

**The 3rd European Human Rights Moot Court Competition 2014/2015**

**ELSA in Cooperation with the Council of Europe**

**“CASE OF B.N. and K.N. v. THE UTOPIN REPUBLIC”**

1. The applicant, B.N., is a Foretian national born in 1982 and residing in Utopolis, the capital of the Utopin Republic. She is the partner of K.N., on whose behalf she is also complaining.
2. K.N. is a Utopin national, born in 1980 and living in Utopolis. She is currently in a permanent vegetative state following a road accident.
3. The two applicants entered into a lesbian relationship in 2008 and married in 2010 in Foretia, although their marriage could not be recognised in the Utopin Republic as the law considers marriages to be between a man and a woman.
4. Both countries became members of the Council of Europe and ratified the European Convention on Human Rights in 1998. Since then, they have also ratified all existing Protocols to the Convention.
5. In July 2012, the two applicants decided to have a child and for this purpose initiated procedures to have in-vitro fertilisation conducted on B.N., with K.N.’s eggs and donor sperm. The procedure to have the fertilised eggs implanted into B.N. was scheduled for 25 November 2012. However, on 20 November the applicants were involved in a road accident in which K.N. suffered severe injuries. She was put on life support and in July 2014 she was declared as being in a permanent vegetative state; B.N. had minor injuries and was released from hospital 15 days later.
6. The eggs, which had been fertilised before the accident, were preserved in the clinic’s facilities.
  - A. Proceedings related to the situation of the fertilised eggs
7. Following the accident K.N.’s family, who strongly disapproved of her relationship and cut most ties with her because of it, asked the clinic, in the name of their daughter, to destroy the fertilised eggs. The clinic refused to do so and the parents filed for a motion in court against the clinic.
8. On 10 December 2012, the Utopolis First Instance Court, acknowledging K.N.’s critical state and the status of her parents as legal guardians in this situation, granted the motion and ordered the clinic to destroy the fertilised eggs.

9. On the same day, B.N. was informed by the clinic of the order and filed for an injunction to stay the execution, contesting the parents' authority to request the destruction of the fertilised eggs.
10. On 15 December 2012, the Utopolis First Instance Court granted the injunction until 15 January 2013, when the hearing to assess the merits regarding the authority claim was set.
11. At that latter date, the applicant announced to the court that she wished to withdraw her claim as void, because the fertilised eggs were no longer in the possession of the clinic.
12. Consequently, the order to destroy the fertilised eggs was served on the clinic, which announced that the material was no longer in their possession, without giving further information.
13. The parents introduced a complaint for theft, asking the authorities to investigate the disappearance of their daughter's fertilised eggs. Following rumours to the effect that the applicant had carried on with the insemination procedure during the period that the order to destroy the fertilised eggs was stayed, they accused the applicant of the crime and joined a claim for damages against her.
14. By a decision of the prosecutor's office of 30 June 2013, it was established that the implantation had been performed on 22 December 2012, based on the prior consent of both B.N. and K.N. and before an enforceable order of destruction had been served on the clinic; that there was a signature of the applicant K.N. authorising the harvesting of her eggs in order for them to be fertilised and later implanted into B.N. (the procedure that was scheduled to be carried out but which had to be adjourned because of the accident both applicants were involved in); that the eggs had duly been harvested and fertilised before being frozen; that there was no indication that the applicant K.N. had had any doubts as to her commitment to the procedure and that it was her who had paid the costs of it; that her parents, although having authority to act in her name, did so without regard to her wishes and engagements prior to the accident; that the relationship between the parents and K.N. had deteriorated because of their constant opposition to her relationship with B.N.; that there was no specific order for the clinic not to carry on with the insemination (the initial order having as object the destruction of the fertilised eggs exclusively and was anyway not enforced at the time of the insemination). In light of this, the prosecutor decided to close the case on the ground that the facts did not constitute the crime of theft.
15. The parents complained against the prosecutor's decision before the First Instance Court.
16. By a judgment of 30 December 2013, the domestic court confirmed the findings of the prosecutor.
17. Following an appeal by the parents, by a final decision of 15 April 2014, the Utopolis Court of Appeal overturned the judgment of 30 December and after reassessing the facts found that, although the elements of the case were not sufficiently solid to constitute a theft, they could nevertheless constitute the offence of disrespecting a court order and

ordered the applicant to pay a fine of 15000 utopis (about 5000 euros) and damages in the amount of 30000 utopis (about 10000 euros) for having proceeded with the

insemination despite the explicit retraction of K.N.'s will in this regard, done by the parents in her name, and the subsequent injunction of the court.

18. The fine in the equivalent of 5000 Euros was executed. The execution proceedings for the damages in the amount of 10000 Euros have not been instituted to date.

#### B. Proceedings related to maternity

18. On 20 September 2013, B.N. gave birth to twins. Their birth certificates showed her as the mother and no name given for the father.
19. On 21 September 2013, K.N.'s parents brought proceedings against B.N. seeking recognition of their daughter's status as the biological mother of the twins and asking the court to give them the legal guardianship of the children.
20. B.N. contested the authority of the parents to act on K.N.'s behalf, since she and K.N. had a valid marriage certificate issued by the Foretian authorities, but which could not be registered in the Utopin Republic because the law did not provide legal recognition of same-sex marriages. She joined a claim for recognition of her status as legal guardian in the interests of K.N.
21. By a judgment of 20 March 2014, the Utopolis First Instance Court dismissed the action brought by the parents; the judge founded his decision on the fact that under the provision of the Utopin Civil Code, motherhood was established through the fact of birth, and in line with the Roman law principle regarding the certainty of the mother (*mater semper certa est*), since there was no discrepancy between the person listed as mother in the twins' certificates and the one having given birth to them, an action for challenging maternity could not stand as substantiated. Moreover, there was no surrogacy contract concluded between K.N. and B.N., and even if there had been, such contract would have been null, because it was not regulated by law.
22. With regard to the applicant's request for guardianship for K.N. based on the marriage certificate issued abroad, the judge stated that since in the Utopin Republic same-sex marriages were not recognised, there was no link between her and K.N., and therefore such a request could not be granted. The domestic court concluded that the sole purpose of this request was eventually to preserve the guardianship over the children in case her maternity were to be put into question, and since this was not the case, the request would be rejected as void of object. The judge also mentioned that the applicant had never contested the parents' authority in a separate case, nor had she asked directly for guardianship over K.N. before the present case came up; therefore her intention was clearly to preserve guardianship over the children first and foremost, and not to act generally in the interests of K.N.

23. The parents filed for an appeal.
24. On 15 June 2014, the Utopolis Court of Appeal confirmed the position of the first instance court on both aspects.
25. Both the parents and the applicant filed for an appeal on points of law.
26. The parents invoked an excessively strict interpretation of the law based on principles set thousands of years ago, which did not reflect present day realities; they brought up the fact that the genetical material of her daughter was abusively used by B.N. with irreversible effects (the birth of the twins) and that the genetic linkage should prevail in this situation, K.N. being recognised as the mother and consequently the children put under her name and given to them as guardians, since K.N. was still in a critical state without clear chances of recovery.
27. The applicant's appeal focused on the dismissal of her claim to be recognised as guardian of K.N.'s interests based on her status as spouse. In reply to the parents' arguments, she stated that their actions had not reflected K.N.'s wishes and prior engagements, that their interests in fact were conflictual because of their obvious opposition to K.N.'s life choices. She further contested the idea of placing the children with K.N.'s parents because first, they were very young and needed to establish a strong bond with their mother and secondly that their interest would not be best protected by placing them with those who had initially sought the destruction of the fertilised eggs. She also mentioned that if it had not been for the accident, the two women had plans to move to Foretia once the pregnancy was obtained, where both could be recognised as parents of the twins and where their marriage was considered valid. These intentions had all been interrupted abruptly by the accident, but there was no indication that K.N. would have changed her mind about any of these plans that accordingly should be respected. Now financial restrictions prevented her from moving to Foretia and by remaining in the Utopin Republic she could be close to K.N., who was still on life support. She stated that following the accident the parents, relying on their position as guardians and the non-recognition of the marriage, had gained access to K.N.'s bank account and blocked B.N.'s own access, so that all K.N.'s income (mainly coming from intellectual property rights, and therefore being generated and paid even while she was not actively working) was under their control. She also stated that K.N. was the primary income provider for the couple, this having been why they had chosen B.N. to carry the pregnancy, so that K.N., who was an artist and a singer, could carry on with her activity and planned events. She also stated that the parents had begun proceedings to evict her from K.N.'s apartment (although this was not enforced yet), putting her and the children in a precarious situation, as she had no one else in the Utopin Republic and her own family in Foretia was unsupportive because of her homosexuality. She also stated that she was placed in the very difficult position of having to technically oppose proceedings brought by K.N. (namely by the parents on her behalf) and challenge her linkage to the children, while their intentions were to have both of them listed as parents once moved to Foretia. She thus insisted on overturning the decision regarding the guardianship for K.N.'s interests, which, if granted to her, could provide her the possibility to secure that

her clearly stated wishes and engagements were fulfilled, could give her access to K.N.'s income and thus provide for the children the material comfort they were being deprived of through the abusive conduct of K.N.'s parents, and could give her the possibility to materially support the costs of initiating the proceedings in Foretia so that both women could be listed on the twins' birth certificates, thus regulating their situation.

28. By a final decision of 30 July 2014, the Supreme Court of the Utopin Republic decided that K.N. was the biological mother of the children. It rejected the argument that only the fact of birth was conclusive of the identity of the mother, in light of the present-day realities when medically assisted reproduction techniques provided for a much broader consideration. Since there was no clear opposition from B.N. challenging the linkage between K.N. and the children, and looking into the best interest of the twins, the Supreme Court concluded that K.N. was to be considered as the mother of the children, given that they embodied her genetic material. Looking to the best interest of the children, and without prejudice to the line adopted by the state legal framework not recognising same-sex partnerships, since B.N. was the one having given birth to the twins and raised them so far, guardianship should stay with her until the possible recovery of K.N., when they could regulate their situation as planned. It also mentioned that in this way, she was always free to proceed with the recognition as being the second parent in Foretia, where this was possible, all the more since she was a Foretian national herself. There was no mention of the eventuality of K.N.'s death. The Court dismissed her claim to be recognised as legal guardian of K.N., given that according to national law, the ones entitled to look over the interests of K.N. were the next of kin, namely the parents in this situation, the marriage not being valid.
29. As of then, B.N. was denied access to K.N.'s hospital room by the parents.
30. On 14 August 2014, a medical report, issued following the request of K.N.'s parents, stated that there were no chances of recovery for K.N. and that life support should be withdrawn following her family's consent. There is no information available as to what is the intention of the parents in this regard. K.N. is still on life support to date.
31. There is no information about a will being left by K.N. in favour of B.N.
32. On 15 August 2014, the applicant B.N., represented by an NGO registered in the Utopin Republic and working in the field of discrimination and minority rights, brought an application before the European Court of Human Rights (ECtHR), asking the Court to recognise a violation of her rights and freedoms protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) and as well of those of K.N., in whose name she also complains. The applicant B.N. gave the NGO a power of attorney to represent both her and K.N. before the Court.

#### Relevant domestic and international law

Both the Utopin Republic and Foretia have signed and ratified the main UN/international treaties; they have also signed and ratified the Oviedo Convention of the Council of Europe and the Social Charter. They are not members of the EU.

According to the Utopin Criminal Procedure Code, decisions of the prosecutor can be challenged before the First Instance Court, whose judgments can be appealed before the Court of Appeal. The party can challenge the prosecutor's decision before the court of first instance, who can either reject it or allow it. If allowed, it can judge the case on the merits if there are enough elements or sent it back to the prosecutor for further investigation.

According to the Utopin Criminal Code, taking a moveable asset which is in the detention or the possession of another, without their consent and with the intention of appropriating it, is punishable by 6 months to 3 years in prison or by fine. Property over the respective good, total or partial, if it was in the legitimate detention or possession of another, does not exclude the commission of the crime.

Disrespecting a court order is a minor offence punishable by fine.

According to the Utopin Civil Procedure Code, save for exceptions expressly mentioned, any civil judgment can be appealed before higher courts. Decisions in appeal can be appealed on points of law before the Supreme Court if there are reasons to think there was a misinterpretation of the applicable law.

The Utopin Civil Code mentions that assisted reproduction will be regulated by special law. A draft law has been pending before the Utopin Parliament for approval since 2009. Assisted reproduction techniques are offered by clinics in the Utopin Republic. In practice, IVF is offered to both married couples and single (unmarried) persons. Fertilisation of donor eggs and by done sperm are available. There is no known case-law of national courts regarding maternity disputes following assisted reproduction.

Adoption in the Utopin Republic is available to both married couples and single (unmarried) persons.

According to the Utopin Civil Code, motherhood is established through the fact of birth. It can also be established by recognition or by court judgment.

In the Utopin legal system, there is no legal recognition of domestic partnership, whether heterosexual or same sex-sex. Marriages between same-sex partners concluded abroad are not recognised. Community of property only applies to married couples; it does not extend to cohabiting couples.

Parenthood established in another country can only be recognised in the Utopin Republic if it is not contrary to national legislation concerning same-sex marriages and parenting.

According to the Utopin Civil Code, guardianship is a legal relationship under which a person or agency ( the guardian) is appointed by a court to make decisions and act on behalf of another person ( the ward) with respect to the ward's personal or financial affairs because the ward, either by reason of his/her age (minority) or due to a specific mental or physical impairment,

lacks sufficient capacity to make or communicate important decisions concerning his or her person, family, or property or lacks of capacity to manage his or her personal financial affairs.

Guardianship can be instituted at the request of the ward, of his spouse or of his family. There is no express obligation for the guardian to take into account the will of the ward.

According to the Utopin law, in case of K.N. 's death, the legal guardianship of the children would be established by a court in their best interest.

The Utopin Republic does not allow euthanasia. A permanent vegetative state can be declared after one year of vegetative state in which a person is completely dependent on life support. Following a through medical examination, if it is certified that there are no chances of recovery, life support can be withdrawn after the family's consent.

According to the Utopin law, children are able to acquire Utopin nationality by the fact of being born of a Utopin parent or on Utopin territory of parents of any nationality.

In both the Utopin Republic and Foretia, in case of death intestate, children and spouse have the right to inherit. If there are no children, the next of kin together with the spouse will have the right to inherit.

There is no alimony obligation between spouses unless for serious illness/incapacity. The Constitution of the Utopin Republic states that life, as well as family life, is protected by law. It also states that marriage between a man and a woman.

Legislation may be challenged before the Constitutional Court, by request to a domestic court to refer a matter before it, if considered potentially contrary to the provisions of the Constitution. It is at the discretion of the domestic courts to proceed or not with the referral.

Hospital regulations provide the possibility of visits by anyone.