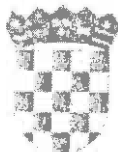

GOVERNMENT OF THE REPUBLIC OF CROATIA
OFFICE OF THE AGENT OF THE REPUBLIC OF CROATIA
BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Class: 004-01/15-02/01
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Mr Johan Callewaert
Deputy Grand Chamber Registrar
EUROPEAN COURT OF HUMAN RIGHTS
COUNCIL OF EUROPE
F-67075 Strasbourg Cedex
France

GRAND CHAMBER

Case no. 28859/11 and 28473/12
Dubská and Krejzová v. Chech Republic

Dear Sir,

With reference to your letter of 24 September 2015, the Government would like to provide following written submissions as a third party in the Court's proceedings in the above case

The Government is fully appreciative of the fact that these submissions should not include any of the comments on the facts and merits of the abovementioned case, but can only address aspects of it which concern the particular interests of the Government in this case.

Bearing the aforementioned in mind, the Government notes that this case concerns the question of the obligation the State is encumbered with when it comes to the issue of birth at home and the women's autonomous right to choose the place of the delivery.

As the Republic of Croatia finds itself in the comparable legislative situation regarding the birth at home as the Chech Republic, the Government finds it undisputable that the possible judgment wherein the Grand Chamber would find the violation of the Convention would certainly have its effect on the legal standing of the Republic of Croatia regarding the same issue.

Address: Dalmatinska 1, 10000 ZAGREB, CROATIA, Tel.: +385 1 4878 100, Fax: +385 1 4878 111,
E-mail: ured@zastupnik-esljp.hr, Web: https://uredzastupnika.gov.hr

In that regard, the Government will in this submission share its view on the matter of *birth at home*, and the legal aspects of it, while at the same time refraining from commenting any aspect of this particular case.

a) Birth at home – medical risk or acceptable alternative?

Firstly, the Government finds it appropriate to comment on the medical aspect of the birth at home issue, i.e. the medical risks implied with the women's choice to give birth at home.

Numerous medical research studies have been undertaken with a view to establish whether there is a higher risk involved with the birth at home than the risk the women normally experiences when giving birth in a medical institution.

In the latest study performed in 2013 in the United States of America, the International Study Group comprised of all leading professors of perinatal medicine from all around the world, established that there is an increased relative risk of 5-minute Apgar scores[1] of zero, of seizures and other neurological outcomes, and of neonatal mortality for planned home birth when compared to hospital births. A five minute Apgar score of zero indicates death in virtually all cases.

The relevance of this research is corroborated by the fact that it is the most comprehensive research performed to date. Besides the fact that it was conducted by some of the esteemed members of the scientific community in the field of Obstetrics, it also included the data on more than 13 million births.

Further, the American College of Obstetricians and Gynecologists (ACOG) in 2011 accepted the findings that there is a 2-fold or even 3-fold risk of neonatal death from planned home birth vs hospital birth. While respecting the right of a woman to make a medically informed decision about delivery, ACOG took the view that pregnant women should be informed about this risk[2]. **The ACOG also concluded that hospitals and hospital centres are the safest setting for giving birth.**

On the other hand, it is undisputed that there are scientific reports stating the delivery at home can have positive effects on the health of the mother and of the newborn. For instance, the research conducted in the United States and published in 2010 concluded that planned home births were associated with fewer maternal interventions including epidural analgesia, electronic foetal heart rate monitoring, episiotomy, and operative delivery. The women giving birth in this manner were less likely to experience lacerations, haemorrhage and infections. Neonatal outcomes of planned home births revealed less frequent prematurity and low birth weight, and less need for assisted new-born ventilation.

The Government is, however, of the view that there is no significant contradiction between the results of these scientific reports.

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[1] Apgar score, introduced in 1952, is as a method to quickly summarize the health of new-born children. The test is generally done at one and five minutes after birth, and may be repeated later if the score is and remains low. Scores 7 and above are generally normal, 4 to 6 fairly low, and 3 and below are generally regarded as critically low.

[2] American College of Obstetricians and Gynecologists, Committee Opinion no. 476. Commitee on Obstetric Practice. Planned Home Birth. Obstet Gynecol 2011;117 (no. 2, part 1), 425-8

It is namely a known scientific fact, so emphasized and called upon by the advocates of the state-assisted home delivery, that the level of psychological comfort experienced in home environment has positive effects on the course and the outcome of the delivery. It is also logical that a significant number of women will regularly feel more at ease and relaxed at home, surrounded by their respective family members, as opposed to regularly impersonal and sterile hospital environment.

This however, does not mean that all possible and sometimes fatal complications can be eliminated by a simple choice of a place of delivery, as the Chamber itself concluded in its judgment in the aforementioned case.

Further, some of these complications cannot be resolved even with the presence of effective and available transport system, capable of taking the pregnant woman from her home to the nearest hospital within a short time span.

Namely, even with the condition of available and efficient emergency transport being satisfied, the extreme sudden complications, such as sudden cardiopulmonary arrest, shoulder dystocia, or maternal exsanguination, cannot be foreseen, or the death of the mother or/and child prevented in all cases. Even the best screening procedures, even when optimally performed, sometimes fail to predict these high risk conditions.

This only goes to show that there is no such thing as a risk free pregnancy and delivery: the adverse consequences cannot be predicted, nor can they be prevented even with the best possible transportation system at hand.

As all of the possible adverse consequences cannot be foreseen, it is presumptuous to claim that for any specific category of pregnant woman, a birth at home is a completely safe option, or even to claim that it is a safer option then the delivery in a hospital. Even with all the benefits and diagnostic tools provided by modern day medicine, this kind of conclusion can only be made retroactively, i.e. when the delivery at issue has already been completed or even in a short period of time after the delivery.

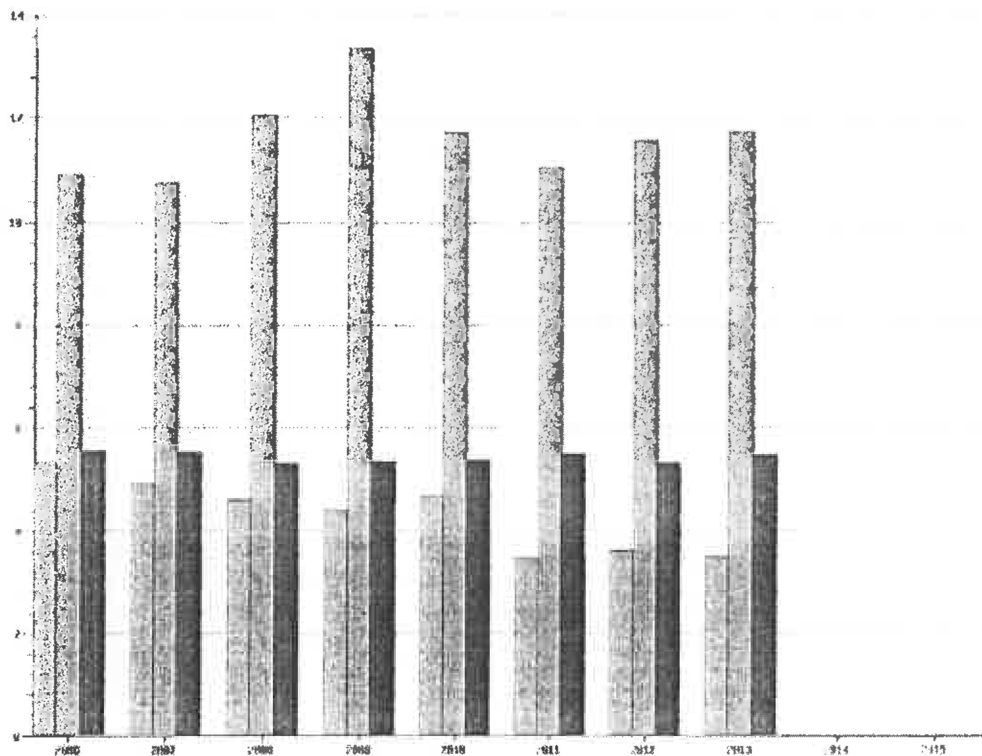
In the Republic of Croatia, the Commission for Perinatal Medicine of the Ministry of Health fully accepts the abovementioned findings, and is of the view that the hospitals are the safest venues for performing deliveries, giving both to a mother and a new-born the best guarantees for the preservation of their health and life.

In conclusion, despite the fact that the delivery at home might bring a certain number of pregnant women a more pleasant experience of delivery, and even a chance to avoid some of the possible complications which would occur in a less pleasant hospital environment, the Government finds it evident and scientifically proven that a full hospital delivery, where a option of a caesarean section can be availed to in terms of minutes and seconds, is still the safest option for both the mother and a child.

Finally, irrespective of how one might interpret the scientific findings presented above, the Government wishes to note that the Republic of Croatia, in comparison to the states which have adopted the legislative option of assisted home births, has the significantly lower perinatal mortality rate.

Namely, the following table layout, provided[3] by the World Health Organization (WHO), displays the relations between perinatal mortality rate in Croatia vis-à-vis and the mortality rates in France and Germany, the countries with long lasting assisted home births practice:

Perinatal deaths by 1000 births in Croatia (column 1), France (column 2) and Germany (column 3) in 2006 – 2013 period



Source: World health Organization

b) Human rights angle – how should domestic legislation treat home births?

Against the above background, the Government finds it evident that the question of the responsibility of the State (and the implied positive/negative obligations) revolves around the question of balance between two rights – on one hand, the right of pregnant women to freely choose the place of their delivery, and the State's obligations (whether positive or negative) in that respect, and on the other hand, the right to life of both a pregnant woman/ mother and a new-born child.

The question is – where to draw the line in the sand between the women's right to choose (and the states obligations in that respect), and the State's obligation to protect her life and the life of the foetus/new-born?

In the Government's view, having the abovementioned scientific facts in mind, the only possible answer to this question lies in the doctrine of *margin of appreciation*. That is to say, the states should be allowed to freely decide whether they will provide for medical

[3] see http://www.euro.who.int/en/data-and-evidence/databases/european-health-for-all-database-hfa-db

assistance in planned home births, or whether they will reserve medical assistance only to hospital deliveries (including the cases of unplanned deliveries outside of the hospital).

The starting point to any conversation about human rights in terms of baby deliveries should be the clear fact that the hospitals are the safest setting for deliveries. As elaborated above, the *best chance for a safe delivery* is a hospital, irrespective of a particular level of risk entailed with a particular pregnancy.

This scientific fact clearly points to a specific human right entailed with the question of substitution for hospital deliveries – a right to life.

With that in mind, the Government notes that various international treaties oblige the States to organize their health systems in a manner which can provide the best possible service to their respective citizens, and to, in terms of deliveries, reduce for perinatal mortality to a lowest possible rate.

In that respect, it is not only the Article 2 of the Convention that puts such a request before the States contracting parties. There is an abundance of international treaties which pose the very same request:

For instance, under the Article 24 of the UN Convention on the Rights of the Child, State parties are obliged to (a) diminish infant and child mortality; and to (b) ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care.

Further, under the International Covenant on Economic, Social and Cultural Rights (1966), the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.

Under the mentioned international obligations[1], and having a due regard to the abovementioned scientific findings, the Government finds it clear that the **obligation** of any State, Contracting party to the Convention, when it comes to the question of perinatal health, is to secure the highest attainable level of hospital medical services available for pregnant women.

Contrary to the above, allowing any alternative to the safest option (like assisted home birth), which entails the assumption of a shared responsibility for the possible adverse effects (that can be completely avoided during a full hospital delivery), should undoubtedly fall within the freedom of assessment of Contracting parties.

Birth at home, as explained above, does not exclude numerous unpredictable risks, and as such boils down to the question of "psychological comfort" for the pregnant woman in question, rather than to the question of the "safest option" for both the mother and the child.

[1] Both Croatia and Chech Republic, as well as the majority of the Contracting parties, have ratified the mentioned international treaties.

In that respect, the question of alternative to hospital birth, such as the assisted home birth, which is aimed at ensuring the adequate level of *psychological comfort*, rather than the mother/child well-being, in the Government's view, falls far outside of the ambit of human rights, to paraphrase honourable judge Yudkivska and her concurring opinion to the Chamber judgment in the abovementioned case.

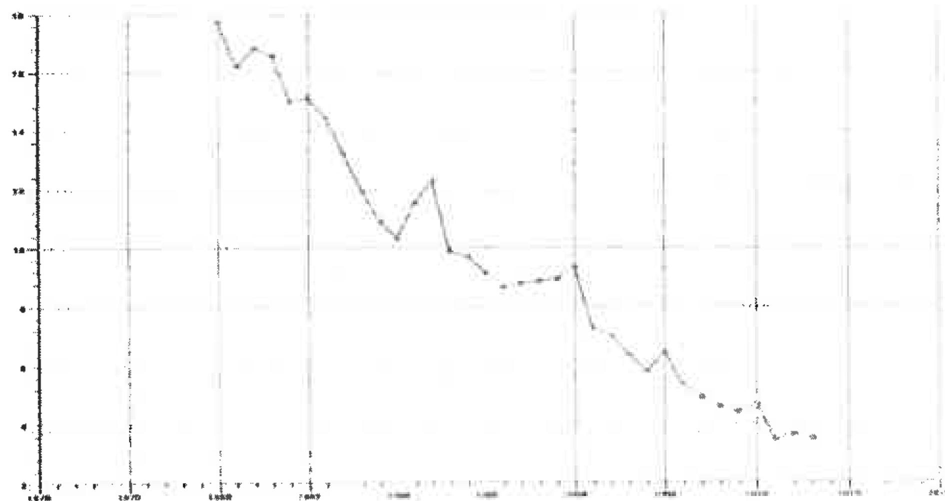
c) Croatia and assisted home births

In the Republic of Croatia, there is no possibility for pregnant women of having an assisted home birth. While there is no option under which a pregnant woman can be punished for deciding for home birth *in lieu* of the hospital, medical staff in the Republic of Croatia is not at liberty to render assistance to pregnant women who have decided to give birth at home.

The reasons behind such a legislative approach are as follows.

First and foremost, the health system of the Republic Of Croatia in the last 30 years undertook tremendous efforts in order to decrease the perinatal mortality rate. In that line, investments in the hospital system, infrastructure and medical equipment, education of both medical staff and Croatian population, led to a significant decrease in the perinatal mortality rate. The information[5] of the WHO reveals that the perinatal mortality rate per 1000 births in Croatia fell from 17.8 (in 1980) to only 3.5 (2013)

Perinatal mortality rate in Croatia per 1000 births in the period of 1980 - 2013



Source: World health Organization

Even though these result already place the Republic of Croatia high on the list of European states, as one of the most successful in this field[6], the main operative goal of the Ministry of Health is to further improve these results, and to provide further an even higher level of medical care for pregnant women and the new-borns.

[5] see http://www.euro.who.int/en/data-and-evidence/databases/european-health-for-all-database-hfa-db

[6] for info on average perinatal mortality rates see http://www.euro.who.int/en/data-and-evidence/databases/european-health-for-all-database-hfa-db

On that note, the Commission for Perinatal Medicine of the Ministry of Health, fully in line with the abovementioned science findings, deems that allowing the alternative to hospital delivery would significantly jeopardize these results.

Further, the Republic of Croatia is a country faced with severe population decrease. Namely, according to the information provided by the Croatian Bureau of Statistics, only in 2013 the number of people who died surpassed the number of babies born by 10.447. What follows is that the unsafe alternative to hospital delivery would hardly have a positive impact on this ongoing population crisis.

Finally, the Republic of Croatia is primarily a rural state which, except for the capital and several other major cities, consists of large and sparsely populated rural areas and islands, as well as mountainous terrain which is difficult to access. In such circumstances it is nearly impossible to secure an effective system of transport which would transfer the mother who decided to give birth at home (even under the assumption that a doctor and midwife are present) to the nearest hospital in time to prevent all possible adverse consequences of the delivery that went wrong for any reason, or because of the occurrence of post-partum complications.

These problems are in large measure irremediable, even with a huge investment of capital. This especially applies for 47 inhabited islands in the Republic of Croatia with nearly 125,000 inhabitants.

d) Concluding remarks

In conclusion, the Government deems that the planned home delivery, in light of all the presented scientific findings, still represents a less safe option, compared to full hospital delivery.

As such, the question on whether the particular state should allow its medical staff to participate in such deliveries falls within its own margin of appreciation, meaning that each contracting party should be absolutely free do decide on its own, based on its own assessment of numerous factors which need to be considered, whether to provide this alternative to its citizens or not.

On that note, the Government deems that the contracting parties should not be pushed in *obligatory* home delivery, nor that the spirit of the Convention asks that such legislative measure or practice be implemented in every contracting party.

This, however, does not mean that a contracting party should completely disregard the fact that a certain, substantial number of women does not feel comfortable in hospital environment, and that some adverse effects to their delivery can be linked to that particular feeling of discomfort and fear.

However, the Government, for all reasons stated above, does not think that the solution to this problem lies in implementing mandatory assisted home delivery.

The compromise could be found in implementation of measures aimed at providing higher level of hospital comfort – ensuring home-like hospital environment, possibility of spouse or close relatives presence during a delivery, rooming-in, respect for pregnant women wishes prior to and during labour as regards the choice of available medical procedures, alternative positions for women during labour, are all elements which can ensure the *best of both worlds*. On one side, the safest possible environment for delivery (hospital), and, one the other side, the level comfort which eliminates risks linked with fear and discomfort.

The Government deems that respect for women's wishes regarding the abovementioned elements, in the context of Article 8 of the Convention, definitely falls well within the ambit of the Convention.

The assisted home births, however, especially in the light of the abovementioned scientific findings, do not.

The Government would appreciate if the Grand Chamber would take all above mentioned into consideration when deliberating the case.

Yours faithfully,

Stelica Staznik
Agent