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

FIRST SECTION

CASE OF KARNER v. AUSTRIA

(Application no. 40016/98)

JUDGMENT

STRASBOURG

24 July 2003

FINAL

24/10/2003

In the case of Karner v. Austria,

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

Mr C.L. ROZAKIS, *President*,
Mr P. LORENZEN,
Mr G. BONELLO,
Mrs N. VAJIĆ,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY, *judges*,
Mr C. GRABENWARTER, ad hoc *judge*,
and Mr S. NIELSEN, *Deputy Section Registrar*,

Having deliberated in private on 7 November 2002 and 3 July 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 40016/98) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Siegmund Karner ("the applicant"), on 24 July 1997.

2. The applicant was represented by Lansky & Partner, a law firm in Vienna. The Austrian Government ("the Government") were represented by their Agent, Mr H. Winkler.

3. The applicant alleged, in particular, that the Supreme Court's decision not to recognise his right to succeed to a tenancy after the death of his companion amounted to discrimination on the ground of his sexual orientation in breach of Article 14 of the Convention taken in conjunction with Article 8.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

6. By a decision of 11 September 2001 the Chamber declared the application partly admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

8. On 7 December 2001 the President of the Chamber granted ILGA-Europe (The European Region of the International Lesbian and Gay Association), Liberty and Stonewall leave to intervene as third parties (Article 36 § 2 of the Convention and Rule 61 § 3). The third parties were represented by Mr R. Wintemute.

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

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1955 and lived in Vienna.

11. From 1989 the applicant lived with Mr W., with whom he had a homosexual relationship, in a flat in Vienna, which the latter had rented a year earlier. They shared the expenses on the flat.

12. In 1991 Mr W. discovered that he was infected with the Aids virus. His relationship with the applicant continued. In 1993, when Mr W. developed Aids, the applicant nursed him. In 1994 Mr W. died after designating the applicant as his heir.

13. In 1995 the landlord of the flat brought proceedings against the applicant for termination of the tenancy. On 6 January 1996 the Favoriten District Court (*Bezirksgericht*) dismissed the action. It considered that section 14(3) of the Rent Act (*Mietrechtsgesetz*), which provided that family members had a right to succeed to a tenancy, was also applicable to a homosexual relationship.

14. On 30 April 1996 the Vienna Regional Civil Court (*Landesgericht für Zivilrechtssachen*) dismissed the landlord's appeal. It found that section 14(3) of the Rent Act was intended to protect persons who had lived together for a long time without being married against sudden homelessness. It applied to homosexuals as well as to persons of opposite sex.

15. On 5 December 1996 the Supreme Court (*Oberster Gerichtshof*) granted the landlord's appeal, quashed the lower court's decision and terminated the lease. It found that the notion of “life companion” (*Lebensgefährte*) in section 14(3) of the Rent Act was to be interpreted as at the time it was enacted, and the legislature's intention in 1974 was not to include persons of the same sex.

16. On 26 September 2000 the applicant died.

17. On 11 November 2001 the applicant's lawyer informed the Court of the applicant's death and that his mother had waived her right to succeed to the estate. He asked the Court not to strike the application out of its list

before the public notary handling the applicant's estate had traced other heirs.

18. On 10 April 2002 the applicant's lawyer informed the Court that the public notary had instigated enquiries in order to trace previously unknown heirs who might wish to succeed to the estate.

II. RELEVANT DOMESTIC LAW

19. Section 14 of the Rent Act (*Mietrechtsgesetz*) reads as follows:

> "Right to a tenancy in the event of death
>
> (1) The death of the landlord or a tenant shall not terminate a tenancy.
>
> (2) On the death of the main tenant of a flat, the persons designated in subsection (3) as being entitled to succeed to the tenancy shall do so, to the exclusion of other persons entitled to succeed to the estate, unless they have notified the landlord within fourteen days of the main tenant's death that they do not wish to continue the tenancy. On succeeding to the tenancy, the new tenants shall assume liability for the rent and any obligations that arose during the tenancy of the deceased main tenant. If more than one person is entitled to succeed, they shall succeed jointly to the tenancy and become jointly and severally liable.
>
> (3) The following shall be entitled to succeed to the tenancy for the purposes of subsection (2): a spouse, a life companion, relatives in the direct line including adopted children, and siblings of the former tenant, in so far as such persons have a pressing need for accommodation and have already lived in the accommodation with the tenant as members of the same household. For the purposes of this provision, 'life companion' shall mean a person who has lived in the flat with the former tenant until the latter's death for at least three years, sharing a household on an economic footing like that of a marriage; a life companion shall be deemed to have lived in the flat for three years if he or she moved into the flat together with the former tenant at the outset."

THE LAW

I. JURISDICTION OF THE COURT

20. The Government requested that the application be struck out of the list of cases in accordance with Article 37 § 1 of the Convention, since the applicant had died and there were no heirs who wished to pursue the application.

21. The applicant's counsel emphasised that the case involved an important issue of Austrian law and that respect for human rights required its continued examination, in accordance with Article 37 § 1 *in fine*. Article 37 § 1 of the Convention reads as follows:

> "1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

22. The Court notes that in a number of cases in which an applicant died in the course of the proceedings it has taken into account the statements of the applicant's heirs or of close family members expressing the wish to pursue the proceedings before the Court (see, among other authorities, *Deweer v. Belgium*, judgment of 27 February 1980, Series A no. 35, pp. 19-20, §§ 37-38; *X v. the United Kingdom*, judgment of 5 November 1981, Series A no. 46, p. 15, § 32; *Vocaturo v. Italy*, judgment of 24 May 1991, Series A no. 206-C, p. 29, § 2; *G. v. Italy*, judgment of 27 February 1992, Series A no. 228-F, p. 65, § 2; *Pandolfelli and Palumbo v. Italy*, judgment of 27 February 1992, Series A no. 231-B, p. 16, § 2; *X v. France*, judgment of 31 March 1992, Series A no. 234-C, p. 89, § 26; and *Raimondo v. Italy*, judgment of 22 February 1994, Series A no. 281-A, p. 8, § 2).

23. On the other hand, it has been the Court's practice to strike applications out of the list of cases in the absence of any heir or close relative who has expressed the wish to pursue an application (see *Scherer v. Switzerland*, judgment of 25 March 1994, Series A no 287, pp. 14-15, § 31; *Öhlinger v. Austria*, no. 21444/93, Commission's report of 14 January 1997, § 15, unreported; *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII). Thus, the Court has to determine whether the application in the present case should also be struck out of the list. In formulating an appropriate answer to this question, the object and purpose of the Convention system as such must be taken into account.

24. The Court reiterates that, while Article 33 (former Article 24) of the Convention allows each Contracting State to refer to the Court (Commission) "any alleged breach" of the Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 34 (former Article 25), claim "to be the victim of a violation ... of the rights set forth in the Convention or the Protocols thereto". Thus, in contrast to the position under Article 33 – where, subject to the other conditions laid down, the general interest attaching to the observance of the Convention renders admissible an inter-State application – Article 34 requires that an individual applicant should claim to have been actually affected by the violation he alleges (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 90-91, §§ 239-40, and *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, pp. 17-18, § 33). Article 34 does not institute for individuals a kind

of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention (see *Norris v. Ireland*, judgment of 26 October 1988, Series A no. 142, pp. 15-16, § 31, and *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI).

25. While under Article 34 of the Convention the existence of a "victim of a violation", that is to say, an individual applicant who is personally affected by an alleged violation of a Convention right, is indispensable for putting the protection mechanism of the Convention into motion, this criterion cannot be applied in a rigid, mechanical and inflexible way throughout the whole proceedings. As a rule, and in particular in cases which primarily involve pecuniary, and, for this reason, transferable claims, the existence of other persons to whom that claim is transferred is an important criterion, but cannot be the only one. As the Court pointed out in *Malhous* (decision cited above), human rights cases before the Court generally also have a moral dimension, which must be taken into account when considering whether the examination of an application after the applicant's death should be continued. All the more so if the main issue raised by the case transcends the person and the interests of the applicant.

26. The Court has repeatedly stated that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties" (see *Ireland v. the United Kingdom*, cited above, p. 62, § 154, and *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 31, § 86). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.

27. The Court considers that the subject matter of the present application – the difference in treatment of homosexuals as regards succession to tenancies under Austrian law – involves an important question of general interest not only for Austria but also for other States Parties to the Convention. In this connection the Court refers to the submissions made by ILGA-Europe, Liberty and Stonewall, whose intervention in the proceedings as third parties was authorised as it highlights the general importance of the issue. Thus, the continued examination of the present application would contribute to elucidate, safeguard and develop the standards of protection under the Convention.

28. In these particular circumstances, the Court finds that respect for human rights as defined in the Convention and the Protocols thereto requires a continuation of the examination of the case (Article 37 § 1 *in fine*

of the Convention) and accordingly rejects the Government's request for the application to be struck out of its list.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

29. The applicant claimed to have been a victim of discrimination on the ground of his sexual orientation in that the Supreme Court, in its decision of 5 December 1996, had denied him the status of "life companion" of the late Mr W. within the meaning of section 14 of the Rent Act, thereby preventing him from succeeding to Mr W.'s tenancy. He relied on Article 14 of the Convention taken in conjunction with Article 8, which provide as follows:

Article 14

"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

"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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Applicability of Article 14

30. The applicant submitted that the subject matter fell within the scope of Article 8 § 1 as regards the elements of private life, family life and home.

31. The Government, referring to *Röösli v. Germany* (no. 28318/95, Commission decision of 15 May 1996, Decisions and Reports 85-A, p. 149), submitted that the subject matter of the present case did not come within the ambit of Article 8 § 1 as regards the elements of "private and family life". The issue whether it came within the ambit of the "home" element could be left open because, in any event, there had been no breach of Article 14 of the Convention taken in conjunction with Article 8.

32. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application

unless the facts of the case fall within the ambit of one or more of the latter (see *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 585, § 22).

33. The Court has to consider whether the subject matter of the present case falls within the ambit of Article 8. The Court does not find it necessary to determine the notions of "private life" or "family life" because, in any event, the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home guaranteed under Article 8 of the Convention (see *Larkos v. Cyprus* [GC], no. 29515/95, § 28, ECHR 1999-I). The applicant had been living in the flat that had been let to Mr W. and if it had not been for his sex, or rather, sexual orientation, he could have been accepted as a life companion entitled to succeed to the lease, in accordance with section 14 of the Rent Act.

Therefore, Article 14 of the Convention applies.

B. Compliance with Article 14 taken in conjunction with Article 8

34. The applicant submitted that section 14 of the Rent Act aimed to provide surviving cohabitants with social and financial protection from homelessness but did not pursue any family- or social-policy aims. That being so, there was no justification for the difference in treatment of homosexual and heterosexual partners. Accordingly, he had been the victim of discrimination on the ground of his sexual orientation.

35. The Government accepted that in respect of succession to the tenancy the applicant had been treated differently on the ground of his sexual orientation. They maintained that that difference in treatment had an objective and reasonable justification, as the aim of the relevant provision of the Rent Act had been the protection of the traditional family.

36. ILGA-Europe, Liberty and Stonewall submitted as third-party interveners that a strong justification was required when the ground for a distinction was sex or sexual orientation. They pointed out that a growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view was supported by recommendations and legislation of European institutions, such as Protocol No. 12 to the Convention, recommendations by the Parliamentary Assembly of the Council of Europe (Recommendations 1470 (2000) and 1474 (2000)), the European Parliament (Resolution on equal rights for homosexuals and lesbians in the EC, OJ C 61, 28 February 1994, p. 40; Resolution on respect for human rights in the European Union 1998-1999, A5-0050/00, § 57, 16 March 2000) and the Council of the European Union (Directive 2000/78/EC, OJ L 303/16, 27 November 2000).

37. 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*, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; *Karlheinz Schmidt v. Germany*, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; *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 *Smith and Grady*, cited above, § 90, and *S.L. v. Austria*, cited above, § 37).

38. In the present case, after Mr W.'s death, the applicant sought to avail himself of the right under section 14(3) of the Rent Act, which he asserted entitled him as a surviving partner to succeed to the tenancy. The court of first instance dismissed an action by the landlord for termination of the tenancy and the Vienna Regional Court dismissed the appeal. It found that the provision in issue protected persons who had been living together for a long time without being married against sudden homelessness and applied to homosexuals as well as to heterosexuals.

39. The Supreme Court, which ultimately granted the landlord's action for termination of the tenancy, did not argue that there were important reasons for restricting the right to succeed to a tenancy to heterosexual couples. It stated instead that it had not been the intention of the legislature when enacting section 14(3) of the Rent Act in 1974 to include protection for couples of the same sex. The Government now submit that the aim of the provision in issue was the protection of the traditional family unit.

40. The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, with further references). It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. 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 section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.

42. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.

43. Thus, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. 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

45. The applicant's lawyer claimed 7,267 euros (EUR) as compensation for pecuniary damage caused by the applicant's having to return the flat, which he had renovated, have recourse to an estate agent and renovate a new flat. He also claimed EUR 7,267 for non-pecuniary damage due to the anxiety suffered by the applicant.

46. The Government argued that the claim for pecuniary damage was not supported by any receipts. As to the claim for non-pecuniary damage, it had only been made after the applicant's death. In the absence of any injury to any heirs, it was unnecessary to determine whether such a claim could form part of the applicant's estate.

47. The Court considers that in the absence of an injured party no award can be made under Article 41 of the Convention as regards the claims for pecuniary and non-pecuniary damage. Accordingly, the Court rejects these claims.

B. Costs and expenses

48. The applicant's lawyer claimed EUR 13,027.75 for costs and expenses incurred in the Convention proceedings.

49. The Government considered this request to be excessive and that any award under that head should not exceed EUR 1,453.46.

50. The Court, making an assessment on an equitable basis, decides that EUR 5,000 shall be paid to the applicant's estate in respect of costs and expenses, plus any tax that may be chargeable.

C. Default interest

51. 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. *Rejects* by six votes to one the Government's request that the application be struck out of the list of cases;

2. *Holds* by six votes to one that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

3. *Holds* by six votes to one
(a) that the respondent State is to pay the applicant's estate, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
(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.

4. *Dismisses* unanimously the remainder of the claims for just satisfaction.

Done in English, and notified in writing on 24 July 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Deputy Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Grabenwarter is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE GRABENWARTER

1. I voted against the majority's decision to reject the Government's request that the application be struck out of the list of cases, for the following reasons.

The Court has decided on a number of occasions to permit a successor in title to continue Convention proceedings when an applicant has died. In the present case, however, it appears that there are no heirs, with the result that Article 37 § 1 of the Convention is in issue.

2. Under Article 37 § 1 of the Convention the Court may at any stage of the proceedings decide to strike an application out of the list of cases where the circumstances lead to the conclusion that the applicant does not intend to pursue his application. However, the Court should continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

I agree with the majority that discrimination against homosexuals in general, and in the field of tenancy legislation in particular, forms an important aspect of respect for human rights. This does not, however, in itself justify the continued examination of a case after the death of an applicant in proceedings under Article 34 of the Convention. The reasoning of the majority is rather short as the reference to case-law concerning the continuation of proceedings when there are heirs does not apply in this case.

At the outset, I agree with the majority that, despite the death of the applicant and the absence of a formal successor in title, the Court may in exceptional cases continue the examination of a case. I also agree that the general importance of the case may be of relevance in this respect.

3. However, I do not share the opinion that the present case is one of "general importance" for these purposes. In taking up the wording of earlier judgments in a different context, the majority suggest that it suffices if the continuation of the examination would "contribute to elucidate, safeguard and develop the standards of protection under the Convention" (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 62, § 154, and *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 31, § 86). While it is true that judgments also serve these purposes, it is not in line with the character of the Convention system (which is primarily designed to protect individuals) to continue proceedings without an applicant on the ground that this contributes to elucidating, safeguarding and developing the standards of protection under the Convention. This rather general criterion is met by the majority of the cases declared admissible, at least by those where the alleged violation is caused by domestic law or general practice and not by the practice applied in the particular case. "General importance" needs to be read in a narrower sense.

The judgment gives no reason for the "general importance" of the case other than the reference to the submissions of a third party, whose intervention "highlights the general importance of the issue". The fact that third parties applied to intervene is an indication of a certain general interest in the case, but it does not mean that the case is of a general importance (see Rule 61 § 3 of the Rules of Court and Article 36 § 2 of the Convention for the criteria for third-party interventions).

In this connection, reference must be made to a recent judgment of the Fourth Section of the Court in *Sevgi Erdoğan v. Turkey* (striking out) (no. 28492/95, 29 April 2003), paragraph 38 of which reads as follows:

> "In the light of the foregoing, and given the impossibility of establishing any communication with the applicant's close relatives or statutory heirs, the Court considers that her representative cannot meaningfully continue the proceedings before it (see, *mutatis mutandis*, *Ali v. Switzerland*, judgment of 5 August 1998, *Reports of Judgments and Decisions* 1998-V, pp. 2148-49, § 32). The Court would also point out that it has already had occasion to rule on the issue raised by the applicant under Article 3 in its examination of other applications against Turkey (see, among many other authorities, *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI; *Büyükdağ v. Turkey*, no. 28340/95, 21 December 2000; and, as the most recent example, *Algür v. Turkey*, no. 32574/96, 22 October 2002). Having regard to those considerations, the Court concludes that it is no longer justified to continue the examination of the application."

Sevgi Erdoğan shows that, while a question of general importance may attach to, for example, cases involving gross violations of human rights (such as the execution of someone following a death sentence before this Court has given judgment), even treatment that may fall under Article 3 of the Convention does not in itself justify continuing the examination of an application. Therefore, it is hard to see why a violation of Article 14 of the Convention taken in conjunction with Article 8 should be seen differently unless there are other reasons.

It appears from *Sevgi Erdoğan* that a prior judgment on the same issue may be relevant in considering whether an application should be struck out of the list of cases under Article 37 § 1 of the Convention. The majority do not rely on that argument. If they had done so they could not have supported the continuation of the proceedings for the following reason. If the Court has not yet decided a particular issue, the question arises whether it would be difficult to bring a similar case before the Court. It follows, however, from the submissions of the applicant's lawyer that there are a number of parallel cases in Austria, especially in Vienna, that could easily be brought before the Austrian courts and hence before this Court. Against the background of the decision of the Austrian Supreme Court in this case, it may even be doubtful whether future applicants would have to introduce a remedy before that court in order to fulfil the requirements of Article 35 of the Convention. In sum, I do not think that it would be especially difficult to bring a parallel case before the European Court of Human Rights.

Both the lack of general importance of the present case and the lack of any particular difficulty in bringing a parallel case before the Court lead me to the conclusion that the present application should have been struck out of the list of cases. The European Court of Human Rights is not a constitutional court which decides on a case-by-case basis which cases it deems expedient to examine on the basis of a general criterion such as the one provided by the majority.

At any rate, the Chamber broke new ground with this decision, which is unprecedented in the case-law of the Court. It refers to a number of cases at paragraph 23 of the judgment, although not *Sevgi Erdoğan*, and then proceeds to decide this case differently. In my view, this is a clear case in which Article 30 of the Convention applies: the judgment has a "result inconsistent with a judgment previously delivered by the Court". It also raises a serious question affecting the interpretation of the Convention. The Chamber should then have relinquished jurisdiction in favour of the Grand Chamber.

4. Were the applicant still alive, I would have voted in favour of finding a violation of Article 14 of the Convention taken in conjunction with Article 8. I only voted against finding a violation as a consequence of my vote on the Government's request to strike the application out of the list of cases.

5. I also voted against the award of just satisfaction under Article 41 of the Convention. However, this is not only a matter of consistency. The decision on that point again shows the problems which arise if one strains the natural wording of the Convention. Article 41 tells us that just satisfaction can only be awarded to an "injured party". This reflects again the notion that the Convention system serves to protect individuals. In this case we have no injured party any more, and there is still some doubt about whether heirs might still turn up (see paragraph 18 of the judgment). To award the specified sum to the applicant's "estate" where there are no heirs does not solve the problem. In the (probable) event that no heir is found, the estate will pass to the State (Article 760 of the Civil Code, *ABGB*), which means that the Contracting Party will have to pay the money from one pocket to the other.