

November 2021

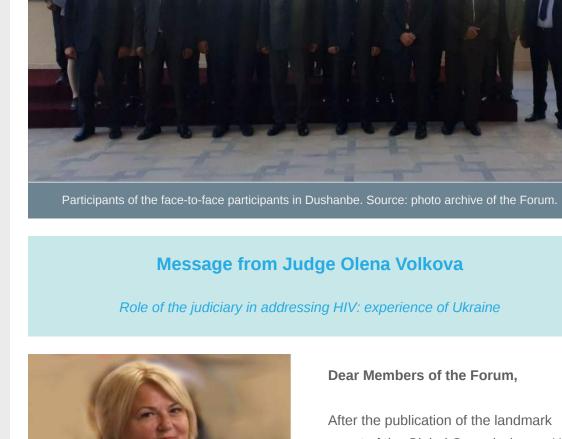
## In this Issue:

- Third Forum Meeting: Judges from EECA affirm their critical role in protecting the rights of people living with HIV and key populations • Message from Judge Olena Volkova. Role of the judiciary in addressing HIV: experience of Ukraine
- Judgment of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic: Adoption rights of people living with HIV • Political Declaration on HIV and AIDS: Ending Inequalities and Getting on Track to End AIDS by 2030
- Overview of the Handbook "Judging the epidemic: A judicial handbook on HIV, **Human Rights and the Law**"
- **Third Forum Meeting**

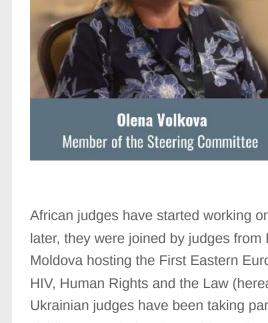
Judges from EECA affirm their critical role in protecting the rights of people living with HIV and key populations



participants from other countries joined the meeting virtually. According to the Forum's tradition, the meetings take place in a different country of the region each year. This year's Forum Meeting was hosted by Ukraine and organized by UNDP in partnership with the National School of Judges of Ukraine. The first day of the Forum was dedicated to criminal matters and the second day focused on a number of civic law topics. The event brought together over 100 participants, including judges from eight countries of the region (Albania, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Ukraine and Uzbekistan), as well civil society organizations, experts, key population representatives, and UN agencies. For more information about the Forum Meeting and its materials, please check the Forum's website.



report of the Global Commission on HIV and the Law "Risks, Rights and Health", in 2012, the interconnection between HIV



contrary, contributes to its aggravation.

and scientific fields.

contracting HIV.

Yours faithfully,

African judges have started working on this challenge in 2014 at the regional level, and, later, they were joined by judges from Eastern Europe and Central Asia (EECA) leading to Moldova hosting the First Eastern Europe and Central Asia Regional Judges' Forum on HIV, Human Rights and the Law (hereafter — "Regional Forum") in 2019. Since that time, Ukrainian judges have been taking part in the work of the Regional Forum and they have vividly responded to the problem, given its relevance in the Ukrainian context. As a trainer of the National School of Judges of Ukraine, having knowledge of the case law of the European Court of Human Rights (or ECtHR), I looked at the problem from a

and the law has been taken to a completely new level. The global

community addressed the issue to judges,

and the judicial community responded.

As you know, the greatest prevalence of such diseases as HIV, tuberculosis (TB) and hepatitis is observed in Africa, therefore, it is not surprising that it was African judges who saw the need to address the issue. They were the ones who managed to start active cooperation and convey the problem to members of the judicial community through communication with victims of the imperfect judicial system. I believe that this approach is the most efficient and appropriate. According to my colleagues who took part in the meetings of the Africa Judges' Forum on HIV and the Law, during the Forum they were the most impressed by the contribution of human rights activists, who worked on cases and assisted people who became victims of inhuman laws. Pure human emotions and stories of people turned out to be stronger arguments than dry figures and data.

Unfortunately, this approach is difficult to implement in most of the Eastern European countries due to high level of stigma and discrimination towards people with and/or

affected by HIV and AIDS-related stigma and fear of openly speak about the issue due to potential disclosure of their status. The stigmatization of HIV, AIDS and TB is the primary

different angle. It turns out that when the issue is broken down into smaller pieces, it

Given that Ukraine is one of the countries with the highest levels of HIV prevalence, unfortunately, such a state of affairs does not help to improve the situation, but, on the

becomes clear that there are many important aspects that judges often omit and/or ignore.

reason why this problem has been deliberately ignored for a long time by legislators and is treated by applying previously used and hopelessly outdated approaches. Thus, since 2017, the Ukrainian judicial community has been paying specific attention to the analysis of specific aspects of adjudication of this category of cases. Judges have started applying international standards based on human rights and universal values in their work, choosing a human-centered approach, whereby the person's HIV status or TB disease is a key factor to be taken into consideration but should not be a source of guilt. In 2019, a number of progressive lawyers took part in the work of the Ukrainian National

Platform for Judges on HIV and the Law, ready to change the approach to the legal system as a whole, to shift the focus and to decriminalize HIV transmission, which for a long time have been excessively penalized, taking into account the progress achieved in the medical

diseases" was organized by UNDP Country Office in collaboration with the National School of Judges in Ukraine with the aim of attracting a large number of judges to enhance their knowledge on the issue and apply new approaches based on international practices. Unfortunately, the judges who had previously participated in the work of the Regional Forums were not involved in the development of the seminar, and this somewhat reduced the degree of emotional intensity, which is an important factor. However, the results of the work were summed up and helped to form the vision for the further preparation to the Third Regional Forum. I am pleased to note that this year the Forum was hosted by Ukraine,

which is undoubtedly the result of the efforts made by the judiciary in addressing HIV and

contribute to the decriminalization of HIV in the country and better protection of the rights

AIDS at the national level. I sincerely hope that the exchange of experience with colleagues from the EECA region and beyond will become a new milestone and will

of people living with HIV and members of key populations that are at higher risk of

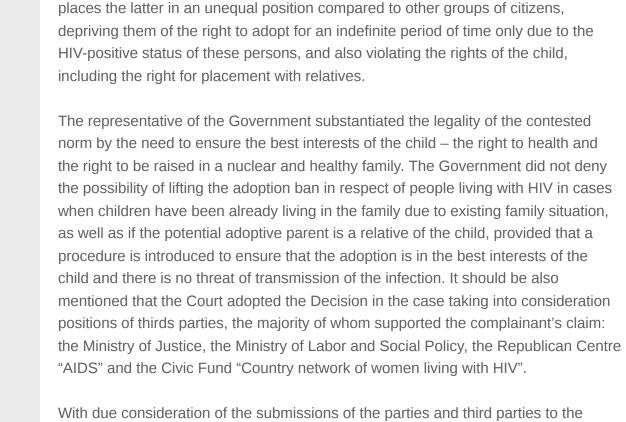
On 10 August 2021, an online seminar for judges called "Problematic aspects of the adjudication of criminal cases under Art. 130, 132 of the Criminal Code of Ukraine. Protection of the rights of HIV-positive persons and persons with incurable infectious

Olena Volkova Member of the Steering Committee of the Regional Judges' Forum Judge of the Yuzhnoukrainsk city court of Mykolaiv region, Ukraine **Decision of the Constitutional Chamber of the Supreme Court** of the Kyrgyz Republic Adoption rights of people living with HIV The full text of the Decision in Russian is available <u>here</u>. On 27 January 2021, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic (hereinafter – the Constitutional Chamber) adopted a landmark decision

recognizing legal provisions of the Decree of the Government that prohibits adoption, guardianship and fostership by people living with HIV as unconstitutional. For the

protection of the complainant, the case was heard in camera.

Source: http://constpalata.kg/ The complainant's representative asked to satisfy the claim stating that the impugned norm violates the prohibition of discrimination of people living with HIV and



practically the same as for HIV-negative people. Giving a possibility for people living with HIV and AIDS to adopt children will, subsequently, give an opportunity for children without parental care to have a family, which is a fundamental condition for improving the standards of living necessary for a child for his/her physical, mental, spiritual, moral and social development (parts 1 and 2 of Article 36 of the Constitution of the KR), especially in cases when an adoptive parent and a child are relatives or due to the family circumstances have been already living together. At the same time, the Constitutional Chamber also noted that this group – people living with HIV and AIDS – has been already vulnerable, due to the diagnosis and associated negative stigma, from social, physical and psycho-emotional perspectives. This has been aggravated by the fact that society does not accept this group, consequently, that adversely affects all spheres of their lives. With the due

note of the abovementioned, it was stated that the imposed restrictions on the

interests of the adopted child.

adoption of children should not entail disproportionate and inconsistent limitations of the constitutional status of a person and constitutional rights related to the issue at hand, and, thereby, hinder the proper protection of both the family interests and

According to 2019 data, there were more than 9,000 adults living with HIV and more than <u>2,000</u> children left without parental care in the Kyrgyz Republic, who were

The Decision of the Constitutional Chamber of Kyrgyzstan reflects the positive trend observed in countries of the region, where courts protect human rights of people

affected by this Decision that gives them an opportunity to have a family.

procedure, the Constitutional Chamber assessed the human rights provisions of the national legislation and norms of the international law and came to the conclusion that the impugned norm is unconstitutional. Stating the grounds of its Decision, the Constitutional Chamber highlighted that nowadays it is generally recognized that, when a person is on antiretroviral therapy, the risk of transmitting HIV to others is

close to zero, and the quality and life expectancy of people living with HIV is

living with HIV from discrimination on issues related to adoption rights: On 20 June 2018, the Constitutional Court of the Russian Federation <u>ruled</u> in favor of a couple in which one of the spouses was HIV-positive and had hepatitis C, and, in accordance with the provisions of the law, could not adopt her spouse's child. The Court found these norms unconstitutional, and the court decisions on the refusal to adopt a child were subject to revision. On 30 July 2018, following the Decision of the Constitutional Court and with reference to this Decision, the Oktyabrsky District Court of Krasnoyarsk <u>declared</u> <u>unlawful</u> the decision of the head of the district administration on the refusal of the request of an HIV-positive grandmother to establish custody of a minor grandson, whose mother died. In 2019, a <u>law</u> was passed allowing adoption in cases where the child already lives in the family. In 2020, a <u>Decree of the</u> Government was adopted allowing the adoption, foster care or adoption of a child by people living with HIV, if they have been registered as outpatients for

at least a year, take therapy and have an undetectable viral load and a CD4+

• In 2019, in Ukraine, in the framework of the administrative court proceeding, the court <u>declared unlawful</u> provisions of the Decree of the Ministry of Health containing a list of diseases, which prevented people living with HIV and AIDS from becoming adoptive parents. In October 2020, the Decree was amended

lymphocyte count less than 350 cells / mL.

and HIV and AIDS was removed from this list of diseases.

**Political Declaration on HIV and AIDS: Ending Inequalities** and Getting on Track to End AIDS by 2030 For more information, please see the full text of the <u>2021 Political Declaration</u> and the **Press Release** World leaders agree to reduce the annual number of new HIV infections to under 370 000 and AIDS-related deaths to 250 000, eliminate new HIV infections among children, end paediatric AIDS and eliminate all forms of HIV-related discrimination by 2025. They also committed to providing life-saving HIV treatment to 34 million people by 2025. On 9 June 2021, after weeks of intense debates, UN Member States adopted the new Political Declaration at the UN General Assembly High-Level Meeting on AIDS that took place in New York. The UN Member States welcomed the progress achieved since the 2001 Political Declaration on Commitment on HIV and AIDSs, and the later 2006, 2011 and 2016 Political Declarations. They further noticed with regret that the international community did not meet the 2020 targets despite having the knowledge and tools to prevent every new HIV infection and AIDS-related death. They called on countries to provide 95% of all people at risk of acquiring HIV within all epidemiologically relevant groups, age groups and geographic settings with access to people-centered and effective HIV combination prevention options. It also calls on countries to ensure that **95**% of people living with HIV know their HIV status, 95% of people who know their status to be on HIV treatment and 95% of people on HIV treatment to be virally suppressed. If the international community reaches these ambitious targets, 3.6 million new HIV infections and 1.7 million AIDS-related deaths will be prevented by 2030.



have sex with men, people who inject drugs, female sex workers, transgender people, and people in prisons and other closed settings — are at particular risk of

New HIV cascade: Commitment to reach the new 95–95–95 (see above) testing,

geographic settings, ensuring that at least 34 million people living with HIV access

suppression through antiretroviral therapy is a powerful component of combination HIV prevention because people living with HIV with undetectable viral loads will not

Elimination of new HIV infections in children: Commitment to ensure 95% of

treatment and viral suppression targets within all demographics, groups and

**Undetectable = Untransmittable (U = U):** Acknowledgement that viral

HIV infection.

transmit the infection to others.

Amina J. Mohammed. Source: unaids.org

"To end AIDS, we need to end the intersecting injustices that drive new HIV infections and prevent people from accessing services," said Amina J. Mohammed, Deputy Secretary-General of the United Nations.

The UN Member States acknowledged that the COVID-19 pandemic has exacerbated

especially when it comes to access to medicines, treatment and diagnostics, further off track, widening fault lines within a deeply unequal world and exposing the dangers of

under-investment in public health, health systems and other essential public services for all and pandemic preparedness. They committed to build back better in a more equitable and

epidemic, as well as to build resilience against future pandemics and other global health

existing inequalities, created additional setbacks and pushed the AIDS response,

inclusive manner from the COVID-19 pandemic and its impact on the global AIDS

pregnant and breastfeeding women have access to combination HIV prevention, antenatal testing and re-testing; 95% of women living with HIV achieve and sustain viral suppression before delivery and during breastfeeding; and 95% of HIVexposed children are tested within two months and, if HIV-positive, are provided with optimized treatment. Fully fund the HIV and AIDS response: Invest US\$ 29 billion annually in low- and middle-income countries, including at least US\$ 3.1 billion towards societal enablers. **10–10–10** targets for societal enablers: • To reduce to less than 10% the number of women, girls and people living with, at risk of and affected by HIV who experience gender-based inequalities and sexual and gender-based violence. • To ensure that less than 10% of countries have restrictive legal and policy environments that lead to the denial or limitation of access to services.

To ensure that less than 10% of people living with, at risk of and affected by

**Sexual and reproductive health:** Commitment to ensure that 95% of women and girls of reproductive age have their HIV and sexual and reproductive health-care

affordability of safe, effective and quality-assured medicines, including generics, vaccines, diagnostics and other health technologies to prevent, diagnose and treat

Service integration: Commitment to invest in systems for health and social

protection systems that provide 90% of people living with, at risk of and affected by HIV with people-centred and context-specific integrated services for HIV and other

Access to affordable medicines, diagnostics, vaccines and health technologies: Commitment to ensure global accessibility, availability and

HIV experience stigma and discrimination.

HIV infection, its co-infections and comorbidities.

service needs met.

services.

known as the GIPA Principle.

Judging the epidemic

A judicial handbook on HIV, human rights and the law

Community leadership, service delivery and monitoring: Commitment to increase the proportion of community-led HIV services and ensure relevant networks and affected communities are sustainably financed, included in HIV response decision-making, and can generate data through community monitoring and research. **GIPA:** Explicit reference to the Greater Involvement of People Living with HIV,

\* 2021 UNAIDS Global AIDs Update: Confronting Inequalities (page 29)

The full text of the Handbook in English is available <u>here</u>.

Overview of the Handbook "Judging the epidemic: A judicial handbook on HIV, Human Rights and the Law" (UNAIDS, 2013)

> The Handbook aims to assist judges and other legal professionals in handling HIV and AIDS-related matters. Judicial training

issues from different jurisdictions.

institutions and ministries of justice may also use it to deliver educational programmes for judges and magistrates on legal issues related to HIV and human rights. Based on international legal and human rights standards, the Handbook contains examples of good-practice advice and judicial rulings on HIV-related

The publication is developed in a way that allows readers to read it in its entirety or

consult it selectively as necessary. Hence, the 10 chapters contained in this Handbook were written to "stand alone", so there is some repetition between chapters. The chapters are divided into two Parts. The chapters in Part 1 "The science and medicine of HIV" provide background information that helps to understand the context of the issues-oriented chapters contained in Part 2. It includes information on how HIV is transmitted, HIV disease and its treatment,

**®UNAIDS** 

sexual transmission of HIV and living with HIV. Part 2 "Legal decisions that promote human rights in the context of HIV" contains seven chapters addressing specific issue areas: discrimination on the basis of actual or presumed HIV-positive status, the criminal law and HIV-disclosure, exposure and/or transmission; sexual assault and domestic violence; drug laws, harm reduction and the rights of people who use drugs; women's rights with respect to family and property law; HIV treatment and health care; human rights and the criminalization of key populations at higher risk of HIV exposure. Below is a brief overview of **Chapter 5** of the Handbook on *factors judges should* consider when adjudicating cases of HIV non-disclosure, exposure and/or transmission. In many jurisdictions, it is considered a crime to engage in certain sexual acts with another person without disclosing one's HIV-positive status, to expose another person to HIV and/or to transmit HIV to another person, especially in a sexual context. Generally, there is no evidence that criminal prosecutions help prevent new HIV infections. Rather, there are indications that overly broad criminalization of HIV non-disclosure, exposure or transmission undermines public health and can result in

an HIV infection.

culpability.

HIV transmission risk: Judges and/or juries should consider the level of HIV transmission risk in the specific circumstances of the case and the degree of harm resulting from the prohibited conduct (if any). They should require proof that HIV was transmitted by the accused in order to secure a conviction. Unfortunately, available scientific techniques (phylogenetic analysis, Recent Infection Testing Algorithm, etc.) have significant limitations and alone cannot definitely prove the source or timing of **Evidence of a culpable mind:** When the legislation criminalizes only intentional actions, willful, purposeful, or intentional exposure or transmission of HIV should not

be presumed merely because the accused has engaged in unprotected sex or has

**Vertical transmission:** Criminal law may also contain specific provisions or can be interpreted in a way that allows the prosecution of women for vertical transmission (i.e. mother-to-child HIV transmission through pregnancy, delivery or breastfeeding). However, due to vulnerabilities, lack of access to services, violence, stigma and

discrimination and other factors women may not be able to prevent the transmission.

We hope that you enjoyed the Third Issue of the Newsletter!

members and other readers. Your suggestions and comments will be greatly appreciated!

**Feedback** 

Copyright © EECA Regional Judges' Forum on HIV, Human Rights and the Law, All rights reserved.

Our mailing address is: forumsudey@gmail.com

In order to make sure we deliver the best and most relevant content, we ask for your honest feedback below. This helps us make sure the Newsletter is useful for Forum

had sex without disclosing the HIV-positive status to the sex partner. On other legislation that criminalizes unintentional acts, (for instance, recklessness or negligence), proving that the accused knew about the HIV-positive status and understood how HIV may be transmitted is critical to the determination of legal

Therefore, from the HIV prevention and women's rights protection perspectives, such approaches to HIV criminalization are rather problematic. **Defences:** Judges should consider, as defences to charges of HIV non-disclosure, exposure and transmission: consent to sex by the sexual partner of the HIV-positive person; use of reasonable precautions to protect a partner from HIV infection; fear of violence, abandonment or abuse, especially for women in abusive relationships. **Sentencing:** Sentencing in HIV-related cases varies greatly from one jurisdiction to another. When imposing sentences, judges may take into account the negative impact that imprisonment may have on the health of a person living with HIV.

HIV, Health and Development Team UNDP Istanbul Regional Hub, Merkez, Abide-i Hürriyet Cd No:142, Istanbul 34381 Turkey Want to stop receiving the Newsletter?