



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

FIRST SECTION

CASE OF R. H. v. AUSTRIA

(Application no. 7336/03)

JUDGMENT

STRASBOURG

19 January 2006

FINAL

19/04/2006

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 R. H. v. Austria,

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

Mr C.L. ROZAKIS, *President*,

Mrs S. BOTOCHAROVA,

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 13 December 2005,

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

PROCEDURE

1. The case originated in an application (no. 7336/03) 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 R. H. (“the applicant”), on 3 June 2002.

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

3. On 2 May 2003 the Court decided to communicate the application to the Government. On 12 June 2003, 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 1965 and lives in Vienna.

5. On 9 December 1998 the Vienna Regional Court (*Landesgericht*) ordered the applicant’s detention on remand on suspicion of having committed homosexual acts with adolescents contrary to Article 209 of the Criminal Code.

6. On 8 April 1999 the presiding judge of the competent chamber of the Regional Court scheduled the applicant's trial for 21 April 1999. On the first day of the trial, on 21 April 1999, the applicant was released from detention on remand and the hearing was adjourned in order to summon a witness residing in the Slovak Republic to the trial. At the hearing of 14 July 1999 the witnesses summoned in Slovakia did not appear. On 16 July 1999 the Regional Court sent letters rogatory requesting the summoning of these witnesses to the competent court in Bratislava. A further hearing was held on 24 November 1999 and the trial again adjourned.

7. On 15 December 1999 the Bratislava District Court II informed the Regional Court that the summons could not be served on the witnesses.

8. On 31 January 2000 the Regional Court requested the applicant to submit addresses to which the summons could be sent. On 15 May 2000 the applicant gave such information in respect of two of the witnesses.

9. On 20 December 2000 the Regional Court again sent letters rogatory to the Slovakian judicial authority to hear one witness. It appears that the Slovakian courts did not succeed in obtaining statements of that witness.

10. On 21 November 2001 a further hearing in the trial against the applicant took place. The Regional Court read out statements of three witnesses made at the pre-trial stage. The applicant's counsel objected to the reading out of the statements. No witnesses were heard.

11. On the same day, the Regional Court convicted the applicant on several counts of the offence under Section 209 of the Penal Code and sentenced him to six months' imprisonment suspended on probation for three years. The applicant was acquitted as regards other charges.

12. On 8 January 2002 the Public Prosecutor filed an appeal against the sentence and, on 25 January 2002, the applicant filed an appeal on points of law and fact, as well as against the sentence. The applicant argued, *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 and that the reading out of the statement of the witnesses at the trial violated his right to a fair hearing under Article 6 of the Convention.

13. On 8 April 2002 the Vienna Court of Appeal, after a public hearing, dismissed the applicant's appeal but granted the Public Prosecutor's appeal and increased the sentence to nine months' imprisonment, out of which six months were suspended on probation.

II. RELEVANT DOMESTIC LAW

14. 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.”

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 applicant 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 his convictions under that 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 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.”

A. Admissibility

19. The Government did not comment on that point.

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

B. Merits

21. 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 applicant in the present case was convicted under Article 209 of the Criminal Code.

22. 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).

23. The Court sees nothing to distinguish the present case from the above precedent. Accordingly, it finds that there has been a violation of Article 14 taken in conjunction with Article 8.

24. 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. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

25. The applicant complained that the criminal proceedings against him had been unfair in that the Regional Court which convicted him had only relied on written statements of witnesses which had been read out at the trial. He relies on Article 6 which insofar as relevant reads as follows:

“1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ...hearing.

3. Everyone charged with a criminal offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

A. Admissibility

26. The Court notes that this complaint 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

27. The Government submitted that the Regional Court had acted correctly when it had read out at the trial the statements of the witnesses made before the investigating judge. The Regional Court had made repeated efforts to have summons for hearings before it served on these witnesses and only when it had become clear that the witnesses could not be heard during the trial the Regional Court decided to read out in court their statements. Moreover, the judgment of the Regional Court was not exclusively based on the statements of the witnesses from Slovakia. In addition the Regional Court had heard five other witnesses which corroborated these statements.

28. This is disputed by the applicant. He submits that it had been correct to read out the statement of the witnesses, which had not appeared before the trial court. However, the Court had proceeded to the reading out of the statement without having given the applicant the opportunity to question the witnesses at an earlier stage. In such circumstances, the trial court should not have relied on the statements as decisive items of evidence. In his view the statements of the further witnesses heard had no particular relevance for the finding of guilt.

29. Having regard to its above conclusion on the complaint under Article 14 read in conjunction with Article 8 of the Convention, the Court finds that there is no need to examine this part of the application. It observes that in the case of *Wolfmeyer v. Austria* (no. 5263/03, 26.5.2005, § 32) - which also concerned criminal proceedings under Article 209 of the Criminal Code – it found that even if Mr Wolfmeyer had eventually been acquitted of the charges under Article 209 of the Criminal Code, he could still claim to be the victim of an alleged breach of Article 14 read in conjunction with Article 8 of the Convention. What mattered was not a conviction under Article 209 of the Criminal Code but the mere fact that criminal proceedings under this provision had been instituted at all. Thus, for the purpose of the present application it is irrelevant whether or not the criminal proceedings against the applicant respected the guarantees of

Article 6 of the Convention because, in any event, the Court has found above that such proceedings should not have been instituted in the first place. In those circumstances the Court considers that no separate issue needs to be examined under Article 6 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The applicant claimed 100,000 euros (EUR) as compensation for non-pecuniary damage, 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, the distress he had suffered was increased by the fact that the criminal proceedings against him had been unfair.

32. The Government contended that the applicant’s claim was excessive.

33. Having regard to the amounts awarded in *L. and V.* the Court considers that an award of EUR 35,000 is appropriate, in particular, taking into account his detention from 9 December 1998 until 21 April 1999.

B. Costs and expenses

34. The applicant claimed a total amount of EUR 15,821.45 for costs and expenses, composed of EUR 5,851.10, including VAT, in respect of the domestic proceedings and EUR 9,970.35, including VAT, in respect of the Convention proceedings.

35. Moreover, the applicant 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 his convictions set aside and to have it removed from the criminal records.

36. The Government found that the applicant’s claim was 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.

37. 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.

38. 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. The Court therefore awards the sums claimed in full, i.e. EUR 5,851.10.

39. 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 applicant in the present case was represented by the same lawyer as the applicants in *L. and V.* Making an assessment on an equitable basis, it awards EUR 3,000.

40. In respect of costs and expenses, the total amount awarded to the applicant is, therefore, EUR 8,851.10.

41. As to the applicant's 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, § 14), considers that the applicant's claim is speculative. It is therefore dismissed.

C. Default interest

42. 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. *Declares* the application admissible unanimously;
2. *Holds* unanimously that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention;
3. *Holds* unanimously that there is no need to examine the complaint either under Article 8 of the Convention alone or under Article 6 of the Convention;
4. *Holds* by four votes to three 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 35,000 (thirty five thousand euros) in respect of non-pecuniary damage;

5. *Holds* unanimously 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 8,851.10 (eight thousand eight hundred and fifty one euros ten cents) for costs and expenses;
6. *Holds* unanimously 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;
7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 January 2006, 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 the Court, the joint dissenting opinion of Judges Botoucharova, Kovler and Hajiyev is annexed to this judgment.

S.N.
C.R.

**JOINT DISSENTING OPINION OF JUDGES
BOTOCHAROVA, KOVLER 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 this case. However, we are unable to accept the amount awarded in respect of non-pecuniary damage for the reasons already expressed in the Dissenting opinion of Judges Botoucharova and Hajiyev in cases of H.G. and G.B. v. Austria (nos. 11084/02 and 15306/02, 2 June 2005).