

Medical Law

**RESTRICTIONS OF MIGRANT RIGHTS AS A MEASURE TO
PRESERVE PUBLIC HEALTH: A COMPARATIVE LEGAL
ANALYSIS**

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Abstract: This article offers a critical analysis (both retrospective and prospective) of the dynamics of the development of legislation and judicial practice on the problem of the legal status of migrants with infectious diseases. There is an assessment of the proportionality (balancing) concerning the introduction of a state measure to limit the stay in the country and the deportation of migrants with infectious diseases (HIV, tuberculosis, and the coronavirus). The article focuses on the stages of development of the legal status of HIV-infected migrants' in Russia under the influence of supranational judicial practice, as well as the difference in its application concerning other diseases. The article is intended to demonstrate how the potential of transnational regulation can be aimed at protecting human rights and freedoms in the current legal realities, and the developed legal mechanism can be implemented in law enforcement in case of emergencies in the health sector, including the spread of a pandemic.

Keywords: Discrimination; Health Protection; Infectious Diseases; Medical Law; Migration; Proportionality

I. INTRODUCTION

Today, viral diseases, including the human immunodeficiency virus (hereinafter referred to as HIV) and tuberculosis, have been diagnosed so often that almost everyone is aware of their rapid spread throughout the world that has been facilitated by the global travel of persons and goods, and also by migration

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movements.¹ States apply a number of measures aimed at combating viruses, including restricting the rights of already infected people to prevent an epidemic throughout the world, and therefore to protect the life and health of the entire population.

The spread of some infectious diseases is constrained by the joint efforts of law and medicine, while some dangerous diseases nevertheless penetrate the internal systems of states and the restrictive measures taken (border closure, the prohibition of freedom of movement, forced treatment and others) do not achieve their goal. A vivid example is the 2020 pandemic caused by the spread of coronavirus infection (COVID-19), which rapidly jeopardized the health of the population of many countries, and possibly the whole world.

The application of restrictions on rights and freedoms is undoubtedly aimed at achieving socially useful goals (enshrined in the Conventions and the fundamental laws of states), however, taking into account only the goal of establishing such “taboos” is insufficient - the problem of finding a balance of private interests of individuals and public health remains unresolved.

In the modern world, which is based on the concept of democracy and the rule of law protecting human rights and freedoms, the introduction of restrictive measures at the legislative level is always accompanied by a clear procedure with differentiation of responsibilities between competent authorities and (or) officials. So, in Russia, it is possible to restrict the rights of infected people by virtue of the Constitution of the Russian Federation of 1993 only by federal law and within certain limits, and to a greater extent such restrictions apply to infected foreigners.² The goal of restricting rights and freedoms is the prevention of the spread of life-threatening infections in the state to protect the health of the entire population. Moreover, it is worth noting that it is very difficult to find a balance in law between maintaining public health and protecting the legitimate interests of infected people. This article argues that the measures applied by the state in some cases seem excessive and require more detailed study, the search for an individualized approach in each specific case.

The aim of the article is to analyse the problems existing in this area, and to develop proposals and recommendations on legislative improvements concerning the rights and freedoms of foreigners with viral diseases, taking

1 L. Gostin, ‘Global health law’ (HUP 2014) 18 and 687.

2 The Constitution of the Russian Federation (adopted by popular vote on December 12, 1993).

into account the mandatory legal positions of national and supranational courts. This article is interdisciplinary and comparative in nature.

The article is divided into five sections. The second section demonstrates the mechanism of state intervention in human rights. A method for determining the proportionality of introduced state restrictions is proposed - a proportionality test (balancing method - USA). The third section is devoted to the presentation of the positions of infected individuals whose rights and freedoms provided for by international regulation (the Declaration of Commitment on HIV/AIDS, the European Convention for the Protection of Human Rights and Fundamental Freedoms) were, in their opinion, disproportionately violated by the laws of others countries. The fourth section includes an analysis of the case-law of the European Court of Human Rights in comparison with the practice of the Constitutional Court of the Russian Federation. It presents proposals to improve the existing regulatory framework, taking into account the mandatory legal positions and humanitarian circumstances relevant to a particular case. Overall, this article demonstrates that despite the initial contradictions and the evolving features between the positions of national and supranational courts, the final decisions of national courts regarding the legal status of infected migrants almost completely apply international legal standards and guidelines expressed by the positions of the European Court of Human Rights, in the domestic legal system. In attempting to balance rights, the scales are tipped towards the individual, differential approach in each case.

II. INTERVENING IN HUMAN RIGHTS: TEST OF PROPORTIONALITY

For a long time, Russia was the only Council of Europe country and one of 16 countries around the world that deported non-citizens with infectious diseases.³ In the European region, since the ruling of the European Court of Human Rights (hereinafter ECHR) in the case of “Kiyutin v. Russia”⁴, two Council of Europe member states (Armenia and Moldova) lifted restrictions on the entry, stay or residence of HIV-infected people. In 2013 and 2015, Andorra and Slovakia, which are the member states, as well as Belarus, which is a European state without the status of a member state, confirmed to UNAIDS that they do not apply any restrictions on entry, stay and residence with respect to people living with life-threatening infections.

3 Federal Law №38-FZ of 30 March 1995 ‘On preventing the spread of diseases caused by the human immunodeficiency virus (HIV) in the Russian Federation’.

4 ECtHR: Case 2700/10 Kiyutin v Russia [2011].

In the Russian Federation, the legal regulation of migrants with infectious diseases is ambiguous. In connection with this, in practice, one can see quite a few cases of their appeal for the protection of their rights and freedoms both in the courts of general jurisdiction, the Constitutional Court and even the ECHR. Interestingly, the circumstances of all applicants are characterized by the presence of certain individual circumstances that are of direct importance to the case. In order to determine the legality and extent of limiting the rights and freedoms of infected migrants and the legality of their residence, it is necessary to assess the fairness and proportionality of such a restriction to understand whether a balance was ensured between constitutionally significant values, public and private interests, while observing the principles of proportionality (equality, equivalence and equity). For this purpose, it's necessary to implement a test for proportionality (the search for the principle of proportionality or proportionality), which is widely used by bodies constitutionally go control of a large number of states as a method of establishing the legitimacy or illegality of restricting fundamental constitutional human rights and freedoms. This technique seems incredibly complex, since judges, when making a decision, must act objectively, not taking their beliefs into account, and also abstracting from all emotion. This is especially true if one takes the words of A.P. Evseeva that “judicial discretion in constitutional justice always has a moral background and leaves room for personal moral choice of judges”.⁵

Germany can be called the “homeland” of the principle of proportionality, where it received the most detailed development.⁶ At present, it has also found reflection in other states of not only the continental, but also the Anglo-Saxon legal system. This spread of proportionality, including its penetration into various legal systems, can be explained by the development of law itself through the process of globalization. Thus, globalization has ensured worldwide active dissemination of the idea of the universality of human and civil rights and freedoms, as enshrined in the Universal Declaration of Human Rights. Moreover, after the Second World War, this idea began to be perceived “as an axiom and for a long time did not raise doubts about its acceptability for all countries and peoples of the modern world.”⁷ As regards the constitutional law of European countries, the principle of proportionality was established (“made a victorious march across Europe”), undoubtedly, under the influence of the

5 A. Evseev, ‘Psychology of constitutional court proceedings: monograph’ (2013), 214.

6 S. Tsakirakis, ‘Proportionality: violation of human rights?’ (2011) CCR № 5 (84), 69.

7 N. Varlamova, ‘The principle of proportionality in modern constitutional and legal theory and practice’ (2013), 5.

practice of the European Court of Human Rights. It became entrenched as the main instrument for protecting the rights and freedoms of man and citizen, defining substantive criteria for their admissibility restrictions (interventions in implementation).⁸

The proportionality test today is the main criterion for the proper implementation by public authorities of the powers granted to them.⁹ Such a test is defined as “constitutional, fundamental, mandatory for the legislative and executive authorities, as well as for the courts in the performance of the functions assigned to them”.¹⁰ Moreover, some researchers believe that the definition of the principle and proportionality is the “ultimate rule of law” and its approval will put an end to disputes about the interpretation of the Constitution. Former President of the European Court of Human Rights Rolva Risdala noted: “Throughout the Convention and its practice, the need to strike a balance between observing the interests of the community and protecting individual fundamental rights runs through the red thread”.¹¹

The proportionality check is a technique carried out in a certain sequence, that is, in compliance with the mandatory steps, each of which corresponds to a specific component of this principle. To begin with, it seems necessary to establish that a certain constitutional law was limited by the actions of the authorities. The Court defines such a meaningful action as a principle of legal certainty.¹²

Secondly, it is necessary to establish what purpose the public authorities pursued when taking restrictive measures, and whether such a goal was legitimate.¹³ A legitimate aim should be understood as such a goal pursued by the legislator, which should be important enough to justify the restriction of constitutionally protected law. For example, the Convention on Human Rights identifies various purposes for which restrictions can be established and applied: interests of national security, territorial integrity, public order, public peace, economic well-being of the country, prevention of unrest and crime; protection of health and morality.

8 *ibid.*

9 A. Koss, E. Gerasimova, ‘Restriction of the possibility of legal stay and residence in the Russian Federation of foreign citizens: problems of determining “humanitarian circumstances” in legislation and law enforcement practice’ (2012) CML № 12, 65.

10 *ibid.*

11 *ibid.*, ss 73.

12 *ibid.*, ss 65.

13 *ibid.*, ss 67.

Thirdly, the measure should be necessary, that is, to ensure the achievement of this goal due to the least possible restriction of rights (criterion of necessity). The introduced measure may be necessary if it is the only (most suitable) to achieve the goal of the legislator¹⁴ and if it least restricts the rights of a private person, that is, a useful result will be achieved, but with significantly less inconvenience for the person whose right is limited - "pressing public need"¹⁵ of the introduced restriction. In assessing the least intervention, the legal equivalent of the Pareto optimality principle can be applied: a solution can only be optimal if it improves circumstances without harming the other side.¹⁶ For instance, the authority does not deport migrants with dangerous infectious diseases, but provides them with mandatory treatment in this country.¹⁷

Fourth, the measure must be proportionate, meaning an appropriate balance (fair balance) must be observed between the importance of achieving the stated goal and the severity of the negative consequences that a person has experienced in connection with the restriction of his right (proportionality in the narrow sense of the word or balancing).

The principle of proportionality applied in this form (albeit with some variations) is widely used by constitutional control bodies as the dominant technique for resolving conflicts related to government interference in fundamental human rights including the healthcare sector. By studying courts' decisions, it can be established that judges often use the proportionality test to find a fair balance between protecting the common interests of the community and due respect for fundamental human rights, because proportionality is balancing or weighing this right and other protected values. [...] The law, in any case, should be fair, but from the point of view of Aristotle: "fair is proportional, unfair is that which violates proportionality".¹⁸ At the same time, one can support the position of the professor Gostin that "norms, institutions, and processes shaping health should be directed at realizing the right to the highest attainable standard of health for all, understood as more a collective than an individual right, which

14 P. Blokhin, O. Kryazkova, 'How to protect your rights in the constitutional Court. Practical guide to filing a complaint with the constitutional Court of Russia' (2014), 120.

15 ECtHR: Case 10465/83 Olsson v Sweden [1988].

16 A. Mikhailov, 'The principle of proportionality: the essence, practice of application by the European Court of human rights, the Constitutional Court of the Russian Federation and the significance for improving the system of proof in modern criminal proceedings' (2016) № 1 (7), 5.

17 ECtHR: Case 2700/10 Kiyutin v Russia [2011].

18 B. Shlink (n.10), 61.

assures that healthy and safe conditions are equally available to all people, everywhere”.¹⁹

III. THE LEGAL STATUS OF MIGRANTS WITH INFECTIOUS DISEASES: VIOLATION OF HUMAN RIGHTS

In the opinion of affected HIV-infected migrants and applicants, several provisions of Russian law prohibiting HIV-infected citizens from living in the Russian Federation contradict both the Constitution and the norms of the European Convention for the Protection of Rights and Fundamental Freedoms.²⁰ First of all, this concerns the equality of human rights regarding a number of factors: gender, race, nationality, language, origin, property and official position, place of residence, religion, beliefs, affiliation with public associations, as well as other circumstances (h. 2 Art. 19 of the Constitution; Art. 14 of the Convention).²¹ According to the applicants, the provisions of the legislation on the deportation of HIV-infected migrants under consideration create a discriminatory position for health reasons, because the use of this measure only in relation to foreign citizens, as well as only for persons with a certain health conditions such as tuberculosis and HIV²² The provisions are general in nature, excluding the necessary differentiation depending on the exceptional circumstances of the case. Of course, the provisions of the Constitution and the Convention do not directly indicate such a basis of non-discrimination. However, the European Court of Human Rights in its decisions independently established that disability, and various health disorders fall within the scope of this provision.²³ This means that the existence of different regulations depending on the state may be considered as a discrimination. The possibility of indirect discrimination cannot also be ruled out - a situation in which certain restrictions or requirements have a different effect on people of different ethnic or state affiliations (a vivid example is Romals, i.e. Roma) opportunities to use rights and freedoms.

Additionally, the application of such restrictive provisions for HIV-infected migrants may violate the right to privacy, which means, inter alia, the right to

19 L. Gostin (n.1), 667.

20 Federal law № 115-FZ of 25 July 2002 “On the legal status of foreign citizens in the Russian Federation”.

21 Convention for the protection of Human Rights and Fundamental Freedoms of 04 November 1950.

22 ECtHR: Case 31039/1 Novruk and others v Russia [2016].

23 ECtHR: Case 2700/10 Kiyutin v Russia [2011].

protect the family, if the HIV-infected alien in Russia has a family, children, other close relatives (part 1 of article 23; part 1 and part 2 of article 38 of the Constitution, Article 8 of the Convention). Meanwhile, the Declaration of Commitment on HIV/AIDS establishes the dominant role of the family in providing care, treatment and support for HIV patients.²⁴ Also, the European Court of Human Rights in its decisions takes a flexible approach to people suffering from the virus, while indicating that the expulsion of a citizen from the country where his family lives, relatives can be considered as a violation of the right to protection of privacy provided for in the European Convention.²⁵ Further, it would be relevant to consider the Convention on the Rights of the Child, which allows separation between parents and a child against their will only if this is done in the interests of the child (Art. 9).²⁶ At the same time, in the case of HIV-infected people, this interest is rather doubtful, because the virus is not transmitted by airborne droplets and with sufficient vigilance and accuracy, the probability of infection of the child is excluded. The European Court of Human Rights examined an interesting case concerning HIV-infected migrants, the story of one of which was distinguished by the fact that the applicant had not lived in Russia for a long time, was divorced and lived with his children at different addresses. His family circumstances proved quite controversial. However, the ECHR clarified that the concept of “family life”, according to Article 8 of the Convention, is not limited to marital relations, and may cover other actual “family” relations in which the parties do not live together.²⁷

Determining the need to apply restrictions on the rights of migrants suffering from the virus, it is necessary to establish what purpose the legislator pursued by applying restrictive measures. Of course, the federal legislator is bound by the public interest, namely, the obligation to ensure the health of the population, and through this - “the rights and freedoms of others”, which means that it can limit rights and freedoms in pursuit of this constitutional goal.²⁸ According to the results of 2018, Russia has become the country with the largest HIV epidemic in the world, according to a UNAIDS report. In terms of the growth

24 Declaration of Commitment on HIV/AIDS Adopted by General Assembly resolution S-26/2 of 27 June 2001

25 *ibid.*

26 Convention on the rights of the child approved by the UN General Assembly on 20.11.1989.

27 ECtHR: Case 13444/04 *Glor v Switzerland* [2009].

28 Federal Law № 323-FZ of 21.11.2011 ‘On the fundamentals of public health protection in the Russian Federation’.

rate of new HIV cases, our country is ahead of most countries in the world. The restrictive measures used by the legislator are associated with the massive spread of HIV, which remains incurable (although exceptions are known) and without the use of appropriate preventive drugs leads to death, which affects the already unstable demographic situation in the state.²⁹ In accordance with the Decree of the Government of the Russian Federation, the disease caused by HIV is included in the list of infectious diseases that pose a real danger to others.³⁰ Additionally, according to G. Onishchenko, chief medical officer, “migration makes a significant contribution to the development of HIV/AIDS in the CIS countries, as a rule, it comes from countries with a lower spread of HIV in the territory of large megacities”.³¹ However, medical and legal experts note that the rate of HIV has stabilized or declined, not due to restrictive migration measures, but due to adequate and effective preventive measures, despite the continuing migration flow.³²

Thus, it can be argued that in the context of the migration and criminogenic circumstance in Russia (including crimes against sexual integrity of the person), there are direct correlations between the increase in the number of HIV-infected people and the influx of migrants (primarily illegal).

However, it is submitted that, despite its infectious nature, HIV is not transmitted by airborne droplets, but through specific contacts, which are almost always private. Thus, in 1987, the World Health Organization established that restricting travel for people living with HIV cannot be justified by reference to health problems (Report of the Consultation on International Travel and HIV infection, March 2–3, 1987). Moreover, taking into account international regulation in the field of healthcare, the diseases that require the appropriate certificate for foreign trips are bird flu, cholera, yellow fever, and severe acute respiratory syndrome (SARS). Also, airborne diseases include progressive tuberculosis, which over time can spread through the air when people sneeze and cough.

29 Russian Constitutional Court: Russian Constitutional Court: Case 1297-O [2015].

30 Resolution of the Government of the Russian Federation of 20 October 2016 № 220R ‘On the State strategy for countering the spread of HIV in the Russian Federation for the period up to 2020 and future prospects’.

31 Sergeev S. (2009) Labor migration contributes to the spread of HIV in Russia. 28 October (<http://ria.ru/society/20091028/190970324.html#ixzz2RO7QI11q>).

32 A. Pokrovskaya, V. Yumaguzin, D. Kireev, M. Vinnik, V. Pokrovskiy ‘The Impact of Migration on HIV Situation (Analytical Review)’ (2019) RAMN № 2, 91.

Indeed, such restrictions in order to protect public health from ‘global health hazards’,³³ expressed in the termination of trips for people suffering from diseases with a short incubation period, seem logical and appropriate when possible infection by airborne droplets, because these viruses can be transmitted due to the presence in the country through random contacts or airborne particles. So, at present, the Chairman of the Government of the Russian Federation, M.V. Mishustin, at the end of February 2020 initiated the introduction of measures to deport and ban the entry of citizens of China and Iran in order to prevent the importation and spread of the coronavirus, an infection included in the list of especially dangerous diseases transmitted by airborne droplets.³⁴

At the same time, as early as mid-March 2020, the Ministry of Internal Affairs had developed a bill to amend the federal law “On the Legal Status of Foreign Citizens” (Art. 31, Art. 32, Art. 34), aimed at the expulsion of foreign citizens suffering from diseases that pose a danger to others (coronavirus is listed) in order to protect public health.³⁵ The adoption of such a law means that when diagnosing a coronavirus in a foreigner, as a disease transmitted by airborne droplets, the person will be subject to immediate deportation, while (in accordance with the bill) without taking into account individual circumstances.³⁶ However, at present, given the introduction of the “high alert” regime, due to the epidemiological circumstance in the Russian Federation (1836 infected on March 30, 2020), these restrictive measures for foreign citizens are not implemented by law.³⁷ Undoubtedly, such a regime differs from emergency and martial law regimes in its “ease”, but nevertheless, in practice, it provides for restricting the rights of citizens: to work, to move freely, to receive medical care in full, to receive timely medical supplies, etc. It would seem that the introduction of additional measures for infected foreigners was deemed to be proportionate during that critical moment, but the changes did not occur at the legislative level. It is likely that when implementing the planned restrictive measures while reducing (or extinguishing) the pandemic, the legislator will

33 L. Gostin (n.1). 667.

34 Mishustin allowed the deportation of foreigners with coronavirus from Russia <https://www.interfax.ru/russia/693781>.

35 S. Pospelova, N. Kamenskaya, M. Posadkova and S. Pospelov, ‘COVID-19 in Russia: novels of legal regulation’ (2020) ML N 2, 315.

36 Draft law on the deportation of foreigners with coronaviruses from Russia 29 March (<https://ria.ru/20200228/1565342872.html>).

37 Coronavirus (COVID-19) <https://coronavirus-monitor.ru/>.

have no fewer questions than HIV or tuberculosis infections. In this regard, the further adoption of any restrictive measures should be built on the established precedents at the national and supranational levels.

However, only the presence of an HIV-infected person in the country does not pose a threat to public health. Prevention of infection does not depend solely on HIV-infected non-citizens; HIV-negative individuals should also take measures to protect themselves from infection, for example, safe, intimate relationships and safe injections. Also, there is a risk that, with such a restriction of rights, migrants will remain in the country illegally in order to avoid being tested for HIV (shadow or illegal migration). In this case, their HIV status will remain unknown to both healthcare institutions and migrants themselves, which will not allow them to take the necessary precautions and preventive measures. Moreover, from an economic point of view, having remained in the territory of the Russian Federation, an HIV-infected citizen cannot become a burden for the domestic health care system, because in the Russian Federation only emergency medical care is provided to foreign citizens free of charge.

It is argued that despite the legitimacy of the aim (protection of the public health), aim can be achieved without banning the residence (stay) of HIV-infected migrants in connection with their state of health, which means that it is not necessary and proportionate. It is apparent that the Russian Federation does not apply such restrictions to tourists or other persons who are short-term residents of its territory; for citizens of the Russian Federation there is also no obligation to be tested for the presence of HIV, including when returning from other states. The result is that the legislator is applying double standards. It is submitted that it is inadmissible to give the problem of the spread of the virus a “foreign” character, to fight it with border methods. It is much more important and more effective, to educate the population on health and prevention issues, to convince that knowledge of HIV status, registration, taking appropriate drugs, vigilance, accuracy and responsibility will help to defeat the fatal outcome of the disease and provide an opportunity to live a full life.

IV. CASE-LAW OF THE RUSSIAN CONSTITUTIONAL COURT AND THE EUROPEAN COURT OF HUMAN RIGHTS

Legal regulation of HIV-infected migrants is ambiguous. In practice, one can find quite a few cases of their appeal for the protection of their constitutional rights and freedoms both in the courts of general jurisdiction and the Constitutional Court. It is interesting that, as already mentioned, the circumstance of all

applicants is characterized by the presence of certain individual circumstances that are directly relevant to the outcome of the case.

At the same time, it is worth noting that the Constitutional Court in its decisions, unlike the European Court of Human Rights, does not adhere to the stages of the proportionality test (legality of purpose, necessity of measure, maintaining a fair balance). It tries to use some of them, but fragmentarily and often inconsistently. For example, in one of his dissenting opinions to the Russian Constitutional Court's decision concerning the possibility of excessive state interference in the performance of contractual obligations, Judge G.A. Gadzhiev notes that when considering the case, the proportionality test, consisting of several specific stages, should have been used, which was not done when making the decision.³⁸

Thus, despite the use of the proportionality test, in Russian justice, this can only be defined as an attempt (trial) to reveal its essence. Perhaps the reason for this is the exercise of caution, constitutional restraint or the provision of intentional freedom to maneuver when considering future cases, taking into account changes in social relations and the socio-political climate in the country. However, such neglect exposes unjustified risks to many constitutional rights and freedoms disproportionately limited by the legislator. These rights and freedoms include the legal status of HIV-infected migrants expelled from the Russian Federation after receiving the results of a positive HIV test.

The first case of deportation of HIV-infected migrants was considered by the Constitutional Court in 2006. Despite the "rejected" nature of the decision, the constitutional review body provided some clarification of the relevant provisions.

An HIV-infected citizen of Ukraine, Mr. X, whose wife and daughter, also Russian citizens, lived in the Russian Federation, applied to the Constitutional Court to restore constitutional rights and freedoms. The applicant was denied a temporary residence permit on the basis of their HIV infection.³⁹ The applicant was convinced that the legislative regulation of the legal status of foreign citizens with HIV does not comply with the Constitution of the Russian Federation to the extent that it does not provide an opportunity for a migrant to live with his family in the Russian Federation, and also violates the right to protection of health and medical care resulting in discrimination based on health.

38 Russian Constitutional Court: Case 3-P [2016].

39 Russian Constitutional Court: Case 155 [2006].

The Constitutional Court, while refusing to consider the complaint, only recommended that law enforcement bodies and courts, on the basis of humanitarian considerations, take into account the exceptional circumstances of the case when deciding whether it is necessary to deport a person from the Russian Federation.

Subsequently, the judicial authority of constitutional review adopted another Decision to clarify the provisions of HIV-infected migrants.⁴⁰ The facts of the case were similar: an HIV-infected Moldovan citizen was legally married to a Russian citizen, had children with her, and lived in the Russian Federation for a long time. However, due to his state of health, his stay was considered undesirable, since, in the opinion of law enforcement agencies, it posed a real threat to public health. The Constitutional Court in its decision once again emphasized that the provisions contested by the applicant governing the legal status of HIV-infected migrants were recognized as constitutional.

It is submitted that such decisions of the constitutional review body were not convincing. The position of the Constitutional Court allowed a flexible approach possible, but did not make it mandatory for courts of general jurisdiction - that is, the reservation was not imperative, and the rules themselves remained consistent with the Basic Law of the state. In this case, the possibility of choosing to take into account individual circumstances completely belonged to law enforcement bodies and courts. Thus, arbitrariness is an obvious risk. For example, the St. Petersburg City Court indicated that the presence of a registered marriage with a Russian citizen is not an unconditional basis for issuing a foreign citizen who has been diagnosed with HIV with temporary residence permits, but only provides the court with the opportunity for such registration.⁴¹ At the same time, the practice of the Sverdlovsk Regional Court directly indicates the need to take into account, on the basis of humanitarian considerations, marital status and other exceptional, noteworthy circumstances.⁴² A court of the Kaliningrad region also held a similar position. Moreover, along with the practice of the Constitutional Court, it widely applied the legal positions of the ECHR, including those expressed in the Resolution in the “Kiyutin v. Russia” case.⁴³

40 Russian Constitutional Court: Case 902-O [2013].

41 Cour de Cassation of the Saint Petersburg city court: Case 8172 [2009].

42 Cour de Cassation of the Sverdlovsk regional court: Case 33-7811 [2008].

43 Cour de Cassation of the Saint Petersburg city court: Case 8172 [2009].

Confirming the ambiguity of the decision of the Constitutional Court, as well as based on the decision of the ECHR in “Kiyutin v. Russia”, the constitutional control body continued to receive complaints about the constitutionality of the provisions under consideration. Thus, the judicial body of constitutional review examined the complaints of three foreign citizens (Ukraine and Moldova) with HIV who are legally married to Russian citizens and who have children - Russian citizens whose stay in the Russian Federation was deemed undesirable due to the presence of HIV.⁴⁴ The Constitutional Court, referring to its previous decisions in this area and many international normative and recommendatory acts, nevertheless changed its approach and ordered the courts of general jurisdiction to investigate and assess the existence of real circumstances of a particular case on the basis of humanitarian considerations. Moreover, the Court also recognized the provisions of federal laws contrary to the Constitution to the extent that these provisions refuse an HIV-infected person whose family members permanently reside in Russia. The Constitutional Court was motivated to come to this decision by the fact that HIV, although being an infectious disease, does not spread as a result of the presence of an infected person in the country or through accidental contact through the air or general carriers such as food or water, but through specific contacts which are almost always private. In addition, the current legislation does not require a mandatory medical examination and a certificate of absence of a disease caused by HIV from foreign citizens and stateless persons who temporarily stay in the Russian Federation.

It is contended that the decision of the judicial authority of the constitutional review seems reasonable and corresponds to the prevailing social and legal realities. At the same time, the fact that despite its infectious nature, HIV is transmitted only through specific personal contacts is subject to mandatory registration. Given the international regulation in the field of healthcare, the diseases that require the appropriate certificate for foreign trips are bird flu, cholera, yellow fever. Serious diseases transmitted by airborne droplets also include coronavirus (COVID-19) and progressive tuberculosis, which over time can spread through the air when people sneeze and cough. At the same time, the judicial authority of constitutional review specified in one of its decisions that for migrants with tuberculosis, the obligation to take into account humanitarian circumstances also applies. This is true only if they confirm the fact of treatment, and as recently established by the Constitutional Court,

44 Russian Constitutional Court: Case 3-P [2016].

treatment for tuberculosis can take place both in the territory of Russia and in foreign countries - otherwise it would result in discrimination on the basis of the location of the medical institution in which the treatment is carried out.

In a sense, migrants suffering from coronavirus and tuberculosis are even more disadvantaged than HIV-infected people, because they need to provide information about their treatment, which is excluded in relation to HIV. Nevertheless, it is submitted that such a difference is justified. Firstly, coronavirus and tuberculosis spread by airborne droplets. Secondly, a complete cure for tuberculosis is possible in contrast to the cure for HIV (only methods for suppressing the virus are generally known).

The approved restrictions, expressed in the termination of international trips, seem logical and expedient if infections are possible by airborne droplets because these viruses can be transmitted due to the presence in the country through accidental contact or airborne particles. However, the mere presence of an HIV-infected person in a country does not pose a threat to public health.

An exception to this conclusion is the case of the ECHR “*Ndangoya v. Sweden*”. A Tanzanian citizen with HIV, the applicant, was granted a permanent residence permit by the Swedish authorities in view of his marriage to a Swedish citizen.⁴⁵ Subsequently, they had two children, and the couple divorced. The applicant was later prosecuted for illegally carrying knives in public places and charged with aggravated assault on a man after having had sexual intercourse without notifying his partner that he had HIV (thereby infecting two women with HIV). The Court of Appeal saw in the actions of *Ndangoya* particular cruelty and indifference to the victims and ordered the expulsion of the applicant from Sweden. The applicant clarified that in Tanzania, he would not be able to receive HIV treatment that could extend his life, as well as maintain close relations with his children and his new girlfriend. The ECHR, in turn, decided that since there is a risk that the applicant may continue such actions contrary to law, the measure adopted by Sweden appears to be proportional and proportionate, and the balance between private and public interests is also observed.

It seems that the problem has been resolved at the national and supranational levels. At the same time, in our opinion, the question of establishing a spectrum of humanitarian circumstances remained uncertain. Currently, only circumstances related to the marital status of a person, as well as the

45 ECtHR: Case 17868/03 *Ndangoya v Sweden* [2004].

length of stay, are actively applied in practice. Thus, the importance of taking into account the long-term residence of a foreign citizen is confirmed by the position of the ECHR Grand Chamber in the case of *Juner v. the Netherlands*, which established that regardless of the presence or absence of a “family life”, the expulsion of a settled migrant constitutes an interference with his right to respect for his private life.⁴⁶

However, it is proposed that other possible exceptional circumstances should also be considered. property:

- a) the presence of real estate;
- b) the presence of work - the only source of subsistence;
- c) the attitude to the payment of taxes and other contributions to budgets;
- d) circumstances of the acquisition of the virus: unsafe injections (drug addiction); sexually from a citizen; in utero; due to medical intervention in a foreign country;
- e) respect for the law: lack of a criminal record; bringing to administrative responsibility in connection with the use of narcotic substances.

At the same time, measures should be developed to counter the abuse of such rights by such persons, for example, the artificial creation of obstacles to expulsion, including the following: fictitious marriage with a Russian citizen, reference to the presence of distant relatives (cousins, aunts).

V. CONCLUSION

Thus, it can be concluded that the application of certain restrictions for people with viral diseases and migrants, including HIV(AIDS), tuberculosis and even coronavirus, is permissible, which is confirmed both by international legal and national regulations. However, they must be implemented to the extent that human rights obligations are respected. Thus, the legal position of the Courts on the need to take into account, including humanitarian circumstances, when making decisions on the deportation of a foreign citizen is an example of the direct influence of the decisions of the supernational judicial authority on constitutional control on legislative regulation and on law enforcement

46 ECtHR: Case 46410/99 *Uner v the Netherlands* [2006].

practice. This expresses the law-generating significance of the decisions of the Courts, in connection with which they are binding and become sources of medical law along with other legal acts.

The role of court decisions is characterized not by the number of decisions made in one form or another, but by the ability of these decisions to have a real impact on the law enforcement and legislative environment. The mechanism developed and approved by the national judicial control authorities for restricting the rights of migrants with infectious diseases can be similarly extended to other diseases to maintain a proportional balance of rights and freedoms between private and public interests, especially in emergencies in the healthcare sector.⁴⁷

47 S. Pospelova S., N. Kamenskaya, M. Posadkova and S. Pospelov, 'COVID-19 in Russia: novels of legal regulation' ML N 2, 314.