The remarks of the Hungarian Government regarding the admissibility and merits of the application handed in by

1. The Government of the Hungarian Republic as a response to the questions stated in the letter written by the Court on January 27th 2010 regarding the admissibility and merits of the application mentioned above, submits the following:

The Section I. deals with the facts of the case, the Section II. deals with the related provisions of Hungarian law, the Section III. deals with the position of the Government regarding the admissibility and merits of the application and the Section IV. comprises of the Governments conclusions regarding the case.

Besides established facts and legal questions mentioned in the remarks the Government does not recognize any further facts and questions, and reserves the right to submit further documents regarding the application. Furthermore it is willing to give remarks on questions asked beyond those asked by the Court during the process.

Section I.
Facts

2. The Government does not argue with the fact that – as stated among the facts handed in on the 27th of January, 2010 by the Court Office – the applicant is an pregnant mother, who wishes to give birth to her child not in a hospital, but in her home. Still the fact that the counsel of the applicant – who he himself handed in a proposal to the Institutional Court concerning said application – has taken this case to his heart so that he identified the applicant as male on the applicant form, indicates the *actio popularis* nature of the application. Nevertheless the Government has no reason to doubt that the counsel has found an actual pregnant woman, who's case he supports, and in who's name the application has been handed in to the Court.

Section II.
Relevant provisions and practice of Hungarian law

3. The Act. CLIV. passed on December 14th 2009 concerning the modification of some laws on the subject of health care

59. § (1) To the Act on Health 247. §. paragraph (1) the upcoming v) bullet point has been added:
[The Government has been authorized to]
"v) to establish the professional rules and the grounds of refusing outside hospital birth"
[in the form of a regulation]

4. *The resolutions of the parliamentary Commissioner for civil rights*

OBH 3840/1996. (30th of January 1998)
[…] The aim of my investigation was to determine whether the health care authorities are unconstitutionally limiting pregnant women's right to self-determination.
[…] Giving birth – although it is a natural biological process – comes with a certain level of risk, and in some cases requires professional medical assistance for the protection of the

physical safety of both the mother and the baby to be born. And so the question rises whether the mother's right to self-determination endangers the fetus' right to life, physical safety and health. Namely because the mother's decision of rejecting hospital conditions makes it difficult to carry out the necessary medical interventions on time.
I think it necessary to learn about how in the case of out of hospital birth do they minimalize risk in the developed European countries.
I have established that out of hospital birth has spread with different frequency and conditions.
In the Netherlands, where it is the most common – the advanced technology, the density of hospitals (reachable at an average of twenty minutes), the training of midwifes, the cooperation of hospitals and the home birth assisting midwifes and doctors – provides the opportunity for the women giving birth to reach a hospital during birth in a short amount of time. In this system the risk of "home birth" is not much higher then hospital birth's. These conditions are not given in Hungary. Because of Hungary's housing conditions, its insufficient suburban infrastructure, the distance from the hospitals and birthing homes in rural areas, the absence of the home care network etc. the practice has not spread on the level as in West-Europe. Thus home birth in Hungary may come with unnecessary risks. In some locations – in the capital and bigger cities – women already have the opportunity by exercising their right to freely choose their doctor, to give birth in institutions where they are not treated as patients […]

OBH 1773/2003. (8th of May 2003)

[…] The free decision of a woman that she wishes to give birth in a facility, in which health care facility or whether she wishes to give birth at home falls within the scope of the right to self-determination. […]
Birth, although a natural biological process, comes with risks, and in some cases requires professional and fast medical assistance, invasive and life-saving interventions may be necessary. The rejection of the opportunity of hospital birth and the choosing of home birth – which cannot be excluded by law due to the right to self-determination and other objective conditions – makes it difficult to carry out medical interventions in time. In the health care system's current condition the necessary instrumental conditions, the quick medical interventions are mostly provided in hospitals. […] home birth in Hungary comes with a greater risk then hospital birth, […]
[…] keeping in mind the shortcomings of the national emergency care system we may conclude that the current condition of health care, the health care practices regarding home birth raise the possibility of the anomaly of endangering the right to life. […]

OBH 4570/2007. (October 2007)

As parliamentary Commissioner I was informed from the press news releases that in September of 2007 during a birth in a birthing house in the capital, which started without complications, because it later resulted an emergency situation– after taken to a hospital – the infant died.
[…]
Due to the states objective duty to protect life, it constitutionally cannot allow the institutional system serving the enforcement of the right to health – which is a state target – of to be neglected without reason, although it also has to bare in mind the particular significance of the XXI. paradigms of the right to self-determination.

[…] it has become necessary for the state to take care of – the women giving birth and her child's protection – by legislation and other organizational measures (e.g. establishing a professional protocol).
[…] baring in mind the medical-professional reasons given so far against the opportunity of planned home birth, and also keeping in mind the general life protecting aspects of planned home birth and international practice, I feel it necessary to subsequently discuss the previously explained professional and legal arguments. To avoid any illegal practices and that births which most likely will not be without risk might be conducted out of hospital– *in connection with the right to the highest possible level of physical and mental health* – it is essential to establish the legislational framework as soon as possible.
[…]

5. *The resolution of the Hungarian Obstetric-Gynecology College on the 18th of January 2002 on the question of "planned home birth"*

"1. The Hungarian Obstetric-Gynecology College's opinion is the same as the most international professional bodies' opinion […] that is, that 'planned home birth' bares within itself such risks which are not compensated by its advantages, namely the home environment's the personal and emotional influence on motherhood and the forming of early mother-child bond.
2. A hospital environment provides the opportunity to fend off the unpredictable dangers of birth and treat its complications fast and at and early stage. At the same apart from the professional board, with the proper conditions more and more women in Hungary may give birth in single-bed rooms with bathrooms, taking advantage of the benefits of family centered obstetrical approach, including giving birth with the a close relative present, early skin-contact and the mother staying together with the newborn. Today it is possible for the woman giving birth to exercise her right to the free choosing of her doctor and to give birth in an institution where she is not treated as a patient, and her wishes, ideas and demands are herd and granted if possible. […]
3. […] the group of women whose labor and birth will go without complications can not be 100% defined prior to the events neither from a legal nor from a professional point of view. The medical profession of obstetrics requires "emergency" efficiency, and so emergency care must be available for the women giving birth at all times.
4. […] At the same time we point out that taken to the hospital by an ambulance called in the event of unexpected obstetric or neonatological complications means a time loss compared to the possibility of immediate treatment in the hospital, which will result in the increase of the number of deaths for both mothers and infants. […]"

Section III.
About the exception of the application and its merits

6. The Court put the questions below to the Government:

"Did the applicant suffer discrimination in her right to respect for private life guaranteed to her by the Convention, violating the 14. article of the Convention in connection with the 8. article? Is it especially discriminative against those mothers who wish to give birth at home (compared those who choose the hospital), that there is no current regulation of home birth in Hungary, and the laws under the 218/1999. (XII.28.) Government Decree supposedly prevent health care professionals from assisting such individuals?"

The Convention's 8. article states. "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Convention's 14. article states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A
The application of article 14.

7. The Government's standpoint is that the Convention's 8. article does not include alternative health care services or the need for specific forms of obstetrical care, therefore the 14. article of the Convention can not be applied in this case.

Furthermore according to the 14. article of the Convention the basis' of differential treatment which require verification are the following: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Although the listing is open, in the Government's opinion the place of birth does not belong among these basis', because the differentiation in this case is not between individuals, but a differentiation between locations. Hence the application *ratione materiae* is unacceptable, because according to the 3. paragraph of article 15. it is incompatible with the provisions of the Convention.

B
Unacceptable because of being apparently unfounded

8. Alternatively the opinion of the Government is that the applicant's complaint based on article 8., and in connection with it, article 14. is apparently unfounded according to the 3. paragraph of the 15. article of the Convention.

9. The discrimination of individuals means that people of similar status receive different treatment, based on relevant aspects, which can not be verified rationally and objectively (*quote Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV).

According to the Convention's standard case law different treatment is discriminative if it "can not be verified rationally and objectively", that is if it has no "legitimate aim", or if there is no "reasonable relationship of proportionality between the applied means and the goal pursued." Furthermore, the Contracting States have the right to a certain level of discretion in the judgment of whether the differences in the otherwise similar situation verify the different treatment – and if yes, to what extent – or not (quote e.g. Gaygusuz v. Austria judgment of 16 September 1996, *Reports* 1996-IV, p. 1142, § 42).

According to the Convention's 14. article of the Convention the basis' of differential treatment which require verification are the following: sex, race, colour, language, religion, political or other opinion, national or social origin, association with

a national minority, property, birth or other status. Although the listing is open, in the Government's opinion the place of birth does not belong among these basis'. Hence different treatment based on the place of giving birth does not require special verification from the Government. In any case, in the light of the arguments given below the Government does not think that the applicant's different treatment – according to place of giving birth– is arbitrary, or rationally and objectively can not be verified.

10. The applicant belongs to the group of women, who wish not to give birth in a health care institution. The applicant argues that based on relevant aspects she is in similar status as those women who wish to give birth in a hospital. Regarding the choosing of birth and the place of birth these two groups are indeed in similar status, but regarding this question the two groups do not receive different treatment: both of them are free to give birth and choose where they wish to give birth. But regarding the health care services and the professional medical help provided at the birth giving, the two groups are significantly in different status. Furthermore the group of women whom the applicant identifies as women who *wish to* give birth in a hospital would be more precisely defined as women who *accept* hospital birth as opposed to the group of women – whom the applicant is also a part of – who wish to give birth at home and *reject* hospital birth. From this viewpoint even if we accept that the two groups have essentially the same status, we can not say that it is rationally and objectively not verified, that for those women who accept the health care services provided by the state, the state provides these health care services while for those women who reject these services, the state does not provide such services.

11. The regulations set by the international human rights legal contracts, which guarantee the right to health and social security – such as the European Social Charta or the Covenant of Economic, Social and Cultural Rights – oblige the states concerned to operate their health care system, but do not have such provisions, which would oblige the states to found a certain type of health care institute or to provide alternative health care services. So from an institutional point of view it is not without rational or objective verification, that a certain state only provides one type of health care service to all of the health care questions that it needs to take care of. If the applicants need is to be understood as concerning not an alternative care institution, but an alternative obstetrical method then it should be noted that alternative obstetrical methods are widely available within the existing health care institutions that is hospitals. Since the right to obstetrical care can be derived from the international human rights agreements, and the right to care for home birth can not, the two groups of women who demand access to obstetrical care and those who demand access to home birth care are significantly in a different status, and this difference verifies that they receive different treatment.

12. The Convention's 8. article – corresponding with the applicant's arguments – indeed includes the right to self-determination. The right to self-determination includes the applicant's right to decide: whether she wishes to give birth in a health care institute or not and whether she rejects or accepts certain health care treatments. The Court has found that " in the field of health care treatments, rejecting or accepting certain treatments may inevitably come with fatal consequences, nevertheless applying a health care treatment without the consent of an adult patient with an ability of discretion would mean an interference into the individual physical integrity that would concern the rights protected by the 1. paragraph of the Convention's 8. article" (compare to *Pretty v. the United Kingdom*, no 2346/02, ECHR 2002-III). And so the right to self-determination includes the right of the individual to decide, whether s/he uses certain health care services, and

with certain limitations it also includes the right to choose between the alternative services provided by the health care system. But the right to self-determination those not include the right for someone to demand non-existing health care services. Otherwise not only the women exercising their right to self-determination by giving birth at home would demand special services provided to them by their choosing, but also the women exercising their right to self-determination by giving birth at a hospital would demand that under no circumstances should their right to freely choose the institution where they give birth and the doctors and midwifes assisting, be limited. In this contexts the Government points out that in the *Pretty v. United Kingdom* case the Court essentially rejected the applicant's claim to a certain type of treatment (euthanasia) to his/her health problem which unlike in the Netherlands, was not used in the United Kingdom.

Consequently the right to self-determination according to article 8. does not impose a positive obligation on the Government, to widen the possibilities to be chosen for the applicant. If it weren't so, anyone could complain about the absence of any other alternative health care service, or the insufficient financing of the health care services, which was clearly not among the intensions of the drafters of the Convention, and the development of international law does not justify a further development of case law in this direction.

13. In any case the right to self-determination according to the Convention's 8. article is not an absolute right. In accordance with the requirements of the 2. paragraph of article 8. it may fall under the limits by the discretion granted to the Contracting States. According to the relevant case law in so far as a particularly important aspect of an individual's existence or identity is at stake, then the discretion reserved for the State is limited. However, if there is no consensus between the member states of the Council of Europe regarding the relative importance of the interests in question or the best method of protecting these interests – especially if the case raises sensitive moral or ethical questions – then the scale of the discretion will widen (*X., Y. and Z. v. the United Kingdom*, judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, § 44; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I). Usually the scale of discretion is also wide if the state has to balance competing private and public interests or rights protected by the Convention (quote *Odiévre*, no. 42326/98, *Reports of Judgments and Decisions* 2003-III., §§ 44-49 and *Fretté*, ibid., § 42).

In the present case the scale of the state's discretion is reasonably wide, since it has to balance the competing rights provided by the Convention to the mother and her child, and there is no consensus between the member states of the Council of Europe neither regarding the relative importance of mother's interests which are at stake nor regarding the best method to protect the competing rights. Home birth is not supported in numerous states of the Council of Europe or is unregulated, and there is no consensus on how to balance the right of the mother to give birth at home and the right of the child to life and health. Truly such a consensus in not achievable between the member states because of the differences in the management and quality of their health care systems.

14. The base of the regulation of home birth in Hungary (or the lack of it) is that considering the present situation of the health care system, infrastructure and the limited resources of emergency care, home birth is less safe then giving birth in a health care facility. This opinion is shared among the competent professional bodies, the Hungarian Obstetric-Gynecology College which was founded for the development of professional

standards and protocols based on regulation and a similar opinion was expressed in the two reports written by the Ombudsman in 1998 and 2003 (quote The 4. and 5. paragraphs above). The Hungarian situation isn't unique in this aspect. The WHO document referred to by the applicant also refers to reports that state that "in certain researches the mortality around the period of birth was a little higher within the midwife dominated models" even in those cases when these models operated in hospitals. Regarding home birth in alternative locations the WHO document states that "there is little data in regarding such home births. The data collected by an Australian study suggests that the low risk births can only be identified with little success." The WHO document establishes that "if a birth takes place at home or in a peripheral birthing center then drawing up an emergency plan – which provides access to a receiving center with the appropriate staff – has to be a part of the preparations for birth." If the emergency access can not be provided, then home birth is not safe.

15. Before the Act CLIV of 1997 on Health came into force home birth was illegal, and it was a legal requirement that a women in labor must be transferred to a hospital. According to the current regulation keeping in mind the mother's right to self-determination home birth is not illegal, but it is not encouraged or supported, since it is still viewed as potentially endangering the child's right to life and health. Those health care professionals who encourage home birth which is regarded as unsafe according to professional rules and who exceed the limits of their operating license and neglect the rules of their profession, according to the 218/199. (XII.28.) Government Decree 101. § are indeed punishable with penalty for offence. However statistical data does not support the applicant's claim that this regulation has kept mother from exercising their right to self-determination by choosing home birth. In the past two years about 150 planned home births took place per year, but only one proceeding was started because of offence based on the provision above. Furthermore there was not one home birth case when the mother's or her newborn child's life or health was threatened because of the lack of professional assistance.

16. On the other hand however in the past few years there have been several cases, when the home birth assisted by health care professionals ended in the hospital, or caused the death or serious injury of the child. One of these cases in 2007 lead the parliamentary commissioner to prompt the legislature to regulate home birth as soon as possible in order to protect the child's right to life. It has become clear that the unlimited right of the mother to self-determination is not consistent with the obligation of the protection of the child's right to life. The regulation of home birth will necessarily limit the mother's right to self-determination by defining the categories of women who will be excluded from the possibility of home birth. From this perspective it seems that – paradoxically – the applicant is complaining about the lack of restriction in the right to self-determination of pregnant women in choosing home birth. This shows that this application indeed does not serve the interest of women who wish to give birth at home, but the interests of health care professionals who wish to institutionalize their home birth services, and so the present application can be viewed as an abuse of the individual right to complain.

17. Currently the creation of the relevant regulation is in progress with involving of all the parties concerned (including the professional organizations and the civil society as well) and the regulation has to balance different right and interests. On the 15th of December 2009 (one day before the submission of the current application to the Court) the Parliament has adopted the law that authorizes the Government to regulate the conditions

of out of hospital birth. The NGOs striving for the advance of home birth objected to the latest drafts of the relevant provisions inter alia on the basis that the drafts define home birth as a mother giving birth at home, and have not spoken of the founding and financing of birthing homes – as new type of health care facilities. This supports the Government's claim stated above that the current application is truly about the need for the creation of a new type of health care service and not about the freedom to refuse to accept the services provided by the health care system, which could be derived from the right to self-determination.

18. In conclusion from those above the standpoint of the Government is that the regulation of home birth has indeed became necessary for the balancing of the competing interests protected by the Convention, but not because of the complaints raised by the applicant, since based on the 8. article the absence of the regulation of home birth does not violate the applicant's right to self-determination.

Section IV.
Conclusions

19. Based on the grounds discussed above the Government asks the Court to

(1) to deem the application unacceptable

- as *ratione materiae* incompatible with the provisions of the Convention; or
- as apparently unfounded based on the 3. paragraph of the 15. article of the Convention; or

(2) establish that the applicant's rights provided by the Convention's 8. and 14. article have not been violated.

Budapest, 17th of May 2010

Dr. Höltzl Lipót
Representative of the
Hungarian Republic