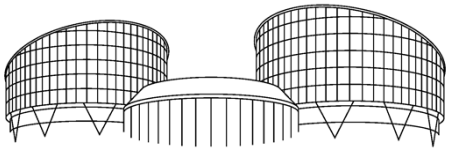

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF KOSAITĖ-ČYPIENĖ AND OTHERS v. LITHUANIA

(Application no. 69489/12)

JUDGMENT

STRASBOURG

4 June 2019

FINAL

04/09/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kosaitė-Čypienė and Others v. Lithuania,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Robert Spano, *President,*
Julia Laffranque,
Valeriu Griţco,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Darian Pavli, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having deliberated in private on 7 May 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 69489/12) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Lithuanian nationals, Ms I. Rinkevičienė ("the first applicant"), Ms E. Zakarevičienė ("the second applicant"), Ms O. Valainienė ("the third applicant") and Ms E. Kosaitė-Čypienė ("the fourth applicant"), on 19 October 2012.

2. The applicants were represented by Mr R. Simaitis and Mr G. Ivoška, lawyers practising in Vilnius. The Lithuanian Government ("the Government") were represented by their Agent, most recently L. Urbaitė.

3. The applicants complained, under Article 8 of the Convention, that Lithuanian law had dissuaded healthcare professionals from assisting them when they had been giving birth at home.

4. On 20 December 2012 the application was communicated to the Government. The parties submitted observations on the admissibility and merits of the case on 6 May 2013 (the Government) and 4 July 2013 (the applicants).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant

5. The first applicant was born in 1983. She lives in Vilnius and has three children. The first time she gave birth was in 2009 in a public hospital in Vilnius. According to the applicant, the doctors therein were rude and rebuked her for her wish to give birth at home, and she felt humiliated and for a long time afterwards could not discuss her experience of giving birth at the hospital without tears coming to her eyes. For those reasons, in 2011 she gave birth to her second child at home, with the assistance of an unlicensed doula (*pribuvėja*), J.I.Š. That birth passed without complications and without the need for medical intervention.

6. After falling pregnant for a third time, and with no possibility of giving birth at home owing to the fact that criminal charges had been brought in respect of the above-mentioned doula, J.I.Š. (see paragraphs 31-35 below), on 9 May 2012 the first applicant asked two public hospitals – one in Vilnius and one in Kaunas – to provide her with medical assistance during the home birth that she was planning. Both hospitals refused on the grounds that providing such assistance was prohibited under Lithuanian law – namely, under Medical Regulation MN 40:2006 (see paragraph 44 below).

7. On 13 June 2012 the first applicant asked the Ministry of Health to either guarantee the provision of such medical assistance during the birth of her third child or to amend the secondary legislation so that healthcare professionals could be allowed to provide such assistance. She considered that the participation of a healthcare professional in the birth was indispensable in order to guarantee the child's and her safety. She indicated that she would give birth on 4-5 July 2012.

8. By a letter of 5 July 2012 the Ministry of Health replied that it had already received proposals from several non-governmental organisations that births outside hospitals be regulated. The Ministry then consulted numerous medical organisations – including the Lithuanian Midwives Association (*Lietuvos akušerių sąjunga*), the Lithuanian Fellowship of Midwives and Gynaecologists (*Lietuvos akušerių ir ginekologų draugija*), the Lithuanian Doctors Association (*Lietuvos gydytojų sąjunga*), the obstetrics and midwifery clinics of both Vilnius University and the Lithuanian University of Health Sciences – for their views on home birth. However, the specialists were unanimous in the conclusion that it was safest for a woman to give birth on a maternity ward, even when there was little risk of complications. It was impossible to foresee that any birth would pass

without complications, and it was always possible that a woman giving birth or a newborn baby might need urgent medical assistance that could be provided only on a maternity ward.

9. The Ministry also pointed out that Lithuania had made great efforts to ensure that safe healthcare services were provided to women giving birth (*gimdyvė*), and that the conditions in maternity wards were designed to render them as close as possible to the home environment. For that purpose medical establishments were supplied with modern medical equipment; at the same time, a woman's family members could be present during birth, and medical institutions were being encouraged to obtain the status of "newborn-friendly". Over the previous twenty years Lithuania had achieved good results in significantly reducing the mortality rate of pregnant women, women giving birth and babies. To provide midwifery services at home, where there were not all the facilities necessary to be able to provide help to women giving birth and to the newborn, would constitute a step backwards. Similarly, to shift the legal and financial liability onto the healthcare specialist or healthcare institution in question would likewise not be acceptable. Moreover, the question of home birth concerned not only the woman's, but also the State's choice; at the same time, it was necessary to balance the interests of society and the rights of the individual. This view was supported by the Court's judgment in *Ternovszky v. Hungary*, (no. 67545/09, § 24, 14 December 2010). Accordingly, the Ministry had no plans to initiate changes to secondary legislation that would regulate the provision of midwifery services at home.

10. The first applicant states in her application that on 11 July 2012 she "[gave] birth at home without qualified healthcare assistance and risked her and the baby's life and health".

B. The second applicant

11. The second applicant was born in 1979. She lives in Vilnius and has three children. She indicated in her application that she had given birth at home in 2006, 2008 and 2011, with the assistance of J.I.Š., the above-mentioned doula. All three births had been "successful".

12. The second applicant submitted that after she had fallen pregnant for a fourth time, and "not being able to safely give birth at home" owing to criminal charges having been brought in respect of the above-mentioned doula, J.I.Š. (see paragraph 6 above and paragraphs 31-35 below), she in April 2012 asked two public hospitals – one in Trakai and one in Vilnius – to provide her with medical assistance during the home birth that she was planning. Both hospitals refused, on the same grounds as those given in the first applicant's case (see paragraph 6 above). Afterwards, the Ministry of Health also refused a request lodged by the second applicant for changes to

be made to the relevant legislation, for reasons identical to those cited in respect of the first applicant's case (see paragraphs 8 and 9 above).

13. In her application to the Court of 19 October 2012 the second applicant noted that she was "firmly resolved (*tvirtai nusiteikusi*) to give birth at home, irrespective of whether she would receive qualified assistance during the birth". Her due date was 17 November 2012.

C. The third applicant

1. The applicant's births at home

14. The third applicant was born in 1982. She lives in Vilnius. She noted in her application that she had given birth at home in 2009 and 2010, with the assistance of the unlicensed doula, J.I.Š. Both births had been "without complications [and] successful, and the children [were] growing up and developing healthily".

15. In her application of 19 October 2012, the third applicant stated that – wishing to have more children and expecting to become pregnant as soon as possible, but also having learned of the criminal charges brought against the doula J.I.Š. – in spring 2012 she became an active member of the movement known as "gimimas.lt" (see paragraphs 26 and 31-35 below). The applicant stated to the Court that during her third pregnancy, having had positive experiences during the first two home births, she could not imagine herself giving birth outside her home, since this seemed to her "the safest, most tranquil [environment] ... for the most intimate of occasions".

16. In September 2012 she asked three public hospitals in Vilnius to provide her with medical assistance during her home birth. All the hospitals refused, on the grounds that in Lithuania there was no legal basis on which to provide medical assistance during a home birth. The head of the Maternity and Obstetrics Clinics at the Vilnius University Hospital (*Vilniaus universiteto Akušerijos ir ginekologijos klinika*) also indicated that she did not have the right to oblige medical personnel to provide medical services outside the hospital. Nevertheless, she invited the third applicant to visit the maternity ward of those clinics in order to "get acquainted with the environment, [which is] a cosy [one] for a woman giving birth".

17. On 21 September 2012 the third applicant then asked the Ministry of Health to either guarantee medical assistance at her home during the birth of her third child or to amend the relevant secondary legislation so that the healthcare professionals were permitted to provide such assistance. She also argued that if the two relevant pieces of secondary legislation were annulled by the Minister of Health (see paragraphs 42 and 44 below), there would remain no obstacles to women receiving medical assistance during home births.

18. This request was refused by the Ministry on 16 October 2012 for the same reasons as those given to the first and second applicants (see paragraphs 8 and 9 above). Given that in her request the third applicant insisted on relying on the Court's judgment in *Ternovszky* (cited above), the Ministry of Health consulted the Ministry of Justice on the matter. The Ministry of Justice noted that the Court had found a violation in the above-mentioned case because of its very particular and specific circumstances, which had led the Court to conclude that the situation in Hungary, in as much as it related to healthcare professionals providing assistance during home births, was surrounded by legal uncertainty that gave rise to arbitrariness. Nonetheless, the Court had acknowledged that, as concerned the provision of healthcare services, the States had a wide margin of appreciation, and regulation had to ensure a proper balance between societal interests and the right at stake. The Ministry of Justice pointed out that the Court's judgment did not mean that a State was under a general obligation to establish a regulatory framework that would allow healthcare specialists to provide services to women giving birth at home. Taking into account the above, and given that Lithuanian law did not contain provisions regarding the provision of healthcare services to women giving birth at home, the Ministry concluded that a pregnant woman could not require that, upon her request, a healthcare institution or a healthcare specialist provide her with childbirth-related healthcare services outside a healthcare institution. Similarly, a healthcare institution or a specialist had no obligation to provide such services, even if a pregnant woman so wished. That being so, the Ministry also emphasised that the third applicant was welcome to visit the maternity wards in Lithuania and to choose the one which had the environment that most suited her.

19. In her application to the Court of 19 October 2012, the third applicant, like the second applicant, stated that she was "firmly resolved to give birth at home, irrespective of whether she would receive qualified assistance during the birth". She was due to give birth in March 2013.

2. Administrative court proceedings against the Ministry of Health

20. After having lodged the instant application with the Court, the third applicant also started administrative court proceedings in respect of the Ministry's refusal to grant her request for the changes in secondary legislation (see paragraphs 17 and 18 above).

21. On 8 April 2013 the Vilnius Regional Administrative Court rejected the third applicant's complaint. The court noted that there were no legal instruments explicitly regulating home births in Lithuania. Therefore, the third applicant's assertion that the two legal instruments adopted by the Minister of Health (see paragraphs 42 and 44 below) directly prohibited home birth was erroneous and unsubstantiated. Those legal instruments only regulated birth in hospitals, not home births.

22. On 22 January 2014 the Supreme Administrative Court upheld the first-instance court's decision. It rejected the third applicant's argument that the absence of any legal regulation allowing the provision of healthcare services during home births constituted a breach of the right to respect for one's private life. The court referred to Article 52 of the Law on the Healthcare System (see paragraph 39 below), which guaranteed a patient's right to privacy. For the court, such legal regulation thus empowered the third applicant to give birth in a specialised medical institution of her choice, which was equipped in accordance with the requirements for such institutions, so that the health of the mother and the newborn would be protected and they could receive immediate high-quality and effective help, should any danger arise to their health or lives during childbirth. The Supreme Administrative Court held that such legal regulation maintained a balance between two constitutional values: privacy and the protection of health.

23. The Supreme Administrative Court also referred to the content of the Ministry of Health letter of 16 October 2012 (see paragraph 18 above), wherein that institution had reminded the third applicant that her family members could be present during the birth of her child and had offered her the opportunity to visit hospitals with maternity wards and to choose the most suitable one. Accordingly, the third applicant had the right and possibility, guaranteed by law, to choose the most suitable medical institution and to state her wishes regarding conditions of privacy and their scope (*dėl privatumo sąlygų ir apimties*). There was no information in the file to the effect that the third applicant had ever approached any of the maternity wards or that she had faced obstacles in choosing how to make use of that right to privacy (for example, by requesting certain services, such as a private room) and then instituted court proceedings. One also had to bear in mind the fact that privacy in respect of the third applicant's personal life (which she had sought by demanding to be provided with medical assistance during her home birth) could not be seen as having a greater value than the health of her and the newborn child, for the purpose of which the State had established a system of personal healthcare and qualified medical assistance.

D. The fourth applicant

24. The fourth applicant was born in 1975. She lives in Vilnius. The fourth applicant stated that she had given birth at home in 2001, 2003 and 2011, with the assistance of doula J.I.Š.

25. In her application to the Court the fourth applicant also stated that even though she was of "reproductive age", she did not dare to become pregnant for the fourth time, owing to the charges pending in respect of J.I.Š., "while the issue of giving birth at home remained legally unregulated

in Lithuania" (*kol Lietuvoje nėra teisiškai sureguliuotas gimdymo namuose klausimas*).

E. General information pertaining to home births in Lithuania

26. In 2012 a non-governmental organisation for promoting childbirth at home, "gimimas.lt", was established. In April 2012 it published an Internet press release calling on society and the State authorities, including the Ministry of Health, to discuss the question of home birth. The third and fourth applicants were among those who initiated that NGO and were its active participants.

27. In April 2012 the Association of Lithuanian Psychologists (*Lietuvos psichologų sąjunga*) asked the Ministry of Health to initiate changes in legislation to permit midwives and obstetrician-gynaecologists to provide medical assistance to women choosing to give birth outside hospital.

28. On 26 April 2012, at the Seimas, the Minister of Health was asked to comment about the possibility of providing medical assistance during home births. He replied that his opinion was categorical and negative; he also asked the non-governmental organisations that promoted that issue to be cautious and responsible. The Minister noted that at that time there were criminal investigations pending concerning "impostors" (*apsišaukėliai*) who had assisted with home births at which babies had died and mothers had suffered serious injuries. He pointed out that it was precisely owing to those criminal investigations that various requests concerning assistance for home births had started reaching the Ministry.

29. In April and May 2012 a group of non-governmental organisations asked the Lithuanian Midwives Association and the Lithuanian Fellowship of Midwives and Gynaecologists for their views on home birth. In its written reply of 17 May 2012, the Lithuanian Midwives Association stated its disapproval of the prospect of midwives assisting with home births. On 19 June 2012 the Lithuanian Fellowship of Midwives and Gynaecologists replied that despite significant worldwide changes in the sphere of maternity care, the question of planned home births remained sensitive and controversial.

F. Criminal proceedings in relation to home births

1. The prologue of the criminal proceedings

30. According to publicly available information, after the death of a baby born at home in June 2011, the police started a criminal investigation. Eventually, the authorities started examining the legality of the actions of a number of persons assisting with home births. The Government were

informed by the police that in respect of those criminal proceedings the applicants only had the status of witnesses.

2. The criminal case against J.I.Š.

31. On an unspecified date the prosecutors started criminal proceedings under Article 202 of the Criminal Code (Unauthorised Engagement in an Economic Activity, see paragraph 48 below) in respect of doula J.I.Š., who, despite having no medical training whatsoever, between 1999 and 2011 on thirty-six occasions had assisted at home births. The scope of her actions at those home births had varied between merely examining newborn babies to performing certain childbirth-related actions.

32. By a judgment of 23 December 2016, the Vilnius City District Court acquitted J.I.Š., holding that she had revived the old profession of doula, which although not regulated in Lithuania, was also not forbidden by law. The court considered that since J.I.Š. had had no medical training and had not acted as an obstetrician-gynaecologist or as a midwife, or as a medical professional in general, she could not be liable under Article 202 § 2 of the Criminal Code.

33. On 19 July 2017 the Vilnius Regional Court overturned the lower court's judgment and convicted J.I.Š. under Article 202 § 2 of the Criminal Code. The appellate court held that while taking part in home births J.I.Š. had been providing healthcare services that fell within the competence of an obstetrician-gynaecologist or a midwife, whereas J.I.Š. had neither a medical education nor a licence to provide such services. By acting in such a manner J.I.Š. had acted in breach of the existing legal regulations, under which the only specialists who could assist with births were obstetrician-gynaecologists and midwives and birth with such assistance could take place (*gimdymai priimami*) only in a maternity ward. It followed that J.I.Š. had been engaged in prohibited medical activities. She was sentenced to six months of deprivation of liberty, suspended for one year.

34. J.I.Š. lodged an appeal on points of law.

35. By a ruling of 12 June 2018, an enlarged chamber (seven judges) of the Supreme Court noted that activities relating to home births, as a phenomenon, had been neither criminalised nor forbidden by law in Lithuania. Accordingly, the appellate court had erred in holding that J.I.Š. had been engaged in unauthorised professional activity, as understood under Article 202 § 2 of the Criminal Code. That notwithstanding, J.I.Š.'s activity, although it had not been prohibited (*jos vykdyta veikla nėra uždrausta*), had been unlawful (*neteisėta*). However, the Supreme Court found that the bill of indictment had failed to establish the precise amount of income that J.I.Š. had received for her activities. It was therefore impossible to establish the element of entrepreneurship, which was necessary in order to hold a person criminally liable under Article 202 § 1 of the Criminal Code. She therefore had to be acquitted.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. The Constitution reads:

Article 53

"The State shall take care of the health of people and shall guarantee medical aid and services for a person in the event of sickness. The procedure for providing medical aid to citizens free of charge at State medical establishments shall be established by law ..."

37. The Law on the Rights of Patients and Compensation for Damage to Their Health (*Pacientų teisių ir žalos sveikatai atlyginimo įstatymas*), as worded between 1 March 2010 and 18 October 2013, read:

Article 4. Right to choose a healthcare institution and a healthcare professional

"1. The patient shall have the right, in accordance with the procedure established by law, to choose a healthcare institution.

2. The patient shall have the right to choose a healthcare professional. The procedure for choosing a healthcare professional shall be established by the head of the healthcare institution [in question] ..."

Article 5. Right to information

"1. The patient has the right to obtain information about the services provided by a healthcare institution, [together with] the prices thereof and the possibilities to use them ...

2. The patient has the right to obtain information about the healthcare specialist who provides him or her with those services (such as his or her name, surname, and post) and information about the specialist's professional qualifications.

3. The patient ... has the right to receive information about his or her state of health, diagnosis, methods of treatment applied in the healthcare institution [in question] or alternatives known to the doctor, potential risks, complications, side-effects ... and other circumstances that may have an effect on the acceptance or rejection by the patient of the proposed treatment, as well as about the consequences of rejecting the proposed treatment ..."

Article 8. Right to privacy

"1. The privacy of patients shall be inviolable. Information concerning the facts of patients' personal existence may be collected only with those patients' consent and if this shall be deemed necessary for diagnosing the illness, treatment or nursing ..."

38. The Law on Health Insurance (*Sveikatos draudimo įstatymas*), as worded at the relevant time, read:

Article 6. Persons eligible for compulsory health insurance and persons covered by compulsory health insurance

"4. Persons insured with State funds ... are:

...

4) women who are on pregnancy and maternity leave, as well as unemployed women during pregnancy ..., before childbirth ... and after childbirth."

Article 9. Personal healthcare services covered by the compulsory health insurance fund budget

"1. The following personal healthcare services are covered by the compulsory health insurance fund budget: preventive medical care, medical care, medical rehabilitation, nursing ...

...

4. The compulsory health insurance fund budget covers:

...

1) primary, secondary and tertiary personal healthcare services..."

39. The Law on the Healthcare System (*Sveikatos sistemos įstatymas*) provides that healthcare services provided to pregnant women are paid by the State (Article 47 § 2 (7)). The Law also provides that information about a person's health is private and may not be disclosed (Article 52).

40. The Law on Medical Practice (*Medicinos praktikos įstatymas*) at the relevant time read:

Article 4. Acquisition and implementation of the right to engage in the practice of medicine

"1. A doctor who has a valid licence issued in accordance with the procedure established by this Law may engage in the practice of medicine in the Republic of Lithuania.

2. The doctor can practise medicine only in a healthcare institution that has a licence to provide healthcare services..."

41. The Law on Nursery Practice and Midwifery Practice (*Slaugos praktikos ir akušerijos praktikos įstatymas*) at the relevant time provided:

Article 10. Illegal practice of nursing and midwifery

"1. The illegal practice of nursing and midwifery – an activity, when a person:

1) is engaged in the general practice of nursing and midwifery without a valid licence ..."

Article 12. Rights of a midwife (*Akušerio teisės*)

"1. A midwife has the following rights:

1) to pursue the practice of a midwife;

2) to refuse to provide midwifery services if working conditions pose a real danger to the health or life of the patient or of the midwife, except for cases when indispensable medical assistance is provided;

...

4) to be engaged in nursing or midwifery, being in employment relation with a legal person that does not have a healthcare licence allowing the provision of adequate nursing and midwifery services;

5) to be engaged in the nursing or midwifery practice, not being in employment relationship with a legal person which provides healthcare services."

42. The Regulation on Healthcare Procedures for Pregnant Women, Women Giving Birth and Newborn Babies (*Nėščiųjų, gimdyvių ir naujagimių sveikatos priežiūros tvarka*), approved by the Minister of Health by order no. 117 of 15 March 1999, read that healthcare institutions were divided into several levels. Level I healthcare institutions provided outpatient perinatal care, including consultations, physical examinations and assessments of pregnancy risk. The right to provide primary perinatal care was granted to a midwife, the obstetrician-gynaecologist and a general practitioner.

Level II A healthcare institutions (district hospitals) provided inpatient healthcare services for women giving birth who had low perinatal risk, as well as healthcare services to newborns without significant pathology-related issues. Level II B healthcare institutions ("multi-profile" regional hospitals) provided obstetric and neonatal consultations, as well as inpatient healthcare services in cases of high perinatal risk during pregnancy and labour that did not call for specialised consultations or inpatient care at Level III hospitals. Level III healthcare institutions (university hospitals) provided specialised consultations and inpatient obstetric and neonatal healthcare services.

Qualified medical assistance for prepartum and postpartum women and newborns could only be provided in healthcare institutions that provided Level II and Level III healthcare services – that is to say hospitals. Such hospitals were obliged to ensure that there were always obstetrician-gynaecologists on duty who could provide a twenty-four-hour service, as well as the assistance of a neonatologist, anaesthesiologist and other medical personnel at any time.

43. As specified by the Government, in 2013 there were thirty-four Level II and Level III medical institutions in Lithuania (including one private clinic) that provided inpatient perinatal and neonatal healthcare services.

The Government also noted that three types of medical personnel were competent to provide monitoring assistance to a pregnant woman in Lithuania: a general practitioner (*bendrosios pagalbos gydytojas*) and an obstetrician-gynaecologist (*akušeris-ginekologas*) – both of these being doctors – and a midwife (*akušeris*) – a specialist type of nurse who provided assistance to pregnant women, women giving birth and postpartum women.

As concerns the types of medical personnel competent to provide assistance to women giving birth, postpartum woman and newborns, those

were an obstetrician-gynaecologist, a neonatologist – both of these being doctors – and a midwife.

44. On 3 April 2006 the Minister of Health Care approved Medical Regulation MN 40:2006 on the rights, duties, competence and liability of a midwife (*Akušeris. Teisės, pareigos, kompetencija ir atsakomybė*). The regulation provided that a midwife could practice at a healthcare institution that had a licence to provide gynaecological services. A midwife also could provide certain services at a patient's home, except for assisting at a regular birth (*priimti normalų gimdymą*).

45. On 1 February 2017 the Ministry of Health set up a working group in order to consider the possibility of allowing home births in Lithuania. The working group included a number of experts in the field from the Lithuanian healthcare institutions. It also included the fourth applicant as the head of the Natural Family Planning Association (*Natūralaus šeimos planavimo asociacija*) non-governmental organisation.

46. On 28 June 2018 the Seimas amended the Law on Nursery Practice and Midwifery Practice by adding point 6 to Article 12 § 1. The law, in force as of 1 January 2019, reads:

Article 12. Rights of a midwife

"1. A midwife has the following rights:

1) to pursue the practice of a midwife;

2) to refuse to provide midwifery services if working conditions pose a real danger to the health or life of the patient or of the midwife, except for cases when indispensable medical assistance must be provided;

...

6) under the rules established by the Minister of Health, to provide to an expectant mother the services of a midwife at home, provided there is an absence of high pregnancy risks, a list of those risks having been established by the Minister of Health."

47. Following that amendment, on 3 January 2019 the Minister of Health approved the Rules on the Provision of Maternity Services at Home Births (*Dėl gimdymo namuose priežiūros paslaugos teikimo tvarkos aprašo patvirtinimo*). It establishes the procedure for the provision of home birth services, the requirements for healthcare institutions and midwives providing assistance at home births, and lists the medical equipment needed to provide such services. The rules specify that a pregnant woman must submit a request to a healthcare institution for assistance during her home birth; they also provide that for such assistance to be granted, it must first be established that there are no risk factors in respect of the pregnancy in question. A woman opting for a home birth may choose the midwife who will assist her. Should a risk subsequently be determined during home birth in respect of the life or health of the woman giving birth, the foetus or the

newborn, or should the woman so request, the healthcare institution must organise their transfer from home to hospital, and such a transfer should take no longer that thirty minutes. The midwife is also under an obligation to visit the mother and newborn within three days of the birth.

48. The Criminal Code at the relevant time provided:

Article 202. Unauthorised Engagement in Economic, Commercial, Financial or Professional Activity

"1. A person who undertakes economic, commercial, financial or professional activity in the form of a business or on a large scale without holding a licence (authorisation) to engage in the activity for which [such authorisation] is required or by other unlawful means

shall be punished by [being sentenced to] community service or with a fine or by restriction of liberty or by imprisonment for a term of up to four years.

2. A person who engages in prohibited economic, commercial, financial or professional activity

shall be punished by imprisonment for a term of up to four years.

3. A legal entity shall also be held liable for acts provided in this Article."

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

49. The relevant international and comparative law material is set out in paragraphs 62-68 of *Dubská and Krejzová v. the Czech Republic* ([GC], nos. 28859/11 and 28473/12, 15 November 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

50. The applicants complained that Lithuanian law had dissuaded healthcare professionals from assisting them when giving birth at home, in violation of their right to private life, as provided 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

(i) Applicability ratione materiae

51. The Government maintained that Article 8 of the Convention could not be interpreted as stipulating the right to give birth at home and the corresponding obligation of the State to provide related healthcare services. In their view, the right to choose the circumstances of giving birth, although acknowledged by the Court in *Ternovszky v. Hungary* (no. 67545/09, § 22, 14 December 2010), to a greater extent was linked not to the right to choose a particular place (such as one's home) for giving birth but with the right to choose the method of delivery, the right to refuse unnecessary medical interventions, the right to choose particular medical personnel (doctors or midwives) to assist during delivery, the right for the father to be present in the delivery room, and the right to stay with a newborn after the delivery. Moreover, the right to give birth at home was not explicitly recognised under the Lithuanian legal system. The Government thus considered that the complaint was inadmissible *ratione materiae*.

(ii) The applicants' victim status

52. The Government also viewed the applicants' complaints as having the nature of an *actio popularis* and having been made *in abstracto*. Although all four applicants had earlier given birth outside healthcare institutions, they had decided to raise the issue of an alleged violation of the Convention only after the institution of a criminal investigation in respect of the individual who had earlier assisted them during their home deliveries. Hence, their application was linked to a greater extent to the criminal investigation rather than to their individual situations. That being so, one also had to bear in mind the fact that mothers giving birth at home were in no way prosecuted and bore no criminal liability in this regard.

53. The Government, referring to *Ternovzky* (cited above, § 21), also considered that the first and the fourth applicants had not been personally affected by the alleged violation of Article 8 of the Convention, since they had not been pregnant or planning to give birth at home at the time of the introduction of the application before the Court. The first applicant had given birth on 11 July 2012, that is to say, before submitting her application to the Court on 19 October 2012 (see paragraphs 1 and 7 *in fine* above). The fourth applicant's claim that she had not dared to become pregnant for the fourth time, even though she had been of "reproductive age" (see paragraph 25), was surrounded by uncertainty and therefore rendered her application an *actio popularis*.

(iii) The exhaustion of the domestic remedies

54. The Government also submitted that, as this had been the first time that the issue of home births within the context of the State healthcare system had been raised in Lithuania, it was all the more important to give the State an opportunity to address it in the light of its obligations under the Constitution and various international instruments. They noted that only the first, second and third applicants had lodged requests with several healthcare institutions and the Ministry of Health for them to be provided with medical assistance during their home births. Afterwards, only one of them – the third applicant – had challenged the Ministry's response in an administrative court. The Government considered that the administrative courts had the power to decide that certain regulatory acts, such as Medical Regulation MN 40:2006, were not in conformity with higher legal instruments. Alternatively, the administrative court could have also referred the matter to the Constitutional Court, which then would have had an opportunity to assess the existing legal regulation and the alleged need to broaden that regulation in view of the right to give birth outside a hospital. The Government thus concluded that the instant application was premature on account of pending (at the time of the Government's observations of 26 April 2013) national proceedings in respect of the third applicant. They also stated that the outcome of those proceedings might have a direct effect on other applicants.

55. The Government also considered that if the absence of relevant legislative regulation regarding home births had caused them certain damage, they could have sought compensation from the State.

(iv) The matter being resolved

56. By a letter of 5 July 2018 the Government informed the Court that the Law on Nursery Practice and Midwifery Practice had been recently amended to enable midwives to provide assistance in the form of maternity services at home births, provided that there were no risk factors, and provided that that assistance was rendered in a manner in accordance with the procedure to be established by the Minister of Health (see paragraph 46 above). By a letter of 31 January 2019 the Government also drew the Court's attention to the fact that earlier that month the Minister of Health had adopted a follow-up legal act on that issue (see paragraph 47 above). The Government thus considered that the adoption of those measures ensured the possibility for expectant mothers to choose where to give birth and to receive appropriate medical assistance. The Government therefore considered that the matters which had given rise to the present application should be considered as resolved and that the application should be struck out of the Court's list of cases, pursuant to Article 37 § 1 (b) of the Convention.

(b) The applicants

(i) Applicability ratione materiae

57. The applicants pointed out that although the right to give birth at home was not explicitly envisaged in the Lithuanian law, it was not prohibited either. They pointed out that they did not require the State to oblige healthcare specialists to assist women during planned home births; rather, they required that the State not prevent them from doing so. In that context the applicants relied on the Court's judgment in *Ternovszky* (cited above, § 22), which had confirmed that "the choice of giving birth in one's home would normally entail the involvement of health professionals". The latter judgment had also made it clear that the circumstances of giving birth incontestably formed part of a person's private life. Contrary to what was claimed by the Government, the whole *Ternovszky* judgment had beyond any doubt been related to the issue of home birth – that is to say choosing a particular place – but definitely not to other aspects of the circumstances in which a woman gave birth.

(ii) The applicants' victim status

58. The applicants partly agreed that they had decided to raise the issue of an alleged violation of their Convention rights only after the institution of a criminal investigation in respect of the individual who had earlier assisted them during home deliveries. However, this was because the pending pre-trial investigation had revealed serious problems surrounding the issue of home births. One of those problems concerned legal uncertainty: although it was legal to give birth at home, the provision of medical assistance was not. The investigation had therefore arguably dissuaded anybody who might be willing to provide particular assistance during home births from doing so. Individuals assisting women at home births were being prosecuted, and the women in question were themselves being called in for questioning by the police. All this had left the applicants with a feeling of insecurity, as they were uncertain as to whether they could receive any required assistance.

59. As to their specific situation, the first three applicants had approached the Ministry of Health while they were pregnant, but their requests for assistance had been refused (see paragraphs 7-9, 12 *in fine*, 17 and 18 above).

60. Furthermore, the first applicant had given birth to her last child at home before lodging her application with the Court. She had done so in order to avoid a repeat of her previous negative experiences at her local public hospital, and even if qualified medical assistance during that home birth was absent (see paragraphs 5 and 10 above).

61. The fourth applicant, although she had not been pregnant when lodging her application with the Court, was of child-bearing age and was planning to conceive and to give birth at home. This applicant had also been

prompted by the Court's judgment in *Ternovsky* (cited above), which showed that in the event that a person lodged an application concerning the right to give birth at home while already being pregnant, the likelihood was that the issue would be dealt with only after the birth had taken place; the possibility of effectively using that right was therefore rather small. Furthermore, all those Lithuanian applicants who had been pregnant at the time of lodging their application had already given birth (see paragraphs 13 and 19 above). Accordingly, the fourth applicant, who was planning to conceive and give birth again and wished to ensure her right to choose the place of birth, was undertaking the defence of this right in advance, in order to have the possibility of giving birth at home with qualified medical assistance.

(iii) Exhaustion of the domestic remedies

62. The applicants stated that any application lodged with the domestic courts, while theoretically possible, would not have been effective. This view was supported by the fact that the third applicant had given birth while her appeal against the Ministry of Health had still been pending (see paragraphs 19 and 22 above). She had been in despair: the time of birth had been approaching and she had decided to exhaust all presumably effective remedies as a last resort in an effort to be able to receive medical assistance during her labour. Unfortunately, her case had demonstrated yet again the ineffectiveness of the national remedies. She had gone into labour while the proceedings had still been pending.

63. In a letter of 5 May 2014 the applicants furthermore pointed out that by that date the third applicant's appeal had already been dismissed by the Supreme Administrative Court, which had, moreover, seen no need to refer the matter to the Constitutional Court (see paragraphs 22 and 23 above). In that connection the applicants also pointed out that, under the domestic law, it was the prerogative of the court in question, rather than the applicant, to raise an issue with the Constitutional Court; a private individual did not have such a right. Even if the Supreme Administrative Court had decided to refer the matter to the Constitutional Court, the process would only have been further suspended. Given that the applicants were still considering giving birth in the future, the prospective length of such proceedings might as well mean that by the end of the Constitutional Court proceedings they would be past "reproductive age". All this showed that the applicants had no domestic remedies to improve their situation.

64. As to the fourth applicant, given the fact that all the applicants knew each other and that the fourth applicant had been aware of the Ministry's answer to the other three applicants (see paragraphs 8, 9, 12 and 18 above), she had been completely certain that it would treat her in the same manner. This was the reason for her applying directly to the Court.

65. Lastly, the applicants pointed out that it was not their intention to seek monetary compensation from the State. Rather, they wished to ensure the realisation of their rights while minimising the possibility of harm.

2. The Court's assessment

(a) Applicability of Article 8 of the Convention

66. The Court has held that although Article 8 cannot 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 v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 163, 15 November 2016, and more recently, *Pojatina v. Croatia*, no. 18568/12, § 44, 4 October 2018). The Court adopts that view also in the present case.

(b) The applicants' victim status

67. 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 rather to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention. 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, with further references).

68. In the present case, the Court notes that the applicants complained of the domestic legislation not permitting them to obtain the assistance of a healthcare professional from the Lithuanian healthcare system when giving birth at home. The Court furthermore 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 in practice did not allow the provision of medical assistance during home births". The fact that the second and the third applicants were resolved to give birth at home without qualified medical assistance (see paragraphs 13 and 19 above) does not prompt the Court to conclude that they cannot claim to be victims of a violation of their rights under Article 8. Consequently, it dismisses the

Government's objection as to these applicants' lack of victim status (see, *mutatis mutandis*, *Pojatina*, cited above, § 46).

69. As to the first applicant, the Court observes that that, in her words, on 11 July 2012 she had given birth at home "without qualified healthcare assistance", thus risking her and the baby's life and health (see paragraph 10 above). Moreover – although this is not conclusive in itself – the Court does not lose sight of the fact that, as acknowledged by the Government, the first applicant and the other applicants in the instant case were questioned as witnesses in the course of the criminal proceedings in respect of the individuals who had assisted them with their home births (see paragraph 30 above). Therefore, it cannot but accept that she can claim to be a victim within the meaning of of Article 34 of the Convention.

70. The Court also reiterates that Article 34 of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 44, Series A no. 246-A, and *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, no. 40825/98, § 90, 31 July 2008). Although it has not been asserted that the fourth applicant in this case was pregnant when lodging this application, it is not disputed that she belonged to a category of women – namely, those of child-bearing age – that may be adversely affected by the restrictions imposed by the prohibition on the provision of medical assistance during home births. She was not seeking to challenge *in abstracto* the compatibility of Lithuanian law with the Convention, since she ran a risk of being directly prejudiced by the measure complained of. The fourth applicant can thus claim to be a "victim" within the meaning of Article 34 of the Convention.

(c) Exhaustion of domestic remedies

71. The Court notes that by its decision of 22 January 2014 the Supreme Administrative Court rejected the third applicant's complaint concerning the Ministry of Health's refusal to ensure that medical assistance be provided to her during her home birth (see paragraphs 22 and 23 above). It also observes that the Government acknowledged that the outcome of those administrative court proceedings was relevant to the situation of all four applicants (see paragraph 54 *in fine* above). Moreover, there is nothing in the administrative courts' decisions that would allow the Court to presume that a claim for damages, lodged in civil proceedings, had reasonable prospect of success. Moreover, what was at the heart of the applicants' complaint was the fact that they wished to have medical assistance during their home births, not pecuniary compensation for the absence of that possibility (see paragraph 65 above). That being so, the Court considers that the Government's objection as to failure to exhaust the domestic remedies must be dismissed.

(d) The matter being resolved

72. The Court reiterates that, under Article 37 § 1 (b) of the Convention, it may "at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that ... the matter has been resolved ...". To be able to conclude that this provision applies to the instant case, the Court must answer two questions in turn: firstly, it must ask whether the circumstances complained of by the applicant still obtain and, secondly, whether the effects of a possible violation of the Convention on account of those circumstances have also been redressed (see *Kaftailova v. Latvia* (striking out) [GC], no. 59643/00, § 48, 7 December 2007).

73. In this respect it is significant that it was only as of January 2019 – that is to say more than six years after this application was lodged with the Court and after the applicants had given birth at home – that Lithuanian law was changed to permit home births with medical assistance (see paragraphs 46 and 47 above). The changes in the domestic law thus could not have retroactively benefitted the situation of the applicants, who remained personally and directly affected by the previous legal regulation. Accordingly, the Court considers that the effects of a possible violation of the Convention have not been sufficiently redressed for it to conclude that the matter has been resolved within the meaning of Article 37 § 1 (b) (see, *mutatis mutandis*, *Konstantin Markin v. Russia* [GC], no. 30078/06, § 88, ECHR 2012 (extracts)).

74. The Court therefore rejects the Government's request for the application to be struck out under Article 37 § 1 (b) of the Convention.

(e) General conclusion on the admissibility

75. The Court notes that the application 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 applicants

76. The applicants submitted that even though initiatives to have legislation allowing medical assistance during home births had been made as early as in the 1990s by "a group of proactive individuals" and, more formally, in 2012 by those belonging to the "gimimas.lt" initiative, no positive response from the Ministry of Health had been received.

77. The fact that, even if home birth was legal in Lithuania and that women did in fact give birth at home, healthcare professionals were forbidden from providing the medical care required for childbirth, had only created detrimental conditions in respect of the safety of women giving birth and the newly born. It was illogical to use the low perinatal mortality figures, as did the Government (see paragraph 84 below), as grounds for prohibiting healthcare professionals from providing assistance during home births. On the contrary, instances wherein homebirths took place without qualified medical assistance could only increase perinatal mortality – not the other way around. Furthermore, the high quality of the healthcare infrastructure, as described by the Government, could not be cited as a reason for impinging upon the applicants' right to choose the place in which they wished to give birth. The issue at stake constituted a particularly intimate and important aspect of the right of pregnant women to respect for their private life. The applicants also referred to numerous studies and reports by midwives' associations abroad that supported a more liberal policy on the matter and considered that home births could be made safe.

78. Even assuming that giving birth at home could be restricted for reasons of public health, the prohibition on giving birth at home with medical assistance was disproportionate. The aim of protecting the mother's and the child's health could be achieved by prescribing specific conditions for giving birth at home, such as requirements in respect of premises and distance to the [nearest] hospital. The applicants also disputed that allowing medical assistance during homebirth would require disproportionately high expenditure on the part of the State. On the contrary, as shown by examples of other States (the applicants relied on certain statistics from the United Kingdom), giving birth at home or in natural-birth centres was as safe as giving birth at home; moreover, the costs were lower. The applicants also wished to underline that they did not require the State to ensure their right to give birth at home by directing healthcare specialists to attend home births, by placing ambulances on standby next to the homes of the women giving birth, or by keeping operating rooms on standby for the entire duration of such women's labour. They only asked that healthcare specialists who were willing to assist during homebirth not be prohibited from doing so, and also that qualified assistance be provided to women in labour who arrived at hospital after experiencing complications.

79. The applicants further noted that owing to the pre-trial investigations in respect of those who had assisted women during home births, the very concept of home birth was seen in Lithuania as being against the law, even though it was not. The fact that women who had given birth at home had been called in for questioning and interrogated about topics of an extremely intimate nature and had been put under pressure to disclose various details of their home births also contributed to the growth of the perception of it being illegal. It had to be emphasised that a large proportion of women

chose to give birth at home precisely because to them it was an event of an extremely intimate and private nature. However, the applicants had been forced to recount the details of that event to investigators, which could be seen as a penalty for their having chosen to give birth at home. This had happened to "three of the four applicants". A noticeably derogatory and degrading tone was also employed by the State authorities towards women who gave birth at home. The applicants lastly stated that they had never sought to influence any on-going pre-trial investigation. However, the fact that people who had helped them during labour were being prosecuted had left the applicants deeply shaken and feeling insecure, as they would not be able to call them for assistance when giving birth at home in the future.

(b) The Government

80. The Government noted at the outset that after 1990 the State had undertaken continuous efforts to improve healthcare services, including in respect of the environment at healthcare institutions. Those services were to be provided free of charge. The protection of people's health was to be treated as a State function and served the public interest. However, by undertaking to secure the high quality of healthcare services – especially in respect of medical interventions – the State retained the right to choose appropriate means in order to achieve the aim pursued. Hence, legal regulation clearly envisaged that high quality of healthcare services could be provided only by licensed healthcare professionals practising in licensed healthcare institutions. This also applied with regard to midwifery and obstetric healthcare services, which were clearly regulated under Lithuanian law (see paragraphs 38, 40 and 42 above). The circumstances of the instant case thus differed from those examined by the Court in *Ternovszky* (cited above), given that at the time the instant application had been lodged with the Court, Lithuania had not committed itself to allowing healthcare professionals to assist with home births.

81. The aim of the legal restriction on medical professionals providing assistance during planned births outside healthcare institutions was to secure the health of the mother and child. The Government underlined that obstetrics was the only area of healthcare practice where assistance was provided to two human beings at the same time. In order to ensure that they stayed alive, both human beings had to be monitored during labour. Even pregnancy that had progressed "without any apparent hitch" could still give way to complications during labour. Urgent measures, including medical intervention, in order to safeguard lives, could therefore be necessary in order to meet the State's responsibility. The adequate level and quality of the required assistance that the State undertook to guarantee could only be ensured in healthcare institutions, which met such standards.

82. The Government also pointed to the specific improvements made to the environment at healthcare institutions in order to render it as

comfortable as possible for women giving birth and for newborns. In 1991 UNICEF's and the World Health Organisation's Baby-Friendly Hospital Initiative (BFHI) started to be implemented in Lithuanian hospitals. Its goal was to ensure that all hospitals promoted and supported the breastfeeding of newborns and to establish uninterrupted skin-to-skin contact between mother and child immediately after birth and to maintain it afterwards. By April 2013 (the date of the Government's observations), BFHI status had been officially awarded to eight hospitals. However, the majority of those requirements, and one in particular – that newborns not be separated from their mothers – were also being implemented in the remaining hospitals; the majority of hospitals in Lithuania could thus be deemed to be "unofficially" baby-friendly.

83. Furthermore, under the law as it stood (see paragraph 37 above), all patients, including pregnant women, had the right to choose a healthcare institution, as well as particular healthcare professionals to assist them with labour. Women could give birth in either public or private hospitals. Moreover, hospitals provided a wide range of choices to women concerning the circumstances of their giving birth: for example, they could refuse unnecessary medical interventions; they also had the right to choose a comfortable physical position during delivery, stay in water during the first stage of labour, have the father of the child or other close persons present in the delivery room, stay in a "family type" ward, with all necessary equipment, bring with them their bedding, and stay with the newborn after the delivery. The majority of hospitals in fact ensured home-like conditions for women giving birth in order that they could feel that they were in an environment similar to that of their home. On the other hand, for emergency situations there were always teams of healthcare professionals on duty.

84. These and other measures implemented by the State, such as the requirement to have the necessary doctors on duty at all times (see paragraphs 42 and 43 above), had had positive results in the form of a significant decrease in perinatal mortality rates during the period 1995-2011. The Government also pointed out that perinatal mortality rate was a key indicator of the health status of the whole community, since in any country it reflected the quality of prenatal, natal and postnatal care.

85. Turning to the specific situation of the four applicants, the Government observed that all four lived in Vilnius, which had three public hospitals and one private hospital where the applicants would have been provided with a high level of healthcare services, including a home-like environment designed to promote mothers' emotional well-being. Accordingly, the applicants' claims concerning the alleged lack of a "mother-friendly" environment in the healthcare institutions were ungrounded. Moreover, in their application to the Court the applicants had emphasised only one – the emotional – aspect of labour. However, in situations when women were in labour the State's primary responsibility

was to protect the health and life of human beings. Hence, it limited the places in which labour could take place (that is to say to hospitals), whereas if it allowed women the unrestricted right to choose the most emotionally comfortable place in which to give birth, it would not be able to secure its primary goal – preserving the health and life of the mother and of the newborn. In this context the Government also pointed to the first applicant's submission that she had given birth to her last child at home, even though she had been aware of the fact that her and her child's life and health were at risk (see paragraph 10 above), which for the Government showed that this applicant thus failed to act in a manner ensuring that the life of a future human being would not be placed in danger.

86. The Government stated that in emergency cases, including planned home births, when certain complications occurred during labour at home and an ambulance was called, healthcare professionals would still come to the patient's home and provide medical assistance, except for certain procedures that had to be performed at a hospital, to which they would offer a secure transfer.

87. Having regard to the legal regulation that clearly prohibited medical personnel from assisting in planned births outside licensed hospitals, including births at home, and the State's efforts to provide high-quality medical assistance and at the same time to ensure a comfortable environment in hospitals, the Government considered that the applicants could have been provided with such services in one of the hospitals in Vilnius. Regrettably, it could be presumed that the present application had been inspired mostly by the pre-trial investigation in respect of those individuals who had earlier assisted the applicants in giving birth to their children at home.

88. The Government also pointed out that only after this application had been lodged with the Court had a more active discussion concerning home births started in Lithuania, since when very diverse opinions, not only among various politicians but also within society as a whole, had been observed. The question of home births needed thorough discussion from different perspectives.

89. Lastly, by a letter of 5 July 2018 the Government also drew the Court's attention to the Supreme Court's ruling of 12 June 2018 (see paragraph 35 above). The Government pointed out that J.I.Š. had faced charges in respect of crimes and misdemeanours against the economic and business order, but not in respect of assisting with home deliveries, thus supporting the Government's earlier position that the domestic legislation did not prohibit midwives from providing assistance during home births and that no criminal sanctions could be possible in respect of such activity.

2. The Court's assessment

(a) As to the examination of the case from the standpoint of the State's negative or positive obligations

90. 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 ... the applicable principles regarding justification under Article 8 § 2 are broadly similar regardless of analytical approaches adopted" (see *Dubská and Krejzová*, cited above, § 165; also see, more recently, *Pojatina*, cited above, § 63).

91. 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"?

92. 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 (see *Dubská and Krejzová*, cited above, § 167, with further references).

93. 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 applicants. The Court sees no reason to disagree on that point, and it must thus establish whether the provisions were also foreseeable.

94. The Court firstly notes that giving birth at home is not, as such, prohibited by the Lithuanian legal system. There are no provisions under domestic law criminalising the acts of women who decide to give birth in that way (see paragraph 35 above), and it has not been argued that any woman has ever been prosecuted or punished for such an action.

95. On the question of whether at the time of the lodging of this application with the Court healthcare professionals were allowed to assist in home births, the Court observes that, under the Regulation on Healthcare Procedures for Pregnant Women, Women Giving Birth and Newborn Babies, qualified medical assistance for such women and babies could only be provided at Level II or Level III healthcare institutions – that is to say at

hospitals (see paragraph 42 above). Similarly, the Law on Medical Practice provided that doctors (including obstetrician-gynaecologists) could practise only in a licensed healthcare institution (see paragraphs 40 and 43 above), and the Law on Nursery Practice and Midwifery Practice prohibited a midwife from practising her occupation outside a licensed healthcare institution (see paragraph 41 above). The fact that a midwife could not assist with home births was explicitly stated in Medical Regulation MN 40:2006 (see paragraph 44 above). For the Court, such a reading of explicitly and clearly regulated Lithuanian law unambiguously supports the conclusion that professionally assisted home births were not permitted. It also follows that because of this, for Lithuanian healthcare professionals, including paediatricians, obstetrician-gynaecologists and midwives, to officially assist with home births would be considered as quackery (see paragraph 28 above; compare *Pojatina*, cited above, § 70).

96. The fact that while women in Lithuania could choose where to give birth midwives had no licence to practise privately, was also confirmed through the letters from the hospitals that the applicants received while some of them were still pregnant (see paragraphs 6, 12 and 16 above).

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

(c) Did the interference pursue a legitimate aim?

98. Contrary to the applicants' arguments, the Court considers that there are no grounds for doubting that the Lithuanian 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 (see *Dubská and Krejzová*, cited above, § 172).

99. 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?

100. The Court summarised the applicable principles in the case of *Dubská and Krejzová* (ibid., §§ 174-79).

101. In the case at hand, the Court has to establish whether the fact that it was impossible in practice for the applicants to be assisted by a healthcare professional from the Lithuanian healthcare system during their home births struck a fair balance, on the one hand, between the applicants' right to respect for their 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.

102. As to the respondent State passing legal acts that did not in practice allow women to be assisted by healthcare professionals from the Lithuanian 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 (ibid., §§ 182-84). 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 *Pojatina*, cited above, § 78).

103. The applicants in the present case wished to give birth at home with the assistance of an obstetrician-gynaecologist or a midwife. The Court accepts that, as a consequence of the operation of the legal provisions in force at the relevant time, they were put in a situation that had a serious impact on their freedom of choice: they were required either to give birth in a hospital or, if they wished to give birth at home, to do so without the assistance of healthcare professionals and therefore with the attendant risks to themselves and their babies. In the end, the first, second and third applicants gave, or were determined to give, birth at home without such assistance, and the fourth applicant allegedly postponed becoming pregnant (see paragraphs 10, 13, 19 and 25 above).

104. In that regard, the Court takes note of the Government's argument that for objective and quantifiable reasons, and even though home delivery might be more pleasant for some mothers-to-be, it still represented an option that was not as safe as a full hospital delivery, which provided the best guarantees for the preservation of the health and life of both mothers and newborns (see paragraphs 81 and 84 above). On this point the Court also refers to the Ministry of Health's reply to the first applicant that healthcare specialists were unanimous in concluding that it was safest for a woman to give birth in a maternity ward (see paragraph 8 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 that would require immediate specialist medical intervention, such as a Caesarean section or special neonatal assistance. The Court likewise 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 (ibid., § 186; as to data on perinatal mortality, see §§ 28 and 29 of that judgment).

105. The Court further notes the first applicant's statement that owing to the humiliation that she had encountered during her first delivery in a public hospital she could not imagine giving birth in a public hospital again (see paragraph 5 above). In that context, the Court also refers to the statements by the second and third applicants to the effect that several times they had "successfully" and "without complications" given birth at home, where the environment had been "the safest and most tranquil" (see paragraphs 11, 14 and 15 above). While it is not for the Court to disregard those arguments and concerns, it also observes that unlike in the *Pojatina* case (cited above, § 81) – where the Court accepted the applicant's submissions that the wishes of mothers-to-be did not seem to be fully respected in maternity wards in Croatia, also because those submissions seemed to have been confirmed in substance by reports by the Committee on the Elimination of Discrimination against Women, the applicants in the instant case did not furnish the Court with such proof regarding the situation in Lithuania.

106. At the same time, the Court acknowledges that, according to the Government, since the 1990s various initiatives to improve the situation have been taken, notably Lithuania joining the Baby-Friendly Hospital Initiative (see paragraph 82 above), as well as taking specific steps to ensure home-like conditions for women giving birth at the majority of maternity wards (see paragraph 83 above). In the instant case the Court cannot but note that all four applicants could have opted to give birth in any maternity ward in Lithuania that they considered likely to respect their wishes in principle (ibid., see also paragraph 18 above). In Vilnius alone, where all the applicants lived, there were three such hospitals (see paragraph 16 above). In fact, in reply to her demand that she be provided with medical assistance during her home birth, the third applicant was explicitly invited to visit one of those hospitals in order to become acquainted with the environment therein (ibid.). However, as pointed out by the Supreme Administrative Court, she never approached any of the maternity wards about arrangements that they could make to ensure her privacy, as she saw it (see paragraph 23 above).

107. Taking into account the above considerations, the Court is of the view that, by not passing legislation that would in practice allow the applicants in this case to be assisted by healthcare professionals from the Lithuanian healthcare system when giving birth at home, the State did not overstep the wide margin of appreciation afforded to it in the matter. 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 interpreted by the Court. There still remains a great disparity between the legal systems of the Contracting States as well as lack of consensus on the

matter (see *Dubská and Krejzová*, cited above, § 183), and the Court remains respectful of the gradual development of law in the sphere (see, most recently, *Pojatina*, cited above, 85).

108. The applicants also complained that midwives and doctors agreeing to assist women deciding to give birth at home had faced possible criminal sanctions for their actions, thus further dissuading women from choosing home births. However, as already noted by the Court, there are no provisions under domestic law criminalising the acts of women who decide to give birth in that setting (see paragraph 94 above). This has also been acknowledged by the applicants (see paragraph 57 above). It is true that the Minister of Health expressed his view on 26 April 2012 that the law prohibited healthcare professionals from assisting at home birth, as such actions would be considered as quackery (see paragraph 28 above). Indeed, a person who had assisted the applicants at their home births had been prosecuted for such an offence (see paragraphs 31-35 above). Be that as it may, it transpires that the criminal proceedings that the applicants relied on concerned a bigger case regarding the death of a baby born at home and the legality of the actions of a number of persons assisting with home births (see paragraph 30 above), which only further corroborates the Court's conclusion that there was a public need to investigate those suspicions. Even if it is true that the applicants were questioned as witnesses during those proceedings, this questioning can be seen not only as the consequence of their choice to give birth at home but also as their civic duty.

109. The Court furthermore observes that, unlike in the case of *Pojatina* (ibid., § 86), the applicants in the present case did not appear to have pleaded that they or their children had been denied postnatal care. Similarly, the applicants never reported having been denied postnatal care to any relevant authority. There is thus no document whatsoever that would allow the Court to verify such an allegation (ibid., § 87). On the contrary, as noted by the Government, should any emergency arise in cases of planned home birth, healthcare professionals would still come to the patient's home and either provide medical assistance there or secure their transfer to a hospital (see paragraph 86 above). This also corresponds to the Court's position 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 the principles enunciated in the Convention on the Rights of the Child, cited in *Dubská and Krejzová*, cited above, § 64).

110. By way of observation, the Court lastly notes that since at least 2012, the year in which the instant application was lodged with the Court, the issue of home births has been a subject of discussion at the Ministry of

Health, which in 2017 established a working group comprising not only healthcare professionals but also the fourth applicant, on behalf of an NGO advocating home births (see paragraph 45 above). As a result, the Lithuanian law was amended to include provisions explicitly regulating home births, so that since 1 January 2019 medical personnel have been allowed to assist at home births (see paragraphs 46 and 47 above). Against this background, the Court also finds that the Lithuanian authorities have made further progress regarding matters relating to home births 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 (see, *mutatis mutandis*, *Dubská and Krejzová*, § 189, and *Pojatina*, § 82, both cited above). The Court considers that these developments have no bearing on the applicants' situation under examination (see, in particular, paragraph 97 above).

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

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 4 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı	Robert Spano
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Laffranque is annexed to this judgment.

H.B.
R.S.

CONCURRING OPINION OF JUDGE LAFFRANQUE

I voted with the majority: the judgment as such cannot depart from the already established case-law of the Court, created by and further developed since the Grand Chamber judgment in the case of *Dubská and Krejzová v. the Czech Republic* ([GC], nos. 28859/11 and 28473/12, 15 November 2016).

However, I have not changed my views as expressed in the joint dissenting opinion in *Dubská and Krejzová* with judges Sajó, Karakaş, Nicolaou and Keller. There should be no room in a democratic society for any interference with mothers' freedom of choice which is not proportionate and which deprives them of the possibility of receiving the indispensable assistance of a midwife during home births, assuming that the preconditions for home birth are met. This is also detrimental to the health of mothers and of course to their newborns. The pre-trial investigations in Lithuania in respect of individuals who had assisted women during home births turned the very concept of home birth into something that was against the law, even if it was not prohibited as such in the Lithuanian legal system.

Nonetheless, the fact of recent positive developments in Lithuanian legislation, so that Lithuanian law has been amended to include provisions explicitly regulating home births, is only to be welcomed.