

CASE – MOOT COURT COMPETITION 2022

BACKGROUND FACTS

The APPLICANT is Abigail North, a 28-year-old woman, and a national of Country B. Abigail recently fled Country B due to political unrest and is currently located in FREELANDIA, where she has applied for asylum.

FREELANDIA is a member of the European Union and has signed and ratified the European Convention on Human Rights (ECHR) and all its protocols. It currently sits on the United Nations Human Rights Council and is a state party to most of the major UN treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

COUNTRY B is Abigail's homeland. It has experienced years of political turmoil, and the government was recently overthrown in a coup d'état. Country B is not a member of the European Union.

CIRCUMSTANCES OF THE CASE

Abigail North, aged 28, is a national of Country B but is currently in Freelandia where she has applied for asylum. Abigail was assigned male at birth, but she often felt uncomfortable in her body and with the way that other people referred to her as a boy. During some periods she was so uncomfortable that she preferred not to go out at all and had severe social anxiety. When she began studying at the university in the capital, she came in contact with a club for LGBTI+ people. Through the safe environment in the club and the friendships she made, Abigail could deal with her feelings about her body and her gender. She began wearing more androgynous clothes and experimenting with makeup, gradually gravitating more towards female expressions. During this time, as she came to accept who she was, Abigail became more comfortable and confident. After a few years, she understood that she was transsexual. As part of this process, Abigail had been seeing a psychiatrist, who referred her for a comprehensive assessment that would determine her eligibility for gender affirming treatment, including surgery, to help address her gender dysphoria. Gender dysphoria means that a person experiences discomfort or distress because their gender identity differs from their sex assigned at birth or sex-related physical characteristics. The feeling that one's body does not comply with one's gender identity is often combined with severe physical suffering, often leading to a limited ability to function in everyday life. The diagnostic examination takes several years and is performed by a psychiatrist, psychologist, and sociologist. The main purpose of the examination is to map a person's gender dysphoria by finding out how their gender identity has been experienced and expressed during life, how much physical gender-related suffering the person has, and what treatment they feel that they need.

Through Abigail's assessment process, it was established that a major cause of her distress and anxiety throughout her life was due to her body not matching her perceived gender, and she was granted gender affirmation treatment. The treatment granted included surgical and hormonal changes to her body and feminise her appearance: she started taking regular doses of hormones, oestrogen, and progesterone, had a surgical breast enlargement and began the

multi-step process of genital surgery. The surgery, called vaginoplasty, is often divided into two parts, and often requires several additional minor surgeries in order to avoid complications and to obtain a good result that will feel satisfactory to the person suffering from gender dysphoria. Abigail went through the first step of the surgical process and was scheduled for additional surgery several weeks later. The initial changes made could not be left as they were, since they could lead to complications in the future.

Country B has experienced severe political disruptions for the last decade. Extremist groups in opposition to the government organised themselves and built up an armed resistance. In recent years, more and more people have been forced to leave the country. As the political situation deteriorated, Freelandia, a nearby country, began accepting large numbers of refugees fleeing Country B. In the weeks before Abigail's next surgery was planned, violent encounters targeting supporters of the government erupted around Country B and the opposition groups marched into the capital and staged a coup d'état, effectively overthrowing the government. Abigail, along with hundreds of others, had to immediately flee the country for fear of political persecution. Abigail was part of a group of political refugees that came to Freelandia. She is now seeking asylum there. Abigail was initially relieved to be able to come to Freelandia as she had relatives there who had left Freelandia the year before and were also waiting to be granted asylum.

Since Freelandia began accepting refugees from Country B three years ago, its migration agency has seen a tremendous increase in the volume of applications for asylum and residence permits. As a result, processing times have been seriously delayed. The average processing time in recent years ranges from 16 months to nearly three years. Freelandia's legislation regarding asylum-seekers states that every asylum seeker is entitled to urgent or emergency medical and dental care. There are also set maximum amounts that an individual would have to pay for medical care as well as for prescription drugs. If a person needs to pay more than the set amount, they can apply to the Migration Agency for a special allowance to help them cover the additional costs. The agency determines whether the request falls within the health care guidelines.

Freelandia's Migration Agency does not have a specialised unit for handling cases of LGBTI+ asylum seekers. In the past couple of years, it has begun offering basic trainings to employees on how to handle more specialised cases, including those involving LGBTI+ individuals, victims of domestic violence, victims of torture, and young children. In Freelandian law there are no explicit rights to gender affirming treatment. Nor does it have specific legislation on legal gender recognition. In recent years, Freelandia has taken steps to formalise in law EU directives and case law regarding anti-discrimination and equal rights protection for LGBTI+ people; however, much of this is still in the legislative process or is lacking enforcement mechanisms.

Upon arriving at the refugee center in Freelandia, Abigail was interviewed by staff from the Migration Agency. Abigail's identity documents still identified her as male. Country B, her home country, required proof of gender confirmation surgery in order to formally acknowledge an individual's preferred gender. While Abigail had begun the process of applying to the courts in Country B to officially have her gender changed on her identification documents, the process was still ongoing when she was forced to flee, and she had not been able to obtain documentation reflecting her female identity. During the registration process with the Migration Agency, she therefore had to present the documents identifying her as male and thus was registered in the system as male. Abigail was clear in explaining to the interviewer that she identified as female and was taking gender affirming hormones and had recently begun the surgical process.

The interviewer whom Abigail met with repeatedly misgendered her, although she had asked to be referred to with female pronouns and was unable to provide any details about access to specialised mental health services or medical care. He told her that she would receive a general medical examination in the coming weeks and could inquire there about counselling services.

At the examination two weeks later, Abigail realised she had again been registered as male, with her old name that she no longer used, and had been assigned to a male doctor who was clearly expecting a male patient. Although the doctor was polite, he was visibly confused and did not have knowledge about the specific medical needs of transgender individuals. Abigail explained to the doctor that she was out of the medications she took as part of her hormone replacement therapy and requested a prescription for them. She also told him that she needed follow-up care after her recent genital surgery. The doctor stated that she would have to see a specialist about this and that he himself could not prescribe such medication. Moreover, he could only write prescriptions for medically necessary drugs to treat urgent conditions. Abigail tried to explain that she did urgently need the medication in order not to disrupt her treatment, and that stopping abruptly would be harmful both mentally and physically, but the doctor again stated that he was not in a position to decide this. He also told her that she would have to consult with her case worker at the Migration Agency to determine if she was eligible for such specialised medical care before any further referrals could be made. The doctor did provide Abigail with the contact information for mental health counselling services.

Abigail immediately contacted her case worker at the Migration Agency. The case worker also did not have any experience in this area but said she would look into it. Abigail felt that the case worker's response to her pleas was dismissive. The case worker repeatedly pointed out that asylum seekers were typically only entitled to emergency medical care and prescriptions to address urgent or preventative issues, such as allergy medications or birth control. Abigail again explained the necessity of not interrupting her hormone therapy. Some days later, the case worker got back to Abigail and informed her that she could not obtain the medications.

To be prescribed hormone replacement drugs, Freelandia requires an individual to undergo a full medical examination, a psychiatric evaluation, an assessment with a mental health therapist, and present letters of support from these medical professionals, who must be licensed in Freelandia. Furthermore, this type of health care, as well as any gender affirming surgeries, are deemed specialised treatment, to which asylum seekers are not entitled as they are not considered to be urgent or emergency care. Even if she got a prescription, she would have to pay the costs out of pocket as the special allowance that the Migration Agency grants in cases of expensive prescriptions would not cover such drugs. The case worker noted that Abigail may be eligible for such care at the conclusion of the asylum proceedings, assuming that she was granted asylum and permitted to remain in Freelandia as a resident, but that even then she would have to follow the national procedures to obtain the treatment. She was further informed that the only medical clinics providing specialised gender care were located in Freelandia's capital city, approximately a six-hour drive from the city where she lived, and that the agency would not assist her with transportation costs.

Not being able to continue hormone therapy or get medical care to follow up on her surgeries was both a terrible physical and mental setback for Abigail. The lengthy and often painful physical transformation process had not only been interrupted but even worse, set back. It had taken a long time to adjust to the hormones and to find the correct dosages, and the surgeries had involved extended recovery times. Still, she had remained positive and confident throughout the process, knowing that all the challenges would lead to her achieving

her dream of finally feeling comfortable in her own body. Now, in addition to the shock and sadness of having to suddenly leave her homeland, Abigail felt a deep sense of hopelessness and despair realising that after everything she had been through, her goal was even farther away, and her transition was instead going backwards.

Due to Freelandia's lack of treatment for trans asylum seekers, Abigail no longer had access to the hormones she had been taking. The consequences of the sudden disruption in the use of hormones were both physical and mental. Her body went into shock due to the hormonal imbalance following the sudden discontinuation of hormone treatment, leading to an imbalance in her blood sugar, muscular aches and pains, irritability, increased sweating, and an overall feeling of exhaustion. Her body hair, such as facial hair, grew back. Although she shaved her beard, the mental side-effects of the regression in her transition, the changes in her appearance with more masculine features, and the lack of the feminine features that she had been looking forward to for many years, were severe. Abigail's female gender was questioned in public spaces and people often noticed her as trans. In Country B this had seldom been a problem as there was a large trans community, especially in the capital, and people were generally more accustomed to seeing trans individuals. The overall attitude towards all LGBTI+ people in the society had been more accepting and liberal. In Freelandia, Abigail noticed that people often stared at her and treated her differently. Her appearance, with female expressions like breasts, makeup, and her choice of clothes and hairstyle, led to unwanted attention. On several occasions people shouted at her on the street, calling her words like "faggot", and "homo". She was also threatened with violence a few times. Abigail ignored this mistreatment, vowing that she would not change who she is or how she looks due to others' narrow-mindedness, but it still caused her to become anxious in social situations, limiting her in her daily life.

Abigail also began experiencing high levels of pain due to the unfinished surgery and had trouble urinating. She sought emergency care at a local hospital but when she asked the hospital to complete the genital surgery, she was denied as the procedure was not considered urgent or life-threatening, which it must be to obtain surgery as an asylum seeker. The regression of her transition, combined with the pain and the disappointment of her interrupted gender affirmation treatment, caused Abigail to experience severe anxiety and depression, and the disruptive thoughts she used to have before her transition resurfaced. She called the mental health service that the Migration Agency had connected her to, but the available services were more general counselling services. The intake worker seemed confused by her requests for a therapist with experience in trans issues and referred her to general trauma counselling. She was finally told that to see a psychotherapist, she would need additional health care coverage, for which she would need to apply to the Migration Agency. Moreover, there was only one therapist available in the region where Abigail lived, and no appointments were available for the next year.

Abigail was extremely distressed by her situation. Without being able to obtain the hormones legally, she would have to turn to the black market, which could be extremely expensive. Moreover, she feared that getting caught making purchases illegally would damage her chances of being granted asylum. Even so, at one point the effects of withdrawal became so severe that she turned to an acquaintance in a similar situation who had been purchasing hormone medication from a black-market dealer. The acquaintance, Elsa, told Abigail that she could check with the dealer to see if he could get additional medications, but that they were very expensive and Abigail would need to have the full payment amount ready. Abigail did not have a job and so far had been subsisting on the small food stipends she received from the Migration Agency. Elsa revealed to Abigail that she sometimes sold illegal narcotics to be able

to afford the medications. Abigail considered the idea but decided against it and said that she would get back in touch with Elsa if she was able to collect the money. Before she could do so, however, some weeks later she learned that Elsa had been arrested during a big police raid, part of a recent government initiative to crack down on drugs and crime. Elsa had been caught in possession of illegal narcotics and various illegally purchased prescription drugs. She was being held in a detention center. She and the others arrested were quickly tried and upon being found guilty, deportation proceedings were initiated. After this, Abigail was too scared to try again to buy the medications illegally. Even if she could afford them, she worried that being arrested, or worse deported, would set her back even further. Moreover, she knew that she would be extremely vulnerable as a trans person in a detention center or prison.

This experience, and the despair over her situation, was so traumatic that Abigail had to contact the emergency services for her psychological problems. When Abigail sought help at the local hospital for her distress and trauma, and at the same time tried to get treatment for the pain she experienced from the complications due to the interrupted genital surgery, she felt that she did not get proper attendance due to her being trans. The hospital staff not only showed a lack of understanding for her troubles, but the doctor she was in contact with during her stay at the hospital expressly told her that she had herself to blame for her situation, as it was her choice to change her body in the first place. The hospital did not provide any treatment, except for prescribing pain killers, again telling her that she would need to get referrals to specialists.

In some of the materials Abigail received from the Migration Agency, it stated that questions and concerns during the asylum process could be addressed to an ombudsperson. A phone number and generic email address were listed. There was no additional information about what the ombudsperson would do or how long it would take to get a response. When she called the number, she was redirected to an automated voicemail system where she left a detailed message about her situation. She also sent an email with the same information. After not getting a response, she went several times to the agency's local office and asked for help in making a complaint. The receptionist was dismissive of her concerns and initially referred her back to the general contact number. Finally, she told Abigail to submit a written complaint. This was difficult for Abigail to do as she was not used to writing in either the Freelandian language or in English, but she was eventually able to get assistance from a human rights organisation in writing it. The agency responded to her complaint with an official notice rejecting her requests for treatment. Abigail followed the process to appeal and eventually her case was forwarded to the Migration Court, the court of appeals for decisions made by the Migration Agency.

Proceedings in the Migration Court are carried out via written pleadings. Although a party can in theory request an oral hearing, in practice this is almost never granted. As such, there is no witness testimony. Parties submit their arguments in writing, along with supporting documents. Abigail included in her pleading the written referral she had received following her assessment in Country B, showing that she had been granted gender affirming treatment, as well as hospital records documenting her surgeries and medication prescriptions.

In its ruling, the court upheld the Migration Agency's decision that the services requested were not considered to be urgent or emergency medical care. The court stated that it did not place much evidentiary value on the medical records Abigail submitted as they came from a non-European Union country. Freelandia requires medical certification from a Freelandia-licensed doctor to even be considered for gender affirming treatment. Moreover, the court questioned the medical necessity of gender affirmation surgery. It acknowledged that Abigail had

experienced challenges but did not consider improving her social situation as part of psychological treatment to be medically necessary. It did not seek out further medical evidence. On appeal, the Migration Appeals Court rejected Abigail's appeal and upheld the agency's decision, relying on the government's established policies regarding access to health care for asylum seekers. As this is the highest court there is no possibility for Abigail to further appeal.

Access to gender confirmation surgery and health care is more readily accessible in other countries, but Abigail worried that leaving Freelandia during the asylum process would further delay the process or completely disqualify her from being granted asylum. Freelandia's laws regarding this state that anyone seeking asylum must remain in the country until the Migration Agency has come to a decision.

THE CASE

Following the Migration Court's ruling against her, the human rights organisation that had helped Abigail advised her that she could bring a case against Freelandia for failing to protect her rights under the European Convention on Human Rights. She could not access appropriate psychological support, hormone replacement treatment, or post-surgical care – services critical to her physical and mental well-being and emotional stability. She was already dealing with the trauma of having to flee her homeland and the stress of going through the asylum procedures and interviews. Although she might eventually be granted a residence permit, which would entitle her to the full range of health care services, this was not guaranteed and the lengthy asylum process was still ongoing, meaning there was no way of knowing when she might get help.

Freelandia denies that it has committed any violations, arguing that the state itself has the authority to determine its own policies governing the asylum process and its national healthcare system. Freelandia has opened its borders to refugees from Country B for several years now, offering them protection and safety. In doing so, it has placed a heavy burden on the Migration Agency and on the population of Freelandia as a whole. Freelandia prides itself on being able to maintain a public health care system but at the same time, this requires it to sometimes make difficult decisions about what types of services it can provide and to whom. If everyone eligible for health care decided to undergo elective surgeries, it would severely disrupt the system.

Freelandia further noted that mental health counseling services, including psychotherapy and services specifically for LGBTI+ individuals, are available to asylum seekers and that Abigail had indeed been referred to those services. While she may have found them not ideal given her very specific needs, given the state's limited resources it cannot be expected to provide tailored mental health services to address every single condition that might arise.

Freelandia has done its best to ensure that asylum seekers have access to basic medical care to address urgent or emergency needs, but it has valid reasons for restricting full access to the public health care system to actual residents. It notes that if Abigail's application for asylum is granted, she too will gain this access. Having to provide all services to everyone seeking them would burden the system. If Freelandia is to continue accepting and hosting refugees, it needs to sustain a good balance.

The Applicant maintains that her rights have been violated, both on substantive and procedural grounds. All domestic remedies have been exhausted, and the Applicant turns now to the European Court of Human Rights.