

een vermindering van hun bezoldiging, het einde van hun eventuele loopbaanontwikkeling en een vermindering, of zelfs de afschaffing, van de ontslagvergoeding waarop zij bij de beëindiging van hun arbeidsverhouding aanspraak hadden kunnen maken, wanneer met deze regeling een legitieme doelstelling van werkgelegenheidsbeleid wordt nagestreefd en de middelen om deze doelstelling te realiseren passend en noodzakelijk zijn.

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Verplichte vaccinatie kinderen niet in strijd met recht op eerbiediging privéleven

Europees Hof voor de Rechten van de Mens
8 april 2021, nr. 47621/13,
ECLI:CE:ECHR:2021:0408JUD004762113
(mr. Spano, mr. Kjølbro, mr. Turković, mr. Lemmens, mr. O’Leary, mr. Grozev, mr. Pejchal, mr. Wojtyczek, mr. Harutyunyan, mr. Pastor Vilanova, mr. Bošnjak, mr. Eicke, mr. Ilievski, mr. Chanturia, mr. Wennerström, mr. Sabato, mr. Seibert-Fohr)
Noot mr. D. Schwartz

Sancties niet-naleven vaccinatieplicht. Fysieke integriteit. Ruime beoordelingsvrijheid.

[EVRM art. 8]

In Tsjechië bestaat een algemene plicht om kinderen te vaccineren tegen een negental ziekten. Naleving van de verplichting kan niet fysiek afgedwongen worden, maar aan de ouders kan wel een boete worden opgelegd. Ook kan de toegang tot de kleuterschool aan niet-gevaccineerde kinderen worden onzegd. Onderhavige procedure betreft vijf vergelijkbare zaken. In een van de zaken is een boete opgelegd aan een vader omdat hij weigerde zijn kinderen van 13 en 14 jaar te vaccineren. In vier andere zaken weigerden de ouders hun kinderen tegen één of een aantal ziektes te vaccineren, waardoor de kinderen de toegang tot de kleuterschool werd geweigerd. De Tsjechische rechterlijke instanties stelden de ouders in het ongelijk, hoofdzakelijk omdat de maatregelen niet op een disproportionele wijze inbreuk maken op fundamentele rechten. De

ouders stellen zich in deze procedure voor het EHRM op het standpunt dat de aan hen opgelegde sancties strijdig zijn met het recht op eerbiediging van het privéleven zoals neergelegd in art. 8 EVRM.

Het Hof stelt voorop dat verplichte vaccinaties onvrijwillige medische interventies zijn die de fysieke integriteit van personen raken. De doelen die aan de verplichting ten grondslag liggen van gezondheidsbescherming en de bescherming van rechten van anderen zijn evenwel legitiem. De vaccinatie beschermt de ontvanger ervan alsook diegenen die om medische redenen niet gevaccineerd kunnen worden. De autoriteiten hebben in dit opzicht een ruime beoordelingsvrijheid. De vaccinatieplicht is dringend aanbevolen door de medische autoriteiten. Het doel is dat elk kind beschermd is tegen ernstige ziektes door vaccinatie of groepsimmunitet. Verder zijn de vaccinaties effectief en veilig bevonden. De maatregelen voldoen aan de eisen van proportionaliteit. Hoewel het weigeren van de toegang tot de kleuterschool gevolgen heeft voor de persoonlijke ontwikkeling van het kind, betreft het een preventie- en geen strafmaatregel. Ook zijn de gevolgen beperkt in tijd, waardoor een kind bij de toelating tot de basisschool geen last heeft van zijn of haar vaccinatiestatus. Alles beziend hebben de autoriteiten een redelijk evenwicht getroffen tussen de relevante belangen.

NB. Deze uitspraak kan van belang zijn voor de vraag of werkgevers van hun werknemers kunnen verlangen dat zij zich laten vaccineren tegen het COVID-19-virus. Het direct (fysiek) verplicht stellen van vaccinatie lijkt gelet op deze uitspraak niet voor de hand te liggen, maar mogelijk is er wel ruimte voor sancties als schorsing of ontslag. Het gaat dan om de vraag wanneer een inbreuk op de bescherming van de persoonlijke levenssfeer en/of de lichamelijke integriteit gerechtvaardigd is. Zie hierover HR, «JAR» 2015/298 en hof ‘s-Hertogenbosch, «JAR» 2014/241, m.nt. De Laat.

*Vavříčka e.a.
tegen
de Tsjechische Republiek.*

*Procedure
(...)*

*The facts**I. Background*

11. In the Czech Republic, section 46(1) and (4) of the Public Health Protection Act (*Zákon o ochraně veřejného zdraví*) (Law no. 258/2000 Coll., as amended – “the PHP Act”) requires all permanent residents and all foreigners authorised to reside in the country on a long-term basis to undergo a set of routine vaccinations in accordance with the detailed conditions set out in secondary legislation. For children under the age of fifteen, it is their statutory representatives (*zákonný zástupce*) who are responsible for compliance with this duty.

12. In the Czech constitutional order duties may be imposed only on the basis and within the bounds of the law (*zákon*) and limitations on fundamental rights and freedoms may likewise only be imposed by the law, this term commonly being understood as an Act of Parliament.

13. The PHP Act is an Act of Parliament. Sections 46(6) and 80(1) provide for the adoption by the Ministry of Health (“the Ministry”) of implementing legislation in relation to vaccination.

14. The Ministry issued the above-mentioned implementing measures in the form of the Decree on Vaccination against Infectious Diseases (*Vyhláška o očkování proti infekčním nemocem*) (Decree no. 439/2000 Coll., as amended – “the 2000 Ministerial Decree”, in force from 1 January 2001 to 31 december 2006, and Decree no. 537/2006 Coll., as amended, – “the 2006 Ministerial Decree”, in force as from 1 January 2007, jointly referred to hereafter as “the Ministerial Decree”).

15. Section 50 of the PHP Act provides that pre-school facilities such as those concerned in the present case may only accept children who have received the required vaccinations, or who have been certified as having acquired immunity by other means or as being unable to undergo vaccination on health grounds. A similar provision appears in section 34(5) of the Education Act (*Zákon o předškolním, základním, středním, vyšším odborném a jiném vzdělávání (školský zákon)*) (Law no. 561/2004 Coll., as amended).

16. The cost of vaccination is covered by public health insurance. The vaccines included in the list of specific vaccine variants for regular immunisation, which is published annually by the Ministry, are free of charge. Other vaccines can be used in-

stead so long as they have been approved by the competent authority, but the cost is not covered by the State.

17. Under section 29(1)(f) and (2) of the Minor Offences Act (*Zákon o přestupcích*) (Law no. 200/1990 Coll., as applicable at the relevant time – “the MO Act”), a person who violates a prohibition or fails to comply with a duty provided for or imposed in order to prevent infectious diseases commits a minor offence punishable by a fine of up to 10,000 Czech korunas (CZK) (currently equivalent to nearly 400 euros (EUR)).

18. In the event of malpractice in administering a compulsory vaccination resulting in damage to the health of an individual who has been vaccinated, the person responsible may be held liable under the general law of tort to pay compensation in respect of the damage caused.

19. As regards damage to health resulting from a compulsory vaccine administered in compliance with the applicable rules and procedures (*lege artis*), until 31 december 2013 compensation could be claimed from the health professional who had performed the vaccination, on the basis of strict liability with no exonerating grounds under Article 421a of the then applicable Civil Code (Law no. 40/1964 Coll., as amended). In the context of a recodification of the civil law, this form of action was abolished with effect from 1 January 2014. However, under new special legislation that took effect on 8 april 2020, the State may be held liable for such damage.

20. Aside from the issue of compensation in such circumstances, a person suffering from any side-effects of the vaccines in question will be eligible for medical treatment, covered by public health insurance.

21. For further information on the relevant domestic law and practice, see paragraphs 65 to 93 below.

II. Application of Mr Vavříčka, no. 47621/13

22. The applicant was born in 1965 and lives in Kutná Hora.

23. On 18 december 2003 the competent Disease Prevention and Control Centre (*hygienická stanice*) found him guilty of an offence under section 29(1)(f) of the MO Act for failure to comply with an order to bring his two children, then aged fourteen and thirteen, to a specified health-care establishment with a view to having them vaccinated against poliomyelitis, hepatitis B and teta-

nus. He was fined CZK 3,000 and ordered to pay CZK 500 in respect of costs (i.e. the equivalent of some EUR 110 in total at the relevant time).

24. The applicant challenged the decision at the administrative level, before the courts and ultimately before the Constitutional Court. He argued that the regulations in question were contrary to his fundamental rights and freedoms, in particular the right to refuse a medical intervention (referring to Articles 5 and 6 of the Convention on Human Rights and Biomedicine, which forms part of the legal order of the Czech Republic and takes precedence over statute in case of conflict (see paragraph 141 below) – the “Oviedo Convention”) and the right to hold and manifest his religious and philosophical beliefs. He opposed what he described as irresponsible experimentation with human health, emphasised the actual and potential side-effects of vaccines and argued that no risk to public health arose in his case, given that the last occurrence of poliomyelitis dated back to 1960, hepatitis B concerned only high-risk groups and tetanus was not transmissible among humans.

25. The applicant’s cassation appeal was first dismissed by the Supreme Administrative Court (“the SAC”) in a judgment of 28 February 2006. That judgment was however quashed by the Constitutional Court in a constitutional judgment (*nález*) of 3 February 2011.

26. The Constitutional Court found that the SAC had failed to provide an adequate response to the applicant’s claim that the impugned decision was contrary to his right to manifest freely religion or belief under Article 16 of the Charter of Fundamental Rights and Freedoms (*Listina základních práv a svobod*) (Constitutional Law no. 2/1993 Coll.). It observed that the vaccination duty as such (imposed on the applicant by the decision of 3 June 2003 implementing the 2000 Ministerial Decree) was not at stake in the case, since his constitutional appeal concerned the penalty for non-compliance with this duty, imposed on him under the MO Act by the decision of 18 December 2003. Accordingly, the Constitutional Court could not exercise its jurisdiction to review the constitutionality of the vaccination duty. In any event, it had no power to substitute the assessment by the legislature or the executive as to the infectious diseases against which compulsory vaccination was needed. That assessment was for the legislature to make having regard to Article 26

of the Oviedo Convention. It was of a political and expert nature and subject to a relatively wide margin of appreciation.

27. The Constitutional Court distinguished between making provision in law for compulsory vaccination and securing compliance with that duty. Compulsory vaccination amounted in principle to an admissible limitation on the fundamental right to manifest freely one’s religion or beliefs, since it was obviously a measure necessary in a democratic society for the protection of public safety, health and the rights and freedoms of others. However, for an interpretation of that limitation to be in conformity with the constitutional requirements, it could not entail unconditional enforcement of the vaccination duty in respect of any person, irrespective of the individual aspects of or motivations for that person’s resistance.

28. More specifically, the Constitutional Court held that:

“A public authority deciding on the enforcement of the vaccination duty or on the penalty for non-compliance with it must take into account the exceptional reasons advanced by the claimant for refusing to undergo vaccination. If there are such circumstances which call, in a fundamental manner, for that person’s autonomy to be preserved, while nevertheless maintaining an opposite public interest..., and therefore for an exceptional waiver of the penalty for [non-compliance with] the vaccination duty, the public authority must not penalise or otherwise enforce the [said] duty...”

The public authority, and then the administrative court in proceedings on an administrative-law action, must take into account all the relevant circumstances of the case in its decision-making, in particular the urgency of the reasons claimed by the person concerned, their constitutional relevance, and the risk to society that may be caused by the conduct of the person concerned. The consistency and credibility of the claims of the person concerned will also be an important aspect.

In a situation where a specific person does not communicate with the competent public authority from the outset, and only seeks to justify his or her attitude in respect of vaccination at later stages in the proceedings, as a general rule the conditions that the person’s attitude be consistent and that the constitutional interest in the protection of

his or her autonomy be urgent would usually not be satisfied.”

29. The Constitutional Court further held that if these criteria were to be applied to the specific facts of the applicant’s case, the fulfilment of the criterion of consistency in his attitude appeared problematic. In that regard, it noted that he had given the reasons for his refusal to allow vaccination only at a late stage of the proceedings and that even at a hearing before the Constitutional Court, he had submitted that his reasons were primarily health-related as, in his view, vaccination was harmful to children, with any philosophical or religious aspects being secondary. However, the criteria were primarily for the SAC to apply, and the applicant’s case was remitted to it for re-examination.

30. In a judgment of 30 september 2011, the SAC dismissed the applicant’s case.

In response to the Constitutional Court’s directions, the SAC established that it had not been until a late stage in the proceedings that the applicant had relied, without further explanation, on the protection of his religious and philosophical convictions. He had subsequently explained his belief that he had the right to refuse compulsory vaccination for himself and his children on account of such convictions. However, he had not advanced any concrete argument concerning his religion and the degree of the potential interference caused by vaccination. The interest in protecting public health thus outweighed the applicant’s right to manifest his religion or beliefs.

31. The final decision was given by the Constitutional Court on 24 January 2013, dismissing the applicant’s complaint against the judgment of 30 september 2011 as manifestly ill-founded.

III. Application of Ms Novotná, no. 3867/14
(...)

IV. Application of Mr Hornych, no. 73094/14
(...)

V. Applications of Mr Brožík and Mr Dubský, nos. 19298/15 and 19306/15
(...)

VI. Application of Mr Roleček, no. 43883/15
(...)

Relevant legal framework and practice
(...)

III. International and European law and practice
(...)

The law
(...)

III. Alleged violation of Article 8 of the Convention
160. The applicants complained that it had been arbitrary to impose a fine on Mr Vavříčka and to refuse the child applicants admission to nursery school on account of the failure of the parents to comply with their statutory duty to have their children vaccinated according to the prescribed vaccination schedule. They relied on Article 8 of the Convention, the relevant part of which reads as follows:

“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.”

(...)

B. Merits

1. The parties’ submissions
(...)

3. The Court’s assessment

(a) Subject matter of the applications

258. The Court notes that the applicants formulated their Article 8 complaints principally with reference to the fine imposed on Mr Vavříčka and to the non-admission of the child applicants to nursery school. In other words, it was the consequences of non-compliance with the vaccination duty that was complained of.

259. However, in the Court’s opinion, the consequences borne by the applicants cannot be meaningfully dissociated from the underlying duty. On the contrary, they flow immediately and di-

rectly from the applicants' attitude towards it and are therefore intrinsically connected to it.

260. In these circumstances, the Court finds that the subject matter of the applicants' complaints is the vaccination duty and the consequences for them of non-compliance with it.

(b) Scope

261. It is common ground among the parties that the complaint raised under Article 8 of the Convention relates to the right to respect for the applicants' private life. The Court agrees, it being well established that a person's physical integrity forms part of their "private life" within the meaning of this provision of the Convention, which also encompasses, to a certain degree, the right to establish and develop relationships with other human beings (see *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 159, 24 January 2017, with further references; and also, in relation to vaccination specifically, *Boffa and Others*, cited above, and *Baytüre and Others v. Turkey* (dec.), no. 3270/09, 12 March 2013).

262. While some of the applicants also referred to the right to respect for family life, the Court does not consider it necessary to examine their Article 8 complaints from this additional perspective.

(c) Interference

263. The Court has established in its case-law that compulsory vaccination, as an involuntary medical intervention, represents an interference with the right to respect for private life within the meaning of Article 8 of the Convention (see *Solomakhin v. Ukraine* (no. 24429/03, § 33, 15 March 2012, with further references). With regard to the present applicants, it is true that, as the Government underlined, none of the contested vaccinations were performed. However, having regard to the subject matter of this case as established above (see paragraph 260), and also to the fact that the child applicants bore the direct consequences of non-compliance with the vaccination duty in that they were not admitted to preschool, the Court is satisfied that, in their regard, there has been an interference with their right to respect for private life.

264. As regards Mr Vavříčka, while it is the vaccination of his children that is at issue, the Court considers that this does not lead to a different conclusion. It notes that under domestic law he was personally subject to the duty to have his chil-

dren vaccinated, and that the consequences of non-compliance with it, i.e. the fine, were borne by him directly as the person legally responsible for their well-being. As noted above, in opposing their vaccination, he explained that he was principally motivated by concern for their physical integrity, fearing that vaccination could cause serious damage to their health. In these circumstances, the Court considers that the facts of the case of Mr Vavříčka also may be regarded as disclosing an interference with the right to respect for private life, as indeed was accepted by the Government (see *Boffa and Others*, cited above, p. 34).

(d) Justification for the interference

265. To determine whether this interference entailed a violation of Article 8 of the Convention, the Court must examine whether it was justified under the second paragraph of that Article, that is, whether the interference was "in accordance with the law", pursued one or more of the legitimate aims specified therein, and to that end was "necessary in a democratic society".

(i) In accordance with the law

266. 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 those to whom it applies to regulate their conduct and, 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, for example, *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 167, 15 November 2016, with a further reference).

267. The Court notes that the vaccination duty has its specific basis in section 46(1) and (4) of the PHP Act, applied in conjunction with the Ministerial Decree issued by the Ministry in the exercise of the power conferred on it to this end by sections 46(6) and 80(1) of the PHP Act (see paragraphs 11, 13 and 74 above). The consequences of non-compliance with the duty stem, for Mr Vavříčka, from the application of section 29(1)(f) and (2) of the MO Act (see paragraphs 17 and 83 above) and, for the child applicants, from the application of section 34(5) of the Education Act, in conjunction with section 50 of the PHP Act (see paragraphs 15, 73 and 81 above). The accessibility

and foreseeability of those provisions have not been disputed by the applicants.

268. Rather, the applicants' specific challenge to the lawfulness of the impugned interference rests primarily on their contention, made in reliance on the provisions of Article 4 of the Charter of Fundamental Rights and Freedoms (see paragraph 65 above), that in the given context the term "law" should be understood as referring exclusively to an Act of Parliament, this being how the notion of "law" (*zákon*) is commonly understood at the national level. They take issue with the fact that the Czech vaccination scheme is based on a combination of primary and secondary legislation.

269. The Court reiterates that the term "law" as it appears in the phrases "in accordance with the law" and "prescribed by law" in Articles 8 to 11 of the Convention, is to be understood in its "substantive" sense, not its "formal" one. It thus includes, *inter alia*, "written law", not limited to primary legislation but including also legal acts and instruments of lesser rank. In sum, the "law" is the provision in force as the competent courts have interpreted it (see, for example, *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 83, 14 september 2010, with a further reference).
270. Moreover, the Court observes that the constitutionality of the legislative arrangement in question was examined *in extenso* and upheld by both the SAC and the Constitutional Court (see paragraphs 36, 60, 86 and 91 above).

271. The Court is therefore satisfied that the interference in question was in accordance with the law within the meaning of the second paragraph of Article 8 of the Convention.

(ii) Legitimate aim

272. With regard to the aims pursued by the vaccination duty, as argued by the Government and as recognised by the domestic courts, the objective of the relevant legislation is to protect against diseases which may pose a serious risk to health. This refers both to those who receive the vaccinations concerned as well as those who cannot be vaccinated and are thus in a state of vulnerability, relying on the attainment of a high level of vaccination within society at large for protection against the contagious diseases in question. This objective corresponds to the aims of the protection of health and the protection of the rights of others, recognised by Article 8.

In view of the above, there is no need to decide whether other aims recognised as legitimate under Article 8 § 2 may be of relevance where a State takes measures to guard against major disruptions to society caused by serious disease, namely the interests of public safety, the economic well-being of the country, or the prevention of disorder.

(iii) Necessity in a democratic society

(1) General principles and margin of appreciation

273. The applicable principles may be summarised as follows (see, in particular, *Dubská and Krejzová*, cited above, §§ 174-8, with further references):

– An interference will be considered "necessary in a democratic society" for the achievement of a legitimate aim if it answers a "pressing social need" and, in particular, if the reasons adduced by the national authorities to justify it are "relevant and sufficient" and if it is proportionate to the legitimate aim pursued.

– The Convention system has a fundamentally subsidiary role. The national authorities have direct democratic legitimation in so far as the protection of human rights is concerned and, by reason of their direct and continuous contact with the vital forces of their countries, they are in principle better placed than an international court to evaluate local needs and conditions.

– It is therefore primarily the responsibility of the national authorities to make the initial assessment as to where the fair balance lies in assessing the need for an interference in the public interest with individuals' rights under Article 8 of the Convention. Accordingly, in adopting legislation intended to strike a balance between competing interests, States must in principle be allowed to determine the means which they consider to be best suited to achieving the aim of reconciling those interests.

– That assessment by the national authorities remains subject to review by the Court, which makes the final evaluation as to whether an interference in a particular case is "necessary", as that term is to be understood within the meaning of Article 8 of the Convention.

– A certain margin of appreciation is, in principle, afforded to domestic authorities as regards that assessment; its breadth depends on a number of factors dictated by the particular case. The margin

will tend to be relatively narrow where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will also be restricted. Where there is no consensus within the Contracting Parties to the Convention, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.

274. The Court has held that matters of healthcare policy are in principle within the margin of appreciation of the domestic authorities, who are best placed to assess priorities, use of resources and social needs (see *Hristozov and Others v. Bulgaria* (nos. 47039/11 and 358/12, § 119, ECHR 2012 (extracts), with further references).

275. Lastly, the Court reiterates that the respondent State's margin of appreciation will usually be wide if it is required to strike a balance between competing private and public interests or Convention rights (see, for example, *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I, with further references).

(2) *The margin of appreciation in the present case*

276. As the case in hand concerns a compulsory medical intervention, the vaccination duty may be regarded as relating to the individual's effective enjoyment of intimate rights (see *Solomakhin*, cited above, § 33). However, the weight of this consideration is lessened by the fact that no vaccinations were administered against the will of the applicants, nor could they have been, as the relevant domestic law does not permit compliance with the duty to be forcibly imposed.

277. On the existence of a consensus, the Court discerns two aspects. Firstly, there is a general consensus among the Contracting Parties, strongly supported by the specialised international bodies, that vaccination is one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination among its population (see paragraph 135 above). Accordingly, there is no doubt about the relative importance of the interest at stake.

278. Secondly, when it comes to the best means of protecting the interest at stake, the Court notes that there is no consensus over a single model.

Rather, there exists, among the Contracting Parties to the Convention, a spectrum of policies on the vaccination of children, ranging from one based wholly on recommendation, through those that make one or more vaccinations compulsory, to those that make it a matter of legal duty to ensure the complete vaccination of children. The Czech Republic has positioned itself at the more prescriptive end of that spectrum, a position supported and shared by three of the intervening Governments (see the submissions of the French, Polish and Slovak authorities at paragraphs 211, 225 and 228 above). The Court notes, moreover, a recent change of policy in several other Contracting Parties, towards a more prescriptive approach due to a decrease in voluntary vaccination and a resulting decrease in herd immunity (see the submissions of the French and German Governments above at paragraphs 211 and 216 above, and also the 2018 judgment of the Italian Constitutional Court, summarised at paragraphs 106-112 above).

279. While childhood vaccination, being a fundamental aspect of contemporary public health policy, does not in itself raise sensitive moral or ethical issues, the Court accepts that making vaccination a matter of legal duty can be regarded as so doing, as attested by the examples of constitutional case-law set out above (at paragraphs 95-127). It notes in this regard that the recent change of policy in Germany was preceded by an extensive societal and parliamentary debate on the issue. The Court considers, however, that this acknowledged sensitivity is not limited to the perspective of those disagreeing with the vaccination duty. As submitted by the respondent Government, it should also be seen as encompassing the value of social solidarity, the purpose of the duty being to protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases and on whose behalf the remainder of the population is asked to assume a minimum risk in the form of vaccination (see in this respect Resolution 1845(2011) of the Parliamentary Assembly of the Council of Europe, set out at paragraph 143 above). The Court will return to this question below.

280. As reiterated above (see paragraph 274), the Court has previously held that healthcare policy matters come within the margin of appreciation of the national authorities. Having regard to the above considerations and applying its well-established case-law principles, the Court takes the

view that in the present case, which specifically concerns the compulsory nature of child vaccination, that margin should be a wide one.

(3) *Pressing social need*

281. Having recognised the importance, generally, of childhood vaccination as a key measure of public health policy, it must next be considered whether the choice of the Czech legislature to make the vaccination of children compulsory can be said to answer to a pressing social need.

282. In this respect it is relevant to reiterate that the Contracting States are under a positive obligation, by virtue of the relevant provisions of the Convention, notably Articles 2 and 8, to take appropriate measures to protect the life and health of those within their jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, Reports of Judgments and Decisions 1998 III; *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, §§ 128-130, ECHR 2008 (extracts); *Furdík v. Slovakia* (dec.), no. 42994/05, 2 december 2008, with further references; *Hristozov and Others*, cited above, §§ 106 and 116; *İbrahim Keskin v. Turkey*, no. 10491/12, § 62, 27 March 2018; and *Kotilainen and Others v. Finland*, no. 62439/12, §§ 78 et seq., 17 september 2020). Similar obligations arise under other widely accepted international human rights instruments, further developed in the practice of the competent monitoring bodies (see, regarding the International Covenant on Economic, Social and Cultural Rights, paragraphs 129-131 above; regarding the Convention on the Rights of the Child, paragraphs 132-134 above; and regarding the European Social Charter, paragraphs 137-140 above).

283. The Court refers to the expert material submitted by the respondent Government, conveying the firm view of the relevant medical authorities of the Czech Republic that the vaccination of children should remain a matter of legal duty in that country, and underlining the risk to individual and public health to which a possible decline in the rate of vaccination would give rise were it to become a merely recommended procedure (see paragraphs 152-153 above). Concerns at the risk associated with a decrease in vaccine coverage were also expressed by the intervening Governments, with emphasis placed on the importance of ensuring that children are immunised against the diseases in question from an early age (see also the decision of the Italian Constitutional

Court at paragraph 107 above). Similar concerns have also been raised at European and international levels (see paragraphs 131, 134, 142, 149 and 151).

284. In view of these submissions, and of the clear stance adopted by the expert bodies in this matter, it can be said that in the Czech Republic the vaccination duty represents the answer of the domestic authorities to the pressing social need to protect individual and public health against the diseases in question and to guard against any downward trend in the rate of vaccination among children.

(4) *Relevant and sufficient reasons*

285. As regards the reasons put forward for the mandatory nature of vaccination in the Czech Republic, the Court has already acknowledged the weighty public health rationale underlying this policy choice, notably in terms of the efficacy and safety of childhood vaccination. It has likewise acknowledged a general consensus supporting the objective, for every State, to attain the highest possible degree of vaccine coverage. Although the applicants argued that the authorities failed to establish that the duty to accept the prescribed vaccinations was necessary and justified (see paragraph 175 above), the Court considers that the Government have clearly set out the reasons behind this choice. It further notes the conclusion of the Czech Constitutional Court that the relevant data from national and international experts in the matter justified pursuing this policy (see paragraph 91 above). While a system of compulsory vaccinations is not the only, or the most widespread, model adopted by European States, the Court reiterates that, in matters of health-care policy, it is the domestic authorities who are best placed to assess priorities, the use of resources and social needs. All of these aspects are relevant in the present context, and they come within the wide margin of appreciation that the Court should accord to the respondent State.

286. Furthermore, the subject matter of the case necessarily raises the question of the best interests of children. In this respect the applicants maintained that it must be primarily for the parents to determine how the best interests of the child are to be served and protected, and that State intervention can be accepted only as a last resort in extreme circumstances. The Government submitted that, in the context of health care, the best in-

terest of the child was served by enjoying the highest attainable standard of health.

287. It is well established in the Court's case-law that in all decisions concerning children their best interests are of paramount importance. This reflects the broad consensus on this matter, expressed notably in Article 3 of the UN Convention on the Rights of the Child (see, for example, *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], request no. P16-2018-001, French Court of Cassation, § 38, 10 april 2019, with further references; and *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, ECHR 2010).

288. It follows that there is an obligation on States to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development. When it comes to immunisation, the objective should be that every child is protected against serious diseases (see paragraph 133 above). In the great majority of cases, this is achieved by children receiving the full schedule of vaccinations during their early years. Those to whom such treatment cannot be administered are indirectly protected against contagious diseases as long as the requisite level of vaccination coverage is maintained in their community, i.e. their protection comes from herd immunity. Thus, where the view is taken that a policy of voluntary vaccination is not sufficient to achieve and maintain herd immunity, or herd immunity is not relevant due to the nature of the disease (e.g. tetanus), domestic authorities may reasonably introduce a compulsory vaccination policy in order to achieve an appropriate level of protection against serious diseases. The Court understands the health policy of the respondent State to be based on such considerations, in the light of which it can be said to be consistent with the best interests of the children who are its focus (see General comment No. 15 of the United Nations Committee on the Rights of the Child at paragraph 133 above; see also the findings of the Italian Constitutional Court and the judgment of the Court of Appeal of England and Wales in this regard, set out at paragraphs 109 and 128 above).

289. The Court therefore accepts that the choice of the Czech legislature to apply a mandatory approach to vaccination is supported by relevant

and sufficient reasons. This finding extends to the specific interferences complained of by the applicants, as the administrative sanction imposed on Mr Vavříčka and the non-admission of the child applicants to preschool stemmed directly from the application of the statutory framework.

(5) Proportionality

290. Finally, the Court must assess the proportionality of the interferences complained of, in light of the aim pursued.

291. It will first examine the relevant features of the national system. The vaccination duty concerns nine diseases against which vaccination is considered effective and safe by the scientific community, as is the tenth vaccination, which is given to children with particular health indications (see paragraph 76 above). While the Czech model espouses compulsory vaccination, this is not an absolute duty. An exemption from the duty is permitted notably in respect of children with a permanent contraindication to vaccination. The applicants and two of the intervening third parties were critical of the manner in which this ground is interpreted and applied by the medical profession in the Czech Republic. The Court notes, however, that none of the applicants, either in the domestic proceedings or before this Court, relied on an actual contraindication in relation to any of the vaccinations concerned by their objections. The question of how the exemption is applied in practice is therefore not specifically relevant to their complaints. The Court reiterates that its task is not to review the relevant legislation or practice in the abstract. While it should not overlook the general context, it must as far as possible confine itself to examining the issues raised by the case before it (see, among many other authorities, *Paradiso and Campanelli*, cited above, § 180). It therefore cannot attach weight to the criticism now levelled at the statutory exemption to the vaccination duty.

292. In the respondent State, an exemption may also be permitted on the basis of the *Vavříčka* case-law of the Constitutional Court (see paragraph 28 above), subsequently developed into the right to a "secular objection of conscience" (see paragraph 93 above). Pursuant to domestic law, this exemption relates to both forms of interference at issue in the present case, and, as confirmed by the Government, it may be relied on directly to challenge a fine or a refusal to admit a

child to nursery school. The applicants argued that this exemption would almost never be granted in practice, in particular as regards admission to preschool. Here too the Court can only note that the child applicants did not seek to rely on this exemption during the domestic proceedings. As for the applicant Vavříčka's criticism in this respect, the Court will address it in its examination of his complaint under Article 9 (see paragraph 335 below).

293. While vaccination is a legal duty in the respondent State, the Court reiterates that compliance with it cannot be directly imposed, in the sense that there is no provision allowing for vaccination to be forcibly administered. In common with the arrangements made in the intervening States, the duty is enforced indirectly through the application of sanctions. In the Czech Republic, the sanction can be regarded as relatively moderate, consisting of an administrative fine that may only be imposed once. In Mr Vavříčka's case, while he argued that the fine was high for him in the circumstances (see paragraph 162 above), the Court notes that the amount was towards the lower end of the relevant scale, and cannot be considered as unduly harsh or onerous.

294. Regarding the child applicants, the Court has viewed their non-admission to preschool as an "interference" within the meaning of Article 8 § 2 of the Convention. The applicants perceived it as a form of sanction or penalty on them. However, the Court regards the consequence, which was clearly provided for in primary legislation, of non-compliance with a general legal duty intended to safeguard in particular the health of young children as being essentially protective rather than punitive in nature (see also paragraph 61 above). It will consider the significance of their non-admission when it assesses the intensity of the interference with their right to respect for private life (see paragraphs 306 and 307 below).

295. The Court notes the procedural safeguards provided for in domestic law. As shown by the course of the domestic proceedings brought by the applicants, they had at their disposal both administrative appeals as well as judicial remedies before the administrative courts and ultimately the Constitutional Court. It was therefore open to them to contest the consequences of their non-compliance with the vaccination duty. Contrary to the applicants' criticism of these remedies, the Court observes that the Constitutional

Court's case-law in particular cannot be fairly described as merely formal or as eschewing a substantive review of the vaccination duty from the perspective of fundamental rights. While it was in different and later proceedings that the Constitutional Court directly addressed the compatibility with the Constitution of the vaccination duty (see paragraph 93 above), finding that the public interest at stake outweighed the objections of the plaintiffs in those proceedings, its reasoning in the proceedings brought by Mr Vavříčka, recognising a constitutional exception to the general duty, must be regarded as a meaningful safeguard. Likewise, in the proceedings brought by Ms Novotná, the Constitutional Court held that in order to effectively protect fundamental rights which conflicted with the public interest, the circumstances of each individual case were to be rigorously assessed. The fact that neither applicant was ultimately successful in their constitutional action does not diminish the significance of this jurisprudential safeguard of fundamental rights.

296. Turning now to the applicants' opposition to the policy of the compulsory vaccination of children, the Court observes that at the heart of their complaint lies a twofold objection. In the first place, they criticised the institutional arrangements in place in the Czech Republic in this area, contending that the discretion granted to the health authorities was excessive and that there were conflicts of interest and a deficit of transparency and public debate. The Court is not persuaded by this criticism. Regarding the scope left to the executive to devise and implement health policy, the Court has already found that no issue of quality of law arises (see paragraphs 267 et seq. above). Moreover it finds pertinent the observation of the SAC that the legislative approach employed makes it possible for the authorities to react with flexibility to the epidemiological situation and to developments in medical science and pharmacology (see paragraph 87 above; see also the remarks of the Italian Constitutional Court at paragraph 107 above). In addition, the domestic system is, as noted above, attended by significant procedural safeguards.

297. As for the integrity of the policy-making process, the Court notes that in reply to the applicants' claim about conflicts of interest the Government have explained the procedure followed by the NIC, in accordance with relevant European and international standards (see paragraph 200

above). In the light of the elements before it, the Court considers that the applicants have not sufficiently substantiated their allegations that the domestic system is tainted by conflicts of interest, or their suggestion that the position on vaccination adopted by the relevant Czech expert bodies, or by the WHO, is compromised by financial support from pharmaceutical corporations.

298. With respect to the transparency of the domestic system and the extent to which the authorities invite public discussion, the Court notes that a degree of transparency is achieved in this respect through the publication of the minutes of the meetings of the NIC on the website of the Ministry of Health (see paragraph 154 above). As for public participation, the Government submitted that the exclusively expert composition of the NIC was in line with the practice of many European States. The Court notes the initiative taken in 2015 to set up a platform for public discussion of vaccination policy, bringing together medical experts and civil society (see paragraph 156 above), although the applicants and the intervenor ROZALIO indicated that its meetings were few and had ceased by 2018. It cannot be said that the arrangements in force, under which policy is entrusted to an expert body operating under the aegis of the Ministry of Health, in accordance with the model chosen by the legislature and ultimately accountable to it, suffer from a serious deficit of transparency such as to call into question the validity of the vaccination policy followed by the Czech Republic.

299. In addition to their submissions regarding the institutional aspects of the domestic system, the applicants also take issue with the effectiveness and safety of vaccinations, expressing strong concern with regard to the potential adverse effects on health, including in the long term. The Court notes first of all the Government's explanation that under the domestic system a certain leeway is allowed regarding the choice of vaccine, although only the standard vaccines are free of charge, the cost of other products resting with the parents. Some leeway regarding the vaccination timetable is also permitted, as long as the child is fully immunised by the relevant age (see paragraphs 76 and 203 above).

300. As for the effectiveness of vaccination, the Court refers once again to the general consensus over the vital importance of this means of protecting populations against diseases that may have

severe effects on individual health, and that, in the case of serious outbreaks, may cause disruption to society (see paragraph 135 above).

301. With regard to safety, it is not disputed that although entirely safe for the great majority of recipients, in rare cases vaccination may prove to be harmful to an individual, causing serious and lasting damage to his or her health. Complaints in relation to such situations have been the subject of previous proceedings under the Convention (see, in particular, *Association of Parents v. the United Kingdom*, no. 7154/75, Commission decision of 12 July 1978, DR 14, p. 31; and *Baytüre and Others*, cited above, § 28). At the oral hearing in the present case, the Government indicated that out of approximately 100,000 children vaccinated annually in the Czech Republic (representing 300,000 vaccinations), the number of cases of serious, potentially lifelong, damage to health stood at five or six. In view of this very rare but undoubtedly very serious risk to the health of an individual, the Convention organs have stressed the importance of taking the necessary precautions before vaccination (see *Solomakhin*, cited above, § 36; *Baytüre and Others*, cited above, § 29, and *Association of Parents*, cited above, pp. 33-34). This evidently refers to checking in each individual case for possible contraindications. It also refers to monitoring the safety of the vaccines in use. In each of these respects the Court sees no reason to question the adequacy of the domestic system. Vaccination is performed by medical professionals only if there is no contraindication, which is checked beforehand as a matter of routine protocol. Vaccines are subject to registration by the State Agency for Drug Control, with all healthcare professionals concerned being under a specific duty to report any suspicion of serious or unexpected side-effects (see paragraphs 78 and 79 above). Accordingly, the safety of the vaccines in use remains under continuous monitoring by the competent authorities.

302. Turning to the question of the availability of compensation on a no-fault or strict liability basis for injury to health caused by vaccination, which was also raised by the applicants, the Court recalls that it has previously examined a case in which the issue of compensation for damage to health caused by vaccination arose, although the vaccine in question was one that was recommended rather than compulsory in the country concerned (see *Baytüre and Others*, cited above, §§ 28-30).

The Court observes, as a general proposition, that the availability of compensation in case of injury to health is indeed relevant to the overall assessment of a system of compulsory vaccination, and it refers in this respect to the *obiter dictum* of the Czech Constitutional Court (see paragraph 90 above). The same issue has been raised by other constitutional courts (see the example of the relevant Italian case-law at paragraphs 111, 113, 114 and 115 above, and the Slovenian case-law at paragraph 127 above). However, in the context of the present applications, the issue cannot be given any decisive significance. As previously observed, no vaccine was administered contrary to the will or wishes of any of the applicants. For most of them, the facts occurred at a time when compensation was available under the 1964 Civil Code (i.e. before 31 december 2013). Moreover, in none of the domestic proceedings brought by the various applicants was the issue of compensation specifically raised. The dictum of the Constitutional Court came in the context of proceedings brought by other parties, who expressly included among the grounds advanced the question of compensation. The Court deduces from this that the issue was not actually relevant to the present applicants' refusal of the vaccination duty, which stemmed instead from the concerns noted above.

303. The Court must furthermore consider the intensity of the impugned interferences with the applicants' enjoyment of their right to respect for private life.

304. Regarding the first applicant, the Court has already found that the administrative fine imposed on him was not excessive in the circumstances (see paragraph 293 above). The Court notes that there were no repercussions for the education of this applicant's children, who were already teenagers when the sanction was applied to him.

305. With respect to the remaining applicants, their enrolment in preschool was either denied or revoked for lack of the required vaccinations. While the applicants and some of the intervening associations complained about the impact of this on the organisation of family life, notably in financial and career terms, the Court reiterates that the personal scope of the case, examined under the private life head of Article 8, is limited to the applicants themselves and the repercussions for them of the contested measures.

306. The Court accepts that the exclusion of the applicants from preschool meant the loss of an

important opportunity for these young children to develop their personalities and to begin to acquire important social and learning skills in a formative pedagogical environment. However, that was the direct consequence of the choice made by their respective parents to decline to comply with a legal duty, the purpose of which is to protect health, in particular in that age group. As stated by the respondent Government, and by some of the intervening Governments, who rely on extensive scientific evidence (see paragraphs 213, 218 and 223 above), early childhood is the optimum time for vaccination. Moreover, the possibility of attendance at preschool of children who cannot be vaccinated for medical reasons depends on a very high rate of vaccination among other children against contagious diseases. The Court considers that it cannot be regarded as disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination. In the view of the Court, it was validly and legitimately open to the Czech legislature to make this choice, which is fully consistent with the rationale of protecting the health of the population. The notional availability of less intrusive means to achieve this purpose, as suggested by the applicants, does not detract from this finding.

307. The Court would further observe that, while not underestimating the educational opportunity foregone by the child applicants, they were not deprived of all possibility of personal, social and intellectual development, even at the cost of additional, and perhaps considerable, effort and expense on the part of their parents. Moreover, the effects on the child applicants were limited in time. Upon reaching the age of mandatory school attendance, their admission to primary school was not affected by their vaccination status (see paragraph 82 above). As for the specific wish of the applicant Novotná to be educated in accordance with a particular pedagogical philosophy, she did not contradict the Government's statement that she would have remained eligible for such schooling notwithstanding her non-attendance at preschool level.

308. Lastly, the applicants argued that the system was incoherent, in that while small children were

required to be vaccinated, this did not apply to those employed in preschools. The Court notes, however, the Government's reply that the general vaccination duty, which consists of initial vaccinations as well as booster vaccinations, applies to everyone residing in the Czech Republic permanently or on a long-term basis (see paragraphs 11 and 77 above), so that the staff members concerned should normally have received all the prescribed vaccinations at the relevant time, as required by law.

309. For these reasons, the Court considers that the measures complained of by the applicants, assessed in the context of the domestic system, stand in a reasonable relationship of proportionality to the legitimate aims pursued by the respondent State through the vaccination duty.

(6) Conclusion

310. The Court would clarify that, ultimately, the issue to be determined is not whether a different, less prescriptive policy might have been adopted, as has been done in some other European States. Rather, it is whether, in striking the particular balance that they did, the Czech authorities remained within their wide margin of appreciation in this area. It is the Court's conclusion that they did not exceed their margin of appreciation and so the impugned measures can be regarded as being "necessary in a democratic society".

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

312. In view of this conclusion, there is no need to examine the Government's non-exhaustion objection in relation to the Article 8 complaints of the applicants Brožík and Dubský (see paragraphs 169 and 170 above).

IV. Alleged violation of Article 9 of the Convention

313. The applicants Vavříčka, Novotná and Hornych also complained that the fine imposed on Mr Vavříčka and the non-admission of Ms Novotná and Mr Hornych to nursery school was contrary to their rights under Article 9 of the Convention, which provides:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

(...)

C. The Court's assessment

330. The three applicants have sought to invoke the protection of Article 9 for their critical stance towards vaccination. There is no suggestion on the part of any of them that their stance on this matter is religiously inspired. It is therefore not their religious freedom that is potentially at stake, but their freedom of thought and conscience.

331. The applicability of Article 9 to this particular conviction has not previously been examined by the Court. It was briefly considered by the Commission in *Boffa and Others* (cited above). In its decision, in so far as relevant, the Commission held that, in protecting the sphere of personal beliefs, Article 9 did not always guarantee the right to behave in the public sphere in a way which was dictated by such beliefs and noted that the term "practice" did not cover each and every act which was motivated or influenced by a belief. It further noted that the obligation to be vaccinated, as laid down in the legislation at issue in that case, applied to everyone, whatever their religion or personal creed. Consequently, it considered that there had been no interference with the freedom protected by Article 9 of the Convention.

332. The Court finds it relevant to refer to its reasoning in the case of *Bayatyan v. Armenia* ([GC], no. 23459/03, § 110, ECHR 2011, with further references), in which it considered the applicability of Article 9 to the conscientious objection of the applicant, on religious grounds, to military service. It held that "opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9." It further held that whether and to what extent such objection came within the ambit of Article 9 must be assessed in the light of the particular circumstances of the case (*ibid.*).

333. The Court would also point to its reasoning in the case of *Pretty v. the United Kingdom* (no. 2346/02, §§ 82-3, ECHR 2002-III), in which it did not doubt the firmness of that applicant's views concerning assisted suicide, but observed that not all opinions or convictions constitute beliefs in the sense protected by Article 9.

334. As regards the applicant Vavříčka, the Court notes that in its first ruling on his case, the Constitutional Court held that there must be the possibility of an exceptional waiver of the penalty for non-compliance with the vaccination duty where the circumstances call in a fundamental manner for respecting the autonomy of the individual. It underlined the importance of the consistency and credibility of the person's claims in this regard, and remarked on the lack of consistency on Mr Vavříčka's part in the proceedings until that stage, who had submitted to that court that his objection to vaccination was primarily health-related; philosophical or religious aspects were secondary (see paragraph 29 above). In the subsequent proceedings, it was found by the SAC that the reasons of conscience given by Mr Vavříčka had been brought forward only at a late stage and that he had failed to advance any concrete argument concerning his beliefs and the intensity of the interference with them caused by vaccination.

335. The applicant complained that his conscientious stance had been assessed negatively in accordance with a standard that had been developed only at a late stage in the domestic proceedings. The Court considers, on the contrary, that the approach of the domestic courts was reasonable and indeed in keeping with its own interpretation of Article 9, which has been set out above. Having regard to the conclusions reached by the domestic courts in this regard, and considering that the applicant has not further specified or substantiated his complaint under Article 9 in the present proceedings, the Court finds that his critical opinion on vaccination is not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.

336. The same applies, *a fortiori*, to the complaints of the applicants Novotná and Hornych, neither of whom even presented such arguments in the domestic proceedings (see paragraphs 37, 45 and 46 above).

337. The Court therefore finds that these complaints are incompatible *ratione materiae* with the

provisions of Article 9 of the Convention within the meaning of Article 35 § 3 (a), and must be rejected in accordance with Article 35 § 4.

338. This finding makes it unnecessary to address the Government's other inadmissibility objections.

V. Alleged violation of Article 2 of Protocol No. 1

A. The parties' submissions

339. The child applicants further complained that the refusal of admission to nursery school was contrary to their rights under Article 2 of Protocol No. 1.

340. (...)

C. The Court's assessment

345. In light of the scope of its examination and findings as regards the child applicants' complaints under Article 8 of the Convention, the Court finds that there is no need to examine their applications separately under Article 2 of Protocol No. 1.

VI. Other alleged violations of the Convention

346. Lastly, some of the applicants also complained of a violation of Articles 2, 6, 13 and 14 of the Convention.

347. However, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

Accordingly, the of the applications is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court

1. *Decides* to join the applications;
2. *Decides*, unanimously, to join to the examination of the merits of the complaints of the applicants Brožík and Dubský under Article 8 of the Convention the Government's objection of non-exhaustion of domestic remedies in relation to those complaints;
3. *Declares*, unanimously, the complaints under Article 8 of the Convention admissible;
4. *Declares*, by a majority, the complaints under Article 9 of the Convention inadmissible;

5. *Declares*, unanimously, the complaints under Articles 2, 6, 13 and 14 of the Convention inadmissible;

6. *Holds*, by sixteen votes to one, that there has been no violation of Article 8 of the Convention and *finds* that, accordingly, the Government's objection of non-exhaustion of domestic remedies in relation to the Article 8 complaints of the applicants Brožik and Dubský has become moot and as such calls for no examination;

7. *Holds*, by sixteen votes to one, that there is no need to examine the applications of the child applicants separately under Article 2 of Protocol No. 1.

(...)

NOOT

Hoewel deze uitspraak gaat over het weigeren van niet-gevaccineerde kinderen op kleuterscholen en het beboeten van ouders die hun kinderen niet vaccineren tegen negen veelvoorkomende ziektes, is de link naar de huidige Covid-19 pandemie snel gelegd. Olsthoorn en ik onderzochten in *TAP* in hoeverre een werkgever werknemers kan 'verplichten' zich tegen Covid-19 te laten vaccineren (A. Olsthoorn & D. Schwartz, 'Vaccinatieplicht voor de werknemer: een prik-kelbaar onderwerp', *TAP* 2021/2.). De onderhavige uitspraak ziet op een vaccinatieverplichting van overheidswege, maar kunnen de afwegingen van het EHRM ons ook van dienst zijn in de arbeidsrechtelijke context? Vanwege de beperkte ruimte richt ik mij bij de bespreking hiervan alleen op de overwegingen van het Hof ten aanzien van art. 8 EVRM en laat ik de behandeling van art. 9 EVRM buiten beschouwing.

Schending van art. 8 EVRM?

Verplichte vaccinatie kan een schending opleveren van art. 8 EVRM (recht op eerbiediging van de persoonlijke levenssfeer). Dat heeft het Hof eerder geoordeeld in *Solomakhin/Ukraine* (EHRM 15 maart 2012, ECLI:CE:ECHR:2012:0315JUD002442903). Nieuw is echter dat het Hof expliciet overweegt dat, ook als geen vaccinatie heeft plaatsgevonden, toch sprake kan zijn van een inbreuk op de persoonlijke levenssfeer, namelijk wanneer de betrokkene direct geconfronteerd wordt met negatieve consequenties van niet-naleving van de vaccinatieplicht. Een indirecte verplichting kan

dus ook een schending van art. 8 EVRM opleveren.

Directe doorwerking grondrechten

In deze zaak ging het dus om een van overheidswege opgelegde vaccinatieplicht, waarbij burgers hun EVRM-rechten inriepen tegen de overheid. Maar hoe zit dat in de arbeidsrelatie? Algemeen wordt aangenomen dat art. 8 EVRM ook direct doorwerkt in horizontale rechtsverhoudingen (vgl. HR 22 november 2019, «JAR» 2019/314, m.nt. Hogewind-Wolters). Bij de vraag of sprake is van een gerechtvaardigde inbreuk op art. 8 EVRM moet een belangenafweging worden gemaakt door een toetsing aan de eisen van noodzakelijkheid, proportionaliteit en subsidiariteit (HR 14 september 2007, «JAR» 2017/15 en EHRM 7 november 2002, nr. 58341/00). Thans is nog niet duidelijk of ook het vereiste van een wettelijke grondslag geldt voor een gerechtvaardigde inbreuk in een horizontale verhouding (zie verder: R. Jonkmans, 'Contractuele beperking van grondrechtrechten', *ArbeidsRecht* 2021/4). In het navolgende richt ik mij daarom enkel op de overwegingen van het Hof ten aanzien van de eisen van noodzakelijkheid, proportionaliteit en subsidiariteit.

Schending gerechtvaardigd?

Het Hof overweegt allereerst dat lidstaten in dit geval een brede marge toekomt bij de beoordeling van de inbreuk. Niemand wordt immers tegen zijn wil gevaccineerd en er is dus enkel sprake van een *indirecte* vaccinatieverplichting. Het Hof oordeelt dat lidstaten een verantwoordelijkheid hebben om hun onderdanen te beschermen tegen ziektes en dat algemeen wordt aangenomen dat vaccins daarvoor het geëigende middel zijn.

Ervan uitgaande dat de beoordeling van het Hof van de 'pressing social need' een uitvoering is van de noodzakelijkheidstoets (bijv. HR 16 juni 2006, ECLI:NL:HR:2009:BG7750), overweegt het Hof dat lidstaten een verplichting hebben om maatregelen te nemen teneinde de gezondheid van hun burgers te beschermen. In de arbeidsrelatie bestaat een enigszins vergelijkbare zorgplicht voor de werkgever, die ten aanzien van Covid-19 specifiek volgt uit de tijdelijke aanvulling van het Arbeidsomstandighedenbesluit (*Stb.* 2020, 483). De werkgever moet maatregelen treffen ter voorkoming of beperking van de kans op

besmetting van werknemers en derden met Covid-19 op de arbeidsplaats. De zorgplicht kan dus invulling geven aan het noodzakelijkheids criterium. Een werkgever zou bijvoorbeeld kunnen stellen dat het overplaatsen van werknemers die zich weigeren te laten vaccineren noodzakelijk is vanwege zijn plicht om besmetting van werknemers en derden met Covid-19 op de werkvloer zoveel mogelijk te voorkomen.

Ten aanzien van de subsidiariteit overweegt het Hof expliciet dat bij de beoordeling van zaken met betrekking tot kinderen de lidstaten de belangen van het kind en kinderen als groep voorop moeten stellen. Kinderen die niet gevaccineerd kunnen worden, moeten worden beschermd door groepsimmunitet en die kan volgens Tsjechië (het Hof volgt die redenering) alleen worden verkregen door (indirecte) verplichte vaccinatie. Hoewel interessant, is deze overweging minder relevant in de arbeidsrechtelijke context. Ten eerste is de overweging specifiek gericht op kinderen. Ten tweede speelt het belang van groepsimmunitet in de werkomgeving mijns inziens minder een rol. Op de werkvloer kan een werknemer die zich niet kan laten vaccineren zich namelijk eenvoudiger beschermen dan tijdens het dagelijks leven in de openbare ruimte.

Het Hof concludeert vervolgens dat de inbreuk op art. 8 EVRM ook proportioneel is. Die beoordeling geeft ook handvatten voor de arbeidsrechtpraktijk. Zo kunnen de wettelijke zorgplicht en de door Hof aangestipte 'social solidarity' ook op de werkvloer een rol spelen. Het Hof oordeelt ook dat het weigeren van kinderen op het kinderdagverblijf geen punitief karakter draagt. Daaruit zou kunnen worden afgeleid dat maatregelen ter bescherming van andere werknemers eerder zijn toegestaan dan maatregelen die tot doel hebben weigerende werknemers te straffen. Het weigeren van werknemers op de werkvloer onder stopzetting van het salaris zal daarom problematisch zijn, omdat dat eerder een punitief karakter heeft. Het tijdelijk overplaatsen van werknemers naar een andere afdeling of het laten verrichten van andere werkzaamheden is dan eerder wel proportioneel.

Conclusie

In zijn algemeenheid kan dit arrest niet direct worden toegepast binnen de arbeidsrelatie, daarvoor is de casus te verschillend van die specifieke

context. Kijkend naar de verschillende vereisten voor een gerechtvaardigde inbreuk op art. 8 EVRM kan uit deze uitspraak wel inspiratie worden geput voor een beoordeling van een vaccinatieplicht in de arbeidsrelatie. Relevant is dat ook een indirecte vaccinatieverplichting een schending oplevert van art. 8 EVRM en dat de zorgplicht van werkgevers ten aanzien van werknemers mogelijk het criterium van noodzakelijkheid kan inkleuren. Daarnaast is ten aanzien van proportionaliteit van belang dat de gevolgen van weigering niet te zwaar mogen zijn en geen punitief karakter zouden moeten dragen. Ten aanzien van de risico's van Covid-19 vaccinaties is de vraag of thans al duidelijk is of die vergelijkbaar zijn aan die van vaccins die al langer beschikbaar zijn. Dit kan een rol spelen bij de beoordeling. Ook de gedachte van 'social solidarity' kan een interessante factor zijn in bijvoorbeeld de zorgsector, waar ook met kwetsbare patiënten wordt gewerkt.

mr. D. Schwartz
advocaat bij De Voort Advocaten | Mediators

Cursusoverzicht

Arbeidsrecht

Zorg dat je altijd up-to-date blijft.



Ons aanbod sluit
aan bij uw behoefte

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