

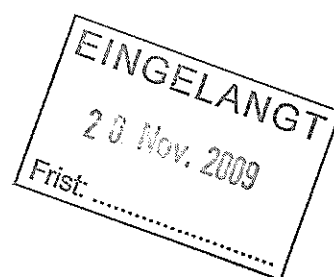
EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

16 November 2009

FIRST SECTION

Application no. 2362/08
by F. J.
against Austria
lodged on 4 January 2008



STATEMENT OF FACTS

THE FACTS

The applicant, Mr F. J., is an Austrian national who was born in 1955 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.

In February 2001 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 the former Article 209 (*Gleichgeschlechtliche Unzucht mit Personen unter 18 Jahren*) of the Criminal Code.

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

On 2 April 2001 the Vienna Regional Court acquitted him of this bill of indictment.

On 14 December 2001 the applicant lodged a request with the Vienna Federal Police Department for the deletion of the electronically processed

data as well as of the data manually processed in files concerning these proceedings.

On 1 August 2002 the Federal Police Department informed the applicant that it had deleted the automatically processed data but dismissed the request concerning the data processed in paper files on 1 August 2002.

On 10 August 2002 the applicant filed a complaint against this decision with the Data Protection Commission.

On 2 September 2003 the Data Protection Commission partly allowed the applicant's complaint against this decision, ordering the Police Departments to modify the filing cards and filing registers (*Steckzettelindices and Protokollbücher*) by noting the acquittal, while maintaining the reference to Article 209 of the Criminal Code.

In the Commission's view entries into these information research tools could not completely be deleted or garbled. According to the relevant provisions of the Security Police Act all administrative action by administrative authorities including police authorities had to be documented and archived. Only by doing so a review of the lawfulness of the actions of the authorities, necessary in a state governed by the rule of law, was possible. This was required by the rules on the authority's internal course of business (*Kanzleiordnung*). However, such data had to be complete and correct which required that also later development, in particular if the person concerned by the investigations had been acquitted, had to be recorded. The question whether the authority could use these data in its work was distinct from the issue of archiving and recording of data and required that separate rules on the use of such data applied.

The Commission dismissed the applicant's complaint as regards the data processed in ordinary paper files (*Kopieakt*). Since data processed in paper files did not fall under the definition of data systems (*Dateien*) set out in Data Protection Act. Thus the right of deletion contained therein was not applicable.

On 21 November 2003 the applicant filed a complaint with the Constitutional Court and with the Administrative Court.

On 26 January 2006 the Constitutional Court quashed the Data Protection Commission's decision. In the Constitutional Court's view the Data Protection Commission had grossly misinterpreted the applicable law, when it had held that only provisions on archiving and storing of data for the internal use of the authority were applicable, since the filing cards at issue did not only contain information of a general character but details on an individual person, such as name and address. Therefore, they did not record merely internal matters of the authority but sensible personal data. Thus, the authority should have applied the rules for use and processing of individual data and should have weighed the private and public interests accordingly. Since the Data Protection Commission had failed to do so the Constitutional Court quashed its decision.

On 28 February 2006 the Administrative Court discontinued the proceedings because the Constitutional Court had already quashed the decision.

Meanwhile the police authorities, taking into account the legal opinion of the Constitutional Court's decision, garbled the reference to Article 209 of the Criminal Code in the filing cards. Thereupon, the applicant maintained

his complaint of 10 August 2002 only in respect of the data processed in the ordinary paper files (*Kopieakte*).

On 9 August 2006 the Data Protection Commission decided again on the applicant's appeal and dismissed his request to delete the data concerning him manually processed in ordinary paper files. Referring to the Constitutional Court's case-law, it found that the right to deletion of data under the Data Protection Act as well as under the Security Police Act was not applicable to data manually processed in paper files because such files were unstructured compilations of information and did not qualify as file systems (*Dateien*) under the Data Protection Act.

On 26 September 2006 the applicant filed again complaints with the Administrative Court and the Constitutional Court.

On 7 March 2007 the Constitutional Court dismissed the complaint. It rejected the applicant's argument that Article 8 and the case-law of the European Court of Human Rights established a right to have deletion of personal data in an ordinary paper file (*Kopieakt*). The cases relied on by the applicant (*Amann v. Switzerland* (no. 27798/95, ECHR 2000-II) and *Rotaru v. Romania* (no. 28341/95, ECHR 2000-V), had to be distinguished from the present case as they concerned completely different facts. In the Constitutional Court's view Article 8 of the Convention did not impose a wider right to deletion of data than already contained in Section 1 of the Data Protection Act.

Moreover, it was apparent and not disputed by the applicant that, following the garbling of his name, date of birth and address in the file register and of the reference to the paper files in the index card, the paper files at issue were no longer traceable through these information tools. This reduced the accessibility of his personal data to an extent that there existed no longer any interference with his rights under Article 8 of the Convention. This being so the Constitutional Court concluded that there had also been no breach of the applicant's rights under Article 13 of the Convention.

On 5 July 2007 the Administrative Court dismissed the applicant's complaint for the same reasons as relied on by the Constitutional Court.

B. Relevant domestic law and background

1. The Data Protection Act

Section 1 of the Data Protection Act reads as follows:

“(1) Everybody shall have the right to secrecy for the personal data concerning him, especially with regard to his private and family life, insofar as he has an interest deserving such protection. Such an interest is precluded when data cannot be subject to the right to secrecy due to their general availability or because they cannot be traced back to the data subject (*Betroffener*).

(2) Insofar persona data is not used in the vital interest of the data subject or with his consent, restrictions to the right to secrecy are only permitted to safeguard overriding legitimate interests of another, namely in case of an intervention by a public authority the restriction shall only be permitted based on laws necessary for the reasons stated in Article 8, § 2 of the Convention. Such laws may provide for the use of data (*Verwendung von Daten*) that deserve special protection only in order to safeguard substantial public interests and shall provide suitable safeguards for the protection of the data subjects' interest in secrecy. Even in the case of permitted

restrictions the intervention with the fundamental right shall be carried out using only the least intrusive of all effective methods.

(3) Everybody shall have, insofar as personal data concerning him are destined for automated processing or manual processing, i.e. in filing systems (*Dateien*) without automated processing, as provided for by law,

1. the right to obtain information as to who processes what data concerning him, where the data originated, for which purpose they are used, as well as to whom the data are transmitted;

2. the right to rectification of incorrect data and the right to erasure of illegally processed data.

(4) Restrictions of the rights according to § 3 are only permitted under the conditions laid out in § 2.”

Section 27 of the Data Protection Act, which concerns the deletion of data, read as follows:

“(1) Every controller shall rectify or erase data that are incorrect or have been processed contrary to the provisions of this Federal Act

1. on his own, as soon the incorrectness of the data or the inadmissibility of the processing becomes know to him, or

2. on a well-founded application by the data subject (*Betroffener*)

The obligation to rectify data according to sub-para. 1 shall apply only to those data whose correctness is significant for the purpose of the data application (*Datenanwendung*). The incompleteness of data shall only justify a claim to rectification if the incorrectness, with regard to the purpose of the data application, results in the entire information being incorrect. As soon as data are no longer needed for the purpose of the data application, they shall be regarded as illegally processed data and shall be erased unless their archiving is legally permitted and unless the access to these data is specially secured Any further use for another purpose shall be legitimate only if a transmission (*Übermittlung*) of the data for this purpose is legitimate; the legitimacy of further uses for scientific or statistical purposes is laid down in sects. 46 and 47.

(4) The application for rectification or erasure shall be complied with within eight weeks after receipt and the applicant shall be informed thereof, or a reason in writing shall be given why the requested erasure or rectification was not carried out.

(5) In the areas of the executive responsible for the fields described in section 26 ..., the following procedure shall be applied to applications for rectification or erasure, insofar as this is required to safeguard those public interests that require secrecy: The rectification or erasure shall be carried out if the demands of the data subject are justified in the opinion of the controller. The required information pursuant to § 4 shall in all cases be that a check of the data files (*Datenbestand*) of the controller with regard to the application for rectification or erasure has been performed. The legality of this course of action is subject to review by the Data Protection Commission (*Datenschutzkommission*) ... and the special complaint proceeding before the Data Protection Commission pursuant to section 31 § 4.”

2. The Security Police Act

The Security Police Act regulates the powers and duties of the authorities dealing with matters of public security and their officers in exercising their functions.

According to Sections 57, 58 and 59 of that act police authorities are allowed to store and make use of personal data such as a person’s name, address, citizenship etc. when police investigations for the purpose of criminal proceedings are conducted against the person. The police

authorities shall not have access to the stored personal data once a person is no longer suspected of having committed an offence. After a further period of two years these data have to be deleted physically. Moreover, every request for and transmission of personal data from an information register shall be recorded in such a way that the request can be traced easily.

According to Section 63 of the Security Police Act, which concerns the deletion of data, data have to be corrected or deleted immediately if it is established that they are incorrect or have been collected unlawfully. Furthermore, personal data that have served the purpose for which they have been stored, have to be deleted immediately, unless there is a separate instruction concerning their deletion.

3. *The Criminal Code*

Former Article 209 of the Penal Code, which was aimed at consensual homosexual acts, read 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.”

4. *The Constitutional Court's case-law*

On 21 June 2002, upon a request for constitutional review made by the Innsbruck Regional Court, the Constitutional Court gave judgement, finding that Article 209 of the Criminal Code was unconstitutional.

The Constitutional Court held that Article 209 concerned only consensual homosexual relations between men aged over 19 and adolescents between 14 and 18. In the 14 to 19 age bracket homosexual acts between persons of the same age (for instance two 16-year-olds) or of persons with a one- to five-year age difference were not punishable. However, as soon as one partner reached the age of 19, such acts constituted an offence under Article 209 of the Criminal Code. They became legal again when the younger partner reached the age of 18. Given that Article 209 did not only apply to occasional relations but also covered ongoing relationships, it led to rather absurd results, namely a change of periods during which the homosexual relationship of two partners was first legal, then punishable and then legal again and could therefore not be considered to be objectively justified.

5. *The replacement of Article 209 of the Criminal Code by the Austrian legislator*

On 10 July 2002, following the Constitutional Court's judgment, the Austrian Parliament decided to repeal Article 209. It also introduced Article 207b (*Sexueller Missbrauch von Jugendlichen*), which penalises sexual acts with a person under 16 years of age if that person is for certain reasons not mature enough to understand the meaning of the act and the offender takes advantage of this immaturity or if the person under 16 is in a predicament and the offender takes advantage of that situation. Article 207b also penalises inducing persons under 18 years of age to engage in sexual activities in return for payment. Article 207b applies irrespective of whether the sexual acts at issue are heterosexual, homosexual or lesbian. The above

amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, came into force on 14 August 2002.

COMPLAINTS

1. The applicant complains under Article 14 read in conjunction with Article 8 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 and even he was acquitted.

2. Furthermore, 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 8 of the Convention read in conjunction with Article 14 because of the Austrian courts' and authorities' refusal to delete the data processed in files concerning the criminal proceedings under 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 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?