

Kiyutin v. Russia: The European Court of Human Rights Acknowledges the Need for Protection of a Class of Individuals with HIV/AIDS

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I. OVERVIEW

Viktor Kiyutin’s only request was for the ability to reside in Russia with his wife and daughter.¹ Being that his wife and daughter were both Russian nationals, Kiyutin incorrectly assumed his residency permit would be granted with no delay.² However, during the application process, Kiyutin learned of his HIV-positive status, and for this reason alone, Kiyutin’s residency application was denied.³ Russia based its decision on the Foreign Nationals Act, which refuses residency to anyone who cannot prove their HIV-negative status.⁴

Kiyutin was born in Uzbekistan (formerly the Uzbek SSR of the Soviet Union) in 1971; in 2002, Kiyutin purchased a house and land in the Oryol region of Russia.⁵ In July 2003, Kiyutin married a Russian national and began the application process for a residency permit, during which time the couple had a daughter.⁶ Russia’s residency application requires applicants to prove their HIV-negative status and strictly denies all applications of individuals with HIV/AIDS; thus, Kiyutin’s

1. *Kiyutin v. Russia*, App. No. 2700/10, paras. 8-9 (Eur. Ct. H.R. Mar. 10, 2011), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “2700/10”).

2. *Id.*

3. *Id.* para. 9.

4. *Id.* para. 11.

5. *Id.* paras. 6-7.

6. *Id.* paras. 8-9.

application was not granted.⁷ Kiyutin reapplied for a temporary residence permit in 2009, but the Oryol Region Federal Migration Service again was not persuaded by Kiyutin's appeal to live in the country with his wife and daughter and set out a decision that stated that not only was Kiyutin's application denied, but also that he had to leave the country within three days or be subject to deportation.⁸ Kiyutin appealed the decision based on United Nations (U.N.) documents regarding HIV/AIDS prevention, but the court was still not persuaded.⁹ Unable to convince the Russian courts, Kiyutin filed a complaint against the Russian Federation with the European Court of Human Rights (ECHR) under article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).¹⁰ Interights, the International Centre for the Legal Protection of Human Rights, was granted permission to intervene as a third party in the case.¹¹ Interights' submissions urged that (1) "general non-discrimination provisions of the key universal and regional human rights treaties were interpreted as prohibiting discrimination on the basis of HIV or AIDS status" and (2) "people living with HIV/AIDS should benefit from the prohibition on discrimination on account of disability existing in the [c]ourt's case-law and in other legal systems."¹² The European Court of Human Rights held that Russia's residency application procedure discriminating against individuals with HIV/AIDS violated protections afforded to those individuals as a vulnerable group under article 14, in conjunction with article 8, of the Convention. *Kiyutin v. Russia*, App. No. 2700/10, para. 74 (Eur. Ct. H.R. Mar. 10, 2011), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "2700/10").

II. BACKGROUND

A. *Russian Legislative and Social Background*

In the past two decades, Russia has dealt with an epidemic of HIV/AIDS cases stemming from lack of education coupled with unregulated prostitution and drug use.¹³ However, the exact breakdown

7. *Id.* paras. 9, 11.

8. *Id.* para. 11.

9. *Id.* paras. 13, 15.

10. *Id.* paras. 1, 15.

11. *Id.* para. 5.

12. *Id.* paras. 46-47.

13. Paul Webster, *HIV/AIDS Explosion in Russia Triggers Research Boom*, 361 LANCET 2132, 2132 (2003).

of this explosion of HIV/AIDS cases is still being researched within, and outside of, Russian borders.¹⁴ In response to this outbreak, Russia enacted the HIV Prevention Act in 1995, which provides free medical assistance to Russian nationals infected with HIV/AIDS, but conversely, orders any foreign national or stateless persons residing in Russia to be deported immediately upon discovering that they are HIV-positive.¹⁵ Following the HIV Prevention Act, the Foreign Nationals Act of 2002 established the requirements for aliens married to Russian nationals, or who had a Russian child, to apply for a residency permit.¹⁶ Among the list of documents required in the residency permit application is a medical certificate showing that the alien is not infected with HIV.¹⁷ Section 7 of the Act also provides that a temporary residency permit can be refused without a showing of HIV-negative status.¹⁸ Additionally, those foreign nationals who do not require a visa to enter Russia may not remain in the country for more than ninety days at a time.¹⁹

In the noted case, the Oryol Region Federal Migration Service rejected the petitioner's residency permit application on the grounds that he could not prove his HIV-negative status, as required under section 7 of the Foreign Nationals Act, and the Oryol Regional Court upheld this judgment.²⁰

B. European and United Nations Response to the HIV/AIDS Crisis

The United Nations Commission on Human Rights first addressed HIV/AIDS discrimination in its Resolution, "The Protection of Human Rights in the Context of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS),"²¹ which confirms the widespread discrimination against individuals affected with those diseases and calls upon its member states to ensure that laws recognize

14. *Id.* at 2133.

15. *Kiyutin*, App. No. 2700/10, paras. 16-18 (explaining Federal'nyi Zakon RF o Preduprezhdenii Raspostraneniya v Rossiiskoi Federatsii Zabolevania, Vyzyvamogo Virusom Immunodefitsita Cheloveka (VICH-infektsii) [Federal Russian Law of the Prevention of the Incidence of the Human Immunodeficiency Virus Disease] 1995, No. 38-FZ, Item 4, 11).

16. *Id.* paras. 19-22 (outlining the Federal'nyi Zakon RF o Pravovom Polozhenii Inostrannyh Grazhdan v Rossiiskoi Federatsii [Federal Russian Law of the Legal Status of Foreign Nationals in the Russian Federation] 2002, No. 115-FZ, Item 6).

17. *Id.* para. 21.

18. *Id.* para. 22.

19. *Id.* para. 19.

20. *Id.* para. 11.

21. U.N. High Comm'n. Human Rights Res. 1995/44, U.N. Doc. E/CN.4/1995/176 (Mar. 3, 1995), available at http://www.k4health.org/system/files/un_Human_Rights_Gambia95.pdf.

and respect these individuals.²² The Resolution also emphasizes the need to respect the privacy of infected individuals and that their status as HIV/AIDS-positive should not be a basis of discrimination in the laws of any member states.²³

Recognizing the growing problem of HIV/AIDS across member nations, the United Nations General Assembly adopted the Declaration of Commitment on HIV/AIDS on June 27, 2001.²⁴ The Declaration acknowledged the significance of the family in support of those infected with HIV/AIDS and recognized the need for strengthened legislation “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.”²⁵ The General Assembly scheduled the initial deadline for this intensified legislation for 2003, calling on U.N. members to develop strategies to address the growing HIV/AIDS epidemic and the stigma associated with the disease.²⁶ Besides the U.N. General Assembly, the Parliamentary Assembly of the Council of Europe and the U.N. Convention on the Rights of Persons with Disabilities also set forth recommendations to end legislative discrimination against individuals with HIV/AIDS.²⁷

The Joint United Nations Programme on HIV/AIDS/International Organization for Migration (UNAIDS/IOM) and the Office of the U.N. High Commissioner for Human Rights addressed the issue of HIV/AIDS-related travel restrictions in their 2004, 2006, and 2008 guidelines.²⁸ The publications of these organizations agree that travel restrictions based on health conditions, such as HIV/AIDS, should be put

22. *Id.* paras. 1-2.

23. *Id.*

24. Declaration of Commitment on HIV/AIDS, G.A. Res. S-26/2, U.N. Doc. A/RES/S-26/2 (June 27, 2001).

25. *Id.* paras. 31, 58.

26. *Id.* para. 37.

27. EUR. PARL. ASS., *HIV/AIDS in Europe*, Res. 1536, para. 9 (2007), available at <http://assembly.coe.int/Documents/AdoptedText/ta07/ERES1536.htm> [hereinafter *HIV/AIDS in Europe*]; United Nations Convention on the Rights of Persons with Disabilities arts. 5, 18, Mar. 30, 2007, 23 U.N. Doc. A/61/611. As of the ruling in the noted case, Russia had signed, but not ratified, the U.N. Convention on the Rights of Persons with Disabilities.

28. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS/INTERNATIONAL ORGANIZATION FOR MIGRATION (UNAIDS/IOM), STATEMENT ON HIV/AIDS-RELATED TRAVEL RESTRICTIONS, paras. 1-7, at 2 (June 2004), available at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/activities/health/UNAIDS_IOM_statement_travel_restrictions.pdf [hereinafter UNAIDS/IOM STATEMENT ON HIV/AIDS]; JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS), INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS, para. 128, at 93, U.N. Doc. HR/PUB/06/9, U.N. Sales, No. E.06.XIV.4 (2006), available at http://data.unaids.org/Publications/IRC-pub07/jc252-internguidelines_en_pdf [hereinafter UNAIDS INTERNATIONAL GUIDELINES].

in place so long as they do so without violating any human rights.²⁹ The Office of the U.N. High Commissioner for Human Rights specifically stated that “any restrictions on these rights based on suspected or real HIV status alone, including HIV screening of international travellers, are discriminatory and cannot be justified by public health concerns.”³⁰ In 2008, UNAIDS/IOM followed with a statement that “HIV-specific restrictions on entry, stay and residence based on HIV status are discriminatory, do not protect public health and do not rationally identify those who may cause an undue burden on public funds.”³¹

C. *European Court of Human Rights Articles 8 and 14*

The Council of Europe drafted the Convention establishing the European Court of Human Rights in 1950, and the Convention was signed into effect in 1953.³² As a member of the Council of Europe, member countries must adopt the Convention, which among other requirements prohibits “discrimination in the enjoyment of the rights and freedoms set out in the Convention.”³³ In the noted case, the petitioner brought his complaint under articles 8, 13, 14 and 15 of the Convention; however, the ECHR found it appropriate to examine the case in view of article 14, taken in conjunction with article 8.³⁴

In its two parts, article 8 addresses rights to respect for private and family life and precludes interference by a public authority in those rights except when necessary in the interests of public safety and for the protection of health and morals.³⁵ Specifically, the first section provides that all individuals have the right to respect for their private and family life, home, and correspondence.³⁶ Realizing some instances come up where these rights may be diminished, section two of the article shows that those rights are not absolute, and in some circumstances public

29. UNAIDS/IOM STATEMENT ON HIV/AIDS, *supra* note 28, para. 3, at 2; UNAIDS, REPORT OF THE INTERNATIONAL TASK TEAM ON HIV-RELATED TRAVEL RESTRICTIONS, para. 5, at 5 (Dec. 2008), available at http://data.unaids.org/pub/Report/2009/jc1715_report_inter_task_team_hiv_en.pdf [hereinafter REPORT OF THE INTERNATIONAL TASK TEAM].

30. UNAIDS INTERNATIONAL GUIDELINES, *supra* note 28, para. 127, at 93.

31. REPORT OF THE INTERNATIONAL TASK TEAM, *supra* note 29, para. 6, at 5.

32. EUROPEAN COURT OF HUMAN RIGHTS, THE COURT IN BRIEF (2012), available at http://www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC585/0/Brochure_en_bref_EN.pdf.

33. *Id.*

34. Kiyutin v. Russia, App. No. 2700/10, para. 39 (Eur. Ct. H.R. Mar. 10, 2011), <http://echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “2700/10”).

35. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention on Human Rights].

36. *Id.*

policy may require governmental interference.³⁷ Article 8 does not force a member state to grant residency based on matrimony or family ties; however, a state's immigration policies cannot violate human rights in their residency applications.³⁸ In particular, the article requires member states to respect an individual's right to privacy to their family lives and their right not to be subject to discrimination.³⁹

Treatment of article 8 in cases before the ECHR requires application of a two-part test.⁴⁰ First, the ECHR must consider the applicability of article 8 to the noted case: is the right that the petitioner claims to have been violated actually a protected right under article 8?⁴¹ Once the ECHR determines that the alleged violated right is a part of private and/or family life, the ECHR must then examine whether the state interfered with the individual's right and whether their interference was justified by public policy.⁴²

Article 14 is applied in conjunction with article 8 because its protection against discrimination complements the goals of article 8.⁴³ Because the article cannot stand on its own when used as a basis for a case before the ECHR, article 14 must be considered in combination with another article of the Convention.⁴⁴ Article 14 prohibits discrimination on grounds of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*."⁴⁵ The goal of article 14 is to prevent discrimination of individuals based on a distinguishable characteristic, but the ECHR has noted that the list is illustrative, not exhaustive.⁴⁶ Thus, the words "other status" provide for broad interpretation, including characteristics that are not innate or inherent,

37. *Id.*

38. *Kiyutin*, App. No. 2700/10, para. 53; *see also* *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, App. Nos. 9214/80, 9773/81, 9474/81, para. 62 (Eur. Ct. H.R. May 22, 1985), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC database" hyperlink; search Application Number "9214/80") (discussing that "family life" must include relationships arising out of legal and genuine marriages).

39. *Kiyutin*, App. No. 2700/10, para. 53; *Abdulaziz*, App. Nos. 9214/80, 9473/81, 9474/81, paras. 59-60.

40. Ursula Kilkelly, *The Right To Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights*, 1 HUMAN RIGHTS HANDBOOK 1, 8-9 (2001), available at <http://www.echr.coe.int/NR/rdonlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf>.

41. *Id.*

42. *Id.*

43. *Kiyutin*, App. No. 2700/10, paras. 54, 56, 58.

44. *Id.* para. 54.

45. Convention on Human Rights, *supra* note 35, art. 14 (emphasis added).

46. *Kiyutin*, App. No. 2700/10, para. 56.

such as health status.⁴⁷ This idea works in conjunction with the recommendation by the Parliamentary Assembly of the Council of Europe, which called for “reinforcement of the non-discrimination clause in Article 14 by including health among the prohibited grounds of discrimination.”⁴⁸ Under the “other status” term in article 14, in conjunction with the right to privacy set out in article 8, the EHCR could analyze whether Russia’s residency permit application violated the Convention.

III. COURT’S DECISION

In the noted case, the ECHR found that Kiyutin’s right to privacy had been violated under article 14 of the Convention, in conjunction with article 8, through Russia’s policy of certification of HIV-negative status for its residency permit application.⁴⁹ The ECHR determined that article 8 properly applied to the alleged violation of privacy and that Russia was guilty of interfering with Kiyutin’s privacy.⁵⁰ Finding that article 8 properly applied, the ECHR then held that Kiyutin’s HIV-positive health status could and should be considered within the meaning of “other status” in article 14.⁵¹ With this conclusion, the ECHR was careful to consider the state’s justification for this interference, but notes that the justification must be objective and reasonable, and the reason for the interference must be weighed against the right to privacy for the individual.⁵² Russia’s main concern was the protection of public health by limiting the spread of HIV/AIDS in the country.⁵³ While this reason is compelling, the ECHR found that Russia’s public health concerns are not sufficiently supported and thus do not outweigh the right to privacy of individuals living with HIV/AIDS.⁵⁴

The ECHR first considered whether the facts of this case fell “within the ambit” of article 8, noting that the right of an alien to reside in a foreign country is not guaranteed by the Convention.⁵⁵ The Convention also does not mandate an absolute obligation to permit married couples of differing nationalities to establish permanent

47. *Id.* para. 57.

48. *Id.*

49. *Id.* para. 74.

50. *Id.* para. 55.

51. *Id.* paras. 56-57.

52. *Id.* para. 62.

53. *Id.* para. 66.

54. *Id.* paras. 65-66.

55. *Id.* paras. 53, 55 (internal quotation marks omitted).

residency in the state of one member of the couple.⁵⁶ However, the ECHR emphasized that all immigration policies should be “compatible with a foreign national’s human rights,” especially regarding the rights of privacy and family life.⁵⁷ “Family life,” the ECHR explained, must include lawful and genuine marriages, such as the marriage in this case, from which a child was born.⁵⁸ The ECHR, therefore, found that Kiyutin’s family fell “within the ambit” of article 8 of the Convention.⁵⁹

Finding that article 8 correctly applied in this case, the ECHR next turned to whether Kiyutin’s status as HIV-positive was included in the “other status” meaning of article 14.⁶⁰ Article 14 does not include health status among its enumerated grounds for unlawful discrimination, but the drafters included “other status,” leaving the door open for the ECHR to include characteristics that are innate or inherent.⁶¹ Through this open door, the ECHR interpreted “other status” to include persons with health statuses such as being HIV-positive.⁶² This finding is supported by several European authorities, including the U.N. Commission on Human Rights (calling for the right to privacy for people living with HIV/AIDS and prohibition of HIV/AIDS-related discrimination),⁶³ Recommendation 1116 by the Parliamentary Assembly of the Council of Europe (instructing the addition of health status as prohibited grounds of discrimination in article 14 of the Convention),⁶⁴ and the U.N. Convention on the Right of Persons with Disabilities (prohibiting discrimination based on disability).⁶⁵ With the support of the United Nations and Council of Europe, the ECHR found that health status should be considered an area of prohibited discrimination under article 14, and thus, this case could properly be tried under article 14, in consideration with article 8.⁶⁶

56. *Id.* para. 53 (citing *Gül v. Switzerland*, App. No. 23218/94 (Eur. Ct. H.R. Feb. 19, 1996), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “23218/94”)).

57. *Id.*

58. *Id.* para. 55.

59. *Id.*

60. *Id.* para. 56.

61. *Id.* (citing *Clift v. United Kingdom*, App. No. 7205/07 (Eur. Ct. H.R. July 13, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “7205/07”)).

62. *Id.* para. 57.

63. U.N. Comm’n. on Human Rights Res. 1995/44, *supra* note 21.

64. EUR. PARL. ASS., *Recommendation 1116 on AIDS and Human Rights*, para. 8 (1989), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta89/EREC1116.htm>.

65. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 27.

66. *Kiyutin*, App. No. 2700/10, paras. 57-58.

With this case properly construed as an article 14 (and article 8) issue, the ECHR then turned to the justification for Russia's discrimination of Kiyutin, and others in his situation, on the basis of his HIV-positive status.⁶⁷ Establishing that Kiyutin is a member of a vulnerable group receiving differential treatment, the ECHR made clear that the burden then falls on the state (Russia) to prove that the discrimination is justified.⁶⁸ Any discrimination of a vulnerable group by a state lowers the deference given to that state by the ECHR.⁶⁹ Particularly compelling evidence against Russia in this case is that out of forty-seven member states of the Council of Europe, only six states require proof of HIV-negative status for their residency permit applications, while only one state has a similar declaration, and three states allow deportation of aliens with HIV-positive status.⁷⁰ These numbers reflect a consensus among European nations that an HIV/AIDS-positive status is not proper grounds for discrimination in residency permit applications.⁷¹

Regardless of the laws of other European countries, Russia argued that their discriminatory practice is justified for the protection of public health covered under article 8 of the Convention.⁷² While this goal appears legitimate, when taking into consideration relevant international reports regarding the spread of HIV through travel, the ECHR suggested this aim is not supported by fact or necessity.⁷³ The ECHR reasoned that "the mere presence of [an] HIV-positive individual in a country is not in itself a threat to public health: HIV is not transmitted casually but rather through specific behaviours that include sexual intercourse and sharing of syringes as the main routes of transmission."⁷⁴ Thus, assuming that aliens entering the country with HIV/AIDS necessarily will spread the disease is impractical and illogical.⁷⁵

Further, Russia's restriction on HIV-positive individuals is only on those seeking permanent residency in the country, but the country applies no such restrictions on short-term visitors.⁷⁶ Russia does not seem to have an explanation to bridge this gap, and notably, allows aliens to

67. *Id.* paras. 59-61.

68. *Id.* paras. 61-62.

69. *Id.* para. 63.

70. *Id.* para. 65.

71. *Id.*

72. *Id.* para. 66.

73. *Id.* paras. 66-67; see *HIV/AIDS in Europe*, *supra* note 27, para. 9; see also United Nations Convention on the Rights of Persons with Disabilities, *supra* note 27.

74. *Kiyutin*, App. No. 2700/10, para. 68.

75. *Id.*

76. *Id.* para. 69.

circumvent the residency application restrictions by leaving and reentering the country every ninety days.⁷⁷ The ECHR viewed this circumvention as casting doubt on the authenticity of Russia's public-health concerns in Kiyutin's case.⁷⁸ The only legitimacy to Russia's argument is that long-term settlers with HIV/AIDS may become a financial drain on the public health funds as they attempt to seek health care in the country.⁷⁹ However, this argument is easily quashed because regardless of whether Kiyutin obtained a residency permit, he would not be eligible for free public health care since he is not a Russian national.⁸⁰

The final significant issue that the ECHR believed Russia had not properly considered is that the implementation of this discriminatory practice could actually lead to the aggravation of the spread of HIV/AIDS amongst illegal aliens and residents in the country.⁸¹ The ECHR worried that Russia's current practice would lead to aliens remaining in the country illegally in order to avoid HIV screening, meaning their HIV status would be unknown to authorities and, more importantly, to themselves.⁸² Without knowledge of their condition, the infected individuals cannot seek the proper medical treatment and avoid spreading the disease through proper precautions.⁸³ Additionally, Russian residents may have a false sense of security about the state of HIV/AIDS in the country; believing their government deports any immigrants with HIV/AIDS, they may not take the necessary precautions to prevent contracting and spreading the disease.⁸⁴ For the foregoing reasons, the ECHR found no compelling reason that refusing Kiyutin's residency application based on his HIV-positive status adequately protected Russia's public health.⁸⁵

Finally, the ECHR took particular issue with the fact that Russia's current residency application leaves no room for individual assessment.⁸⁶ In the noted case, Kiyutin's application was continuously denied based solely on the health status bar of the Foreign Nationals Act, with no

77. *Id.* para. 69; *see also id.* para. 19 (discussing article 5 of the Russian Foreign Nationals Act).

78. *Id.* para. 69.

79. *Id.* para. 70.

80. *Id.* paras. 23, 70 (“[O]nly emergency treatment may be provided to foreign nationals free of charge Other medical assistance may be provided on a paid basis” (citations omitted)).

81. *Id.* para. 71.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* para. 72.

86. *Id.*

consideration taken as to Kiyutin's family status.⁸⁷ The ECHR found that "such an indiscriminate refusal of residence permit, without an individualised judicial evaluation and solely based on a health condition, cannot be considered compatible with the protection against discrimination enshrined in Article 14 of the Convention."⁸⁸

Thus, taking into account the fact that Kiyutin belonged to a vulnerable group whose status is protected under article 14, and that Russia was not able to provide reasonable justifications for its discrimination, the ECHR found that Kiyutin was a victim of discrimination in violation of article 14 in combination with article 8 of the Convention.⁸⁹

IV. ANALYSIS

The ECHR's landmark decision in the noted case essentially inserts health status, specifically a person's HIV/AIDS status, into areas of discrimination regulated by article 14 of the Convention.⁹⁰ The ECHR reasons that health status should be considered an "other status" based on recommendations of various European and international authorities, but the ECHR appears to have a belief that an individual's health status is a firmly protected matter to be included in article 14.⁹¹ The ECHR is particularly concerned with the stigma associated with HIV/AIDS, which began with the spread of the disease in the 1980s and led many to associate the disease with homosexuals, prostitutes, and drug users.⁹² The stigma previously associated with these groups of people transferred to the stigma associated with HIV/AIDS, a discrimination that the ECHR is determined to undermine with this decision.⁹³

By recognizing that individuals with HIV/AIDS are members of a vulnerable group, the ECHR held Russia's HIV-negative status provision to a higher burden of necessity.⁹⁴ Russia's application provision seems especially archaic when considering that the majority of Council of Europe member states do not use HIV/AIDS status as a determining factor for residency approval.⁹⁵ The ECHR's reliance on reports by

87. *Id.* para. 73.

88. *Id.*

89. *Id.* para. 74.

90. *Id.* para. 57.

91. *Id.*

92. *Id.* para. 64 ("Ignorance about how the disease spreads has bred prejudices which, in turn, has stigmatised or marginalised those who carry the virus.").

93. *Id.*

94. *Id.* paras. 63-65.

95. *Id.* para. 65.

international bodies about travel restrictions on HIV/AIDS-infected individuals further justifies its decision to hold Russia to a higher standard.⁹⁶ These reports all support the conclusion that there is no scientific or reasonable justification to issue travel bans for those with HIV/AIDS, and even Russia's laws do not prevent short-term visitors with HIV/AIDS from entering the country for up to ninety days at a time.⁹⁷ Russia has essentially undermined its own laws and public health goals by freely allowing HIV/AIDS-infected individuals into the country for periods of time up to three months.

While the ECHR has a strong argument for applying a higher burden on Russia to prove the legitimacy of its residency permit provision, the ECHR is also significantly interfering with Russia's right to choose who can become a permanent resident of its country. In considering the applicability of article 8 to the noted case, the ECHR concedes that the article in no way imposes an obligation on a member state to grant residency permits just because one spouse is a citizen of the country.⁹⁸ Nevertheless, this consideration is brief and the ECHR quickly turns to the duty of the state to exercise immigration policies in a way that does not interfere with human rights.⁹⁹ The ECHR does not appear to spend much time weighing the right of Russia (or any other member state) to make its own immigration policy decisions versus the goals of the Convention.¹⁰⁰ Throughout the ECHR's decision, Russia's arguments for its reasoning are swiftly overturned, with the focus on the various international reports as to why Russia's goal of protecting public health is invalid.¹⁰¹

However, the ECHR's balancing (and most reasonable) argument is that Russia's law does not allow for individual assessment.¹⁰² The ECHR's compelling justification for intervention in this case is the fact that Russia's residency provision was discriminatory and, in fact, expressly provided that any applicant with HIV/AIDS would automatically be denied residency.¹⁰³ This provision did not allow for

96. *Id.* para. 67; see WORLD HEALTH ORGANIZATION (WHO), REPORT ON THE CONSULTATION ON INTERNATIONAL TRAVEL AND HIV INFECTION, paras. 2-3 (1987), available at http://who1ibdoc.who.int/hog/1987/WHO_SRA_GLO_87.1.pdf [hereinafter WHO REPORT]; see also *HIV/AIDS in Europe*, *supra* note 27, para. 9; United Nations Convention on the Rights of Persons with Disabilities, *supra* note 27, arts. 5, 18, 23.

97. *Kiyutin*, App. No. 2700/10, paras. 67, 69; WHO REPORT, *supra* note 96, paras. 2-3.

98. *Kiyutin*, App. No. 2700/10, para. 53.

99. *Id.*

100. See generally *id.* paras. 53-55.

101. See generally *id.* paras. 53-74.

102. *Id.* paras. 19-22, 72-73.

103. *Id.* para. 72.

considerations such as, in the noted case, that the applicant was married to a Russian national and had a daughter in the country.¹⁰⁴ It is the wholesale nature of the provision that compounds the discrimination factor of the provision and allows for full article 14 application.¹⁰⁵

The ECHR fully discusses the importance of adding “health status” as an area of discrimination to article 14 but does not include much discussion about the connection of HIV/AIDS to the homosexual community or the need to add homosexuals to the list of vulnerable groups. The ECHR acknowledges that the stigma associated with HIV/AIDS stems from the stigma connected with homosexuals, but does not speak further about the vulnerability of homosexuals as a discriminated group.¹⁰⁶ This is a missed opportunity by the ECHR, which may (or may not) be deliberate because the issue of homosexuals’ rights is still highly contested.

The ECHR’s strong (unanimous) decision has the possible side effect of greatly increasing the power of the ECHR to have its hand in policy decisions of member states. The ECHR argues that the “other status” portion of article 14 has always been broadly applied, but this decision further increases the court’s future ability to interpret what is an “other status.”¹⁰⁷ Health status is not usually an outward characteristic, so discrimination is not based on a traditional form of discrimination (such as race, gender, age, et cetera). In the noted case, the ECHR has essentially widened the field of possible areas of discrimination to be protected under article 14 of the Convention to those areas that are not outwardly viewable. This expansion is rationalized by prior court rulings,¹⁰⁸ which found that the list in article 14 is not exhaustive¹⁰⁹ and not limited to innate or inherent characteristics.¹¹⁰ Again, this expansion could lay the groundwork (whether purposefully or not) for the future inclusion of sexual orientation as a prohibited area of discrimination.

104. *Id.* paras. 72-73.

105. *Id.* paras. 72-74.

106. *Id.* para. 64.

107. *Id.* para. 56.

108. *Id.*

109. *Engel & Others v. The Netherlands*, App. Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, para. 72 (Eur. Ct. H.R. June 8, 1976), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “5100/71”); *Carson & Others v. United Kingdom*, App. No. 42184/05, para. 70 (Eur. Ct. H.R. Mar. 16, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “42184/05”).

110. *Clift v. United Kingdom*, App. No. 7205/07, paras. 56-58 (Eur. Ct. H.R. July 13, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow “HVDOC Database” hyperlink; search Application Number “7205/07”).

One key factor to Russia's argument missed by the ECHR is the level of the current HIV/AIDS epidemic in the country, contributing to Russia's stricter laws on the subject. A study released by the World Health Organization (WHO) in 2005 indicated that Russia had "one of the most rapidly growing HIV epidemics globally, with an explosive increase since 1996."¹¹¹ The ECHR acknowledges that Russia's application provision is in place to protect public health, but the ECHR overlooks just how great the strain of the disease is on the country.¹¹² That same report from the WHO stresses that one of the causes of this epidemic is the stigma felt by drug users and homosexual males in the country.¹¹³ The ECHR missed the chance to make the connection between the HIV/AIDS epidemic and homosexuality in Russia, which begs for further analysis, especially when creating newly-defined discriminated groups covered by article 14.

V. CONCLUSION

The ECHR made a landmark decision in this case by unambiguously making health status an area of discrimination covered by article 14 of the Convention.¹¹⁴ The ECHR firmly rejected any stereotypes associated with HIV/AIDS and made clear that any future provisions regarding this disease had to be based on (internationally supported) facts, not on prior misconceptions.¹¹⁵ The ECHR also widened the range of potential areas of discrimination by abolishing the obstacle that any form of discrimination had to be based on an inherent characteristic.¹¹⁶ Just how significant this barrier-breaking will be for other vulnerable groups in the future remains to be seen. However, the ECHR has opened the door to other cases challenging the definition of "other status" in article 14 of the Convention and has given hope and opportunity to other vulnerable groups of society.

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111. WHO, SUMMARY COUNTRY PROFILE FOR HIV/AIDS TREATMENT SCALE-UP: RUSSIAN FEDERATION 1 (2005), http://www.who.int/hiv/HIVCP_RUS.pdf [hereinafter COUNTRY PROFILE].

112. *Kiyutin*, App. No. 2700/10, para. 66.

113. COUNTRY PROFILE, *supra* note 111, at 1.

114. *Kiyutin*, App. No. 2700/10, paras. 57, 74.

115. *Id.* paras. 67-71.

116. *Id.* paras. 56-57.

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