

## To vax or not to vax? Covid-19 vaccination mandates in light of *Vavříčka* and others v. The Czech Republic

### *¿Vacunarse o no vacunarse? La obligación de la vacunación contra la Covid-19 a la luz del caso Vavříčka y otros vs. la República Checa*

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## Abstract

This case report discusses the judgement of the European Court of Human Rights in *Vavříčka and Others v. the Czech Republic*, which remains the only case concerning compulsory vaccination to date. This is particularly important in the context of the COVID-19 pandemic, in which many European States restricted unvaccinated individual's freedoms in a post-lockdown setting. After outlining the relevant facts and arguments brought by both the applicants and the Government, it comments on the Court's assessment under Article 8 ECHR by evaluating inter alia the notion of interference and conflicting interests of parents versus children. First and foremost, however, it sheds light on how the case fits into the wider discussion on COVID-19, particularly what standards it puts in place and what implications it bears on future applications concerning COVID-19 vaccination rules. Namely, it illustrates how the threshold of necessity may be established in relation to Article 8 interferences.

**Keywords:** COVID-19; mandatory vaccination; Article 8 ECHR; necessity; bodily integrity.

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## Resumen

Este informe de caso analiza la sentencia del Tribunal Europeo de Derechos Humanos en el caso *Vavříčka y otros contra la República Checa*, que sigue siendo el único caso relativo a la vacunación obligatoria hasta la fecha.

Esto es particularmente importante en el contexto de la pandemia de COVID-19, en la que muchos Estados europeos restringieron las libertades de las personas no vacunadas en un entorno posterior al confinamiento.

Después de esbozar los hechos y argumentos relevantes presentados tanto por los solicitantes como por el Gobierno, comenta la evaluación del Tribunal en virtud del artículo 8 de la Convención Europea de Derechos Humanos – CEDH- evaluando, entre otras cosas, la noción de interferencia y conflicto de intereses de los padres frente a los hijos no vacunados.

Sin embargo, ante todo, el análisis arroja luces sobre cómo encaja el caso en el debate más amplio sobre la vacunación frente a la COVID-19 y en particular qué estándares se establecen y qué implicaciones tiene en futuras aplicaciones relacionadas con las normas de vacunación contra la COVID-19. Es decir, ilustra cómo se puede establecer el umbral de la necesidad de vacunación en relación con lo establecido en el artículo 8 de la Convención.

**Palabras claves:** COVID-19; vacunación obligatoria; artículo 8 CEDH; necesidad; integridad corporal.

## Introduction

### Background to the European Court of Human Rights

The European Court of Human Rights (ECtHR) is the regional level Court that acts as the enforcement mechanism for the European Convention on Human Rights (ECHR), of which all member States of the Council of Europe are High Contracting Parties. Any individual within the territory of any State within the Council of Europe is able to lodge an application to the Court alleging that their human right(s) had been violated by that State. The application's admissibility will then be examined and, if deemed admissible, it will be decided on the merits of the complaint. If the Court does find a violation of an applicant's Convention rights in a given case, the respondent State must comply with the judgment — the Court, in that sense, is legally binding. This case report will discuss the Court's judgment in *Vavříčka and Others v. the Czech Republic*, and its wider implications in light of mandatory COVID-19 vaccinations in the Council of Europe.

### Methodology

This case report first analysed the court's judgment in *Vavříčka and Others v. the Czech Republic*, to identify the circumstances in which the Court had found mandatory vaccination rules to be

permissible. It outlined the relevant facts and arguments brought by both the applicants and the Government before evaluating the Court's assessment of these under Article 8 ECHR. Using this knowledge as a starting point, the authors then speculated on the wider implications that this judgment may have in light of the mandatory vaccination rules imposed by many States in the Council of Europe. The case report therefore illustrated how the threshold of necessity may be established in relation to Article 8 interferences.

### Summary of the relevant facts

Against the backdrop of compulsory childhood vaccination schemes in the Czech Republic, the applicants in *Vavřička and Others v. the Czech Republic*, which consisted of six joined applications lodged against the ECtHR, alleged that the consequences of non-submission to this statutory duty resulted in several violations under the ECHR (2021). In the Czech Republic, the Public Health Protection Act obliges all permanent and long-term residents to undergo compulsory vaccination in line with the Decree on Vaccination Against Infectious Diseases. In the case of children under the age of fifteen, this obligation is transferred to their statutory representatives. Whilst compliance cannot be physically enforced, failure to comply with the requirement establishes a minor administrative offence. Furthermore, without undergoing the mandatory vaccination, children cannot be accepted to pre-school facilities (paras 11–17).

The first applicant, Mr Vavřička, refused to have his two teenage children vaccinated, making references to the “irresponsible experimentation with human health” (para. 24). As a result of this, he was convicted of an offence and fined 110 EUR. The applicant unsuccessfully challenged the decision at the domestic courts, but the Constitutional Court ultimately found his allegations manifestly ill-founded – referring to inconsistency and non-credibility (paras 23–31). The other five applicants were pre-school children, whose parents refused to vaccinate them. They complained about the fact that the respective pre-school facilities denied their admission based on their non-compliance with the vaccination requirements. The reasons for non-vaccination submitted by the parents varied in substance, but mostly concerned the insurmountable health risks related to vaccines and the lack of their medical necessity (para. 34,46). The applicants raised the right to secular conscientious objection and argued that the decision to (not) vaccinate fell within their right to freely manifest their beliefs and convictions, which were however only framed in vague terms (paras 32–64).

### Main legal arguments of the parties

The applicants brought a complaint, inter alia, under Article 8 ECHR, the right to respect for private and family life. They did so as the right to personal autonomy in relation to one's health or, in Mr Vavřička's case, the health of one's children falls within the sphere of this Article (para. 173). The child applicants argued that it had been arbitrary to deny their access to pre-school education because of their non-vaccination, whilst Mr Vavřička complained that the fine was arbitrary. Additionally, the applicants submitted that the *Kruslin* test could not be satisfied since the Government's actions were not necessary in a democratic society. Namely, they were

disproportionate. Refusing these children’s preschool education put them at a significant disadvantage in their future development, which was not proportionate to a punishment for not being vaccinated (para. 178).

The Government submitted, *inter alia*, that the child applicants’ non-admission to pre-school did not constitute an interference in the sense of Article 8 as other means of developing their personality were available (para. 194), as opposed to Mr. Vavříčka whose financial penalty clearly amounted to an interference (para. 192). If there nevertheless was an interference on both accounts, it was in any way justified through the necessity test in order for the Czech Republic to meet its positive obligations (paras 195-197). Due to vaccine scepticism in the country, the State believed that it must impose compulsory vaccination to achieve sufficient vaccine coverage. The government argued that this measure was not arbitrary since the State offered room for objections to vaccination without consequence, such as religion or conscience, but that the applicants had not met the criterion for this exemption at national level (paras 197–204).

### **The Grand Chamber’s Findings**

The Court reiterated that a person’s ‘physical integrity’ falls under the notion of ‘private life’ within the meaning of Article 8 (para. 261). An ‘involuntary medical intervention’, in this case an obligation to undergo compulsory vaccination, although said vaccination was not forcibly performed on either of the applicants, nevertheless amounted to an *interference* with the Article 8 right as the consequences of non-compliance directly affected the applicants. Following that, the standard Article 8 test for justifying the interference was deployed by the Court (paras 263–265).

In § 267, the Court held that the element of an ‘accessible’, ‘precise’ and ‘foreseeable’ legal basis was met. It contended that the measure clearly pursued a legitimate aim as it sought to protect the society against serious diseases (para. 272), while considering the interests of both those being vaccinated and those who had to rely on herd immunity. In determining the necessity of the obligation to get vaccinated, it emphasised the subsidiary role of the Court and allowed for a wide margin of appreciation (MoA) of the State. The Court found there is a pressing social need aimed at protecting individual and public health as well as to prevent a “downward trend in the rate of vaccination among children” (paras 272–288). The measure was thus considered proportionate to the legitimate aims pursued (para. 304). As for the lost opportunity to engage in a ‘formative pedagogical environment’, it underlined the importance of social solidarity – perceiving the consequence of non-fulfilment as a preventive, rather than punitive, measure (para. 294). Importantly, the admission to primary school had not been affected as the legal duty only applied to pre-schooling. As the Grand Chamber was satisfied with the fulfilment of the Article 8 test, by 16 votes to 1, it established that the Czech Republic did not exceed its MoA and thus no violation of Article 8 occurred.

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The Court did not deem it necessary to consider Article 2 of Protocol 1 – which specifically addresses the right to education – separately, having examined the complaints under Article 8. The alleged violations of Articles 2, 6, 13 and 14 were rejected as manifestly ill-founded (paras 345–347). In his partly concurring and partly dissenting opinion, Judge Lemmens on one hand stressed the importance of social solidarity, which may require restricting the freedom of individuals, and on the other, expressed his regret that the complaint was not examined separately under Article 2 of Protocol 1 (Dissenting opinion of Judge Lemmens, para. 3). Judge Wojtyczek on his part criticised the substance of arguments which were relied on in the Court’s deliberation, namely that they lacked expert scientific basis and were merely ‘value judgments’. Neither was he satisfied with the apparently low threshold that the Court applied to justify this kind of serious interference to bodily integrity, which warranted a narrow MoA in his opinion (Dissenting opinion of Judge Wojtyczek, paras 6-18).

## Commentary

### The assessment of interference under Article 8

As a preliminary remark, the Court found an interference within the meaning of Article 8 even though the bodily integrity of the applicants as such was not at stake, being satisfied that an ‘involuntary medical intervention’ was concerned similarly to its findings in *Solomakhin v. Ukraine*. Indeed, as no vaccine was forcefully administered on either of the applicants, the existence of an interference was substantiated by the imposition of a financial penalty and, in the case of the child applicants, by their non-admission to pre-school facilities as a direct consequence of non-vaccination (263). Interestingly, in the Court’s view, this amounted to an interference despite the fact that the children were essentially only prevented from attending pre-school care rather than primary school (paras 263–264). Either way, the degree of interference was limited, which the Court recognised in § 276, yet it did not engage in a substantial assessment of whether there was an interference in the first place. Whilst the striking out of the alleged violation of Article 8 at this stage would be surprising given the Court’s rather broad interpretation of interferences in its previous case law, it could have been reasonably expected for it to frame it with more conviction. Namely, it could have emphasised in what ways the implications of non-vaccination bore direct effects on the applicants’ Article 8 rights, such as formative development of the children, especially in light of some further inconsistencies in the government’s compulsory vaccination scheme. To illustrate, the applicants raised the issue of the vaccination status of pre-school employees, in particular the fact that the vaccination duty did not specifically extend to them, which could have resulted in an unbalanced situation in which children would be forced to comply with the vaccination scheme whereas adults would not. However, the Court did not address this issue, presuming that nursery staff “should normally have received” (para. 308) the prescribed vaccination [as children] without going into detail of a potentially contradictory situation.

A substantial issue also arose in the Court's determination of legitimate aim. It failed to address how the imposition of financial penalties pursues the aim of protecting the health of children, since such a measure can hardly be seen as changing any health-related aspects of these children (Vikarská, 2021). In that sense, the clear distinction between pre-school and primary school attendance seems illogical at best: the child is denied access to pre-school care not to put others at risk, but this very risk dissipates once the child reaches the age of 6 and is enrolled in primary school (from para. 272 onwards). Additionally, as asserted by Vikarská, the Court could reasonably expect the children to mingle with their peers outside the context of pre-school care, and the risks of non-vaccination extend significantly to other contexts, potentially impacting more children (2021). Limiting one's social interaction solely in the context of pre-schooling therefore seems odd. It is also noteworthy that the Article 8 test was deployed in light of a wide MoA, even though there had previously been a narrow MoA applied to cases where there was no European consensus in matters relating to personal autonomy (e.g., *A.P., Garçon and Nicot v. France*, 2017). It has also been established that the question of bodily integrity generally calls for a narrow MoA (*Y.F. v. Turkey*, 2003).

### **The autonomy of parents versus the best interests of the child**

An underlying issue was the scope of positive obligations of States under the Convention as contrasted to the conflicting interests of parents and children. There is no denying that the child applicants suffered the consequences of their parent's decision to not vaccinate them, since they were not in a position to decide on such substantive matters themselves (Dissenting opinion of Judge Wojtyczek). As a starting point, it should not be presumed that the interests of parents equal those of children. The question of child representation thus plays a major role as it is unclear whether children should be generally protected or if the parents should enjoy unlimited authority when it comes to their children's health (Ważyńska-Finck, 2021). Inhuman or degrading treatment indicates the former, as in *A v. UK*, where the abusive stepfather could not rely on a legal basis in English law, and in *Z and others v. UK*, where severe neglect of children at the hands of their parents amounted to violation of the State's positive obligations under Article 3 (Kilkelly, 2001). The case-law on Article 3 must nevertheless be differentiated from that on Article 8. In *Johanson v. Norway* it was held that emphasis should be placed on the best interests of the child and that these interests "may override those of the parent" (1996). On the other hand, in *Glass v. UK*, a doctor's decision to treat a disabled child despite the parents' wishes constituted a violation of Article 8 (ECtHR, 2020). Although the present facts differ substantially from the aforementioned cases, the question of whether the best interests of the child have been considered remains valid. Yet, the ECtHR neglected the fact that the applicants were children, framing its reasoning in terms of lack of parental consent. Arguably, a child-centred perspective was thus missing (Ważyńska-Finck, 2021), somewhat undermining the position of children who were the applicants in this case.

Furthermore, the impacts on the right to education were surprisingly not addressed by the Court. It dismissed any considerations under Protocol 2 without further substantiating any

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reasons for doing so, which is odd since the right to education strikes one as an issue which should have been considered in the Court's deliberation. Indeed, the Court accepted that the non-admission to pre-school care prevented the children from acquiring some important personal and social skills. Thus, it could be interpreted that the Court does not perceive pre-school education as falling under the scope of the right to education. In sum, the Court's judgment suggests a strong stance of the Court in support of mandatory vaccination (paras 294, 345).

### Implications for COVID-19

Since the facts of the case relate to the decision of a parent choosing not to vaccinate their child, and the consequence that followed, this judgment does not provide a concrete precedent for 'covid cases'. It does, however, offer insight into the Court's interpretation of the circumstances that would constitute necessity in relation to a State's vaccination programme. Across Europe, there has been a widespread introduction of 'covid passes' in post-lockdown settings. This has resulted in unvaccinated individuals being unable to enjoy the same freedoms as those that have been vaccinated against COVID-19, as proof of vaccination was required for entry into some establishments. Since the banning of children to preschools qualified as an interference in the *Vavříčka* case (para. 263), it is likely that the denial of entry for unvaccinated individuals into certain establishments requiring a 'covid pass' would qualify as an interference with one's rights under Article 8 ECHR.

In determining whether such an interference would be justified, the *Vavříčka* judgment gives guidance. In that case, when evaluating the proportionality of such an interference, the ECtHR appeared to distinguish pre-schooling from primary education. In doing so, it concluded that the measure was proportionate as it did not affect one's fundamental right to education – but merely one's ability to attend, seemingly non-essential, pre-school. Thus, it is reasonable to infer that the Court would likely find mandatory vaccination for 'non-essential' activities to be proportionate to the aim of States in suppressing coronavirus and protecting the health of those in their jurisdiction. An unvaccinated individual's Article 8 ECHR rights would likely not be violated by the use of 'covid passes' in Europe, since the interference that this practice creates could be deemed justified via the satisfaction of the *Kruslin* test (*Kruslin v France*, 1990).

Whether mandatory vaccination as a prerequisite to employment would amount to a violation of Article 8 is slightly more difficult to foretell. It is nonetheless of importance since some States have introduced this measure. In August 2021, a request for interim measures was lodged by French firefighters in *Abgrall and 671 Others v. France*, challenging the French law on mandatory vaccination for certain professions (European Court of Human Rights, 2021a). The Court concluded that the request fell outside the scope of Article 39, implying that the threshold of 'imminent risk or irreparable damage' that would warrant its intervention and potential suspension of the French law had not been met (European Court of Human Rights, 2022). Another French firefighter case – brought by one of the applicants from the former case –

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*Thevenon v. France*, is currently pending before the Court (European Court of Human Rights, 2021b). Whilst the Court is expected to assess the merits of the application, as opposed to an Article 39 assessment relating to deployment of interim measures, it is quite likely that the case will be dismissed on the grounds of non-fulfilment of formal requirements – namely the criterion of exhaustion of domestic remedies. If the Court were to nonetheless evaluate the application's substantive merits, there is a possibility that it may find a violation. The Court finding a violation is, however, unlikely when considering the case of *Solomakhin v Ukraine*, (2012) where the Court gave the State a wide MoA during an epidemic. As mentioned in Section 3.1, the Court allowed for forced vaccination provided that the two-part test laid out by the Court could be satisfied. States requiring individuals to prove that they have been vaccinated in order to enjoy non-essential activities relates to a pandemic; it is therefore reasonable to assume that a similar level of disposition as provided in *Solomakhin* would be granted in these proceedings. There have been no reports of forced vaccination occurring in any High Contracting Party to the ECHR, so cases related to vaccination as a prerequisite to employment are likely to be required to meet a lower threshold than in *Solomakhin*. It is therefore possible that the infringement of mandatory vaccination as a prerequisite to work is justifiable via the *Kruslin* test.

The above conclusion is reinforced by the pragmatic nature of the Court, in which they attempt to refrain from excessive judicial activism. Given that many States have introduced these measures, and the politically charged nature of restrictions on individuals not vaccinated against COVID-19, it is likely that a responding State to an application relating to restrictions on the unvaccinated would be, rightly or wrongly, granted a wide MoA. There are examples of this in Strasbourg case law, such as the controversial cases of *Handyside v UK* (1976) and *Bankovic and Others v Belgium and Others* (2001). Perhaps even any future cases relating to mandatory vaccinations against COVID-19 may be seen as allowing for a wider MoA than is typically granted in cases pertaining to bodily integrity under Article 8.

### **Conclusion: a strong position and yet... possible grounds against compulsory vaccination?**

The case of *Vavříčka and Others v. the Czech Republic* is ground-breaking in that it is the first case on mandatory vaccination to be decided by the Court, thereby laying the foundations for future “anti-vaxxer” cases. This seems particularly relevant amidst the discussions on compulsory vaccination in the context of the COVID-19 pandemic, be it vaccination as a prerequisite for performing certain professions, or legislation imposing a general vaccination duty.

The Court's differentiation between what appears to be 'non-essential activities', together with a wide MoA granted in respect of the threshold of necessity, indicates that the State's positive obligations to protect the health of the general public outweighs one's Article 8 interferences in the context of mandatory vaccination. Despite the Court's seemingly clear message to anti-

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vaxxers, however, there seems to be some room left for conscientious objection to vaccines. Indeed, the Court stressed throughout the judgment that the applicants could not, in part, object due to their inconsistent reasoning towards vaccination. Thus, it could be argued that consistent and credible objections could be accepted by the Court, in which case the threshold test may look different and/or give rise to a different finding.

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