

**Observations of the Government of the Republic of Hungary in response to
the Applicant's Observations in the case of v. Hungary
(application no.)**

1. In response to the applicant's Observations of 29 June 2010 (hereinafter referred to as "OA") the Government of the Republic of Hungary submit the following comments on the question of admissibility and merits of the above application.

2. The Government first note that the applicant's observations still do not contain any personal information that would make it possible to conclude that the applicant has been personally affected by the impugned legal provision or by the lack of regulation of home birth. As a woman recipient of child care allowance (stated as her profession in the application form), the applicant had already given birth when she filed her application to the Court. Yet, there was no mention in the application whether she had been prevented from exercising her right to self-determination in respect of that birth. Moreover, as a woman known to be pregnant at the time of filing the present application (on 15 December 2009) she must have given birth by now again. Yet, she has still not provided any information on whether she was able to exercise her right to self-determination and give birth at home or she was forced to go to hospital. If she gave birth at home, did she find any health professional to assist her and if not, did she suffer any prejudice on account of the lack of such assistance? Was she prosecuted for giving birth at home as she alleges that women usually are (§ 10 of OA) and she allegedly fears (§ 12 of OA), or were those helping her prosecuted in criminal or administrative proceedings? In lack of any information to the contrary, the Government must presume that the applicant has not in fact been prevented from exercising her right to self-determination, as women in general are not, otherwise she would not have missed a chance to support her general allegations by facts from her own personal experience. Therefore she cannot be regarded as a victim of a violation of Article 8 of the Convention within the meaning of Article 34 of the Convention.

In lack of any personal information, the applicant's observations remain in the nature of an *actio popularis* or of a third party intervention reiterating the arguments of home birth care providers wishing to promote home birth. No reasonable woman wishing to make an informed decision in exercise of her right to self-determination would find it objectionable to be provided with information on the potential risks of home birth, only home birth care providers could regard provision of this kind of information as an attempt by medical staff to divert pregnant women from their idea of giving birth at home (§ 10 of OA).

3. The Court has established in its case-law that only differences in treatment based on a personal characteristic (or "status") by which persons or groups of persons are distinguishable from each other are capable of amounting to

discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen*, judgment of 7 December 1976, Series A no. 23, § 56). The Government are of the opinion that the venue for giving birth is not such a personal characteristic, therefore Article 14 is not applicable in the present case. As regards the applicant's complaint under Article 8, taken alone, the Government reiterate that no pregnant woman in Hungary is prevented from exercising her right to self-determination, that is all are free to decide whether to take advantage of available health care services or not. Contrary to her allegations, the applicant could not cite any specific example (and certainly not her own personal experience) when a woman had been penalised for the sole reason that she had refused to go to hospital to give birth.

4. By characterising the Government's position as an "unreasonably protectionist attitude", the applicant seems to lose sight of the fact that it is not only the pregnant woman's right to self-determination which is at stake in the process of birth but the rights of the child to be born. In this respect the Government wish to point out that the applicant's arguments about the proper terminology to be used, denying that the rights of the child are at stake at birth and suggesting that "it would be more precise to write about 'foetal rights'" (see § 16 of OA) puts the issue of home birth in a new context. From this perspective, regulation of home birth involves decisions about serious issues of ethics such as the definition of the notion of a "child", its delimitation from a "foetus", and the limits of the rights of the foetus. In lack of a European consensus on these ethical issues, the Government submit that State Parties to the Convention enjoy a very wide margin of appreciation in the regulation of home birth.

5. The Government are of the opinion that such a "protectionist attitude" is justified by the State's obligation to protect the child's right to life. Article 2 of the Convention itself requires that in case of the death of a child an effective investigation be carried out. Therefore prosecution of those suspected to be responsible for the death of a child during home birth cannot be regarded as a harassment of home birth care providers being involved in such births or as an attempt to dissuade mothers from exercising their right to self-determination in respect of home birth.

6. As regards the applicant's arguments that she lives in Budapest, very close to a hospital, the Government note that the tragic event which prompted the Parliamentary Commissioner to issue a recommendation on the regulation of home birth in October 2007 had occurred also in Budapest, a few minutes away from a hospital. Therefore the vicinity of a hospital is not a decisive factor in assessing the safety or risks of home birth. Emergency services are indeed available in Hungary and the applicant and all pregnant women have equal access to them. However, those services are not considered to be of such an exuberance that it could make it reasonable to encourage women to give birth at home, that is to generate possibly more demand for those services.

7. The applicant admits that statistics do not support her argument that the petty offence proceedings have the effect of dissuading mothers from exercising their right to self-determination by choosing to give birth at home (§ 15 of OA). However, she fails to explain, let alone substantiate, why “the opposite of it is more realistic”. Taking into consideration the latency of planned home birth, as the applicant suggests, strengthens the Government’s position: if there are even more planned home births in Hungary than shown by the statistics, that can hardly support the argument that pregnant women are dissuaded from giving birth at home with or without professional assistance.

8. As regards the last sentence of § 15 of the Government’s Observations of 17 May 2010 stating that “there were no cases reported when the mother’s or the newborn child’s life or health were put to danger by lack of professional assistance at home birth”, which was misunderstood by the applicant, the Government wish to clarify that they did not refer to any criminal proceedings (neither here nor in § 16 of their Observations). This sentence simply stated the fact that no such event had happened which would support the applicant’s assumption that women giving birth at home are indeed missing the health care assistance they are in need of. Therefore there is no evidence that home birth care professionals are dissuaded by legislation to provide assistance to those who are in need of it or that obtaining the necessary health care assistance is made impossible by the impugned legal provision or by the lack of regulation of home birth or that there are any legal obstacles preventing women from exercising their right to self-determination in respect of giving birth.

9. In light of the foregoing, the Government maintain their arguments and conclusions set out in their Observations of 17 May 2010 as regards the admissibility and merits of the above application under Article 8, taken alone or in conjunction with Article 14 of the Convention.

10. As regards the claims for costs, the Government are of the opinion that they are not justified since the Government are not aware that the Court has ever reimbursed the costs of filing third party interventions.

Budapest, 14 September 2010



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of Hungary