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**Unsichtbare Minderheiten
Invisible Minorities**

Verlag Dr. Kovač

The intention of conference organisers was to put this complex and important area of European Public Law in the scientific perspective, taking into consideration the regulations and practice of the European Union, member states and of the Republic of Croatia. Moreover, and even more important, it was not the lack of regulation that has driven us toward this issue; rather it is the general state of consciousness that needs to be re-calibrated according to unprecedented social complexities that continue to emerge in modern Europe.

We owe a special gratitude to the *Hanns Seidel Stiftung* that supported publishing of the collected papers in your hands.

We are sincerely pleased that *Verlag dr. Kovač* has recognized the importance of this legal phenomenon offering continuous support to our scientific endeavours by publishing the Conference outcomes in its edition.

Rijeka/Ludwigsburg, 12 June 2012

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Minderheiten und ihre Berücksichtigung im nationalen und internationalen Recht

*Bernd Baron von Maydell**

I. Vorbemerkung

Lassen Sie mich mit einer persönlichen Vorbemerkung beginnen.

Die Probleme von Minderheiten waren Gegenstand meiner ersten wissenschaftlichen Arbeit, meiner Dissertation, in der ich mich mit den Rechten nationaler Minderheiten auf eigene Schulen befasst habe¹. Die besondere Situation in den Nachfolgestaaten des ehem. Österreich/Ungarischen Reiches waren ein Gegenstand meines damaligen Interesses und haben zu verschiedenen Kontakten mit Kollegen aus dieser Region geführt².

Daneben besteht eine noch ältere Beziehung zu dem Minderheitenthema. Ich stamme aus dem Baltikum aus einer Familie, die mehrere hundert Jahre zur herrschenden Schicht der Gutsherren in Estland gehört hat³. Diese herrschende Schicht ist dann nach dem 1. Weltkrieg zur Minderheit geworden, allerdings einer Minderheit, die von einem fortschrittlichen Minderheitenstatut profitiert hat⁴.

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¹ *von Maydell*, Inhalt und Funktionen eines modernen Volksgruppenrechts, dargestellt am Anspruch der Volksgruppen auf eigene Schulen in Deutschland, Jur. Diss., Marburg 1960.

² Jahrzehnte nach dem Abschluss der Dissertation ergaben sich mit einem Mitglied des Sachverständigen-Ausschusses der ILO (Prof. *Vilfan*) am Rande der gemeinsamen Arbeit Diskussionen über die Minderheitenprobleme nach dem Untergang der Österreich-Ungarischen Doppelmonarchie. In diese Diskussion war auch die Frau von Prof. *Vilfan*, *Maria Vilfan*, einbezogen, die auf Grund eigener Arbeiten mit der Minderheitenproblematik in Jugoslawien bestens vertraut war.

³ Zur Geschichte vgl. *von Pistoikors*, Die Deutschen in der Geschichte der baltischen Länder Estland und Lettland, in: von Pistoikors (Hrsg.), Deutsche Geschichte im Osten Europas, Baltische Länder, 1994, S. 13 ff.; vgl. auch *von Rauch*, Geschichte der baltischen Staaten, 1986.

⁴ Dazu *Schlau*, Die Deutsch-Balten, 1995, S. 87 ff.; vgl. auch *Schmidt*, Geschichte des Baltikums, 2. Aufl. 1993, S. 268 ff.

tional legal systems. Universal political documents (notably the UN and the ILO) had a direct impact on EU activities in the context of a global fight against the pandemic and inclusion into relevant campaigns, and their nexus is discernible with codes of good practice of European companies and those offering health services. However, a higher prevalence of HIV in Europe is possible *pro futuro*, which in the context of work, freedom of movement and social security system benefits opens up certain dilemmas and poses challenges to the European social model.

The phase that has to be permanently improved due to its importance and influence on the protection of fundamental human rights of HIV-infected workers is the phase of further education in cooperation with social partners, i.e. management and workers' organisations. Protection of privacy and dignity in correlation with the right to confidentiality of testing and the right to work should be reviewed on the case-to-case basis avoiding thereby every stigmatisation and discrimination. However, there should be constant re-evaluation of the relationship of values protected by some decision or procedure. In other words, HIV-infected workers have the right to be integral part of any company and any employer since, on the basis of uncontested scientific knowledge, it is clear that the risk of infection at work is mostly very small. The work of health care professionals should be assessed carefully to avoid unnecessary procedures of denial of the right to work. Invasive medicine represents a certain specific category where there is a risk, but in these cases performance of work should be regulated by a mutual agreement between an HIV-infected worker and an employer, and not by unilateral moves of the administration. The role of the employer in modern European countries must be directed towards elimination of resistance of the working environment to infected workers and a proper attitude towards potential discrimination and stigmatisation. It is important thereby to pay attention to differences in the attitudes between women and men working with HIV-infected persons, since men are more prone to prejudice and homophobia, while women are more accepting of infected persons.⁷⁰ Thus we need the essential achievements and values advocated by diversity management, including diverse and inclusive workforce in the broadest sense of the word.

⁷⁰ Vest/Tarnoff/Carr/Vest/O'Brien, Factors Influencing a Manager's Decision to Discipline Employee for Refusal to Work with an HIV/AIDS Infected Coworker, in: *Employee Responsibilities and Rights Journal*, 15(2003), 1, pp. 32-34.

Human Rights of HIV-Positive People in the Light of the Case of Kiyutin v. Russia

Nives Mazur Kumrić*

"The HIV issue is a human rights issue. HIV prevention, treatment, care and support is a human rights priority, as much a challenge for leadership as it is to vulnerable communities".
Desmond Tutu, XVIII International AIDS Conference, Vienna, Austria, 23 July 2010

I. Introduction

The Case of Kiyutin v. Russia (application no. 2700/10) tackles the highly complex and sensitive issue of discrimination against HIV-positive people and represents the landmark case of the European Court of Human Rights (hereinafter: ECHR) referring to human rights of people living with HIV. In this precedent case in which the judgement was delivered on 10 March 2011 and became final on 15 September 2011, the ECHR has strongly condemned the discrimination, stigmatization and marginalization of people infected with HIV. This way, the international community has not only paved the way for better and more efficient protection of HIV-positive people but also drawn attention to the complexity of the problem which is being faced by members of this large invisible minority group. The problem ranges from overcoming life-threatening conditions to various economic, social and political issues which, according to Kull, "highlight international injustices"¹. This case has affirmed the omnipresent prejudices against HIV-positive people, generated by social anomalies of a global nature such as homophobia, poverty, health care disparities, racism and other forms of discrimination.

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¹ Kull, HIV History, Illness, Transmission and Treatment, in: Cannon Poindexter (ed.), *Handbook of HIV and Social Work: Principles, Practice, and Populations*, Hoboken 2010, p. 3.

Discrimination based on health status or more precisely the difference in treatment to which the applicant was subjected as an HIV-positive person when applying for a residence permit was put under the spotlight in the case of Kiyutin v. Russia. The proceedings were initiated before the ECHR by Mr Viktor Viktorovich Kiyutin, a national of Uzbekistan, pursuant to the application of 18 December 2009 against the Russian Federation. The dispute emerged from Kiyutin's (unsuccessful) attempts to obtain a residence permit in Russia, on the occasion of which the only drawback to residence issue referred to Kiyutin's health status. The chronology of respective facts gets us back to the year 2003 when the applicant moved to Oryol, Russia, where he married a Russian woman and submitted an application for a residence permit. Mandatory HIV screening of applicants is one of the preconditions for obtaining the residence permit in Russia and the application is rejected if applicants are HIV-positive. Due to the fact that Kiyutin tested positive for HIV, the final instance of the Oryol Regional Court rejected his application for a residence permit on 13 October 2004. In the meantime, Kiyutin got a daughter in Russia in 2004. The complexity of the new family situation encouraged Kiyutin to file a new application for a temporary residence permit in 2009. Acting in compliance with section 7 § 1 (13) of the Russian Foreign Nationals Act which prohibits issue of residence permits to foreign nationals infected by HIV, later that same year, the Federal Migration Service made the decision that qualified Kiyutin as an unlawful resident in Russia. Consequently, in his application before the ECHR Kiyutin claimed that he had been discriminated against by the Russian authorities on account of his health status. Although he was aware of the strict rules set out by the Russian legislation with respect to immigration of HIV-positive people, Kiyutin claimed that Russian courts, when deciding on residence permits, should be more flexible and take into consideration specific circumstances of every individual case. In his concrete case, these specific circumstances encompassed his family situation and state of health. Taking into account the overall factual situation, the ECHR decided to try the case under Article 14 (prohibition of discrimination) in conjunction with Article 8 (the right to family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)².

Within the framework of this case, the below lines offer an overview of relevant international legal concepts and regulations relating to the controversial provisions of the Russian legislation as well as clarification of the judgement of the ECHR and their repercussions for the legal status of HIV-positive people.

² Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Rome, 4.XI.1950, CETS No. 005. For the wording of Protocol No. 11 see ETS No. 155 and for that of Protocol No. 14 see CETS No. 194.

II. Definitions of discrimination and appertaining standards of international law

Prohibition of discrimination is one of the most significant imperative norms within the system of human rights protection and thus has been incorporated into numerous international legal instruments and general state practice. Due to its frequent and continuous application followed by *opinio iuris* on mandatory acting in accordance with prohibition of discrimination, the principle of non-discrimination has gradually evolved into customary international law. Today, this principle is inseparably linked with the equality principle - both concepts are multidimensional and they imply legal, political and moral connotations³. Despite the importance of the principle of non-discrimination and the rich tradition of the codification of this segment of international law, no universal anti-discriminatory treaty which would cover all grounds of discrimination has been adopted so far.

The roots of prohibition of discrimination can be found in a number of historical documents such as Magna Charta Libertatum (1215) while in terms of contemporary international law, prohibition of discrimination can be traced in widely popular legal texts such as the Charter of the United Nations (1945)⁴ and the Convention Against Discrimination in Education (1960)⁵ which both include an anti-discriminatory provision *mutatis mutandis* integrated in several more re-

³ Smith, Textbook on International Human Rights, 4th edition, New York 2010, pp. 189-191; Moeckli, Equality and Non-discrimination, in: Moeckli/Shah/Sivakumaran (eds.), International Human Rights Law, New York 2010, pp. 189-209; Brownlie, Principles of Public International Law, 7th edition, New York 2008, pp. 572-575; Anbrassy et al., Međunarodno pravo 1, 2. izmijenjeno izdanje, Školska knjiga, Zagreb 2010, pp. 370-382; Barić Punda, Načelo nediskriminacije - jedno od temeljnih načela zaštite ljudskih prava i sloboda, Zbornik radova Pravnog fakulteta u Splitu, 1-2/2005, p. 27.

⁴ The relevant section of the Charter is the chapter on International Economic and Social Co-operation (IX) which calls for, *inter alia*, "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Charter of the United Nations, Official Gazette of the Republic of Croatia - International Treaties, No. 15/1993, pp. 305-335; corrections in No. 7/1994, p. 331.

⁵ Pursuant to Article 1 § 1, discrimination (in the context of education) is defined as 'any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education [...]'. Convention against Discrimination in Education, United Nations Educational, Scientific and Cultural Organization, Adopted by the General Conference at its eleventh session, Paris, 14 December 1960, available at: http://www.unesco.org/education/information/nfsunesco/pdf/DISCRJ_E.PDF (accessed 8 May 2012).

cent and referential anti-discriminatory documents: the International Convention on the Elimination of All Forms of Racial Discrimination (1965)⁶, the Convention on the Elimination of All Forms of Discrimination against Women (1979)⁷ and the Convention on the Rights of Persons with Disabilities (2006)⁸. Although often cited in the context of the principle of non-discrimination, the latter four documents stipulate prohibition of discrimination only in respect to specific cases (in education, racial discrimination, discrimination against women and persons with disabilities), so if searching for a universal definition of discrimination, one has to refer to the General Comment No. 18 on Non-Discrimination (1989) made by the UN Human Rights Committee concerning the International Covenant on Civil and Political Rights (1966). This Comment sees discrimination as '[...] any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'⁹.

The principle of non-discrimination is one of the key provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms

⁶ Article 1 § 1 specifies (racial) discrimination as '[...] any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. *International Convention on the Elimination of All Forms of Racial Discrimination*, A/RES/2106(XX) of 21 December 1965.

⁷ Article 1 sets forth discrimination (against women) as '[...] any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'. *Convention on the Elimination of All Forms of Discrimination Against Women*, A/RES/34/180 of 18 December 1979.

⁸ Pursuant to Article 2, discrimination (on the basis of disability) means 'any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation'. *Convention on the Rights of Persons with Disabilities*, A/RES/61/106, 13 December 2006.

⁹ UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: <http://www.unhcr.org/refworld/docid/453883fa8.html> (accessed 8 May 2012).

(1950) as well or more precisely its Article 14 governing that 'the enjoyment of the rights and freedoms set forth in this 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'¹⁰. Since this is an example of a non-independent rule, i.e. an accessory prohibition of discrimination in which discrimination is prohibited only in relation to the other rights enshrined in the Convention¹¹, there was the need to broaden this kind of determination of discrimination, which was realized in 2000 by adopting Protocol No. 12 to the Convention regulating general prohibition of discrimination¹².

Since the essence of the above case relates to analysis of Article 14, special attention should be paid to the standpoint of the ECHR in some of its judgments based on this Article. One of the most quoted judgments of the ECHR is undoubtedly that passed in the case of *Willis v. UK* (2002), which qualified discrimination as 'treating differently, without an objective and reasonable justification, persons in relevantly similar situations'¹³.

III. Applicable law in the Case of Kiyutin v. Russia – national and international regulations

1. Relevant Russian law and practice

In submissions by the Russian Government filed as a response to Kiyutin's application, the Government denied that the refusal of a residence permit had negative effects on the applicant's right to respect for his family life. The Government claimed that although the refusal could have negative repercussions for the applicant's family life, its actions could be justified by provisions of particu-

¹⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14*, loc. cit.

¹¹ *Thornberry/Amor Martin Estébanez*, *Minority Rights in Europe – A Review of the Work and Standards of the Council of Europe*, Council of Europe Publishing, Strasbourg Cedex 2004, pp 47-51.

¹² Article 1 § 1 states that 'the enjoyment of any right set forth by law 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'. *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4.XI.2000, CETS No. 177.

¹³ *Willis v. the United Kingdom*, Application no. 36042/97, 11 June 2002, para. 48.

lar Russian laws. This assertion primarily referred to Section 7 § 1 (13) of the Foreign Nationals Act (2002) foreseeing the possibility to refuse a temporary residence permit or to annul a previously issued residence permit "if the foreigner is unable to produce a certificate showing that he or she is not infected with HIV"¹⁴. Besides, the refusal was supported by the policy of the Russian authorities laid down in the HIV Prevention Act (1995), the purpose of which was to prevent "massive spread of the HIV epidemic and its socio-economic and demographic consequences in the Russian Federation" because possible epidemics represents a threat "to personal, public and national security and to the existence of humankind". The same Act in its Section 11 § 2 *expressis verbis* sets out the obligation of expulsion of HIV-positive aliens and includes the formulation that "foreign nationals and stateless persons who are on the Russian territory are to be deported once it is discovered that they are HIV-positive"¹⁵. Except for proposing several other possible solutions (e.g. leaving the country and coming back after every 90 days), the Russian Government pointed out that Russian courts, when deciding on residence permits, are not bound to take account of the factual background of a specific case on the basis of humanitarian considerations. In this concrete case, the factual background comprised Kiyutin's state of health, i.e. the clinical stage of his disease.

Apart from using the HIV Prevention Act (no. 38-FZ of 30 March 1995) and Foreign Nationals Act (no. 115-FZ of 25 July 2002) as a legal foundation for its allegations, the Russian Government referred to the case-law of the Russian Constitutional Court as well. On 12 May 2006, the Constitutional Court rejected a similar application for a residence permit submitted by an HIV-positive Ukrainian national with the identical family situation like Kiyutin's. Namely, the Ukrainian national lodged an appeal against the decision of the Constitutional Court and claimed that the HIV Prevention Act and the Foreign Nationals Act are discriminatory and that they violate his right to respect for his family life and his right to medical assistance. However, the Constitutional Court found the provisions of appertaining laws fully compliant with the Russian Constitution which considers the right to State protection of public health as one of the principal constitutional values.

The analyzed restrictive approach to the status of HIV-positive foreign travelers and aliens is not a novelty in the Russian legislation, but Russia has in-

herited it from the Soviet Union¹⁶. Although restrictive measures have been applied in Russia for decades, they have failed to eradicate HIV/AIDS. In fact, the fastest growing HIV infection is in Russia¹⁷ and international travellers and migrants have often been blamed for the spread of HIV/AIDS and other epidemic and pandemic diseases¹⁸.

2. Relevant international documents

According to estimates, more than 25 million people worldwide have died of AIDS since the time when the disease was first registered in 1981¹⁹. The pandemic character of this disease have enticed the international community to get involved into codification of regulations aimed at ensuring legal protection of the infected, including protection from discrimination²⁰. Due to the fact that anti-discriminatory regulations providing HIV-positive people with necessary protection represent the backbone of this paper, the following chapters cater for an overview of relating regulations of international law which had major effect on the positions of judges when deciding on the Kiyutin case.

¹⁴ *Kiyutin v. Russia*, Application no. 2700/10, 10 March 2011, para. 22.

¹⁵ *Kiyutin v. Russia*, op. cit., paras. 16, 40.

¹⁶ *Closen/Wojcik*, International Health Law, International Travel Restrictions and the Human Rights of Persons with AIDS and HIV, in: *Touro Journal of Transnational Law*, No. 2/1990, pp. 288-289.

¹⁷ *Gostin*, The Global Reach of HIV/AIDS: Science, Politics, Economics, and Research, in: *Emory International Law Review*, No. 1/2003, p. 6.

¹⁸ *Hendriks*, The Right to Freedom of Movement and the (Un)lawfulness of AIDS/HIV Specific Travel Restrictions from a European Perspective, in: *Nordic Journal of International Law*, Vol. 59/1990, p. 186.

¹⁹ *Kull*, op. cit., p. 7. MacFarlane draws attention to alarming data that HIV infects over 5000 people each day, while the death rate exceeds 4 million deaths per year. *MacFarlane*, Exclusion at the Borders: The Necessity of a Concrete International Law Responding to HIV/AIDS Travel Restrictions, in: *Journal of Migration and Refugee Issues*, No. 4/2007, p. 125. For a deeper insight into HIV/AIDS pandemic, including the latest statistics, see: *Walker*, The HIV/AIDS Pandemic and Human Rights: A Continuum Approach, in: *Florida Journal of International Law*, No. 2/2007, pp. 338-340; *Sidibé*, Getting to Zero New HIV Infections: The Prevention Revolution, in: *Brown Journal of World Affairs*, No. 2/2011, pp. 7-8.

²⁰ Nevertheless, Garrett is of the opinion that the pandemic's impact on many areas of daily life, such as economic activity, agricultural practices, childhood development, and the credibility of political leaders is still poorly understood. *Garrett*, Lessons of HIV/AIDS, *Foreign Affairs*, No. 4/2005, p. 52.

The leading role in defining international standards for protection of HIV-positive people have been played by the United Nations and the Council of Europe.

Accordingly, the United Nations Commission on Human Rights adopted, as early as in 1995, a resolution entitled the Protection of Human Rights in the Context of HIV and AIDS, provisions of which have served as a guiding light in a number of subsequent resolutions with the same name. The historically important regulation proclaimed by the preceding resolution, which terminated the possibility of existence of legal gaps regarding protection of HIV-positive people, encompasses the formulation 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'. The resolution also foresees active participation of states in the procedure of implementation of provisions of international law into their national legislation, inviting them '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'²¹. In compliance with the aforementioned, these views have been repeated in more recent resolutions of the Human Rights Committee (in 2006, the Committee was succeeded by the Human Rights Council), the last of which was Resolution A/HRC/RES/16/28 of 13 April 2011²².

When it comes to prominent documents in this area, one also has to mention the Declaration of Commitment on HIV/AIDS adopted by the United Nations General Assembly Resolution A/RES/S-26/2 of 27 June 2001. Seeking an effective response, § 58 of this Declaration calls upon the states to '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*

21 The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS), 3 March 1995, E/CN.4/RES/1995/44, available at: <http://www.unhcr.org/refworld/docid/3b000a00.html> (accessed 20 May 2012).

22 The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS): resolution adopted by the Human Rights Council, 13 April 2011, A/HRC/RES/16/28, available at: <http://www.unhcr.org/refworld/docid/4dbff5fc2.html> (accessed 20 May 2012). Bearing in mind the time when the judgment was delivered, it is no wonder that the last resolution stated in the judgment was Resolution no. 2005/84 of 21 April 2005. See: *Kiyutin v. Russia*, para. 29.

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'²³.

In June 2004, the Joint United Nations Programme on HIV/AIDS/International Organization for Migration (UNAIDS/IOM) published the Statement on HIV/AIDS-Related Travel Restrictions that gives the states a few valuable recommendations. Before all, item 1 of the Statement clearly lays down that '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)'. In the light of elimination of discrimination against HIV-positive people, the same item explicitly sets forth that 'exclusion of HIV-infected non-nationals adds to the climate of stigma and discrimination against people living with HIV and AIDS'. Furthermore, item 3 suggests that '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'. Finally, what particularly concerns the Kiyutin case is item 4 of the Statement stipulating individual approach in every concrete case and stating that 'any health-related travel restriction should only be imposed on the basis of an individual interview/examination'²⁴.

Significant contribution to formulation of anti-discriminatory regulations has been made by the Office of the UN High Commissioner for Human Rights which published, together with the UNAIDS, the International Guidelines on HIV/AIDS and Human Rights in 1998 (consolidated version of the 1998 and 2002 Guidelines dates from August 2006). Pursuant to § 127 of the Guidelines, 'there is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status'. The only exception to this conception is yellow fever which entails a certificate for international travel. The respective paragraph ends with the conclusion that 'any restrictions on these rights based on suspected or real HIV status alone, including HIV screening of interna-

23 Declaration of commitment on HIV/AIDS, A/RES/S-26/2, 27 June 2001.

24 UNAIDS/IOM Statement on HIV/AIDS-Related Travel Restrictions, June 2004, available at: <http://www.unhcr.org/refworld/docid/468249392.html> (accessed 21 May 2012).

tional travellers, are discriminatory and cannot be justified by public health concerns²⁵.

One of the legally binding documents of the UN in the sphere of protection of HIV-positive people is the Convention on the Rights of Persons with Disabilities which was adopted on 13 December 2006 and entered into force on 3 May 2008. Russia signed it on 24 September 2008 but has not ratified it yet²⁶. The generally accepted opinion on HIV-positive people spans the thesis that these people are "persons with disabilities", since they also 'have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others' (Article 1 § 2). Considering the rights protected by this Convention which were affected in our case, the following articles are deemed relevant: Article 5 – Equality and non-discrimination, Article 18 – Liberty of movement and nationality, and Article 23 – Respect for home and the family²⁷.

All the above goals of anti-discriminatory policies were acknowledged in the Report on the International Task Team on HIV-Related Travel Restrictions prepared by the UNAIDS in December 2008. In detailed findings of the Task Team, it was ascertained that there is no proof that 'HIV-related restrictions on entry, stay and residence protect the public health'. This assertion was accompanied with the concern that 'they may in fact impede efforts to protect the public health'. What is of utter importance is the conclusion that 'restrictions on entry, stay and residence that specify HIV, as opposed to comparable conditions, and/or are based on HIV status alone are discriminatory'²⁸.

Finally, the Committee on Economic, Social and Cultural Rights made a highly valuable General Comment on Non-Discrimination (no. 20, 2009) in 2009, which clarifies Article 2 § 2 of the International Covenant on Economic, Social and Cultural Rights (1966). This Article guarantees that the rights recog-

nised 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*'. As far as the perception of discrimination against HIV-positive people is concerned, the key factor is the determination of the broadness of the term of "other status". The Committee *expressis verbis* assumed that this term encompasses "health status" and specifically "HIV status" as one of the grounds referred to in Article 2 § 2²⁹.

All the above-mentioned UN initiatives are in accordance with the 2000 Millennium Development Goals which aim to reduce global inequalities by 2015; namely, one of these goals is to combat HIV/AIDS and other major diseases that afflict humanity³⁰.

Regarding relevant activities of the Council of Europe in this area, its Parliamentary Assembly has dealt with the issue of HIV/AIDS-related discrimination in a number of documents. As soon as in 1989, it adopted Recommendation 1116 (1989) on AIDS and Human Rights³¹ and in 2007, Resolution 1536 that only confirmed its dedication to combating all forms of discrimination against people living with HIV/AIDS³².

Although the number of legal regulations governing the issue of protection of HIV-positive people from discrimination exceeds the number of such docu-

25 *International Guidelines on HIV/AIDS and Human Rights – 2006 Consolidated Version*, Joint United Nations Programme on HIV/AIDS (UNAIDS) 2006, HR/PUB/06/9, available at: <http://www.ohchr.org/Documents/Issues/HIV/ConsolidatedGuidelinesHIV.pdf> (accessed 21 May 2012).

26 See *Convention and Optional Protocol Signatures and Ratifications*, available at: <http://www.un.org/disabilities/countries.asp?navid=17&pid=166> (accessed 28 May 2012).

27 *Convention on the Rights of Persons with Disabilities*, A/RES/61/106, 13 December 2006.

28 *Report of the International Task Team on HIV-Related Travel Restrictions. Findings and Recommendations (December 2008)*, UN Joint Programme on HIV/AIDS, June 2009, UNAIDS/09.19E/JC1715E, available at: <http://www.unhcr.org/refworld/docid/4a946972.html> (accessed 23 May 2012), paras. 30-40, 45-47.

29 General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights), UN Committee on Economic, Social and Cultural Rights (CESCR), 2 July 2009, E/C.12/GC/20, available at: <http://www.unhcr.org/refworld/docid/4a609612.html> (accessed 23 May 2012).

30 United Nations Millennium Declaration, U.N. Doc. A/RES/55/2, 8 September 2000. See also: *Shetty*, Millennium Declaration and Development Goals: Opportunities for Human Rights, in: Sur – International Journal on Human Rights, No. 2/2005, pp. 8, 11, 20.

31 RECOMMENDATION 1116 (1989) on AIDS and human rights, Text adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989 (21st Sitting), available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/t089/EREC1116.htm> (accessed 23 May 2012). Hence, in item D (3), the Parliamentary Assembly calls upon the states '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'.

32 *Resolution 1536 (2007) on HIV/AIDS in Europe*, Text adopted by the Parliamentary Assembly on 25 January 2007 (8th Sitting), available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/t07/eres1536.htm>, (accessed 23 May 2012). Although most provisions are applicable to the Kiyutin case, item 9 (10) seems to be highly worth mentioning since it warns the states to 'ban compulsory HIV/AIDS screening for people applying for travel visas, asylum, jobs or enrolment at a university in favour of voluntary testing'.

ments stated in this paper³³, the author has opted for only those standards of international law which have played a major role in shaping the opinion of judges in the Kiyutin case and as such have become foundations for reasoning in subsequent cases of discrimination against HIV-positive people.

IV. Migrations and HIV restrictions – comparative data

Comparison of the Russian legislation with standards of international law in the area of entry, stay and residence of HIV-positive people reflects considerable differences, to the extent that the Russian attitudes towards HIV-positive people can be identified as discriminatory. Still, fair evaluation of the Russian legal regulations and getting a comprehensive picture of this issue require a survey of experiences of other states in this field. For that purpose, one can use the Mapping of Restrictions on the Entry, Stay and Residence of People Living with HIV prepared by the Joint United Nations Programme on HIV/AIDS (UNAIDS) in May 2009.

According to the latest data of the survey (as of June 2011), 49 countries, territories and areas impose some form of restriction on the entry, stay and residence of people living with HIV based on their HIV status. Among them, there are seven member states of the Council of Europe: beside the Russian Federation, these are Andorra, Armenia, Cyprus, Lithuania, Moldova and Slovakia. Moreover, five countries require declaration of HIV status for entry or stay, resulting, for people living with HIV, in either a bar to entry/stay or the need for discretionary approval, e.g. through granting waivers (none of those states is a

member of the Council of Europe); five countries deny visas for even short term stays (none of them is a member of the Council of Europe); and 22 countries deport individuals once their HIV-positive status is discovered (including three member states of the Council of Europe: Armenia, Moldova and the Russian Federation)³⁴. Finally, 128 countries, territories and areas have no HIV-specific restriction on entry, stay and residence³⁵.

MacFarlane argues that travel restrictions against HIV-positive people 'shift the focus away from more effective solutions like preventative measures and education', 'create a false sense of security allowing residents of a country to believe that the country is insulated from further infection' and 'force HIV-positive immigrants who fear a denial of admission to enter illegally'³⁶. Recent statistical trends warn that migrating persons are, next to women and children, vulnerable populations who are increasingly infected by the HIV³⁷.

V. Judgment of the ECHR - implications *de lege lata* and *de lege ferenda*

Kiyutin grounded his application on the thesis that the decision of the Russian authorities to reject issue of his residence permit 'had been disproportionate to the legitimate aim of the protection of public health and had disrupted his right to live with his family'³⁸ and hence he referred to violation of the provisions of Articles 8, 13, 14 and 15 of the Convention. However, the ECHR did not take account of the violation of Articles 13 (the right to an effective remedy) and 15 (derogation in time of emergency), but it solely focused on examining the issue

³³ For a more detailed overview of the human rights framework related to HIV practice and policy see: *Cannon Poindexter*, The Human Rights Framework Applied to HIV Services and Policy, in: Cannon Poindexter (ed.), *Handbook of HIV and Social Work: Principles, Practice, and Populations*, Hoboken 2010, pp. 59-64; *Closen/Wojcik*, op. cit., pp. 295-304; *Kirby*, The Never-ending Paradoxes of HIV/AIDS and Human Rights, in: *African Human Rights Law Journal*, No. 2/2004, pp. 173-175; *Kirby*, AIDS and the Law, in: *Commonwealth Law Bulletin*, No. 1/1993, pp. 357-363; *Chang-Ming*, HIV/AIDS and International Travel: International Organizations, Regional Governments, and the United States Respond, in: *New York University Journal of International Law and Politics*, No. 4/1991, pp. 1048-1052; *MacFarlane*, op. cit., pp. 130-133, 136-137; *Walker*, op. cit., pp. 350-378; *Bromley Chan*, From Legal Universalism to Legal Pluralism: Expanding and Enhancing the Human Rights Approach to HIV/AIDS, in: *South African Journal on Human Rights*, No. 2/2005, pp. 194-197; *Watchirs*, Human Rights Approach to HIV/AIDS: Transforming International Obligations into National Laws, in: *Australian Yearbook of International Law*, Vol. 22/2002, pp. 86-87, 89-93.

³⁴ Already in 1990 Closen and Wojcik qualified such internal and border policies as "irrational and discriminatory". *Closen/Wojcik*, op. cit., p. 293. Similarly, *MacFarlane* emphasises that "HIV travel restrictions contravene the basic tenets of the UN Charter to protect human rights" and "defy several principles of international human rights law". *MacFarlane*, op. cit., p. 139.

³⁵ *HIV-related restrictions on entry, stay and residence*, UNAIDS Human Rights and Law Team – updated in June 2011, available at: http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20110620_CountryList_TravelRestrictions_en.pdf (accessed 12 May 2012).

³⁶ *MacFarlane*, op. cit., p. 143.

³⁷ *Ibid.*, p. 129. See also: *Walker*, The HIV/AIDS Pandemic and Human Rights: A Continuum Approach, in: *Florida Journal of International Law*, No. 2/2007, pp. 340-348.

³⁸ *Kiyutin v. Russia*, para. 39.

under Article 14 (prohibition of discrimination) in conjunction with Article 8 (the right to family life).

Since Article 14, which has been elaborated in the above lines, does not provide for the free-standing right to non-discrimination, the ECHR considered it in conjunction with Article 8. The latter Article stipulates in its § 1 that 'everyone has the right to respect for their private and family life, his home and his correspondence' while in its § 2, it governs that 'there shall be no interference by a public authority with the exercise of this right except such 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'³⁹.

Prior to analysis of the factual background and its correlation with Articles 14 and 8, it should be noted that there was also a third party in the case - the International Centre for the Legal Protection of Human Rights (Interights) which set forth its observations on the respective issue in written submissions. The first thesis of the third party included the allegation that HIV-positive people are provided with protection primarily by the general non-discrimination provisions of the key universal and regional human rights treaties. Secondly, the third party brought up that this way the protection is not exhausted since apart from general anti-discrimination international law standards, people living with HIV/AIDS should also 'benefit from the prohibition of discrimination on account of the disability existing in the ECHR's case-law and in other legal systems'⁴⁰. In a plethora of legal norms applicable to protection of HIV-positive people, the third party put a particular accent on an anti-discrimination framework established under the Convention on the Rights of Persons with Disabilities, broad application of which is to be found in the activities of the Office of the High Commissioner for Human Rights, the World Health Organisation and the UN Programme on HIV/AIDS (UNAIDS) in their joint Disability and HIV Policy Brief (2009). Such a disability-based approach to HIV-positive people put forward by the third party was underpinned by the belief that legislation and practice of many countries include indirect or direct extension of their disability laws to include HIV status (in the light thereof, countries like Canada, the USA, the United Kingdom, Germany and Norway were mentioned). Furthermore, the third party skilfully drew attention to the ECHR's case-law, precisely to the Case of *Glor v. Switzerland* (application no. 13444/04) wherein it was acknowledged that Article 14 of the Convention protects against discrimination based on

³⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, loc. cit.

⁴⁰ *Kiyutin v. Russia*, op. cit., para. 47.

disability. Applying the above rules, the third party came to the right conclusion that 'international law does not recognise the right to settle in a foreign country and travel restrictions may not be illegitimate *per se* when applied in a neutral fashion; however, those same restrictions will be in breach of anti-discrimination standards if they single out persons living with HIV for differential treatment without an objective justification'⁴¹. When assessing whether the difference in treatment is justified or not, the ECHR deemed, in its judgements, several particularly vulnerable groups (Roma, homosexuals, persons with mental disabilities) as persons who 'have suffered a history of prejudice and social exclusion'⁴² and who are subject to a narrower margin of appreciation by the state. In this sense, the third party consequently singled out two possible justifications for the aforementioned differential treatment on account of one's HIV status and these are a) the public health threat rationale and b) the public cost rationale.

Judging on the merits, the ECHR first discussed the issue whether the facts of the case fall "within the ambit" of Article 8 or not? Seeing the respective Article through the prism of the Kiyutin case, great relevance is born in the reasoning of the ECHR that 'even though Article 8 does not include the right to settle in a particular country or the 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 their private or family life and the right not to be subject to discrimination'⁴³. At this point, the ECHR also defined the concept of "family life" which, as claimed, 'must at any rate include the relationships that arise from a lawful and genuine marriage'⁴⁴. Since Kiyutin's situation was compatible with the ECHR's above-mentioned reasoning, the ECHR made the decision that the facts of the case do fall "within the ambit" of Article 8 of the Convention.

The second concern which was supposed to be resolved by the ECHR referred to the question whether the applicant's health status was "other status" within the meaning of Article 14 or not? This part of the judgment dealt with general evaluation of Article 14 that protects against discrimination and recalled that 'Article 14 only complements the other substantive provisions of the Convention and the Protocols thereto' and that it involves no 'independent existence because it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions'⁴⁵. Nevertheless, in order to apply Arti-

⁴¹ *Ibid.*, para. 48.

⁴² *Ibid.*

⁴³ *Ibid.*, para. 53.

⁴⁴ *Ibid.*, para. 55.

⁴⁵ *Ibid.*, para. 54.

cle 14, it is not necessary to presuppose violation of one of the substantive rights protected by the Convention. On the contrary, as asserted by the ECHR, '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'⁴⁶. In terms of the prohibition set out in Article 14 in the context of differences in treatment, the judgment acknowledged that the former relates only to 'those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another'⁴⁷. The phrases stated in Article 14 – "any ground such as" and "any other status" – entail that it is clear that the list of differences is not exhaustive but illustrative. Article 14 does not lay down *expressis verbis* a health status or any medical condition as a possible protected ground of discrimination. Nevertheless, the ECHR assumed that this Article suggests that physical disability and various health impairments fall within its scope. Referring to the view of the UN Commission on Human Rights, the ECHR confirmed that the term of "other status" in non-discrimination provisions in international legal instruments can be interpreted to cover health status, including HIV-infection⁴⁸.

While making a decision on the connection between Article 14 and Article 8, the ECHR was expected to answer the question whether the applicant was in an analogous position to other aliens or not? The answer first pointed to the definition of discrimination stated in the introductory considerations of this paper and shaped within the framework of the ECHR's case-law, according to which discrimination implies different treatment of persons, without an objective and reasonable justification, in analogous or relevantly similar situations. In the light of this rule, the ECHR assumed the posture 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'⁴⁹. In order to fit in the Kiyutin case with the definition of discrimination, the ECHR had to resolve the complex dilemma whether the difference in treatment was objectively and reasonably justified or not. As to depict such a difference in treatment as being objective and reasonable, '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'⁵⁰. On the occa-

46 *Ibid.*, para. 54.

47 *Ibid.*, para. 56.

48 *Ibid.*, para. 57.

49 *Ibid.*, para. 61.

50 *Ibid.*, para. 62.

sion of assessing justifications of a different treatment, the state enjoys a margin of appreciation. The broadness of this margin of appreciation cannot be the same for all human rights. In fact, if protection of fundamental rights and freedoms relates to a particularly vulnerable group in the society who has been facing considerable discrimination, the ECHR should warn the state that in such cases 'its margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question'⁵¹. Taking into consideration the fact that HIV-positive people have been subject to evident stigmatization, prejudices and social exclusion since the very beginning of the epidemics in the 1980s⁵², the ECHR has involved HIV-positive people into a vulnerable group, with respect to which 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'⁵³. When deciding on a possible extent of margin of appreciation, the ECtHR referred to the existing European consensus regarding the award of a residence permit to an HIV-positive person. Namely, the ECHR ascertained that 'out of forty-seven Member States of the Council of Europe, only six States require an individual applying for a residence permit to submit negative HIV test results, that one State requires a declaration to that effect, and that only three States make provision for deportation of aliens who are found to be HIV-positive'⁵⁴. Russia is thus considered an exception and its strict restrictions may put HIV-positive people into a discriminatory position. Another Russian

51 *Ibid.*, para. 63.

52 According to Kanya, some of the most prevalent forms of discrimination are exclusion from employment opportunities, housing discrimination, lack of access to services, denial of freedom of movement, lack of privacy, lack of equal protection before the law, assaults or inhumane treatment, and other forms of overt and covert discrimination. See: Kanya, Underlying Principles of Helping in the Field, in: Cannon Poindexter (ed.), Handbook of HIV and Social Work: Principles, Practice, and Populations, Hoboken 2010, p. 34. Furthermore, Cameron points out that human rights abuse against HIV-positive people can take three forms: a) the enactment by the state of repressive laws aimed at inhibiting the civil liberties or civic status of HIV-positive people, b) the violation by health-care workers, employers and others of "first generation" rights – the rights to dignity, privacy and autonomy and c) denying HIV-positive people "second generation" rights – access to a fair share of national resources and wealth, in both the public and private sectors. Cameron, Human Rights, Racism and AIDS: The New Discrimination, in: South African Journal on Human Rights, No. 1/1993, p. 22. See also: Melendez, HIV-Related Crisis Intervention and Counseling, in: Cannon Poindexter (ed.), Handbook of HIV and Social Work: Principles, Practice, and Populations, Hoboken 2010, pp. 94-95; Cameron, Legal and Human Rights Responses to the HIV/AIDS Epidemic, in: Stellenbosch Law Review, No. 1/2006, pp. 38-40.

53 *Kiyutin v. Russia*, op. cit., para. 64.

54 *Ibid.*, para. 65.

problem comprises the fact that not all the foreigners on the Russian territory are treated equally, evidence of which is that HIV-related travel restrictions are applied neither to tourists or short-term visitors nor to Russian nationals leaving and returning to the country. There are also some differences with respect to medical treatment of HIV-positive people; namely, the Russian state provides only Russian nationals with free medical assistance. Since the ways of HIV transmission are the same for all people, irrespective of the duration of their stay in Russia and their nationality, the ECHR judged that there was no justification for such selective enforcement of HIV-related restrictions against foreigners who apply for residence in Russia, especially since those people represent a minority with respect to similar categories such as travellers and migrants⁵⁵. Therefore, the conclusion of the judgment acknowledged that protection of public health can be deemed legitimate in this context, but only if the state can present compelling and objective arguments in favour of the assertion that protection of public health could only be achieved through the applicants' exclusion from residence on account of their health status. Refusal of residence permit can be compatible with the protection against discrimination enshrined in Article 14 of the Convention only if individualised judicial evaluation has already been performed and all circumstances in the case have been taken into considerations and not only the health condition. Due to the fact that Kiyutin as an HIV-positive person had been put into the category of particularly vulnerable groups, that his exclusion had not been shown to have a reasonable and objective justification and that inflexible provisions of the Russian legislation give no space for individualised evaluation, the ECHR concluded that the Russian Government, by denying Kiyutin's right to reside in the state had overstepped the narrow margin of appreciation. Kiyutin was pronounced a victim of discrimination on account of his health status and the ECHR, judging in his favour, explicitly confirmed violation of Article 14 of the Convention taken together with Article 8.

Although the judgment in the Kiyutin case was passed by a regional court, it is beyond any doubt that it includes universal values promoted by the entire international community. This judgement represents the first authoritative condemnation of discrimination of HIV-positive people by an international human rights adjudicator and contains progressive attitudes towards the combat against discrimination, so one can be positive that these attitudes will improve the status of HIV-positive people within the international community.

⁵⁵ Similarly, Closen and Wojcik argue that "in large countries, the national spread of AIDS may be far more significant in actual numbers than the international spread of AIDS to some smaller nations". Closen/Wojcik, *op. cit.*, p. 294. See also: Chang-May, *op. cit.*, p. 1047.

VI. Conclusion

Even though it has been over 30 years since the first AIDS-related deaths were documented and although the world has gone through epidemics and pandemics of this disease in the meantime⁵⁶, HIV-positive people are still facing various forms of discrimination, prejudices and stigmatization. Such social phenomena are not only deeply rooted in public awareness but they are also officially supported and promoted by national legislation of certain countries. The Kiyutin case has indicated both the complexity of this problem and the existing legal solutions provided by the international community when trying to eliminate discrimination against HIV-positive people.

The judgement in the Kiyutin case represents both a historical breakthrough and step forward in the area of human rights protection. It has explicitly promoted two principles: that HIV-positive people shall be, in the context of prohibition of discrimination, considered as a distinct group which is provided with protection of fundamental rights and that HIV-positive people belong to a vulnerable group whose rights are carefully monitored and their restriction implies a higher degree of scrutiny before the ECHR.

Although in the respective case, the ECHR judged on the protection of HIV-positive people against discrimination only in the context of international travel and migration, the repercussions of the judgment are far-reaching, particularly in the field of protection of family life, health care and employment. The Russian example has shown that the official policy of a certain country may bring to wrong impressions of local population towards HIV-positive people. One of these wrong impressions of the public was to give the green light to expulsion of these people from the state territory, which converts these issues from a "domestic" problem into a "foreign" one.

Despite the fact that the ECHR is not one of the pioneers in defining international standards for the protection of HIV-positive people against discrimination, it is still beyond any doubt that the ECHR regained its importance by the precedent judgement in the Kiyutin case and became one of the leaders in combating discrimination against this particularly vulnerable group in the society, which all lead to visible acknowledgement of the rights of this invisible minority.

⁵⁶ See: Closen/Wojcik, *op. cit.*, p. 286.