia*, sex, race and property. However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see *Engel and Others v. the Netherlands*, 8 June 1976, § 72, Series A no. 22, and *Carson and Others*, cited above, § 70) and the inclusion in the list of the phrase "any other status" (in French "*toute autre situation*"). The words "other status" have generally been given a wide meaning (see *Carson and Others*, cited above, § 70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift v. the United Kingdom*, no. 7205/07, §§ 56-58, 13 July 2010).

57. Following the disclosure of the applicant's HIV-positive status, it has become legally impossible for him to be admitted for lawful residence in Russia because of a legal provision restricting issuance of residence permits to aliens who are unable to show their HIV-negative status. Although Article 14 does not expressly list a health status or any medical condition among the protected grounds of discrimination, the Court has recently recognised that a physical disability and various health impairments fall within the scope of this provision (see *Glor*, §§ 53-56, and *G.N. and Others*, § 119, both cited above). The Court notes the view of the United

Nations Commission on Human Rights that the term "other status" in non-discrimination provisions in international legal instruments can be interpreted to cover health status, including HIV infection (see paragraph 29 above). This approach is compatible with Recommendation 1116 (1989) of the Parliamentary Assembly of the Council of Europe, which called for reinforcement of the non-discrimination clause in Article 14 by including health among the prohibited grounds of discrimination (see paragraph 31 above) and with the United Nations Convention on the Rights of Persons with Disabilities which imposed on its States Parties a general prohibition of discrimination on the basis of disability (see paragraph 32 above). Accordingly, the Court considers that a distinction made on account of an individual's health status, including such conditions as HIV infection, should be covered – either as a disability or a form thereof – by the term "other status" in the text of Article 14 of the Convention.

58. It follows that Article 14 of the Convention taken in conjunction with Article 8 is applicable in the present case.

2. Compliance with Article 14 of the Convention taken in conjunction with Article 8

(a) Whether the applicant was in an analogous position to other aliens

59. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV, and *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).

60. As the spouse of a Russian national and father of a Russian child, the applicant was eligible to apply for a residence permit by virtue of his family ties in Russia (see paragraph 20 above). For his application to be completed, he was required to undergo a medical examination to ascertain his HIV status and enclose a certificate showing that he was not HIV-positive (see paragraph 21 above). After the test revealed his HIV-positive status, his application for a residence permit was rejected on account of the absence of the mandatory HIV clearance certificate. This was the only ground referred to in the decisions of the Federal Migration Service and the Russian courts (see paragraphs 11-13 above). In so far as the Government claimed that the applicant also posed a threat to public order because he had been previously convicted of serious crimes in Uzbekistan, the Court observes that their allegation was not supported by any specific evidence or documents and that the domestic authorities had obviously refused him a residence permit because of his HIV status rather than because of any criminal history he may have had.

61. The Court therefore considers that the applicant can claim to be in a situation analogous to that of other foreign nationals for the purpose of an application for a residence permit on account of their family ties in Russia.

(b) Whether the difference in treatment was objectively and reasonably justified

62. Once an applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified (see *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III). Such justification must be objective and reasonable or, in other words, it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, subject matter and background (see *Burden*, § 60; *Carson and Others*, § 61; and *Clift*, § 73, all cited above).

63. If a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question. The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice could entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs (see *Alajos Kiss v. Hungary*, no. 38832/06, § 42, 20 May 2010). In the past, the Court has identified a number of such vulnerable groups that suffered different treatment on account of their sex (see *Abdulaziz, Cabales and Balkandali*, cited above, § 78, and *Burghartz v. Switzerland*, 22 February 1994, § 27, Series A no. 280-B), sexual orientation (see *Schalk and Kopf v. Austria*, no. 30141/04, § 97, ECHR 2010, and *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, ECHR 1999-VI), race or ethnicity (see *D.H. and Others*, cited above, § 182, and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII), mental faculties (see *Alajos Kiss*, cited above, § 42, and, *mutatis mutandis*, *Shtukaturov v. Russia*, no. 44009/05, § 95, ECHR 2008), or disability (see *Glor*, cited above, § 84).

64. Since the onset of the epidemic in the 1980s, people living with HIV/Aids have suffered from widespread stigma and exclusion, including within the Council of Europe region (see, in particular, Parliamentary Assembly Recommendation 1116 (1989) on Aids and human rights, and point 9.2 of Resolution 1536 (2007) on HIV/Aids in Europe, both cited at paragraph 31 above). In the early years of the epidemic when HIV/Aids

diagnosis was nearly always a lethal condition and very little was known about the risk of transmission, people were scared of those infected due to fear of contagion. Ignorance about how the disease spreads has bred prejudice which, in turn, has stigmatised or marginalised those who carry the virus. As the routes of transmission of HIV/Aids became better understood, it was recognised that HIV infection could be traced to specific behaviours – such as same-sex sexual relations, drug injection, prostitution or promiscuity – that were already stigmatised in many societies, thereby creating a false nexus between the infection and personal irresponsibility and reinforcing other forms of stigma and discrimination, such as racism, homophobia or misogyny. Despite the recent considerable progress in HIV prevention and improved access to HIV treatment, stigma and related discrimination against people living with HIV/Aids have remained a subject of great concern for all international organisations active in the field of HIV/Aids. The United Nations Declaration of Commitment on HIV/Aids noted that the stigma "increase[d] the impact of the epidemic on individuals, families, communities and nations" (see paragraph 28 above) and United Nations Secretary-General Ban Ki-moon acknowledged that "to greater or lesser degrees, almost everywhere in the world, discrimination remain[ed] a fact of daily life for people living with HIV" (6 August 2008). The Court therefore considers that people living with HIV are a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on the basis of their HIV status.

65. The existence of a European consensus is an additional consideration relevant for determining whether the respondent State should be afforded a narrow or a wide margin of appreciation (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 81, ECHR 2007-V, and *S.L. v. Austria*, no. 45330/99, § 31, 9 January 2003). Where there is a common standard which the respondent State has failed to meet, this may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases (see *Tănase v. Moldova* [GC], no. 7/08, § 176, ECHR 2010, and *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 85, ECHR 2008). The Court observes that only six of the forty-seven member States of the Council of Europe require an individual applying for a residence permit to submit HIV-negative test results, that one State requires a declaration to that effect, and that only three States make provision for the deportation of aliens who are found to be HIV-positive (see paragraphs 37 and 38 above). The other Contracting States do not impose any restrictions on the entry, stay or residence of people living with HIV on account of their HIV status. It appears therefore that the exclusion of HIV-positive applicants from residence does not reflect an established European consensus and has little support among the Council of Europe member

States. Accordingly, the respondent State is under an obligation to provide a particularly compelling justification for the differential treatment of which the applicant complained to have been a victim.

66. The Government put forward a number of aims pursued by the impugned restriction which appeared to follow closely the text of the Preamble to the HIV Prevention Act (see paragraphs 16 and 40 above). They did not explain how the alleged threats to national security and to the existence of humankind were relevant to the applicant's individual situation, what socio-economic or demographic consequences his presence in the Russian territory could entail or why the refusal of a residence permit would enhance the protection of the rights and interests of others. It transpires nevertheless from the Constitutional Court's decision that the restriction on temporary residence of HIV-positive foreign nationals had the aim of ensuring the protection of public health (see paragraph 25 above). While that aim is without doubt legitimate, it does not in itself establish the legitimacy of the specific treatment afforded to the applicant on account of his health status. It has to be ascertained whether there is a reasonable relationship of proportionality between the aim pursued and the means employed.

67. The Court has consistently held that it takes into account relevant international instruments and reports in order to interpret the guarantees of the Convention and to establish whether there is a common standard in the field concerned. It is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them (see *Tănase*, § 176, and *Demir and Baykara*, §§ 85-86, both cited above). In the present case, the Court considers undoubtedly relevant the third party's submission on the existing consensus among experts and international organisations active in the field of public health who agreed that travel restrictions on people living with HIV could not be justified by reference to public-health concerns. The World Health Organization rejected travel restrictions as an ineffective method of preventing the spread of HIV as long ago as 1987 (see the "Report on the consultation on international travel and HIV infection", 2-3 March 1987). The same view has since been expressed by the United Nations Office of the High Commissioner for Human Rights (see the extracts from the International Guidelines on HIV/Aids and Human Rights, cited in paragraph 34 above), the IOM (see the UNAIDS/IOM statement, cited in paragraph 33 above), the United Nations High Commissioner for Refugees ("Note on HIV/Aids and the protection of refugees, IDPs and other persons of concern", 2006), the World Bank ("Legal aspects of HIV/Aids", 2007), and, most recently, the International Labour Organization ("Recommendation concerning HIV and Aids and the world of work" (no. 200), 2010). At the European level, the European Parliament and the European Commission acknowledged that "there are no objective reasons for a travel ban on HIV infected people" (Resolution of

22 May 2008). The respondent Government, for their part, did not adduce any expert opinions or scientific analysis that would be capable of gainsaying the unanimous view of the international experts.

68. Admittedly, travel restrictions are instrumental for the protection of public health against highly contagious diseases with a short incubation period, such as cholera or yellow fever or, to take more recent examples, severe acute respiratory syndrome (SARS) and "avian influenza" (H5N1). Entry restrictions relating to such conditions can help to prevent their spread by excluding travellers who may transmit these diseases by their presence in a country through casual contact or airborne particles. However, the mere presence of an HIV-positive individual in a country is not in itself a threat to public health: HIV is not transmitted casually but rather through specific behaviours that include sexual relations and the sharing of syringes as the main routes of transmission. This does not put prevention exclusively within the control of the HIV-positive non-national but rather enables HIV-negative persons to take steps to protect themselves against the infection (safer sexual relations and safer injections). Excluding HIV-positive non-nationals from entry and/or residence in order to prevent HIV transmission is based on the assumption that they will engage in specific unsafe behaviour and that the national will also fail to protect himself or herself. This assumption amounts to a generalisation which is not founded in fact and fails to take into account the individual situation, such as that of the applicant. In addition, under Russian law any form of behaviour by an HIV-positive person who is aware of his or her HIV-status that exposes someone else to the risk of HIV infection is in itself a criminal offence punishable by deprivation of liberty (see paragraph 27 above). The Government did not explain why these legal sanctions were not considered sufficient to act as a deterrent against the behaviours that entail the risk of transmission.

69. Furthermore, it appears that Russia does not apply HIV-related travel restrictions to tourists or short-term visitors. Nor does it impose HIV tests on Russian nationals leaving and returning to the country. Taking into account that the methods of HIV transmission remain the same irrespective of the duration of a person's presence in the Russian territory and his or her nationality, the Court sees no explanation for a selective enforcement of HIV-related restrictions against foreigners who apply for residence in Russia but not against the above-mentioned categories, who actually represent the great majority of travellers and migrants. There is no reason to assume that they are less likely to engage in unsafe behaviour than settled migrants. In this connection, the Court notes with great concern the Government's submission that the applicant should have been able to circumvent the provisions of the Foreign Nationals Act by leaving and re-entering Russia every ninety days. This submission casts doubt on the genuineness of the Government's public-health concerns relating to the

applicant's presence in Russia. In addition, the existing HIV tests to which an applicant for Russian residence must submit will not always identify the presence of the virus in some newly infected persons, who may happen to be in the time period during which the test does not detect the virus and which may last for several months. It follows that the application of HIV-related travel restrictions only in the case of prospective long-term residents is not an effective approach in preventing the transmission of HIV by HIV-positive migrants.

70. The differential treatment of HIV-positive long-term settled migrants as opposed to short-term visitors may be objectively justified by the risk that the former could potentially become a public burden and place an excessive demand on the publicly funded health-care system, whereas that risk would not arise for the latter, who could seek treatment elsewhere. However, such economic considerations for the exclusion of prospective HIV-positive residents are only applicable in a legal system where foreign residents may benefit from the national health-care scheme at a reduced rate or free of charge. This is not the case in Russia: non-Russian nationals have no entitlement to free medical assistance, except emergency treatment, and have to pay for all medical services themselves (see paragraph 23 above). Thus, irrespective of whether or not the applicant obtained a residence permit in Russia, he would not be eligible to draw on Russia's public health-care system. Accordingly, the risk that he would represent a financial burden on the Russian health-care system has not been convincingly established.

71. Finally, the Court notes that travel and residence restrictions on persons living with HIV may not only be ineffective in preventing the spread of the disease, but may also be actually harmful to the public health of the country. Firstly, migrants might remain in the country illegally so as to avoid HIV screening, in which case their HIV status would be unknown both to the health authorities and to the migrants themselves. This would prevent them from taking the necessary precautions, avoiding unsafe behaviours and accessing information on HIV and HIV prevention services. Secondly, the exclusion of HIV-positive foreigners may create a false sense of security by encouraging the local population to consider HIV/Aids as a "foreign problem" that has been taken care of by deporting HIV-positive foreigners and not allowing them to settle, so that the local population feels no need to engage in safe behaviours.

72. In the light of the foregoing, the Court finds that, although the protection of public health was indeed a legitimate aim, the Government were unable to adduce compelling and objective arguments to show that this aim could be attained by the refusal to issue the applicant a residence permit on account of his health status. A matter of further concern for the Court is the blanket and indiscriminate nature of the impugned measure. Section 7(1)(13) of the Foreign Nationals Act expressly provides that any

application for a residence permit should be refused if the applicant is unable to show his or her HIV-negative status. Section 11(2) of the HIV Prevention Act further provides for the deportation of non-nationals who are found to be HIV-positive. Neither provision leaves any room for an individualised assessment based on the facts of a particular case. Although the Constitutional Court indicated that the provisions did not exclude the possibility of having regard to humanitarian considerations in exceptional cases (see the decision of 12 May 2006 cited in paragraph 24 above), it is not clear whether that decision gave the domestic authorities discretion to override the imperative regulation of section 7(1)(13) of the Foreign Nationals Act.

73. In the instant case, the Federal Migration Service, the District Court and the Regional Court gave no heed to the Constitutional Court's position. Although the applicant's appeal statement expressly relied on the decision of 12 May 2006 and the relevant international instruments, the courts rejected the applicant's application for a residence permit solely by reference to the legal requirements of the Foreign Nationals Act, without taking into account the actual state of his health or his family ties in Russia. In rejecting the applicant's request for supervisory review, the Regional Court expressly stated that the courts were not obliged to have regard to any humanitarian considerations and that the provisions of section 7(1)(13) requiring the production of a certificate showing HIV-negative status could not in any event be disregarded (see paragraph 15 above). The Government confirmed in their final submissions to the Court that the applicant's individual situation was of no legal relevance and that the domestic courts had not been required to take into account the information on his state of health or his family ties (see paragraph 42 above). The Court considers that such an indiscriminate refusal of a residence permit, without an individualised judicial evaluation and solely based on a health condition, cannot be considered compatible with the protection against discrimination enshrined in Article 14 of the Convention (see, *mutatis mutandis, Alajos Kiss*, cited above, § 44).

74. Taking into account that the applicant belonged to a particularly vulnerable group, that his exclusion has not been shown to have a reasonable and objective justification, and that the contested legislative provisions did not make room for an individualised evaluation, the Court finds that the Government overstepped the narrow margin of appreciation afforded to them in the instant case. The applicant has therefore been a victim of discrimination on account of his health status, in violation of Article 14 of the Convention taken in conjunction with Article 8.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

75. The applicant also complained under Article 6 § 1 of the Convention that the domestic courts did not inform him that he had the right to ask for an examination of his complaint in private and that they did not order a closed session of their own motion.

76. The Court considers that, although the applicant had no legal background and was not represented, he could have stated his wish to have his case heard behind closed doors in plain language or at least mentioned this wish in his statement of claim before the domestic courts. Lacking any indication of the applicant's preference as to the type of proceedings, the domestic courts were under no obligation to exclude the public of their own motion. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. 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

78. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

79. The Government submitted that the claim was excessive.

80. The Court accepts that the applicant suffered distress and frustration because of the discrimination against him on account of his health status. Making its assessment on an equitable basis, the Court awards the applicant EUR 15,000, plus any tax that may be chargeable on that amount.

B. Costs and expenses

81. The applicant also claimed 14,700 Russian roubles for legal costs and translation expenses.

82. The Government submitted that reimbursement was possible only in respect of the costs and expenses incurred in the proceedings before the Court.

83. Under the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as

to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 350 for costs and expenses incurred in the domestic and Strasbourg proceedings, plus any tax that may be chargeable to the applicant.

C. Default interest

84. 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 UNANIMOUSLY

1. *Declares* the complaint concerning the refusal of a residence permit admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 350 (three hundred and fifty euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant on these amounts, to be converted into Russian roubles at the rate applicable at the date of settlement;
   (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* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Nina Vajić
President