

Enduring Discrimination

Constitutional Court: No Justice for Gay Policeman

Rechtskomitee LAMBDA (RKL) hopes for Administrative High Court

Back in 1976 a long-serving and highly decorated constable had been discharged on the basis of having been convicted under Austria's infamous anti-homosexual offence, Art. 209 Criminal Code. The disciplinary sanction perpetuates even these days: the pension of the man is still cut by 25%. The Constitutional Court refused to deal with the case. Rechtskomitee LAMBDA (RKL), Austria's civil rights organisation for homo- and bisexual as well as transgender women and men, now hopes for the Administrative Supreme Court.

The Regional Criminal Court of Vienna, on the sole basis of the anti-homosexual offence, convicted U.H. to 3 months of dungeon, aggravated by one day of abstinence per month. The Upper Regional Court of Vienna confirmed the sentence.

At that time the then 32 year-old man had already served in the police-forces for more than 10 years and had been highly decorated for his merits.

„One of the most serious violations“

On the basis of the conviction U.H. was discharged from the police forces. The Disciplinary Commission mentioned his *“devious inclinations”* and that the man had committed *“one of the most serious violations of obligations”* (!). It would be out of question *“that homosexuals in the police forces already as such are presenting a bad burden on these forces”*. *“A man however whose homosexual inclinations are already known would hardly ever be accepted to the police corps!”*.

Would the constable have been a woman or would his partner or both of them have been female, he would never have been reported to the police, he would never have been prosecuted, he would never have been convicted and he would never have received a disciplinary sanction. Because he is a man and because his partners were male, he had been convicted as a sex-offender and discharged from the police forces.

The disciplinary sanction even perpetuates today. The man still suffers from it. He had never been accepted to the police forces again and his pension still is cut by 25%; until his death.

In his hope for justice the man turned to the Constitutional Court and relied on the European Court of Human Rights case-law which bans states from attaching negative effects on prior human-rights violations and instead obliges them to actively remove such negative effects which materialize today as a result of human-rights violations in the past. No one should have to suffer today from violations which took place in the past.

Referral to the ECJ?

The Constitutional Court refused to deal with the case (VfGH 28 Feb 2011, B 952/09, B 91/11, B 119/11). The alleged violations of the European Convention of Human Rights the judges said, would be so unfounded that it would not merit to deal with them.

Rechtskomitee LAMBDA (RKL), Austria's civil rights organisation for homo- and bisexual as well as transgender women and men, now is hoping for the Administrative Supreme Court, which will have to analyse the case also under the aspect of the EU-Antidiscrimination-Directive (2000/78/EC).

„The Administrative Supreme Court recently favourably decided a lot of important LGBT-cases which the Constitutional Court refused to deal with“, says *Dr. Helmut Graupner*, president of RKL and counsel of the policeman, „We have asked the Court to refer the case to the Court of Justice of the European Union“.

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 member of Vienna state parliament Marco Schreuder, 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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