

European Law Moot Court Competition 2013-2014

Case M-564/13

Spyridon and others

v

Minister for Immigration and Naturalisation and

Director-General of Healthcare

1. The Principality of Brandoa is a small EU Member State which has withstood several foreign invasions over the last 100 years. Throughout the century, the Catholic Church played a very important part in the Brandoan story, both religiously and politically, and the catholic faith is hence deeply embedded in national culture and beliefs. Essentially service-based, the Brandoan economy has been particularly vulnerable in the context of the economic crisis of the last decade, and it continues to face complex budgetary challenges.
2. David Michael, a (male) Brandoan national, was married to Katya Yvana from 1997 until her untimely death in 2003. There was a child of the marriage, Jefferson Wellerson, he too a Brandoan citizen, born in early 2003. Jefferson Wellerson suffers from Down's syndrome and was later diagnosed with a hypothyroidism condition and a hypertrophic cardiomyopathy, both of which stem from the syndrome.
3. Shortly after being widowed, David Michael migrated with his son to the neighbouring Grand Duchy of Moita, an EU Member State with a more dynamic economy and more progressive society than Brandoa, where he established a business. In 2004 he met Spyridon, a (male) national of the Federal Republic of Rebordosa, a non-EU Member State. After dating for some time they decided to marry. Moitan law allows same-sex marriage, as well as step-parental adoption for same-sex couples, so long as, according to Moitan family law and reflecting Moitan private international law, the intended spouses are, and/or the intended adoptive parent is (as the case may be), habitually resident in Moita. Following their marriage, Spyridon therefore adopted Jefferson Wellerson and is now legally recognised in Moita as his parent.
4. Jefferson Wellerson has no recollection of his mother. As far back as he can remember he has called Spyridon 'Dad' and recognises him as a father, exactly as he does David Michael.
5. In 2007 David Michael was tempted back home to Brandoa, together with his spouse and son, by an attractive job offer in Mont St. Bleck, the capital city. Once settled, Spyridon decided to pursue doctoral studies at a local university.

6. Immediately upon arrival in Mont St. Bleck Jefferson Wellerson began treatment at the (public) Hospital of St. Benedicta with a view to controlling the manifestations of his condition's symptoms.
7. However, a year later Dr. Rita Danai, the physician in charge of Jefferson Wellerson's treatment, moved to Moita, where she joined a private clinic dedicated to the treatment of health issues related to Down's Syndrome called the *Down's Syndrome Treatment Centre*.
8. Both David Michael and Spyridon had complete faith in Dr. Rita Danai and the work she had done with Jefferson Wellerson in Brandoa. Jefferson Wellerson himself had become very attached to her. Although domiciled in Brandoa, it was for them a natural choice to continue Jefferson Wellerson's treatment with Dr. Rita Danai, for which purpose he travelled regularly to her clinic in Moita. Pursuing studies in a Ph.D. programme and so able to manage his time more flexibly, it was Spyridon who normally accompanied him on these trips. David Michael's private health insurance covered the costs of treatment, as well as the travel and accommodation expenses of the accompanying person.
9. In February 2010, owing to complications in his treatment, Jefferson Wellerson was hospitalised and required to remain in Moita. Spyridon stayed there with him, David Michael visiting for short periods throughout the year which followed. Only in mid-March 2011 was Jefferson Wellerson released from hospital treatment and allowed to return to Brandoa.
10. In 2013 Spyridon decided to apply for a permanent residence permit from the Brandoan authorities. The national legislation implementing Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States is Decree n. 1/2005. The relevant provisions are as follows:

Article 36

1. A permanent residence permit shall be issued to a European Union citizen who:

- has resided legally for at least five consecutive years in the territory of the Principality;*
- has become integrated into the community; and*
- has the financial means necessary to sustain livelihood.*

2. The same shall apply to ascendants and descendants until the third degree, to siblings, as well as to the wife or husband of the European Union citizen.

3. Paragraph 2 shall apply even if those mentioned therein are citizens of a non-European Union country.

Article 37

1. Absences from the territory of the Principality of up to six consecutive months shall not affect the acquisition of rights under Article 36.

2. Absences of longer than six months can be justified only in the performance of compulsory military service, by serious illness of the absent person or by issues related to pregnancy.

11. Owing to his trips accompanying Jefferson Wellerson to his treatment in the Moitan clinic Spyridon was abroad for several periods, and, on the occasion of his son's term of hospitalisation, for more than a year. Whilst recognising that the reasons for being away were indeed 'serious illness', the Brandoan authorities nevertheless contend that Spyridon was not the ill person addressed in article 37(2) and that the legislation does not extend the privilege to people accompanying the patient, irrespective of whether the latter is a minor.
12. What is more, the Brandoan Civil Code does not allow same-sex marriage, or step-parent adoption by same-sex couples. In this it has the overwhelming support of the Brandoan people. Indeed, in a 2009 referendum on whether same-sex marriage and step-parent adoption by same-sex couples should be legalised, more than 70 percent of the population voted against. The relevant provisions of the Civil Code state still the following:

Article 1654

Marriage is a solemn contract between two persons of opposite sex who wish to unite and form a family.

....

Article 1970

Same-sex partners may not jointly adopt children, nor may a same-sex partner adopt his or her partner's biological child.

13. Because Spyridon is acknowledged as a family member of neither David Michael nor Jefferson Wellerson, and so falls outwith the scope of article 36(2) of Decree n. 1/2005, he was denied a permanent residence permit.
14. Spyridon brought an action against the Minister for Immigration and Naturalisation before the Administrative Court of Mont St. Bleck, claiming discrimination against him and his husband on grounds of sexual orientation, that the refusal to acknowledge the legality of their union is a violation of his fundamental rights in light of both the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. Spyridon submits that he should be duly recognised as a lawful spouse, for his marriage to David Michael is perfectly legal in both Moita, where it was celebrated, and

Rebordosa, his country of origin. He thus claims that his treatment constitutes a breach of his right of free movement, entails discrimination of their status as a couple, and is, moreover, contrary to the general principle of non-discrimination on grounds of sexual orientation.

15. He submits further that the refusal of a host Member State to recognise co-adoption cannot be permitted to hinder of the right of Jefferson Wellerson, a European Union citizen, to have his parents, especially his primary carer, with him. He argues that, although not his biological father, it was he who accompanied Jefferson Wellerson throughout his lengthy treatments, and the emotional bond thus created, particularly important for a child with his condition, cannot be compromised. He considers therefore that Jefferson Wellerson's fundamental rights are also violated, as is the right of David Michael to have his family with him.
16. In October 2013, David Michael's health insurance was terminated. For Jefferson Wellerson's treatments to continue, his parents relied upon Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare. As the directive had not yet been transposed by Brandoa, they had recourse to the procedure set out in Decree n. 177/92, the applicable national legislation then in force. According to its most relevant provisions:

Article 7

- 1. Brandoan residents may seek treatment abroad, the costs to be met by the Treasury of the Principality, only where they require specialised healthcare which is not provided within the Brandoan National Health Service.*
 - 2. A request for authorisation for healthcare to be provided abroad must be submitted to the Director-General of Healthcare, accompanied by a medical report and a reasoned estimate of expected cost.*
 - 3. The request shall be approved only if the institution at which the healthcare is to be provided provides high quality healthcare and its cost does not jeopardise the financial sustainability of the National Health Service.*
 - 4. Private healthcare institutions which do not hold a certificate of equivalency issued by a competent authority of their host Member State attesting that the quality of the care they provide is comparable to that available in public institutions are excluded from the present article.*
 - 5. No decision of the Director-General of Healthcare may be the subject of a challenge before an administrative court of the Principality unless it has first been appealed to the Minister of Healthcare, who is afforded a period of six months in which to determine that appeal.*
17. On 26 October 2013, David Michael and Spyridon submitted a request for authorisation for healthcare to be provided Jefferson Wellerson at the *Down's Syndrome Treatment Centre*, together with a medical report and a provisional budget. According to the estimate, the total cost of care would be some

€400,000.00. Four days later they were notified by the Director-General of Healthcare that the request was refused. Four reasons were given:

- a) *The proposed treatment is available in the Principality of Brandoa, there is therefore no need to seek it abroad.*
- b) *The proposed treatment is to be provided by a private institution which lacks a certificate of equivalency, and which is therefore explicitly excluded from Decree n. 177/92.*
- c) *The same treatment in the Principality of Brandoa costs €40,000.00, which is a tenth of the estimated cost in the Grand Duchy of Moita. Approving this treatment, or any like it, would jeopardise the sustainability of the Brandoan National Health Service.*
- d) *There is no guarantee that the Down's Syndrome Treatment Centre in Moita provides high quality healthcare.*

18. David Michael and Spyridon take the view that the decision, as well as the legal machinery of Decree n. 177/92, violate both the freedom to provide services (article 56 TFEU) and Directive 2011/24, in particular articles 3(a), (g) and 7 to 9 thereof. Moreover the decision violates article 9 TFEU, articles 24, 26 and 35 of the Charter of Fundamental Rights of the European Union, and articles 7 and 25 of the UN Convention on the Rights of People with Disabilities of 13 December 2006 (to which both the Principality of Brandoa and the Grand Duchy of Moita are party).

19. They decided to challenge the decision of the Director-General of Healthcare before the Administrative Court of Mont St. Bleck immediately, without first appealing to the Minister of Healthcare. Alongside the abovementioned grounds they take the view that article 7(5) of Decree n. 177/92 violates the right to effective judicial protection, set out in article 47 of the Charter of Fundamental Rights, for two reasons: first, it establishes a special rule different from the general regime applicable to all other national acts – according to which any administrative decision is subject to judicial review without the precondition of an administrative appeal; and secondly, the 6 month waiting period, during which time stands still and no expedited procedure to be used in cases of urgency is available, constitutes excessive delay.

20. Because Spyridon is a petitioner in both cases and because in Brandoan constitutional law the various executive branches of government are indivisible, the President of the Mont St. Bleck Administrative Court ordered that the cases against the Minister for Immigration and Naturalisation and the Directorate-General of Healthcare be joined.

21. Having heard submissions from all parties, on 15 November 2013 the Administrative Court referred the following questions to the Court of Justice seeking a preliminary ruling under article 267 TFEU:

- 1. Is a third-country national considered to be a “family member” for the purposes of article 16(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 under circumstances such as those at issue in the main proceedings in which:**
 - a. he or she is lawfully married to a citizen of the Union under the law of a Member State other than that in which the application for permanent residence is submitted,**
 - b. he or she has lawfully adopted a citizen of the Union under the law of a Member State other than that in which the application for permanent residence is submitted, and neither the marriage nor the adoption is allowed or recognised in the latter Member State?**
 - 2. If the answer to question 1a or question 1b is in the affirmative, is article 16(3) of Directive 2004/38 to be interpreted as including a temporary absence of a third-country national of a maximum of twelve consecutive months for the purpose of accompanying a minor citizen of the Union adopted by the third-country national under the law of a Member State other than that in which the application for permanent residence is submitted, for the treatment of a ‘serious illness’ of this citizen of the Union, where the third-country national is the minor citizen’s primary carer?**
 - 3. Are articles 3(a), (g) and 7 to 9 of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare, article 56 TFEU, article 9 TFEU and articles 24, 26 and 35 of the Charter of Fundamental Rights of the European Union to be interpreted as precluding legislation of a Member State such as that at issue in the main proceedings which allows cross-border healthcare (i) only for treatment not available in the Member State of affiliation, (ii) excludes from its scope private healthcare institutions which do not have a certificate of equivalency, (iii) establishes a unilateral evaluation of the quality of care in the Member State of treatment, and (iv) balances it in general with the financial sustainability of the Member State of affiliation’s National Health Service?**
 - 4. Is article 47 of the Charter of Fundamental Rights to be interpreted as precluding a requirement that a national decision implementing European Union law must be appealed before a Minister, who then has six months to determine the appeal, before it may be challenged before a court of law?**
22. The order for reference was received by the Registrar of the Court, who assigned it case number M-564/13. In accordance with article 23 of the Statute of the Court, the Registrar notified Spyridon (as applicant against the Minister

for Immigration and Naturalisation), Spyridon and David Michael (applicants in their own names and acting on behalf of JW (a Minor)) against the Director-General of Healthcare), and the Minister for Immigration and Naturalisation and the Director-General for Healthcare (as the respective defendants). Observations are invited, on behalf of both the applicants and defendants, to be received by the Court by 30 November 2013.