

**Marica Pirošková**  
zástupkyňa Slovenskej republiky  
v konaní  
pred Európskym súdom pre ľudské práva

**Marica Pirošková**  
Agent of the Government  
of the Slovak Republic  
before the European Court of Human Rights

**Mr J. Callewaert**  
Deputy Grand Chamber Registrar  
European Court of Human Rights  
Council of Europe  
F- 67075 Strasbourg Cedex  
France

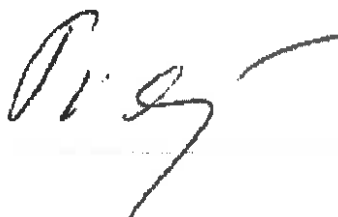
**Bratislava, 15 October 2015**  
**No.: 45593/2015/AB**

**Application no. 28859/11 and 28473/12**  
**Dubská and Krejzová v. the Czech Republic**

Dear Sir,

Referring to your letter of 24 September 2015, in which the Court informed the Government of the Slovak Republic that the President of the Grand Chamber has granted leave, under Rule 44 § 3 of the Rules of Court, to make written observations to the Court, please find enclosed the Government observation to the case.

Yours faithfully,



**OBSERVATIONS OF THE GOVERNMENT OF THE SLOVAK REPUBLIC FOR  
THE GRAND CHAMBER**

**IN CASE OF DUBSKÁ AND KREJZOVÁ v. THE CZECH REPUBLIC**

**(applications no. 28859/11 and 28473/12)**

**OBSERVATIONS OF THE GOVERNMENT OF THE SLOVAK REPUBLIC FOR  
THE GRAND CHAMBER  
IN CASE OF DUBSKÁ AND KREJZOVÁ v. THE CZECH REPUBLIC**

**I. GENERAL OBSERVATION**

1. With letter of 24 September 2015, the deputy registrar of the Grand Chamber of the European Court of Human Rights (hereafter the „Grand Chamber“ and the „Court“) notified the Government of the Slovak Republic (hereafter the „Government“) on the president of the Grand Chamber granting leave upon Rule 44 sec. 3 of the Rules of the Court to the request of the Slovak Republic enabling thus the Government to enter into the proceedings in case of Dubská and Krejzová v. the Czech Republic (hereafter the „application“ and „applicants“).

2. In the instant case the Court sitting in the former fifth section examined whether the prohibition to health care providers to attend home births violates the right of the applicants for respect of their privacy upon Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the „Convention“). In the judgment of 11 December 2014 (hereafter the „judgment“) it arrived to the conclusion that the noted rights of the applicants were not violated.

3. The Government of the Slovak Republic upon the request of the deputy registrar of the Grand Chamber submit within the set time limit the following observations to the case.

**II. LAW**

4. The Chamber in the judgment, having regard to all the circumstances of the case and bearing in mind that there is no European consensus in the matter, found that in adopting and applying the policy in force at the relevant time relating to home births, the authorities did not exceed the wide margin of appreciation afforded to them or upset the fair balance which is required to be struck between the competing interests. Accordingly, it concluded that there has been no violation of Article 8 of the Convention.

5. The Government fully consent to the conclusion of the Chamber on the non-violation of Article 8 of the Convention.

6. As for the examination of the case, the Government assume its assessment to be done from the point of view of positive obligations and not the negative obligations of the State. It is undoubted that it is not all the time inevitable in the practice to precise the obligation of the State as the boundary between the State's positive and negative obligations, as reiterated by the Court (for instance *Von Hannover v. Germany*, no. 59320/00, judgment of 24 June 2004, § 57), are very tight. Despite of this, a detailed analysis of this aspect in certain cases, including the present one, is appropriate. The principles for assessing the positive and negative obligations of the State are according to the Convention similar, but some factors shall be more important in assessing the situation from the point of view of positive obligations of the State – being so in search for fair balance between the interests of the individual and the society as such, as the Court within the positive obligations gives the States wider margin for appreciation as in assessing the case from the point of view of negative obligation.

7. Providing service connected to pregnancy and birth is a significant issue of women's human rights. Respective concerned rights are regulated by international conventions. In Article 12 of the International Covenant of Economic, Social and Cultural Rights the States to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Article 12 of the Convention on Elimination of all forms of Discrimination against women (CEDAW) explicitly defines the obligation of State Parties to ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period. When interpreting the noted rights, the UN Committee for Economic, Social and Cultural Rights stresses that the right to health contains also freedoms and also claims. Freedoms contain the rights of every person to control their health and body and the right not to be subjected to interventions or treatment without previous consent. On the contrary, claims in the Committee view contain the right to a system of health protection providing equal opportunities for people in order for them to be able to use the highest attainable standard of health. The Committee also stated that the right to health, like other social rights, included the following interrelated and essential elements: availability (meaning that properly functioning public health and healthcare facilities, goods, services and programs have to be available in sufficient quantity within the State party), accessibility (meaning that healthcare facilities, goods and services have to be accessible to everyone), acceptability (meaning that all healthcare facilities, goods and services must be respectful of medical ethics and culturally appropriate) and quality (meaning that healthcare facilities, goods and services must also be scientifically and medically appropriate and of good quality).

8. The Convention on the Rights of the Child handles the issue of birth or the circumstances of child birth even more particularly, recognizing in Article 24 the rights of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services, shall pursue full implementation of this right and, in particular, shall take appropriate measures among others for to diminish infant and child mortality, to ensure the provision of necessary medical assistance and health care to all children and to ensure appropriate pre-natal and post-natal health care for mothers.

9. In Article 15 (2013) of the general comments to the Convention on the Rights of the Child the UN Committee binds the States to provide for adequate regulation, supervision and conditions in the field of provision of health care services which is in the Government's view substantive for the assessment of the submitted case, the Committee imposes on States also the obligation to invent mechanisms for the determination and hold liability, ensuring the observe standards of quality control. It is the responsibility that the Committee holds for crucial part of realization of the right of children to health. The Committee reminds State Parties on their obligation to ensure that relevant government authorities and service providers are held accountable for maintaining the highest possible standard of children's health and health care until they reach the age of 18. National laws should place a statutory obligation on the State to provide the services, programs, human resources and infrastructure needed to realize children's right to health and provide a statutory entitlement to essential, child sensitive, quality health and related services for pregnant women and children irrespective of their ability to pay. (Articles 90 and 94 of the Comments)

10. As follows from the cited provisions, States have strong positive obligation as to the duty to regulate and set the system of provision of health care in relation to births including the provision of adequate education of all providers of health care and other involved subjects, control and enforce the observation of the existing medical, material, human right

and other relevant standards and within such context the functioning of the system continuous monitoring (including collection and publishing of necessary data) and reconsider them. Their aim should be nonetheless to provide protection and realization of the right to life and health of woman as well the child.

11. Already the increase of the noted standards of natal and neonatal health care lead in the 20th century to gradual transfer of deliveries from domestic environment to hospitals. Result of professionalizing was the significant decrease of mortality of newborns and others. Statistical data of WHO are unanimous – countries of the developed world with well developed infrastructure of health care establishments providing services connected to delivery show significantly lower results as the countries with lower standard in this field. The Slovak Republic ranks in this regard among developed States, as statistics also confirm. In the 50es of the 20th century almost 65% of all births were transferred to maternity hospitals and in the 60es almost 98% of them. By transferring deliveries to hospitals maternal mortality out of 70 women for 100 000 children born alive decreased to 10 women for 100 000 children born alive. As for mortality of newborns, according to the neonatal section of the Slovak Pediatric Association was in 2014 the new born mortality in the Slovak Republic 3.3 for 1000 children born alive, which has positive decreasing tendency.

12. The Chamber considered in the judgment that there exist no grounds for doubting that the policy in issue in the Czech Republic was designed to protect the health and safety of the newborn during and after delivery and, at least indirectly, that of the mother. It noted that it may accordingly be said that it served the legitimate aim of the protection of health and of the rights of others within the meaning of Article 8 § 2 of the Convention.

13. The Government fully identify with this conclusion and underline that legitimate aim of protecting the best interests of the child, depending on their nature and seriousness, may override those of the parent. The Government reiterate, as stated by the Chamber in its judgment, that while there is generally no conflict of interest between the mother and her child, certain choices made by the mother as to the place, circumstances or method of delivery may be seen to give rise to an increased risk to the health and safety of the newborns, whose mortality rate, as shown in figures for perinatal and neonatal deaths, is not negligible, despite all the advances in medical care. The Government in this regard stress the positive obligation of the State to protect life and health of the child and the obligation of States to grant children highest attainable standard of health care.

14. It follows from the Court's case-law that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when deciding any case under Article 8 of the Convention. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see *Connors v. the United Kingdom*, judgment of 27 May 2004, § 82, with further references). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, the margin will be wider (see *A, B and C v. Ireland*, judgment of 16 December 2010, § 232, with further references, and *Stubing v. Germany*, judgment of 12 April 2012, § 60, with further references). In the present case the Chamber expressly conceded that the margin of appreciation to be afforded to the respondent State must be a wide one, giving an involved complex matter of healthcare policy requiring an assessment by the national authorities of expert and scientific data concerning the relative risks of hospital and home births, the physical vulnerability of newborns and their full dependence on decisions made by others which justifies a strong involvement on the part of the State and the fact that the issue of

home births touches on areas where there is no clear common ground amongst the member States and involves general social and economic policy considerations for the State, including the allocation of financial means, as setting up an adequate emergency system may involve shifting budgetary resources from the general system of maternity hospitals to a new security network for home births.

15. The Government shall be aware of their positive obligation to protect the life and health of the child and provide it the highest attainable standard of health care and the responsibility connected to it. In the Government's view, the above noted may not be provided for in home births. Regarding the above listed, in sense of the Slovak legal regulation health care is provided by the provider of health care, obliged to dispose with material and technical equipment, set by respective legal rule. Qualified midwives are entitled to individually assist in the health care institute of institutional care exclusively physiological delivery during which episiotomy is required. Home births bring about risks for the mother and her child which are not balanced by the basic and needed necessities at home.

16. The Chamber stated in its judgment that the majority of the research studies presented to it do not suggest that there is an increased risk for home births compared to births in a hospital, but only if certain preconditions are fulfilled (home births only in the case of "low-risk" pregnancies, attendance by a qualified midwife, who is able to detect any complications during a delivery and to refer a woman in labour to a hospital if necessary and the transfer of mother and child to hospital should be secured within a very short period of time). With regard to the fact that in the Slovak Republic the rate of births outside health care institutes according to last data of 2013 amounted to 0,36 % (198 births) it is not possible to statistically assess the level of their security. Statistic from Western European countries enabling home births show that a part of home births required transport to hospital – for example in Germany in 2013 up to 11,3 % of home births required transport to hospital during delivery and in 0,1% of cases the was born during transport.<sup>1</sup>

17. The Government stress in this regard that births are mostly not to plan, with unforeseeable course and the possibility of acute threat of the mother and her baby's health and life. To foresee if pregnancy will end with physiological birth or need of fast intervention, or necessary surgery is impossible in advance. Birth is in all cases a dynamical process which may get complicated in any phase and may directly threaten the life of the fetus and obviously the woman in labor. None of such complications may be resolved at home which is being testified by births with lasting results either with the child or the mother. Acute hypoxia of the child, embolism or bleeding of the woman is not possible to handle beyond health care institution. Unpretermitted trend is also the constantly increasing age of the mothers and the related complications. According to the statistics of the National Center of Health Information for instance in 2013, in the Slovak Republic 6292 newborns required provision of health care in specialized neonatological institutions, that is, approximately every 8 to 9 born child required specialized intensive health care.

18. The Government stress that the field of provision of health care has its specifics, reflecting historical, geographical, demographical, scientific and economic development of the region. The State carries responsibility by considering all factors for health care to be provided completely and at the highest attainable level to everyone under its competence without difference, whereas it must in the examined field look for balance between individual interests

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<sup>1</sup> See data of Gesellschaft für Qualität in der außerklinischen Geburtshilfe e.V. ([http://www.quag.de/downloads/QUAG\\_bericht2013.pdf](http://www.quag.de/downloads/QUAG_bericht2013.pdf))

of the mothers concerning the course of the labor and the interests of the state on the protection of the mothers' and child health.

19. Regarding the State's wide margin of appreciation in this field, the Slovak Republic maintains the view to prefer humanization during birth and adjustment of the circumstances for births, but only in health care institutions. It should inevitably be stressed the need of protection of children rights, their chance to life and their right to health which are during birth beyond a health care institution decreased. The majority of women selecting the possibility of delivery in domestic circumstances argument with the need for intimacy, the opportunity to select the method and position of delivery, to decline medical interventions during its course, the need for the presence of close person and exclusion of separation from the child. The UN Committee for the rights of the child requires States to support the Mother and baby friendly hospital initiative, where WHO and UNICEF set the criteria for maternal and neonatal stations of health care institutions. While cooperating with the noted organizations, the Slovak Republic since 1996 implements quality projects of perinatal care including support of physiological maternity, behavioral approach during common nursing of newborns and mothers, support of breast-feeding and stresses the inseparability of the mother and child tie. Each health care provider shall be responsible for the highest standard of birth humanization. Some providers rebuilt health care institutions in order for them to use in the practice also alternative methods of giving births, for example, vertical birth position, birth into water and acceptance of birth plans upon mother request, exclusive rooms with possibility of presence of husband and family members during birth and the entire stay in the health care institution. Immediate contact of the mother with the newborn after delivery shall be provided for in each delivery room and is condition for the „Mother and baby friendly hospitals“ – Mother and Baby Friendly Hospital Initiative – MBFHI. From the point of view of breast-feeding support, MBFHI is in the European Union considered for a model of the best practical care about the mother and the newborn after delivery. It requires among others the dried newborn to be placed on the mother's body (skin to skin) within half an hour after delivery, to provide for the newborn and mother to be together enabling breast-feeding “upon request“, and so on.

20. The Government assume that this approach concerning births, similar to that in the Czech Republic, meets the idea of respect and active support of women rights connected to births. They fully accept at the same time the rights of the child following from international documents, providing therewith for the balance between the interests of the woman, her child and the society interest to keep them.

21. With reference to the afore mentioned, the Government request the Grand Chamber to decide similarly, as the chamber did on the non violation of the rights of the applicants under Article 8 of the Convention, with regard to the fact that by adopting and asserting policies concerning home births the Czech authorities did not exceed the wide margin of appreciation which they dispose with and either the balance that need to be kept between the concerned conflicting interests.

Bratislava, 15 October 2015



Marica Pijošilková

Agent of the Government of the Slovak  
Republic before the European Court of Human  
Rights