



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

FIRST SECTION

CASE OF H.G. and G.B. v. AUSTRIA

(Applications nos. 11084/02 and 15306/02)

JUDGMENT

STRASBOURG

2 June 2005

FINAL

02/09/2005

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 H.G. and G.B. v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs S. BOTOUCHAROVA,

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 12 May 2005,

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

PROCEDURE

1. The case originated in two applications (no. 11084/02 and 15306/02) 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 H.G. (“the first applicant”) and Mr. G.B. (“the second applicant”), on 10 March 2002 and 12 April 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 30 April 2002 and 16 May 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. On 1 September 2001 the Innsbruck Regional Court (*Landesgericht*) ordered the first applicant's detention on remand on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code.

5. On 3 December 2001 the Innsbruck Regional Court convicted the first applicant under Article 209 of the Criminal Code and sentenced him to eighteen months' imprisonment. It found that, from July 2001 until his arrest, the first applicant had had sexual relations with three different male minors born in 1986 and 1987 respectively. In determining the sentence the court had regard to the first applicant's confession as a mitigating circumstance and to his previous convictions as aggravating circumstance.

6. On 6 December 2001 the first applicant started to serve his sentence of imprisonment at Garsten prison. On 1 September 2002 the first applicant was granted early release from detention.

B. The second applicant

7. On 25 September 2000 the Wels Regional Court convicted the second applicant under Article 209 of the Criminal Code and sentenced him to three months' imprisonment, suspended for a probation period of three years. It found that on 3 June 1998 the second applicant had had a sexual encounter with a male minor born in 1981. Referring to Article 41 § 1 of the Criminal Code the court found that the conditions for an extraordinary mitigation of sentence (*ausserordentliche Strafmilderung*) were met, i.e. a sentence below the statutory level of punishment could be pronounced. Having regard to all the circumstances of the case, in particular that the offence had merely been attempted, the court found that a suspended term of imprisonment was commensurate to the second applicant's guilt.

8. On 14 December 2000 the second applicant appealed, arguing, *inter alia*, that Article 209 of the Criminal Code was unconstitutional in that it did not comply with Article 8 of the Convention read in conjunction with Article 14.

9. On 20 February 2001 the Linz Court of Appeal dismissed the second applicant's appeal. The Court stated that it had no doubts about the constitutionality of Article 209 of the Criminal Code and referred in this respect to the Constitutional Court's case-law.

II. RELEVANT DOMESTIC LAW

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

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.”

11. 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.

12. 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.

13. 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

14. 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.”

15. The Government contested that argument.

A. Admissibility

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

17. As regards the first applicant the Government submitted that he failed to exhaust domestic remedies as required by Article 35 of the Convention since he has not appealed against the Innsbruck Regional Court's judgment of 3 December 2001 to the Innsbruck Court of Appeal. Although the applicant's conviction was based on an unambiguous legal provision, Article 209 of the Criminal Code, the Innsbruck Court of Appeal could have applied for a review of the constitutionality of this provision before the Constitutional Court and did so in another case.

18. The first applicant submitted that an appeal to the Court of Appeal against the Regional Court's judgment was, in the circumstances of the case, no effective remedy. Before the Court the first applicant does not complain about any procedural shortcoming of the criminal proceedings against him but only about their result. In this respect the first applicant emphasised that he himself could not apply to the Constitutional Court for a review of the constitutionality of Article 209 of the Criminal Code. Such an application could only be filed by the Court of Appeal on its own motion and there was no right of the parties to request a court of appeal to file such a request.

19. The Court recalls that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic bodies, and in compliance with the formal requirements and time-limits laid down in domestic law. However, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the

requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied. Moreover, the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (*Henaf v. France*, no. 65436/01, 27 November 2003, §§ 30-32 with further references).

20. The Court observes that the first applicant did not file a plea of nullity against his conviction. Although in criminal proceedings an appeal to a court of appeal is in principle an efficient remedy to be exhausted, the Court nevertheless must take the particular circumstances of the present case into account. It observes first that the first applicant complains about a breach of Article 8 of the Convention alone and read in conjunction with Article 14, i.e. about the legal basis for his conviction, but not about the proceedings leading thereto.

21. It might be left open whether in general an applicant is dispensed of making use of the remedy of an appeal under the Austrian Code of Criminal Procedure in the absence of a complaint about procedural shortcomings and when Austrian domestic courts - such as in the present case - apply unambiguous legal provisions, because, in view of the state of the Constitutional Court's case-law on Article 209 of the Criminal Code at the time of the first applicant's conviction, such an appeal must have been deemed as devoid of any prospect of success. In this respect the Court observes that the Constitutional Court had examined the constitutionality of Article 209 of the Criminal Code in a judgment of 3 October 1989 and had found that this provision was in conformity with the Austrian Constitution. Subsequently, on 29 November 2001, the Constitutional Court dismissed a request by the Innsbruck Court of Appeal for a fresh review of the constitutionality of Article 209 of the Criminal Code finding that the issue was *res judicata* (see as to the development of the Constitutional Court's case-law *L. and V. v. Austria*, nos. 39398/98 and 39829/98, 9 January 2003, §§ 23-28). It was only a few days later, on 3 December 2001, that the applicant was convicted of the offence under Article 209 of the Criminal Code. Applying Article 35 of the Convention with the necessary degree of flexibility and without excessive formalism, the Court cannot reasonably expect the first applicant to have appealed against the Regional Court's judgment of 3 December 2001.

22. The Court, therefore, concludes that the first applicant has complied with his obligation to exhaust domestic remedies. The Government have not raised a preliminary objection as regards the second applicant's application.

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

B. Merits

24. 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).

25. 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.

26. 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 first applicant had no right to compensation for the period of one year spent in detention. They were, therefore, still victims within the meaning of Article 34, of the violation alleged.

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

28. 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.

29. 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.

30. 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 had been a violation of Article 8 taken alone (§ 55).

31. 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.

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

33. 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 taken alone.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. 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

35. Both applicants requested compensation for non-pecuniary damage. The first applicant claimed 500,000 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. In addition to the general distress and humiliation, he particularly suffered from having been deprived of his liberty during one year of detention, which had lasted from 1 September 2001 until 1 September 2002. The second applicant claimed EUR 100,000, pointing out that he had also suffered feelings of distress and humiliation.

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

37. Having regard to the amounts awarded in *L. and V.*, the Court considers that, in the first applicant's case, an award of EUR 75,000 is appropriate, in particular, taking into account his detention. In the second applicant's case, the Court, making an assessment on an equitable basis, awards EUR 15,000.

B. Costs and expenses

38. The first applicant claimed a total amount of EUR 20,741.73 for costs and expenses, composed of EUR 2,107.90, including VAT, in respect of the domestic proceedings and EUR 18,633.83, including VAT, in respect of the Convention proceedings.

The second applicant claimed a total amount of EUR 18,662.91 for costs and expenses, composed of EUR 8,424.37, including VAT, in respect of the domestic proceedings and EUR 10,238.54, including VAT, in respect of the Convention proceedings.

39. 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.

40. 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.

41. 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.

42. 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 the first applicant benefited from legal aid as regards his trial and his pre-trial detention.

The Court therefore awards the sums claimed in full, i.e. EUR 2,107.90 to the first applicant and EUR 8,424.37 to the second applicant.

43. 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.

44. In respect of costs and expenses, the total amount awarded to the first applicant is, therefore, EUR 5,107.90, the total amount awarded to the second applicant is EUR 11,424.37.

45. 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

46. 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

1. *Decides* unanimously to join the applications;
2. *Declares* unanimously the applications admissible;
3. *Holds* unanimously that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;
4. *Holds* unanimously that there is no need to examine the complaint under Article 8 of the Convention alone;
5. *Holds*
 - (a) by 5 votes to 2 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 75,000 (seventy five thousand euros) in respect of non-pecuniary damage and EUR 5,107.90 (five thousand one hundred and seven euros ninety cents) for costs and expenses;
 - (b) unanimously 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 15,000 (fifteen thousand euros) in respect of non-pecuniary damage and EUR 11,424.37 (eleven thousand four hundred and twenty four euros thirty-seven cents) for costs and expenses;
 - (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* unanimously the remainder of the applicants' claim for just satisfaction.

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

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinion is annexed to this judgment:

- Dissenting opinion of Judges Botoucharova and Hajiyeu.

C.L.R.

S.N.

DISSENTING OPINION OF JUDGES BOTOCHAROVA AND
HAJIYEV

We share the conclusion of the Chamber in finding a violation of Article 14 of the Convention taken in conjunction with Article 8 in these cases. However, we regret that we are unable to accept the amount of 75 000 euros in respect of non-pecuniary damage for the first applicant as it does not follow the Court's case-law for non-pecuniary loss in comparable cases under Article 41.

We would recall that under Article 41 just satisfaction will be afforded by the Court only "if necessary" (see, *inter alia*, the *Dudgeon* judgment of 24 February 1983, Series A no. 59, p.7., par. 11). In exercising the discretion thus conferred on it, the Court will have regard to what is equitable in all the circumstances of the case (*Silver and Others* (Article 50), 24 October 1983, Series A no. 67, para 9). In our view the notion of "equity" has not been respected in the case of the first applicant.

The present case is but one following the case of *L. and V. v. Austria* in which the Court has found a violation of the same kind and it comes after Austria has repealed its law relating to the criminalising of homosexual acts of adult men with consenting adolescents between the ages of 14 and 18. The Court would in such circumstances take that fact into account and follow the award made in the leading case. The Court is free to adjust the amount it awards following the particular circumstances of a case. Still, if deciding to award an excessive sum when deciding on non-pecuniary damage given in equity it should explain the reasons which prompted it to depart from its own established case-law. As this is not the case and as at the same time the amount is not adequate to the character of the violation found, we cannot agree with the majority.