Application Nos 28859/11 and 28473/12

IN THE EUROPEAN COURT OF HUMAN RIGHTS

ŠÁRKA DUBSKÁ AND ALEXANDRA KREJZOVÁ

Applicants

v

THE CZECH REPUBLIC

Respondent

SUBMISSION ON BEHALF OF THE ROYAL COLLEGE OF MIDWIVES

A. Introduction & overview

1. This written submission is made on behalf of the Royal College of Midwives ('the RCM') pursuant to permission granted by the President of Grand Chamber on 21 July 2015. The RCM is grateful to the Court for the opportunity to present its submission in this case.

2. The RCM is the UK's national midwifery organisation. In this submission it seeks to provide a midwifery perspective on the issues in the case and to explain that the autonomy of midwives is critical to ensuring respect for women's right to make their own decisions about childbirth. The failure by the Czech Republic to safeguard midwives' professional autonomy and permit home birth threatens to harm women and their babies.

3. The RCM addresses the following issues below:

   (i) The status of midwifery as an autonomous profession;

   (ii) The current evidence on the safety of home birth;

   (iii) Women's right to choice of place of birth in the UK;

   (iv) The regulation of home birth in the UK;

   (v) The consequences of failure to support home birth.

B. The RCM

4. The RCM is the United Kingdom's only professional organisation and trade union led by midwives for midwives. It has a presence in each of the four United Kingdom countries. The RCM is a membership organisation the objects of which are to promote and advance the art and science of midwifery and to promote the effectiveness and protect the interests of its members. The majority of the midwives in the UK are members. The RCM regards itself as the voice of midwifery in the UK. Internationally, the RCM is highly regarded and healthcare professionals around the world rely on its evidence-based guidelines. It has a long-standing interest in midwifery care in Eastern Europe and has followed developments in the case law of the European Court closely.

5. The RCM is committed to developing a maternity service that meets the needs of women and their families throughout pregnancy, labour and the postnatal period. It believes that a maternity service based on woman-centred care is a vital contribution to public health and it supports the primacy of women's choice in pregnancy and childbirth.

C. The status of midwifery as an autonomous profession

6. Midwifery is an autonomous profession bound by its own codes of professional practice and conduct. It is not a branch of nursing, which is based on a curative medical model of care. Rather, midwifery treats pregnancy and birth as normal life events. Midwifery is fundamentally woman-centred: midwives promote the physical, psychological and social well-being of the woman and family throughout the childbearing cycle and support the woman's own informed choices about pregnancy and childbirth.[1] Intrinsic to the autonomy of midwifery, and to the very essence of the profession, is the principle that care is not institutionalised but based on the relationship with the individual woman. As a consequence, midwifery is not confined to an institutional setting. As recorded in the International Confederation of

[1] Hatem M, Sandall J, Devane D, Soltani H, Gates S, 2009. Cochrane Review: Midwife-led versus other models of care for childbearing women. (The Cochrane Collaboration). Available here: http://bit.ly/1LULOQj.

Midwives' International Definition of the Midwife, it can be practised in the community, in a woman's own home, in a birth centre and in hospital.[2]

7. The safety and effectiveness of midwifery has been demonstrated in numerous international studies. The recent highly-respected Cochrane Review of midwifery-led care in countries around the world concluded that there were significant health benefits to midwifery care for women and their babies and that the majority of pregnant women should be offered midwifery-led care in preference to medical models of care.[3]

8. The autonomy of the midwifery profession is recognised by the law of the European Union, which provides harmonised standards for the training and qualification of midwives in all EU member states. Under the Professional Qualifications Directive, midwives must be able to provide maternity care in their own right, without supervision from doctors, and are required to have personally conducted at least 30 deliveries before qualification.[4] EU law also protects midwives' right to self-employment.[5] It follows from the recognition of the competences and autonomy of midwives that they must be permitted by European states to provide care in all settings, including in women's own homes.

9. In the Czech Republic, the RCM understands that the regulations governing midwives' attendance at home births reflects a lack of autonomy for the profession more generally. Midwives in hospitals are under the control of doctors and do not conduct deliveries themselves, contrary to EU law.[6] There are a very few self-employed midwives, a number of whom have been subject to unjustified legal proceedings as described in the Applicants' submissions.[7] The regulatory and healthcare systems in the Czech Republic appear designed to diminish and side-line the profession of midwifery.

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[2] International Confederation of Midwives, International Definition of the Midwife, adopted June 15 2011. Available here: http://bit.ly/1NddGka.
[3] See n1 above.
[4] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.
[5] Article 49, Treaty on the Functioning of the European Union.
[6] Applicant's Written Submissions on the Merits of the Case (Dubská), dated 2 September 2015, §41.
[7] Written response of the Applicant to the Observations of the Czech Government, dated 21 May 2013, §§7-13.

10. The motivation for the state's oppressive approach to midwifery was alluded to in the dissenting judgment of Judge Lemmens. He stated: '*the issue of home births seems to be the object of a form of power struggle between doctors and midwives.*'[8] The RCM agrees and notes that the position in the Czech Republic reflects enduring competition between obstetricians and midwives for control of the culture of maternity care in countries around the world.

11. The role of the state in this power struggle must be to regulate the healthcare system in a manner that respects the rights of the women in its jurisdiction. The state cannot rely on professional dysfunction as an excuse for failure to protect women's rights. Where the professional power struggle is enshrined in an oppressive regulatory system that privileges one model of care over another, thereby interfering with women's Article 8 rights, that system fails to satisfy the standards set out in Article 8(2). As Judge Lemmens held, the state cannot show that a system designed to further the interests of the medical community at the expense of women's rights is a proportionate response to a legitimate aim.

D. The current evidence on the safety of home birth

12. The RCM has maintained a consistent position on the safety of home birth: it is a safe choice for women with uncomplicated pregnancies. In 2007, the RCM issued a joint statement with the Royal College of Obstetricians and Gynaecologists stating:

> 'The Royal College of Midwives (RCM) and the Royal College of Obstetricians and Gynaecologists (RCOG) support home birth for women with uncomplicated pregnancies. There is no reason why home birth should not be offered to women at low risk of complications and it may confer considerable benefits for them and their families. There is ample evidence showing that labouring at home increases a woman's likelihood of a birth that is both satisfying and safe, with implications for her health and that of her baby.'[9]

13. The RCM's position has been fortified by more recent evidence from the UK showing the safety of home birth.[10] Since the decision of the Fifth Section of the Court, the National Institute for Clinical Excellence (NICE), which sets internationally-

[8] Dissenting Opinion of Judge Lemmens, Judgment of the Fifth Section, §3.
[9] See Royal College of Obstetricians and Gynaecologists/Royal College of Midwives Joint Statement No.2, April 2007. Available here: http://bit.ly/1VIGFPO.
[10] 'The Birthplace Study', Perinatal and maternal outcomes by planned place of birth for healthy women with low-risk pregnancies: the Birthplace in England national prospective cohort study, *BMJ*, 2011;343:d7400.

recognised standards for healthcare, has recommended that women with uncomplicated pregnancies are told that midwife-led care in a birth centre is safer than care in a hospital and that home birth is safer for women who have had a previous child.[11] It recommends that the option of home birth is made available to all women with uncomplicated pregnancies.

14. In the home birth research studies cited by the Court, the evidence from European countries which treated home birth as a legitimate healthcare choice showed generally positive outcomes for women and babies.[12] To the extent that the Wax study, conducted in the United States, showed worse outcomes for home birth than for hospital birth, it can be explained in part by the marginalisation of home birth in the US. Studies from the US, where the healthcare system is wholly distinct from European systems, are not appropriate comparators for the Court when there is European evidence available that demonstrates positive results. In general, studies from countries which do not legitimise home birth are testament to the basic truth, discussed further below, that when professional attendance at home birth is not permitted by the healthcare system, it is a more dangerous choice for mothers and babies.

15. The Court's view[13] that home birth remained risky because of unexpected complications disregarded the conclusion of the research studies. They are explicitly aimed at determining this issue – whether home birth gives rise to greater risk because of the time taken to access emergency medical services in the event of complications. In those countries which do not prevent midwives from assisting home birth, the studies show that unanticipated complications do not raise the risk of home birth. It was not appropriate for the Court to consider the international evidence on safety and then reach its own conclusion based on '*unexpected risks*' cited by the Respondent government without any basis in evidence.

E. Women's right to choice of place of birth in the UK

[11] NICE guidelines, Intrapartum care of healthy women and their babies during childbirth, December 2014. Available here: http://bit.ly/1Bd1B9Y.
[12] Cited by the Court at §§62-67. De Jonge (Holland, 2009), Birthplace (UK, 2011).
[13] At §97.

16. Women's fundamental rights to human dignity and autonomy can be profoundly affected by their experience of maternity care. The RCM is devoted to respecting women's right to make their own decisions about childbirth. It promotes a human rights based approach to maternity care and wholeheartedly welcomed the conclusion in *Ternovszky v Hungary* (App No 67545/09) that Article 8 protects women's right to choose where to give birth.

17. Contrary to the Court's mistaken categorisation of the UK in its judgment,[14] home birth is not expressly permitted by law. There are no regulations in the UK permitting or mandating the provision of a home birth service, but the right to choose where to give birth has featured as fundamental element of the government's maternity policy since the landmark report *Changing Childbirth* published in 1993. Under current government policy, all UK hospitals are expected to make home birth an option for women and women are entitled to self-refer to home birth services in their area.[15]

18. In interpreting the common law, the UK courts have shifted their approach to clinical negligence to emphasise that women are responsible for making decisions about the maternity care that they receive. As Lady Hale stated in the recent decision *Montgomery v Lanarkshire Health Board*:

> 'Gone are the days when it was thought that, on becoming pregnant, a woman lost, not only her capacity, but also her right to act as a genuinely autonomous human being.'[16]

19. The right to choose where to give birth can also be negatively expressed as the right to withhold consent to treatment. No woman can be compelled to receive care in hospital and any attempt to do so would be considered a gross infringement of her autonomy (this is presumably the reason that the Czech authorities have not chosen to criminalise or impose administrative sanctions on women who choose to give birth at home). In the UK, the national midwifery regulator, the Nursing and Midwifery

[14] At §60.
[15] Department of Health, Maternity Matters: Choice, access and continuity of care in a safe service (2007).
[16] [2015] UKSC 11 at §116.

Council ('NMC'), has recognised that women cannot be forced to give birth in hospital against their wishes.[17]

20. As a consequence, the regulator has accepted that midwives have a professional duty of care to attend women who are giving birth outside hospital to ensure the safety of mother and baby.[18] This arguably gives effect to the state's positive obligations under Article 2 of the European Convention. If a doctor or midwife were aware that a woman was giving birth at home but failed to provide her with support and she or her baby subsequently died, the state could be deemed responsible for their deaths on *Osman* principles.[19]

F. The regulation of home birth in the UK

21. Home birth is not expressly regulated by legislation in the UK. In effect, midwives' capacity to provide care to women at home is an implied part of their general competence as midwives and any care they provide, regardless of the setting in which they provide it, is subject to scrutiny by the professional regulator and the general law.

22. In the UK, there is no need for national legislation specifically governing home birth as full recognition is given to women's rights to make informed decisions about their care and midwives' competence to provide maternity care in all settings is respected. Rules governing the specific practicalities of home birth, such as training and equipment, are promulgated by the appropriate regulatory body and the midwife's employer.

23. The UK system stands in contrast to that of the Czech Republic. The difference lies not in the presence or absence of regulation governing home birth, but in the existence of positive and permissive state policy and practice which enables full recognition of women's right to make their own choices about childbirth which must be respected by healthcare providers. In the Czech Republic, the state has adopted a negative approach to women's rights, which is reflected in an arbitrary and punitive regulatory regime.

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[17] NMC, Supporting women in their choice for home birth, M/10/15 (2010). 'Women have a right to make their own decisions on these issues, if they are competent to do so, and midwives have a duty of care to respect their choice.' Available here: http://bit.ly/1hSKnY1.
[18] Ibid.
[19] *Osman v UK* (2000) 29 EHRR 245.

G. The consequences of failure to support home birth

24. The Respondent has stated that the prohibition on midwives' attendance at home births in the Czech Republic is intended to protect the health of women and babies. Nonetheless, the state has not prohibited women from giving birth at home unattended by health professionals and it remains perfectly lawful for a woman to give birth at home alone, or assisted by an untrained birth attendant. Many women will not be deterred from giving birth at home because of their inability to obtain midwives' attendance, as the fact that Ms Dubska gave birth alone illustrates. In these circumstances, the RCM does not consider that limiting midwives' ability to support women at home can possibly be reconciled with the pursuit of public health; it merely pushes home birth underground to the inevitable detriment of the health of women and babies.

25. The RCM considers that the following consequences arise from prohibiting midwifery assistance at home birth:

(i) Women give birth at home without any trained assistance. This gives rise to risks for the health of women and their babies should complications occur.

(ii) There is no regulation of the qualifications and competence of home birth attendants. A woman may be assisted by an untrained birth attendant who is not subject to any regulatory control.

(iii) There is a disincentive to transfer to hospital if complications arise during birth because the midwife or other attendant might be reported to the authorities.

(iv) Transfer to hospital from home in an emergency is hindered by lack of proper referral procedures and record-keeping. The hospital will not be aware of the obstetric history of a woman who transfers in labour, it will have no record of the progress of labour or the nature of any complication. Safe care will be compromised as a result.

(v) Giving birth at home becomes stigmatised. Hospital staff will often treat women who transfer from home with suspicion and disrespect and may delay urgent care.

26. To avoid these consequences and truly promote the health of women and their babies, midwives must be able to support women at home in a permissive regulatory environment which enables safe referral to other health professionals and safe transfer to hospital if necessary.

27. Limiting the scope of professional health workers to practice their profession in accordance with EU and international standards does not promote public health. It is contrary to best evidence on outcomes for the health of women and babies, undermines the independence of the profession of midwifery and facilitates a monopoly of maternity care by the medical profession.

28. As a consequence, the RCM submits that the Respondent has not established that measures designed to prohibit home birth pursue a legitimate aim under Article 8(2).

H. Conclusion

29. For the reasons above, the Czech state cannot show that its arbitrary regulatory regime promotes the legitimate aim of public health or constitutes a proportionate limitation on women's fundamental right to make choices about childbirth. The hostile and punitive approach to midwifery in the Czech Republic poses a serious threat to women's health and reproductive autonomy.

ELIZABETH PROCHASKA

MATRIX

8 September 2015