

Wolfmeyer v Austria, (Application no. 5263/03)

1) Reference Details

Jurisdiction: European Court of Human Rights

Date of decision: 26 May 2005

Link to full case:

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=774522&portal=hbkm&source=externalbydocnumber&table=1132746FF1FF2A468ACCBDCD1763D4D8149>

2) Facts

The applicant, an Austrian citizen, was convicted by the Feldkirch Regional Court under Article 209 of the Criminal Code for having committed homosexual acts with adolescents. He was sentenced to six months' imprisonment which was suspended on probation. Following this he requested in his appeal that the Constitutional Court review the constitutionality of Article 209. On 21 June 2002, the Constitutional Court found that Article 209 of the Criminal Code was unconstitutional. Following this decision, the Innsbruck Court of Appeal acquitted the applicant. On 20 September 2002, the Feldkirch Regional Court dismissed the applicant's request for reimbursement of his defence costs, holding that under Article 393a(3) of the Code of Criminal Procedure, no right to compensation existed if the accused was not punishable for reasons that occurred after the indictment was filed. On appeal, the Innsbruck Court of Appeal partly granted the applicant's claim and awarded him partial reimbursement for costs and expenses.

3) Law

National Law

- Article 209 of the Austrian Criminal Code

International Law

- Article 8 of the European Convention on Human Rights (right to privacy)
- Article 8 in conjunction with Article 14 (right to non-discrimination) of the European Convention on Human Rights (the Convention)

4) Legal Arguments

The Applicant

The applicant argued that neither the Constitutional Court's judgement of 21 June 2002 nor his acquittal and the subsequent costs order acknowledged, let alone provided redress, for the violation of the Convention. In his submission he referred to the Court's judgments in *L. and V. v Austria* and *S.L. v Austria*. He argued in particular that his acquittal could not be considered to have removed the discrimination which lay in the instigation of criminal proceedings against him under Article 209 of the Criminal Code. He submitted that he had suffered the humiliation and public exposure of the first instance proceedings and conviction, and had lost his employment as a result. He also submitted that he had not received any redress for non-pecuniary damage sustained and had to bear the greater part of his defence costs. On this basis he argued that it was incorrect to say that he was put in a

position as if Article 209 had never been applicable. He argued that neither the Constitutional Court's declaration of the unconstitutionality of Article 209 of the Criminal Code, or his acquittal and the granting of litigation costs acknowledged or afforded redress for the violation of his rights under the Convention.

The State

The State argued that the applicant could not claim to be a victim of the alleged violation within the meaning of Article 34 of the Convention as, by virtue of his acquittal, the contribution granted towards his defence costs, and due to the the ruling that Article 209 was unconstitutional, the applicant was treated as if Article 209 had never been applicable to the facts underlying the charge.

5) Decision

The Court considered that neither the applicant's acquittal nor the subsequent partial costs award amounted to recognition by the State of a violation of the applicant's right to freedom from discrimination. The Court noted that the applicant had been acquitted without compensation for humiliation on account of penalisation of his sexuality, and without adequate redress. In considering the merits the Court noted the similarities between the present case and the cases of *L. and V. v Austria* and *S.L. v Austria*. It held unanimously that the existence of Article 209 of the Criminal Code and the conduct of the criminal proceedings against the applicant amounted to a violation of Article 14 taken in conjunction with Article 8.