

Helga Pedersen
Moot Court Competition



CASE

Marlier v. Zemland

HELGA PEDERSEN MOOT COURT
COMPETITION

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COUNCIL OF EUROPE



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Marlier against Zemland

Facts

1. The applicant, Ms Adela Marlier, was born in 1985. She is a national of Zemland, a Council of Europe Member State and lives in Orionopolis, Zemland's capital.

The applicant's state of health

2. The applicant is a factory worker in Zemland. Since 2019, she has been diagnosed with multiple sclerosis. Apart from progressively worsening physical symptoms, the disease has caused her mental health problems as well. In particular, she has been struggling with severe depression and anxiety.
3. The applicant has been following the standard protocol recommended for patients with multiple sclerosis in Zemland. She has also been undergoing psychotherapy with a view to improving her mental health. The available medication did not bring any major relief for her symptoms. The disease has been progressing steadily.
4. Through friends and online, the applicant learnt that cannabis could be used to alleviate symptoms of her disease. She approached her doctors (neurologist and psychiatrist) with a request to access medical cannabis. However, she was informed that Zemland does not allow the use of cannabis for medical purposes. On the contrary, anyone possessing or using cannabis regardless of quantity, is liable to criminal prosecution.
5. In 2020, after further deterioration of her physical and mental health, including a brief hospitalisation at a psychiatric clinic, the applicant decided to start cultivating cannabis for her own consumption on her family land. The land, adjacent to her family's house, was owned in equal shares by the applicant and her two siblings. The applicant used 10 square metres of the land to cultivate six cannabis plants for her personal use.
6. In June 2021, after the first harvest, the applicant started growing more cannabis plants and over time had around 20 plants in total. In June 2021, she started using some of the cannabis buds she had cultivated previously. On occasion, she also offered dried cannabis buds for free to her acquaintances with similar health problems. In general, all of her acquaintances reported at least some improvement of their symptoms.
7. In September 2021, the applicant started sharing her daily struggles on social media and the effects of cannabis on her health. Her number of followers steadily grew from over a hundred to over 3,000 followers.

8. In particular, the applicant shared with her followers that while cannabis had not brought about a major improvement of her condition, it had provided significant relief from her anxiety and depression as well as reduced tremors and chronic pain. Seeing positive effects on her own health and on those of others, the applicant called on the authorities to legalise cannabis for medical use in Zemland, including at least partial reimbursement by the public health insurance.
9. In early 2022, the applicant's social media posts went viral and sparked a heated debate on the subject of legalisation of medical cannabis in Zemland. The applicant was invited as a guest on several podcasts in Zemland. She also participated in discussions on advantages and disadvantages of legalisation of cannabis in Zemland. The discussions included doctors sharing practice from other countries that legalised cannabis for medical purposes, especially for patients with chronic and/or terminal diseases.

Criminal proceedings against the applicant

10. In July 2022, the applicant was charged with unauthorised possession and trafficking in narcotic drugs and psychotropic substances within the meaning of Articles 251 and 255 of the Criminal Code.
11. While the prosecution argued that this was a straightforward case supported by a wealth of evidence, the applicant called expert witnesses and other witnesses in mitigation. The prosecution adduced witness testimonies that persons related to the applicant had sold cannabis plants.
12. On 21 September 2022, the first-instance criminal court held a public hearing and heard statements from witnesses and experts in human rights, bioethics, and forensics. Witnesses called by the applicant from abroad described their experiences in using medical cannabis. Five Zemland citizens with health problems testified that the applicant had provided them with cannabis for free. The court also examined various documentary evidence, including available research on the use of medical cannabis for chronically ill patients. The research, published in another Council of Europe Member State in 2021, was inconclusive as to whether the use of medical cannabis should be recommended for the clinical management of chronic pain. An expert in neurology called by the applicant confirmed that the applicant had reported amelioration of her symptoms. However, as pain is a subjective feeling, the expert could not objectively verify that cannabis had reduced the applicant's pain.
13. On 1 October 2023, the first-instance court found the applicant guilty of the above crimes, sentenced her to a prison sentence of two years and six months. The court also ordered forfeiture of the land used to grow the cannabis plants, six cannabis plants found on the land,

all dried cannabis found on the family property (100 grams in total), and around 20,000 EUR on all of the applicant's bank accounts. The court reasoned that the forfeiture of the land was necessary to prevent crime and that the money on the applicant's bank accounts highly likely included proceeds from the crime of drug trafficking. The court found the witnesses called by the applicant not credible and concluded that the prosecution had proved their theory of the case beyond reasonable doubt.

14. The first-instance court dismissed as not relevant the expert opinion of a professor in bioethics that cannabis had been successfully used in some countries as an alternative treatment for chronic pain. In the expert's opinion, the use of medical cannabis might have an ethical dimension in that it had a potential to reduce the use of – arguably more harmful - opioids. He added that, according to the “harm” principle, an individual is free to use, or even abuse, illicit agents, unless she or he harms others. Furthermore, according to the principle of autonomy, patients have the ultimate authority to determine what happens to their bodies and undergo treatment on the basis of their informed consent. The first-instance court concluded that the above notions, albeit philosophically interesting, do not mean that the applicant had the right to demand any type of treatment or any drugs she wished. On the contrary, any treatment options must remain within the scope of the existing legislation.
15. On 15 October 2023, the applicant appealed, arguing *inter alia* that she had openly shared her health struggles online, that she was also helping others, and would not have done so had she intended to commit a crime. Moreover, she was forced to cultivate cannabis, as the State had not offered any alternative for persons suffering from diseases such as multiple sclerosis. No other available treatments helped her or ameliorated her symptoms. She pointed out that at least five persons had testified that she had provided the cannabis for free to them, but that the first-instance court had failed to give weight to their testimonies.
16. The applicant also complained about the property forfeiture and argued that such a sentence would leave her in an even harder economic situation being a low-wage factory worker. It would also significantly affect her state of health as she was no longer able to use cannabis to alleviate her symptoms. The applicant maintained that she merely attempted to open a debate on a very important matter that could change the lives of many suffering Zelanders for the better.
17. In her appeal, the applicant also relied on Article 8 of the European Convention on Human Rights (the Convention) and on Article 1 of Protocol No. 1, arguing that the first-instance judgement had unlawfully restricted her right to respect for her private life, including her personal autonomy and quality of life, her home and her property rights. At the very least, the court should rely on Article 100 of the Criminal Code in respect of the sentence.

18. On 30 January 2024, the second-instance court reversed the first-instance conviction and acquitted the applicant. The court of appeal agreed with the applicant that she had started the cultivation of cannabis as a measure of last resort in order to be able to live her life with as little suffering as possible. The court also found that the prosecution had not provided evidence that the applicant was selling the cannabis to others. The court also held that the applicant's social media posts were not an expression or an admission of a crime, but an act of her freedom of expression. In addition to finding her not guilty, the second-instance court also noted that the first-instance court, by not exercising any flexibility allowed by the criminal legislation, had imposed an excessively severe sentence in violation of the applicant's rights under Article 8 of the Convention and Article 1 of Protocol No. 1.
19. On 10 February 2024, the prosecution lodged an appeal, arguing that the court of appeal had erred in both facts and law, considered irrelevant factors, and came to a conclusion that was not based on the applicable legislation.
20. On 14 August 2024, the Supreme Court granted the prosecution's appeal and reversed the second-instance court's judgement. It fully agreed with the first-instance court's reasoning and concluded that the applicant had been guilty as charged. The Supreme Court concluded that the applicant's conviction was fully in line with the applicable legislation and did not lead to any violation of the applicant's human rights.
21. The Supreme Court, while appreciating the applicant's difficulties and the gravity of her health state, opined that the applicant was not in any emergency or a life-threatening situation such as those envisaged in Article 100 of the Criminal Code. It also held that the prosecution had provided witness testimonies that persons related to the applicant had sold cannabis and not provided it for free to seriously ill patients. Lastly, the Supreme Court agreed with the first-instance judgement that the applicant's social media posts were an admission of her guilt. The applicant was fully aware of the illegality of her actions and possible consequences. Accordingly, she had to face a conviction and an appropriate sanction.
22. The Supreme Court concluded that the applicant's conviction and sentence were taken within the scope of the applicable legal framework. The applicant's argument that the State's failure to provide her with an illicit substance had ultimately led her to commit the crimes, did not raise any human rights issues. The sentence was not excessive or disproportionate in the circumstances of the case so as to raise any issues under the Convention.
23. On 1 September 2024, the applicant submitted an application before the European Court of Human Rights alleging violation of her rights under Article 8 of the Convention and Article 1 of Protocol No. 1.

Law

24. Zemland is a Council of Europe Member State. It is not a Member State of the European Union. It has ratified all major Council of Europe and United Nations human rights treaties and all additional protocols to the Convention. It has also ratified the 1961 United Nations Single Convention on Narcotic Drugs, the 1971 United Nations Convention on Psychotropic Substances, and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The Constitution of Zemland

25. Article 30 of the Constitution guarantees the right to the enjoyment of the highest attainable standard of physical and mental health. Health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

26. Article 45 of the Constitution provides that everyone has the right to the full and free development of his or her personality.

27. Article 51 requires the Government to give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, rehabilitation and social reintegration of the affected individuals.

28. All rights guaranteed by the Convention and its Protocols have their equivalent in the Constitution.

Law on Controlled Substances

29. According to Section 10, cultivation, production, preparation, possession, offering, distribution, purchase, sale, delivery of drugs contrary to the provisions of the law, shall be punishable serious offences when committed intentionally. Specificities shall be regulated by the Criminal Code.

30. The list of narcotic drugs and psychotropic substances annexed to the Law includes opium, opioids, coca and cannabinoids. The Law specifies that cultivation of coca leaves is not allowed for any purpose. The cultivation of poppies is legal as long as they are not used to produce illicit substances. The cultivation of hemp containing less than 0.3% tetrahydrocannabinol (THC) by dry weight is legal, provided it is not used to produce illicit substances.

31. Section 12 states that the medical use of some narcotic drugs or psychotropic substances is indispensable for the relief of pain and suffering and that adequate provisions must be made to

ensure their availability for such purposes. A narcotic drug or a psychotropic substance may be used in clinical practice only following a registration in the national register of authorised medicines. Medical cannabis is not registered in Zemland. In general, Zemlanders may apply for an exception to use an unregistered medication on compassionate grounds. No such exception has ever been granted for patients requesting to use medical cannabis.

The Criminal Code

32. According to Article 251, possession of any amount of any illicit substance for personal use is prohibited and punishable. The sentence depends on the specific illicit substance and the amounts in possession. Possession of cannabis is punishable by:
 - a. up to one year of unconditional prison sentence for a “minor amount” of cannabis;
 - b. one to ten years of unconditional prison sentence for a “major amount” of cannabis; and
 - c. ten to fifteen years of unconditional prison sentence for an “excessive amount” of cannabis.
33. Annex F to the Criminal Code includes a list of illicit substances and defines “minor/major/excessive” amounts of each substance. As for cannabis,
 - a. up to one cannabis plant (excluding hemp) or up to 0.5 gram of cannabis (dry weight) is considered a “minor amount”;
 - b. a “major amount” of cannabis is defined as more than one cannabis plant (excluding hemp) or more than 0.5 grams of cannabis (dry weight), but less than 500 cannabis plants (excluding hemp) or less than 250 grams of cannabis (dry weight);
 - c. an “excessive amount” of cannabis is defined as at least 500 cannabis plants (excluding hemp) or at least 250 grams of cannabis (dry weight).
34. Article 255 states that no one shall traffic any illicit substance. Traffic includes selling, giving, delivering or otherwise distributing the substance and shall be punishable by one to ten years of imprisonment.
35. Forfeiture of possessions is an automatic sanction if an individual is found guilty of trafficking illegal substances. The extent and amount of forfeited possessions shall be determined by the competent court on a case-by-case basis.
36. One may be found guilty of both possession of and trafficking in illegal substances on the basis of the available evidence. However, possession of an “excessive amount” of illicit substances automatically gives rise to the offence of trafficking without the need to prove anything else other than possession of an “excessive amount” of the illegal substance.

37. If one is found guilty of both offences of possession of and trafficking in illegal substances, the court shall impose only one - harsher - sentence.
38. As part of general provisions related to sentencing, Article 100 provides that a court may decide to exceptionally lower the sentence prescribed in the Criminal Code, if it considers that, in the particular circumstances of the case, the statutory sentence would be too harsh. Article 100.1 adds that such exceptional circumstances may include, among others, crimes committed under duress, in an emergency, or to save one's life or the lives of others.

The Code of Criminal Proceedings

39. City courts have jurisdiction to hear criminal cases at first instance. Both the defendant and the prosecution can submit appeals. Appeals must be filed with the competent regional court within 30 calendar days from the date when the decision was served on the respective party to the proceedings.
40. The regional courts' decisions may be further appealed to the Supreme Court within 30 calendar days from the date when the regional court's decision was served on the respective party. The Supreme Court can review both questions of facts and law. Its decisions are final and not subject to a further appeal.

Debate on the legalisation of medical cannabis

41. The legislative power vests in the Zemlandic Parliament. The relevant State institutions and members of Parliament may formally propose legislative bills and/or amendments. Individuals do not have the right to initiate legislative amendments or to request courts to examine legality of certain legislative provisions or their compatibility with the Constitution or international human rights and/or other treaties ratified by Zemland. Individuals may submit petitions to members of Parliaments, however, the decision on any legislative initiative is fully within the discretion of the parliamentarians.
42. Zemland applies zero-tolerance policies towards any illicit substances. Besides criminalisation and prosecution, the Zemlandic Government supports large-scale education campaigns at schools and youth establishments.
43. The applicant's social media posts and her other related public activities opened debates for allowing use of cannabis for medical purposes, especially for terminally ill patients. In January 2024, a member of Parliament proposed a legislative amendment to that effect, but it did not get the requisite majority vote.