

How Compatible Is the Statutory Child Vaccination Duty with Article 8 of the European Convention on Human Rights?

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ABSTRACT: On April 8, 2021, the Grand Chamber of the European Court of Human Rights (ECtHR) adopted a first judgment on compulsory childhood vaccination. This judgment, adopted by a clear majority (sixteen votes to one) in the case of *Vavříčka and Others v. the Czech Republic*, established that the general legal duty consecrated in Czech Republic to vaccinate children against a number of diseases well known to medical science does not violate article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR), as requested by the applicants. In the above-mentioned case, the first applicant, according to the Czech legislation, was fined for the failure to respect the vaccination duty for his two children, the other applicants being all denied the admission of their children to preschool for the same reason. Following its constant case law in relation with article 8, the ECtHR examined the issues of the State interference in the right to respect for private life, the legitimate aims pursued by the Czech authorities in protecting health, the margin of appreciation of the State and the proportionality principle. The Court reached the conclusion that in striking the particular balance between the need to respect the right to private life and the legitimate aim to safeguard the health of young children and the community, respectively, the Czech authorities had not exceeded both the recognized margin of appreciation for a State when adopting measures regarded as “necessary in a democratic society” and the principle of proportionality.

KEYWORDS: childhood vaccination, compulsory, private life, human rights, European Court, Czech Republic, margin of appreciation, interference, proportionality

1. Introduction

On 8 April 2021, the Grand Chamber of the European Court of Human Rights (ECtHR) adopted its first decision about compulsory childhood vaccination. The Court examined the petition lodged on 23 July 2013 by Pavel Vavříčka against the Czech Republic, through which he complained upon a breach of Article 8 (right to respect for private and family life) of the European Convention of Human Rights (Convention). In essence, the applicant invoked the fact that in 2003 he had been fined as he had refused the vaccination of his two children, aged 14, respectively 13, against poliomyelitis, hepatitis B and tetanus, given that the domestic legislation in the Czech Republic required this vaccination to be compulsory. All his domestic appeals had been rejected, which resulted in his application addressed to ECtHR based on the Article 8 of the Convention.

Other 5 similar applications were later submitted by citizens from the Czech Republic, applications which were cumulated and examined by ECtHR. These applications invoked, in addition to fines applied to parents refusing to follow the national obligation to vaccinate their children and refusing their access to preschool.

Given the wider European background for the typology of these cases, the governments of France, Germany, Poland and Slovakia requested and received the granted leave to intervene in the proceedings in front of the Court and transmitted their written comments. Several nongovernmental organizations received a similar status.

The Court adopted a decision on 8 April by the 17 judges of the Grand Chamber. Having a majority of 16 to 1, including a partly concurring and partly dissenting opinion, the

ECtHR decided in essence that the measures adopted by the Czech Republic on the relationship with the mentioned applicants represented an interference “necessary in a democratic society” and that, therefore, article 8 of the European Convention of Human Rights was not violated (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021).

2. Commentaries upon Article 8 of the European Convention of Human Rights

From the historical perspective, the Article 8 of the Convention is inspired by the Article 12 of the Universal Declaration of Human Rights (1948, 4). The final version of Article 8 was adopted by the Committee of Ministers of the Council of Europe in 1950, together with the overall text of the Convention, based on Recommendation no. 38 on 8 September 1949 of the Consultative Assembly of the Council of Europe and the subsequent incorporation of one British amendment in para 2 of the above-mentioned article (Russo 1999, 305-306). The final text, which established the right to private and family life, runs as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The structure of this norm is similar to that in Article 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of assembly and association) of the Convention, so that, following a first para establishing the fundamental right which is guaranteed, a second follows, which lists restrictions which legitimately and objectively can be applied to rights protected by the authorities of the State Parties of the Convention (Russo 1999, 306).

The explanation provided by the doctrine (Sudre 2005, 251) in relation to this apparent paradox, respectively establishing *fundamental* human rights presenting derogations, limitations or restrictions of their free exercise in international law of, is reflected in one of the classifications of fundamental rights and freedoms mentioned by the authors in the area. Thus, fundamental human rights could go into *intangibile* rights (right to life, interdiction of torture, interdiction of slavery or forced labor) from which no derogation is accepted and, respectively, *conditional* rights, which present a significant level of protection but whose exercise could be reduced via limitations, restrictions or derogations (Corlăţean 2015, 56-57). The doctrine mentions that the restrictions of the free exercise of one right, which, through this derogation, does not turn into less fundamental than the other ones protected by international law, needs to be provided by the law or international treaties explicitly and specifically and to be objectively underpinned by higher reasoning, necessary in a democratic society, such as the protection of public order, national security and the health status of the nation.

The content of the fundamental right in Article 8 of the Convention also entails a series of correlative obligations on behalf of states, both *negative* (Russo 1999, 306-307) and *positive* (Jacobs, White & Ovey 2014, 338, 365).

The state has, firstly, a series of *negative* types of obligations, of *abstention* (except legal derogations mentioned in para 2 of Article 8) based on which it needs to limit the interference in the private life of individuals. The doctrine specifies in this area, as a reference in the ECtHR jurisprudence, the decision Leander v. Sweden (Russo 1999, 307).

At the same time, the literature mentions the *positive* obligations of the state to adopt laws, public policies and concrete measures meant to project the individual against the

arbitrary interference of the public entities in the private of family life and to guarantee an *effective* respect of private life. In real terms, the doctrine mentions two cases regarding the above-mentioned positive obligations, respectively either the adoption of an expressed conduct of the very state in order to ensure the effective guarantee of the right of an individual, or when the state has to protect the individual against the interference of other individuals, therefore not from public authorities (Jacobs, White & Ovey 2014, 338). The doctrine covers in this sense the judgements of ECtHR in the cases *Hatton v. the United Kingdom* (Jacobs, White & Ovey 2014, 365), *Marckx v. Belgium* and *Airey v. Ireland* (Russo 1999, 308).

In what regards derogations and limitations of the free exercise of right to private life, affirmed and guaranteed in para 1 of Article 8, the doctrine analyzed the *interference* resulted from public authorities and the requirements regarding the presence of the *licit character* of this interference, which have to be fulfilled explicitly, so that this derogation from the full guarantee to the right of private life is accepted. Thus, the following *conditions* are identified in order to establish the licit character of the interference of the state in the guaranteed right in Article 8:

- This interference has to be in accordance with or provided by law. That is to say that the interference of the state needs legal or conventional grounds (provided by an international treaty);

- The interference requires an objective reason and to be legitimate. The doctrine mentions reasons such as national security, public safety, the economic welfare of the country, public order, protection of morality or public health, protection of rights and freedoms of other citizens;

- The limitations of the mentioned fundamental right are to be necessary in a democratic society.

The control which CEDO is asked to exert when limitations of the free exercise of the fundamental right in discussion are filed and, respectively, interference of the state, targets the fulfilment of requirements listed above and, in this context, determining the *proportionality of the interference* which aims to secure the legitimate aim pursued by the state, according to which the *overall interests of the society prevail upon individual interests*, as well as examining the way in which public authorities have legitimately used, or, on the contrary, abused by the *margin of appreciation* which states enjoy when they choose specific means to reach objectives established socially (Jacobs, White & Ovey 2014, 309). The judgement of ECtHR regarding *Handyside v. the United Kingdom* is mentioned, according to which, as a principle, *national authorities are better placed than an international judge to assess the need of such an interference* (Russo 1999, 340).

These were the criteria used by ECtHR to examine and adopt a decision in the case of *Vavříčka and others v. the Czech Republic*. I need to mention that the application formulated by the applicants concerned mainly the first part of Article 8, respectively the right to private life (not the right to family life), as well as Article 9 (right to freedom of thought and conscience) and, respectively, Article 2 of Protocol 1 (right to education) of the European Convention of Human Rights (Case of *Vavříčka and Others v. the Czech Republic*, European Court of Human Rights, 2021).

3. Legal reasoning of the European Court for Human Rights

In the following section, I will analyze the main elements of the legal reasoning of ECtHR which, as mentioned earlier, assessed the facts and circumstances invoked by the applicants based on its constant jurisprudence regarding Article 8 of the Convention, as well as legislative aspects and public policies of authorities in the Czech Republic regarding the

compulsory character of children's vaccination in this country for a set number of diseases identified by the medical science as presenting a high risk.

The Court specifies from the very beginning that its legal analysis focuses, in the context of Article 8 in the Convention, on the fact that the case relates to the standard and routine vaccination of children against diseases that are well known to medical science and the policy of the Czech state which establishes the compulsory nature of these vaccines (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021, para. 158). Specifically, the vaccines under discussion are administered against diphtheria, tetanus, whooping cough, Haemophilus influenzae type b infections, poliomyelitis, hepatitis B, measles, mumps, rubella and – for children with specified health indications – pneumococcal infections (see Q&A on the case of Vavříčka and Others v. the Czech Republic 2021).

1.1. A first key aspect approached by the Court regarded *the existence of an interference*. The Court is categorical in its conclusion, according to which compulsory vaccination, as an involuntary medical intervention, represents an interference with the right to respect for private life. In the cases under discussion, the Court estimates that non-admission in the preschool of children in whose name applications were lodged to ECtHR for 5 out of 6 known cases, they bore the direct consequences of non-compliance with vaccination duty. Regarding the applicant Pavel Vavříčka, he was personally subject to the obligation to pursue the vaccination of his two children, according to national legislation, and the infringement of this legal obligation attracted the application of a fine. That is to say that the Court admits that the applicants supported an interference in their free exercise to private life (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021, para. 263-264).

1.2. The next objective of the legal reasoning of the Court was to identify if there is a justification objectively grounded of the above-mentioned interference.

A first conclusion was that *the interference of national public authorities had a legal adequate basis*, supported by a combination of legal texts and other normative acts having a subsequent legal force in internal judicial order (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021, para. 271).

Secondly, the Court observes the existence of a *legitimate aim* pursued through the above-mentioned interference (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021, para. 272). The objective of national legislation under discussion is to cover protection against diseases generating a serious health risk. This concerns equally both persons undertaking a vaccine and those unable to take a vaccine, who are therefore vulnerable and depend on a high level of vaccination in the society which implicitly covers their own protection to a certain degree. The Court agrees that this objective corresponds to the aims to protect health and respectively the protection of the rights of the others, which are included in the regulation settled by Article 8 in the Convention.

Thirdly, the Court assesses *the need of an interference mentioned in a democratic society*. For this, the Court examines:

- *The margin of appreciation of states*

Assessing this criterion, present in the constant jurisprudence of ECtHR over years, represented a key element for the final decision of the Court. In the case under discussion, regarding compulsory medical intervention, ECtHR admits that compulsory vaccination can be considered as holding a direct impact upon the effective exercise of intimate rights of the individual. However, this conclusion is lessened by the fact as such, according to which no vaccine was or could not be applied against the will of the applicants as the relevant domestic law does not permit compliance with the duty to be forcibly imposed in the mentioned cause.

The Court remarks the existence of a general consensus according to which vaccination is one of the most effective medical interventions, with a cost-benefit ratio extremely favorable and that each state should take action to reach the highest vaccination level for its

population. On the other hand, the Court mentions the absence of a unique model in European states and, respectively, a certain diversity of legislative systems and practice action. However, ECtHR remarks that the most rigorous and prescriptive level in the Czech Republic is shared by other states as well, such as third applicants in the case and that other states have lately adopted stricter procedures for children's vaccination in the context of a lower social vaccination on voluntary basis and, as a result, a progressive decrease of collective immunity. Therefore, though requiring compulsory vaccination may raise a series of social sensitivities, it has to be mainly looked upon from the perspective of social solidarity. The objective of obligativity is to project the health of all members of the society and especially of those more vulnerable to certain diseases and for which the others are called to assume a minimum risk via vaccination.

As a result, the Court estimates that, in the analyzed case, the margin of appreciation of the state should be a wide one (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021, para. 276-280);

- *Pressing social need*

The Court observes the fact that the provisions of the European Convention of Human Rights establish a positive obligation for State Parties to adopt necessary measures to protect life and health of people under their jurisdiction. From this perspective, the Court considers that the vaccination duty in the Czech Republic represents the appropriate response of authorities to the pressing social needs to protect individual and public health against diseases under discussion and to avoid downward trends to vaccinate children (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021, para. 284);

- *Relevant and sufficient reasons*

The Court admits in its analysis a series of public health reasons which the government of the Czech Republic invoked in favor of applying the solution of efficient children's vaccination. The Court notes that, in this case national authorities are the best positioned to appreciate priorities, using available resources and social needs. In this context, the best interest of the child has to be at the center of all decisions affecting children's health and development. At the same time, the objective to protect against serious diseases has a direct connection with that to generate a herd immunity as wide as possible and, therefore, the group immunity.

For ECtHR, the health policy of the state under discussion responds to these requirements and the legislative solution for children's compulsory vaccination, as well as specific interference in the private life of individuals are therefore supported by relevant and sufficient reasons (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021, para. 289);

- *Proportionality of the interference in light of the aim pursued*

The Court observes in its analysis that the Czech system of children's vaccination adopted a model which implies obligativity but that in this case, it is not an absolute obligation. On the one hand, an exemption regards children holding a permanent contraindication to vaccination but there is also another exempt based on a decision of the national Constitutional Court which established a "secular objection of conscience".

Even if in the specified state children's vaccination is a legal obligation, it cannot be imposed by force. In addition, the sanction applied to the *Vavříčka* applicant is tempered by the fact that it represents *an administrative fine* which, in addition, can be applied *but once*.

In what regards the children-applicants in this case, the Court considers their non-admission to the preschool as a measure which especially aims at preserving their health and which had mainly a protective and not a punitive nature. The Court adds though that this loss is a direct consequence of the option expressed by their parents to decline a legal obligation and that the effects for children have a rather temporary character, the access to primary school, once their age allows it, being guaranteed.

This final conclusion of the Court, on such a delicate topic related to the refusal in the preschool for children declining the vaccine represents, in the opinion of the author, the solely objectionable element of the decision of ECtHR. It is difficult to justify such a sanction applied to unvaccinated children, who represent, in fact, a consistent minority as, on the one hand, their potential access to preschool would not represent a challenge for vaccinated children but possibly to themselves only, and, on the other, the objective of herd immunization as “social shield” cannot be objectively reached by 100%. From this perspective, in the opinion of the author, the juridical reasoning mentioned is difficult to be accepted, so as to support the denial of the right to education and socializing for children, especially important for their debut in social life.

In any case, the Court considered that the measures contested by the applicants go into a ratio of proportionality reasonable with legitimate aims pursued by the respective state via compulsory children’s vaccination (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021, para. 309).

Conclusion

The essence of this case, according to the legal reasoning of the Court, did not concern the need to determine if another policy, less prescriptive, could have been adopted, as the case in other European states, Parties to the European Convention of Human Rights. It was rather necessary to assess if national authorities in the Czech Republic, while establishing the balance of individual and collective rights as they have completed it, have gone beyond or not the wide margin of appreciation of the state, which was admitted in the constant jurisprudence of ECtHR in Article 8 of the Convention. The Court concludes that, based on reasons presented above, the measures contested by applicants had been “necessary in a democratic society” and that, therefore, there was no violation of Article 8 in the Convention protecting the right to individual life of individuals (Case of Vavříčka and Others v. the Czech Republic, European Court of Human Rights, 2021, para. 310-311). At the same time, the Court declared, in a majority of votes, that the petitions of applicants invoking the violation of Article 9 (right to freedom of thought and conscience) are not to be admitted and that, at the same time, it was unnecessary to examine separately the respective applications which would refer to Article 2 as well (right to education) of the Protocol to the European Convention of Human Rights.

From the perspective of the author, the Vavříčka judgement is a key one at European level, from the perspective of the public opinion impact and its effects upon public perception, mainly in the context of the pandemic confronted by the international society. It does NOT establish the obligation of vaccination at European level nor the obligation of vaccination for all age groups, as it was inadequately interpreted via world media. The Vavříčka judgement will, however, generate a similar jurisprudence in the area of children’s vaccination, in case similar complaints from other European countries arise, states adopting an identical vaccination system for children based on the force of the precedent of res judicata of the European judgements, established via the Court’s jurisprudence (Modinos v. Cyprus judgement, Vermeire v. Belgium judgement) and admitted in the specialized doctrine (Bîrsan 2006, 598). On the other hand, nothing from this judgement forces other European states to adopt the same obligatory system for children’s vaccination. What will ECtHR continue to do, however, in the case of future applications elaborated on the topic of vaccination procedures in various State Parties to the Convention, in relation with Article 8 in the Convention, is to apply the same principles of assessment, out of which the one regarding examining the interference of national authorities in the free exercise of a fundamental right and, respectively, the one regarding the margin of appreciation of states will stay as fundamental for the final conclusion of the European Court of Human Rights.

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