



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

FIRST SECTION

CASE OF WOLFMAYER v. AUSTRIA

(Application no. 5263/03)

JUDGMENT

STRASBOURG

26 May 2005

FINAL

12/10/2005

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 Wolfmeyer v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr P. LORENZEN,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 3 May 2005,

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

PROCEDURE

1. The case originated in an application (no. 5263/03) 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 an Austrian national, Mr Thomas Wolfmeyer (“the applicant”), on 30 January 2003.

2. The applicant was 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 22 September 2003 the Court decided to communicate the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1968 and lives in Bludenz.

5. In May 2000 the Feldkirch Regional Court (*Landesgericht*) opened criminal proceedings against the applicant on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code.

6. On 23 November 2000 the Regional Court, after having held a trial, convicted the applicant under Article 209 of the Criminal Code and sentenced him to six months' imprisonment suspended on probation. It found that, in 1997, he had performed homosexual acts with two adolescents.

7. Upon the applicant's appeal, the Innsbruck Court of Appeal (*Oberlandesgericht*) requested the Constitutional Court (*Verfassungsgerichtshof*) to review the constitutionality of Article 209.

8. On 29 November 2001 the Constitutional Court dismissed this request (see paragraph 22 below).

9. On 20 December 2001 the Innsbruck Court of Appeal filed a new request for review of the constitutionality of Article 209.

10. On 21 June 2002 the Constitutional Court gave a judgment holding that Article 209 of the Criminal Code was unconstitutional (see paragraph 23 below).

11. The amendment repealing Article 209 entered into force on 14 August 2002. While, according to the transitional provisions, Article 209 remained applicable in all cases in which the judgment at first instance had already been given before the entry into force of the amendment, it could no longer be applied in the applicant's case since it had been the case in point (*Anlaßfall*) before the Constitutional Court.

12. On 17 July 2002 the Innsbruck Court of Appeal, noting that the Constitutional Court had repealed Article 209 as unconstitutional, acquitted the applicant. This decision was served on him on 12 August 2002.

13. On 20 September 2002 the Feldkirch Regional Court dismissed the applicant's request for reimbursement of his defence costs holding that under Article 393a (3) of the Code of Criminal Procedure (*Strafprozeßordnung*) no right to compensation existed if the accused was not punishable on grounds which occurred after the indictment was filed.

14. On 12 November 2002 the Innsbruck Court of Appeal partly granted the applicant's appeal, awarding him reimbursement of a total amount of 1,839.38 euros (EUR) for costs and expenses. It found that the Regional Court had wrongly applied Article 393a (3) of the Code of Criminal Procedure. The applicant's case had been the case in point before the Constitutional Court leading to the repeal of Article 209 of the Criminal Code. His case had to be treated as if Article 209 had never existed. Consequently, it could not be said that he was acquitted on grounds which occurred after the indictment.

15. The court found that the applicant's defence costs including the costs relating to the proceedings before the Constitutional Court, in which the applicant, as an interested party (*mitbeteiligte Partei*), had made detailed submissions, had been necessarily incurred. However, the law provided that only a maximum amount of EUR 1,091 was to be reimbursed as

contribution to the defence costs. In addition EUR 748,38 were awarded for cash expenses.

II. RELEVANT DOMESTIC LAW

A. The Criminal Code

16. Any sexual acts with persons under 14 years of age are punishable under Articles 206 and 207 of the Criminal Code.

17. 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.”

18. This provision was aimed at consensual homosexual acts, as any sexual act of adults with persons up to 19 years of age are punishable under Article 212 of the Criminal Code if the adult abuses a position of authority (parent, employer, teacher, doctor, etc.). Any sexual acts involving the use of force or threats are punishable as rape, pursuant to Article 201, or sexual coercion pursuant to Article 202 of the Criminal Code. Consensual heterosexual or lesbian acts between adults and persons over 14 years of age are not punishable.

19. On 10 July 2002, following the Constitutional Court's judgment of 21 June 2002 (see paragraph 23 below), Parliament decided to repeal Article 209. That amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, came into force on 14 August 2002.

B. The Constitutional Court's judgments

1. *The judgment of 3 October 1989*

20. In a judgment of 3 October 1989, the Constitutional Court found that Article 209 of the Criminal Code was compatible with the principle of equality under constitutional law and in particular with the prohibition on gender discrimination contained therein.

21. The relevant passage of the Constitutional Court's judgment reads as follows:

“The development of the criminal law in the last few decades has shown that the legislature is striving to apply the system of criminal justice in a significantly more restrictive way than before in pursuance of the efforts it is undertaking in connection with its policy on the treatment of offenders, which have become known under the general heading of 'decriminalisation'. This means that it leaves offences on the statute

book or creates new offences only if such punishment of behaviour harmful to society is still found absolutely necessary and indispensable after the strictest criteria have been applied. The criminal provision which has been challenged relates to the group of acts declared unlawful in order to protect – in so far as strictly necessary – a young, maturing person from developing sexually in the wrong way. ('Homosexual acts are only offences of relevance to the criminal law inasmuch as a dangerous strain must not be placed by homosexual experiences upon the sexual development of young males ...' Pallin, in Foregger/Nowakowski (publishers), *Wiener Kommentar zum Strafgesetzbuch*, 1980, paragraph 1 on Article 209 ...) Seen in this light, it is the conviction of the Constitutional Court that from the point of view of the principle of equality contained in Article 7 § 1 of the Federal Constitution and Article 2 of the Basic Law those legislating in the criminal sphere cannot reasonably be challenged for taking the view, by reference to authoritative expert opinions coupled with experience gained, that homosexual influence endangers maturing males to a significantly greater extent than girls of the same age, and concluding that it is necessary to punish under the criminal law homosexual acts committed with young males, as provided for under Article 209 of the Criminal Code. This conclusion was also based on their views of morality, which they wanted to impose while duly observing the current policy on criminal justice which aims at moderation and at restricting the punishment of offences (while carefully weighing up all the manifold advantages and disadvantages). Taking everything into account, we are dealing here with a distinction which is based on factual differences and therefore constitutionally admissible from the point of view of Article 7 § 1 of the Federal Constitution read in conjunction with Article 2 of the Basic Law.”

2. *The judgment of 29 November 2001*

22. On 29 November 2001 the Constitutional Court dismissed the Innsbruck Regional Court's request to review the constitutionality of Article 209 of the Criminal Code.

The Regional Court had argued, *inter alia*, that Article 209 violated Articles 8 and 14 of the Convention as the theory that male adolescents ran a risk of being recruited into homosexuality on which the Constitutional Court had relied in its previous judgment had since been refuted. The Constitutional Court found that the issue was *res judicata*. It noted that the fact that it had already given a ruling on the same provision did not prevent it from reviewing it anew, if there was a change in the relevant circumstances or different legal argument. However, the Regional Court had failed to give detailed reasons for its contention that relevant scientific knowledge had changed to such an extent that the legislator was no longer entitled to set a different age-limit for consensual homosexual relations than for consensual heterosexual or lesbian relations.

3. *The judgment of 21 June 2002*

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

The Regional Court had argued, firstly, as it had done previously, that Article 209 of the Criminal Code violated Articles 8 and 14 of the Convention and, secondly, that it was incompatible with the principle of equality (*Gleichheitsgrundsatz*) as guaranteed by Article 7 § 1 of the Federal Constitution, as a relationship between male adolescents aged between 14 and 19 was first legal, but became punishable as soon as one reached the age of 19 and became legal again when the second one reached the age of 18.

The Constitutional Court held that the second argument differed from the arguments which it had examined in its judgment of 3 October 1989 and that it was therefore not prevented from considering it. It noted that Article 209 concerned consensual homosexual relations between men aged over 19 and adolescents between 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 of persons with a one- to five-year age difference were not punishable. However, as soon as one partner reached the age of 19, such acts constituted an offence under Article 209 of the Criminal Code. They became legal again when the younger partner reached the age of 18. Given that Article 209 did not only apply to occasional relations but also covered 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.

THE LAW

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

24. The applicant complained about Article 209 of the Criminal Code and about the conduct of criminal proceedings against him under this provision. Relying on Article 8 of the Convention taken alone and in conjunction with Article 14, he alleged that his right to respect for his 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 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.”

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.”

A. Admissibility

25. The Government argued that the applicant could not claim to be a victim of the alleged violation within the meaning of Article 34 of the Convention. Following the Constitutional Court's judgment of 21 June 2002, he was acquitted by the Innsbruck Court of Appeal and was awarded a contribution to his defence costs.

26. The Government conceded that the Constitutional Court, when repealing Article 209 of the Criminal Code, did not rely on the argument that the contested provision violated Articles 8 and 14 of the Convention. However, the reasons given by the Innsbruck Court of Appeal for the applicant's acquittal and for granting him a contribution to his defence costs showed that it considered Article 209 to be unconstitutional and in breach of the Convention. In essence, the applicant was treated as if Article 209 had never been applicable to the facts underlying the charge.

27. The applicant argued that neither the Constitutional Court's judgment of 21 June 2002 nor his acquittal and the subsequent costs order acknowledged, let alone provided redress, for the violation of the Convention. In particular, the acquittal could not remove the discrimination which lay in the mere conduct of criminal proceedings against him under Article 209 of the Criminal Code. He had suffered the humiliation and public exposure of the first instance proceedings and conviction. Living in a small provincial town in the most conservative region of Austria, he had lost his employment as a result. Moreover, he did not receive any redress for non-pecuniary damage sustained and had to bear the greater part of his necessary defence costs. It was therefore incorrect to say that he was put in a position as if Article 209 had never been applicable.

28. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 43, ECHR 1999-VI).

29. It is true that Article 209 of the Criminal Code was repealed by the Constitutional Court and the applicant was subsequently acquitted.

However, in the case of *S.L. v. Austria*, concerning an applicant who had never been prosecuted under Article 209 but was, on account of his sexual orientation, directly affected by the maintenance in force of that provision, the Court has already noted that the Constitutional Court's judgment has not acknowledged let alone afforded redress for the alleged breach of the Convention (no. 45330/99, § 35, ECHR 2003-I (extracts)).

30. Indeed the Constitutional Court did not rely on the argument of alleged discrimination of homosexual as compared to heterosexual or lesbian relationships, but rather on the lack of coherence and objective justification of the provision in other respects (see paragraph 23 above). The Government did not contest this. Instead they argue that the applicant's acquittal and the subsequent costs order contain at least an implicit acknowledgement of the breach of the Convention.

31. The Court does not share this view. It observes that neither the applicant's acquittal nor the subsequent costs order contains any statement acknowledging at least in substance the violation of the applicant's right not to be discriminated against in the sphere of his private life on account of his sexual orientation. Even if they did, the Court finds that neither of them provided adequate redress as required by its case law.

32. In this connection it is crucial for the Court's consideration that in the present case the maintenance in force of Article 209 of the Criminal Code in itself violated the Convention (*S.L. v. Austria*, cited above, § 45) and, consequently, the conduct of criminal proceedings under this provision.

33. The applicant had to stand trial and was convicted by the first instance court. In such circumstances, it is inconceivable how an acquittal without any compensation for damages and accompanied by the reimbursement of a minor part of the necessary defence costs could have provided adequate redress (see, *mutatis mutandis*, *Dalban*, cited above, § 44). This is all the more so as the Court itself has awarded substantial amounts of compensation for non-pecuniary damage in comparable cases, having particular regard to the fact that the trial during which details of the applicants' most intimate private life were laid open to the public, had to be considered as a profoundly destabilising event in the applicants' lives (*L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 60, ECHR 2003-I).

34. In conclusion, the Court finds that the applicant's acquittal which did not acknowledge the alleged breach of the Convention and was not accompanied by adequate redress did not remove the applicant's status as a victim within the meaning of Article 34 of the Convention.

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

B. Merits

36. The applicant referred to the Court's judgments in *L. and V. v. Austria* (cited above) and *S.L. v. Austria* (cited above) and repeated the arguments relied on by the applicants in these cases. The Government did not submit observations on the merits.

37. In these cases, the Court found a violation of Article 14 of the Convention taken in conjunction with Article 8 on the ground that the respondent Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code (*S.L. v. Austria*, cited above, § 45) and consequently, the applicants' convictions under this provision (*L. and V. v. Austria*, cited above, § 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 (*S.L. v. Austria*, § 47 and *L. and V. v. Austria*, § 55).

38. The present case differs from *L. and V. v. Austria* in that the applicant was acquitted following the repeal of Article 209, while the convictions of applicants L. and V. continue to stand despite the said repeal. In this context, the Court refers to its above finding that the applicant's position as a victim has not been removed by his acquittal. There are no other elements which would distinguish the present case from the above precedent. As was already noted above, in the case of *S.L. v. Austria*, the finding of a violation was based on the mere maintenance in force of Article 209 of the Criminal Code. The repeal of that provision was not considered to affect the applicant's victim status.

39. Accordingly, the Court considers that the maintenance in force of Article 209 of the Criminal Code and the conduct of the criminal proceedings against the applicant on the basis of that provision amounted to a violation of Article 14 taken in conjunction with Article 8.

40. Having regard to the foregoing considerations, 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

41. 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

42. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage. He argued that the maintenance in force of Article 209 of the Criminal Code until 2002 and the conduct of criminal proceedings against him stigmatised him as a sexual offender and treated his sexual orientation as being inferior and contemptible. In particular he was subject to humiliation and public exposure during the trial before the Feldkirch Regional Court.

43. The Government opposed the applicant's claim.

44. The Court will have regard to the amounts awarded under the head of non-pecuniary damage in comparable cases.

Most of them concern cases in which the applicants' convictions still stand despite the repeal of Article 209. The Court, having regard to this factor and to the suffering caused by the trial, awarded the following amounts: in *L. and V. v. Austria*, EUR 15,000 to each applicant (cited above, § 60); in *Woditschka and Wilfling v. Austria*, the same amount to the first applicant and EUR 20,000, to the second applicant who had in addition suffered a month of pre-trial detention (nos. 69756/01 and 6306/02, § 35, 21 October 2004); in *Ladner v. Austria*, EUR 17,500 taking into account the applicant's pre-trial detention of thirteen days (no. 18297/03, § 34, 3 February 2005).

In the case of *S.L.* who was affected by the mere maintenance in force of the contested provision but had never been prosecuted, the Court awarded EUR 5,000 (cited above, § 52).

45. The present applicant had to stand trial and was convicted at first instance. The Court considers that the acquittal, although it has to be taken into account in the assessment of non-pecuniary damage, cannot make undone the suffering associated with the public exposure of most intimate aspects of the applicant's private life or the loss of his employment. As was already noted, no redress for non-pecuniary damage was provided at the domestic level.

46. Having regard to the amounts granted in the above comparable cases, the Court, making an assessment on an equitable basis, awards the applicant EUR 10,000 for non-pecuniary damage.

B. Costs and expenses

47. The applicant also claimed EUR 27,739.70, including VAT, for the costs and expenses incurred before the domestic courts. The sum does not include the amount which was reimbursed at the domestic level. The applicant pointed out that the Innsbruck Court of Appeal in its costs order of 12 November 2002 considered that his defence costs had been necessarily incurred.

Moreover, the applicant claimed EUR 4,245, including VAT, for costs and expenses incurred before the Court.

48. The Government submitted that the statement presented by the applicant was based on the correct figures in accordance with the Autonomous Remuneration Guidelines for Lawyers but listed a number of separate items which were already covered by the standard rates.

49. 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 (see, among many others, *L. and V. v. Austria*, cited above, § 64).

50. As to the costs of the domestic proceedings, the Court finds that they were actually and necessarily incurred. It remains to be assessed whether they were reasonable as to quantum. The Court observes in particular that the present case, apart from the criminal proceedings, included two sets of proceedings before the Constitutional Court (see paragraphs 22-23 above). The Innsbruck Court of Appeal observed in its costs order of 12 November 2002 that the applicant had made detailed submissions in these proceedings.

51. The Court, therefore, accepts that the applicant's costs in the domestic proceedings were higher than the costs of the applicants in the above comparable cases, which varied between EUR 1,500 and EUR 12,478, according to the circumstances (see *L. and V. v. Austria*, cited above, § 65; and *Woditschka and Wilfling*, cited above, § 40). Nevertheless, it considers that the costs claimed are excessive. It therefore awards an amount of EUR 15,000.

52. As to the costs of the Convention proceedings, the Court takes into account that the case is a follow-up case to *L. and V. v. Austria*. Moreover, the applicant in the present case was represented by the same lawyer. Making an assessment on an equitable basis, the Court awards the applicant EUR 3,000 under this head.

53. In sum, the Court awards the applicant EUR 18,000 for costs and expenses.

C. Default interest

54. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;
3. *Holds* that there is no need to examine the complaint under Article 8 of the Convention alone;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 10,000 (ten-thousand euros) in respect of non-pecuniary damage and EUR 18,000 (eighteen-thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
 - (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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 26 May 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President