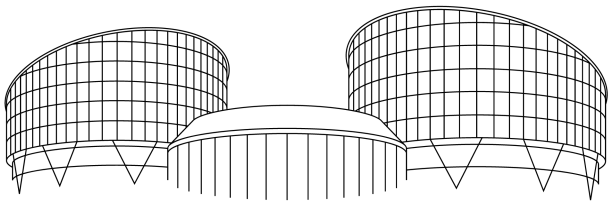

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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FIRST SECTION

CASE OF P.B. AND J.S. v. AUSTRIA

(Application no. 18984/02)

JUDGMENT

STRASBOURG

22 July 2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of P.B. and J.S. v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Giorgio Malinverni, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 1 July 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 18984/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by one Hungarian national, Mr P.B. and one Austrian national, Mr J.S. ("the applicants"), on 24 April 2002. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Mr J. Unterweger, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. By a decision of 20 March 2008 the Court declared the application admissible.

4. The Government of Hungary, having been informed by the Registrar of their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1), indicated that they did not intend to do so.

5. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1963 and 1959 respectively and live in Vienna.

7. The applicants live together in a homosexual relationship. The second applicant is a civil servant and, for the purpose of accident and sickness insurance cover, he is insured with the Civil Servants Insurance Corporation ("the CSIC") (*Versicherungsanstalt Öffentlicher Bediensteter*). On 1 July 1997 the first applicant asked the CSIC to recognise him as the dependent (*Angehöriger)* and to extend the second applicant's insurance cover to include him. He submitted that section 56(6) of the Civil Servants Sickness and Accident Insurance Act ("the CSSAIA") (*Beamten-Kranken- und Unfallversicherungsgesetz*) only referred to persons of the opposite sex living with the principally insured person and running the common household without receiving any payment. But, because there were no good reasons for excluding persons living in a homosexual relationship from the privilege of extended insurance cover, section 56(6) should be interpreted as also including homosexual partners.

8. On 2 September 1997 the CSIC dismissed the request, holding that, because the first applicant was of the same sex as the second applicant, his request had to be dismissed. This decision was served on the second applicant who, on 1 October 1997, filed an objection.

9. On 21 November 1997 the Mayor of Vienna, acting as the Regional Governor, quashed the decision on procedural grounds. He held that the CSIC should have served its decision on the first applicant.

10. On 13 January 1998 the CSIC dismissed a request by the first applicant and this time served the decision on him. The first applicant filed objections.

11. The mayor of Vienna confirmed the CSIC's decision on 19 March 1998. Thereupon the first applicant lodged a complaint with the Constitutional Court in which he argued that the exclusion, under section 56(6) of the CSSAIA, of homosexual couples from the extension of insurance cover was in breach of Article 14, read in conjunction with Article 8, of the Convention and was therefore unconstitutional.

12. On 15 June 1998 the Constitutional Court declined to deal with the first applicant's complaint. Referring to its previous case-law, the Constitutional Court found that, in the issue at hand, the legislator had had a very wide margin in which to reach a decision and the decision taken had been within that margin.

13. On an unspecified date the Constitutional Court granted a request by the first applicant for the case to be transferred to the Administrative Court.

On 7 September 1998 the first applicant supplemented his complaint to the Administrative Court.

14. On 4 October 2001 the Administrative Court dismissed the first applicant's complaint. It found that the authorities had correctly concluded that section 56(6) of the CSSAIA only applied to heterosexual partnerships. There was no issue under Article 14, read in conjunction with Article 8, of the Convention, because Article 8 did not guarantee specific social rights, and the case at issue did not therefore fall within the ambit of that provision. The exclusion of homosexual partnerships from the scope of section 56(6) of the CSSAIA also complied with the principle of equality because that difference in treatment was justified. While it was true that, where persons of different sex living together in a household in which one of them was running that household while not being gainfully employed, it was, as a rule, safe to conclude that they were cohabiting in a partnership, that was not the case if two persons of the same sex were living together in a household. In the absence of any possibility to register a homosexual partnership, it would have been necessary to undertake delicate enquiries into the most intimate sphere of the person concerned. That difference in the factual situation justified different treatment in law.

15. In proceedings instituted by the Constitutional Court to examine the constitutionality of two similar provisions to section 56(6) of the CSSAIA relating to extending insurance cover to relatives, on 10 October 2005 the Constitutional Court decided to quash section 123(8b) of the General Social Security Act ("the GSSA") (*Allgemeines Sozial-versicherungsgesetz*) and section 83(3) of the Social Security Act for Trade and Commerce ("the TCSSA") (*Gewerbliches Sozialversicherungsgesetz*). The Constitutional Court explicitly referred to the judgment of the European Court of Human Rights in the case of Karner v. Austria (see *Karner v. Austria*, no. 40016/98, 24 July 2003) and held that the two provisions in which the extension of insurance cover to unrelated persons living with the insured were discriminatory because they were restricted to persons of the opposite sex.

16. On 1 August 2006 the Social Rights Amendment Act ("the SRAA") (*Sozialrechts-Änderungsgesetz*) entered into force amending in particular the GSSA, the TCSSA and also section 56 of the CSSAIA. A second amendment to section 56 of the CSSAIA entered into force on 1 July 2007.

II. RELEVANT DOMESTIC LAW

17. Before 1 August 2006 section 56(6) of the Civil Servants Sickness and Accident Insurance Act (*Beamten-, Kranken- und Unfallversicherungs-gesetz),* in so far as relevant, provided as follows:

> "(1) Relatives are entitled to benefits, if they have their ordinary residence in Austria and are neither health insured under the provisions of this Act nor any other provision of law ...

...

(6) A person belonging to the group of parents, ... step-parents and foster parents, children, ... stepchildren and foster children, grandchildren or brothers and sisters of the insured or a person of the opposite sex who is not related to him or her who has been living with him or her in the same household for at least ten months and since then has been doing the domestic work for the insured without payment, unless there is a spouse living in the same household who is able to work, shall be regarded as a member of the household. Only one person can be a member in this sense."

18. After the amendment to the Civil Servants Sickness and Accident Insurance Act on 1 August 2006, section 56(6) remained the same, but a new paragraph (6a) was introduced. It read as follows;

"A person who is not a relative of the insured and who has been living with him or her in the same household for at least ten month and since then is doing the domestic work for him or her without payment, unless there is a spouse living in the same household who is able to work, shall be regarded as a member of the common household, if

(a) he or she is bringing up one or more children living in the same household ... or did so for at least four years;

(b) he or she is entitled to benefits for the payment of nursing care (at least level 4) pursuant to section 5 of the Federal Nursing Care Benefits Act or pursuant to the provisions of the Regional Nursing Care Benefits Act;

(c) he or she is doing nursing work for the insured who is entitled to benefits (at least level 4) for the payment of nursing care pursuant to the Federal Nursing Care Benefits Act or pursuant to the provisions of the Regional Nursing Care Benefits Act."

19. On 1 July 2007 a further amendment to the Civil Servants Sickness and Accident Insurance Act entered into force. Section 56(6) no longer applied to non-related persons, but only to relatives of the insured. The newly introduced paragraph 6a was only slightly modified. These provisions, in so far as relevant, read as follows:

"(6) A person belonging to the group of parents, ... step-parents and foster parents, children, ... stepchildren and foster children, grandchildren or brothers and sisters of the insured who has been living with him or her in the same household for at least ten months and since then has been doing the domestic work for the insured without payment, unless there is a spouse living in the same household who is able to work, shall be regarded as a member of the household. He or she shall also be considered a member if he or she is no longer able to do the domestic work. Only one person can be a member in this sense.

(6a) A person who is not a relative of the insured and who has been living with him or her in the same household for at least ten month and since then has been doing the domestic work for him or her without payment, unless there is a spouse living in the same household who is able to work, shall be regarded as a member of the common household, if

(a) he or she is bringing up one or more children living in the same household ... or did so for at least four years, or

(b) he or she is doing nursing work for the insured who is entitled to public benefits at least level 4 pursuant to the Federal Nursing Care Benefits Act or pursuant to the provisions of the Regional Nursing Care Benefits Act."

20. The last amendment to the Civil Servants Sickness and Accident Insurance Act which entered into force on 1 July 2007 was accompanied by a transitory provision. Section 217(3) and (4) read as follows:

"(3) Persons of the opposite sex and not related to the insured, who, pursuant to section 56(6) as in force on 30 June 2007, had been entitled to benefits as relatives and who on that date had already reached twenty-seven years of age remain entitled to benefits as relatives until the relevant circumstances change.

(4) Persons of the opposite sex and not related to the insured, who, pursuant to section 56(6) as in force on 30 June 2007, had been entitled to benefits as relatives and who on that date had not yet reached twenty-seven years of age remain entitled to benefits as relatives until the relevant circumstances change, but at most until 31 December 2010."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

21. The applicants claimed to be victims of discrimination on the ground of sexual orientation in that the Administrative Court in its decision of 4 October 2001 upheld that the insurance cover of the second applicant only extended to heterosexual partners within the meaning of section 56(6) CSSAIA. They relied on Article 14 of the Convention in conjunction with Article 8.

22. Article 14 reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 8, in so far as relevant, provides:

"1. Everyone has the right to respect for his private and family life [and] his home ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Submissions by the parties

23. The applicants submitted that they had been victims of discrimination because of the refusal of the Austrian authorities to extend the second applicant's health and accident insurance to the first applicant on grounds of their sexual orientation. This had also been acknowledged in substance by the Constitutional Court in its judgment of 10 October 2005. They maintained that, despite the Constitutional Court's judgment of 10 October 2005 and the subsequent amendment to the CSSAIA, they were still victims because same-sex partners were still excluded from joint insurance if they did not raise children in the common household. Moreover, the transitional provision guaranteed the joint insurance to those (male/female) couples who were entitled to it before the amendment, irrespective of whether they raised children or not. Given that this was not the case for same-sex partners they were continuously victims of discriminatory legislation.

24. The Government did not comment on the merits of the application. They noted that after the Constitutional Court had, on 10 October 2005, repealed the two parallel provisions of the General Social Security Act (GSSA) and the Social Security Act for Trade and Commerce (TCSSA) and replaced them with section 56(6) of the CSSAIA, a general reform reformulating the legal provisions on the extension of insurances to cohabitees had been enacted. On 1 August 2006 and 1 July 2007 amendments to the CSSAIA entered into force, which regulated the affiliation of a partner to a social security scheme in a non-discriminatory way.

B. The Court's assessment

1. Applicability of Article 14

25. The Court points out at the outset that the provision of Article 8 of the Convention does not guarantee as such a right to have the benefits deriving from a specific social security insurance scheme extend to a co-habiting partner (see *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 53, ECHR 2006-VI).

26. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of "private life" within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate to address the issue whether their relationship also constitutes "family life".

27. The Courts reiterates its established case-law in respect of different-sex couples, namely that the notion of family under this provision is not confined to marriage-based relationships and may encompass other *de*

facto "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that "family" unit from the moment and by the very fact of his birth (see *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; and also *Johnston and Others v. Ireland*, 18 December 1986, § 56, Series A no. 112).

28. In contrast, the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life" but has not found that it constitutes "family life", even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, with further references). In the case of *Karner* (cited above, § 33), concerning the succession of a same-sex couples' surviving partner to the deceased's tenancy rights, which fell under the notion of "home", the Court explicitly left open the question whether the case also concerned the applicant's "private and family life".

29. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of "family" (see paragraph 26 above).

30. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

31. With regard to Article 14, which was relied on in the present case, the Court reiterates that it only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence because it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among many other authorities, *Sahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but also sufficient for the facts of the case to fall "within the ambit" of one or more of the Articles of the Convention (see

Petrovic v. Austria, 27 March 1998, § 22, *Reports of Judgments and Decisions* 1998-II).

32. The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It also applies to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see *E.B. v France* [GC], no. 43546/02, § 48, ECHR 2008-... with further references).

33. The present case concerns the possibility to extend accident and sickness insurance cover under a statutory insurance scheme to cohabiting partners, a possibility which the legal provisions impugned by the applicants recognise under certain conditions. Moreover, the possibility to extend insurance cover, in the Court's view, has to be qualified as a measure intended to improve the principally insured person's private and family situation. The Court therefore considers that the extension of insurance cover at issue falls within the ambit of Article 8.

34. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right - a possibility open to it under Article 53 of the Convention - cannot, in the application of that right, take discriminatory measures within the meaning of Article 14 (see, *mutatis mutandis*, *E.B. v. France*, cited above, §49).

35. Because the applicants complain that they are victims of a difference in treatment which allegedly lacks objective and reasonable justification as required by Article 14 of the Convention, that provision, taken in conjunction with Article 8, is applicable.

2. Compliance with Article 14 read in conjunction with Article 8

36. The applicants submitted that they had been victims of discrimination because it had been impossible to have the cover of the second applicant's health and accident insurance extended to include the first applicant. This was because, under section 56(6) of the CSSAIA, as in force until 1 August 2006, such an extension was only open to cohabitees of the opposite sex and because this discriminatory situation did not effectively change after the entry into force of an amendment to the relevant provisions which imposed conditions they could not fulfil.

37. The Government did not comment on the situation in law until the entry into force of the modifications of the CSSAIA on 1 August 2006 and 1 July 2007 respectively and argued that from that time on the applicants could no longer claim to be victims of discrimination, because the amended provisions were formulated in a gender-neutral way.

38. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a

reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Petrovic*, cited above, p. 586, § 30). Furthermore, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see *Burghartz v. Switzerland*, cited above, § 27; *Karlheinz Schmidt v. Germany*, 18 July 1994, § 24, Series A no. 291-B; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 29, ECHR 1999-IX; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 94, ECHR 1999-VI; *Fretté v. France*, no. 36515/97, §§ 34 and 40, ECHR 2002-I; and *S.L. v. Austria*, no. 45330/99, § 36, ECHR 2003-I). Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see *Karner v. Austria*, no. 40016/98, § 36, ECHR 2003-IX).

39. In order to determine whether the difference in treatment that the applicants complained of had an objective and reasonable justification, the Court will consider each of the periods separately.

(a) First period: until the entry into force of section 56(6a) of the CSSAIA on 1 August 2006

40. The Court notes that on 1 July 1997 the first applicant asked the CSIC to recognise him as a dependent of the second applicant and to extend the latter's health and accident insurance cover to him. On 2 September 1997 the CSIC dismissed the request, holding that, because the first applicant was of the same sex as the second applicant, he did not qualify as a dependent within the meaning of section 56(6) of the CSSAIA. It did not accept the applicants' argument that section 56(6) should be interpreted so as to also include homosexual relationships. The appeal authorities also refuted this argument. The Administrative Court, in its judgment of 4 October 2001 found that the exclusion of homosexual partnerships from the scope of section 56(6) of the CSSAIA also complied with the principle of equality because that difference in treatment was justified. It argued that, while it was true that where persons of different sex living together in a household in which one of them was running that household and not being gainfully employed, it was, as a rule, safe to conclude that they were cohabiting in a partnership, that was not the case if two persons of the same sex were living together in a household. In the absence of any possibility to register a homosexual partnership, it would be necessary to undertake delicate enquiries into the most intimate sphere of the person concerned. That difference in the factual situation justified different treatment in law.

41. The Court further observes that the Government themselves have not given any justification for the difference in treatment experienced by the applicants and that experienced by cohabitees of the opposite sex.

42. The Court reiterates that in the case of *Karner v. Austria*, which bears certain similarities to the present case, it found that in cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people - in this instance persons living in a homosexual relationship - from the scope of application of a specific provision of law (see *Karner*, cited above, § 41). It does not consider, however, that the Government or the domestic authorities and courts have advanced any arguments that would allow such a conclusion.

Accordingly, there was a breach of Article 14, read in conjunction with Article 8, in respect of the period in question.

(b) Second period: from the entry into force of section 56(6a) of the CSSAIA on 1 August 2006 until the entry into force of the amended section 56(6) and (6a) of the CSSAIA on 30 June 2007

43. The Court considers that the discriminatory character of the CSSAIA established above did not change after the first amendment, because unmarried male/female couples qualified for preferential treatment, whereas unmarried couples of the same sexual orientation, irrespective of their sexual orientation, only qualified if they were raising children together. Even though the situation improved as a result of that amendment because homosexual couples were in principle no longer excluded from the scope of application of section 56 of the CSSAIA, there remained a substantial difference in treatment for which no sufficient justification had been advanced by the Government.

44. Accordingly, there was also a breach of Article 14, read in conjunction with Article 8, in respect of this period.

(c) Third period: after the entry into force of the amended section 56(6) and (6a) of the CSSAIA on 1 July 2007

45. The Court observes that the newly amended version of the CSSAIA as in force from 1 July 2007 onwards omitted the explicit reference to partners of the opposite sex in section 56(6a) and restricted the scope of application of section 56(6) to relatives. It is thus formulated in a neutral way concerning the sexual orientation of cohabitees.

46. The applicants submitted that, following the above-mentioned amendment, the legal situation is still discriminatory, because the opportunity to extend health and accident insurance cover has become more difficult following the amendment because additional conditions were introduced which not all couples, and in particular the applicants, fulfil. Moreover, they were also victims of discrimination because persons to

whom the extension of insurance cover had been granted before the entry into force of the amendment continued to benefit from an extension of the insurance cover.

47. As regards the applicants' first argument, the Court observes that Article 14 of the Convention only guarantees a right to equal treatment of persons in relatively similar situations but does not guarantee access to specific benefits. It further observes that the condition to which the applicants refer, the raising of children in the common household, is formulated in a neutral way and the applicants did not argue that under Austrian law homosexuals are excluded from caring for children.

48. As regards the applicants' second argument, the Court observes that, according to the transitory provision of section 217 of the CSSAIA, the continued application of section 56(6a) is restricted to persons having passed a certain age limit and where the relevant circumstances remain the same, and also applies to those who will not have yet reached the age limit by 31 December 2010. The Court cannot find that it is incompatible with the requirements of Article 14 for those who have previously been entitled to a specific benefit under the law in force at the time to be given sufficient time to adapt to changing circumstances.

49. In this context, the Court notes its case-law according to which the principle of legal certainty, which is necessarily inherent in the law of the Convention, may dispense States from questioning legal acts or situations that antedate judgments of the Court declaring domestic legislation incompatible with the Convention. The same considerations apply where a constitutional court annuls domestic legislation as being unconstitutional (see *Marckx v. Belgium*, 13 June 1979, § 58, Series A no. 31). Moreover, it has also been accepted, in view of the principle of legal certainty that a constitutional court may set a time-limit for the legislator to enact new legislation with the effect that an unconstitutional provision remains applicable for a transitional period (see *Walden v. Liechtenstein* (dec.), no. 33916/96, 16 March 2000; and *J.R. v. Germany* (dec.), no. 22651/93, Decisions and Reports 83-A).

50. The Court therefore considers that from 1 July 2007 the applicants were no longer subject to an unjustified difference in treatment as regards the benefit of extending health and accident insurance cover to the second applicant. Accordingly there was no breach of Article 14, read in conjunction with Article 8, in respect of this period.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 1 PROTOCOL No. 1

51. The applicants also complained under Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1, that the Administrative

Court's decision violated their right to the peaceful enjoyment of their property. Article 1 of Protocol No. 1, in so far as relevant, reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...."

52. The Court observes that neither the Government nor the applicants submitted any observations in this respect. Having regard to its finding under Article 14, read in conjunction with Article 8, the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

54. The applicants claimed pecuniary damage in the amount of 28,375.12 euros (EUR) for the period from 1993 until May 2008 plus EUR 81.52 per month from that date onwards. They submitted that, because it had been impossible to extend the second applicant's health and accident insurance cover to the first applicant, the first applicant had had to subscribe to an individual health insurance for himself which had cost him in contributions EUR 11,375.12 from 1993 until May 2008 plus a lump sum for non-reimbursed vaccination costs in the amount of EUR 1,000 and costs for medical care abroad in the amount of EUR 16,000. Lastly, they claimed EUR 81.52 per month, from May 2008 onwards, which was the monthly contribution of the first applicant to his health and accident insurance scheme.

55. The Government submitted that that claim was excessive because the first applicant could have avoided a large portion of the amount claimed for the individual health insurance contract by subscribing to the general social insurance scheme. The monthly contributions under that scheme were moderate and could even have been reduced in the event of hardship. Moreover, the period for which reimbursement of those costs could be

claimed only started in July 1997, when the applicants first applied to include the first applicant in the second applicant's health insurance scheme. It must also be taken into account that even if the extension to the insurance cover had been granted, additional contributions for such an extension would have had to have been paid from January 2001 onwards. Such hypothetical costs would have had to have been offset against the applicants' reimbursement claim. The claim for vaccination costs was unfounded, because, in any event, such costs were not covered by the insurance scheme to which the first applicant wished to adhere. The lump sum claim for medical treatment abroad was equally unfounded because normally such treatment was also covered by a health clause in a private travel insurance contract and, in any event, the applicants failed to substantiate that claim.

56. The Court observes first that it has found a breach of Article 14, read in conjunction with Article 8, only in respect of the period until 30 June 2007. Thus, it cannot make any award for claims which relate to the subsequent period. The Court further observes that, as regards the claims for reimbursement of vaccination costs and costs of medical treatment abroad the applicants have merely indicated a lump sum and failed to substantiate their claim. Thus, no award for pecuniary damage can be made in this respect. Nevertheless, the Court is convinced that the applicants, as a consequence of the refusal of the request for extension of the second applicant's health and accident insurance cover to the first applicant and the ensuing necessity for him to subscribe to another insurance scheme, have suffered financial loss. However, the sums claimed by the applicants are excessive because it seems reasonable, as argued by the Government, to start the period for which reimbursement may in principle be granted only when the applicants made a concrete step to have the insurance cover extended in 1997 and to deduct costs the applicants would have incurred if the extension of the insurance cover had actually been granted. Having regard to the above considerations the Court grants, on an equitable basis, EUR 5,000 under this head plus any tax that may be chargeable on this amount.

57. The applicants claimed non-pecuniary damage in the amount of EUR 36,000.

58. The Government considered this claim excessive and found that, in the circumstances of the present case, the finding of a violation constituted in itself sufficient redress.

59. The Court considers that the applicants must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards them EUR 10,000 under this head plus any tax that may be chargeable on this amount.

B. Costs and expenses

60. The applicants claimed costs and expenses incurred in the domestic proceedings in the amount of EUR 5,408.62, including Turnover Tax, and costs and expenses incurred in the proceedings before the Court in the amount of EUR 10,273.67, also including Turnover Tax. In addition, the applicants claimed a lump sum of EUR 2,500 for out of pocket expenses for them and EUR 500 for translation.

61. The Government disputed this claim as being excessive. In their view it should be taken into account that the submissions made before the domestic authorities and courts and those made before the Court were to a large extent identical.

62. The Court finds that no reimbursement of out of pocket expenses and costs for translation can be granted because the applicants have failed to submit receipts in order to substantiate these claims.

63. As regards the claim for costs and expenses incurred in the domestic proceedings and before the Court, the Court reiterates that, according to its case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred in order to prevent or redress the violation found and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicants EUR 4,500 in respect of the domestic proceedings and EUR 5,500 in respect of the Convention proceedings. Consequently, the Court awards the applicants EUR 10,000 in respect of costs and expenses, plus any tax that may be chargeable to them.

C. Default interest

64. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by five votes to two that there has been a violation of Article 14, read in conjunction with Article 8 of the Convention, as regards the period until 1 August 2006;

2. *Holds* unanimously that there has been a violation of Article 14, read in conjunction with Article 8 of the Convention, as regards the period from 1 August 2006 until 30 June 2007;

3. *Holds* unanimously that there has been no violation of Article 14, read in conjunction with Article 8 of the Convention, as regards the period from 1 July 2007 onwards;

4. *Holds* unanimously that it is not necessary to examine the application also under Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1;

5. *Holds* unanimously
(a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 22 July 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Vajić and Malinverni is annexed to this judgment.

C.L.R.
S.N.

JOINT PARTLY DISSENTING OPINION OF JUDGES VAJIĆ AND MALINVERNI

(Translation)

We are unable to agree with the majority's opinion that, in the present case, there had been a violation of Article 8, taken together with Article 14 of the Convention, during the "first period", running from 1 July 1997 to 1 August 2006, date of the entry into force of Article 56 (6a) of the CSSAIA (see paragraphs 36 to 38 of the judgment).

It was on 1 July 1997 that the first applicant asked the CSIC to recognise him as a dependant of the second applicant and to extend the latter's health and accident insurance cover to him (see paragraph 7 of the judgment).

We find it quite understandable that, at the material time, the Austrian authorities should have denied the first applicant's request on the ground that Article 56 (6) of the CSSAIA could not be interpreted so as to include homosexual relationships. To be sure, at that time very few European States had enacted legislation on registered partnerships (such as the French *PACS*), and there was also a very small number of States that treated on an equal footing, for social security purposes, two cohabiting persons of the opposite sex and two homosexuals living together.

At the present time, apart from the six member States that grant same-sex couples the right to marry, namely Belgium, the Netherlands, Norway, Portugal, Spain and Sweden (see the case of *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, § 27), only thirteen countries have enacted a law on registered partnerships. Most of those have only done so since 2000: Belgium, Luxembourg, Switzerland and the United Kingdom in 2004, Estonia in 2005, and the Czech Republic in 2006. Only Denmark, Norway and Sweden had enacted such legislation in the 1990s.

It can thus be said that at the material time there was no European consensus as to whether homosexual couples should be treated on an equal footing with heterosexual couples, even unmarried ones, for various legal purposes in general, and for that of social security in particular.

In these conditions we find it difficult to accept that the decisions by the various competent Austrian authorities rejecting the applicants' request, all those decisions having been issued between 1997 and 2001 (see paragraphs 8 to 14), may be regarded as contrary to Articles 8 and 14 taken together. As the Constitutional Court found in its judgment of 15 June 1998, in the absence of a European consensus, "the legislator had had a very wide margin in which to reach a decision and the decision taken had been within that margin" (paragraph 12).

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