

Austria

Constitutional Court: Incitement to Hatred Against Homosexuals Remains Legal

Rechtskomitee LAMBDA: „Case goes up to Strasbourg“

The Austrian Constitutional Court has decided: while other minorities are protected by specific statutes against incitement to hatred and against discrimination (also outside of the workplace), gays and lesbians stay unprotected in Austria. The Constitutional Court thus follows the Austrian federal government which, before the court, defended the lack of protection for homosexuals and which had argued that incitement to hatred against and discrimination of lesbians and gays lacks sufficient social disturbance. The case now goes up to the European Court of Human Rights.

Despite the fact that lesbians and gays belonged to the prime target groups of national-socialist terror Austrian legislation still does not protect them against incitement to hatred and against discrimination outside of the workplace, as it does for other prime victim groups. The eight applicants (see below) in April 2010 asked the Constitutional Court to strike down, for discrimination, Art. 283 of the Austrian Criminal Code (CC) (“Incitement to Hatred”) and those parts of the Federal Equal Treatment Act which, on the grounds of race, ethnic origin and sex, provide protection against discrimination outside the workplace.

Five of the eight applicants have been active in the LGBT-movement for years and therefore are especially endangered by incitement to hatred based on sexual orientation. Five of the applicants themselves became victims of considerable discrimination (outside of the workplace). Wouldn't they have been discriminated on the basis of their sexual orientation but on the basis of their sex or their ethnic origin they could have claimed compensation in the courts.

Constitutional Court: homosexuals not affected by lack of protection

The Austrian federal government in their submission to the Constitutional Court vividly defended the lack of protection for lesbians and gays. Incitement to hatred against homosexuals, they argued, would not be comparable to incitement to hatred against muslims, christians, jews or persons of different colour. It would not endanger public peace because it would – different then incitement to hatred against other minorities – lack “dangerous close-range and long-range effects”.

The Constitutional Court now followed the wishes of the federal government and rejected the application as inadmissible. Homosexuals, so the judges, would not be directly affected by their lack of protection. They therefore have no right to challenge the (allegedly) discriminatory legislation in the Constitutional Court (VfGH 15.12.2010, G 68, 69/10).

In sharp contrast to its position before the Constitutional Court the federal government last year introduced legislation into the federal parliament which would have extended the protection of Art. 283 CC to incitement to hatred against lesbians and gays (<http://www.parlament.gv.at/PG/DE/XXIV/II/00674/pmh.shtml>) and would have banned discrimination on the basis of sexual orientation outside the workplace (<http://www.parlament.gv.at/PAKT/VHG/XXIV/II/00938/index.shtml#tab-Uebersicht>). Both bills failed in parliament.

„Hate mongers are still allowed to incite to hatred against lesbians and gays, and now even with the consent of the Constitutional Court“, says *Dr. Helmut Graupner*, president of RKL and counsel of the applicants, „We are hoping for the European Court of Human Rights“.

Rechtskomitee LAMBDA (RKL), founded in 1991, on a supra-partisan and denominational level is working for the implementation of human rights for homo- and bisexual men and women. In its honorary board it convenes so prominent members as former Prime Minister Dr. Alfred Gusenbauer, President of Federal Parliament Mag. Barbara Prammer, former Minister of Justice Mag. Karin Gastinger, the Honorary President of the

Parliamentary Assembly of the Council of Europe Peter Schieder, Federal Ombudsman Mag. Terezija Stoisits, former Director of Public Security Dr. Erik Buxbaum, the former President of National Judges Association Dr. Barbara Helige, the Chairwoman of the National Judges Association's Working Party on Fundamental Rights Dr. Mia Wittmann-Tiwald, the Vice-President of the Vienna Bar-Association Dr. Elisabeth Rech, the former President of D.A.S.-legal expenses insurance company Dr. Franz Kronsteiner, the President of Weisser Ring Dr. Udo Jesionek, the Secretary General of Amnesty International Austria Mag. Heinz Patzelt, the Vice-Chairperson of the Executive Board of the European Union Agency for Fundamental Rights Univ.-Prof. Dr. Hannes Tretter, and the well-known human-rights experts Dr. Lilian Hofmeister and Univ.-Prof. Dr. Manfred Nowak, the constitutional law professors Univ.-Prof. Dr. Christian Brünner, Univ.-Prof. Dr. Bernd-Christian Funk, Univ.-Prof. Dr. Heinz Mayer and Univ.-Prof. Dr. Ewald Wiederin, famous child- and adolescent psychiatrist Univ.-Prof. Dr. Max Friedrich and the Vienna Child- and Youth-Ombudspersons DSA Monika Pinterits and Dr. Anton Schmid, sexologists Univ.-Prof. Dr. Josef Christian Aigner, Univ.-Prof. Dr. Rotraud Perner and Univ.-Lekt. Mag. Johannes Wahala, Life-Ball-Organisor Gery Keszler and many more. October 2nd, 2006, RKL's 15 years anniversary has been celebrated in historic Ceremonial Act "Against Sexual Apartheid" in the lower chamber of Austrian federal parliament. This first honouring of an lgbt organisation in the plenary session hall of a national parliament worldwide took place in attendance of over 500 guests including highest representatives from the judiciary, administration and politics (<http://www.rklambda.at/festakt/index.htm>). Since 2010 RKL is a member of the Fundamental Rights Platform of the European Union Agency for Fundamental Rights (www.fra.europa.eu).

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The applicants:

Walter Dietz (Secretary General of RKL), *Dr. Helmut Graupner* (President of RKL), *Marco Schreuder* (former member of the Vienna state parliament) und *Dr. Michaela Tulipan* (treasurer of RKL and board-member of Queer Business Women), have been active in the LGBT-movement for years and therefore are especially endangered by incitement to hatred based on sexual orientation.

Dr. Michaela Tulipan, a lawyer in private practice, in addition has lost one her clients, a Vienna big bank, after she had started her LGBT-activism.

Günter Kowar organises the LGBT-group of Krems in the state of Lower Austria. The regional weekly NÖN for years now has been persistently refusing to publish announcements of the meetings for the group, while it regularly accepts such announcements for all kinds of other groups.

Dietmar Zechner (name changed) with his partner was thrown out of a bed-and-breakfast inn in Pinkafeld in the state of Burgenland, because the owner, as he said, had expected „male and female” instead of “male and male”.

Lou Hampala and *Claudia Tondl*, in the state of Vienna, had been refused a lease because they wanted to live in the apartment as a couple.

The applicants presented to the Constitutional Court several examples of public incitement to hatred against lesbians and gays in Austria (in and outside the internet), involving even approval of violence and calls to kill homosexuals.