Nada Bodiroga-Vukobrat, Gerald G. Sander & Sanja Barić (Hrsg./eds.)

 Unsichtbare Minderheiten
 Invisible Minorities

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Forward

The intention of conference organizers 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 Hanne Seidel Stiftung that supported publishing of the collected papers in your hand.

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

Rijeka/Ludwigshurg, 12 June 2012

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Minderheiten und ihre Berücksichtigung im nationalen und internationalen Recht

Bernard Von Meyendorff

I. Vorbemerkung


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

Nives Mazur Kamrić

"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 Klyutin v. Russia (application no. 2708/10) 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 judgment 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". 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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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 juris 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 consequences. 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 route of prohibition of discrimination can be found in a number of historical documents such as Magna Charta Libertatis (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) and the Convention Against Discrimination in Education (1960) which both include an anti-discriminatory provision mutatis mutandis integrated in several more regulations.


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. 1/1993, pp. 303-331, corrections in No. 5/1994, p. 341.

5 Pursuant to Article 1 (1), discrimination (in the context of education) is defined as "any distinction, exclusion, restriction or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or status, has the purpose or effect of nullifying or impairing equality of opportunity to 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 1966, available at: http://www.unesco.org/education/information/education/pdf/DISCR_E.PDF (accessed 8 May 2012).

2 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 and No. 14, Rome, 4.XII.1950, CETS No. 143, for the wording of Protocol No. 11 see ETS No. 125 and for that of Protocol No. 14 see CETS No. 134.
cent and influential anti-discriminatory documents: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of Persons with Disabilities (2006). Although often cited in the context of the principle of non-discrimination, the latter four documents stipulate prohibition of discrimination only in respect to specified cases (in education, racial discrimination, discrimination against women and persons with disabilities), so it 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 sets discrimination as "[...] any distinction, exclusion or preference based on race, colour, national or social origin, religious or political opinion, sex, marriage, or state of health that has the purpose or effect ofnullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." The principle of non-discrimination is one of the key provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (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." 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 Convention, 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 discrimination.

Since the essence of the above case relates to analysis of Article 14, special attention should be paid to the standpoint of the ECtHR in some of its judgments based on this Article. One of the most quoted judgments of the ECtHR 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." III.

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

1. Relevant Russian law and practice

In submissions by the Russian Government filed as a response to Kryżys’ 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 particular international law.


4. Article 1 § 1 states that "the enjoyment of any right or freedom stated in this Covenant 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, 13 December 2000, CETS No. 192.

In Russian law, 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 cancel a previously issued residence permit "if the foreigner is unable to produce a certificate showing that he or she is not infected with HIV." 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 represent a threat "to personal, public and national security and to the existence of humankind." The same Act in its Section 11 § 2 requires verbal note be taken of the obligation of expulsion of HIV-positive aliens and includes the formulation that "foreign nationals and stateless persons who are on the Russian territory to be deported once it is discovered that they are HIV-positive." 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 Khurin'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 Khurin'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 arresting 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 limited it from the Soviet Union. 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 Russia, and international travelers and migrants have often been blamed for the spread of HIV/AIDS and other epidemic and pandemic diseases.

2. Relevant International documents

According to estimates, more than 25 million people worldwide have died of AIDS since the time the disease was first registered in 1981. The pandemic character of this disease has led the international community to get involved into codification of regulations aimed at ensuring legal protection of the infected, including protection from discrimination. Due to the fact that anti-discriminatory regulations providing HIV-positive people with necessary protection represent the backbone of this paper, the following chapters inter alia an overview of relating regulations of international law which had major effect on the positions of judges when deciding on the Khurin case.

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14 Khurin v. Russia, Application no. 270410, 10 March 2011, para. 22.
15 Khurin v. Russia, op. cit., paras. 16, 40.
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 not poorly understood—Garrett, Lessons of HIV/AIDS, Foreign Affairs, No. 6/2003, p. 52.
The leading role in defining international standards for protection of HIV-positive people has been played by the United Nations and the Council of Europe. According to 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 proclaims 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. ... 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/16/2 of 13 April 2011.22

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/55/253 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


22 The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS) resolution adopted by the Human Rights Council, 13 April 2011, A/HRC/RES/16/28, available at: http://www.unhchr.org/refworld/docid/4d0f562.html (accessed 20 May 2012). Bearing in mind the time when the judgment was delivered, it is no wonder that the last resolution quoted in the judgment was Resolution no. 2005/84 of 21 April 2005. See: G punches v. Russia, para. 29.

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tional travellers, are discriminatory and cannot be justified by public health concerns. 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 yet. 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 allied 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 family. 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 humanity.

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 Rights and in 2007, Resolution 1536 that only confirmed its dedication to combating all forms of discrimination against people living with HIV/AIDS. Although the number of legal regulations governing the issue of protection of HIV-positive people from discrimination exceeds the number of such docu-


agents stated in this paper, 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 Kijjukt 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, the evaluation of the Russian legal regulations and getting a comprehensive picture of this issue requires 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: besides the Russian Federation, these are Armenia, Azerbaijan, 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 bot or anstay 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). Finally, 128 countries, territories and areas have no HIV-specific restrictions on entry, stay and residence.

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'. Recent statistical trends warn that migrating persons are, next to women and children, vulnerable populations who are increasingly infected by the HIV.

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

Kijjukt grounded his application on the thesis that the decision of the Russian authorities to reject 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 and be treated in violation of the provisions of Article 8, 13, 14 and 15 of the Convention. However, the ECtHR did not take account of the violation of Articles 8 (the right to a private and family life) and 15 (right to liberty in time of emergency), but solely focused on examining the issue
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 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' 59.

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 (Intergency) which set forth its observations on the respective issue in written submissions. The first trials 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 60. 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 (as the right 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 Citar v. Switzerland (application no. 13444/04) wherein it was acknowledged that Article 14 of the Convention protects against discrimination based on disability. Applying the above rules, the third party came to the right conclusion that internal laws do not recognize 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 justifiction 61. When assessing whether the difference in treatment is justified or not, the ECHR deemed, in its judgement, several particularly vulnerable groups (Romas, homosexuals, persons with mental disabilities) as persons who 'have suffered a history of prejudice and social exclusion' 62 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:

- public health (treat rationale) and
- 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 Kiyatan 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" 63. 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" 64. Since Kiyatan’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 these provisions" 65. Nevertheless, in order to apply Article 14, one must establish a systemic approach, which have been elaborated in the above lines.

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60 Kiyatan v. Russia, op. cit., para. 47.
61 Ibid., para. 48.
62 Ibid.
63 Ibid., para. 53.
64 Ibid., para. 55.
65 Ibid., para. 54.
circle 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 expressio 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 impediments 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-infection. 48

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 Kiyev 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 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 occasion 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 1980s, 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'. 52 When deciding on a possible extent of margin of appreciation, the ECHR referred to the existing European consensus regarding the award of a residence permit to an HIV-positive person. Namely, the ECHR stated that 'not 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'. 53 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 Kiyev, 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,amma or unfavorable treatment, and other forms of covert and overt discrimination. See: Kiyev, Unifying Principles of Helping in the Field: in: Camens, Polidesign (ed.), Handbook of HIV and Social Work: Principles, Practice, and Populations, Helsinki 2016, p. 34. Furthermore, Camens points out that human rights stance against HIV-positive people can take three forms 4.1) the existence by the state of oppressive laws aimed at inhibiting the civil liberties or civic norms of HIV-positive people. In the violation by health-care workers, employers and others of "first generation" rights - the rights to dignity, privacy and autonomy and of ignoring HIV-positive people "second generation" rights - access to a fair share of national resources and wealth, in both the private and public sectors. Camens, Human Rights, Rights and AIDS. The New Discrimination, in: South African Journal on Human Rights, No. 1/1993, p. 22. See also: Molaison, HIV-Related Crime Intervention and Counseling, in: Camens, Polidesign (ed.), Handbook of HIV and Social Work: Principles, Practice, and Populations, Helsinki 2010, pp. 94-95; Camens, Legal and Human Rights Ramifications in the HIV/AIDS Epidemic, in: Stellhorst Law Review, No. 1/2006, pp. 36-45.

53 Kiyev, v. Russia, op. cit., para. 64.

54 ibid, para. 63.
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 either 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 ECtHR 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 migrants. 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 examined 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 Kiyatin 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 from residence on account of their health status, the ECtHR concluded that the Russian Government, by denying Kiyatin’s right to reside in the state had overstepped the narrow margin of appreciation. Kiyatin was pronounced a victim of discrimination on account of his health status and the ECtHR, judging in his favour, explicitly confirmed violation of Article 14 of the Convention taken together with Article 8.

Although the judgment in the Kiyatin case was passed by a regional court, it is beyond any doubt that it includes universal values promoted by the entire international community. This judgment represents the first authoritative condemnation of discrimination of HIV-positive people by an international human rights adjudicator and conveys 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.

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 meantime, HIV-positive people are still facing various forms of discrimination, prejudices and stigmatisation. 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 Kiyatin 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 judgment in the Kiyatin 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 whose restriction implies a higher degree of scrutiny before the ECtHR.

Although in the respective case, the ECtHR 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 ECtHR 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 ECtHR regained its importance by the precedent judgment in the Kiyatin 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.

55 Similarly, Ciesiak and Wojciech argue that “in large countries, the national spread of AIDS may be far more significant in actual numbers than the international spread of AIDS in some smaller nations”. Ciesiak/Wojciech, op. cit., p. 294; see also: Chang-Mey, op. cit., p. 1047.

56 See: Ciesiak/Wojciech, op. cit., p. 286.