



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

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16 November 2009

FIRST SECTION

Application no. 26271/08
by E.B. against Austria
lodged on 29 April 2008



STATEMENT OF FACTS

THE FACTS

The applicant, E. B., is an Austrian national who was born in 1947 and lives in Austria. He is represented before the Court by Mr H. Graupner, a lawyer practising in Vienna.

A. The circumstances of the case

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

1. The first set of criminal proceedings against the applicant

In March 1999 the Vienna Federal Police Department conducted police investigations against the applicant on suspicion of having committed homosexual acts with consenting adolescents within the age bracket between 14 and 18, an offence under former Article 209 (*Gleichgeschlechtliche Unzucht mit Personen unter achtzehn Jahren*) of the Criminal Code and on suspicion of having committed sexual acts with minors under the age of 14 years, an offence under Article 207 (*Sexueller Missbrauch von Unmündigen*) of the Criminal Code.

At an unspecified date the Vienna Public Prosecutor's Office charged the applicant with these offences.

On 1 June 1999 the Vienna Regional Court acquitted him of these charges.

2. *The second set of criminal proceedings against the applicant*

In July 1999 the Vienna Federal Police Department conducted police investigations against the applicant on suspicion of having committed the offence under Article 207 and 209 of the Criminal Code.

At an unspecified date the Vienna Public Prosecutor's Office charged the applicant with these offences.

On 18 November 1999 the Vienna Regional Court acquitted him partly and convicted him of having committed an offence under Article 209 of the Criminal Code and sentenced him to one year imprisonment.

3. *The third set of criminal proceedings against the applicant*

In January 2001 the Vienna Federal Police Department again conducted police investigations against the applicant on suspicion of having produced pornographic illustrations of minors under the age of 14, an offence under Article 207a of the Criminal Code (*Pornographische Darstellungen Minderjähriger*) and of having committed an offence under Article 209.

At an unspecified date the Vienna Public Prosecutor's Office charged the applicant with the offence under Article 209 of the Criminal Code.

On 6 April 2001 the Vienna Regional Court convicted him of the offence under Article 209 of the Criminal Code and sentenced him to one year imprisonment.

4. *Proceedings for having the data of the police investigations deleted*

On 8 May 2006 the applicant lodged a request with the Vienna District Police Department for the deletion of the automatically processed data as well as of the data manually processed in files, held by the police authorities, concerning these three set of proceedings. On 31 May 2006 the Department informed the applicant that no automatically processed data relating to the above proceedings existed anymore and dismissed the request concerning the data processed in paper files.

On an unspecified date the applicant filed a complaint against this decision to the Data Protection Commission.

On 29 November 2006 the Data Protection Commission dismissed the complaint. It found that, as regards the non-electronically processed data stored in ordinary paper files, the Data Protection Act and the right to request a deletion was not applicable as such paper files constituted an unstructured compilation of information but not a filing system (*Datei*) within the meaning of the Data Protection Act. As regards the filing cards and filing registers (*Steckzettelindices and Protokollbücher*) the Commission noted that on 12 July 2006 the police authorities, after having been invited to comment on the applicant's complaint, had informed the Commission that all references in these research tools to the issues under Article 209 of the Criminal Code had been garbled (*unkennlich gemacht*). In the filing registers (*Protokollbücher*) also the name and address of the applicant had been deleted. In such circumstances the ordinary paper-files (*Kopieakten*) relating to investigations against the applicant had essentially the purpose of documenting the activities of the authority and did no longer allow for tracing sensitive information as to Article 209 of the Criminal Code on the applicant. The applicant's complaint was therefore ill-founded.

On 2 January 2007 the applicant asked for legal aid in order to file a complaint with the Administrative Court. In addition he proposed to refer the case to the Court of Justice of the European Communities for a preliminary ruling.

On 8 January 2007 the Administrative Court, referring to its case-law in similar cases, dismissed the request for legal aid because of lack of prospect of success.

On 13 March 2007 the applicant filed a complaint with the Constitutional Court.

On 24 September 2007 the Constitutional Court, referring to its previous case-law, declined to deal with the case because it lacked any prospect of success.

B. Relevant domestic law and background

For a description of the relevant domestic law see application no. 2362/08, *F.J. v. Austria*.

COMPLAINTS

1. The applicant complains under Article 8 read in conjunction with Article 14 of the Convention that data in files concerning proceedings under Article 209 of the Criminal Code against him are stored by the police authorities even though the European Court of Human Rights had found this provision to be discriminatory and the Austrian Constitutional Court had it annulled.

2. Under the same provision he complains about the stigma attaching to the storage of the data processed in files also concerning the criminal investigations under Article 207 and 207a of the Criminal Code even though he was acquitted of these charges.

3. Under Article 6 § 2 of the Convention he complains that the storage of the above data also violated the principle of presumption of innocence.

4. Finally, the applicant complains under Article 13 of the Convention that he had no effective remedy at his disposal against the above described breach of Article 14 read in conjunction with Article 8.

QUESTIONS TO THE PARTIES

1. Did the applicant suffer discrimination on the ground of his sex or other status, contrary to Article 14 of the Convention read in conjunction with Article 8 because of the Austrian courts' and authorities' refusal to delete the data processed in files and filing cards concerning the criminal proceedings regarding Article 209 of the Criminal Code at the police authorities?

(Reference is made to the Court's judgements in the case of *L. and V. v. Austria*, nos. 39392/98 and 39829/98, ECHR 2003-I and *H.G. and G.B. v. Austria*, nos. 11084/02 and 15306/02, 2 June 2005.)

2. Did the applicant suffer discrimination on the ground of his sex or other status, contrary to Article 14 of the Convention read in conjunction with Article 8 because of the Austrian courts' and authorities' refusal to delete the data processed in files and filing cards at the police authorities concerning the criminal proceedings regarding Article 209 of the Criminal Code and other sexual offences after final acquittal?

3. Did the applicant have at his disposal an effective domestic remedy for his Convention complaints under Articles 14 read in conjunction with Article 8 as required by Article 13 of the Convention?

4. Was the presumption of innocence, guaranteed by Article 6 § 2 of the Convention, in particular concerning the refusal of deletion of the above mentioned private data, respected in the present case?