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

FIRST SECTION

CASE OF WODITSCHKA and WILFLING v. AUSTRIA

(Application nos. 69756/01 and 6306/02)

JUDGMENT

STRASBOURG

21 October 2004

FINAL

21/01/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Woditschka and Wilfling v. Austria,

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

and Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mrs N. VAJIĆ,
Mr A. KOVLER,
Mr V. ZAGREBELSKY,
Mrs E. STEINER,
Mr K. HAJIYEV, *judges*,
Mr S. QUESADA, *Deputy Section Registrar*,

Having deliberated in private on 30 September 2004,

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

PROCEDURE

1. The case originated in two applications (no. 69756/01 and no. 6306/03) 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 Austrian nationals, Mr Michael Woditschka ("the first applicant") and Mr Wolfgang Wilfling ("the second applicant"), on 13 May 2001 and on 23 January 2002, respectively.

2. 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. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. On 10 October 2002 and 21 March 2002, respectively, the Court decided to communicate the applications to the Government. On 12 June 2003 it decided to examine the merits of the applications at the same time as its admissibility pursuant to Article 29 § 3 of the Convention.

THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

A. The first applicant

4. The first applicant was born in 1979 and lives in Vienna.

5. On 19 July 2000 the Vienna Regional Court (*Landesgericht für Strafsachen*) convicted the first applicant under section 209 of the Criminal

Code of having committed homosexual acts with an adolescent and sentenced him to a fine of ATS 4,500 (approximately EUR 330) with 75 days' imprisonment in default. The sentence was suspended on probation. The Regional Court found that, in September 1999, the first applicant, who was then twenty years old, had had about ten homosexual contacts with a sixteen-year-old. In determining the sentence the court had regard to the applicant's confession and his young age as a mitigating circumstance, as well as to the repetition of the offence as an aggravating circumstance.

6. On 13 November 2000 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the first applicant's appeal on points of law, in which he had complained that section 209 of the Criminal Code was discriminatory and violated his right to respect for his private life, and in which he had also suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision.

B. The second applicant

7. The second applicant was born in 1964 and lives in Traiskirchen.

8. On 7 August 2001 the Wiener Neustadt Regional Court ordered the second applicant's detention on remand on suspicion of having committed homosexual acts with an adolescent contrary to section 209 of the Criminal Code.

9. On 24 August 2001 the Wiener Neustadt Regional Court convicted the second applicant under section 209 of the Criminal Code and sentenced him to fifteen months' imprisonment, fourteen of which were suspended on probation. It found that, from March 2001 until his arrest, the second applicant had a homosexual relationship with a seventeen-year-old. In determining the sentence the court had regard to the applicant's confession as a mitigating circumstance, as well as to the repetition of the offence and a previous conviction as aggravating circumstances.

10. On 7 September 2001 the second applicant was released from detention on remand.

11. On 23 October 2001 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the second applicant's appeal on points of law, in which he had complained that section 209 of the Criminal Code was discriminatory and violated his right to respect for his private life, and in which he had also suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision. Upon the Public Prosecutor's appeal it changed the sentence to the effect that only ten out of fifteen months of imprisonment were suspended on probation.

12. Subsequently the second applicant was granted a stay of the execution of his sentence. On 7 July 2002 he requested a pardon and a further stay of execution pending the decision on his request for pardon. On

11 July 2002 the Wiener Neustadt Regional Court granted a further stay of execution.

13. On 23 September 2002 the Federal President, upon the second applicant's request, granted him a remission of the remaining sentence.

II. RELEVANT DOMESTIC LAW

14. Article 209 of the Criminal Code, in the version in force at the material time, read as follows:

> "A male person who after attaining the age of 19 fornicates with a person of the same sex who has attained the age of 14 but not the age of 18 shall be sentenced to imprisonment for between six months and five years."

15. On 21 June 2002, upon a request for review made by the Innsbruck Regional Court, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional.

16. On 10 July 2002 Parliament decided to repeal Article 209. That amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, came into force on 14 August 2002.

17. The Court notes that the legal situation has remained unchanged since 9 January 2003, when it gave its *L. and V. v. Austria* judgment (nos. 39392/98 and 39829/98, ECHR 2003-I). For a more detailed description of the law, the Constitutional Court's judgments concerning Article 209 of the Criminal Code and the parliamentary debate relating to the issue, it therefore refers to the said judgment (§§ 17-33).

THE LAW

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

18. The applicants complained of the maintenance in force of Article 209 of the Criminal Code, which criminalised homosexual acts of adult men with consenting adolescents between the ages of 14 and 18, and of their convictions under that provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, they alleged that their right to respect for their private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

Article 8 of the Convention provides:

> "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 provides:

> "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."

19. The Government contested that argument.

A. Admissibility

20. The Court observes that the two applications raise the same legal issue. It therefore decides to join them.

21. The Court considers that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It finds further that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

22. The Government noted that the present case raised the same issue as the *L. and V. v. Austria* judgment and repeated the arguments they had submitted in that case (see *L. and V. v. Austria*, cited above, § 42).

23. Further, the Government noted that the repeal of Article 209 of the Criminal Code which intervened after the applicants' conviction had become final did not change their legal position. However, the second applicant had been granted a remission of his sentence.

24. The applicants agreed that their position was not affected by the change in law. They pointed out that the Constitutional Court's judgment of 21 June 2002 which was based on other grounds than those relied on in the present case, had not acknowledged, let alone afforded redress for, the alleged breach of the Convention. Their convictions still stood and they had no right to any form of compensation. In particular, the second applicant had no right to compensation for the 32 days spent in pre-trial detention. They were, therefore, still victims within the meaning of Article 34, of the violation alleged.

25. Moreover, the applicants repeated the arguments relied on by the applicants in the *L. and V.* case (§§ 39-40).

26. The Court observes that the present case raises the same issue as *L. and V. v. Austria* (cited above). It notes in particular that, like the

applicants in the *L. and V.* case the applicants in the present case were convicted under Article 209 of the Criminal Code.

27. The Court reiterates its finding in *L. and V.* that the fact that Article 209 of the Criminal Code has been repealed does not affect the applicants' victim status (ibid., § 43). It sees no reason to deviate from this position in the present case.

28. In the *L. and V.* case the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision (ibid., § 53). Further it found that it was not necessary to rule on the question whether there has been a violation of Article 8 taken alone (§ 55).

29. The Court sees nothing to distinguish the present case from the above precedent. It notes that the parties have not submitted any new argument which would require it to deviate from its previous finding.

30. Accordingly, the Court finds that there has been a violation of Article 14 taken in conjunction with Article 8.

31. Moreover, the Court does not consider it necessary to rule on the question whether there has been a violation of Article 8 alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

32. 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

33. Both applicants requested compensation for non-pecuniary damage. The first applicant claimed 75,000 euros (EUR), asserting that he had suffered feelings of distress and humiliation due to the maintenance in force of Article 209 of the Criminal Code and, in particular, the criminal proceedings against him resulting in his conviction, which stigmatised him as a sexual offender. The second applicant claimed EUR 150,000. He pointed out that, in addition to the general distress and humiliation, he particularly suffered from having been deprived of his liberty during 32 days of pre-trial detention. Moreover, he contended that his detention caused the bankruptcy of his enterprise. Although he could not specify the pecuniary damage caused, this should be taken into account when awarding non-pecuniary damage.

34. The Government contended that the applicants' claims were excessive.

35. The Court, having regard to the amounts awarded in *L. and V.* considers that, in the first applicant's case, an award of EUR 15,000 is appropriate. In the second applicant's case, the Court making an assessment on an equitable basis and, in particular, taking into account his pre-trial detention, awards EUR 20,000.

B. Costs and expenses

36. The first applicant also claimed a total amount of EUR 15,306.80 for costs and expenses, composed of EUR 7,888.86 in respect of the domestic proceedings and EUR 7,417.94 in respect of the Convention proceedings.

The second applicant claimed a total amount of EUR 29,635.58 for costs and expenses, composed of EUR 12,478.80 in respect of the domestic proceedings and EUR 17,156.78 in respect of the Convention proceedings.

37. Moreover, both applicants requested the Court to make an award of any future costs which may become necessary to remove the consequences flowing from the violation of the Convention, in particular to have their convictions set aside and to have them removed from the criminal records.

38. The Government found that the applicants' claims were excessive. In particular, as regards the Convention proceedings they pointed out that the present case was simply a follow-up case to *L. and V.* Further, they considered that the claim for future costs was of a speculative nature.

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

40. In the present case, the Court considers that the costs of the domestic proceedings, which related entirely to Article 209 of the Criminal Code, were actually and necessarily incurred. It notes that the difference in the sums claimed is explained by the fact that additional legal acts were required with regard to the second applicant's pre-trial detention and with regard to the stay of the execution of his sentence. The Court therefore awards EUR 7,888 to the first applicant and EUR 12,478 to the second applicant.

41. As to the costs of the Convention proceedings, the Court takes into account that the present case is a follow-up case to *L. and V.*, Moreover, the applicants in the present case were represented by the same lawyer as the applicants in *L. and V.* Making an assessment on an equitable basis, it awards each applicant EUR 3,000.

42. In respect of costs and expenses, the total amount awarded to the first applicant is, therefore, EUR 10,888, the total amount awarded to the second applicant, is EUR 15,478.

43. As to the applicants' request for future costs linked to removing the consequences of the violation found, the Court, referring to the reasons given in *L. and V.* (cited above, § 68), considers that the applicants' claim is speculative. It is therefore dismissed.

C. Default interest

44. The Court considers it appropriate that the default interest 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 applications;

2. *Declares* the applications admissible;

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

4. *Holds* that there is no need to examine the complaint under Article 8 of the Convention alone:

5. *Holds*
(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 10,888 (ten thousand eight hundred and eighty-eight euros) for costs and expenses, plus any tax that may be chargeable;
(b) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of non-pecuniary damage and EUR 15,478 (fifteen thousand four hundred and seventy eight euros) for costs and expenses, plus any tax that may be chargeable;
(c) 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 21 October 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA Christos ROZAKIS
Deputy Registrar President