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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Applications nos 39392/98 and 39829/98
by G.L. and A.V. against Austria

The European Court of Human Rights, sitting on 22 November 2001 as a Chamber composed of
Mr C.L. ROZAKIS, *President*,
Mrs F. TULKENS,
Mr G. BONELLO,
Mr E. LEVITS,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER, *judges*,
and Mr E. FRIBERGH, *Section Registrar,*

Having regard to the above applications lodged with the European Commission of Human Rights on 20 June and 10 December 1997, respectively, and registered on 16 January and 13 February 1998, respectively,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the decision of 30 January 2001 to join the applications and to communicate them to the respondent Government,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

The first applicant, G.L., is an Austrian national, who was born in 1967 and lives in Vienna. The second applicant, A.V., is an Austrian national, who was born in 1968 and is also living in Vienna. The applicants are represented before the Court by Mr H. Graupner, a lawyer practising in Vienna. The respondent Government are represented by Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

A. The circumstances of the case

1. The first applicant

On 8 February 1996 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) convicted the applicant under section 209 of the Criminal Code (*Strafgesetzbuch*) of homosexual acts with adolescents and sentenced him to one year's imprisonment suspended on probation.

Prior to giving its judgment, the court held a trial at which it heard the applicant, who was assisted by counsel. He was questioned in particular about a calendar which had been seized at his home, and in which he had made diary-like entries about his sexual encounters, usually noting the first name of his partner, his approximate age, the kind of sexual acts performed, as well as his sensations and feelings. According to the minutes, all relevant documents were read out, including the opinion of a psychiatric expert. No witnesses were heard. On the basis of the evidence before it, the court found it established that between 1989 and 1994 the applicant had had, in Austria and in a number of other countries, homosexual contacts either by way of oral sex or masturbation with numerous persons between fourteen and eighteen years of age, whose identity could not be established.

On 5 November 1996 the Supreme Court (*Oberster Gerichtshof*), upon the applicant's plea of nullity, quashed the judgment regarding the offences committed abroad. The applicant had also complained about the use of his calendar-diary, claiming that such use violated his right not to incriminate himself and could only be justified in the case of a very serious crime but not to provide proof of an offence under section 209 of the Criminal Code which itself lacked any justification. In this respect, the Supreme Court found that the Code of Criminal Procedure (*Strafprozess-ordnung*) did not contain any prohibition on using a calendar as evidence - even if it contained diary-like entries - provided that it had been read out at the trial. As the applicant had not objected to the reading out of the calendar and had failed to obtain an interim decision (*Zwischenerkenntnis*) of the trial court,

which was a formal requirement for raising a plea of nullity under section 281 § 1 (4) of the Code of Criminal Procedure, he was barred from complaining about its use as evidence. This decision was served on 8 January 1997.

On 29 January 1997 the Vienna Regional Criminal Court, in renewed proceedings, which had been discontinued as far as the offences committed abroad were concerned, held a further hearing. Again the applicant did not object to the reading out of his calendar-diary. At the close of the hearing the Regional Court found the applicant guilty under section 209 of the Criminal Code as regards the offences committed in Austria and fixed the sentence at eleven months' imprisonment suspended on probation.

On 27 May 1997 the Supreme Court dismissed the applicant's plea of nullity in which he had complained that the application of section 209 of the Criminal Code violated his right to respect for his private life and his right to non-discrimination, and had suggested that the Supreme Court request the Constitutional Court to review the constitutionality of that provision.

On 31 July 1997 the Vienna Court of Appeal (*Oberlandesgericht*), upon the applicant's appeal, reduced the sentence to eight months' imprisonment suspended on probation.

2. The second applicant

On 21 February 1997 the Vienna Regional Criminal Court convicted the applicant under section 209 of the Criminal Code of homosexual acts with adolescents, and one minor count of misappropriation. It sentenced him to six months' imprisonment suspended on probation. The Court found it established that on one occasion the applicant had had oral sex with a fifteen year old boy.

On 22 May 1997 the Vienna Court of Appeal 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 had also suggested that the Court of Appeal request the Constitutional Court to review the constitutionality of that provision. It also dismissed his appeal against sentence. The decision was served on 3 July 1997.

B. Relevant domestic law and background

1. The Criminal Code

Any sexual acts with persons under fourteen years of age are punishable under sections 206 and 207 of the Criminal Code.

Section 209 of the Criminal Code reads as follows:

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

This provision is aimed at consensual homosexual acts, as any sexual acts of adults with persons up to nineteen years of age are punishable under section 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 section 201, or sexual coercion pursuant to section 202 of the Criminal Code, respectively. Consensual heterosexual or lesbian acts between adults and persons over fourteen years of age are not punishable.

Offences under section 209 are regularly prosecuted, an average of sixty criminal proceedings being opened per year, out of which a third result in a conviction. As regards the penalties applied, a term of imprisonment usually exceeding three months is imposed in 65 to 75% of the cases, out of which 15 to 25% are not suspended on probation.

2. Proceedings before the Constitutional Court

In a judgment of 3 October 1989, the Constitutional Court found that section 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. This judgment was given upon the complaint of a person, who subsequently brought his case before the Commission (no. 17279/90, Z. v. Austria decision 13.5.92, unpublished).

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 only leaves offences on the statute book or creates new offences 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 is included in that group of acts considered unlawful in order to protect - to an extent thought to be unavoidable - 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 ...'). 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 para. 1 of the Federal Constitutional Law and Article 2 of the Basic Constitutional Act those legislating on the criminal law 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 s. 209 of the Penal 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 para. 1 of the Federal Constitutional Law, in conjunction with Article 2 of the Basic Constitutional Act."

On 8 May 2001 the Innsbruck Court of Appeal, before which criminal proceedings involving the application of section 209 of the Criminal Code are pending, decided to institute proceedings for the review of the constitutionality of this provision before the Constitutional Court. It argued *inter alia* that section 209 violated Articles 8 and 14 of the Convention and that recent scientific knowledge about homosexuality constituted a new element which justified a further examination of the issue. These proceedings are currently pending before the Constitutional Court.

3. Parliamentary debate

In spring 1995 the Social-democratic Party, the Green Party and the Liberal Party brought motions in Parliament to repeal section 209 of the Criminal Code. They argued in particular that the legislator in the 1970ies had justified this provision on the theory that male adolescents were at a risk of being recruited into homosexuality while female adolescents were not. However, modern science had shown that sexual orientation was already established at the beginning of puberty. Moreover, different ages of consent were not in line with European standards. In this respect they referred in particular to Recommendation 924/1981 of the Parliamentary Assembly of the Council of Europe which had advocated equal ages of consent for heterosexual and homosexual contacts. Protection of juveniles against sexual violence and abuse was sufficiently afforded by other provisions of the Criminal Code irrespective of their sexual orientation.

Thereupon, on 10 October 1995, a Sub-Committee of the Legal Affairs Committee of Parliament heard eleven experts in various fields such as medicine, sexual science, AIDS prevention, developmental psychology, psychotherapy, psychiatry, theology, law and human rights law. Nine were clearly in favour of repealing section 209, an important argument for the experts in the fields of medicine, psychology and psychiatry being that sexual orientation was, in the majority of cases, established before the age of puberty, which disproved the theory that male adolescents were recruited into homosexuality by homosexual experiences. Another recurring argument was that penalising homosexual contacts made AIDS prevention more difficult. Two experts were in favour of keeping section 209: one simply stated that he considered it necessary for the protection of male adolescents, the other considered that despite the fact that there was no such

thing as being recruited into homosexuality, not all male adolescents were already sure of their sexual orientation and it was therefore better to give them more time to establish their identity.

On 27 November 1996 Parliament held a debate on the motion to repeal section 209 of the Criminal Code. Those speakers who were in favour of repealing section 209 relied on the arguments of the majority of the experts heard in the sub-committee. Of those speakers who were in favour of keeping section 209, some simply expressed their approval while others emphasised that they still considered the provision necessary for those male adolescents who were not sure of their sexual orientation. There was an equal vote at the close of the debate (91 to 91). Consequently, section 209 remained on the statute book.

On 17 July 1998 the Green Party again brought a motion before Parliament to repeal section 209 of the Criminal Code. The ensuing debate followed much the same lines as before. The motion was rejected by 81 votes to 12.

COMPLAINTS

1. The applicants complain under Article 8 of the Convention, taken alone and in conjunction with Article 14, about section 209 of the Criminal Code, criminalising homosexual adult acts with consenting adolescents between fourteen and eighteen years of age. They also complain of their convictions under this provision. The applicants point out in particular that in Austria, like in the majority of European countries, heterosexual and lesbian relations between adults and consenting adolescents over fourteen years of age are not punishable. They submit that there is nothing to indicate that adolescents need more protection against consensual homosexual relations with adults than against such heterosexual or lesbian relations. While not being necessary for protecting male adolescents in general, section 209 of the Criminal Code hampers homosexual adolescents in their development by attaching a social stigma to their relations with adult men and to their sexual orientation in general.

2. In addition, the first applicant complains under Articles 6 and 8 of the Convention that, in the criminal proceedings against him, his diary was used as evidence. He submits that this use amounted to an obligation to incriminate himself. Moreover, it was an interference with the most intimate sphere of his private life, which was not necessary to prosecute, as the offence itself was contrary to the Convention.

THE LAW

1. The applicants complain that section 209 of the Criminal Code is discriminatory and violates their right of respect for their private life. They rely on Article 8 taken alone and in conjunction with Article 14 of the Convention.

Article 8, so far as relevant, reads as follows:

> "1. Everyone has the right to respect for his private ... life, ...
>
> 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 ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 reads as follows:

> "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."

The Government contend that the Constitutional Court's ruling of 3 October 1989 is still relevant, although new proceedings for a review of the constitutionality of section 209 of the Criminal Code are currently pending before that court. They refer to the case-law of the Commission (cf. no. 17279/90 Z. v. Austria, decision 13.5.92, unpublished, and no. 22646/93, H.F. v. Austria, decision 26.6.95, unpublished) pointing out that it found no indication of a violation either of Article 8 alone or taken in conjunction with Article 14 of the Convention in respect of section 209 of the Austrian Criminal Code. As to the aforementioned case of Sutherland v. the United Kingdom (which was struck off the Court's list of cases due to a change in law after the Commission had found a violation of Article 14 taken in conjunction with Article 8), the Government point out that there is an important difference, namely that under section 209 of the Austrian Criminal Code, the adolescent participating in the offence is not punishable. Moreover, they refer to the fact that the Austrian Parliament has heard numerous experts and has extensively discussed section 209 with a view to abolishing it, but has upheld it, as the provision was still considered necessary within the meaning of Article 8 § 2 of the Convention for the protection of male adolescents. Finally, the Government argue that a number of recent changes in other provisions of the Criminal Code show that discrimination against homosexuals is gradually being eliminated.

For their part, the applicants, referring to the Court's case-law, assert that any interference with a person's sexual sphere as well as any difference in

treatment based on sex or sexual orientation requires particularly weighty reasons (see *Smith and Grady v. the United Kingdom* judgment cited above, § 94; *A.D.T v. the United Kingdom*, no. 35765/97, 31.7.2000, § 36).

This is all the more true in a field where a European consensus exists to reduce the age of consent for homosexual contacts. Despite the fact that European consensus has been ever growing since the introduction of his application, the Government failed to come forward with any viable justification for upholding a different age of consent for homosexual contacts than for heterosexual or lesbian contacts. In particular, they point out that in April 1997, and again in September and December 1998, the European Parliament requested Austria to repeal section 209. Similarly, the Human Rights Committee set up under the International Covenant on Civil and Political Rights has found that section 209 was discriminatory. The Parliamentary Assembly of the Council of Europe issued two recommendations in 2000 advocating equal ages of consent for heterosexual, lesbian and homosexual contacts and a number of member States of the Council of Europe have recently introduced equal ages of consent.

Further, the applicants point out that the Commission, in the Sutherland case, turned away from its earlier case-law. In their view the difference between the present application and the Sutherland case is not decisive, as the fact that under the United Kingdom at the material time the adolescent partner was also punishable was only referred to by the Commission as a subsidiary argument. As to the Government's further argument that section 209 was still considered necessary for the protection of male adolescents, they submit that the great majority of scientific experts heard in Parliament disagreed with this view. Finally, the applicants contend that the recent changes in the Criminal Code to eliminate discrimination against homosexuals requires even more compelling reasons to be shown for maintaining a different age of consent for homosexual relationships.

The Court considers in the light of the parties' submissions, that this complaint raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits. The Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

2. The first applicant complains under Articles 6 and 8 of the Convention that, in the criminal proceedings against him, his diary was used as evidence.

The Government plead non-exhaustion as the applicant failed to object to the reading out of his calendar-diary at the trial and to obtain an interim decision by the trial court. In any case, they assert that the interference with the applicant's private life had a legal basis in the Code of Criminal

Procedure and was necessary for the prevention of crime and the protection of the rights of others.

The first applicant submits that he did not agree to the reading out of his calendar-diary and that an objection and a request for an interim decision by the trial court would not have offered any prospects of success. Moreover, the applicant argues that the Supreme Court did not reject his complaint on purely formal grounds but only added that he had not objected to the reading out of the calendar-diary.

The Court recalls that, pursuant to Article 35 § 1 of the Convention, it may only deal with the matter after all domestic remedies have been exhausted. Article 35 § 1 requires that the complaints intended to be made subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p.1210, § 66).

The Court notes that two sets of proceedings were conducted in the present case. According to the minutes of the trial held on 8 February 1996, the first applicant did not object to the reading out of his calendar-diary and did not obtain an interim decision in this respect. The Supreme Court therefore found that he had failed to comply with the formal requirements for raising a complaint about the use of his diary as evidence in his plea of nullity. Thus, it did not deal with the substance of the applicant's arguments that the use of his calendar-diary violated his right not to incriminate himself and would only be permissible for the prosecution of a very serious crime. In the renewed proceedings the applicant did not raise the issue at all. The Court therefore finds that he has failed to exhaust domestic remedies.

It follows that this part of the application must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicants' complaint that section 209 of the Austrian Criminal Code is discriminatory and violates their right to respect for their private lives;

Declares inadmissible the remainder of the application.

Erik FRIBERGH
Registrar

Christos L. ROZAKIS
President