

# EUROPEAN COURT OF HUMAN RIGHTS

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## CHAMBER JUDGMENTS IN THE CASES OF *L. and V. v. AUSTRIA* and *S.L. v. AUSTRIA*

The European Court of Human Rights has today notified in writing two judgments<sup>1</sup> in the cases of *L. and V. v. Austria* (application nos. 39392/98 and 39829/98) and *S.L. v. Austria* (no. 45330/99). The Court held unanimously, in each case, that:

- there had been a **violation of Article 14** (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private life) of the European Convention on Human Rights;
- there was no need to rule on the complaints lodged under Article 8 of the Convention alone.

Under Article 41 (just satisfaction), the Court awarded:

- unanimously - in *L. and V.* - 15,000 euros (EUR) to each of the applicants for non-pecuniary damage and EUR 10,633.53 to *L.* and EUR 6,500 to *V.* for costs and expenses;
- by four votes to three - in *S.L.* - EUR 5,000 to the applicant for non-pecuniary damage and EUR 5,000 for costs and expenses.

(The judgments are available only in English.)

### 1. Principal facts

G.L., A.V., and S.L., all Austrian nationals, were born in 1967, 1968 and 1981 respectively. The first two live in Vienna and S.L. lives in Bad Gastein (Austria).

*G.L.* - was convicted on 8 February 1996 by Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) of homosexual acts with adolescents under Article 209 of the Criminal Code (*Strafgesetzbuch*), which penalises the homosexual acts of adult men with consenting adolescents aged between 14 and 18. He was sentenced to one year's imprisonment, suspended on probation for three years. Relying mainly on his diary, in which he had made entries about his sexual encounters, the court found it established that between 1989 and 1994 he had had, in Austria and in a number of other countries, homosexual relations either by way of oral sex or masturbation with numerous unidentified young men aged 14 to 18.

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1. Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its Protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

The judgment regarding the offences committed abroad was later quashed and the applicant's sentence reduced to 11 months' imprisonment suspended on probation for three years. On appeal the sentence was further reduced to eight months.

On 27 May 1997 the Supreme Court dismissed G.L.'s plea of nullity in which he had complained that the application of Article 209 violated his right to respect for his private life and his right to non-discrimination. He had also asked for a review of the constitutionality of Article 209.

**A.V.** - was convicted on 21 February 1997 by Vienna Regional Criminal Court under Article 209 of homosexual acts with adolescents, and on one minor count of misappropriation. He was sentenced to six months' imprisonment suspended on probation for three years. The Court found it established that on one occasion A.V. had had oral sex with a 15-year-old.

On 22 May 1997 Vienna Court of Appeal dismissed his appeal on points of law. It also dismissed his appeal against sentence.

**S.L.** - began to be aware of his sexual orientation aged about 11 or 12. While other boys were attracted by women, he realised that he was emotionally and sexually attracted by men, in particular by men who are older than himself. Aged 15, he was sure of his homosexuality.

S.L. submitted that he lived in a rural area where homosexuality was still taboo. He suffered from the fact that he had to hide his homosexuality and that - before the age of 18 - he could not enter into any fulfilling sexual relationship with an adult partner for fear of exposing that person to criminal prosecution under Article 209, of being obliged to testify as a witness on the most intimate aspects of his private life and of being stigmatised by society should his sexual orientation become known.

## **2. Procedure and composition of the Court**

The applications were lodged with the European Commission of Human Rights on 20 June 1997, 10 December 1997 and 19 October 1998 respectively and transmitted to the European Court of Human Rights on 1 November 1998. The first two applications were declared partly admissible and the third application admissible on 22 November 2001.

Judgment was given by a Chamber of seven judges, composed as follows:

Christos **Rozakis** (Greek), *President*,  
Françoise **Tulkens** (Belgian),  
Giovanni **Bonello** (Maltese),  
Nina **Vajić** (Croatian),  
Snejana **Botoucharova** (Bulgarian),  
Anatoli **Kovler** (Russian),  
Elisabeth **Steiner** (Austrian), *judges*,

and also Søren **Nielsen**, *Deputy Section Registrar*.

### 3. Summary of the judgment<sup>1</sup>

#### Complaints

The applicants alleged, in particular, that the maintenance in force of Article 209 - as well (in the case *L. and V* only) as their convictions under that provision - violated their right to respect for their private lives and were discriminatory. They relied on Articles 8 and 14 of the Convention.

#### Decision of the Court

##### Articles 8 and 14

The Court noted that, following the Constitutional Court's judgment of 21 June 2002, Article 209 of the Austrian Criminal Code was repealed on 10 July 2002. The amendment in question entered into force on 14 August 2002. Nonetheless, in *L. and V.*, the applicants were convicted under the contested provision and their respective convictions remain unaffected by the change in the law. In *S.L.*, the Court recalled that the applicant was prevented by Article 209 from entering into any sexual relationship corresponding to his disposition. Accordingly, it found that he was directly affected by the maintenance in force of Article 209 before the age of 18. The Court considered that the Constitutional Court's judgment had not acknowledged let alone afforded redress for the alleged breaches of the Convention. Nor had it resolved the issue in question.

The Court observed that, in previous cases relied on by the Austrian Government relating to Article 209, the European Commission of Human Rights had found no violation of Articles 8 or 14. However, the Court had frequently held that the Convention was a living instrument, which had to be interpreted in the light of present-day conditions. What was decisive, was whether there was an objective and reasonable justification why young men in the 14 to 18-year age bracket needed protection against any sexual relationship with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterated that the scope of the margin of appreciation left to the country concerned would vary according to the circumstances. One of the relevant factors might be the existence or non-existence of common ground between the laws of the countries which had ratified the Convention. In that respect, there was, the Court observed, an ever-growing European consensus that equal ages of consent should apply to heterosexual, lesbian and homosexual relations.

The Government relied on the Constitutional Court's judgment of 3 October 1989, which had considered Article 209 necessary to avoid "a dangerous strain" being "placed by homosexual experiences upon the sexual development of young males". However, during the 1995 Parliamentary debate on a possible repeal of Article 209, the vast majority of experts heard in Parliament clearly supported an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty, thus disproving the theory that male adolescents were "recruited" into homosexuality. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996, shortly before the convictions of *L. and V.*, to keep Article 209 on the statute book.

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1. This summary by the Registry does not bind the Court.

To the extent that Article 209 embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes could not of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.

Finding that the Austrian Government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 or, in *L. and V.*, the applicants' convictions, the Court held that there had been, in both cases, a violation of Article 14 taken in conjunction with Article 8. The Court did not consider it necessary to rule on the question of whether there had been a violation of Article 8 taken alone.

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The Court's judgments are accessible on its Internet site (<http://www.echr.coe.int>).

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*The European Court of Human Rights was set up in Strasbourg in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. On 1 November 1998 a full-time Court was established, replacing the original two-tier system of a part-time Commission and Court.*