



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

THIRD SECTION

PARTIAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71436/01  
by Klaus BADER  
against Germany

The European Court of Human Rights (Third Section), sitting on 5 July 2005 as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,  
Mr J. HEDIGAN,  
Mr L. CAFLISCH,  
Mr C. BÎRSAN,  
Mrs M. TSATSA-NIKOLOVSKA,  
Mr E. MYJER,  
Mr DAVID THÓR BJÖRGVINSSON, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having regard to the above application lodged on 27 April 2001,  
Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Klaus Bader, is a German national who was born in 1956 and lives in Ravensburg.

**A. The circumstances of the case**

The facts of the case, as submitted by the applicant, may be summarised as follows.

### *1. The factual background*

The applicant is the father of the child R., born out of wedlock on 19 January 1987. The applicant had acknowledged paternity immediately after his son's birth.

The applicant and the child's mother (Ms K.) separated permanently in 1989. On 7 December 1990 Ms K. married Mr K.

### *2. The adoption proceedings*

By order of 20 May 1992 the Ravensburg District Court (*Amtsgericht*) decreed the child's adoption by Mr and Ms K.

On 7 May 1995, following the applicant's complaint, the Federal Constitutional Court (*Bundesverfassungsgericht*) lifted the binding effect of the adoption order of 20 May 1992 insofar as it prevented a fresh consideration of the case (*Aufhebung der Rechtskraft*) and remitted the case to the District Court. The Constitutional Court found that the legal provision permitting adoption of a child by his mother and stepfather without the natural father's consent and without taking into account the latter's interests in the maintenance of a parental relationship violated his rights to the enjoyment of his family life as guaranteed by Article 6 § 2 (1) of the Basic Law (*Grundgesetz*). Accordingly, the legislator was ordered to amend the legal provisions.

On 1 July 1998 new legislation entered into force, providing that a minor's adoption depended on both parents' consent. However, if the mother of a child born out of wedlock exercised sole custody, the court had to substitute the natural father's consent if the child would suffer a disproportionate disadvantage if not adopted (section 1748 (4) of the Civil Code, see relevant domestic law below).

On 1 August 1998 the counsel representing Mr and Ms K. filed a request to substitute the applicant's consent to the child's adoption by Mr K.

On 31 January 2001 the District Court, having heard the applicant, Mr and Ms K. and the child as well as expert opinion, substituted the applicant's consent to the adoption pursuant to Article 1748 § 4 of the Civil Code. That court found that the child's interest in being adopted by his stepfather outweighed the applicant's interest in the maintenance of the parental bonds by far. It noted that the child had expressed that he felt as a full member of the K. family and that he strongly wished to be legally accepted as Mr K.'s child. It further noted that the K. family had been considerably disturbed during the previous ten years by numerous confrontations with the applicant. Furthermore, the court-appointed expert had clearly stated that the adoption would be in the child's interest. With regard to the applicant's interests, the District Court noted that the adoption would lead to a severing of the parental links. It took however into consideration that the child had lived for more than eleven years with the

K. family and that no father-son relationship existed between the applicant and the child. Finally, the District Court considered that the adoption might put an obstacle to a later reconciliation between the applicant and the child, but considered that this would not prevent the child to get in touch with the applicant if he might later on wish to do so.

On 16 March 2001 the Ravensburg Regional Court (*Landgericht*) rejected the applicant's complaint and imposed on him the costs of the complaint proceedings. It noted that the District Court, in its decision of 31 January 2001, had erroneously named Mr K. as the person who had filed the request to substitute the applicant's consent, when the request was in fact filed by Ms K. on behalf of her child. However, it found that the actual procedural and material situation was decisive and that Ms K. had in fact been entitled to file this request.

On 22 March 2001 the applicant lodged a complaint with the Federal Constitutional Court which was rejected as being inadmissible on 9 May 2001.

On 4 April 2001 the applicant lodged a further complaint against the decision of the Regional Court. He alleged, *inter alia*, that the District Court had not been entitled to substitute the applicant's consent for lack of a valid request.

On 18 May 2001 the child's *curator ad litem* (*Verfahrenspflegerin*) requested to substitute the applicant's consent.

On 30 May 2001 Mr and Ms K.'s counsel confirmed that also Ms K. requested – on behalf of her son – to substitute the applicant's consent to the adoption.

On 17 July 2001 the Stuttgart Court of Appeal (*Oberlandesgericht*) rejected the applicant's complaint and ordered the applicant to pay the court fees and to reimburse the other parties' legal expenses. It noted that, according to the relevant legal provisions, the request to substitute the natural father's consent had to be lodged by the child himself. Having regard to the *curator ad litem*'s declaration of 18 May 2001, there did not remain any doubt as to the existence of a valid request. Accordingly, it was not necessary to examine the legal relevance of Ms K.'s request.

The Court of Appeal further found that the impugned decisions did not violate the applicant's rights under the Basic Law and under the Convention. In particular, the lower courts had duly weighed the applicant's interests. The Court of Appeal added that the applicant's long lasting fight for his rights had forced the child and his new family onto the defensive, which made it necessary in the child's interest to permit the adoption. It further noted that the last contact between the applicant and the child which took place with the mother's consent was in 1990 – when the child was merely three years old – and that the applicant's further endeavours to get into touch had raised the child's aversions. The Court of Appeal considered that the length of the proceedings – which could not be attributed

to the courts – had put the child under particular pressure and had thus weakened the applicant's position.

On 31 August 2001 the District Court issued an order confirming the child's adoption by Mr K. The decision was issued free of charge. The District Court noted that the child had fully integrated into the K. family. According to the courts' previous findings, the child would suffer a disproportionate disadvantage if not adopted. The District Court found that the other legal prerequisites were met and, in particular, that the child had firmly expressed that he wished to be adopted.

On 19 October 2001 the Regional Court rejected the applicant's complaint as being inadmissible.

On 6 August 2001 the applicant filed a constitutional complaint against the Court of Appeal's decision of 17 July 2001, the Regional Court's decision of 16 March 2001 and the District Court's decision of 31 January 2001.

On 17 September 2001 the applicant lodged a constitutional complaint against the District Court's decision of 31 August 2001. He alleged that the impugned decisions and the legal provisions they were based upon violated his right to the enjoyment of his family life under Article 6 of the Basic Law and under Article 8 of the Convention.

By letter of 12 February 2004 the Federal Constitutional Court informed the applicant that they had communicated his joint complaints to the Government and to several other interested parties for comments. By letter of 28 February 2005 the same court informed the applicant that – due to the high workload of the section – it could not be predicted when a decision on the admissibility of his complaint could be passed.

### 3. *The cost order proceedings*

On 12 September 2001 the Ravensburg District Court issued a cost order (*Kostenfestsetzungsbeschluss*) ordering the applicant to refund a sum of approximately 400 DEM as legal expenses to the child's *curator ad litem*. The cost order was issued on the basis of the Court of Appeal's decision of 17 July 2001.

On 19 September 2001 the District Court issued a cost order ordering the applicant to refund a sum of approximately 1,000 DEM as legal expenses to Mr and Ms K. The cost order was issued on the basis of the Regional Court's decision of 16 March 2001 and the Court of Appeal's decision of 17 July 2001. The applicant lodged complaints against both decisions, alleging, in particular, that the proceedings aimed at the substitution of his consent had not been in accordance with the law.

On 19 September 2001 the Ravensburg Court of Appeal rejected the applicant's complaints against both decisions, finding that the cost orders had been issued in accordance with the law and that the applicant, during complaint proceedings, was excluded from raising complaints relating to the

substantive law of the decision they were based upon (*materiellrechtliche Einwendungen*). On 21 November 2001 the Federal Constitutional Court refused to entertain the applicant's complaint.

#### 4. *The execution proceedings*

The applicant's creditors instigated execution proceedings based on the cost orders of 12 and 19 September 2001.

On 15 April 2002 – following the applicant's refusal to pay and to allow the court bailiff access to his apartment – the Ravensburg District Court ordered the search of the applicant's apartment.

By decision of that same date, the District Court ordered the applicant to make an *affidavit* (*eidesstattliche Versicherung*) of his possessions. On 27 May and 17 June 2002 respectively the Regional Court rejected the applicant's complaints.

On 15 July 2002 the bailiff searched the applicant's apartment, without however finding any assets.

On 14 January and 18 February 2003 the District Court ordered the applicant's arrest on the basis of section 901 of the Code of Civil Procedure (see relevant domestic law below) in order to compel him to render an *affidavit*.

The applicant submitted a medical attestation dated 28 July 2003, according to which he was unfit for detention.

On 9 January 2004 a public health officer (*Amtsarzt*) informed the bailiff that he had examined the applicant and found him to be fit for detention.

On 8 April 2004 the Regional Court rejected the applicant's complaints against the arrest warrants, finding that these had been issued in accordance with section 901 of the Code of Civil Procedure (see relevant domestic law below).

On 24 May 2004 the Federal Constitutional Court refused to entertain the applicant's complaint against the arrest orders.

The applicant was arrested on 28 May 2004. According to the bailiff's protocol, the sums to be paid by the applicant amounted at that time to 344.40 EUR and 663.75 EUR respectively.

On 30 July 2004 the applicant was released.

#### 5. *The criminal proceedings against the applicant and against Mr K.*

On 22 October 1999 the Ravensburg District Court convicted the applicant of coercion (*Nötigung*) to the detriment of Mr K. and of having caused damage to property and sentenced him to a fine of 1,500 DEM. The sentence was partly based on Mr K.'s testimony.

On 26 October 2000 the applicant filed a request to re-open the criminal proceedings and to hear a further witness. On 25 May 2001 the Biberach District Court rejected the applicant's request as being inadmissible.

On 27 July 2001 the Ravensburg Regional Court rejected the applicant's complaint. The applicant alleged that he had unsuccessfully lodged a complaint with the Federal Constitutional Court. However, he was unable to submit a copy of the respective decision.

On 19 May 2000 the Ravensburg District Court acquitted Mr K. from the charge of having delivered false testimony in the proceedings against the applicant. In these proceedings, the applicant himself gave testimony as a witness. The applicant alleged that the presiding judge should have been excluded from the proceedings, because he and the accused were members of the same social club.

On 20 September 2000 the Public Prosecutor refused to open criminal proceedings against the presiding judge for perversion of justice.

On 14 November and 12 December 2000 respectively the General Public Prosecutor and the Baden-Württemberg Ministry of Justice rejected the applicant's complaints.

On 6 April 2001 the Federal Constitutional Court refused to entertain the applicant's complaint.

## **B. Relevant domestic law and practice**

### *1. The guarantee of family life under the Basic Law*

Article 6 of the Basic Law (*Grundgesetz*) reads as follows:

“(1) Marriage and the family shall enjoy the special protection of the state.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty...”

### *2. The provisions regulating adoption*

The statutory provisions on adoption are to be found in the Civil Code (*Bürgerliches Gesetzbuch*).

Section 1747 (2) of that law originally provided that a child born out of wedlock could be adopted by its mother or stepfather without the natural father's consent.

On 7 May 1995 the Federal Constitutional Court (*Bundesverfassungsgericht*) found that this provision violated the natural father's rights to the enjoyment of his family life as guaranteed by Article 6 § 2 (1) of the Basic Law insofar as it did not require the natural father's consent and did not allow to weigh the latter's interests.

On 1 July 1998 the Act Concerning the Reform of Childhood Rights (*Gesetz zur Reform des Kindschaftsrechts*) entered into force, which amended the relevant provisions on child adoption as follows:

Under section 1741 (1) the adoption of a child is permissible if it is in the interest of the child's well-being and if it can be expected that parent-child relations will develop between the person applying for the permission to adopt and the child. According to section 1746 (1), the child concerned must consent to the adoption. If the child is incapable of entering into legal transactions or under fourteen years of age, only the child's legal representative may give the necessary consent.

An adoption may only take place with the natural parents' consent (section 1747 (1)).

According to section 1748, the court, upon the child's request, shall substitute its consent for that of a parent in case of a gross and persistent failure to fulfil parental duties towards the child or in the case where a parent is indifferent towards the child if, in the absence of an adoption, the child would suffer a disproportionate disadvantage. If the child is born out of wedlock and the mother has sole custody pursuant to section 1626a (2), the competent court shall substitute the father's consent if the failure to adopt would cause the child to suffer a disproportionate disadvantage (section 1748 (4)).

Section 1626 a (2) provides that the mother of a child born out of wedlock exercises sole custody if no other agreement has been reached between the parents.

### 3. *The legal provisions on cost orders*

Section 104 of the Code of Civil Procedure (*Zivilprozessordnung*) provides that the first instance courts, upon request, issue a cost order fixing the legal expenses to be reimbursed by the unsuccessful party to the successful one.

The validity of the cost order depends entirely on the validity of the legal title it has been issued upon (*Kostengrundscheidungs*). The cost order may be enforceable even before the legal title becomes final.

If, however, the legal title is quashed in the course of further proceedings, the cost order becomes invalid without the need of any further judicial act and any sum of money which has already been paid has to be reimbursed.

### 4. *The law on the execution of decisions*

Section 758 of the Code of Civil Procedure provides that the bailiff is entitled to search the debtor's flat if this should be necessary for reasons of execution. If the debtor refuses the bailiff access to his flat, the court issues a search warrant (section 758a (1)).

Section 807 of the Code of Civil Procedure provides that a debtor is obliged to make an *affidavit* of his possessions under the condition that the execution proceedings have not led to the fulfilment of the legal title or that the debtor has opposed to the search of his flat.

On the basis of section 901, the court, following the creditor's request, can order the detention of a debtor who fails to render an *affidavit* of his possessions.

Section 902 provides that the debtor may, during detention, request the bailiff at any time to let him make the *affidavit*. The bailiff has to comply immediately. Following the *affidavit*, the debtor has to be released.

The detention must not exceed a period of six months (section 913).

## COMPLAINTS

1. The applicant complained under Article 8 of the Convention about the severing of the parental links to his natural son.

2. The applicant further complained under Article 6 § 1 of the Convention that the adoption proceedings were not in accordance with the law. He maintained, in particular, that section 1748 (4) of the Civil Code was not applicable to this case and that the proceedings aimed at substituting his consent had been instigated without a valid request.

Moreover, he maintained that the Federal Constitutional Court did not appear to be able to safeguard his rights within a reasonable time.

3. By letter to the Court of 6 February 2004 the applicant further complained under Article 14 of the Convention about the fact that section 1748 (4) of the Civil Code only applied to fathers, but not to mothers of children born out of wedlock.

4. The applicant complained under Articles 6 § 1 and 13 of the Convention about the cost orders issued against him, maintaining that these lacked a valid legal basis.

5. Under Article 8 of the Convention, the applicant complained about the search of his flat.

6. Invoking Articles 5 and 7 of the Convention, the applicant complained about his arrest and subsequent detention. He alleged that the execution proceedings had not been in accordance with the law, maintaining in particular that he had been unlawfully convicted to bear the costs of the adoption proceedings.

7. The applicant complained under Article 6 § 1 of the Convention about the domestic courts' refusal to re-open the criminal proceedings against him.

8. Invoking Article 6 § 1 of the Convention, the applicant complained that Mr K. had not been tried by an impartial tribunal.



## THE LAW

### *1. The complaints relating to the adoption proceedings*

The applicant complained that the decisions of the domestic courts to allow his natural child's adoption by Mr K. amounted to a breach of Article 8 of the Convention, the relevant part of which provides:

“1. Everyone has the right to respect for his...family life...

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.”

He alleged, in particular, that it was not necessary to sever all parental links to his natural son. He further complained under Article 6 § 1 of the Convention that the domestic proceedings were not conducted in accordance with the law.

He further maintained that the Federal Constitutional Court did not appear to be able to safeguard his rights under the Convention within a reasonable time.

The Court considers that it cannot, on the basis of the file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of it to the respondent Government.

### *2. The complaints relating to the cost orders*

The applicant further complained about the fact that the District Court, by cost orders of 12 and 19 September 2001, obliged him to reimburse his adversaries' expenses. He invoked Article 6 § 1 of the Convention, which, insofar as relevant, reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

The applicant alleged that the proceedings leading to the substitution of his consent had not been based on a valid request. He further maintained that he could not be held liable for the costs which were incurred as a consequence of the Federal Constitutional Court's decision of 7 May 1995.

The Court notes that a cost order merely serves to calculate the exact amount of expenses to be reimbursed by the unsuccessful party to the successful one. It depends entirely on the validity of the legal title it is based on. If the legal title is quashed, the cost order becomes invalid, without the need of any further judicial act.

Turning to the present case, the Court notes that the impugned cost orders were based on the decisions of the Ravensburg Regional Court of 16 March 2001 and of the Stuttgart Court of Appeal of 17 July 2001.

Nothing in the case-file indicates that the proceedings leading to the issue of the cost orders were in any way arbitrary. In particular, it is acceptable that the domestic courts did not allow the applicant to raise his complaints against the legal title as such during costs proceedings, because these complaints could be raised in the proceedings against the legal title itself. Accordingly, the proceedings aimed at the issue of the cost orders did not violate the applicant's right to a fair trial as guaranteed by Article 6 § 1.

The Court does not find that this complaint raises an issue under Article 13.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected in accordance with Article 35 § 4.

### *3. The complaints relating to the execution proceedings*

a) The applicant complained under Article 8 of the Convention about the Ravensburg District Court's order of 15 April 2002 entitling the bailiff to search his apartment.

The Court reiterates that in order to satisfy the requirements of Article 35 § 1 of the Convention, the applicant must have raised his complaints, at least in substance, in accordance with the formal requirements of domestic law before the national courts (see, among other authorities, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI). The Court notes that the applicant has not established that he has lodged a constitutional complaint against the search order. There is nothing to indicate that a constitutional complaint would not constitute an effective remedy in this specific case. It follows that this complaint has to be declared inadmissible for non-exhaustion of domestic remedies (Article 35 § 1).

b) The applicant complained about his arrest and subsequent detention. He invoked Articles 5 § 1 of the Convention, which, insofar as relevant, reads as follows:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(...)”

The applicant further invoked Article 7 of the Convention.

The Court considers that it cannot, on the basis of the file, determine the admissibility of this complaint and that it is therefore necessary, in accordance with Rule 54 § 3 (b) of the Rules of Court, to give notice of it to the respondent Government.

*4. The complaints relating to the criminal proceedings*

As regards the applicant's complaints relating to his own criminal proceedings as well as those directed against Mr K., the Court, in the light of all the material in its possession, finds that the matters complained of do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

For these reasons, the Court unanimously

*Decides* to adjourn the examination of the applicant's complaints concerning the adoption proceedings and his arrest and subsequent detention;

*Declares* the remainder of the application inadmissible.

Vincent BERGER  
Registrar

Boštjan M. ZUPANČIČ  
President