

## Litigation - Cyprus

Court rules on illegal immigrant's right to remain

Contributed by [Andreas Neocleous & Co LLC](#)

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[Facts](#)  
[Decision](#)  
[Comment](#)

In *Ngassam v Republic of Cyprus via the General Director of the Ministry of Interior and the Attorney General of the Republic* the Supreme Court recently ruled on the right of an HIV-positive illegal immigrant to remain in Cyprus.<sup>(1)</sup>

### Facts

The applicant, a Cameroon national, entered Cyprus illegally and subsequently applied for asylum. Her application was rejected by the Asylum Service. She then filed an administrative appeal. The Refugee Reviewing Authority rejected her appeal on the grounds that:

- she was an illegal immigrant, as defined under Article 6(1)(k) of the Aliens and Immigration Law (Chapter 105); and
- invoking the provisions of Article 6(1)(c) of the law, she was an HIV/AIDS carrier.

The applicant then filed recourse under Article 146 of the Constitution against this decision.

According to Article 8 of the Refugee Law 2000, the applicant had no right to remain in Cyprus after the authority's decision had been issued. Article 39 of EU Directive 2005/85/EC grants the right to appeal against a decision of the relevant authority, but gives individual member states discretion to decide whether to allow applicants to remain pending the outcome of an appeal. Cyprus elected not to grant the right to remain after the rejection of the administrative appeal.

While the constitutional recourse against the authority's decision was pending, the head of the Ministry of Interior ordered the applicant to be deported and to be detained pending deportation. A handwritten note was inserted in this order stating that "it is postponed until newer directions", instead of until judgment in the constitutional recourse.

The first issue that this case raised was whether the applicant should be deported, irrespective of the pending constitutional appeal, which could result in the reversal of the authority's decision. The case raised a further important issue - namely, whether the power to deport people with HIV or AIDS contained in Article 61(c) of the Aliens and Immigration Law violated the constitutional principle of non-discrimination.

### Decision

The Supreme Court clarified the meaning of Article 39 of EU Directive 2005/85/EC by noting that it does not merely give member states discretion to decide whether applicants will be allowed to remain while their recourse is pending; it also imposes an obligation to put in place adequate protective measures if they opt not to allow applicants to remain. The court therefore considered that if the applicant is not allowed to remain, adequate protective measures should be made available in the event that applicants are to be deported to their home country, where they allege that they were persecuted.

Relying on *Yvonne van Duyn v Home Office* ([1974] C41-74) and *Marks & Spencer plc v Commissioners of Customs and Excise* ([2002] C-62/00), the court held that member states' obligation goes beyond mere promulgation of national legislative measures to transpose a directive - they must also ensure its full and effective implementation. The court accordingly held that the immediate issuing of a deportation order after the

Author

[Alexia Solomou](#)



notification to the applicant of the authority's decision was illegal. Since a detention order can be made only on the basis of a valid deportation order, the detention order was also illegal.

The Supreme Court then made reference to the International Guidelines on HIV/AIDS and Human Rights, as consolidated in 2006, and the Note on HIV/AIDS and the Protection of Refugees, Internally Displaced Persons and Other Persons of Concern published by the UN High Commissioner for Refugees. The court considered that the limitation of the rights of movement and the choice of residence on the sole basis that someone is suffering from HIV/AIDS constitutes discrimination. Within the framework of the principle of non-repatriation, a refugee cannot be deported to a country where he or she will be persecuted for being HIV-positive. The court concluded that the possibility of deportation on the sole basis of being an HIV/AIDS carrier within the frame of Article 6 (1)(c) of Chapter 105 violated the principle of non-discrimination.

## Comment

This case is of fundamental importance because it involves the interaction of three legal orders - the domestic law of Cyprus, EU law and international law. When it comes to the international legal order, the court made reference to international guidelines and the UN commissioner's note. These instruments are considered as soft law (as opposed to treaties and customary international law, which are traditionally considered as hard law). Domestic courts rarely refer to soft law instruments, and the present Supreme Court case is exceptional.

This case is also notable for the teleological interpretation given to EU Directive 2005/85/EC. Referring to leading cases on the fundamental EU law principle of direct effect, as well as its subsequent application establishing the requirement of sufficiently clear and precise provisions of a directive, the court interpreted the decision of the general director of the Ministry of Interior in such a way as to give full and practical effect to Article 39 of the directive.

Furthermore, this case resonates with the European Court of Human Rights judgments in the cases of *D v United Kingdom* (Application 30240/96) and *N v United Kingdom* (Application 26565/05), which flesh out the reasoning of the court, albeit on a different legal basis - namely, Article 3 of the European Convention of Human Rights (on the prohibition of torture or inhuman or degrading treatment). In the former case, the court found that the removal of an HIV-positive immigrant from the United Kingdom to St Kitts would amount to inhuman treatment in violation of Article 3. The latter case clarified that the threshold for non-deportation on medical grounds is high, and that the circumstances in the case of *D v United Kingdom* were exceptional.

Even recognising that the present case was not based on the European Convention of Human Rights, it might nevertheless have been useful had the court given a detailed exposition of its reasoning - insofar as international law is concerned - for example, by considering Article 3 of the convention and the case law of the European Court of Human Rights. Applying such rules, the Cyprus Supreme Court could have examined whether the person concerned, if deported, would face a real risk of being subjected to inhuman treatment. The court could also have taken the opportunity to examine Article 14 of the convention, analysing its findings of discrimination in the present case.

For further information on this topic please contact [Alexia Solomou](mailto:alexia.solomou@neocleous.com) by telephone (+357 25 110 000), fax (+357 25 110 001) or email ([alexia.solomou@neocleous.com](mailto:alexia.solomou@neocleous.com)).

## Endnotes

(1) Supreme Court of Cyprus, August 20 2010, Case 493/2010.

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