CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 45330/99
by S.L.
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 application lodged with the European Commission of Human Rights on 19 October 1998 and registered on 11 January 1999,

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 observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant is an Austrian national, who was born in 1981 and lives in Bad Gastein. He was represented before the Court by Mr H. Graupner, a lawyer practising in Vienna. The respondent Government were represented by Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

At about the age of eleven or twelve the applicant began to be aware of his sexual orientation. 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. At the age of fifteen he was sure of his homosexuality.

The applicant submits that he lives in a rural area where homosexuality is still taboo. He suffers from the fact that he cannot live his homosexuality openly and - until he reached the age of eighteen - could not enter into any fulfilling sexual relationship with an adult partner for fear of exposing that person to criminal prosecution under section 209 of the Criminal Code (*Strafgesetzbuch*), 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.

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

The applicant complains 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. The applicant points 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. He submits 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.

THE LAW

The applicant complains that section 209 of the Criminal Code is discriminatory and violates his right to respect for his private life. He relies 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 assert that the applicant cannot claim to be a victim of the alleged violation as he was at the time of the introduction of his application not yet nineteen years of age and thus not personally affected by the threat of punishment under section 209 of the Criminal Code.

The applicant contends that the question does not depend on whether he risked punishment under section 209 of the Criminal Code. He submits that the very existence of section 209 attaches social stigma to homosexuality in general. Consequently, homosexual adolescents, in particular those living in rural areas like him, do not disclose their sexual orientation. It would therefore have been impossible for him enter into a homosexual relationship with another adolescent. In any case, he felt and still feels attracted to men who are older than himself. Thus, until the age of eighteen he either had to respect the law and not have any sexual relationship corresponding to his personality, or to enter into an unlawful relationship which might have exposed his over nineteen-year-old partner to criminal prosecution and himself to the risk of being obliged to testify as a witness on the most intimate aspects of his private life. He claims, therefore, that he was a victim of the alleged violation until he attained the age of eighteen.

The Court recalls that Article 34 (former Article 25) of the Convention does not provide individuals with any *actio popularis* for the interpretation of the Convention; nor may it form the basis of a claim made *in abstracto* that a law contravenes the Convention. Nevertheless, the Court has held that Article 34 entitles individuals to contend that a law in itself violates their rights, without any individual measure of implementation, if they are directly affected by it or run a risk of being directly affected by it (see for instance the Klass and Others v. Germany judgment of 6 September 1976, Series A no. 28, p. 18, § 33 and the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, p. 16, § 31).

The Court agrees with the applicant that the question whether he was directly affected by the existence of section 209 of the Criminal Code does not necessarily depend on whether he risked punishment under that provision. It is true that in a number of comparable cases concerning the prohibition by criminal law of homosexual activities between consenting adults, the Court has held that the very existence of legislation directly affected the respective applicants' private life on the ground that they had no other choice than either to respect the law and to refrain from engaging in prohibited sexual acts to which they were disposed by reason of their sexual orientation, or to commit such acts and thereby become liable to prosecution (see the Dudgeon v. the United Kingdom judgment of

22 October 1981, Series A no. 45, p. 18, § 41, the Norris v. Ireland case, cited above, p. 16, § 32, and the Modinos v. Cyprus judgment of 22 April 1993, Series A no. 259, p. 11, § 24).

On the same basis, the European Commission of Human Rights found that legislation prohibiting homosexual activities prior to the age of eighteen directly affected the applicant's private life (no. 25184/94, Sutherland v. the United Kingdom, Comm. Report 1.7.97, § 36). However, this assessment was not invalidated by the fact that the risk of prosecution was rather remote, there being no incidents of prosecution or a claimed policy of non-prosecution (see in particular the Norris judgment, cited above, § 33, and the Modinos judgment, also cited above, p. 11, §§ 23-34). In addition, in the Norris case, the Court took into account that the effect of criminally sanctioning homosexual acts reinforced the misapprehension and general prejudice of the public and increased the anxiety and guilt feelings of homosexuals (Norris judgment, *ibid*.).

Section 209 of the Criminal Code at issue in the present case penalises a man over nineteen year of age for performing consensual homosexual acts with an adolescent between fourteen and eighteen years of age. Contrary to the above-mentioned Sutherland case, the applicant could therefore, before he attained the age of eighteen, engage in a homosexual relationship with another adolescent without breaking the law. Moreover, had he performed homosexual acts with an adult man, only the latter would have risked criminal prosecution. However, there is some force in the applicant's argument that this provision contributes to the general stigmatisation of homosexuality, the ensuing reluctance of male adolescents to disclose their sexual orientation, particularly in the rural area where he is living, and the inhibitions imposed on their sexual behaviour. Moreover, the applicant asserts that he has always felt attracted to men older than himself. Under the legislation in force he could therefore not enter into any sexual relationship corresponding to his disposition without exposing his partner to the risk of criminal prosecution, a risk which is moreover a real one (see above - relevant domestic law). Further, he would have exposed himself to the risk of being involved in criminal investigations and of having to testify as a witness on the most intimate aspects of his private life, which in itself constitutes an interference with the right to respect for one's private life (see the *Smith and Grady v. the United Kindgom* judgment, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI).

On the basis of the foregoing considerations, the Court finds that the very existence of section 209 of the Criminal Code directly affected the applicant until he attained the age of eighteen. Consequently, he can claim to be a victim within the meaning of Article 34 of the Convention of the violations alleged.

As to the merits, 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 his part, the applicant, referring to the Court's case-law, asserts 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, he points 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 applicant points out that the Commission, in the Sutherland case, turned away from its earlier case-law. In his 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, he submits that the great majority of scientific experts heard in Parliament disagreed with this view. Finally, the applicant contends 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 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.

For these reasons, the Court by a majority

Declares the application admissible, without prejudging the merits of the case.

Erik FRIBERGH
Registrar

Christos L. ROZAKIS
President