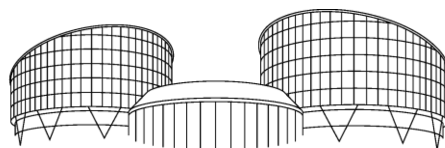

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

# CASE OF E.B. AND OTHERS v. AUSTRIA

*(Applications nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07)*

JUDGMENT

STRASBOURG

7 November 2013

**FINAL**

07/02/2014

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**In the case of E.B. and Others v. Austria,**

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 15 October 2013,

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

# PROCEDURE

1. The case originated in five applications (nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Austrian nationals, Mr E.B. ("the first applicant"), Mr H.G. ("the second applicant"), Mr A.S. ("the third applicant") and Mr A.V. ("the fourth applicant"), on 26 October 2006, 17 August 2007 and 18 October 2007. The President of the Section acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. All the applicants were represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicants alleged that the Austrian authorities had refused to delete the criminal convictions from their criminal records, even though the offence in question had been abolished.

4. On 31 August 2009 the applications were communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

### A. Application no. 31913/07

5. The first applicant, Mr E. B., is an Austrian national born in 1947.

#### *1. The first applicant's convictions under Article 209 of the Criminal Code*

6. On 23 September 1982 the Innsbruck Regional Court convicted the applicant of homosexual acts with consenting adolescents within the age bracket of 14 to 18, an offence under Article 209 of the Criminal Code, and sentenced him to ten months' imprisonment. On 10 August 1983 the Innsbruck Court of Appeal reduced the sentence to seven months' imprisonment.

7. On 18 November 1999 the Vienna Regional Court convicted the applicant of other offences under the same provision and sentenced him to two years and six months' imprisonment. On 30 March 2000 the Supreme Court partly acquitted him and reduced the sentence to one year's imprisonment.

8. On 6 April 2001 the Vienna Regional Court convicted the applicant under Article 209 of the Criminal Code and sentenced him to one year's imprisonment. The applicant did not appeal.

9. All those convictions were entered in the applicant's criminal record.

#### *2. Proceedings in respect of deletion of the conviction from the first applicant's criminal record*

10. On 8 May 2006 the first applicant applied to have each conviction under Article 209 of the Criminal Code deleted from his criminal record on the grounds that Article 209 of the Criminal Code had been repealed by the Constitutional Court in the meantime. On 20 October 2006 the Federal Minister of the Interior dismissed his application.

11. On 29 November 2006 the applicant applied for legal aid in order to lodge a complaint against the Federal Minister's decisions with the Administrative Court and the Constitutional Court.

12. On 18 December 2006 the Constitutional Court dismissed the request for legal aid, holding that the applicant's complaint had no prospect of success. It noted that in a previous judgment of 4 October 2006 it had found that the administrative authorities were only entitled to execute the orders of the criminal courts concerning registration, but that they had no

competence to review on their own initiative the lawfulness of the respective order on its merits. Since a review of the lawfulness of an ordinary court's decision by an administrative authority would be in contradiction to the separation of powers under constitutional law, the Federal Ministry of the Interior's decision had not breached the law.

13. On 12 December 2006 the Administrative Court, referring to the Constitutional Court's case-law, according to which the authorities were only entitled to check whether a mistake had occurred when a conviction was registered, but not to decide on the lawfulness of an entry on their own initiative, dismissed the applicant's request for legal aid on the grounds that his complaint lacked any prospect of success.

14. On an unspecified date the first applicant lodged a request for a renewal of each set of criminal proceedings which had led to his convictions under Article 209 of the Criminal Code with the Supreme Court in order to seek the quashing of the convictions, with a view to their subsequent deletion from his criminal record.

15. By decisions of 27 September 2007, 23 October 2007 and 15 November 2007 respectively, the Supreme Court rejected the application. As the highest instance for criminal proceedings, it found that it had, in principle, the competence to take the necessary decisions in fulfillment of its obligations arising from the Federal Constitution and the European Convention on Human Rights. However, in order to safeguard the principle of legal certainty, it had to apply the same admissibility criteria as the European Court of Human Rights under the Convention. This meant that applying Article 35 § 1 of the Convention *per analogiam*, a request for a renewal of the criminal proceedings had to be submitted within a period of six months after the conviction had become final and that the applicant had to have exhausted domestic remedies. It rejected the applicant's request because it had been introduced outside of the six-month period and, as regards the first set of proceedings, on the additional ground that the applicant had failed to raise his complaint before the domestic courts. Furthermore, it noted that the matter had already been examined by the Supreme Court in the first set of proceedings.

## B. Application no. 38357/07

16. The second applicant, Mr H. G. is an Austrian national born in 1960.

### *1. The second applicant's conviction under Article 209 of the Criminal Code*

17. On 31 May 1989 the Leoben Regional Court convicted the second applicant of homosexual acts with consenting adolescents within the age bracket of 14 to 18, an offence under Article 209 of the Criminal Code, and

sentenced him to eight months' imprisonment. The conviction was entered in the criminal record.

*2. Proceedings in respect of the deletion of the conviction from the second applicant's criminal record*

18. On 25 September 2005 the second applicant applied to have the conviction under Article 209 deleted from his criminal record, on the grounds that that provision had been repealed in the meantime. On 24 February 2006 the Federal Ministry of the Interior dismissed the application.

19. On 3 April 2006 the second applicant lodged a complaint against that decision with the Administrative Court and the Constitutional Court, and applied for legal aid.

20. On 11 October 2006 the Constitutional Court declined to deal with the complaint for lack of any prospect of success. In its reasoning it referred to its judgment of 4 October 2006 (see paragraph 12 above).

21. On 21 March 2007 the Administrative Court dismissed the applicant's complaint, finding that the mere repeal of a criminal provision by the Constitutional Court or the legislator, without any specific order of a competent court, as in the instant case, could not give rise, under the Criminal Record Act, to the administrative authorities deleting a conviction that had been lawfully entered in a person's criminal record. The authorities were only entitled to check whether a mistake had occurred when the conviction had initially been recorded.

22. On an unspecified date the applicant lodged a request for a renewal of the criminal proceedings to the Supreme Court order to seek the quashing of the conviction, with a view to its subsequent deletion from his criminal record.

23. On 1 August 2007 the Supreme Court rejected the application. As the highest instance for criminal proceedings, it found that it had in principle the competence to take the necessary decisions in fulfillment of its obligations arising from the Federal Constitution and the European Convention on Human Rights. However, in order to safeguard the principle of legal certainty, it had to apply the same admissibility criteria as the European Court of Human Rights under the Convention. This meant that, applying Article 35 § 1 of the Convention *per analogiam*, a request for a renewal of the criminal proceedings had to be submitted within a period of six months after the conviction had become final and that the applicant had to have exhausted domestic remedies. It rejected the applicant's request since it had been introduced outside of the six-month period.

## C. Application no. 48098/07

### *1. The second applicant's further conviction under Article 209 of the Criminal Code*

24. On 24 March 1994 the Leoben Regional Court convicted the second applicant again of homosexual acts with consenting adolescents within the age bracket of 14 to 18, an offence under Article 209 of the Criminal Code, and sentenced him to one year's imprisonment.

25. On 20 September 1994 the Supreme Court rejected a plea of nullity lodged by the second applicant and on 4 November 1994 the Graz Court of Appeal dismissed an appeal lodged by him. The conviction was entered in the criminal record.

### *2. Proceedings in respect of the deletion of the conviction from the second applicant's criminal record*

26. On 25 September 2005 the second applicant applied to have the conviction under Article 209 deleted from his criminal record. On 24 February 2006 the Federal Ministry of the Interior dismissed the application.

27. On 3 April 2006 the second applicant lodged a complaint against that decision with the Administrative Court and the Constitutional Court, and applied for legal aid.

28. The Constitutional Court declined to deal with the complaint on 11 October 2006 because, in accordance with its case-law, it lacked any prospect of success.

29. On 21 March 2007 the Administrative Court dismissed the second applicant's complaint.

30. On an unspecified date the applicant lodged a request for a renewal of the criminal proceedings with the Supreme Court in order to seek the quashing of the conviction, with a view to its subsequent deletion from his criminal record.

31. On 23 October 2007 the Supreme Court rejected the request for the same reasons as those given in its judgment of 1 August 2007 (see paragraph 23 above).

## D. Application no. 48777/07

32. The third applicant, Mr A. S., is an Austrian national born in 1949.

*1. The third applicant's conviction under Article 209 of the Criminal Code*

33. On 25 May 1999 the Graz Regional Court convicted the applicant of homosexual acts with consenting adolescents within the age bracket of 14 to 18, an offence under Article 209 of the Criminal Code. It sentenced him to one year's imprisonment and ordered his detention in a secure psychiatric institution, pursuant to Article 21 § 2 of the Criminal Code. The applicant did not appeal against that decision. The conviction was entered in his criminal record.

*2. Proceedings in respect of the deletion of the conviction from the third applicant's criminal record*

34. On 25 September 2005 the third applicant applied to have the conviction deleted from his criminal record. On 22 February 2006 the Federal Ministry of the Interior dismissed his application.

35. On 3 April 2006 the third applicant lodged a complaint with the Administrative Court and the Constitutional Court against the Federal Minister's decision.

36. On 11 October 2006 the Constitutional Court declined to deal with the case because, in accordance with its case-law, it lacked any prospect of success.

37. On 21 March 2007 the Administrative Court dismissed the complaint.

38. On an unspecified date the third applicant lodged a request for a renewal of the criminal proceedings with the Supreme Court in order to seek the quashing of the conviction with a view to its subsequent deletion from his criminal record.

39. On 13 November 2007 the Supreme Court rejected the request for the same reasons as those given in its judgment of 1 August 2007 (see paragraph 23 above).

## E. Application no. 48779/07

40. The fourth applicant, Mr A. V., is an Austrian national born in 1968.

*1. The fourth applicant's conviction under Article 209 of the Criminal Code*

41. On 29 August 1997 the Vienna Regional Court convicted the fourth applicant of homosexual acts with consenting adolescents within the age bracket of 14 to 18, an offence under Article 209 of the Criminal Code, and sentenced him to six months' imprisonment. As the fourth applicant did not appeal against that decision, it became final. The conviction was entered in his criminal record.

*2. Proceedings in respect of the deletion of the conviction from the applicant's criminal record*

42. On 25 September 2005 the fourth applicant applied to have the conviction deleted from his criminal record, because Article 209 had been repealed in the meantime. On 24 February 2006 the Federal Ministry of the Interior dismissed his application.

43. On 3 April 2006 the fourth applicant lodged a complaint against the Federal Minister's decision with the Administrative Court and the Constitutional Court.

44. On 4 October 2006 the Constitutional Court dismissed the complaint. It found that the administrative authorities were only entitled to execute the orders of the criminal courts concerning the recording of convictions, but that they had no competence to review on their own initiative whether the respective order was lawful on its merits. Since a review of the lawfulness of an ordinary court's decision by an administrative authority would be in contradiction to the separation of powers under constitutional law, the Federal Ministry of the Interior's decision had not breached the law.

45. On 21 March 2007 the Administrative Court dismissed the fourth applicant's complaint.

46. On 30 November 2006 the fourth applicant lodged a request for a renewal of the criminal proceedings with the Supreme Court in order to seek the quashing of the conviction with a view to its subsequent deletion from his criminal record.

47. On 6 September 2007 the Supreme Court rejected the request for the same reasons as those given in its judgment of 1 August 2007 (see paragraph 23 above).

## II. RELEVANT DOMESTIC LAW AND BACKGROUND

### A. The Criminal Code

48. Article 209 of the Criminal Code, in force until 14 August 2002, deals with consensual homosexual acts and reads as follows:

> "A male person who, after attaining the age of nineteen, fornicates with a person of the same sex who has attained the age of fourteen years but not the age of eighteen years, shall be sentenced to imprisonment of between six months and five years."

### B. The Constitutional Court's case-law

49. In a judgment of 21 June 2002, following a request for a constitutional review made by the Innsbruck Regional Court, the

Constitutional Court found that Article 209 of the Criminal Code was unconstitutional.

50. The Constitutional Court held that Article 209 concerned only consensual homosexual relations between men aged over 19 and adolescents between the ages of 14 and 18. In the 14-to-19 age bracket, homosexual acts between persons of the same age (for instance two 16-year-olds) or persons with an age difference of between one and five years, were not punishable. However, as soon as one partner reached the age of 19, such acts constituted an offence under Article 209. They became legal again when the younger partner reached the age of 18. Given that Article 209 applied not only to occasional relations but also to ongoing relationships, it led to rather absurd results – namely, a change of periods during which the homosexual relationship of two partners was first legal, then punishable and then legal again – and could therefore not be considered to be objectively justified.

### C. Amendment of the Criminal Code by the Austrian legislator

51. On 10 July 2002, following the Constitutional Court's judgment, the Austrian Parliament decided to repeal Article 209. It also introduced Article 207b, which penalises sexual relations with persons under 16 years of age under specific conditions and which is formulated in a gender neutral way. This provision prohibits sexual acts with a person under 16 years of age if, for certain reasons, that person is not mature enough to understand the meaning of the act and the offender takes advantage of that immaturity, or if the person under 16 is in a predicament and the offender takes advantage of that situation. Article 207b also penalises the inducing of persons under 18 years of age to engage in sexual activities in return for payment. Article 207b applies irrespective of whether the sexual acts at issue are heterosexual, homosexual or lesbian. The above amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, entered into force on 14 August 2002.

52. Under its transitional provisions, the amendment did not apply to criminal proceedings in which a first-instance judgment had already been given. It did exceptionally apply, subject to the principle of the application of a more favourable law, where a judgment had been set aside, *inter alia*, following the reopening of proceedings or in the context of a renewal of the proceedings following the finding of a violation of the Convention by the European Court of Human Rights. Apart from those situations, convictions under Article 209 remained unaffected by the amendment.

## D. Retrial under Article 363a and 363b of the Code of Criminal Proceedings

53. Under the heading "Renewal" (*Erneuerung des Strafverfahrens*), the Code of Criminal Procedure (*Strafprozeßordnung*) provides as follows:

**Article 363a**

"1. If it is established in a judgment of the European Court of Human Rights that there has been a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette [*Bundesgesetzblatt*] no. 210/1958) or of one of its Protocols on account of a decision [*Entscheidung*] or order [*Verfügung*] of a criminal court, a retrial shall be held on application in so far as it cannot be ruled out that the violation might have affected the decision in a manner detrimental to the person concerned.

2. All applications for a retrial shall be decided by the Supreme Court. ..."

**Article 363b**

"1. On an application for a retrial, the Supreme Court shall deliberate in private only where the Attorney-General or the judge rapporteur proposes that a decision be taken on one of the grounds set out in paragraphs 2 and 3.

2. Where the Supreme Court deliberates in private, it may refuse an application.

...

if it unanimously considers the application to be manifestly ill-founded.

..."

## E. Criminal Record Act

54. Under the Criminal Record Act (*Strafregistergesetz),* every criminal conviction and sentence pronounced by a court for criminal matters (excluding those dealt with by administrative authorities) is to be registered in the criminal record (*Strafregister*), and is to remain visible there until its deletion. The criminal record is a central register which is kept by an administrative authority and which is accessible to law-enforcement authorities (*Strafregisterauskunft*). Furthermore, anybody is entitled to obtain a copy of his or her own criminal record, which may be presented to employers in order to prove his or her moral integrity (*Strafregister-bescheinigung*).

The following provisions are relevant to the present case:

**Section 2**

“(1) The following must be entered in the criminal record:

1. all final convictions by the domestic criminal courts ...,

2. all final convictions of Austrian nationals and persons who have their residence or usual place of abode in Austria, by foreign criminal courts ...,

...

4. all decisions of the Federal President in connection with a conviction mentioned under subparagraphs 1 to 3, and decisions of the domestic courts regarding

...

(c) the pardoning of the convicted person, the mitigation, conversion or new fixing of a penalty

...

(k) the setting aside or alteration of a conviction or later decision;

...

(m) the extinction of a conviction;

...

(3) Any ruling imposing a penalty or preventive measure against a person or guilty verdict because of an act triable under Austrian law by the courts pursuant to the 1960 Code of Criminal Procedure in proceedings that are in compliance with the principles of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Federal Law Gazette no. 210/1958, shall be deemed a conviction within the meaning of this federal law.”

**Section 3 Criminal record cards**

“(1) Convictions by domestic criminal courts shall, once they take effect, be notified by the courts determining the case at first instance to the Vienna Federal Police Directorate through the transmission of criminal record cards.

...”

**Section 4 Other notifications**

“(1) Decisions of the Federal President relating to one of the convictions mentioned in subparagraphs 1 to 3 of section 2(1) and final decisions by domestic criminal courts shall be notified to the Vienna Federal Police Directorate by the court, which shall inform the convicted person thereof. The notification shall state the conviction to which the President’s or court’s decision refers. Detailed regulations regarding the

external form of these notifications shall be adopted by the Federal Ministries in charge of the implementation of this federal act by mutual agreement through official instructions.

(2) The date on which all prison sentences, fines (penalties in lieu of forfeiture or confiscation) and preventive measures accompanying deprivation of liberty imposed in a conviction have been completed, are deemed to have been completed, have been remitted or no longer need to be executed (section 2(1)(5)) shall be notified to the Vienna Federal Police Directorate by the court determining the case at first instance. If, in the case of a conviction under section 6(4) of the Criminal Records (Deletion) Act 1972, Federal Law Gazette no. 68, in respect of an unconditionally remitted prison sentence or in respect of a completely or only partly conditionally remitted prison sentence where remission has been revoked, the date of release from prison precedes the date stated in the first sentence, this release shall also be notified.

(3) Convictions and decisions, orders and notifications by foreign organs relating to convictions shall be notified to the Vienna Federal Police Directorate by all domestic authorities and offices obtaining knowledge thereof, unless they are aware that the Vienna Federal Police Directorate has already received a corresponding notification.

...”

**Section 5 Correction of previous notifications**

“(1) If a domestic criminal court becomes aware that there has been a change in the personal situation of a convicted person (section 3(2)(2)) or that the information contained in the criminal record about a convicted person or a conviction is incorrect or that a person has convictions that are not included in the criminal record, it shall notify the Vienna Federal Police Directorate accordingly.

...”

**Section 8 Legal protection against entries in the criminal record**

“(1) Any person in connection with whom a conviction, a decision by the Federal President or any other decision, order or notification relating thereto has or has not been entered in the criminal record may request a declaration that the entry in the criminal record is incorrect or inadmissible and therefore must be replaced or deleted, that the entry should have been made or that the conviction has been extinguished.

(2) A request under subsection (1) shall be filed with the Federal Ministry of the Interior, which shall determine it.

(3) If a request under subsection (1) is completely or partly allowed, the criminal record shall be corrected.”

**Section 9 Information about entries in the criminal record**

“(1) Except where provided for in other federal laws and international agreements, the Vienna Federal Police Directorate shall, on request, provide free of charge information about entries in the criminal record:

1. to all domestic authorities, offices of the federal police and – in respect of members of the armed forces – also to the military authorities;

2. to all foreign authorities in so far as a reciprocal agreement exists.”

**Section 10 Criminal record certificate**

“(1) Mayors, in places where there are federal police directorates, these directorates, as well as Austrian missions abroad, shall, on request, issue certificates on the basis of documentation collected by the Vienna Federal Police Directorate about the applicant’s convictions appearing in the criminal record or stating that the criminal record does not contain any such convictions (criminal record certificates).

...”

**Section 12 Deletion of criminal record data**

“After a period of two years has elapsed following the extinction of a conviction, any data concerning the conviction and the convicted person shall be deleted from the criminal record.”

### F. The Criminal Record (Deletion) Act

55. Under section 4 of the Criminal Record (Deletion) Act 1972 *(Tilgungsgesetz)* the period during which a simple conviction remains on the criminal record before its deletion is calculated by adding together all the recorded convictions. This period may last from three years for a conviction of minor importance, and if no further convictions are entered during this period, up to fifteen years for a conviction for which a sentence of more than three years’ imprisonment was imposed. Thus the duration of the criminal record depends on the sentence and may be prolonged by subsequent convictions. A sentence of life imprisonment is never deleted from the record.

# THE LAW

## I. JOINDER OF THE APPLICATIONS

56. Given that these five applications concern similar facts and raise essentially identical issues under the Convention, the Court decides to consider them in a single judgment, cf. Rule 42 § 1 of the Rules of Court.

## II. THE GOVERNMENT'S REQUEST TO STRIKE THE FIRST APPLICATION OFF THE LIST

57. The Government informed the Court that the first applicant, Mr E. B., had died on 14 September 2008 and asked the Court to strike the application off the list. They submitted that his application, which essentially concerned complaints under Article 14 read in conjunction with Article 8 of the Convention, related to his private life and could not be transferred to an heir.

58. On 26 April 2010 the applicant's lawyer submitted that the heir of E.B., his daughter S.B., had informed him that she wished to pursue the application before the Court, as the case also had a moral dimension and concerned important questions of general interest.

59. The Court notes that at the time of lodging his applications the first applicant was still alive. The question is therefore whether his daughter could continue proceedings before the Court which had already been instituted by the direct victim of an alleged violation of the Convention.

60. In this connection, the Court reiterates that in various cases where an applicant died in the course of the proceedings it has taken into account the statements of the applicant's heirs or of close members of his family who expressed the wish to pursue the proceedings before the Court (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, with further references). The Court has taken a more restrictive approach only as concerns applications introduced by close relatives of victims of an alleged violation of the Convention themselves after the death of the direct victim or where the heir did not have a sufficient link to the direct victim (see *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI; *Fairfield v. the United Kingdom* (dec.), no. 24790/04, ECHR 2005-VI; and *Léger v. France* (striking out) [GC], no. 19324/02, 30 March 2009).

61. As regards the Government's argument that the first applicant's case concerned highly personal matters which did not allow for the examination to be continued on the request of a close relative, the Court reiterates that human rights cases before the Court generally also have a moral dimension, and persons close to an applicant may thus have a legitimate interest in ensuring that justice is done, even after the applicant's death. This holds true all the more if the leading issue raised by the case transcends the person and the interests of the applicant and his heirs and may affect others (see *Karner v. Austria*, no. 40016/98, § 25, ECHR 2003-IX).

62. The Court therefore considers that the conditions for striking the case off the list of pending cases, as defined in Article 37 § 1 of the Convention, have not been met and that it must accordingly continue to examine the application.

## III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 8

63. The applicants complained that their convictions under Article 209 of the Criminal Code remained on their criminal record even though the European Court of Human Rights had found that provision to be discriminatory and the Austrian Constitutional Court had it annulled. This amounted to discrimination on the grounds of their sexual orientation, in breach of Article 14 read in conjunction with Article 8 of the Convention. Article 14 of the Convention reads as follows:

> "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."

Article 8 of the Convention reads as follows:

> "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."

64. The Government contested that argument.

### A. Admissibility

65. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### B. Merits

#### *1. The parties' submissions*

66. The applicants stressed at the outset that their complaints did not concern their original convictions under Article 209 of the Criminal Code, but the social stigma which still attached to their convictions even today. The criminal record of their convictions was accessible to law-enforcement authorities and also appeared in their character references (*Leumunds-zeugnis*). They also argued that the maintaining of the entry extended the period for which other convictions had to remain on their criminal records.

Moreover, criminal courts could take such convictions as an aggravating circumstance in subsequent criminal proceedings.

67. The applicants also submitted that the Convention prohibits States from attaching further negative effects to prior human-rights violations also where those violations have not been challenged, so the fact that they had not challenged their convictions before the Court was therefore irrelevant. Sexual autonomy and prohibition of discrimination on the grounds of sexual orientation were general principles of European law, and the Government were therefore under an obligation to provide sound reasons to justify the necessity of continuing the negative consequences of their convictions under article 209 of the Criminal Code. Since they had failed to do so, there had been a breach of Article 14 read in conjunction with Article 8 of the Convention.

68. The Government argued that the applicants, in essence, were seeking redress in the present proceedings for an alleged violation of their rights which had taken place in the past, namely when they had been convicted of offences under Article 209 of the Criminal Code. However, they had failed to lodge applications with the Court in respect of those convictions and the Convention does not require member States to redress breaches of the Convention in respect of which no judgment has been given by the Court.

69. The Government further submitted that there was no indication that the applicants' right to respect for their private life had been violated in a discriminating manner. In accordance with Article 46 of the Convention, convictions under Article 209 of the Criminal Code that were the subject of proceedings before the Court may be set aside in re-opened proceedings, pursuant to Article 363a of the Code of Criminal Procedure, and subsequently deleted from the criminal record. Since the Convention did not provide for a general *res judicata* effect of judgments of the Court, the fact that the applicants' convictions, which had not been the subject of proceedings before the Court, continued to appear on their criminal records could not be in breach of the Convention.

*2. The Court's assessment*

70. The Court observes at the outset that the applicants did not complain about their convictions *per se,* but about the Austrian authorities' refusal to delete those convictions from the criminal record. The applicants considered that that refusal was in breach of Article 14 of the Convention, read in conjunction with Article 8 thereof.

71. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the

facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports of Judgments and Decisions* 1997-I, and *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II).

72. The Court has also held that not every difference in treatment will amount to a violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory (see *Ünal Tekeli v. Turkey*, no. 29865/96, § 49, ECHR 2004-X). However, this is not the only facet of the prohibition of discrimination under Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV).

73. A difference in treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the principles which normally prevail in democratic societies. A difference in treatment in the exercise of a right laid down by the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, for example, *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008; *Petrovic*, cited above, § 30, and *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 177, Series A no. 102).

74. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Gaygusuz v. Austria*, 16 September 1996, § 42, Reports 1996-IV). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background (see *Rasmussen v. Denmark*, 28 November 1984, § 40, Series A no. 87, and *Inze v. Austria*, 28 October 1987, § 41, Series A no. 126), but the final decision as to observance of the Convention's requirements rests with the Court. Since the Convention is, first and foremost, a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Ünal Tekeli*, cited above, § 54, and, *mutatis mutandis*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV).

75. As regards the applicability to the present case of Article 14 of the Convention read in conjunction with Article 8 thereof, the Court reiterates that the storing by a public authority of information relating to an individual's private life amounts to an interference within the meaning of

Article 8, and that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention (see *Gardel v. France*, no. 16428/05, §§ 58 and 62, ECHR 2009). Having regard to the sensitive nature of information contained in a criminal record and the impact it may have on the individual concerned, given that it is available to public authorities and could also be disclosed in a person's criminal record certificate, such information is closely linked to a person's private life, even though it has been based on a judgment by a court that was delivered in public.

76. The Court therefore concludes that Article 14 of the Convention read in conjunction with Article 8 thereof is applicable in the present case. The next question to be addressed is whether Article 14 of the Convention has been complied with.

77. In this connection, the Court observes that between 1983 and 2001 all the applicants were convicted of one or more offences under Article 209 of the Criminal Code, which punished homosexual relations between adults and consenting male persons within the age bracket of 14 to 18. On 21 June 2002 following a request by the Innsbruck Regional Court for a constitutional review, the Constitutional Court ruled that Article 209 of the Criminal Code was unconstitutional as being arbitrary (see "Relevant Domestic Law and Background" above). Moreover, in a series of cases against Austria, the Court has found that Article 209 of the Criminal Code, which only punished sexual relations between male adults and male persons between the ages of 14 and 18 years, and not lesbian sexual relations, was discriminatory and in violation of Article 14 taken in conjunction with Article 8 of the Convention (see *L. and V. v. Austria*, nos. 39392/98 and 39829/98, ECHR 2003-I; *Woditschka and Wilfling v. Austria*, nos. 69756/01 and 6306/02, 21 October 2004; *Landner v. Austria*, no. 18297/03, 3 February 2005; *H.G. and G.B. v. Austria*, nos. 11084/02 and 15306/02, 2 June 2005; *C Wolfmeyer v. Austria*, no. 5263/03, 26 May 2005; and *R.H. v. Austria*, no. 7336/03, 19 January 2006). Since the Constitutional Court's decision of 21 June 2002, Article 209 of the Criminal Code has no longer been in force. On 10 July 2002, following the Constitutional Court's judgment, Parliament replaced Article 209 by Article 207b, which contained a prohibition of sexual relations with persons under 16 years of age under specific conditions and was formulated in a gender-neutral way.

78. The Court therefore will have to examine whether the failure to treat the applicants differently from other persons also convicted of a criminal offence, but where the offence in question had not been quashed by the Constitutional Court or otherwise abolished, pursued a legitimate aim and, if so, whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Inze*, cited above, ibid.).

79. The Court considers that it is within the normal course of events that provisions of the Criminal Code are amended or repealed in order to adapt this part of the legal order to changing circumstances within society. The mere fact that a criminal conviction that occurred in the past was based on a legal provision which has lost its force of law will normally have no bearing on the conviction's remaining on the person's criminal record, as it concerns essentially a fact from the past. Abolishing an offence or substantially modifying its essential elements does not mean that the provision, at the time it was in force and applied, did not meet all the requirements under constitutional law.

80. The situation is different, however, as regards convictions under Article 209 of the Criminal Code. Parliament repealed and replaced Article 209 by a substantially different provision because the Constitutional Court had found that it was not objectively justified and therefore unconstitutional, and the Court had found that convictions under that provision violated Article 14 of the Convention read in conjunction with Article 8. Thus Article 207b of the Criminal Code, which replaced Article 209 was introduced not as part of a general process to adapt the Criminal Code to respond to the needs of a changing society, but to eliminate a provision that was in contradiction to the Federal Constitution.

81. The Court therefore considers that this particular feature of the present case requires a different response by the legislator. Since keeping an Article 209 conviction on someone's criminal record may have particularly serious consequences for the person concerned, the legislator, when amending the relevant legal provision in order to bring it into conformity with modern standards of equality between men and women, should have provided for appropriate measures, such as introducing exceptions to the general rule (see *Thlimmenos*, cited above, § 48).

82. The Government, however, have not provided any explanation as to the purpose of leaving unamended the provision on maintaining convictions on the criminal record.

83. The Court concludes, therefore, that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

## IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

84. The applicants complained that they had no effective remedy at their disposal in respect of the refusal to delete their convictions under Article 209 of the Criminal Code from their criminal records. They relied on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.".

85. The Government contested the applicants' argument.

### A. Admissibility

86. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### B. Merits

87. The applicants maintained that they did not have an effective remedy at their disposal to complain that their conviction under Article 209 of the Criminal Code had been kept on the criminal record. As regards the possibility of requesting a renewal of the criminal proceedings relied on by the Government, the applicants submitted that that remedy had not been created until 2007, by which time the six-month time-limit for requesting a retrial had already expired. Moreover, that remedy could be used only in the event that the Supreme Court had not decided on the same case in the past, which was the case for some of the applicants. For this reason, the Supreme Court did not and could not decide on the merits of their requests. The other remedy they had tried, a request to have their criminal record amended, was also dismissed by the authorities because, in the view of the Constitutional Court, a decision of the Federal Minister for the Interior on a request to amend the criminal record without an underlying decision by an ordinary court was in violation of the constitutional principle of separation of powers. Lastly, they emphasised that the principal issue in the proceedings instituted by them was the maintaining of their convictions under Article 209 of the Criminal Code on their criminal record, and not the convictions themselves, which had occurred between 1982 and 2001. Thus remedies which might have been available at that time against the convictions themselves were of no relevance for the violations suffered today.

88. The Government submitted that the applicants had had appropriate remedies at their disposal and had made use of them. An appeal to the Federal Minister of the Interior regarding an incorrect entry in the criminal record could lead to an amendment of the criminal record and was therefore an effective remedy in principle. Moreover, the applicants, who had failed to lodge applications with the Court concerning the criminal proceedings in respect of which modification of the criminal record had been sought – some of them had not even appealed against the first-instance conviction – had also had the opportunity of requesting a renewal of the criminal proceedings under Article 363a of the Code of Criminal Proceedings. In the event that such a request had been successful, it would have had

repercussions on the entries in their criminal records. As regards the latter remedy, it should be noted that this provision was, according to the wording of Article 363a, possible only in respect of violations of the Convention found by a judgment of the Court. The Supreme Court, however, considered it its duty, under Article 46 of the Convention, to guarantee compliance with the constitutional and international obligations flowing from the Convention in the field of criminal jurisdiction by extending the scope of application of Article 343a of the CCP to cases where no judgment against Austria had been issued. In so doing, the Supreme Court found that it would be in accordance with the spirit of Article 35 of the Convention if its review of domestic decisions were limited in time, and therefore adopted the six-month time-limit stipulated in Article 35 of the Convention. Since the applicants had not applied to the Supreme Court for a renewal of the criminal proceedings within that time-limit, their requests were inadmissible. It was therefore exclusively due to circumstances attributable to the applicants that that remedy had been unsuccessful.

89. The Court reiterates that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI). The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 288, ECHR 2011, and *I.M. v. France*, no. 9152/09, § 128, 2 February 2012).

90. The Court has further specified that the "effectiveness" of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. However, Article 13 requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Jabari v. Turkey*, no. 40035/98, § 48, ECHR 2000-VIII).

91. In the present case, the applicants have made use of two remedies: on the one hand, proceedings for having their convictions under Article 209 of the Criminal Code removed from their criminal record; and, on the other hand, requesting the renewal of the criminal proceedings which had been the object of the corresponding entries in their criminal records. In the Government's view, both procedures, even though they were unsuccessful, constituted effective remedies, whereas in the applicants' view they did not.

92. As regards the first remedy, the Court observes that the Federal Minister of the Interior dismissed the requests and the Constitutional Court, in its respective decision, held that administrative authorities were only entitled to execute the orders of the criminal courts concerning the recording of convictions, but that they had no competence to review on their own initiative whether the respective order was lawful on its merits or had become unlawful. Thus, an entry in the criminal record which corresponded to a judgment by a criminal court could not be eliminated in that way. As regards the second remedy, the Supreme Court rejected all the applicant's requests for the renewal of the criminal proceedings that had led to their convictions under Article 209 of the Criminal Code because they were introduced more than six months after the final judgment had been given in their cases, a time-limit which the Supreme Court applied *per analogiam,* referring to Article 35 of the Convention. The Court notes, however, that at the time of the applicants' convictions, Article 363a of the Code of Criminal Procedure was not yet in force. Thus it cannot be seen how the applicants could have complied with that time-limit.

93. The Court therefore concludes that in the particular circumstances of the case the applicants did not have available to them a remedy satisfying the requirements of Article 13 of the Convention. It follows that there has been a breach of this provision.

## V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. 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

95. The first, third and fourth applicants claimed 50,000 euros (EUR) and the second applicant claimed EUR 100,000 in respect of non-pecuniary damage.

96. In the Government's view those amounts were excessive. They pointed out that they were far above the amounts granted in cases in which the Court had found a breach of Article 14 of the Convention read in conjunction with Article 8 in respect of the criminal convictions themselves.

97. The Court considers that the applicants must have suffered non-pecuniary damage that cannot be sufficiently compensated for by the mere finding of a violation of Article 14 taken together with Article 8. Making its assessment on an equitable basis, it awards each applicant

EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

### B. Costs and expenses

98. The applicants also claimed the reimbursement of costs and expenses incurred before the domestic courts and authorities and those incurred before the Court. The first applicant claimed EUR 38,410.38 under this head. His claim comprised EUR 16,911.18 for his defence in the criminal proceedings in 1982, 1999 and 2001, EUR 8,326.08 for the proceedings in respect of the rectification of his criminal record and the proceedings for the renewal of the criminal proceedings, and EUR 13,173.12 for the proceedings before the Court. The second applicant claimed EUR 13,805.37 for the costs of the domestic proceedings and the proceedings before the Court in respect of application no. 38357/07 and EUR 17,731.89 in respect of application no. 48098/07. Those amounts comprised EUR 5,197.41 and EUR 5,197.41 for the criminal record rectification proceedings and the renewal proceedings, and EUR 8,607.96 and EUR 12,534.48 for the proceedings before the Court. The third applicant claimed EUR 22,040.40, of which EUR 9,119.70 was for the criminal record rectification proceedings and the renewal proceedings, and EUR 12,920.70 for the proceedings before the Court. The fourth applicant claimed EUR 23,315.52, of which EUR 10,394.82 was for the criminal record rectification proceedings and the renewal proceedings, and EUR 12,920.70 was for the proceedings before the Court. All the sums included value-added tax (VAT).

99. The Government submitted that the expenses for the domestic proceedings were only partly justified and that, in any event, the amounts claimed were excessive. The costs and expenses claimed for the Convention proceedings were also excessive. In this connection, they pointed out that all the applicants had been represented by the same lawyer and that his submissions had been broadly identical and to a large extent a repetition of the submissions before the domestic authorities and courts.

100. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

101. In respect of the first applicant's claim concerning the costs of his defence in the criminal proceedings in 1982, 1999 and 2001, the Court observes that his present application only concerned his attempts to have his criminal record modified, but did not concern the underlying criminal proceedings themselves. Therefore no award can be made in this respect.

102. As regards the applicants' claims for costs incurred in the domestic proceedings in respect of the deletion of their convictions under Article 209

of the Criminal Code from their criminal records and for the renewal of the underlying criminal proceedings, the Court considers their claims excessive, particularly given their broadly similar submissions in the proceedings at issue. Making an assessment on an equitable basis, the Court awards the first and second applicants EUR 6,000 each and the third and fourth applicants EUR 4,000 each under this head, plus any taxes that may be chargeable to the applicants on these amounts.

103. As regards the applicants' claims for reimbursement of costs incurred in the proceedings before the Court, the Court also considers these claims excessive. In this connection, it notes that the applicants were all represented by the same lawyer whose submissions were to a large extent identical in the present applications. Making an assessment on an equitable basis, the Court awards the first, third and fourth applicants EUR 5,000 each under this head and the second applicant EUR 10,000, plus any taxes that may be chargeable to the applicants on these amounts.

### C. Default interest

104. 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. *Decides* to join the proceedings in the applications;

2. *Declares* the applications admissible;

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

4. *Holds* that there has been a violation of Article 13 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicants, 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) the first applicant EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 11,000 (eleven thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(ii) the second applicant EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(iii) the third applicant EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 9,000 (nine thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
(iv) the fourth applicant EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 9,000 (nine thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(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;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 7 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Isabelle Berro-Lefèvre
President