



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

SECOND SECTION

CASE OF BATTISTA v. ITALY

(Application no. 43978/09)

JUDGMENT

STRASBOURG

2 December 2014

FINAL

02/03/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Battista v. Italy,

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

Işıl Karakaş, *President*,

Guido Raimondi,

András Sajó,

Nebojša Vučinić,

Helen Keller,

Egidijus Kūris,

Robert Spano, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 4 November 2014,

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

PROCEDURE

1. The case originated in an application (no. 43978/09) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr Alessandro Battista (“the applicant”), on 6 August 2009.

2. The applicant was represented by Mr A. Battista, a lawyer practising in Naples. The Italian Government (“the Government”) were represented by their Agent, Ms E. Spatafora.

3. On 11 April 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1967 and lives in Naples.

5. While he was in judicial separation proceedings from his wife (D.L.), a provisional residence order was issued to both parents in respect of the couple’s two children (G.L. and M.T.).

6. On 29 August 2007 the applicant asked the guardianship judge to issue him with a new passport, requesting that the name of his son, G.L., also be entered in it. His former wife objected, arguing that the applicant was not making the maintenance payments ordered by the president of the court at the time of the judicial separation.

7. By a decree of 18 September 2007, the guardianship judge rejected the applicant's request, holding that it was inappropriate to issue the requested passport, given the imperative of protecting the children's right to receive the maintenance payments. In this regard, he emphasised that the applicant, who was supposed to make a maintenance payment of 600 euros (EUR) per month, paid only a small amount (EUR 45 to 90) and that there was a risk that he would shirk his obligation completely if he were to travel abroad.

8. By a decision of 26 October 2007, the guardianship judge ordered that M.T.'s name be removed from the applicant's passport.

9. On 31 October 2007 the Naples Police Commissioner (*questore*) ordered the applicant to hand in his passport to the police station and amended his identity card, making it invalid for foreign travel.

10. The applicant appealed to the Naples Court against the guardianship judge's decision. He alleged that:

- under the measures ordered by the president of the court at the time of the judicial separation, the children had been due to spend the period of 10 to 26 August, during the school holidays, with him; on that basis, he had planned to take them to Sicily by plane; however, this required that the names of his two children be included in his passport;
- on account of his former wife's objection and the guardianship judge's decree, he and his children had been unable to go on holiday;
- the children's names were included in the mother's passport;
- the dismissal of his request amounted to a penalty that was not prescribed by law.

11. On 7 February 2008 the applicant asked the Naples guardianship judge to issue him with a new passport, explaining that his former wife had retained his identity card and his passport in the family home.

12. By a decree of 29 February 2008, the Naples guardianship judge dismissed the applicant's request on the ground that he had not paid the maintenance sums due in respect of his children, and that it was to be feared that he was leaving the country only in order to evade his obligation entirely.

The applicant also appealed against that decision to the Naples Court, alleging a breach of his right to freedom of movement.

13. By a decision of 5 February 2009, the Naples Court joined the appeals and dismissed them. The court noted, firstly, that the legal basis for the guardianship judge's decision was Law no. 1185 of 21 November 1967, as amended by the Passports Act 2003 (Law no. 3).

14. The court found that the guardianship judge did indeed have jurisdiction to rule on the applicant's request for a passport and on the inclusion in it of his son's name. As to the merits of the appeal, the court noted that the applicant was not complying with his obligation to pay maintenance and that this circumstance was one of the lawful grounds for

refusing to issue a passport, in the children's interests, in accordance with section 12 of the Passports Act.

15. On 4 November 2008 D.L. was ordered to pay a fine of EUR 100 for failing to bring the children to an appointment with the applicant.

16. By a decree of 8 April 2009, the guardianship judge issued D.L., at her request, with a passport in which the names of the two children were included.

17. On 21 August 2012 the applicant asked the Naples guardianship judge to issue individual passports to his children, in application of Legislative Decree no. 135 of 2009.

18. D.L. objected, arguing that the children did not need these passports; that the applicant had made no maintenance payments since 2007; and that, indeed, criminal proceedings were pending in that regard.

19. By a decision of 3 October 2012, the guardianship judge rejected the applicant's request. He considered that the proceedings for the separation of the applicant and D.L. were still pending and that, in the light of the considerations put forward by D.L., with whom the children resided, it was appropriate to stay any issue of passports to the children. The applicant did not appeal against that decision.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

20. Law no. 1185 of 21 November 1967, as amended by the Passports Act 2003 (Law no. 3), provides:

Section 3

"A passport cannot be delivered:

(a) to children who are subject to parental authority, where the parents do not consent, or, in the absence of parental authority, where the guardianship judge does not consent;

(b) to parents of minor children, in the absence of authorisation by the guardianship judge. Such authorisation shall not be necessary if consent has been given by the other parent, or if one of the two parents has sole custody...

Section 12

A passport may be withdrawn from a person who is abroad and is unable to prove that he or she has made maintenance payments as ordered by a court decision in respect of his or her minor children..."

21. In practice, there are two exceptions in which a passport may nonetheless be issued: where the person concerned has shown the necessity for medical care in another country, or where he or she must travel abroad for professional reasons.

22. Legislative decree no. 135 of 2009 made it obligatory for minor children to hold individual passports. Since 25 November 2009 it has

therefore no longer been possible to include minor children on their parents' passports. Entries made prior to that date remain valid, in accordance with the arrangements provided for in the legislation then in force. The validity of minor children's passports varies depending on the child's age: three years from children aged under three, and five years for children aged from three to eighteen.

23. Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations proposes a series of measures aimed at facilitating the payment of maintenance claims in cross-border situations.

24. The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance establishes a system of administrative cooperation between the authorities of the Contracting States and a system for the recognition and enforcement of maintenance decisions and agreements.

25. The New York Convention on the Recovery Abroad of Maintenance was adopted and opened for signature on 20 June 1956 by the United Nations Conference on Maintenance Obligations, convened pursuant to Resolution 572 (XIX) of the United Nations Economic and Social Council, adopted on 17 May 1955.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 4 TO THE CONVENTION

26. The applicant complained of an interference with his private life and his freedom of movement. In particular, he alleged that there was no statutory rule preventing parents who did not make maintenance payments from holding a passport or from having their children's names added to it.

He relied on Article 2 of Protocol No. 4 to the Convention, which provides:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

27. The Government contested the applicant’s arguments.

A. Admissibility

28. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

29. The applicant submitted that there was no legal basis for the authorities’ refusal to issue him with a passport. In particular, he argued that he had never been convicted for a violation of the obligations to assist one’s family (*violazione degli obblighi di assistenza familiare*), an offence punishable under Article 570 of the Criminal Code, and that no court had convicted him for failure to pay the sums due in maintenance. He also submitted that he had no criminal record.

30. The Government pointed out that Article 16 of the Constitution provided that the freedom of a citizen to leave the territory of the Republic was subject to compliance with the obligations provided for law.

31. They further considered that the interference in the applicant’s right was specifically provided for by law, namely section 3 (a) and (b) of Law no. 1185 of 1967, and explained that it was intended to protect the children: it was intended to ensure that the applicant made his maintenance payments and to prevent the commission of an offence. In the Government’s opinion, this interference met the criterion of being “necessary in a democratic society”, especially in the light of the Court’s case-law on unpaid debts.

32. In this connection, the Government pointed out that the Naples Court had decided to transmit its decision of 22 October 2008 to the public prosecutor, in order to establish whether a judicial investigation could be opened for a violation of the obligations to assist one’s family, an offence punishable under Article 570 of the Criminal Code.

33. The Government indicated that the Constitutional Court, in its judgment no. 464 of 1997, had stated that the essence of the relevant section of Law no. 1185 of 1967 was “to ensure that the parent fulfils his or her obligations towards his or her children”.

They added that, under the Court of Cassation’s case-law, the guardianship judge’s decision in this area was a measure of “non-

contentious proceedings”, that is, it was not intended to settle a conflict between the parents’ subjective rights in a final manner.

34. The Government referred to the Court’s case-law on restrictions on freedom of movement in situations involving pending criminal trials, bankruptcy or violations of obligations with regard to military service.

2. The Court’s assessment

35. The Court observes at the outset that the present case raises a novel issue, in that it has not previously had occasion to consider measures restricting the freedom to leave a country on account of the existence of particularly significant debts to a third party, such as maintenance payments.

36. In previous cases examined under Article 2 of Protocol No. 4, the Court or the former European Commission of Human Rights considered such bans imposed in connection with, for example:

- pending criminal proceedings (see *Schmidt v. Austria*, no. 10670/83, Commission decision of 9 July 1985, Decisions and Reports (DR) 44, p. 195; *Baumann v. France*, no. 33592/96, ECHR 2001-V; *Földes and Földesné Hajlik v. Hungary*, no. 41463/02, ECHR 2006-XII; *Sissanis v. Romania*, no. 23468/02, 25 January 2007; *Bessenyei v. Hungary*, no. 37509/06, 21 October 2008; *A.E. v. Poland*, no. 14480/04, 31 March 2009; *Iordan Iordanov and Others v. Bulgaria*, no. 23530/02, 2 July 2009; *Makedonski v. Bulgaria*, no. 36036/04, 20 January 2011; *Pfeifer v. Bulgaria*, no. 24733/04, 17 February 2011; *Prescher v. Bulgaria*, no. 6767/04, 7 June 2011; and *Miażdżyk v. Poland*, no. 23592/07, 24 January 2012);
- enforcement of criminal sentences (see *M. v. Germany*, no. 10307/83, Commission decision of 6 March 1984, DR 37, p. 113);
- the criminal conviction of the applicant, until such time as he had been rehabilitated (see *Nalbantski v. Bulgaria*, no. 30943/04, 10 February 2011);
- pending bankruptcy proceedings (see *Luordo v. Italy*, no. 32190/96, ECHR 2003-IX);
- refusal to pay customs penalties (see *Napijalo v. Croatia*, no. 66485/01, 13 November 2003);
- failure to pay taxes (see *Riener v. Bulgaria*, no. 46343/99, 23 May 2006);
- failure to pay judgment debts to private persons (see *Ignatov v. Bulgaria*, no. 50/02, 2 July 2009; *Gochev v. Bulgaria*, no. 34383/03, 26 November 2009; and *Khlyustov v. Russia*, no. 28975/05, 11 July 2013);
- knowledge of “State secrets” (see *Bartik v. Russia*, no. 55565/00, ECHR 2006-XV);
- failure to comply with military service obligations (see *Peltonen v. Finland*, no. 19583/92, Commission decision of 20 February 1995, DR 80-A, p. 38, and *Marangos v. Cyprus*, no. 31106/96, Commission decision of 20 May 1997, unpublished);

- mental illness of the person concerned, coupled with a lack of arrangements for appropriate care in the destination country (see *Nordblad v. Sweden*, no. 19076/91, Commission decision of 13 October 1993, unpublished);
- court orders prohibiting minor children from being removed to a foreign country (see *Roldan Texeira and Others v. Italy* (dec.), no. 40655/98, 26 October 2000, and *Diamante and Pelliccioni v. San Marino*, no. 32250/08, 27 September 2011);
- ban prohibiting a Bulgarian from leaving the territory of Bulgaria for two years on account of breaches of the immigration laws of the United States (see *Stamose v. Bulgaria*, no. 29713/05, ECHR 2012).

The Court considers that in spite of the differences between those cases and the present case, the principles laid down in them are also applicable here.

37. Article 2 § 2 of Protocol No. 4 guarantees to any person the right to leave any country for any other country of that person's choice to which he or she may be admitted. The domestic courts' refusal to issue the applicant with a passport and the decision to invalidate his identity card for foreign travel constituted an interference with that right (see the decision in *Peltonen*, cited above, p. 43, and the above-cited judgments in *Baumann*, §§ 62-63; *Napijalo*, §§ 69-73; and *Nalbantski*, § 61). It must therefore be determined whether that interference was "in accordance with law", pursued one or more of the legitimate aims set out in Article 2 § 3 of Protocol No. 4, and whether it was "necessary in a democratic society" for the achievement of such an aim.

38. With regard to the lawfulness of the measure, the Court reiterates its settled case-law according to which the expression "in accordance with law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (see *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V). In order for the law to meet the criterion of foreseeability, it must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice – to regulate their conduct.

39. As the Government have emphasised, the interference was based on section 12 of the Passports Act 1967 (Law no. 1185 of 21 November 1967), as amended by Law no. 3 of 2003, regard being had to the fact that the applicant was failing to make the maintenance payments which he was required to pay for his children. The interference thus clearly had a legal basis in national law. In this regard, the Court also notes that the Constitutional Court, in its judgment no. 464 of 1997, stated that the essence of the relevant section of Law no. 1185 of 1967 is to "to ensure that the parent fulfils his or her obligations towards his or her children".

40. The Court also considers that the imposition of the impugned measure was intended to guarantee the interests of the applicant's children and that in principle it pursued a legitimate aim, namely the protection of the rights of others – in the present case, the children's right to receive the maintenance payments.

41. With regard to the proportionality of a restriction imposed on account of unpaid debts, the Court reiterates that such a measure is justified only so long as it furthers the pursued aim of guaranteeing recovery of the debts in question (see *Napijalo*, cited above, §§ 78 to 82). Furthermore, even were it justified at the outset, a measure restricting an individual's freedom of movement may become disproportionate and breach that individual's rights if it is automatically extended over a long period (see *Luordo*, cited above, § 96, *Földes and Földesné Hajlik*, cited above, § 35).

42. In any event, the domestic authorities are under an obligation to ensure that a breach of an individual's right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in view of the circumstances. They may not extend for long periods measures restricting an individual's freedom of movement without regular re-examination of their justification (see *Riener*, cited above, § 124, and *Földes and Földesné Hajlik*, cited above, § 35). Such review should normally be carried out, at least in the final instance, by the courts, since they offer the best guarantees of the independence, impartiality and lawfulness of the procedures (see *Sissanis v. Romania*, no. 23468/02, § 70, 25 January 2007). The scope of the judicial review should enable the court to take account of all the factors involved, including those concerning the proportionality of the restrictive measure (see, *mutatis mutandis*, *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, § 60, Series A no. 43).

43. Turning to the circumstances of the present case, the Court notes that the applicant has not had a passport or an identity card which is valid for foreign travel since 2008. It notes that he was refused a passport or an identity card which was valid for foreign travel on account of failure to make maintenance payments. The domestic courts (see paragraphs 11-12 above) emphasised that the applicant had not made the required maintenance payments in respect of his children, and that there was a risk that he would make no further payments if he travelled abroad.

44. As shown by the documents in the case file, and especially the relevant domestic decisions, the national courts did not consider it necessary to examine the applicant's personal situation or his ability to pay the amounts due, and applied the impugned measure automatically. There seems to have been no attempt to balance the rights at stake. The only factor taken into consideration was the property interests of the maintenance recipients.

45. Moreover, the Court notes that there has been civil-law cooperation at European and international level on the issue of the recovery of

maintenance payments. It points out that there exist methods for obtaining recovery of debts outside national boundaries, in particular Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, and the New York Convention on the Recovery Abroad of Maintenance. Those instruments were not taken into account by the authorities when applying the impugned measure. They had merely emphasised that the applicant could have travelled abroad using his passport and thus succeeded in evading his obligation.

46. The Court further observes that, in the present case, the restriction imposed on the applicant did not ensure payment of the sums due in maintenance.

47. Accordingly, it considers that the applicant was subjected to measures of an automatic nature, with no limitation as to their scope or duration (see *Riener*, cited above, § 127). In addition, the domestic courts have not carried out any fresh review of the justification for and proportionality of the measure, having regard to the circumstances of the case, since 2008.

48. In the light of the foregoing, the Court does not consider that the automatic imposition of such a measure for an indeterminate period without any regard to the individual circumstances of the person concerned can be described as necessary in a democratic society.

49. It follows that there has been a violation of Article 2 of Protocol No. 4.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

50. The applicant alleged that the refusal to issue him with a passport amounted to interference with his right to respect for his private life as guaranteed by Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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.”

51. The Court notes that this complaint, as put to it by the applicant, is closely linked to the complaint under Article 2 of Protocol No. 4, examined above, and must likewise be declared admissible.

52. Having regard to its conclusions under Article 2 of Protocol No. 4 (see paragraphs 48 and 49 above), the Court does not consider it necessary to examine it separately.

III. OTHER ALLEGED VIOLATIONS

53. The applicant alleged that the mother of his children received preferential treatment in that, unlike him, she had been able to have the children's names entered on her passport, a fact which, he submitted, was in breach of Article 5 of Protocol No. 7 to the Convention.

54. The Court notes at the outset that the applicant has failed to substantiate this complaint. In so far as it raises a separate issue from that examined above and in so far as it has jurisdiction to examine the allegations, the Court has not found any appearance of a breach of the rights and freedoms guaranteed by the Convention. Accordingly, it declares this complaint inadmissible.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed EUR 30,000 in respect of the non-pecuniary damage that he alleged he had sustained, on his own behalf and on behalf of his children, as a result of the fact that it was impossible to travel abroad.

57. The Government contested this claim. They considered that the amount claimed was, in any event, excessive and that it did not correspond to the criteria used by the Court.

58. The Court considers it appropriate to award the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

59. The applicant also claimed EUR 20,000 for the costs and expenses incurred before the domestic courts and before the Court, without however submitting any supporting documents.

60. The Government considered this sum excessive and submitted that the applicant had not shown that the alleged costs and expenses had been necessary and reasonable.

61. According to the Court's 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 and are reasonable as to quantum. In the present case, noting that the applicant did not produce any documents in support of his claims, the Court decides not to award any sum under this head.

C. Default interest

62. The Court considers it appropriate that the default interest rate 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. *Declares*, unanimously, the application admissible in respect of the complaints under Article 2 of Protocol No. 4 to the Convention and Article 8 of the Convention;
2. *Declares* by a majority, the remainder of the application inadmissible;
3. *Holds*, unanimously, that there has been a violation of Article 2 of Protocol No. 4 to the Convention;
4. *Holds*, unanimously, that there is no need to examine the complaint under Article 8 of the Convention;
5. *Holds*, unanimously,
 - (a) that the respondent State is to pay the applicant, within three months from 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 non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 2 December 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Deputy Registrar

Işıl Karakaş
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the statement of dissent of Judge Kūris is annexed to this judgment.

A.I.K.
A.C.

STATEMENT OF DISSENT BY JUDGE KŪRIS

I voted against points 2 and 6 of the operative part of the judgment. In my opinion, the issue touched upon in paragraphs 53 and 54 of the judgment merits scrutiny under Article 5 of Protocol No. 7 to the Convention. Consequently, this part of the application should have been declared admissible.