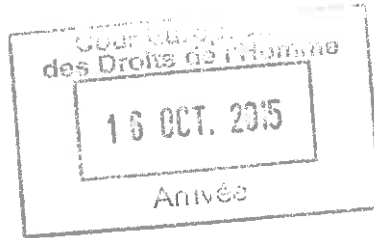


Public Defender of Rights
Mgr. Anna Šabatová, Ph.D.



In Brno, October 12, 2015
File no.: 37/2015/SZD/IŠ

The Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex
France

**Opinion of the Public Defender of Rights regarding the Matter of Dubská
and Krejzová against the Czech Republic (Applications no. č. 28859/11
and 28473/12)**

Introduction and the introductory facts

The role of the Public Defender of Right (Ombudsman) is mainly to protect persons from both conduct that is either unlawful or of somehow erroneous nature and inactivity of the authorities and public bodies (to check and inspect the public administration). Simultaneously, the Czech Public Defender acts as the national Equality body (national body for equal treatment and protection from discrimination) in the virtue of the relevant Directives of European Union (such as 2000/43/EC¹, 2000/78/EC²). The Defender also conducts systematic visits of places where persons are restricted on their freedoms and liberties³ and monitors forced returns/ expulsions of aliens in the virtue of the so called Return Directive.⁴ She exercises her authority in an independent and impartial manner.

I would like to submit to the Court **an overview of cases submitted to the Defender** so as to enable the Court to assess the concerned case while aware of broader circumstances.

The Defender is turned to by women having undergone labour and deliveries in medical facilities when they disagree with certain procedures or acts performed by the facility to which they failed to grant consent or they consider such procedures and acts to be of non- standard, outdated, degrading or discriminatory quality.⁵ Another group of women is represented by women who plan to deliver their children outside medical facility but they are unable to secure the assistance of a midwife or a doula. Other persons challenge the imposition of fees for certain services such as presence of other persons during labour and at the delivery.⁶

The complaints regarding labour and childbirth may be divided as follows:

1. **Complaints related to the procedure during labour in a medical facility;**
2. **Lack or absence of an opportunity to give birth with professional supervision** (supervision of a person with relevant medical qualification such as for example a midwife) outside medical facility; absent provisions governing home births or similar alternatives;
3. **Administrative difficulties** in the event of a child having been born outside medical facility - birth certificate not being issued, benefits of national social

¹ Directive of the Council of Europe 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

² Directive of the Council of Europe 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

³ This activity is performed by the Public Defender in the virtue of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁴ Directive of the European Parliament and the Council of Europe 2008/115/ES of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁵ Should such a woman fail to succeed with a complaint with the provider of medical services, she may turn to authority that had granted the concerned provider with the relevant license (usually the regional authority depending on the seat of the medical facility operated by the services provider. The Defender verifies whether the complained had been duly dealt with.

⁶ Fees imposed upon the women in labour for having other persons present at childbirth where subject to complain by the concerned women as well as complaints by men - fathers present at childbirth.

support (social security benefits - maternity and parental benefits) not being awarded;

4. Complaints submitted by **the midwives** alleging hindrance and obstacles in performance of their profession and professional duties.

1. Complaints regarding the procedure during labour and childbirth in a medical facility

Most of the complainants pointed out that during labour or within the post-delivery care the conditions in the facility were lacking in dignity. They claimed inter alia lack of privacy caused by presence of too many persons on the room where the labour and delivery took place, the (hospital) rooms being overcrowded by other women in labour, failure to respect the birth plan (medical treatment and intervention - especially episiotomy - being administered without prior notification or even in spite the express refusal) or other wishes related to the process of childbirth (opportunity to eat and drink, to move around, to opt for a specific maternal birthing positions either on or off bed), continuous monitoring of the unborn child and separation of the child immediately after the birth or in the 48 hours following the birth and so on.⁷

Currently I am inquiring into a case⁸ where the complainant drafted a birth plan prior to the delivery⁹. The plan contained a request related to the process of childbirth such as refusal to undergo episiotomy, having the child placed on the belly of the mother immediately after the birth, requesting no weighing and measuring of the child instantly after the birth so as to maintain the contact of the mother with the child, in other word minimum disturbance of the moments after the birth. The requests were not respected and the complainant thus filed a complaint directly with the concreted medical facility and subsequently with the regional authority. The complainant perceived the administered episiotomy as the gravest of all instances of malpractice. The regional authority assessed her complaint as unfounded. In the reasoning it relied on the opinion of an independent expert¹⁰ who stated that "*episiotomy is unambiguously the type of treatment the refusal of which upon a wish or request of the woman in labour may not be guaranteed to be respected*".

The medical facility further stated that it is necessary to weigh and measure the child immediately after the birth and it cannot be done on mother's body. The facility considered the number of five persons present at labour and delivery (an obstetrician, two assistants, a child nurse, and a paediatrician) to be the minimum safe number of

⁷ Case pending under file no. 1398/2014/VOP/IJ, case pending under file no. 1719/2014/VOP/MJ, case pending under file no. 7302/2014/VOP/SK, alternatively case pending under file no. 3055/2014/VOP/SK.

⁸ Case pending under file no. 3055/2015/VOP/SK.

⁹ Birth plan is a written document in which the concerned pregnant woman expresses her wishes and plans regarding the process of childbirth such as types of medication, chosen birthing position for the first and second phase of childbirth etc. The women often state in the birth plan that it is to represent their informed consent or express withdrawal of such consent with administration of certain medical services and care in the virtue of provision § 34 and subsequent provisions of the Act no. 372/2011 of Collection on Medical Services and conditions of provision of such services in its latest wording.

¹⁰ In the virtue of the Act on medical services the administrative body dealing with the complaint appoints and independent expert when the complaint contests the procedure or course of action in administration of medical services or alleges injury or harm to health of the patient suffered as a result of administration of medical services.

staff present at the first moments after birth. I have also found out in the meantime that the birth plan of the complainant is not filed within the medical file. The birth plan must be contained in the medical file in order for the requests to be treated as binding although the relevant medical file quotes the plan directly. The inquiry is still pending.

Another similar case¹¹ concerns a complainant who alleges that she had submitted the birth plan to the medical facility immediately after her admission to the facility (she has a witness). In spite of that the plan is not contained in the medical file and cannot currently be located. In this case too the complainant saw the main instance of malpractice in episiotomy she was to undergo contrary to her wishes. Preliminary outcome of the inquiry suggests possible lack of thoroughness in maintaining the medical file - this may significantly influence the assessment of whether there had or had not been an informed consent or direct withdrawal of such consent with certain medical treatment, administration of certain medical services and care in the virtue of provision § 34 and subsequent provisions of the Act on medical services or whether the case might amount to an instance of administration of medical care without consent.¹² I thus among other things concentrate on whether the Regional authority while dealing with the complaint verified the mechanism of maintenance of medical files and documentation and the risk of arbitrary or intentional loss of selected documents from the file.

In 2014 I dealt with the case of a complainant¹³ who wished to have a doula present at child birth in the medical facility. The complainant contested the imposition of a fee in the amount of 1500 Czech crown (approximately 55 Euro) for such presence of doula at childbirth. I arrived at the conclusion that the presence of a doula at childbirth is to be viewed as presence of a person designated by the woman in labour in the virtue of § 28 paragraph 3 letter e) of Article 3 of the Act on Health Services. It thus amounts to the statutory right of the woman the exercise of which cannot be conditioned by any monetary consideration while relying on current provisions of law. I made the case publicly available through the media in October 2014 and I am still discussing the matter with the Ministry of Health and the Regional authority. The medical facilities unfortunately continue imposing the concerned fees in spite of the fact that the district court awarded the concerned complainant an order under which the fees collected for presence of other persons at childbirth had to be returned.¹⁴

Regarding the matter of childbirths and deliveries at medical facilities I would like to add that that the recommendation guidelines issued by the Ministry of Health encourage the release of a physiological newborn "into its own social environment"

¹¹ Case maintained under file no. 7302/2014/VOP/SK.

¹² Pursuant to the Act on Health Services the patient may without his consent only be granted the urgent care in the event when his medical conditions does not enable the patient to grant such a consent: that does not effect the tool of prior living will.

¹³ Case maintained under file no. 7591/2013/VOP/MJ. Other similar cases related to fees imposed for presence of the fathers at childbirth (case maintained under file no.1851/2015/VOP/MJ and case maintained under file no. 7080/2014/VOP/MJ), but the complainants did not exhaust the opportunity to file a complaint with the provider of the medical services and thus I was unable to deal with the cases.

¹⁴ District court in Mělník in its judgement of November 11, 2014, file no. 12 117/2014-106 dealt with a similar case and awarded the compensation in the form of return of the fees in the amount of 1.200,- Czech crowns (approx. 44 EUR) for two persons present at childbirth. The amount of the fee was found disproportionate with respect to the fact that the actual costs incurred by the medical facility amount to merely tens of crowns..

after at least 72 hours from the moment of birth have passed and only under the conditions set forth therein have been satisfied. The above guidelines admit that under certain circumstances it might be possible for the newborn to be released prior to the passage of the 72 hour period after the birth.

The recent attitude toward women attempting to deliver a child in an outpatient clinic is reflected also by the above mentioned recommendation guideline that considered it necessary¹⁵ to expressly stress when addressing the medical services providers that the early departure from a medical facility as such cannot solely be considered to represent a conduct threatening the child and is not to be reported to the body of social and legal protection of children.

Unfortunately, the experience of some women in labour thus suggests disrespect for their will, the risk of manipulating the medical documentation in the case of disputes, as well as the effort to restrict the presence of other persons at the delivery (including professional assistance) by means of fees.

2. Impossibility of delivery outside a medical facility with professional assistance (a professionally qualified person, e.g. a midwife); missing legal regulations of birthing centres or similar alternatives

The applicants (women with previous negative experience, as well as women who are to deliver their first child) frequently seek an alternative to the delivery in a medical facility. They find out that even though the legal regulation does not expressly prohibit a delivery outside such a facility, it does not allow it in fact. The Defender received the first complaint in the matter already in 2003.¹⁶ The applicants contested, in particular, the ambiguity of the legal regulation, the impossibility of delivering a baby outside a medical facility with the assistance of a midwife, and the lack of reimbursement of the midwife's services from public health insurance.¹⁷

Even though the Czech legal regulation does not expressly prohibit delivery a baby outside a medical facility, any such delivery is virtually excluded by the Implementing Decree of the Ministry of Health No. 92/2012 Coll., on the requirements for minimum technical and material equipment of medical facilities and home care contact centres. The Decree sets out the conditions for the workplaces of midwives where physiological deliveries take place. One of the conditions stipulates that *"unless carrying out a delivery using a Caesarean section or a surgery leading to the termination of the delivery in an inpatient health care facility is secured within 15 minutes upon establishing delivery complications, there shall be established a delivery room complying with the requirements prescribed in Section II, para. 1.8 of Annex No. 4 to this Decree, and the equipment of the midwife's workplace shall be complemented with the equipment specified in Section I, para. 19, letters b), f), g) and u) and Section II, para. 1.18, letters a), b), e) and g) of Annex No. 4 to this Decree"*. As a matter of fact, the conditions cannot be met in the home environment of delivering mothers or in any other environment, in principle. At present, delivery rooms

¹⁵ Most likely as a response to the case of Hanzelka couple. The judgement of the ECHR dated December 11, 2014, Hanzelovi versus the Czech Republic application no. 43643/10

¹⁶ The case with the file reference 848/2003/VOP/MP.

¹⁷ The Public Defender received multiple complaints, e.g. cases with the file reference 2491/2013/VOP/ZK, 1317/2013'2/VOP/ZK, 5263/2014/VOP/SK, 4687/2011/VOP/ZK, 4688/2011/VOP/ZK, or 4689/2011/VOP/ZK.

meeting the conditions set out by the Decree are thus located exclusively in health care facilities.

Some of the mothers-to-be would find it sufficient if the delivery in the medical facility were carried out by “their” midwife. The operators of medical facilities allow carrying out the delivery only to midwives with whom they have concluded an agreement, which often remains unattainable.

In the case of reservations to a legal regulation, the Defender may only recommend its enactment, amendment or annulment. The Defender is not equipped with the legislative initiative (i.e. not being competent to submit a bill to the Parliament).¹⁸

I thus continue to communicate with the Ministry of Health, the coordinator of the legal regulation. In August 2014, I was notified by the Ministry of the ongoing debate taking place at the Ministry in two working groups and dealing with the issues of obstetrics. The meetings of the first working group, established in March 2012 and consisting of the representatives of the Ministry, providers of health services in the sphere of gynaecology and obstetrics, midwives, health insurance companies, and Government Representative for Human Rights, were too adversarial, and as a result, no consensus was found, and the negotiations “collapsed”. The second working group was established in March 2013, yet it no longer took into account the participation of midwives. The results of the negotiations were then analysed by the Ministry, considering the appropriateness and need of establishing another working group on obstetrics. Consequently, the only active group last year was a working group on training of midwives, which does not address the issue of home births, though.¹⁹

In January 2015, there was the first meeting of the working group on obstetrics established at the Government Council for Equal Opportunities for Women and Men. The group was tasked to search for suitable criteria to change the system. The working group held its second (and to date last) session in April 2015.

The Czech legislation does not prohibit deliveries outside medical facilities, yet it does not make them possible in practice. Women who do not wish to give birth in a medical facility thus risk the delivery without any assistance and necessary care. In spite of the declared efforts, the necessary debate on appropriate changes in the existing system has not yet even taken place.

3. Formal complications for the case of a child born outside a medical facility – non-issuance of a birth certificate and rejection to provide social benefits (maternity and parental allowances)

In some cases, the parents of children born at home face ostracism and may fail when attempting to meet the required formalities.

Pursuant to the provisions of § 16, para. 4 of Act on Registers, *“for the purposes of recording in the birth register the birth of a child born outside the medical facility and*

¹⁸ The legislative initiative has only been granted to individual MPs, groups of MPs, the Senate, the Government or the Regional Council.

¹⁹ I received the statement of the Ministry of Health on 20 August 2014 within the case with the file reference 36/2013/DIS/IJ.

whose mother was not even subsequently provided with any health services, in addition to the documents specified in paragraphs 1, 2 or 3, either parent shall submit further documents necessary to establish the fact that the mother of the child is the woman who gave birth to him or her."

Although the legislature envisaged the possibility of the birth of a child outside a medical facility, the parents of such children subsequently face impracticable challenges imposed by the registry office to submit "further documents necessary to establish...".

In one of the cases²⁰, the registry office refused to record the child in the birth register and issue a birth certificate. The birth took place outside a medical facility, and the midwife carrying out the delivery upon agreement did not issue any certificate of the birth (as the Czech legislation does not allow assisting at such deliveries). The applicants submitted to the registry office the record on the declaration of paternity by means of a consensual declaration of the parents, the declaration on the name of the child, birth certificates and identity cards of both parents, the statutory declaration of the father on the birth of the child, the applicant's pregnancy certificate, and the medical reports on ultrasound examinations establishing the usual course of pregnancy. However, the registry office did not deem such evidence as sufficient. The applicants turned to court seeking the declaration of maternity. They prevailed in the end.²¹

In another case of a child born outside a medical facility²², the applicants submitted their identity cards, a record on the declaration of paternity and the declaration of the name, the mother's pregnancy certificate, and the vaccination card with the record of the treatment of the child's paediatrician. In addition, the registry office requested the submission of a certificate issued by a gynaecologist or midwife attesting that the woman had actually given birth. In the course of my investigation, the registry office abandoned this request, recording the child's birth and issuing the birth certificate.

A potential impossibility of a "standard" certification of the birth date complicates granting social benefits.²³ I have thus encountered a case²⁴ when the applicant disagreed with the commencement of the payment of maternity benefits. The expected date of the childbirth in fact differed from the actual date of the childbirth by three weeks. The applicant filed with the court, yet I have not received any information on the outcome of the proceedings.

In the effort to comply with their duties, the parents of children born outside a medical facility face up to problematic requirements imposed by the administrative authorities.

²⁰ The case with the file reference 1274/2014/VOP/SK.

²¹ The child was born on 10 January 2014. The court's decision on the declaration of maternity took effect on 4 August 2015.

²² The case with the file reference 4371/2014/VOP/MV.

²³ The benefit may be claimed by means of the form entitled "Application for compensatory allowance in pregnancy and maternity", issued by the attending physician or gynaecologist taking care of the woman in the course of the pregnancy and maternity.

²⁴ The case with the file reference 7241/2013/VOP/OR.

4. Complaints of midwives concerning obstacles to exercising their profession²⁵

Pursuant to the provisions of § 6, para. 3 of the Act on Non-Medical Professions²⁶, “the exercise of the profession of a midwife shall be deemed as providing health care in childbirth assistance, i.e. arranging for the necessary supervision, providing care and consultancy to women in the course of their pregnancy, at childbirth and in the puerperium, and on condition that they take place physiologically, carrying out the physiological childbirth and providing care for the newborn; any such health care shall also include nursing services offered to the woman in the sphere of gynaecology. Furthermore, in cooperation with the physician, the midwife shall also contribute to the preventive, therapeutic, diagnostic, rehabilitation, urgent, or continuing health care.”

Midwives may work in a medical facility (hospital), in a gynaecologist's office, or they may run their private practices.

In 2009, within the effect of the Decree of the Ministry of Health No. 49/1993 Coll., on technical and material requirements for the equipment of medical facilities, in the wording effective until 31 August 2010, my predecessor investigated the alleged unequal (disparate) approach of Regional Authorities in deciding on authorising the operation of private medical facilities (hereinafter only as the “private facility”) in which it would be possible to carry out childbirths with the assistance of midwives without a specialist physician. The investigation revealed an unequal approach, establishing that certain Regional Authorities required meeting the conditions unforeseen by the statute. Apart from harmonising the practice, it resulted in **the legal regulation becoming more restrictive upon enacting a new decree²⁷** which provided for material and technical requirements for the equipment of medical facilities, including the midwife's workplace.

As a consequence, the legal regulation, in practice, disallows assisting and conducting childbirth outside a medical facility.

Conclusion

Women turning to the Defender consider the approach of the staff in medical facilities as disgraceful, humiliating and causing fears or resistance to another childbirth in the facility. Such experience subsequently affects new expectant mothers considering available childbirth options.

²⁵ The complaints directed against restrictions on the activities of midwives or concerning the impossibility of providing their services during a childbirth carried out in the domestic environment included, for instance, cases with the file reference 2491/2013/VOP/ZK, 1317/2013'2/VOP/ZK, 5263/2014/VOP/SK, 4687/2011/VOP/ZK, 4688/2011/VOP/ZK, or 4689/2011/VOP/ZK.

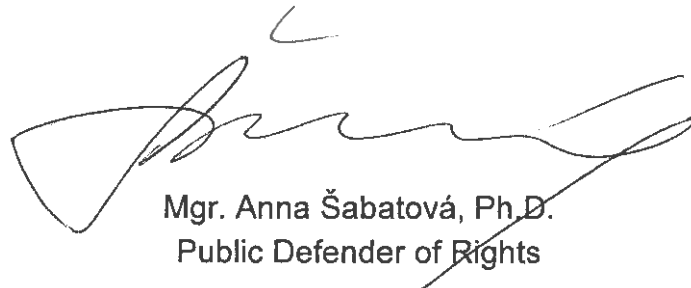
²⁶ Act No. 96/2004 Coll., on the Conditions for Obtaining and Recognizing Qualifications for Non-Medical Professions and Activities Related to the Provision of Health Care and on Amendment to some Related Acts (Act on Non-Medical Professions), as amended.

²⁷ The Decree of the Ministry of Health No. 221/2010 Coll., on requirements for material and technical equipment of medical facilities and amending the Decree of the Ministry of Health No. 51/1995 Coll., amending and supplementing the Decree of the Ministry of Health of the Czech Republic No. 49/1993 Coll., on the technical and material requirements for healthcare facilities, and amending the Decree of the Ministry of Health Czech Republic No. 434/1992 Coll., on health emergency service (Decree on the requirements for material and technical equipment of medical facilities); set aside on 1 April 2012.

I am convinced of the inevitability of the change in the approach of medical staff to women giving birth and in setting the rules of provided care in order to respect their wishes and needs as much as possible with regard to their health condition and the health of the expected child. A change in the approach is then likely to reduce the number of women refusing to give birth in a medical facility.

Yet, there will probably always be a small group of women who wish to give birth at home. They should not be “punished” for their decision, either, on condition that the Czech legislation provides for such an option. If the state seeks to protect the health and life of an unborn child, it must not leave even these women without any professional assistance, and it should at least provide access to basic care precisely due to the fact that the inaccessibility of legal professional assistance jeopardizes the life and health of both the woman and the child.

I am not questioning the excellent results of Czech obstetrics, manifested through a sustained low neonatal mortality. However, I do believe that it is necessary to change the existing hospital practice so that women could rely on the fact that the medical staff will respect their wishes. The obstetrics system would certainly benefit from other changes providing greater space to natural childbirths with the assistance of midwives and without excessive interventions. For this reason, I regret that instead of factual debate on such changes, one may observe merely escalated discussions on the issues of “home births: yes or no”. As a result, the criticism (wrongly) targets women to whom a home birth represents the only way out of the current system.



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