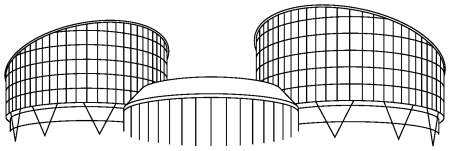

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF I.B. v. GREECE

(Application no. 552/10)

JUDGMENT

STRASBOURG

3 October 2013

FINAL

03/01/2014

This judgment has become final under Article 44 § 2 of the Convention.

In the case of I.B. v. Greece,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 10 September 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 552/10) against the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Greek national, Mr I.B. ("the applicant"), on 2 December 2009. The President of the Section acceded to the applicant's request not to have his name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Mr G. Letsas and Ms. V. Mantouvalou, lawyers practising in London. The Greek Government ("the Government") were represented by the delegates of their Agents, Ms G. Papadaki, Adviser at the State Legal Council, and Ms M. Germani, Legal Assistant at the State Legal Council.

3. The applicant alleged, in particular, a violation of Article 14 of the Convention taken in conjunction with Article 8.

4. By a decision of 28 August 2012, the Chamber declared the application partly admissible.

5. The applicant and the Government each filed further observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1980 and lives in Athens.

7. The applicant had been working for a jewellery manufacturing company since 2001. On 4 March 2003 he resigned from his post in order to carry out his military service. Afterwards he contacted S.K., the owner of the company, who hired him again on a full-time basis from 1 July 2004 on a monthly salary of 722.92 euros (EUR).

8. In January 2005 the applicant told three of his colleagues – I.M., S.M. and O.G. – that he feared he had contracted the human immunodeficiency virus (HIV). On 11 February 2005, while he was on annual leave, that fear was confirmed by a test establishing that he was indeed HIV-positive. On 15 February his employer, S.K., received a letter from the three above-mentioned employees in which they told her that the applicant "had Aids" and that the company should dismiss him before the end of his annual leave. All three colleagues had tested negative for Aids.

9. In the meantime information about the applicant's health condition had spread throughout the entire company of seventy employees. The staff started complaining to their employer about having to work with a colleague who was HIV-positive and demanded his dismissal. S.K. then invited an occupational-health doctor to come to the company premises and talk to the staff about HIV and how it could be transmitted. The doctor attempted to reassure the staff by explaining the precautions to be taken but they continued to demand the applicant's dismissal. S.K. then considered transferring the applicant to another department at a different location, but the head of that department threatened to resign if the applicant joined his team. S.K. then offered to help the applicant set up his own business if he would tender his resignation. She also offered to pay for him to attend a training course in hairdressing. The applicant refused her offers however.

10. On 21 February 2005 thirty-three employees of the company (approximately half the total number of staff) sent a letter to S.K. asking her to dismiss the applicant in order to "preserve their health and their right to work", failing which the harmonious atmosphere in the company would, in their view, be liable to deteriorate. On 23 February 2005, two days before the applicant returned from leave, S.K. dismissed him and paid him the statutory compensation due under Greek law, namely, one month's salary and EUR 843.41 in respect of holiday leave.

11. Shortly after his dismissal the applicant found another job in a private company.

12. On 13 May 2005 the applicant brought proceedings in the Athens Court of First Instance. He complained that "unacceptable social prejudices and outdated taboo considerations" had prevailed over recognition of his

contribution to the company where he had worked. He also claimed that he had been unfairly dismissed and that his dismissal was invalid because he had not been paid sufficient compensation. He alleged that he had been dismissed on the basis of "despicable considerations" which took no account of the "human factor or his person", that his employer "had remained manifestly indifferent to the fact that she had thus seriously harmed a hard-working and conscientious employee at the very time when basic humane considerations required that he be supported and had at the same time callously insulted him", and that his employer had "treated him with an unjustified and inhumane aversion for his serious health problem".

13. The applicant added that the only reason that had led S.K. to dismiss him had been (scientifically unfounded) prejudice against HIV-positive persons and the alleged "risk" that they posed in their professional and social relations. It was therefore clear, in the applicant's view, that S.K.'s conduct had brutally violated his personality rights, in particular the most intimate ones concerning sensitive personal details. The manner in which he had been dismissed had diminished unacceptably his value as a human being by reducing him to an "object" that could be handled according to "personal prejudices and obsessions".

14. The applicant asked the court to declare the termination of the contract unlawful, order the employer to continue employing him and paying him a salary, and to pay him EUR 9,397 in unpaid salaries, EUR 1,068.62 in holiday bonuses and various other amounts calculated by him and, lastly, the sum of EUR 200,000 for non-pecuniary damage.

15. In a judgment of 13 June 2006 the court held that the dismissal was unlawful, as contrary to Article 281 of the Civil Code which prohibited the exercise of a right if it manifestly exceeded the limits imposed by good faith or morals. The court found that the sole ground for terminating the contract had been the applicant's illness and awarded him EUR 6,339.18, which corresponded to unpaid salaries since his dismissal. The court considered that the employer's conduct, even taking account of the pressure exerted by her employees, had constituted an abuse of rights. It found that the employer had decided to dismiss the applicant in order to ensure that her company continued operating smoothly and to avoid protests and complaints, thus currying favour with the majority of her staff.

16. However, the court rejected the applicant's complaint that his dismissal had violated his personality rights because it had not been established that the dismissal had been motivated by reprehensible intent or an intention to defame the applicant. The court found, however, that S.K. had dismissed the applicant in order to preserve what she had wrongly believed to be an issue of peaceful working relations within the company. Lastly, the court held that it was not necessary to order the applicant's reinstatement because he had found a new job in the meantime.

17. On 26 February and 15 March 2007 respectively, S.K. and the applicant lodged an appeal against that judgment with the Athens Court of Appeal.

18. In a judgment of 29 January 2008, the Court of Appeal dismissed S.K.'s appeal and upheld the applicant's appeal on both grounds, namely, abuse of rights and violation of personality rights. Like the Court of First Instance, the Court of Appeal acknowledged that S.K. had dismissed the applicant after giving in to pressure from staff and in order to preserve a good working environment in the company. The Court of Appeal observed that the employees' fears were scientifically unfounded, as the occupational-health doctor had explained. Given the mode of transmission of the virus, there was no danger to their health. Accordingly, their fears were in reality based on prejudice rather than on an established risk; consequently, the applicant's illness could not affect the future smooth operation of the company.

19. The Court of Appeal weighed the need to maintain the smooth operation of the company, which was threatened by scientifically unfounded fears, against the applicant's justified expectation of being protected during the difficult period he was experiencing. It noted that where an employee's illness did not adversely affect work relations or the smooth operation of the company (through absenteeism or reduced working capacity, for example), it could not serve as an objective justification for terminating the contract. It noted that the applicant had not been absent from work and that no absence on the ground of illness was foreseeable in the immediate future. Moreover, the nature of the applicant's job, which did not demand excessive effort, precluded the risk of a reduction in his capacity for work since, during the many years in which a person was merely HIV-positive, his or her working capacity was not substantially reduced.

20. It observed that the applicant's illness could not adversely affect the future smooth operation of the company, as none of the employees had left the company between the time when the applicant's illness had been revealed and the termination of his employment contract. It concluded that the fact that S.K. "had given in to the demands of her employees, dismissed the applicant and terminated his contract could not be justified on grounds of good faith or the employer's interests within the proper meaning of the term".

21. The Court of Appeal awarded the applicant the sum of EUR 6,339.18 in unpaid salaries backdated to the date of his dismissal. It also held that the applicant's personality rights had been infringed as his unfair dismissal had affected both his professional and social status, which were the two facets of an individual's personality. It awarded him the further sum of EUR 1,200 for non-pecuniary damage under that head.

22. On 4 July 2008, S.K. appealed on points of law against the Court of Appeal's judgment.

23. On 16 October 2008 the applicant also lodged an appeal against the Court of Appeal's judgment. He relied on Articles 180 (nullity of a legal act),

281 (abuse of rights) and 932 (compensation for non-pecuniary damage) of the Civil Code, on Article 22 (right to work) of the Constitution, and on the principle of proportionality regarding the amount of the compensation awarded. Relying on the case-law of the Court of Cassation, he also submitted that where a dismissal had been set aside by a judicial decision as unfair, the employer was under an obligation to reinstate the employee. More specifically, in his second ground of appeal, the applicant submitted that the Court of Appeal had wrongly rejected his request to be reinstated in the company, arguing that reinstatement was the rule in the event of a breach of Article 281, or in the event of an infringement of personality rights or of the right to personal development and participation in professional life.

24. In judgment no. 676/2009 of 17 March 2009 (finalised on 4 June 2009), the Court of Cassation quashed the Court of Appeal's judgment on the ground, *inter alia*, that the court had wrongly construed and applied Article 281 of the Civil Code to the facts of the case. It found that termination of an employment contract was not unfair if it was justified by the employer's interests "in the proper sense of the term", such as the restoration of peaceful working relations between employees and the smooth operation of the company where these were liable to be disrupted by maintaining the dismissed employee in his or her post. The Court of Cassation held as follows:

> "As the dismissal ... was not motivated by ill-will, revenge or any aggressivity on the part of [the employer] towards [the employee], the dismissal was fully justified by the interests of the employer, in the proper sense of the term [interests], in that it was done in order to restore peace in the company and its smooth operation. The employees were seriously perturbed by the extremely serious and contagious illness of the [applicant], which aroused feelings of insecurity among them and fears for their health, prompting them to request – collectively and in writing – his dismissal and stress that if he were not dismissed the smooth operation of the company would be severely affected ..."

25. Lastly, the Court of Cassation dismissed the applicant's appeal as devoid of purpose and remitted the case to the Court of Appeal.

26. Neither the applicant nor his former employer took the initiative reserved to them by statute of applying to the Court of Appeal for a ruling on the case remitted to it.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Domestic law

27. The relevant Articles of the Greek Constitution provide as follows.

Article 9 § 1

"... An individual's private and family life is inviolable ..."

Article 22 § 1

"Work constitutes a right and shall enjoy the protection of the State, which shall seek to create conditions of employment for all citizens and shall promote the moral and material advancement of the rural and urban working population. ..."

Article 25 § 1

"The rights of human beings as individuals and members of society and the principle of the constitutional welfare state are guaranteed by the State.

All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. Where appropriate, these rights shall also apply to the relations between individuals. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, shall be provided for either directly by the Constitution or by statute ... and shall respect the principle of proportionality."

28. Section 1 of Law no. 2112/1920 on dismissal and the termination of employment contracts in the private sector provides:

"A private-sector employee recruited on a contract of indefinite duration who has been employed for more than two months cannot be dismissed without prior written notice of termination of the employment contract ..."

29. The relevant sections of Law no. 3304/2005 on equal treatment (race, nationality, religion, age, sexual orientation) read as follows.

Section 1 – object

"The object of the present Law is the adoption of a general regulatory framework in which to combat discrimination based on religion or other beliefs, disability, age or sexual orientation in the sphere of employment ... and to ensure that the principle of equal treatment is applied."

Section 2 – principle of equality of treatment

"1. Direct or indirect discrimination on one of the grounds referred to in section 1 shall be forbidden.

2. Harassment ..., with the aim or effect of adversely affecting a person's dignity and creating an intimidating, hostile, degrading, humiliating or aggressive environment, shall also be regarded as discrimination."

Section 10 – reasonable measures accommodating disabled persons

"In order to comply with the principle of equal treatment of disabled persons, the employer must take all necessary measures required in the circumstances to ensure that disabled persons have access to a workstation, can carry on an activity and develop professionally, and take part in professional training, in so far as such measures do not impose an unreasonable burden on the employer ..."

Section 12 – positive action and special measures

"1. It shall not be discriminatory to adopt or maintain special measures designed to prevent or compensate for disadvantages based on religious grounds or other beliefs, or grounds of disability, age or sexual orientation.

2. It shall not be discriminatory to adopt or maintain measures protecting the health and safety of disabled persons in the workplace or measures creating or maintaining the conditions or facilities for preserving and promoting their integration in the activity and work."

B. The National Commission for Human Rights

30. On 27 January 2011 the National Commission for Human Rights drew up a report on "issues relating to the protection of the rights of HIV-positive persons". The introduction to the report reads as follows.

"The National Commission for Human Rights has been prompted to examine issues relating to the protection of the rights of HIV-positive persons by the observed lack of enjoyment of fundamental rights by the said individuals, which is exacerbated by stigmatisation, manifestations of intolerance, violations of confidentiality and other forms of social discrimination to their detriment.

The impetus for this was judgment no. 676/2009 of the Court of Cassation, in which that court actually upheld the lawfulness of the dismissal of an HIV-positive employee and endorsed the conditions in which he was dismissed. Having regard to the importance of that decision – which is the first judicial ruling of its kind in the judicial annals of the country – and to the fact that it highlighted a unique but important aspect of the problems facing HIV-positive persons, the Commission organised a consultation with several other organisations and institutions campaigning for the protection of the rights of such persons. A number of issues were raised during the discussion, but the ones considered to be the most important were the following: a) stigmatisation as a result of HIV/Aids, b) discriminatory treatment of persons infected with the virus, particularly in the workplace, c) access by such persons to health services, and d) protection of their private life."

31. In its final considerations the Commission observed:

"There is a current and pressing need to protect the rights of HIV-positive persons and to institutionalise and apply the fundamental principles on which these rights are based, having regard to the fact that, according to the latest official statistics, the disease appears to have reached alarming levels in our country.

The risks do not stem only from the disease itself and the fact that it is spreading, but also from the formation and consolidation of dangerous and scientifically unfounded misconceptions through court rulings which maintain that HIV-positive employees constitute a 'danger' in their workplace.

Lastly, we should point out that the protection of the rights of HIV-positive persons does not concern them alone but public health in general, in that if these people are not protected they will hesitate to be tested ... which will undermine the efforts being made by public-health organisations to limit the spread of the disease."

III. RELEVANT EUROPEAN AND INTERNATIONAL INSTRUMENTS

A. International Labour Organization (ILO) Recommendation concerning HIV and AIDS and the World of Work, 2010 (no. 200)

32. This Recommendation is the first human rights instrument on HIV and Aids in the world of work. It was adopted, by a large majority, by government representatives, employers and workers of the member States of the ILO at the International Labour Conference in June 2010. It provides, *inter alia*, as follows.

> "3. ...
>
> (c) [T]here should be no discrimination against or stigmatization of workers, in particular jobseekers and job applicants, on the grounds of real or perceived HIV status or the fact that they belong to regions of the world or segments of the population perceived to be at greater risk of or more vulnerable to HIV infection;
>
> ...
>
> 9. Governments, in consultation with the most representative organizations of employers and workers, should consider affording protection equal to that available under the Discrimination (Employment and Occupation) Convention, 1958, to prevent discrimination based on real or perceived HIV status.
>
> 10. Real or perceived HIV status should not be a ground of discrimination preventing the recruitment or continued employment, or the pursuit of equal opportunities consistent with the provisions of the Discrimination (Employment and Occupation) Convention, 1958.
>
> 11. Real or perceived HIV status should not be a cause for termination of employment. Temporary absence from work because of illness or caregiving duties related to HIV or AIDS should be treated in the same way as absences for other health reasons, taking into account the Termination of Employment Convention, 1982.
>
> 12. When existing measures against discrimination in the workplace are inadequate for effective protection against discrimination in relation to HIV and AIDS, Members should adapt these measures or put new ones in place, and provide for their effective and transparent implementation."

B. Texts of the Parliamentary Assembly of the Council of Europe

33. The Parliamentary Assembly of the Council of Europe (PACE) has raised the question of HIV/Aids in a number of documents. In its Recommendation 1116 (1989) on Aids and human rights, it stated the following:

> "3. Noting that, although the Council of Europe has been concerned with prevention ever since 1983, the ethical aspects have been touched upon only cursorily;
>
> 4. Considering nevertheless that it is essential to ensure that human rights and fundamental freedoms are not jeopardised on account of the fear aroused by Aids;

5. Concerned in particular at the discrimination to which some Aids victims and even seropositive persons are being subjected;

...

8. Recommends that the Committee of Ministers:

A. instruct the Steering Committee for Human Rights to give priority to reinforcing the non-discrimination clause in Article 14 of the European Convention on Human Rights, either by adding health to the prohibited grounds of discrimination or by drawing up a general clause on equality of treatment before the law; ..."

34. In its Resolution 1536 (2007) on HIV/Aids in Europe, PACE reaffirmed its commitment to combating all forms of discrimination against persons living with HIV/Aids:

"9. While emphasising that the HIV/Aids pandemic is an emergency at the medical, social and economic level, the Assembly calls upon parliaments and governments of the Council of Europe to:

9.1. ensure that their laws, policies and practices respect human rights in the context of HIV/Aids, in particular the right to education, work, privacy, protection and access to prevention, treatment, care and support;

9.2. protect people living with HIV/Aids from all forms of discrimination in both the public and private sectors ..."

C. The International Covenant on Economic, Social and Cultural Rights

35. Article 2 § 2 of the International Covenant on Economic, Social and Cultural Rights provides that the rights enunciated in the Covenant "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". In its General Comment on Non-Discrimination (No. 20, 2009), the United Nations Committee on Economic, Social and Cultural Rights expressly stated that the expression "other status" appearing at the end of Article 2 § 2 of the Covenant included health status, in particular HIV status:

"33. Health status refers to a person's physical or mental health. States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum ..."

D. Judgment of the South African Constitutional Court in the case of *Hoffmann v. South African Airways*

36. In the case of *Hoffmann v. South African Airways* (CCT 17/00) of 28 September 2000, an application had been made to the Constitutional Court

against a decision of the Witwatersrand High Court regarding discrimination in the employment of Mr Hoffmann as a cabin attendant for the airline company South African Airways on the ground that he was HIV-positive. The company relied on three arguments: the negative reaction of HIV-positive persons to the yellow fever vaccine; the risk of transmitting diseases to passengers and other members of the company; and the low return on investment in such staff as they had a lower life expectancy than the others.

37. The Constitutional Court unanimously held that such discrimination had breached Mr Hoffmann's constitutional rights.

38. Firstly, it held that a distinction had to be made between HIV-positive persons and persons suffering from immune deficiency. It observed that Mr Hoffmann had been only HIV-positive at the time of his dismissal and the court's decision. It added that the practice of other foreign airlines had no bearing on an examination of the constitutionality of the decision. Secondly, it recognised that a company's commercial concerns were legitimate but considered that these should not serve as a pretext for denying elementary fundamental rights such as compassion and tolerance of others. Having regard to those overriding considerations, persons infected with HIV were in a particularly fragile situation which required full protection under the legal system. Accordingly, the court held that the violation of Mr Hoffmann's rights required the airline to offer him a job forthwith and to bear the costs of the proceedings.

IV. COMPARATIVE LAW MATERIAL

39. A comparative study of the legislation of thirty member States of the Council of Europe on the protection provided under domestic law to HIV-infected persons from discrimination in the employment context shows that seven States – Albania, Azerbaijan, Italy, the Republic of Moldova, Romania, the United Kingdom and Russia – have passed specific legislation in this respect. In the twenty-three other States, which have not passed specific legislation, HIV-positive persons who face differences in treatment in the workplace can rely on the general provisions of domestic law governing non-discrimination. The decisions of the domestic courts and other bodies for human rights protection in some of these States show that they grant protection against dismissal to HIV-positive persons through the prohibition imposed on other grounds of discrimination, such as health or disability.

40. In France, for example, on 6 September 2012 the Equal Treatment Commission (the Human Rights Council since October 2012) found that the Law on equal treatment of persons suffering from a disability or chronic illness did not oblige an employee (the case in question concerned the dismissal of an HIV-positive employee of a licensed bar) to disclose his or her illness unless he or she would otherwise be unable to perform the work.

The Commission also found that the supposed prejudice of customers towards HIV-positive persons did not justify terminating the contract.

41. On 13 December 1995 the Pontoise Criminal Court, in France, sentenced an employer to five months' imprisonment, suspended, and ordered him to pay EUR 3,000 in damages for dismissing – purportedly on economic grounds – one of his employees, a veterinary assistant who was HIV-positive.

42. Even before the enactment in Belgium of the Law of 10 May 2007 on combating certain forms of discrimination, the Dendermonde Labour Court had held, on 5 January 1998, that an employer had abused his right to terminate an employment contract by dismissing an employee solely on account of his HIV infection.

43. The Swiss Federal Supreme Court (judgment BGE 127 III 86) held that dismissal from work solely on account of HIV infection was discriminatory and unfair for the purposes of Article 336 of the Code of Obligations.

44. On 18 October 2004 the Poltava Regional Court, in Ukraine, ordered the editor of a newspaper to pay compensation to a journalist who had been dismissed because he was HIV-positive.

45. In Croatia, following the intervention of the Ombudsman, the Police Internal Rules, which had previously provided that an HIV-positive person could neither become nor remain a serving police officer, were amended.

46. On 23 November 2009 the Polish Constitutional Court declared unconstitutional a provision of the Ministry of Interior's Regulations according to which any police officer who was HIV-positive should automatically be declared unfit for service.

47. On 26 April 2011 the Russian Supreme Court declared inoperative a provision of the Civil Aviation Regulations forbidding HIV-positive persons from working as pilots on any type of aircraft.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

48. The applicant complained of a violation of his right to private life, alleging that the Court of Cassation had ruled that his dismissal on the ground of his HIV status had been lawful. He also submitted that his dismissal had been discriminatory and that the Court of Cassation's reasoning, according to which his dismissal had been justified by the need to preserve a good working environment in the company, was not a valid basis for differential treatment

compatible with Article 14. He relied on Article 14 of the Convention taken in conjunction with Article 8. Those provisions are worded as follows:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. The parties' submissions

1. The Government

49. The Government conceded that any dismissal of an employee would doubtless have an impact on his or her private life. However, that did not suffice to render Article 8 applicable. According to the Court's case-law, a dismissal did not raise a problem under Article 8 unless it entailed broader consequences for the employee, such as an inability to find another job, and not merely the loss of his or her post. The applicant's dismissal had not had the effect of excluding him from the job market (as had been the case in *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII), or of generally depriving HIV-positive persons of the right to employment. The applicant had found work shortly after he was dismissed. Article 8 protected the relations that both parties intended to forge, whereas in the applicant's case his colleagues had not wanted to work with him. Lastly, the applicant's employer had not misused information relating to the applicant's health status.

50. According to the Government, the applicant had not been a victim of discrimination either. His employer had dismissed him out of concern to protect the company's interests and secure peaceful working relations, not because of prejudice against his HIV status. The fact that the Court of Cassation had recognised that he had been dismissed on that basis did not mean that it had been prejudiced or biased against the applicant. Its reasoning had not hinged on the fact that the applicant was HIV-positive. Furthermore, the applicant's employer, S.K., had not been at an advantage before the Court of Cassation on account of not being HIV-positive.

51. The Government submitted that the applicant's health and his continued employment in the company had not been the subject of "negotiation" between the employer and the applicant's colleagues. The employer had tried to find a solution which, without endangering the survival of her company, would take account of the applicant's interests. She had examined the possibility of taking less radical measures than dismissal and had tried to help the applicant by offering him a training course in hairdressing or helping him to set up his own business. When all those attempts failed, the employer had put her personal interests – preserving the smooth operation of the company – above the applicant's interests and had decided to dismiss him. The employer could not have ignored her employees' fears. Ensuring a harmonious working environment was not only a right of the employer but also an obligation towards his or her employees. The fact that an employer had put her personal interests above those of one of her employees and had not reacted in a "desirable" way – namely, by ignoring her employees' fears – and the fact that the Court of Cassation had not compelled that employer to do what would have been "desirable" did not amount to a violation of the Convention.

52. The Government submitted that the cases of *Obst v. Germany* (no. 425/03, 23 September 2010) and *Schüth v. Germany* (no. 1620/03, ECHR 2010), relied on by the applicant, weighed more heavily in favour of a finding of no violation. In the latter judgment in particular the Court had attached special weight to the fact that the applicant's dismissal might make it totally impossible for him to find employment, which was not the case in the present situation. As the applicant had been hired by another company shortly after his dismissal, it had not had the effect of stigmatising him or debarring him from professional or social life.

53. The Government considered that the present case had to be distinguished from *Kiyutin v. Russia* (no. 2700/10, ECHR 2011), in which the restrictions imposed on the applicant's rights were the result of a State action. In the present case the alleged discriminatory treatment had been the act of an individual and the Court of Cassation had had the task of examining a dispute between individuals. Furthermore, the European consensus observed by the Court in *Kiyutin* had concerned the entry, stay and residence of HIV-positive persons in the member States of the Council of Europe; it had not concerned the degree of responsibility of individuals, nor had it compared their responsibility with that of the State.

54. The Government pointed out that the Court of Cassation had not deemed the fears of the applicant's colleagues worthy of protection. Its judgment had been neither arbitrary nor unreasonable even if the State's margin of appreciation was considered to be limited on account of the fact that the applicant was HIV-positive. In the present case the Greek judicial system could not require more of the employer, given that she was only an individual, that she had tried both to avoid dismissing the applicant and to

help him, and that the atmosphere in the company was particularly hostile towards him.

55. The Government submitted that the applicant had not been treated unfavourably on account of his health either by the Court of Cassation or his employer. The latter had not compared the applicant's state of health with that of her other employees; she had taken the decision to dismiss him not because he was HIV-positive but in order to restore peace in the company.

56. The Government argued that neither Article 8, whether taken alone or in conjunction with Article 14, nor even Protocol No. 12 required member States to introduce legislation outlawing the dismissal of HIV-positive employees from a post in the private sector. Provision for such an obligation would lead to an extension of the State's responsibility regarding relations between individuals, whereas according to the Court's relevant case-law the States had a wide margin of appreciation in that area. They referred to the case of *Evans v. the United Kingdom* ([GC], no. 6339/05, § 77, ECHR 2007-I).

57. In the Government's submission, States were of course not prevented from passing legislation of that type but this could not be regarded as an obligation arising from Articles 8 and 14 of the Convention. The Greek State had in principle complied with its positive obligations regarding employment law, including in the areas in which questions could arise that affected the private life of the persons concerned. It afforded effective protection to HIV-positive employees through well-established provisions of employment law, civil law, civil procedure and provisions governing specific categories of employee (Law no. 2643/1998 on employment protection for disabled persons and Law no. 3304/2005 incorporating Directive 2000/78/EC of the Council of the European Union of 27 November 2000 establishing a general framework for equal treatment in employment and occupation).

58. The Government observed that, relying on the relevant provisions of civil law and employment law, the applicant had brought an action in the civil courts, which had examined his case according to the special procedure applicable to employment disputes. The fact that the lower courts had found in the applicant's favour showed that the above-mentioned provisions provided a sufficient framework for the protection of HIV-positive employees. The effectiveness of that framework could not be challenged merely because the Court of Cassation had ultimately found in favour of the applicant's employer.

2. The applicant

59. Relying on *Sidabras and Džiautas*, *Obst* and *Schüth*, all cited above; *Palomo Sánchez and Others v. Spain* ([GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, ECHR 2011); and *Siliadin v. France* (no. 73316/01, ECHR 2005-VII), the applicant claimed that the fact that his complaint related to the circumstances of his dismissal did not render Article 8 of the

Convention or the principle of positive obligations inapplicable *per se*. The factual circumstances showed that the attitude of his colleagues and of his employer had had an impact on his private life which could not be regarded as negligible. He had been the subject of immediate, direct and effective stigmatisation on the part of his colleagues and had been treated like a pariah who should no longer be entitled to work. Furthermore, his employer could, and should, have adopted a different attitude towards him and in particular insisted that his HIV status was not a ground for dismissal, rather than turning it into a subject for negotiation with her other employees. The applicant submitted that he had expressed his desire to keep his job despite the hostile reactions and social stigmatisation he had suffered. Employment was an important component of a person's self-respect, which was essential to his or her ability to form social and private relations.

60. The applicant also referred to a number of international instruments such as ILO Recommendation no. 200 and PACE Resolution 1536 (2007), (see paragraphs 32 and 34 above) which, in his submission, defined stigmatisation in the world of work and called for the protection of persons infected with the virus against any form of discrimination.

61. The applicant submitted that the Court of Cassation had "had an obligation", in the circumstances of the case, to rule the dismissal unfair on the ground of discrimination. He considered that he had been treated less favourably than his colleagues on account of his health. If he had not contracted the virus, his colleagues would not have refused to work with him and his employer would not have dismissed him. If it were a well-established principle in Greece that an HIV-positive employee could not be dismissed, employees who harboured prejudice would know that they could not obtain a dismissal, would not disrupt the operation of the company, and would refrain from interfering in the professional and private life of the employee in question. In the present case the motives of the employees were inseparable from those of the employer and it could not be claimed that the dismissal was not discriminatory on the pretext that the employer's motives, taken alone, constituted valid grounds for dismissal.

62. The applicant maintained that if it were not recognised as unlawful to dismiss a member of a vulnerable group on the ground that his or her colleagues refused to work with him or her because of prejudice, this would lead to wide-scale discrimination and exclusion: persons prejudiced against others of a particular race, ethnic background or sexual orientation could simply refuse to work with them and their employers would accordingly dismiss them. If the courts did not intervene, the prejudices of third parties would have the effect of debarring members of a vulnerable group from the majority of private-sector jobs and establishing a form of segregation between companies which employed persons from that group and those which did not.

63. The applicant submitted that, in the present case, the Court of Cassation had not weighed the need to protect HIV-positive employees from

discrimination against the need for employers to protect their interests. Moreover, the Court of Cassation's judgment was particularly succinct and had not really examined the question of the proportionality of the interference.

64. The applicant submitted that there were a number of factors in the present case which would justify finding – as, moreover, the Court had done in *Kiyutin* (cited above, § 63) – that the State had a narrower margin of appreciation. Those factors were: undeniable prejudice on the part of his colleagues towards HIV-positive individuals; the fact that the latter were part of a particularly vulnerable group, were victims of systematic discriminatory treatment and suffered from stigmatisation, social exclusion and marginalisation; and the fact that HIV-positive status was irreversible and often perceived as a sign of the sexual preferences of the person concerned. Where an HIV-positive employee was dismissed, the resulting stigmatisation was devastating. He or she had to face up not only to the illness but also to the detrimental effect of being dismissed on account of the disease. Such stigmatisation could make it impossible to find a new job.

65. In support of his submissions, the applicant also relied on a number of judgments of the Supreme Courts of many countries which had ruled in favour of HIV-positive employees in the workplace, and particularly *Hoffmann v. South African Airways* of the South African Constitutional Court (see paragraphs 36-38 above) which held that prejudice against that category of persons did not constitute a legitimate professional interest.

66. Relying on *Bah v. the United Kingdom* (no. 56328/07, ECHR 2011), the applicant submitted that States had to advance very weighty arguments to justify a difference in treatment based on medical conditions, such as HIV status. As the Court had stated in that judgment, a difference in treatment based on an immutable personal characteristic had to be explained in more detail than a difference in treatment based on a characteristic subject to an element of choice. In the applicant's submission, HIV status was a condition which, once acquired, was unlikely to disappear.

B. The Court's assessment

1. Applicability of Article 8 taken in conjunction with Article 14

67. Regarding whether the facts of the case fall within the scope of Article 8, the Court reiterates that the notion of "private life" is a broad concept, not susceptible to exhaustive definition. It covers the physical and moral integrity of the person and sometimes encompasses aspects of an individual's physical and social identity, including the right to establish and develop relationships with other human beings, the right to "personal development" or the right to self-determination as such (see *Schüth*, cited above, § 53).

68. As in *Schüth*, the applicant in the present case did not complain of a direct intervention by the national authorities resulting in his dismissal, but of a failure on their part to protect his private sphere against interference by his employer, which could engage the State's responsibility (see, *mutatis mutandis*, *Palomo Sánchez and Others*, cited above, § 60).

69. The Court has already had the opportunity to rule, under Article 8, on cases of dismissal of employees on account of their private activities (see *Obst* and *Schüth*, cited above). Likewise, in a different context, the Court has decided that Article 8 applied in a situation where the authorities refused to grant a residence permit because the applicant was HIV-positive (see *Kiyutin*, cited above) or where the persons concerned were prohibited from working in the private sector on account of their previous employment (see *Sidabras and Džiautas*, cited above).

70. It is therefore now established that both employment matters and situations involving HIV-infected persons fall within the scope of private life. The Court cannot but conclude thus, since the HIV epidemic cannot be considered only as a medical problem given that its effects are felt in every sphere of private life.

71. Turning to the facts of the present case, the Court notes that there is a particularity which distinguishes it from all the above-mentioned cases: the dismissal from work of an HIV-positive employee. There is no doubt that while the stated ground for dismissing the applicant was to preserve a good working environment in the company, the triggering event was the announcement that he was HIV-positive. It was that event which prompted his colleagues to express their refusal to work with him, despite reassurances from the occupational-health doctor invited by the employer to explain the mode of transmission of the disease. It was that event which prompted the employer to attempt to persuade him to leave the company and the employees to openly threaten to disrupt the operation of the company as long as the applicant continued to work there.

72. It is clear that the applicant's dismissal resulted in the stigmatisation of a person who, even if they were HIV-positive, had not shown any symptoms of the disease. That measure was bound to have serious repercussions for his personality rights, the respect owed to him and, ultimately, his private life. To that must be added the uncertainty surrounding his search for a new job, since the prospect of finding one could reasonably have appeared remote having regard to his previous experience. The fact that the applicant did find a new job after being dismissed does not suffice to erase the detrimental effect of his dismissal on his ability to lead a normal personal life.

73. Lastly, the Court reiterates that in *Kiyutin*, cited above (§ 57), it held that a person's health status, including such conditions as HIV infection, should be covered – either as a form of disability or in the same way as a

disability – by the term "other status" in the text of Article 14 of the Convention.

74. It follows that Article 14 of the Convention taken in conjunction with Article 8 is applicable to the facts of the present case.

2. Compliance with Article 14 taken in conjunction with Article 8

(a) Whether the applicant was in an analogous situation to that of other employees of the company

75. According to the Court's established case-law, discrimination means treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV, and *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).

76. As an employee of the company, the applicant could legitimately hope to continue working there as long as he did not commit an act capable of justifying his dismissal under domestic employment law. However, he was dismissed shortly after it was revealed that he had tested positive for HIV.

77. The Court considers that the applicant's situation should be compared to that of the other employees in the company because this is relevant to an assessment of his complaint based on a difference in treatment. It is clear that the applicant was treated less favourably than any of his colleagues and that this was solely because he was HIV-positive. The Court notes that the employer's concern was admittedly to restore peace in the company, but that that concern was rooted in the situation created by the attitude of the applicant's colleagues towards his HIV status.

(b) Whether the difference in treatment in question was objectively and reasonably justified

78. Once an applicant has shown that there has been a difference in treatment, it is incumbent on the respondent State to prove that the difference in treatment was justified. Such justification must be objective and reasonable or, in other words, it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background (see *Kiyutin*, cited above, § 62).

79. In *Kiyutin*, the Court stated that if a restriction on fundamental rights applied to a particularly vulnerable group in society that had suffered considerable discrimination in the past, the State's margin of appreciation was substantially narrower and it must have very weighty reasons for imposing the restrictions in question (ibid., § 63).

80. HIV-positive persons have to face up to a whole host of problems, not only medical, but also professional, social, personal and psychological, and above all sometimes to deeply rooted prejudices even among the most highly educated people.

81. The Court acknowledged this state of affairs in *Kiyutin*, cited above. It found that ignorance about how the disease spreads had bred prejudices which, in turn, had stigmatised or marginalised those infected with the virus. It added that, consequently, people living with HIV were a vulnerable group and that the State should be afforded only a narrow margin of appreciation in choosing measures that singled out this group for differential treatment on the basis of their HIV status (ibid., § 64).

82. Additionally, the Court observes that a comparative study of the legislation of thirty member States of the Council of Europe on the protection from discrimination in the employment context afforded to HIV-infected persons showed that seven States had enacted specific legislation to that end. However, in the twenty-three other States, which had not passed legislation to that end, HIV-positive persons who suffered differences in treatment in the workplace could rely on the general anti-discrimination provisions of domestic law. The decisions of the domestic courts and other human rights protection bodies in some of those States showed that they granted protection against dismissal to persons living with HIV by subsuming this into other prohibited grounds of discrimination, such as health or disability (see paragraph 39 above).

83. It would therefore appear that even if not all the member States of the Council of Europe have enacted specific legislation in favour of persons living with HIV, there is a clear general tendency towards protecting such persons from any discrimination in the workplace by means of more general statutory provisions applied by the courts when examining cases of dismissal of HIV-positive employees in both the public and private sectors (see paragraphs 40-47 above).

84. Moreover, the Court notes that the provisions governing non-discrimination contained in various international instruments grant protection to HIV-infected persons. In that context the United Nations Committee of Economic, Social and Cultural Rights has recognised HIV-positive status as a prohibited ground of discrimination. Furthermore, a growing number of specific international instruments contain provisions concerning HIV-positive persons, including in particular a prohibition on discrimination in employment, such as ILO Recommendation no. 200 concerning HIV and AIDS and the World of Work (see paragraph 32 above).

85. On the facts of the case the Court observes that the applicant's employer terminated his contract owing to the pressure exerted on her by her employees, who had learnt that the applicant was HIV-positive and feared for their own health. It also notes that the employees of the company had been

informed by the occupational-health doctor that their working relations with the applicant did not expose them to any risk of infection.

86. The lower courts weighed the need to protect the smooth operation of the company against the applicant's justified expectation that he would be protected during the difficult period he was experiencing. They found that the scales tipped in favour of the applicant. In particular, the Court of Appeal found that the threat of disruption to the company in the present case, as a result of the overwhelming reaction of the employees, was based on a scientifically unfounded response. It observed that where an employee's illness did not adversely affect working relations or the smooth operation of the company (through absenteeism or a reduction in working capacity, for example), it could not serve as an objective justification for terminating the contract. Moreover, the nature of the applicant's job, which did not demand excessive effort, precluded the risk of a reduction in his capacity for work since, during the many years in which a person was merely HIV-positive, his or her working capacity was not substantially reduced.

87. In the present case the Court of Appeal expressly recognised that the applicant's HIV status did not affect his capacity to do his job and there was no indication that he would be unable to perform his contract properly, which would have justified its immediate termination (see paragraph 19 above). The Court of Appeal also recognised that the company's very existence was not threatened by the pressure exerted by the employees (see paragraph 20 above). Supposed or expressed prejudice on the part of employees could not be relied on as a pretext for terminating the contract of an HIV-positive employee. In such cases the need to protect the employer's interests had to be balanced very carefully against the need to protect the interests of the employee, who was the weaker party to the contract, particularly where the latter was HIV-positive.

88. However, the Court of Cassation did not weigh up all the competing interests as carefully and thoroughly as the Court of Appeal. On rather cursory grounds, having regard to the importance and unusual nature of the questions raised by the case, it held that the dismissal was entirely justified on the ground of the employer's interests, in the proper sense of the term, because the measure had been imposed in order to restore peace in the company and ensure that it continued to operate smoothly. Although the Court of Cassation did not contest the fact that the applicant's infection did not adversely affect his ability to perform his employment contract, it nonetheless based its decision, justifying the employees' fears, on a manifestly inaccurate premise, namely, that the applicant's illness was "contagious". In doing so, the Court of Cassation ascribed to the smooth operation of the company the same meaning that the employees wished to give it, thus aligning that definition with the employees' subjective perception.

89. The Court does not share the Government's view that a ruling by the Court of Cassation in the applicant's favour would not have solved the

problem because the employer would then have had to bear the cost of extended disruption to the company while the applicant would still have been faced with a hostile environment. The stakes involved for the applicant before the Court of Cassation were limited to obtaining compensation – which the Court of Appeal had awarded him – as his initial claim (for reinstatement in the company) had been dismissed both by the Court of First Instance and the Court of Appeal. Moreover, there could be no speculation about what the attitude of the company employees would have been if the Court of Cassation had upheld the decision of the lower courts, still less if legislation or well-established case-law existed in Greece protecting HIV-positive persons in the workplace.

90. In sum, the Court considers that the Court of Cassation did not adequately explain how the employer's interests prevailed over those of the applicant and that it failed to weigh up the rights of the two parties in a manner required by the Convention.

91. It follows that the applicant was discriminated against on the basis of his health, in breach of Article 14 of the Convention taken in conjunction with Article 8. There has therefore been a violation of those provisions.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

92. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

93. The applicant claimed 6,339.18 euros (EUR) in respect of pecuniary damage, which was the amount awarded him by the Court of Appeal. He also claimed statutory interest accrued from the date of the Court of Appeal's judgment. He claimed a further EUR 20,000 in respect of non-pecuniary damage caused by the stigmatisation and discriminatory dismissal to which he had been subjected.

94. The Government asked the Court to dismiss the claims in respect of pecuniary damage on the ground that they concerned an economic aspect of employment and not the right to respect for private life guaranteed by Article 8. With regard to non-pecuniary damage, the applicant's allegation that he had been stigmatised and discriminated against was unfounded since, shortly after being dismissed, he had found another job. If the Court were to conclude that there had been a violation of the Convention, that finding would be sufficient just satisfaction.

95. The Court reiterates that it has found a violation of Article 14 of the Convention taken in conjunction with Article 8 on account of the fact that the Court of Cassation failed to weigh up the rights of the two parties in a manner required by the Convention. It observes that the Court of Appeal had determined the amount to be awarded to the applicant in unpaid salaries at EUR 6,339.18, and awards him that sum in respect of pecuniary damage. It also considers that he should be awarded EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

96. The applicant claimed EUR 6,000 in fees for the two lawyers who had represented him before the Court (sixty hours' work at EUR 100 per hour).

97. The Government asked the Court to dismiss the claim because it had not been submitted together with the necessary supporting documents.

98. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). The Court observes that the applicant did not submit the necessary documents in support of his claim for costs and expenses. Accordingly, the claim is rejected.

C. Default interest

99. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

2. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 6,339.18 (six thousand three hundred and thirty-nine euros and eighteen cents), plus any tax that may be chargeable, in respect of pecuniary damage;

(ii) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

3. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 3 October 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President