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Inhoudsindicatie

Recht op respect voor het privéleven, Recht op geassisteerde thuisbevallingen, Thuisbevallingen niet verboden, Inschakelen professionele assistentie wel verboden, Wetgeving niet duidelijk, Klaagster wist van verbod, Geen schending art. 8 EVRM

Ga direct naar

Samenvatting

Klaagster in deze zaak was thuis van haar vierde kind bevallen met de assistentie van een buitenlandse verloskundige. Volgens klaagster hebben een kinderarts en een gynaecoloog aanvankelijk geweigerd klaagster en haar baby te onderzoeken. Een week na de geboorte van haar kind heeft klaagster een geboortecertificaat gekregen. Klaagster stelt zich bij het Hof op het standpunt dat de Kroatische wetgeving thuisbevallingen toestaat, maar dat vrouwen zoals zij in de praktijk geen gebruik kunnen maken van deze keuze, omdat ze daarbij geen professionele hulp kunnen krijgen.

Het Hof accepteert dat er op het eerste gezicht twijfels kunnen zijn over de vraag of er in Kroatië een systeem van voor geassisteerde thuisbevallingen is opgezet. Het Hof doet daarom een oproep aan de nationale autoriteiten om de relevante wetgeving te verduidelijken zodat deze aangelegenheid uitdrukkelijk en helder is gereguleerd. In de

voorliggende zaak was klaagster, via brieven van de Kroatische Kamer van Verloskundigen en van het Ministerie van Gezondheid, duidelijk gemaakt dat de nationale wetgeving geassisteerde thuisbevallingen niet toestond. Het Hof stelt verder vast dat de nationale autoriteiten daarbij een juist evenwicht hadden gevonden tussen het recht van klaagster op haar privéleven en het belang van de Staat om de gezondheid van moeders en kinderen te beschermen. Kroatië was volgens het EVRM niet verplicht om geassisteerde thuisbevallingen toe te staan. Tussen de verdragsstaten bestaat er ten aanzien van dit vraagstuk een veelheid van benaderingswijzen. Er heeft daarom geen schending van **art. 8 EVRM** plaatsgevonden. Rechter Koskelo heeft een concurring opinion toegevoegd aan de uitspraak en rechter Wojtyczek schreef een dissenting opinion.

Uitspraak

THE LAW

I. Alleged violation of Article 8 of the Convention

39. The applicant complained that Croatian law had dissuaded healthcare professionals from assisting her when giving birth at home, in violation of her right to a private life, as provided for in Article 8 of the Convention, which reads:

“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.”

A. Admissibility

1. The parties’ arguments

(a) The Government

40. The Government maintained that Article 8 was not applicable to the case since the issue at stake was only the personal comfort of the applicant, who had wanted to give birth at home, which could not be part of her right to respect for her private life. There was no scientific proof that giving birth in a medical facility could in any way damage the physical or psychological integrity of a mother or child and thus the legislation concerning home birth as such could not be the subject of an examination by the Court under Article 8 of the Convention.

41. The Government maintained further that the circumstances of the applicant in the present case should be distinguished from those of the applicants in *Dubská and Krejzová* (cited above). In that case, one of the applicants had eventually given birth at home alone while the other had had to abandon giving birth at home altogether and have her child in a hospital. The applicant in the present case had given birth at home with the assistance of a midwife from abroad. Furthermore, there was no indication that the applicant would not have had emergency medical assistance if the home birth had gone wrong. Also, the applicant had been able to properly register the birth of her child and neither the applicant nor the midwife concerned had been prosecuted. Against that background, the Government deemed that the applicant could not be seen as a victim of the violation alleged.

(b) The applicant

42. The applicant replied that the Court’s case-law made it clear that the circumstances of giving birth incontestably formed part of a person’s private life. That had been confirmed in *Ternovszky v. Hungary* (no. 67545/09, § 22, 14 December 2010) and in *Dubská and Krejzová* (cited above).

43. She further submitted that she had decided to give birth at home as her first three hospital deliveries had been stressful as she had felt that her wishes had not been respected and that she had not had control over the procedures

that had been followed. However, not being able to find any midwife in the Croatian healthcare system to assist her, she had hired one from abroad, which had caused her feelings of uncertainty and anxiety. In particular, she had feared the criminal sanctions that she or the foreign midwife could have faced. Also, since the foreign midwife had not been licensed to practise in Croatia, there had been no guarantee that the midwife would have been able to arrange emergency transport and admission to hospital if the delivery had gone wrong. Finally, her decision to give birth at home had led to her and her child being denied postnatal care, which had been a common situation for women in Croatia who had decided to give birth at home. She could therefore certainly be considered a victim of the violation complained of.

2. The Court's assessment

(a) Applicability of Article 8 of the Convention

44. The Court held in a recent Grand Chamber case that although Article 8 could not be interpreted as conferring a right to give birth at home as such, the fact that it was impossible in practice for women to be assisted when giving birth in their private home came within the scope of their right to respect for their private life and accordingly of Article 8. It found that issues related to giving birth, including the choice of the place of birth, were fundamentally linked to a woman's private life and fell within the scope of that concept for the purposes of Article 8 of the Convention (see *Dubská and Krejzová*, cited above, § 163). The Court sees no reason to depart from that view in the present case.

(b) The applicant's victim status

45. The Court has consistently held in its case-law that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, among other authorities, *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X). Accordingly, in order to be able to lodge an application in accordance with Article 34 an individual must be able to show that he or she was "directly affected" by the measure complained of. This is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015).

46. In the present case, the Court notes that the applicant complained that the domestic legislation concerning home birth was not consolidated and that therefore she could not obtain assistance of a health professional from the Croatian healthcare system when giving birth at home. The Court further notes that in the above-cited case of *Dubská and Krejzová* the Grand Chamber assessed a situation under Article 8 of the Convention where domestic legislation did not in practice allow for medical assistance during home births. The Court sees no reason to depart from that view in the present case. The fact that the applicant eventually gave birth at home with the assistance of a midwife from abroad does not prompt the Court to conclude that she cannot claim to be a victim of a violation of her rights under Article 8. Consequently, it dismisses the Government's objection as to the applicant's lack of victim status.

(c) Conclusion as to the admissibility

47. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The applicant

48. The applicant submitted that the domestic legislation concerning home births had placed her in a state of uncertainty as regards the legality of her actions during the vulnerable period of her pregnancy. Moreover, after the delivery she had faced problems such as the denial of postnatal care to her and her child and had still felt anxiety

about a possible criminal prosecution. The Government could therefore not claim that there had been no interference with her right to respect for her private life.

49. The applicant submitted further that the legislation on the matter was not foreseeable. In particular, the Act on Midwifery envisaged private practices for midwives (see paragraph 32 above), while the Bylaw on emergency medical assistance and the Plan and programme of healthcare measures guaranteed professional assistance during home births (see paragraphs 28 and 31 above). Such factors tended to support the conclusion that professionally assisted home births were permitted. However, the Healthcare Act did not provide a procedure for midwives to set up a private practice (see paragraphs 21-25 above). Moreover, the Ministry of Health had expressed a view that assisting with home births would be considered as quackery (see paragraph 12 above).

50. The applicant maintained that the interference at issue did not pursue the legitimate aim of protecting the life and health of women and their newborn babies since by allowing home births – but at the same time making it impossible for women to receive professional assistance – the State *de facto* exposed women and children to increased risks to their health and life.

51. The applicant did not consider that the State had a wide margin of appreciation on the matter. The issue at stake was a particularly intimate and important aspect of the right of pregnant women to respect for their private life. She also respectfully disagreed with the Grand Chamber in the abovecited case of *Dubská and Krejzová* that there was no clear common ground regarding skilled attendants at home births. The applicant was of the opinion that there was a clear trend among Council of Europe member States towards a liberal policy on the matter. She added that the consensus on the issue among those States was supported by international expert opinion on the issues of maternal health and the importance of skilled attendants at birth.

52. The applicant added that the prohibitive and punitive approach adopted by the Republic of Croatia could affect women's enjoyment of other fundamental rights, such as the right to life and health. By making it less safe for women to give birth at home, the State could put those other rights at risk. Unlike the Czech Republic, which had tried to initiate an open discussion on the matter of home birth with a view to adopting certain policies and laws, the Croatian Government had entirely failed to deal with the matter.

53. The applicant noted that hospital births in the Republic of Croatia were associated with a high risk of procedures that did not respect women's choices. In her argument she relied on the reports of the Committee on the Elimination of Discrimination against Women, the Parents in Action - Roda NGO and the Gender Equality Ombudsperson, which noted situations of a lack of respect for women's wishes in maternity wards during childbirth (see paragraphs 17-19 above).

54. The applicant contested the Government's argument that Croatia's geographical characteristics and a lack of financial means meant it was not possible to set up an adequate transport system which could ensure the speedy transfer of a mother and child to the nearest hospital in case of an emergency during a home birth (see paragraph 59 below). There was no difference between providing transport for an emergency situation during a home birth or for any other kind of emergency situation. Moreover, the Government did not submit any evidence to demonstrate that the State would face financial constraints if allowing professionally assisted home births.

55. Lastly, the applicant submitted that her situation should be distinguished from that in *Dubská and Krejzová* (cited above) as she had been refused postnatal care, which had been a common situation for women in Croatia who had decided to give birth at home. Moreover, women who gave birth at home in Croatia often experienced difficulties registering their children in State registers since the relevant law obliged them to submit medical documents to prove their motherhood. Furthermore, midwives were not free from harassment. The Ministry of Health had expressly held that their assisting with home births was considered as quackery (see paragraph 12 above) and they had also been submitted to police questioning (see paragraph 15 above). The applicant thus argued that her situation was more akin to *Ternovszky* (cited above), in which the Court had held that a lack of legal certainty and threats to healthcare professionals had limited the choices of the applicant in that case when considering home delivery. For the Court, that situation had been incompatible with the notion of "foreseeability" and hence with that of "lawfulness" (ibid., § 26).

(b) The Government

56. The Government firstly argued that there had been no interference with the applicant's right to respect for her private life because she had given birth at home, as she had wished, with the assistance of a midwife from abroad.

57. Were the Court to find that there had been an interference owing to the fact she had not been able to have the assistance of a health professional from the Croatian healthcare system, the Government maintained that it had been based in law since the relevant legislation regulated births in medical facilities only, which implied that planned home births with the assistance of health professionals were not permitted. That was confirmed by the Ministry of Health letter (see paragraph 12 above) to which the applicant had referred in her application to the Court. The possibility to set up private midwife practices was still not regulated by law. Such interference also pursued the legitimate aim of protecting the health and life of mothers and their new-born children.

58. As to the proportionality of the interference, the Government maintained that even though home delivery might be more pleasant for women giving birth, it still represented, in the light of all the scientific findings known to them, an option that was less safe than a full hospital delivery. They noted that the Commission for Perinatal Medicine of the Ministry of Health was of the view that hospitals were the safest places for child deliveries, providing the best guarantees for the preservation of the health and life of both mothers and babies. As such, the question of whether the State should allow its medical staff to participate in such deliveries fell within its margin of appreciation, meaning that each Contracting Party should be absolutely free to decide on its own, on the basis of its own assessment of numerous factors which needed to be considered, whether or not to provide that alternative to its citizens. The Government asserted that the Contracting Parties should not be compelled to make provision for home delivery and that the spirit of the Convention did not require that legislative measures or practices to that effect should be implemented in every Contracting Party. That, however, did not mean that a Contracting Party should entirely disregard the fact that a substantial number of women did not feel comfortable in a hospital environment and that certain adverse effects in relation to child delivery could be linked to that particular feeling of discomfort and fear.

59. The Government submitted that apart from the capital and several other bigger cities the Republic of Croatia consisted mostly of large and sparsely populated rural areas and islands and mountainous terrain that was difficult to access. In such circumstances it was virtually impossible to provide an effective transport system which could ensure the speedy transfer of a mother and child to the nearest hospital if a home birth went wrong. Furthermore, the Republic of Croatia did not for the time being have sufficient financial resources to set up a home birth system which could guarantee the same level of medical services as in medical facilities.

60. The Government submitted that 99.2% of deliveries in Croatia took place in public maternity wards. There were currently thirty-one public maternity wards and one private ward in Croatia. In line with the available space and other capacities, maternity wards allowed women to choose between several possible delivery positions and to have a spouse or other close relative present during giving birth. Mothers-to-be were free to choose the maternity ward in which they wished to give birth. The Government further submitted that in 1993 Croatia had joined the Baby-Friendly Hospital Initiative (BFHI), a programme launched by the WHO and UNICEF. Currently all maternity wards in Croatia were BFHI accredited, that is certified for their excellence in maternity care and support for breastfeeding. In 2015 Croatia had also joined the Mother-Friendly Hospital Initiative and in 2016 it had initiated a pilot programme to comply with the guidelines set down by the International Federation of Gynaecology and Obstetrics.

61. As to the applicant's allegation that she had been denied postnatal care, the Government submitted that doctors were not allowed under the relevant law to refuse to provide medical assistance (see paragraphs 36 and 37 above). Even if her allegation was true, the applicant had never reported such an event to any relevant authority. Finally, there was no dispute about the fact that the applicant had received medical assistance and medical care after the delivery (see paragraph 10 above) and had managed to register her child in the State register (see paragraph 11 above). As regards the anxiety that the applicant had allegedly felt in relation to possible criminal sanctions, the Government maintained that there was no single provision in domestic law which could be understood as criminalising the actions of women who had decided to give birth at home. No woman had ever been punished for such an act. Moreover, no health professional, including the foreign midwife who had assisted the applicant, had ever been prosecuted in criminal

proceedings or sanctioned for assisting with a home birth (see paragraph 16 above). The criminal offence of quackery could only be committed by persons who had provided medical assistance without having the necessary professional qualifications (see paragraph 36 above).

62. In conclusion, and having regard to the wide margin of appreciation that should be given to the Contracting States on this issue, the Government argued that the interference with the applicant's right to respect for her private life had been proportionate to the aim pursued.

2. The Court's assessment

(a) Whether the case should be examined from the standpoint of the State's negative or positive obligations

63. In the above-cited case of *Dubská and Krejzová* the Court held that the matter involved "an interference with the applicants' right to avail themselves of the assistance of midwives when giving birth at home, owing to the threat of sanctions for midwives, who in practice were prevented from assisting the applicants by the operation of the law" and that " in any event, as the Court has already held, the applicable principles regarding justification under Article 8 § 2 are broadly similar regardless of analytical approaches adopted" (see *Dubská and Krejzová*, cited above, § 165).

64. Accordingly, to determine whether the interference in this case entailed a violation of Article 8 of the Convention, the Court must examine whether it was justified under the second paragraph of that provision, that is whether the interference was "in accordance with the law" and "necessary in a democratic society" for the pursuit of one of the "legitimate aims" specified in Article 8.

(b) Was the interference "in accordance with the law"?

65. The Court reiterates that an impugned interference must have some basis in domestic law, which law must be adequately accessible and be formulated with sufficient precision to enable a citizen to regulate his or her conduct, he or she being able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (ibid., § 167).

66. In the present case, there was no dispute between the parties that the domestic legal provisions providing the legal basis for the impugned interference were accessible to the applicant. The Court sees no reason to disagree on that point, and it must thus establish whether the provisions were also foreseeable.

67. The Court notes firstly that giving birth at home is not, as such, prohibited by the Croatian legal system. There are no provisions under domestic law criminalising the acts of women who decide to give birth in that way, and apparently no woman has ever been punished for such an action (see paragraph 61 above).

68. On the question of whether health professionals were allowed to assist in home births, the Court observes that, pursuant to the Compulsory Health Insurance Act, guaranteed healthcare was provided through health measures established on the basis of the corresponding plan and programme of the Ministry of Health (see paragraphs 29 and 30 above). The corresponding plan and programme included the professional assistance of a doctor and a midwife in a home birth as one of the healthcare measures involved (see paragraph 31 above). Such a regulation tended to support the conclusion that professionally assisted home births were permitted.

69. The Court further observes that the Act on Midwifery provided for midwives being in private practice (see paragraph 33 above). However, the Healthcare Act never expressly regulated the procedure for midwives setting up in midwife practice (see paragraphs 21-25 above). The Court notes that the Healthcare Act was amended several times after the Act on Midwifery came into force, and it remained silent on that matter (see paragraphs 26 and 32 above). Because of this, in reality, no Croatian health professionals, including midwives, officially assisted with home births (see paragraph 8 above).

70. The Court further notes that in its letter of 11 May 2011 the Ministry of Health stated that the relevant domestic law provided that babies were to be delivered in medical facilities. The question of home births had not been regulated by

law, and medical assistance in such procedures was considered quackery (see paragraph 12 above). The Court does not find it necessary to assess the accuracy of the Ministry of Health's conclusion that such medical assistance would constitute the criminal offence of quackery (see paragraph 36 above). In any event, it appears that no health professional, including the foreign midwife who assisted the applicant, has ever been prosecuted in a criminal case or sanctioned for assisting with a home birth (see paragraphs 16 and 61 above).

71. The Court also observes that in its letter to the applicant of 1 December 2011 the Croatian Chamber of Midwives, while noting that the matter of midwives in private practice had been regulated in an inconsistent manner, also informed her that, under domestic law, health professionals, including midwives, were unable to assist with home births (see paragraph 8 above). The letter also cited a statement from the Ministry of Health from August 2011, published on the Croatian Chamber of Midwives' website, which showed that no system of assisted home births had been set up in Croatia.

72. The Court therefore accepts that at first there might have been some doubt as to whether a system for assisted home births had been set up in Croatia. It therefore finds it appropriate to invite the Croatian authorities to consolidate the relevant legislation so that the matter is expressly and clearly regulated (see paragraphs 65 and 66 above). However, in the present case, it is of the view that the applicant was clearly made aware, through the letters from the Croatian Chamber of Midwives and the Ministry of Health which she received while she was still pregnant with her fourth child, that the relevant domestic law did not allow health professionals, including midwives, to assist with planned home births.

73. The Court therefore holds that the impugned interference was foreseeable for the applicant and in accordance with the law.

(c) Did the interference pursue a legitimate aim?

74. Contrary to the applicant's arguments, the Court considers that there are no grounds for doubting that the Croatian State's policy of encouraging hospital births, as reflected in the relevant national legislation, was designed to protect the health and safety of mothers and children during and after delivery (compare to *Dubská and Krejzová*, cited above, § 172).

75. It may accordingly be said that the interference in the present case served the legitimate aim of the protection of the health and rights of others within the meaning of Article 8 § 2 of the Convention (ibid., § 173).

(d) Was the interference necessary in a democratic society?

76. The Court summarised the applicable principles in the case of *Dubská and Krejzová* (ibid.) as follows:

"174. An interference will be considered "necessary in a democratic society" for the achievement of a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, *mutatis mutandis*, *Fernández Martinez v. Spain* [GC], no. 56030/07, § 124, ECHR 2014 (extracts)).

175. In this connection, the Court reiterates the fundamentally subsidiary role of the Convention system and recognises that the national authorities have direct democratic legitimation in so far as the protection of human rights is concerned. Moreover, by reason of their direct and continuous contact with the vital forces of their countries, they are in principle better placed than an international court to evaluate local needs and conditions (see, e.g., *Maurice v. France* [GC], no. 11810/03, § 117, with further references, ECHR 2005-IX).

176. It is therefore primarily the responsibility of the national authorities to make the initial assessment as to where the fair balance lies in assessing the need for an interference in the public interest with individuals' rights under Article 8 of the Convention. Accordingly, in adopting legislation intended to strike a balance between competing interests, States must in principle be allowed to determine the means which they consider to be best suited to achieving the aim of reconciling those interests (see *Odièvre*, cited above, § 49; *Van Der Heijden v. the Netherlands* [GC], no. 42857/05, §

56, 3 April 2012).

177. While it is for the national authorities to make the initial assessment, the final evaluation as to whether an interference in a particular case is “necessary”, as that term is to be understood within the meaning of Article 8 of the Convention, remains subject to review by the Court (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 101, ECHR 2008; *Van Der Heijden*, cited above, § 57).

178. A certain margin of appreciation is, in principle, afforded to domestic authorities as regards that assessment; its breadth depends on a number of factors dictated by the particular case. The margin will tend to be relatively narrow where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights. Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will also be restricted. Where 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, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *Van der Heijden*, cited above, §§ 55-60 with further references, and also *Parrillo v. Italy* [GC], no. 46470/11, § 169, with further references, ECHR 2015).

179. A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation” (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52 with further references, ECHR 2006-VI; *Shelley v. the United Kingdom* (dec.), no. 23800/06, 4 January 2008; and *Hristozov*, cited above, § 119).”

77. In the case at hand, the Court has to establish whether the fact that it was impossible in practice for the applicant to be assisted by a health professional from the Croatian healthcare system during her home birth struck a fair balance, on the one hand, between the applicant’s right to respect for her private life under Article 8, and, on the other, the State’s interest in protecting the health and safety of mothers and children during and after delivery. In addition to this, the Court has to verify whether the respondent State, by allegedly denying postnatal care to the applicant and her child born at home, and by making it difficult for her to register her child in the State register, overstepped the margin of appreciation afforded to it.

78. As to the respondent State passing legislation that did not in practice allow women to be assisted by health professionals from the Croatian healthcare system when giving birth at home, the Court notes that in the above-cited case of *Dubská and Krejzová*, the Grand Chamber held that the margin of appreciation to be afforded to the national authorities in that case had to be wide, while not being unlimited (see *Dubská and Krejzová*, cited above, §§ 182-184). In the light of those considerations, the Court must see whether the interference constitutes a proportionate balancing of the competing interests involved, having regard to the margin of appreciation. In cases arising from individual applications the Court’s task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it. Consequently, the Court’s task is not to substitute its own view for that of the competent national authorities in determining the most appropriate policy for regulating matters regarding the circumstances of giving birth. Instead, it must decide on the compatibility with Article 8 of the State’s interference in the present case on the basis of the fair-balance test described above (see *Dubská and Krejzová*, cited above, § 184).

79. The applicant in the present case wished to give birth at home with the assistance of a midwife. The Court accepts that as a consequence of the operation of the legislative provisions in force at the relevant time, she was put in a situation which had a serious impact on her freedom of choice: she was required either to give birth in a hospital, or, if she wished to give birth at home, to do so without the assistance of a midwife and, therefore, with the attendant risks that posed to herself and her baby. In the end, she gave birth at home with a midwife from abroad (see paragraph 9 above).

80. In that regard, the Court takes note of the Government’s argument that in the light of all the scientific findings known to them, and even though home delivery might be more pleasant for mothers-to-be, it still represented an option

that was not as safe as a full hospital delivery. They noted that the Commission for Perinatal Medicine of the Ministry of Health was of the view that hospitals were the safest places for performing deliveries, providing the best guarantees for the preservation of the health and life of both mothers and newborns (see paragraph 58 above). In the case of *Dubská and Krejzová* the Court also noted that the risk for mothers and newborns was higher in the case of home births than in the case of births in maternity hospitals which were fully staffed and adequately equipped from a technical and material perspective, and that even if a pregnancy proceeded without any complications and could have therefore been considered a “low-risk” pregnancy, unexpected difficulties could arise during the delivery which would require immediate specialist medical intervention, such as a Caesarean section or special neonatal assistance. Moreover, the Court noted that a maternity hospital could provide all the necessary urgent medical care, whereas this would not be possible in the case of a home birth, even with a midwife attending (see *Dubská and Krejzová*, cited above, § 186).

81. The Court notes that the applicant could have opted to give birth in any maternity ward in Croatia which she considered likely to respect her wishes in principle (see paragraph 60 above). However, according to the applicant’s submissions based on her own experience (see paragraph 48 above), the wishes of mothers-to-be do not seem to be fully respected in maternity wards. Those remarks would seem to be confirmed in substance by the reports of the Committee on the Elimination of Discrimination against Women, the Parents in Action - Roda NGO and the Gender Equality Ombudsperson, which noted situations of a lack of respect for women’s wishes in maternity wards during childbirth (see paragraphs 17-19 above).

82. In the Court’s opinion, those concerns cannot be disregarded when assessing whether the authorities struck a fair balance between the competing interests at stake. At the same time, the Court acknowledges that in recent years according to the Government, various initiatives to improve the situation have been taken, notably by joining the Mother-Friendly Hospital Initiative in 2015 and starting a pilot programme in 2016 to comply with the guidelines set by the International Federation of Gynaecology and Obstetrics (see paragraph 60 above). On that background, the Court finds it appropriate to invite the Croatian authorities to make further progress in such matters by keeping the relevant legal provisions under constant review so as to ensure that they reflect medical and scientific developments while fully respecting women’s rights in the field of reproductive health, notably by ensuring adequate conditions for both patients and medical staff in maternity hospitals across the country (compare *Dubská and Krejzová*, cited above, § 189).

83. The applicant also complained that women deciding to give birth at home, as well as the midwives agreeing to assist them, had faced possible criminal sanctions for their actions. However, as already noted by the Court, there are no provisions under domestic law criminalising the acts of women who have decided to give birth in that way. Moreover, according to the Government, no woman has ever been punished for such actions (see paragraph 61 above).

84. The Court further notes that the Ministry of Health expressed a view in its letter of 11 May 2011 that since the question of home birth was not regulated by law medical assistance with home births would be considered quackery (see paragraph 12 above). As already noted by the Court, it does not find it necessary to assess the accuracy of the Ministry of Health’s conclusion that such medical assistance would constitute the criminal offence of quackery (see paragraph 36 above). Indeed, although it appears that several midwives suspected of having taken part in the birth had been questioned by the police, apparently no health professional, including the foreign midwife who assisted the applicant, has ever been prosecuted in a criminal case or sanctioned for assisting with a home birth (see paragraphs 15, 16 and 61 above).

85. Taking into account above considerations, the Court is of the view that by not passing legislation that would in practice allow women to be assisted by health professionals from the Croatian healthcare system when giving birth at home, the State did not overstep the wide margin of appreciation afforded to it on the matter (see paragraph 78 above). The Court reiterates that, while it would be possible for the respondent State to allow planned home births, it is not required to do so under the Convention as currently interpreted by the Court. There still remains a great disparity between the legal systems of the Contracting States on the matter (see *Dubská and Krejzová*, cited above, § 183), and the Court remains respectful of the gradual development of law in the sphere.

86. As to the applicant’s complaint that she and her child were denied postnatal care, allegedly a common situation faced by women in Croatia who decided to give birth at home, the Court firstly reiterates that in no circumstances

should a child be deprived of his or her right of access to healthcare services on the grounds that he or she was born outside of a medical facility. The best interests of the child must be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (see *Dubská and Krejzová*, cited above, § 64).

87. In this respect, the Court notes that the applicant never reported the event of being denied postnatal care to any relevant authority. There is thus no document whatsoever to allow the Court to verify that allegation. The Court notes in that regard that under the relevant domestic law a doctor who unlawfully refused to provide medical assistance could be punished for a misdemeanour and ordered to pay a fine of between 5,000 and 10,000 Croatian kunas (see paragraph 36 above). Moreover, the refusal of medical assistance in an emergency situation constituted a criminal offence (see paragraph 37 above). Therefore, if the applicant and her child had initially indeed been refused postnatal care as she alleged and if she had reported the event the doctors involved could have been sanctioned. In any event, it was undisputed that the applicant and her child eventually did receive post-delivery medical care (see paragraph 10 above).

88. The Court further notes that the issue of the first medical examination of children born at home was a matter of discussion between the Ministry of Health and Parents in Action - Roda NGO. According to the Ministry of Health's letter of 31 May 2012, situations in which doctors were faced with having to examine children born at home without there being any medical documentation were becoming more and more frequent. The ministry thus maintained that doctors were obliged to examine such children but were not allowed to register data they were not able to verify (see paragraph 14 above).

89. As to the applicant's complaint that women giving birth at home experienced difficulties in registering their children in State registers as the relevant law obliged them to submit medical documents to prove their motherhood, the Court firstly notes that there is indeed such a requirement under the domestic law (see paragraphs 13, 30 and 34 above). However, the Court finds such a requirement understandable as it is clearly directed at avoiding possible abuses in situations where there is no official information on the birth of a child or its biological parents. As to the applicant's particular situation, the Court notes that her child was born on 15 February 2012 and that she succeeded in registering the birth on 23 February 2012 (see paragraph 11 above).

90. In conclusion, and having regard to the particular circumstances of the present case, the Court is of the view that the interference with the applicant's right to respect for her private life was not disproportionate.

91. Accordingly, there has been no violation of Article 8 of the Convention.

II. Alleged violation of Article 13 of the Convention

92. The applicant complained that as the matter of professional assistance with home births was not properly regulated she did not have at her disposal an effective domestic remedy for her complaint related to the violation of her right to respect for her private life. She relied on Article 13 of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

93. The Government reiterated their arguments submitted under Article 8 of the Convention.

94. The Court reiterates that Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the grounds of being contrary to the Convention (see, among other authorities, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 94, ECHR 2013 (extracts), and *Roche v. the United Kingdom* [GC], no. 32555/96, § 137, ECHR 2005-X). In the instant case, the applicant's complaint under Article 13 is at odds with this principle. Consequently, this complaint is manifestly ill-founded and as such must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court

1. *Declares*, by a majority, the applicant's complaint under Article 8 of the Convention admissible;

2. *Declares*, unanimously, the remainder of the application inadmissible;

3. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention.

Concurring opinion of Judge Koskelo

1. I agree with my colleagues that there has been no violation of Article 8 in the present case. In the judgment, the complaint is analysed from the point of view of the State's negative obligations. Thus, the impugned domestic measures are characterised as an interference with the applicant's rights under Article 8. Although this approach is in line with the position taken by the Grand Chamber in *Dubská and Krejzová v. the Czech Republic* ([GC], nos. 28859/11 and 28473/12, §§ 164-65, 15 November 2016), I would nevertheless like to express my reservations about it, especially as the Grand Chamber judgment on this point appears quite thinly reasoned.

2. The Court has accepted that Article 8 cannot be interpreted as conferring a right to give birth at home (see *Dubská and Krejzová*, cited above, § 163). At the same time, the choice of the place of birth is said to fall within the scope of the woman's private life, and the impugned measures are characterised as an interference with the woman's "right" to avail herself of the assistance of midwives when giving birth at home. Thus, the State is seen as "interfering" with the woman's private life by limiting what is perceived as her inherent "right" of choice through a denial of professional assistance for home births. I find this line of thinking problematic, especially as there is more at stake than self-determination for the woman who will be giving birth, namely the health and safety of the baby about to be born, the latter being unable to attend to his or her own interests.

3. It suffices here to refer to the World Health Organization, according to which a properly attended home birth does require a few essential preparations. Transport facilities to a referral centre must be available if needed. In practical terms this means that community participation and revolving funds are necessary to enable transport to be arranged for emergencies in areas where transportation is a problem. If birth does take place at home, contingency plans for access to a properly-staffed referral centre should form part of the antenatal preparations (see WHO/FRH/MSM/96.24).

4. Thus, the issue of home births is not one where the State could, responsibly, adopt a policy of *laissez-faire*. Nor is it merely a matter of regulation, but one of putting in place an adequate infrastructure and, consequently, of providing the budgetary resources necessary for implementing the requirements referred to above.

5. With the above in mind, I would find it appropriate to examine a complaint such as the present one from the point of view of the State's positive obligations.

6. Furthermore, given that the adoption of policies in this field will have to reconcile the interests at stake, in circumstances where the framework conditions and available possibilities vary and where decisions must depend on the setting of priorities among various competing needs in health and social policies, States must enjoy a wide margin of appreciation. In this regard, I have no difficulty in agreeing with the Court's position in *Dubská and Krejzová* and in the present case.

7. In the light of the submissions put forward in this case, I see no grounds for finding a violation of Article 8.

Partly dissenting opinion of Judge Wojtyczek

1. I respectfully disagree with the view of my colleagues that the instant application is admissible.

2. The present case reveals once again the weakness of the Court's approach towards Article 8 rights. In this case the

first question to be examined is whether the applicant can claim to be a victim of an interference with her rights, i.e., whether her rights were affected by the acts or omissions of the authorities. The question whether in a specific case there is an interference at all with Article 8 rights cannot be answered without previously defining with sufficient precision the content of the rights enshrined therein. For as long as the Court does not give a more precise definition of this content, it is impossible to establish whether Article 8 is "applicable" in a specific case or – to put it more precisely – whether the specific actions or omissions of the authorities pointed to by an applicant constitute an interference with the right protected by Article 8.

3. While considering the applicability of Article 8, the majority expressed the following point of view in paragraph 44:

"[The Court] found that issues related to giving birth, including the choice of the place of birth, were fundamentally linked to a woman's private life and fell within the scope of that concept for the purposes of Article 8 of the Convention (see *Dubská and Krejzová*, cited above, § 163)."

I note in this respect that the use of the phrase *issues related to giving birth* does not give a clear indication as to the exact content of the right protected. More precise is the formula *the choice of the place of birth*. It can be inferred from the above-quoted passage that under Article 8 every woman has the right to respect for her freedom to choose the place of birth of her child. It suggests that every woman is free in particular to choose to give birth at home and that Article 8 protects this choice against an excessive interference. This conclusion is, however, difficult to reconcile with the view of the majority that *Article 8 could not be interpreted as conferring a right to give birth at home as such* (paragraph 44), which suggests that the choice of giving birth at home remains out of the scope of protection of Article 8.

4. In the same part of the reasoning, focusing on the applicability of Article 8 (paragraph 44), the majority further state:

"The Court further notes that in the above-cited case of *Dubská and Krejzová* the Grand Chamber assessed a situation under Article 8 of the Convention where domestic legislation did not in practice allow for medical assistance during home births. The Court sees no reason to depart from that view in the present case."

This part of the reasoning prompts serious objections. Firstly, what is "that view" referred to here? The previous sentence speaks only about the fact that an assessment was made by the Court. Secondly, the majority refer here to a situation where domestic legislation did not in practice allow for medical assistance during home births. Moreover, in the case of *Dubská and Krejzová*, domestic legislation provided for sanctions against midwives assisting during home births. Such a situation is different from the facts of the instant case, which show that the domestic legislation permitted medical assistance during home births and at same time did not in practice prevent it.

5. Examining the applicant's victim status the majority stated (in paragraph 44):

"The Court held in a recent Grand Chamber case that although Article 8 could not be interpreted as conferring a right to give birth at home as such, the fact that it was impossible in practice for women to be assisted when giving birth in their private home came within the scope of their right to respect for their private life and accordingly of Article 8."

I note in this context that the applicant did exercise her freedom to choose the place of birth of her child. She decided to give girth at home and chose a foreign midwife to assist her. As she had decided, she gave birth assisted by a midwife. It was therefore possible in practice for the applicant to be assisted when giving birth in her private home.

The majority only explain what they see as an "interference" in paragraph 79, while dealing with the proportionality of the interference in the following terms:

"[The applicant] was required either to give birth in a hospital, or, if she wished to give birth at home, to do so without the assistance of a midwife and, therefore, with the attendant risks that posed to herself and her baby."

This statement does not reflect the facts of this specific case. The applicant, a mother who had wished to give birth at home, was not required, legally speaking, to do so without the assistance of a midwife. More generally, as established

by the Court, Croatian legislation did not prevent mothers from giving birth at home with the assistance of midwives.

It is true that the Croatian legislation makes it somewhat more difficult to find a midwife for a home birth in comparison with the hypothetical situation in which legislation might explicitly regulate private midwife practice and explicitly provide for the assistance of midwives at home births. However, the Court's case-law has not established that the State has a "positive" obligation to provide midwifery assistance at home. If – as the majority allege – Article 8 could not be interpreted as conferring a right to give birth at home as such, then it is difficult to understand why the fact that it was impossible in practice for women to be assisted when giving birth in their private home can still *come within the scope* of their right to respect for their private life and accordingly of Article 8. Moreover, as explained in a more detailed manner in several separate opinions (see the concurring opinion of Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov, paragraph 5, attached to the judgment in the case of *Paradiso and Campanelli v. Italy* [GC], no 25358/12, 24 January 2017; and the dissenting opinion of Judges Wojtyczek and Pejchal, paragraph 8, attached to the judgment in the case of *Orlandi and Others v. Italy*, nos. 26431/12, 26742/12, 44057/12 and 60088/12, 14 December 2017), the expression *falling* within the scope of a right is a source of confusion. The relevant question is not whether some facts *fall* or *come* within the scope or ambit of a Convention provision but whether the acts or omissions of the State, invoked by the applicant, can contradict an (at least *prima facie*) obligation established in the Convention.

6. The Court explained as follows in two judgments; firstly in *Mansur Yalcin v. Turkey* (nos. 26431/12, 26742/12, 44057/12 and 60088/12, § 40, 14 December 2017):

"... l'article 34 vise non seulement la ou les victimes directes de la violation alléguée, mais encore toute victime indirecte à qui cette violation causerait un préjudice ou qui aurait un intérêt personnel valable à obtenir qu'il y soit mis fin (voir, *mutatis mutandis*, *Tourkiki Enosi Xanthis et autres c. Grèce*, no 26698/05, § 38, 27 mars 2008 ; voir aussi *Defalque c. Belgique*, no 37330/02, § 46, 20 avril 2006). En tout état de cause, que la victime soit directe, indirecte ou potentielle, il doit exister un lien entre le requérant et le préjudice qu'il estime avoir subi du fait de la violation alléguée. En effet, la Convention n'envisage pas la possibilité d'engager une *actio popularis* aux fins de l'interprétation des droits qui y sont reconnus ; elle n'autorise pas non plus des particuliers à se plaindre d'une disposition de droit interne simplement parce qu'il leur semble, sans qu'ils en aient directement subi les effets, qu'elle enfreint la Convention (*Sejdić et Finci c. Bosnie-Herzégovine* [GC], nos 27996/06 et 34836/06, § 28, 22 décembre 2009*)*."

and secondly in *SAS v. France* ([GC], no 43835/11, § 57, 1 July 2014):

"An individual may nevertheless argue that a law breaches his or her rights in the absence of a specific instance of enforcement, and thus claim to be a 'victim', within the meaning of Article 34, if he or she is required either to modify his or her conduct or risk being prosecuted, or if he or she is a member of a category of persons who risk being directly affected by the legislation (see, in particular, *Marckx v. Belgium*, 13 June 1979, § 27, Series A no. 31; *Johnston and Others v. Ireland*, 18 December 1986, § 42, Series A no. 112; *Norris*, cited above, § 31; *Burden v. the United Kingdom* [GC], no. 13378/05, § 34, ECHR 2008; and *Michaud v. France*, no. 12323/11, §§ 5152, ECHR 2012)."

This is not the case for the present applicant.

For all those reasons. I conclude that the applicant cannot claim to be a victim of a violation of her Convention rights. In any event, it is difficult to see any tangible prejudice, let alone any significant disadvantage, suffered by the applicant.

7. Concerning the substance of the case, I would like to highlight the following inconsistency in the reasoning. On the one hand, the majority state the following:

"The Court notes firstly that giving birth at home is not, as such, prohibited by the Croatian legal system" (paragraph 66).

"The corresponding plan and programme included the professional assistance of a doctor and a midwife in a home

birth as one of the healthcare measures involved (see paragraph 31 above). Such a regulation tended to support the conclusion that professionally assisted home births were permitted" (paragraph 68).

"... in reality, no Croatian health professionals, including midwives, officially assisted with home births" (paragraph 69).

On the other, they express the following opinion:

"72. ... in the present case, it is of the view that the applicant was clearly made aware, through the letters from the Croatian Chamber of Midwives and the Ministry of Health which she received while she was still pregnant with her fourth child, that the relevant domestic law did not allow health professionals, including midwives, to assist with planned home births.

73. The Court therefore holds that the impugned interference was foreseeable for the applicant and in accordance with the law."

I note that the information received from the Croatian Chamber of Midwives and the Ministry of Health (in brief, to the effect that assistance is prohibited) does not reflect the content of the Croatian law established earlier (in brief, that assistance is permitted but not officially provided due to a lacuna in the law). In other words, the information provided to the applicant was not accurate. This inaccurate information about the law, as provided to the applicant, prompts the majority to conclude that the interference based upon it was foreseeable. Such an approach is highly problematic. In my opinion, the legal situation was sufficiently clear, not because of but *in spite of* the information provided in the above-mentioned documents.

8. The approach adopted by the majority in the present case leads to an *in abstracto* examination of the Croatian legislation.

Noot

1. Thuisbevallingen zijn een aangelegenheid waarover binnen en tussen de verdragsstaten van het EVRM verschillend wordt gedacht. Dat verklaart, in een notendop, dat het Hof in de zaak *Pojatina* t. *Kroatië* voor de derde maal binnen 10 jaar tijd uitspraak doet over deze kwestie, waaronder een uitspraak van de Grote Kamer. Ook in *Pojatina* t. *Kroatië* constateert het Hof een inbreuk op **art. 8 EVRM** van de vrouw die in de voorliggende zaak werd belemmerd thuis te bevallen. Conform de twee vorige uitspraken van het Hof, komt het Hof tot de eindconclusie dat dit recht niet is geschonden. Tegelijkertijd benadrukt het Hof dat het belangrijk is deze aangelegenheid uitdrukkelijk en helder te reguleren. Voegt deze zaak verder nog iets toe aan de bestaande jurisprudentie?

2. Zoals gezegd heeft het Hof zich in het recente verleden eerder uitgesproken over het zogenoemde recht op thuisbevalling. Dat gebeurde in de Hongaarse zaak *Ternovszky* (EHRM 14 december 2010, nr. 67545/09, ECLI:CE:ECHR:2010:1214JUD006754509, **«EHRC» 2011/44**, m.nt. Griffioen, **«GJ» 2011/35**, m.nt. Hendriks) en de Tsjechische zaak *Dubská en Krejzová* (EHRM 11 december 2014, nrs. 28859/11 en 28473/12, ECLI:CE:ECHR:2014:1211JUD002885911, **«EHRC» 2015/43**, m.nt. Hendriks onder 2015/42), waarover uiteindelijk ook de Grote Kamer uitspraak deed (EHRM 15 november 2016 (GK), nrs. 28859/11 en 28473/12, ECLI:CE:ECHR:2016:1115JUD002885911, **«EHRC» 2017/38**, m.nt. Hendriks). In al deze zaken stelden klaagsters dat zij feitelijk werden gedwongen te bevallen in een ziekenhuis of kraamkliniek, nu professionele assistentie bij een thuisbevalling was verboden. Het Hof heeft in deze zaken duidelijk gemaakt dat dergelijke verboden inbreuk maken op het recht van zwangere vrouwen op privéleven, maar dat verdragsstaten de vrijheid hebben ervoor te kiezen om meer gewicht toe te kennen aan de bescherming van moeder en kind. Wel is het van groot belang, aldus het Hof in de zaak *Ternovszky* (reeds aangehaald), dat voor de betrokken vrouwen de van toepassing zijnde wetgeving voorzienbaar is. Wegens dit gebrek aan voorzienbaarheid concludeerde het Hof in *Ternovszky* tot een schending van art. 8 EVRM.

De Grote Kamer van het Hof heeft in het kader van zijn uitspraak in de zaak *Dubská en Krejzová* t. *Tsjechië* (reeds aangehaald) gekeken naar de situatie in andere Europese landen. Daaruit kwam naar voren dat in 20 Europese landen thuisbevallingen onder bepaalde medische voorwaarden zijn toegestaan en dat thuisbevallingen in 23 andere Europese landen niet zijn gereguleerd of zijn ondergereguleerd. Bij een dergelijk gebrek aan consensus tussen

verdragsstaten is het Hof doorgaans zeer terughoudend zijn eigen mening op te leggen aan landen, zeker als het een moreel en ethisch gevoelig onderwerp betreft (vgl. *Evans* t. *Verenigd Koninkrijk*, EHRM 10 april 2007 (GK), nr. 6339/05, ECLI:CE:ECHR:2007:0410JUD000633905, **«EHRC» 2007/73**, m.nt. Brems, par. 59). In dergelijke gevallen komt verdragsstaten een ruime beoordelingsvrijheid (*margin of appreciation*) toe om een mensenrechtelijke kwestie naar eigen inzicht op te lossen.

3. Dat de klachten over thuisbevallingen vooralsnog alleen uit Midden- en Oost-Europese landen kwamen, kan suggereren dat dit vraagstuk alleen in dit deel van Europa speelt. Niets is minder waar. Ook in landen waar thuisbevallingen zijn toegestaan, zoals in Nederland, roept het toestaan en reguleren van thuisbevallingen discussie op. Hoewel het aantal thuisbevallingen in Nederland de afgelopen jaren is gedaald van 34 naar 13 procent, blijft een aanzienlijke groep vrouwen van mening dat het thuis bevallen van een kind de voorkeur heeft. Zij worden daarin gesteund door verloskundigen die menen dat ziekenhuisbevallingen de zwangerschap onnodig medicaliseert, tenzij er sprake is van een indicatie voor een ziekenhuisbevalling. Dat sommige vrouwen zich blijven verzetten tegen ziekenhuisbevallingen waar die niet nodig zijn blijkt ook uit een aantal recente rechterlijke uitspraken, waarbij belangenorganisaties zich verzetten tegen de invoering van de Prestatiebeschrijving integrale geboortezorg (CBb 22 juni 2017, nr: 17/157, **ECLI:NL:CBB:2017:203**, *AB* 2017/285, m.nt. A.C. Hendriks en CBb 4 september 2018, **ECLI:NL:CBB:2018:426**, *AB* 2018/376, m.nt. A.C. Hendriks). Via het maken van een – ook financiële – koppeling van door verloskundigen en gynaecologen te leveren zorg rond bevallingen, zouden zwangere vrouwen in mindere mate zelf kunnen kiezen door welke verloskundige zij zich wensen te laten begeleiden. De bestuursrechter heeft deze bezwaren overigens ongegrond verklaard. Vergelijk daarmee de cijfers in Vlaanderen; daar kiest minder dan 2 procent van het aantal zwangeren ervoor om thuis te bevallen. In Vlaanderen is eerder sprake van een discussie om de voordelen van thuisbevallen te benadrukken (D. Bergkotte-Van der Putten & E. Bruneel, *Thuis of in het ziekenhuis; Hoe bevalt het bij de buren?*, Gent: Arteveld Hogeschool 2006). Daar wordt met name benadrukt dat thuisbevallen goedkoper is dan in het ziekenhuis. Hoe het ook zij, thuisbevallingen leiden binnen en tussen verdragsstaten van het EVRM soms tot hoogoplopende discussies, omdat thuisbevallingen minder veilig zouden zijn voor moeder en kind. Daar staat ontegenzeggelijk tegenover dat de kwaliteit van de door ziekenhuis te leveren geboortezorg in sommige verdragsstaten alles behalve goed is (*Asiye Genç* t. *Turkije* EHRM 27 januari 2015, nr. 24109/07, ECLI:CE:ECHR:2015:0127JUD002410907, **«EHRC» 2015/80**, m.nt. Toebes en *Aydoğdu* t. *Turkije*, EHRM 30 augustus 2016, nr. 40448/06, ECLI:CE:ECHR:2016:0830JUD004044806, **«EHRC» 2016/232**, **«GJ» 2016/154**, m.nt. Hendriks).

4. In dit licht bezien is het niet verwonderlijk dat het Hof in de zaak *Pojatina* t. *Kroatië* na de eerdere zaak *Dubská en Krejzová* (reeds aangehaald) wederom tot de conclusie komt dat art. 8 EVRM niet is geschonden. Het Hof leunt daarbij sterk op de overwegingen van de Grote Kamer in deze zaak. Ook in Tsjechië werd (en wordt) het vrouwen feitelijk onmogelijk gemaakt thuis te bevallen door een tot verloskundigen gericht verbod om thuis assistentie te verlenen aan een bevalling. Het Kroatische verbod op assistentie bij thuisbevallingen lijkt evenwel minder strikt dan in Tsjechië. Zo zijn er in Kroatië, voor zover bekend, nooit moeders of verloskundigen gearresteerd die hebben gekozen voor een thuisbevalling. En blijkens de zaak *Pojatina* treden de Kroatische autoriteiten niet handhavend op indien een zwangere een buitenlandse verpleegkundige inschakelt bij een thuisbevalling. Dat alles roept wel de vraag op of de Kroatische autoriteiten zich in voldoende mate inspannen om gevaarlijke situaties rond thuisbevallingen te voorkomen. Hierover gaat ook de concurring opinion van rechter Koskelo, die meent dat het waarborgen van veilige bevallingen positieve verplichtingen legt op overheden en dat het regelen van thuisbevallingen – anders dan de meerderheid van het Hof meent – niet moet worden bezien vanuit het oogpunt van de negatieve verplichtingen die in art. 8 EVRM liggen besloten.

5. Anders dan de Grote Kamer in de zaak *Dubská en Krejzová* (reeds aangehaald), gaat het Hof in de zaak *Pojatina* niet echt in op de dieper liggende redenen van de Kroatische autoriteiten om assistentie bij thuisbevallingen te verbieden. Weliswaar erkent het Hof dat de Kroatische wetgeving niet erg duidelijk is, maar niet in die mate dat – zoals in de zaak *Ternovszky*, reeds aangehaald – deze onvoorzienbaar is. Evenmin roept het Hof de Kroatische autoriteiten op “to make further progress by keeping the relevant legal provisions under constant review, so as to ensure that they reflect medical and scientific developments whilst fully respecting women’s rights in the field of reproductive healthcontinu” te evalueren (*Dubská en Krejzová*, reeds aangehaald, par. 189). Dit ter verzekering dat deze in overeenstemming zijn met de actuele stand van de medische wetenschap en het respect voor de rechten van vrouwen.

Wat dit betreft formuleert het Hof zijn eisen minder scherp, zonder hiervoor een verklaring te geven.

6. Het Hof gaat niet nader in op de vraag in hoeverre zwangere vrouwen als slachtoffer kunnen worden aangemerkt nu het verbod op assistentie is gericht op in Kroatië werkende verloskundigen, en het zwangere vrouwen kennelijk is toegestaan een buitenlandse verloskundige te vragen assistentie te bieden. Zonder te miskennen dat dit verbod uiteindelijk zwangere vrouwen treft, en dat niet iedereen de financiële mogelijkheden heeft een buitenlandse verloskundige te betalen, merk ik op dat het bijzonder blijft dat het Hof in zo'n zaak toch als vanzelfsprekend aanneemt dat aan het slachtoffervereiste van **art. 34 EVRM** is voldaan. Zie over dit vraagstuk ook de kritische dissenting opinion van rechter Wojtyczek.

7. Een analyse van de zaak *Pojatina* leert dat het Hof zijn in de Grote Kamer-uitspraak in de zaak *Dubská en Krejzová* (reeds aangehaald) geformuleerde uitgangspunten herhaalt, ook al is de situatie in Kroatië niet in alle opzichten vergelijkbaar met die in Tsjechië. Het Hof vraagt de Kroatische autoriteiten wel – net als in de zaak *Ternovszky* (reeds aangehaald) – om het vraagstuk van thuisbevallingen uitdrukkelijk en helder te reguleren, maar het verzoekt diezelfde autoriteiten niet langer – en daarmee anders dan in de zaak *Dubská en Krejzová* – de wet- en regelgeving op dit gebied 'under constant review' te houden. Daarmee lijkt het Hof verdragsstaten alles bij elkaar iets meer ruimte te laten dit vraagstuk naar eigen inzicht te regelen.

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