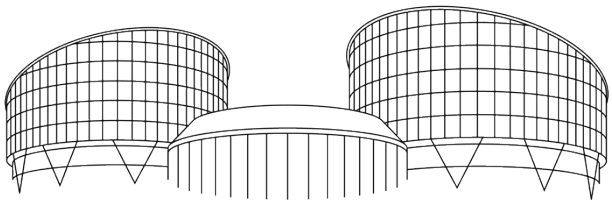

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF TERNOVSZKY v. HUNGARY

(Application no. 67545/09)

JUDGMENT

STRASBOURG

14 December 2010

FINAL

14/03/2011

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

In the case of Ternovszky v. Hungary,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Nona Tsotsoria,
Kristina Pardalos,
Guido Raimondi, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 23 November 2010,

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

PROCEDURE

1. The case originated in an application (no. 67545/09) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Ms Anna Ternovszky ("the applicant"), on 15 December 2009.

2. The applicant was represented by Mr T. Fazekas, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr L. Höltzl, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged under Article 8 read in conjunction with Article 14 of the Convention that the fact that she could not benefit from adequate professional assistance for a home birth in view of the relevant Hungarian legislation – and as opposed to those wishing to give birth in a health institution – amounted to discrimination in the enjoyment of her right to respect for her private life.

4. On 25 January 2010 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1979 and lives in Budapest.

6. At the time of introduction of the application the applicant was pregnant and intended to give birth at her home, rather than in a hospital or a birth home. However, in view of section 101(2) of Government Decree no. 218/1999 (XII.28.), any health professional assisting a home birth runs the risk of conviction for a regulatory offence and, indeed, at least one such prosecution has taken place in recent years. In the applicant's view, while there is no comprehensive legislation on home birth in force in Hungary, this provision effectively dissuades health professionals from assisting those wishing home birth.

II. RELEVANT DOMESTIC LAW

7. The Constitution provides as follows:

Article 70/D

"(1) Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health.

(2) The Republic of Hungary shall implement this right through institutions of labour safety and health care, through the organization of medical care and the opportunities for regular physical activity, as well as through the protection of the urban and natural environment."

Article 70/E

"(2) The Republic of Hungary shall implement the right to social support through the social security system and the system of social institutions."

8. Section 15(1) of the Health Care Act 1997 provides that a patient's right to self-determination can be restricted only as prescribed by law. According to section 15(2), it is the free choice of a patient to accept or reject certain treatments. Under section 20(1), a competent patient may reject medical treatment unless this endangers the life or limb of another person.

9. Section 101(2) of Government Decree no. 218/1999 (XII.28.), as in force in the relevant period, provides that a health professional who carries out activities within his or her qualifications without a licence, or carries out such activities in a manner which is not in compliance with the law or the licence, is punishable with a fine of up to 100,000 Hungarian forints.

10. Act no. CLIV of 2009 (adopted on 14 December 2009) on the Amendment of Certain Health-Related Acts provides as follows:

Section 59(1)

"Section 247(1) of the Health Care Act [1997] shall be completed with [the following provision]:

« (v) [The Government shall] determine [in a decree] the professional rules and conditions governing birth outside an institution and the causes excluding the possibility of such birth. »"

III. RECOMMENDATION OF THE WORLD HEALTH ORGANIZATION (WHO/FRH/MSM/96.24)

11. *Care in Normal Birth: a practical guide (Report of a Technical Working Group)*

2.4 Place of Birth

"... Although risk assessment may be appropriately performed by trained birth attendants their advice about the place of birth, made on the basis of such assessment, is not always followed. Many factors keep women away from higher level health facilities. These include the cost of a hospital delivery, unfamiliar practices, inappropriate staff attitudes, restrictions with regard to the attendance of family members at the birth and the frequent need to obtain permission from other (usually male) family members before seeking institutional care ... Often, high and very high risk women do not feel ill or show signs of disease, so they give birth at home, attended by a family member, by a neighbour or by a TBA ...

However, a properly attended home birth does require a few essential preparations ... [T]ransport 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.

In some developed countries birth centres in and outside hospitals have been established where low-risk women can give birth in a home-like atmosphere, under primary care, usually attended by midwives. In most such centres electronic fetal monitoring and augmentation of labour are not used and there is a minimum use of analgesics. An extensive report about birth centre care in the USA described care in alternative birth centres in and outside hospitals ... Experiments with midwife-managed care in hospitals in Britain, Australia and Sweden showed that women's satisfaction with such care was much higher than with standard care. The number of interventions was generally lower, especially obstetric analgesia, induction and augmentation of labour. The obstetric outcome did not significantly differ from consultant-led care, though in some trials perinatal mortality tended to be slightly higher in the midwife-led models of care ...

In a number of developed countries dissatisfaction with hospital care led small groups of women and caregivers to the practice of home birth in an alternative setting, often more or less in confrontation with the official system of care. Statistical data about these home births are scarce. In an Australian study data were collected which suggested that the selection of low-risk pregnancies was only moderately successful. In planned home deliveries the number of transfers to hospital and the rate of obstetric interventions was low. Perinatal mortality and neonatal morbidity figures were also relatively low, but data about preventable factors were not provided ...

> The Netherlands is a developed country with an official home birth system. The incidence of home deliveries differs considerably between regions, and even between large cities. A study of perinatal mortality showed no correlation between regional hospitalisation at delivery and regional perinatal mortality ... A study conducted in the province of Gelderland, compared the "obstetric result" of home births and hospital births. The results suggested that for primiparous women with a low-risk pregnancy a home birth was as safe as a hospital birth. For low-risk multiparous women the result of a home birth was significantly better than the result of a hospital birth ... There was no evidence that this system of care for pregnant women can be improved by increasing medicalization of birth ...
>
> So where then should a woman give birth? It is safe to say that a woman should give birth in a place she feels is safe, and at the most peripheral level at which appropriate care is feasible and safe ... For a low-risk pregnant woman this can be at home, at a small maternity clinic or birth centre in town or perhaps at the maternity unit of a larger hospital. However, it must be a place where all the attention and care are focused on her needs and safety, as close to home and her own culture as possible. If birth does take place at home or in a small peripheral birth centre, contingency plans for access to a properly-staffed referral centre should form part of the antenatal preparations."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

12. The applicant complained that the ambiguous legislation on home birth dissuaded health professional from assisting her when giving birth at home, which amounted to a discriminatory interference with her right to respect for her private life. She relied on Article 8 read in conjunction with Article 14 of the Convention. The Government contested that argument.

13. The Court considers that this complaint falls to be examined under Article 8 alone which provides as relevant:

> "1. Everyone has the right to respect for his private ... life...
>
> 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

14. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 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 Government

15. The Government first noted that the application did not disclose any element enabling the Court to determine whether the applicant had been directly and personally affected by the impugned lack of regulations on home birth, that is, whether she had given birth at home without adequate professional assistance or had to face sanctions for doing so. This uncertainty rendered the case an *actio popularis*.

16. The Government further argued that the right to self-determination under Article 8 did not yield any positive obligation to widen the range of choices available within the health care system. In any event, the right to self-determination might be subject to restrictions within the margin of appreciation enjoyed by the Contracting State. Where a particularly important facet of an individual's existence or identity was at stake, the margin allowed to the State would be restricted. Where, however, there was no consensus amongst 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, this margin would be wider; there would also usually be a wide margin if the State was required to strike a balance between competing private and public interests or Convention rights. These considerations applied in the present case. Home birth was not supported or regulated in many Member States and there was no consensus as to how to strike a fair balance between the mother's right to give birth at home and the child's right to life and health and, in particular, to a safe birth.

17. They submitted moreover that there was a professional consensus in Hungary to the effect that home birth was less safe than birth in a health care institution. Nevertheless, since a change in legislation in 1997, it was no longer prohibited, regard being had to the mother's right to self-determination. However, it was not encouraged or supported either, because of the inherent risks. Health professionals who encouraged unsafe home births, overstepped the limits of their licences and disregarded the rules of their profession might face administrative sanctions. Statistics, however, did not disclose that this provision dissuaded mothers from giving birth at home: in 2008 and 2009, some 150 planned home births had taken place annually whereas only one single administrative procedure had been instituted in connection with home birth. There was no evidence that birth

care professionals were effectively discouraged by the legislation from providing assistance to those in need, that obtaining the necessary assistance was impeded by the lack of regulations, or that there were legal obstacles to women exercising their right to self-determination in respect of giving birth.

18. However, there had been several instances in recent years where home births assisted by health professionals had ended in hospitals or resulted in the death or serious injury of the baby. These unfortunate developments had necessitated specific legislation on the matter. On 14 December 2009 Parliament had adopted an act authorising the Government to regulate the conditions of birth outside an institution. The legislative process was currently underway. In sum, the Government concluded that the lack of regulations on home birth in the relevant period did not amount to a breach of the applicant's right to self-determination under Article 8 of the Convention.

b. The applicant

19. The applicant submitted that despite the ongoing legislative process, the question of home birth had not yet been regulated. The existing rule contained in section 101 of Government Decree no. 218/1999. (XII.28.) represented an unjustified yet real threat to health professionals inclined to assist home births.

20. She further emphasised that an informed choice of the conditions of one's giving birth was a matter which belonged to the hard core of self-determination and as such, to that of private life, rather than to obstetrics alone. This choice could not be categorically overruled by considerations aiming at protecting the child since it had not been proven that home birth was riskier than birth in an institution. The purpose of the application was to obtain an unhampered right to home birth without the assisting professionals facing sanctions but with access to an institution in case of complications, rather than to require additional infrastructure or alternative medical services or to impose an unreasonable financial burden on the health care system. Finally, relying on a related Recommendation of the World Health Organization (see paragraph 11 above), she emphasised that hospital and home births were equal alternatives, and that a prospective mother's informed choice between them must be respected.

2. The Court's assessment

a. Victim status

21. The Court notes at the outset the Government's position that the application represents an *actio popularis* for want of any particular measure applied to the applicant's detriment. However, it appears from the circumstances of the case that she was pregnant at the time of the introduction of the application and inclined to give birth at home. In these circumstances, the Court is satisfied that the applicant can claim to be a

victim of a violation of her rights under Article 8 of the Convention without any particular measure being applied, simply by virtue of the existence of the impugned legislation (see *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 44, Series A no. 246-A).

b. Existence of an interference

22. The next matter to be decided is whether the contested legislation constitutes an interference with the exercise of the rights guaranteed to the applicants under Article 8 § 1. "Private life" is a broad term encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (see *Pretty v. the United Kingdom*, no. 2346/02, § 62, ECHR 2002-III), and it incorporates the right to respect for both the decisions to become and not to become a parent (*Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-IV). The notion of a freedom implies some measure of choice as to its exercise. The notion of personal autonomy is a fundamental principle underlying the interpretation of the guarantees of Article 8 (cf. *Pretty*, loc. cit.). Therefore the right concerning the decision to become a parent includes the right of choosing the circumstances of becoming a parent. The Court is satisfied that the circumstances of giving birth incontestably form part of one's private life for the purposes of this provision; and the Government did not contest this issue. The Court notes that the applicant was not prevented as such from giving birth at home. However, the choice of giving birth in one's home would normally entail the involvement of health professionals, an assumption not disputed by the parties. For the Court, legislation which arguably dissuades such professionals who might otherwise be willing from providing the requisite assistance constitutes an interference with the exercise of the right to respect for private life by prospective mothers such as the applicant.

c. In accordance with the law

23. In order for the "interference" established above not to infringe Article 8, it must first of all have been "in accordance with the law". The Court considers that the term "in accordance with the law" alludes to the very same concept of lawfulness as that to which the Convention refers elsewhere when using the same or similar expressions, notably the expressions "lawful" and "prescribed by law" found in the second paragraphs of Articles 9 to 11. The concept of lawfulness in the Convention, apart from positing conformity with domestic law, also implies qualitative requirements in the domestic law such as foreseeability and, generally, an absence of arbitrariness (*Rekvényi v. Hungary* [GC], no. 25390/94, § 59, ECHR 1999-III). The Court notes that it has found that the law itself constitutes the interference with the applicant's right to respect for private life (see paragraph 22 above) but considers that this conclusion does not

preclude an examination of whether the quality of the law meets the requirements of the notion of "in accordance with the law" in paragraph 2 of Article 8.

24. The Court considers that, where choices related to the exercise of a right to respect for private life occur in a legally regulated area, the State should provide adequate legal protection to the right in the regulatory scheme, notably by ensuring that the law is accessible and foreseeable, enabling individuals to regulate their conduct accordingly. It is true that, in this regard, the State has a wide margin of appreciation; however, the regulation should ensure a proper balance between societal interests and the right at stake. In the context of home birth, regarded as a matter of personal choice of the mother, this implies that the mother is entitled to a legal and institutional environment that enables her choice, except where other rights render necessary the restriction thereof. For the Court, the right to choice in matters of child delivery includes the legal certainty that the choice is lawful and not subject to sanctions, directly or indirectly. At the same time, the Court is aware that, for want of conclusive evidence, it is debated in medical science whether, in statistical terms, homebirth as such carries significantly higher risks than giving birth in hospital[1].

25. In the present case, the Court observes that child delivery is regulated not only as a matter of public health but also as one falling within the ambit of social security. According to the Constitution, public health and social security is provided by institutional services (see paragraph 7 above). For the Court, a constitutional obligation of this kind warrants regulation which should take into proper consideration the right of choice of the mother.

26. The Court observes that sections 15 and 20 of the Health Care Act 1997 recognise patients' right to self-determination in the context of medical treatment, including the right to reject certain interventions (see paragraph 8 above). At the same time, section 101(2) of Government Decree no. 218/1999 sanctions health professionals who carry out activities within their qualifications in a manner which is incompatible with the law or their licence (see paragraph 9 above). For the Court, these legal provisions may reasonably be seen as contradictory in the context of assisting home births, an issue otherwise unregulated under Hungarian law. The Court notes in this connection that the Government admitted that in at least one case proceedings were instituted against a health professional for having assisted home birth. It also takes cognisance of the task given by Act no. CLIV of 2009 to the Government to regulate the matter in a decree (see paragraph 10 above). However, the parties agree that such regulations have not been enacted to date, although the Government accepted their necessity (see

[1] See in particular De Jonge A, van der Goes BY, Ravelli AC, Amelink-Verburg MP, Mol BW, Nijhuis JG, et al.: Perinatal mortality and morbidity in a nationwide cohort of 529,688 low-risk planned home and hospital births. BJOG An International Journal of Obstetrics and Gynaecology 2009;116:1177-84.

paragraph 18 above). These considerations enable the Court to conclude that the matter of health professionals assisting home births is surrounded by legal uncertainty prone to arbitrariness. Prospective mothers cannot therefore be considered as freely benefiting from such assistance, since a permanent threat is being posed to health professionals inclined to assist home births by virtue of Government Decree no. 218/1999 as well as the absence of specific, comprehensive legislation on the matter. The lack of legal certainty and the threat to health professionals has limited the choices of the applicant considering home delivery. For the Court, this situation is incompatible with the notion of "foreseeability" and hence with that of "lawfulness".

27. The foregoing considerations are sufficient to enable the Court to find that there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

28. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

29. The applicant made no damages claim.

B. Costs and expenses

30. The applicant claimed 1,250 euros (EUR) for the costs and expenses incurred before the Court which corresponds to ten hours of legal work spent on the case by her lawyer, charged at EUR 125 per hour.

31. The Government contested this claim.

32. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum claimed, i.e. EUR 1,250.

C. Default interest

33. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible, by a majority;

2. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;

3. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,250 (one thousand two hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into Hungarian forints at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 14 December 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Françoise Tulkens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint concurring opinion of Judges Sajó and Tulkens;
(b) dissenting opinion of Judge Popović.

F.T.
S.H.N.

JOINT CONCURRING OPINION OF JUDGES SAJÓ AND TULKENS

While the autonomy aspect of the right to respect for private life makes it clear that there is a right to become or not to become a parent (*Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-IV), and in order to be effective the conditions of the exercise of that right are also to be respected, we find it necessary to clarify why this right to respect for parental choice necessitates a minimum of positive regulation. Such choice would have been a liberty in the 19th century. As long as there is no State interference with the freedom, there seems to be no problem. But the background assumption of classical liberalism does not necessarily work in the contemporary welfare State, especially in the medical environment. In this welfare system practically everything is regulated; regulation is the default, and only what is regulated is considered safe and acceptable. Suddenly, in the absence of positive regulation, what was a matter of uncontested private choice becomes unusual and uncertain. In a very densely regulated world some disadvantages emerge for freedoms without regulatory endorsement.

In the present case, the increasing difficulty to find midwives and supportive obstetricians, troubles with the civil registration, etc. might result in an environment which is hostile to the freedom in question. While midwives are recognised as a profession according to European Union law and entitled to provide services, including to care for and assist the mother during labour, where their activities run into administrative difficulties – like for example denial of a tax ID required for service providing – home birth becomes a hard and risky choice, even if the choice itself remains formally without interference. The sanctions applicable to midwives discourage their participation in home-birth-related activities. Where regulation is the default, as in the medical context, lack of enabling regulation may be detrimental to the exercise of the right, and traditional non-interference will not be sufficient. This may be one of the many unpleasant consequences of living in an overregulated world. It is here that an affirmation of a liberty in positive law is warranted.

In the present case the liberty is not self-explanatory as the expectant mother has to interact during the period of pregnancy with authorities and regulated professionals who act as figures of some kind of public authority vis-à-vis the pregnant person, who is understandably very vulnerable because of her dependency. It is this consideration that makes us believe that a freedom may necessitate a positive regulatory environment which will produce the legal certainty providing the right to choose with effectiveness. Without such legal certainty there is fear and secrecy, and in the present context this may result in fatal consequences for mother and child.

These considerations are in line with the Court's case-law. Private life includes a person's physical and psychological integrity, and the State is

under a positive obligation to secure its citizens their right to effective respect for this integrity (*Tysiąc v. Poland*, no. 5410/03, § 107, ECHR 2007–IV). Its positive obligations may involve the adoption of measures designed to ensure respect for private life (see *Kroon and Others v. the Netherlands*, 27 October 1994, § 31, Series A no. 297-C; and *Mikulić v. Croatia*, no. 53176/99, § 57, ECHR 2002–I). Such measures include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures.

As the judgment underlines, the regulatory protection required in the present case means that the State is to provide adequate legal security which is needed for the exercise of a freedom. This cannot be equated with liberalising home birth as such. The latter decision is obviously a matter of balancing in view of available (currently disputed) medical knowledge, the health of the mother and the child, the structure of health care services, etc. This is a matter where the State has a broad margin of appreciation, where the concerns of paragraph 2 of Article 8 apply, and where the burden on the mother's right to choose shall be limited only proportionally.

DISSENTING OPINION OF JUDGE POPOVIĆ

To my greatest regret I could not join the colleagues in this case. It was on account of the following reasons. There has been no exhaustion of domestic remedies in the case (1). Neither could the applicant prove a victim status in terms of Article 34 of the Convention (2). Furthermore, there was no interference with the applicant's rights (3) and last, but not least, the applicant's claim before our Court was to my mind an *actio popularis* (4).

(1) The applicant has not submitted any piece of evidence which might prove her attempt to have recourse at the national level. The Government objected that her claim was an *actio popularis*. I shall return to this particular issue further on, but let me mention at this stage that the Government's objection in substance refers to the non-exhaustion of domestic remedies. The reason why the applicant had not exhausted domestic remedies is to be found in the fact that she had no arguable claim at the national level.

The applicant did not have an arguable claim because the national legislation on home birth, as pointed out by the Government, is permissive. Both the Health Care Act of 1997 and the Amendment Act no. CLIV of 2009 provide for home birth.

The applicant in this case complained of the lack of secondary legislation on home birth. In this respect, I maintain my position expressed in the dissenting opinion in the case of *L. v. Lithuania*: a lack of secondary legislation does not impede the realisation of a right provided for by the primary legislation, as long as the latter remains permissive (see *L. v. Lithuania*, no. 27527/03, ECHR 2007-X).

It is to be underlined that the applicant's task consisted of proposing a new piece of legislation to be adopted in her country. Such a task is undoubtedly noble, but at the same time overwhelmingly political.

(2) To be able to consider the applicant's victim status in terms of Article 34 of the Convention one should take the applicant's claim before our Court as a starting point. That claim is in form, as well as in substance, identical to the applicant's task mentioned above. The applicant claimed before the Court the adoption of a piece of secondary legislation at the national level.

Let me assume for a second that the applicant had a certain right at the domestic level (which evidently was not the case in reality) to file such a claim. The question of momentum would inevitably arise at that stage. When was the applicant entitled to such a claim, which might enable her to attain victim status?

The piece of legislation which the applicant would like to be completed by secondary legislation, namely the Amendment Act no. CLIV, was adopted on 14 December 2009. The applicant filed her application with this Court on 15 December 2009, claiming an interference with her rights and

demanding adoption of secondary legislation. It is therefore clear, especially in the light of the substance of the applicant's claim, that the respondent State could not legislate overnight, which makes me conclude that the applicant did not have victim status at the moment of filing her application with the Court.

Has the applicant attained victim status after filing the application? The answer to this question is in my opinion also to be given in the negative. Bearing in mind that the applicant's claim was the adoption of a piece of legislation in the respondent State, the question of a possible attaining of victim status must be reformulated. The real issue is whether the lapse of time can transform someone who is not a victim into a victim, in the light of his/her claim? Or, in other words, can the lapse of time by itself alone bring the victim status to the applicant? There has not been a single change of circumstances of the case between the moment of filing the application with the Court and the moment of giving judgment on the case. That is why I fail to understand how the lapse of time alone, without provoking any change of material circumstances, could have altered the applicant's situation under Article 34 of the Convention. The lapse of time could by no means serve the purpose of bringing victim status to the applicant.

To substantiate victim status according to the Court's case-law an applicant is under an obligation to prove "reasonable likelihood" of interference with his/her rights. If proven, "the reasonable likelihood" of interference leads to achieving a status of a victim of a human rights violation (see *Halford v. the United Kingdom*, 25 June 1997, §§ 59-60, *Reports of Judgments and Decisions* 1997-III). The applicant in this case has failed to comply with the rule developed in the Court's case-law, which I have just mentioned.

(3) In the present case there was no interference with the applicant's rights, as protected by the Convention. In the light of the rule in *Halford* quoted above, the non-existence of secondary legislation can by no means be considered susceptible of constituting the "reasonable likelihood" of interference with the applicant's rights. The reason for this is to be found in the permissive character of primary legislation, existing in the respondent State, which I have invoked.

At this point I would like to underline the need for a clear distinguishing of the present case from the one of *Klass and Others v. Germany* (6 September 1978, Series A no. 28). The Court held in *Klass and Others* that there had been interference on the grounds that the legislation in itself had constituted it, because of its character (see *Klass and Others*, cited above, §§ 34-26). In the case at stake the character of primary legislation is permissive, which represents the ground for distinguishing the present case from the situation in *Klass and Others*. The legislation contested in *Klass and Others* was substantially restrictive and potentially harmful to the enjoyment of human rights. The Hungarian health legislation could not be

considered to be such, even assuming the existence of a necessity of completing it by secondary legislation.

(4) The applicant could not prove to have had an arguable claim at the domestic level. She also could not be considered a victim of a violation of human rights in the respondent State, either at the moment of filing the application or at any other until the date of adopting the judgment in her case. This is what makes me finally conclude that the applicant was not substantially acting on her own behalf and in her own interest. Therefore, I find the rule in *Očić v. Croatia* ((dec.), no. 46306/99, ECHR 1999-VIII), applicable to the present case. It says that "Article 34 [of the Convention] may not be used to found an action in the nature of *actio popularis*, nor may it form the basis of a claim made *in abstracto* that a law contravenes the Convention".

I do not deny the existence of problems in the organisation of health service and care in Hungary. I also welcome the applicant's wish to enhance public debate and suggest amendment of the national legislation in her country. It is, however, in terms of Article 35 of the Convention that I hold the application filed with this Court to be inadmissible.