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"(Mixed) experiences of taking cases to the European Court of Human Rights"

by Kurt Krickler

I will talk about some applications activists from my organisation, Homosexuelle Initiative Wien, or HOSI Vienna for short, including myself, have filed against Austria before the European Commission and the European Court of Human Rights in Strasbourg, as well as about some complaints my organisation has either pro-actively supported or in other ways got involved in. Before the reform of the Strasbourg institutions in 1998, applications had to be filed before the Commission, and only if its opinion was challenged by one of the parties, the case was taken on to the Court. In 1998, the Commission was abolished, and since only the Court is dealing with applications.

HOSI Wien's first case was somehow comparable to the case here in Moscow. It was about freedom of assembly and freedom of opinion. The background: In November 1988, gay and lesbian activists participated in the unveiling ceremony of the first part of a huge monument against war and fascism put up on a central square in downtown Vienna. The activists

were fully supporting the event and took part completely peacefully, however showed a huge banner saying “Thousands of homosexual Nazi victims still wait for their rehabilitation”, just to remind all the other anti-fascists gathered for the ceremony of that fact. Suddenly the police ordered the activists to put down the banner. The activists, of course, refused to do so. And so the police removed the banner using violence against the activists.

Two of them, Gudrun Hauer and Alfred Guggenheim, filed a complaint with the Constitutional Court as they considered the police action as a violation of their right to freedom of opinion. The gay and lesbian participation in the ceremony was no counter demonstration, and not a single person among the big crowd of participants had expressed disapproval or considered the banner as a disturbance of the ceremony. After the incidence, the mayor of Vienna even declared that he had explicitly asked the police to avoid any conflict and to leave the banner. So, the police action was completely arbitrary and not ordered by the official organiser of the event, the City of Vienna.

The Constitutional Court ruled in October 1990 that there was no violation of the fundamental rights of the claimants who then took the case to Strasbourg. The Commission declared the application admissible and

invited Austria to comment on the facts. The Austrian government defended the police action pretending police just wanted to protect the ceremony from counter demonstrators.

In October 1993 the European Commission of Human Rights ruled that there was no violation of the Convention concurring with the contradictory arguments of the Austrian government and completely ignoring the arguments and facts brought forward by the applicants. This judgment is also dangerous insofar as it means the police could dissolve or interrupt a demonstration under the pretext of protecting it against disturbances from alleged counter demonstrator who in reality are regular participants in the demonstration. In our case there was nobody who accused us of being counter demonstrators except the police.

Funny enough, two years before that ruling, in June 1991, HOSI Wien was again participating with a huge banner with the same slogan on the occasion of the unveiling of the completed monument. This time the police did not intervene, and exactly the same activity as three years earlier was suddenly not considered an annoyance to the ceremony. So we lost the case and a lot of money, but in the end we had gained a moral victory.

Our next case was again about freedom of speech. In August 1995, I outed the “homosexual tendencies” of four Austrian Roman-Catholic bishops. All of them sued me in civil court, demanding the retraction of the statement that they were homosexuals (what I had never said – I was talking about “homosexual tendencies”) and the publication of this retraction in a series of newspapers. Of course, I refused, and so the case went true the court system up to the High Court. It was not at all a surprise for me that a gay activist did not win a court case against four Catholic bishops. The courts, however, substantiated their judgments in an incredibly homophobic way. They argued that publicly saying about another person that he or she is a homosexual, would be a defamation, regardless of the statement being true or not, because in any case it is strongly discriminatory due to the attitudes still prevailing in society despite the repeal of the total ban on homosexuality. Therefore, the disclosure of a person’s homosexuality is appropriate to disparage a person in the public opinion. The judgments clearly reinforce discrimination against and the “invisibilisation” of homosexuals.

Of course, as a gay activist I could not accept this homophobic substantiation, and so I filed four complaints in Strasbourg, one application against each of the judgments. I argued not only that my right to freedom of expression was violated, but the judgment was also discrimination on the

grounds of sexual orientation. Imagine I would go to court as a gay man because somebody accused me of being a heterosexual. This would certainly never be considered as a statement disparaging me in the public opinion. However, I still could sue somebody saying about me I am a homosexual, and this person would be convicted because regardless of the truth of the statement, it could disparage me in the public. The argumentation of the courts was completely weird.

Obviously the Vatican had intervened in Strasbourg and so in September 2000, the Court, departing heavily from its previous jurisprudence in similar cases, declared all four applications inadmissible. From correspondence with the European Court during the procedure, it became quite obvious that the Court also did not take the cases too serious because they were not about convictions in criminal but “only” in civil procedures.

Well, that was not so surprising either. However, the bishops were clever enough not to insist to have the retraction of my statement published in all the newspapers because this would only have given new media coverage and attention to the issue. Of course, the four cases cost a little fortune but we raised almost enough money in donations to cover the fees of my “dream team” of lawyers. I wrote letters to the bishops informing them that I would not have money to pay for their lawyers. But if they insisted to get

the money from me, I would be happy to sit in front of St. Stephan's Cathedral in Vienna and beg for money, of course with posters explaining what I would collect the money for. I have never heard from them again, and I did not pay their lawyers.

Despite the big financial risk the whole outing action was great fun. I really enjoyed it and did not regret it a single moment, although I also received one or two death threats. The outing of the four bishops created the largest media hype ever in the history of the Austrian movement.

I will soon return to Strasbourg with another application, again in a libel case. Last month I was convicted by a criminal court for having called Walter Tancsits, a member of Parliament of the governing People's Party (ÖVP), a "mental descendant of the brown Nazi myrmidons" ("geistiger Nachfahre der braunen Nazi-Schergen"). I was sentenced to a fine of 240 euros or, in default of payment, a month in jail. The sentence, however, was pronounced on probation. If I do not commit another crime during the three-year probationary period, I will not have to pay the fine or serve the time in prison. In addition HOSI Wien was ordered to pay 1,500 euros in direct reparation to Tancsits for having disseminated the press release with my statement via the Austrian Press Agency and having posted it on the

website. In this press release we also stated the ÖVP would “take ideological views of the Nazis” (“vertritt nationalsozialistisches Gedankengut”).

Background for this criticism of the ÖVP in general and Tancsits in particular was the fact that the party continued to block an amendment to the Federal Nazi Victims Compensation Act to also cater for the victims persecuted on the grounds of their sexual orientation and thus give them a legal entitlement to the same compensation as other victim groups have. In a debate in Parliament in March 2005, Tancsits was speaking on behalf of the ÖVP defending again their position not to include “sexual orientation” as a ground of persecution under the compensation act.

In April 2005, we were acquitted by a Vienna court that quoted a number of case law of the European Court of Human Rights. Tancsits, however appealed, and in January of this year the appeal court quashed the acquittal and remitted the case to the first instance for re-examination because it considered the statements as a defamation. Last month, the first instance court pronounced the above-mentioned sentence. HOSI Wien and I appealed against this judgment but the second instance court will certainly not change its opinion. Therefore, after that we will go to Strasbourg, and since this case is a criminal one, I wonder whether this

time the European Court will be more inclined to declare the case admissible and rule in line with its established case law in freedom of speech cases.

Let me also say a few words on some applications in Strasbourg which did not effect HOSI Wien or one of its activists directly but which we have been involved in or have supported. And in this context let me first make some general observations:

The jurisprudence of the European Court of Human Rights in LGBT cases is a very striking example of how human rights are subject to political and societal developments, and that human rights are certainly not static but subject to wide and broad interpretation. It is amazing to see how differently the very same provision in the Convention can be interpreted over time. With regard to LGBT rights, the Strasbourg court has certainly not been very progressive, running in front of developments, on the contrary, it rather lagged behind and in most cases only ruled in favour of LGBT people when the issue in question had reached European-wide consensus and standard.

A good example for this is the first big victory in Strasbourg: In 1981 the Court ruled, in *Dudgeon against the United Kingdom,* that the total ban on homosexual activity, i. e. also among consenting adults, in Northern Ireland was in breach of the Convention. In the two decades before, Strasbourg had rejected a couple of similar complaints as “inadmissible” as the Commission, at that time in place, could not see any violation. When the positive judgment finally was made in 1981, only three other Council of Europe member states – Ireland, Cyprus and Liechtenstein – and some other territories under the British Crown still had a total ban while all the other member states had already repealed such legislation. So, this judgment was everything else than a revolutionary or landmark decision. Funny enough Liechtenstein was allowed to join the Council of Europe three years earlier, in 1978, under the reservation that its total ban on homosexuality would be exempted from the Convention’s applicability.

However, the judgment in Dudgeon later turned out to be of great significance because after the collapse of the Soviet Union and Yugoslavia, there were suddenly more than a dozen new states with a total ban on homosexuality queuing up to join the Council of Europe in the 1990s. And so, in the last 15 years, the total ban on homosexual behaviour was repealed in 19 European countries and dependent territories: Albania, Azerbaijan, Armenia, Bermuda, Bosnia-Herzegovina, Estonia, Georgia,

Gibraltar, Guernsey, Jersey, Latvia, Lithuania, Isle of Man, Macedonia, Moldova, Romania, Russia, Serbia, and Ukraine.

A similar story or better saga can be told regarding the other “big” criminal law issue – the discriminatory higher age of consent for homosexual than for heterosexual acts. Such provisions had existed in many European countries. Again for decades, the Commission had rejected as “inadmissible” all the applications filed against various countries as no violation of the Convention could be seen in such a higher age of consent.

It was only in 1997 that the European Commission of Human Rights ruled – in *Sutherland versus United Kingdom* – that such a discriminatory provision violated the Convention. At that time only a third of the Council of Europe member states still had such provisions in their criminal code. Since the UK government did not challenge the opinion of the Commission and agreed to amend the law, the case never reached the Court of Human Rights. It was only in 2003 that also the Court – in judgments against Austria – ruled that a discriminatory age of consent is a breach of the Convention.

A very interesting and striking feature in this saga is the change of opinion of the Commission between 1995 and 1997, because as late as in 1995

the Commission had still rejected a complaint against the higher age of consent in Austria. And only two years later it completely changed its mind and handed down the positive ruling in Sutherland against the UK. My personal theory why the Commission changed its mind so totally within two years is the following. In the application rejected as inadmissible, the Austrian government defended the age of consent provision by referring to opinions of scientific experts heard in Parliament during the process of introducing this provision in Austria in 1971, replacing the total ban on female and male homosexuality. These expert opinions were also quoted in the judgment of Austria's Constitutional Court that had ruled earlier in that complaint. The European Commission of Human Rights concurred with these expert opinions, the judgment of the Austrian court and the arguments of the Austrian government.

No LGBT organisation was involved in that application, the individual who filed it acted completely on his own. What the Commission in Strasbourg did not know, however, was that these expert opinions were already out-dated and obsolete when the provision was introduced in 1971, a period when several countries with similar provisions had already started to repeal their discriminatory age of consent provisions. And most embarrassing, the Commission did not know that the most vocal expert in the law reform in Austria that was prepared back in the late 1960s was a certain Professor

Graßberger who already had fervently advocated for a total ban on female and male homosexuality during the Nazi era and was quoted in Nazi Germany by those who wanted to expand the total ban in Germany also to female homosexuality which, however, did not happen in the end.

When HOSI Wien learned about this decision of the Commission of Human Rights in August 1995, we immediately wrote letters to both the president of the Commission, Carl-Åge Nørgaard, and to the vice secretary-general of the Council of Europe, Peter Leuprecht, who happened to be Austrian. We pointed out to the fact that the Commission concurred with arguments of a Nazi expert. We also released a press statement denouncing that Nazi doctrine has sneaked into the jurisprudence of the Commission via the Austrian Constitutional Court and the arguments of the Austrian government.

This criticism of HOSI Wien could have been the reason for the sudden change of mind of the Commission. Very likely they did not want to be associated with opinions of Nazi experts. At least, I do not see any other reason. Certainly, there were neither new scientific findings nor changes in the legal order of the member states between 1995 and 1997 that would have made a totally different ruling necessary.

Interventions by the LGBT movement to the Court of Human Rights therefore can make a difference. In a less aggressive and more constructive way, ILGA-Europe is doing that by presenting, in selected caes, so-called “friends of the court” submissions prepared by legal experts such as Robert Wintemute and often in conjunction with other NGOs. One successful case was the first positive decision by the Court in an application dealing with same-sex partnership rights. The case, which at the national level was also supported by HOSI Wien – *Karner versus Austria* – concerned a gay man who was evicted from the apartment of his deceased partner because due to the jurisprudence of Austria’s high court, he was not entitled to take over the lease contract from his deceased partner. While the wording of the Austrian Rent Act is neutral and does not distinguish between same-sex and opposite-sex non-married domestic partners, the Austrian high court had argued that the neutral language was for linguistic but not legal reasons.

With the judgment in *Karner versus Austria* the Strasbourg Court also changed its previous approach to rule in favour of LBGT rights only when these already have been mainstreamed and become standard throughout Europe. Because in July 2003, when the Court handed down its judgment, only 12 of the then 45 Council of Europe member states had adopted some

form of legal recognition of same-sex partnerships, thus in theory having 33 countries to adapt to this decision. With this judgment, therefore, the Court, for the first time, has clearly been ahead of the legal developments in Europe, and not just lagging behind.

The significance of the Karner judgment, however, not only lies in its geographical potential but also in its potential scope of similar application. Because the Court argued that a government must have convincing and weighty reasons to justify a different legal treatment of same-sex and opposite-sex domestic partners. There is hardly any legal area where such weighty reasons could be put forward to exclude same-sex couples from certain rights granted to opposite-sex non-married couples. So in reality, the Karner decision means nothing less than that all now 46 member states of the Council of Europe must grant the same rights to non-married same-sex partners as they grant to non-married opposite-sex partners.

At the moment HOSI Wien is also supporting a similar case already declared admissible. It is about the exclusion of same-sex domestic partners from the possibility to be covered under the partner’s social insurance, which is possible for non-married opposite-sex couples. There is no doubt that Austria will also lose that case.

In August 2004, an Austrian couple, two men, filed an application in Strasbourg challenging the ban on same-sex marriage in Austria. This will certainly be a litmus test for the Court and its willingness to really interpret the Convention in the spirit of universal indivisible human rights.

So, these are our very mixed experiences of taking cases to Strasbourg.