

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

GRAND CHAMBER

CASE OF VAVŘIČKA AND OTHERS v. THE CZECH REPUBLIC

(Applications nos. 47621/13 and 5 others)

JUDGMENT

Art 8 • Private life • Fine on parent and exclusion of children from preschool for refusal to comply with statutory child vaccination duty • General European consensus to achieve highest possible degree of vaccine coverage • Social solidarity towards the most vulnerable requiring the rest of the population to assume a minimum risk in the form of vaccination • Mandatory approach answering a pressing social need to protect individual and public health against the diseases well-known to medical science and to guard against any downward trend in child vaccination rate • Compulsory policy consistent with the best interests of the children, to be considered both individually and as a group and requiring to protect every child from serious diseases through immunisation • Domestic system allowing exemptions and accompanied by procedural safeguards • Necessary precautions taken, including the monitoring of the safety of the vaccines in use and the checking for possible contraindications in each individual case • Fine not excessive and no repercussions for the education of school-age children • Effects on child applicants limited in time, admission to primary school not being affected by vaccine status • Impugned measures proportionate to the legitimate aims pursued • Wide margin of appreciation not overstepped

STRASBOURG

8 April 2021

This judgment is final but it may be subject to editorial revision.



In the case of Vavřička and Others v. the Czech Republic,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Robert Spano, *President*,
Jon Fridrik Kjølbro,
Ksenija Turković,
Paul Lemmens,
Síofra O'Leary,
Yonko Grozev,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Pere Pastor Vilanova,
Marko Bošnjak,
Tim Eicke,
Jovan Ilievski,
Lado Chanturia,
Erik Wennerström,
Raffaele Sabato,
Anja Seibert-Fohr, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 1 July 2020 and 13 January 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in six applications (nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Czech nationals, Mr Pavel Vavřička, Ms Markéta Novotná, Mr Pavel Hornych, Mr Radomír Dubský, Mr Adam Brožík and Mr Prokop Roleček ("the applicants"), between 23 July 2013 and 31 August 2015.

2. The applicants were initially represented by Mr D. Záhumenský, and subsequently by Ms Z. Candigliota and Mr J. Švejnoha, Mr J. Novák and Mr T. Moravec, lawyers practising in the Czech Republic. Before the Grand Chamber, all of the applicants were represented by Ms Candigliota. The Czech Government ("the Government") were represented by their Agent, Mr V. A. Schorm, of the Ministry of Justice.

3. The applicants alleged, in particular, that the various consequences for them of non-compliance with the statutory duty of vaccination had been incompatible with their right to respect for their private life under Article 8 of the Convention.

4. The applications were allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 7 and 9 September 2015 the Government were given notice of the above complaint, and also of related complaints made by Mr Vavřička, Ms Novotná and Mr Hornych under Article 9 of the Convention, and by all of the child applicants under Article 2 of Protocol No. 1.

5. The President of the Section granted leave to submit written comments (Article 36 § 2 of the Convention and Rule 44 § 3) to the non-governmental organisations *Společnost pacientů s následky po očkování, z.s.* (Association of Patients Injured by Vaccines), European Centre of Law and Justice and *ROZALIO – Rodiče za lepší informovanost a svobodnou volbu v očkování, z.s.* (Group of Parents for Better Awareness and Free Choice with Regard to Vaccination – "ROZALIO"), each of which submitted comments.

6. On 17 December 2019 a Chamber of the First Section, composed of Ksenija Turković, President, Aleš Pejchal, Armen Harutyunyan, Pere Pastor Vilanova, Tim Eicke, Jovan Ilievski, Raffaele Sabato, judges, and Abel Campos, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was decided in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicants and the Government each filed a memorial on the admissibility and merits of the applications.

9. The President granted leave to submit written comments to the Governments of France, Germany, Poland and Slovakia, each of which filed observations. Leave to intervene was also granted to the European Forum for Vaccine Vigilance. Additional written comments were submitted by ROZALIO, and the comments submitted to the Chamber by the other third-party interveners remained in the case-file.

10. A hearing took place in the Human Rights Building, Strasbourg, on 1 July 2020, attended by the parties' representatives and advisers.

There appeared before the Court:

(a) *for the Government*

Mr V. A. SCHORM, *Agent*,
Mr R. PRYMULA, President of the Czech Vaccinology Society and Government Agent for Health Science and Research,
Ms E. PETROVÁ, Office of the Government Agent, Ministry of Justice,
Ms K. RADOVÁ, Office of the Government Agent, Ministry of Justice,
Ms D. PRUDÍKOVÁ, Ministry of Education, Youth and Sports,
Mr T. SUCHOMEL, Ministry of Health,
Ms H. CABRNOCHOVÁ, Vice-president of the Czech Vaccinology Society and the Association of General Practitioners for Children and Youth, *Advisers*;

(b) *for the applicants*

Ms	Z. CANDIGLIOTA,	*Counsel*,
Mr	D. PETRUCHA,	
Mr	K. LACH,	
Mr	D. DUŠÁNEK,	
Ms	P. JANÍČKOVÁ,	*Advisers*,
Ms	B. ROLEČKOVÁ,	*Applicant's parent*.

The Court heard addresses by Mr Schorm, Mr Prymula and Ms Candigliota and their replies to questions put by the judges.

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 l 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 preschool 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 instead 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 VAVŘIČKA, 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 tetanus. 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

32. The applicant was born on 12 October 2002. She was granted admission to a Montessori nursery school by a decision of 4 April 2006, when she was some three and a half years old.

33. On 10 April 2008 the principal of the establishment decided to reopen the admission procedure, having been informed by the applicant's paediatrician that – contrary to a previously submitted medical certificate of 15 March 2006 to the effect that she "had received the basic vaccination" – the applicant had not actually received the MMR (measles, mumps and rubella) vaccine. The reopened proceedings resulted in a decision of 14 July 2008 reversing, for lack of a required vaccination, the previous decision to admit the applicant to the establishment.

34. In her subsequent unsuccessful appeals at the administrative level and before the courts, as well as to the Constitutional Court, the applicant argued that an exception to the right protected under Article 5 of the Oviedo Convention (that any intervention in the health field be subject to free and informed consent) could not be provided for by secondary legislation, i.e. the 2006 Ministerial Decree. That Decree did not set an age limit for the MMR vaccination. With reference to "statistical information" and the "opinion of experts", she contended that vaccination presented a risk to health and was not necessary in a democratic society. The decision of 14 July 2008 was contrary to her interests and her right to education. She was prevented from continuing in the Montessori educational system unless she submitted to a medical procedure to which she did not consent.

35. The applicant's arguments were dismissed at all levels, the final decision being given by the Constitutional Court on 9 July 2013. Its conclusion can be summarised as follows.

36. To the extent that the applicant was challenging the legal basis for the vaccination duty, limitations to the guarantees under Articles 5 and 6 of the Oviedo Convention were provided for by an Act of Parliament (the PHP Act) setting out the duty to submit to routine vaccination, in respect of which only particular aspects such as the vaccine types and the conditions for administering them were set out in the 2006 Ministerial Decree adopted in application of that law. This arrangement satisfied the constitutional requirements that duties be imposed on the basis and within the bounds of the law (Article 4 § 1 of the Charter) and that limitations on fundamental rights and freedoms be imposed only by the law (Article 4 § 2 of the Charter). Any case-law inconsistencies in that regard had been resolved (see, in particular, paragraphs 85 et seq. below).

37. In so far as the applicant contested the need to protect public health by means of the vaccination at stake in her case, the objection was dismissed as unfounded. It was noted that she had raised no arguments whatsoever as regards any "circumstances which require in a fundamental manner that the individual's autonomy be preserved" within the meaning of

the Constitutional Court's judgment in the *Vavřička* case (see paragraph 28 above).

38. In that regard, the Constitutional Court specifically pointed out that effective protection of those fundamental rights that were in conflict with the public interest in the protection of health could be ensured through a rigorous assessment of the individual circumstances of each case, rather than by calling into question the vaccination duty as such. In the applicant's case, the courts had duly examined and responded to her objections. She had failed to show that on the facts of her case the duty to undergo the MMR vaccination amounted to a disproportionate interference with her fundamental rights. Nor had she established any circumstance that would have enabled her, in accordance with section 50 of the PHP Act, to be admitted to a nursery school without being vaccinated.

39. Leaving open the question whether attendance at a nursery school fell within the ambit of the right to education, the Constitutional Court nevertheless held that in a situation where the applicant's continued attendance was likely to put at risk the health of others, the public's subjective right to the protection of health took priority. Her non-admission to the nursery school was accordingly free from any error.

40. In addition, the applicant had prevented herself from being able to attend preschool by refusing to meet conditions which were identical for everyone, and had probably not acted in good faith when submitting an inaccurate medical certificate with her initial application for admission.

IV. APPLICATION OF Mr HORNYCH, No. 73094/14

41. The applicant was born on 26 September 2008. At a young age, he suffered from various ailments and did not receive any vaccinations. He claimed that his parents had never actually refused to have him vaccinated and that the failure to vaccinate him was due to the lack of an individualised vaccination recommendation from his paediatrician.

42. When applying for admission to nursery school, his paediatrician certified in the relevant form that the applicant had not been vaccinated. The form also contained the following handwritten text: "[the applicant] is not lacking any routine vaccination required under the law". It was later established by the authorities, and not disputed by the applicant, that the handwritten text had been added by someone other than the paediatrician.

43. By a decision of 27 June 2011, the applicant was refused admission to the nursery school pursuant to section 50 of the PHP Act because he had failed to prove that he had been vaccinated. His administrative appeal was dismissed, the authority having established through telephone contact with the paediatrician that there had been no relevant change in the situation since the above-mentioned certificate had been issued.

44. The applicant further pursued his case through an administrative-law action and a cassation appeal, arguing principally that he had fulfilled all the

statutory admission requirements, since – given that he had not received any individualised vaccination recommendations – he could not be regarded as missing any vaccination required by law. The authorities had failed to establish the opposite. It had been arbitrary and contrary to his right to protection of personal information for them to have obtained further information from his paediatrician by telephone. He had been deprived of the opportunity to comment. It was apparent that no minor offence had been committed in connection with his vaccination status, as no proceedings had been brought in that respect.

45. His appeals were dismissed, *inter alia* on the grounds that although the administrative appeal authority had obtained information from the paediatrician by an extraordinary channel, the applicant had had access to the case-file and the contested decision was based solely on facts of which he had been aware. Moreover, under section 50 of the PHP Act the relevant criterion for being admitted to nursery school was whether or not the vaccination duty had been complied with, and not the reasons for possible non-compliance. Finally, the applicant had not even argued that there were any "circumstances which require in a fundamental manner that the individual's autonomy be preserved", within the meaning of the definition established in the Constitutional Court's judgment in the *Vavřička* case ("the *Vavřička* jurisprudence" – see paragraph 28 above), nor had he relied on any of his fundamental rights.

46. In his ensuing constitutional appeal, the applicant alleged a violation of his rights under Articles 6 § 1 (fairness) and 8 (private and family life, in particular the right to personal development) of the Convention, essentially on the same grounds as before the lower courts. He argued that these courts had failed to assess the medical necessity of the vaccinations he had been required to undergo. In addition, "for the sake of completeness" he submitted specifically that since his parents had not refused to have him vaccinated, they could not be blamed for failing to justify their refusal on the grounds of their beliefs or convictions.

47. On 7 May 2014 the Constitutional Court rejected the appeal as manifestly ill-founded, noting that the courts had duly examined all the relevant elements and endorsing their conclusions.

V. APPLICATIONS OF Mr BROŽÍK AND Mr DUBSKÝ, Nos. 19298/15 AND 19306/15

48. The applicants were born on 11 and 16 May 2011 respectively. Their parents refused to have them vaccinated. It was later noted by the authorities that in their application for admission to nursery school they had submitted a certificate issued by their paediatrician to the effect that they had not been vaccinated on account of their parents' beliefs and convictions.

49. On 2 May 2014 they were refused admission to nursery school with reference to the *Vavřička* jurisprudence and on the grounds that compulsory

vaccination amounted to an acceptable restriction on the right to manifest one's religion or beliefs freely, since it was necessary for the protection of public health and of the rights and freedoms of others.

50. The applicants challenged that decision through an administrative appeal and through an administrative-law action against the subsequent dismissal of that appeal.

51. Together with their administrative-law action, on 18 July 2014 the applicants requested the Hradec Králové Regional Court to adopt an interim measure authorising them to attend a given nursery school from 1 September 2014 pending the outcome of the proceedings on the merits of that action. They argued that they would otherwise be liable to serious harm, consisting in discrimination against them and a limitation of their personal development and access to preschool education. They asserted furthermore that their admission could not pose any risk to the other children who had been vaccinated, and that many adults were not, or were no longer, immunised against the illnesses in question.

52. On 13 August 2014 the Regional Court dismissed the request for an interim measure. It noted that there was no right, as such, of admission to preschool and that such admission was subject to conditions, including that set out in section 50 of the PHP Act. Non-admission was thus envisaged by law and was not a rare occurrence, especially on account of the lack of available places. Accordingly, the impugned decision could not have entailed a serious type of harm justifying the adoption of an interim measure.

53. Relying on Article 6 of the Convention, the applicants challenged this judgment by way of a constitutional appeal. At the same time, they requested the Constitutional Court itself to adopt an interim measure similar to that previously requested from the Regional Court.

54. On 23 October 2014 the Constitutional Court dismissed both the applicants' constitutional appeal and their request for an interim measure as manifestly ill-founded. Emphasising that the proceedings on the merits were still ongoing at the relevant time, it considered that the dismissal of the requests for interim measures had not entailed constitutionally unacceptable consequences. Moreover, the applicants had not demonstrated that it was necessary to adopt interim measures, and the Regional Court's reasoning in that respect was logical, understandable and relevant.

55. Once the Constitutional Court had resolved the matter of the interim measure, it remained to determine the merits of the applicants' administrative-law action. This was dismissed in a judgment of the Regional Court of 10 May 2016. Although further appeals were available, the applicants did not pursue the matter any further.

VI. APPLICATION OF Mr ROLEČEK, No. 43883/15

56. The applicant was born on 9 April 2008. His parents, who are biologists, decided to draw up an individual vaccination plan for him. As a result, he was vaccinated later than provided for by the applicable rules and was not vaccinated against tuberculosis, poliomyelitis or hepatitis B, and did not receive the MMR vaccine.

57. On 22 and 30 April 2010 the principals of two nursery schools refused him admission under section 50 of the PHP Act.

58. In his subsequent unsuccessful appeals at the administrative level and before the courts, including the Constitutional Court, the applicant argued, *inter alia*, that there had been a violation of his right to respect for private and family life, his right to education and his right not to be subjected to discrimination. No account had been taken of his parents' convictions in pursuing his best interests, or of the principle of proportionality. Section 50 of the PHP Act should be set aside. The interference with his rights had been disproportionate, and less radical measures had been available to allow for the protection of public health. His non-admission had had repercussions for the entire family, in that his mother had been obliged to stay at home to look after him.

59. The applicant's arguments were dismissed on grounds that can be summarised as follows, the key decisions being given by the Constitutional Court on 27 January 2015 (validity of section 50 of the PHP Act) and 25 March 2015 (merits of the applicant's individual case).

60. Section 50 of the PHP Act did not breach in any way the rule that some matters were to be regulated solely by an Act of Parliament. It laid down a condition for being admitted to day-care or preschool facilities, with reference to section 46 of the PHP Act. The latter provision defined the scope and content of the underlying duty. To the extent that the applicant might be understood as wishing to challenge the vaccination duty as such, this was beyond the scope of his challenge to section 50 of the PHP Act and should have been raised separately. As this had not been done, the Constitutional Court was prevented from reviewing the vaccination duty in the present proceedings. Nevertheless, its constitutionality had already been examined and upheld in another judgment in an unrelated case, namely no. Pl. ÚS 19/14, concerning a different consequence (a fine) of a breach of the vaccination duty (see paragraphs 90 et seq. below).

61. Having an individual vaccination plan did not fall within any of the discrimination grounds provided for by law. Contrary to the applicant's suggestion, non-admission to nursery school was not a penalty. As regards proportionality, the applicant had not referred to any exceptional circumstances to outweigh the interest of the protection of public health, within the meaning of the *Vavřička* case-law (see paragraph 28 above).

62. The detailed content of the right to education under Article 33 of the Charter was set out in the Education Act (see paragraphs 80 *seq*. below) and

pertained to all types and levels of education. In the Constitutional Court's view, this included preschool education, as this involved a process of acquiring skills, attitudes and knowledge, rather than just childcare or child-minding. A limitation on that right, consisting in a requirement of compliance with the vaccination duty, did not suppress the very essence of the right and clearly pursued the legitimate aim of protecting public health. Moreover, the means provided for achieving this aim were rational and free from any arbitrariness. Vaccination represented an act of social solidarity on the part of those accepting a minimum risk in order to protect the health of society as a whole. This was all the more valid as the number of vaccinated children attending preschool establishments grew.

63. Lastly, with reference to the considerations mentioned in the preceding paragraph as well as in the other constitutional judgment mentioned above (case no. Pl. ÚS 19/14), the Constitutional Court found that the lower courts' conclusions in the proceedings brought by the applicant had an adequate basis in findings of fact and were supported by cogent reasoning. There had accordingly been no breach of the applicant's fundamental rights.

64. The judgment of 27 January 2015 concerning the validity of section 50 of the PHP Act was adopted by a majority. A dissenting judge attached a separate opinion, in which she considered, *inter alia*, that the scope of the vaccination duty extending to nine diseases as a requirement for admission to the preschool system was excessive and that the existing regulations infringed the applicant's basic rights. In her view, linked as it was to the public debate on the possible harmful effects of vaccination, the judgment of the plenary formation had limited itself to general statements about solidarity.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Domestic law

1. *Charter of Fundamental Rights and Freedoms (Constitutional Law no. 2/1993 Coll.)*

65. In so far as relevant, Article 4 provides:

> "1. Duties may be imposed only on the basis and within the bounds of the law and only if the fundamental rights and freedoms of the individual are respected.
>
> 2. Limitations may be placed upon fundamental rights and freedoms only by the law and under the conditions prescribed in [this Charter]."

66. Pursuant to Article 7 § 1:

> "The inviolability of the person and of his or her private life shall be guaranteed. It may only be restricted in the cases provided for by law."

67. The relevant part of Article 15 § 1 reads as follows:

> "Freedom of thought, conscience and religious conviction shall be guaranteed. ..."

68. Under Article 16 § 1:

> "Everybody has the right to manifest freely his or her religion or faith, alone or jointly with others, privately or in public, through religious service, instruction, religious practice, or religious rites."

69. Article 31 provides that:

> "Everyone shall have the right to the protection of his or her health. Citizens shall have the right, on the basis of public insurance, to free health care and to health aids under the conditions provided for by law."

70. As to the scope of the second sentence of Article 31, the Constitutional Court held (constitutional judgment of 10 July 1996, published in the Collection of Laws under no. 206/1996) that its content is limited to what is covered by public insurance, which in turn depends on the amount of the insurance premiums collected. All of the relevant Chapter of the Charter depends on the economic and social level achieved by the State and the attendant standard of living.

71. Under Article 33 § 1:

> "Everybody shall have the right to education. School attendance shall be mandatory for the period specified by law."

72. Pursuant to the relevant part of Article 41 § 1;

> "[The right to education under Article 33] can be relied on only within the scope of the laws adopted for the implementation of that provision."

2. Public-Health Protection Act (Law no. 258/2000 Coll., as amended)

73. This legislation sets out the general framework for vaccination, defining its purpose, personal scope, vaccine types, the conditions for administering vaccination as well as for assessing immunity, and other matters. Section 46(1) and (6) provides for the adoption by the Ministry of Health of implementing measures, regulating in greater detail matters such as the classification of vaccines, the timing of injections and other conditions for the administration of vaccinations, and methods for checking immunity (see below). Moreover, it provides that day-care facilities for children up to the age of three and other types of preschool facilities (i.e. those that receive children until the school year following the date on which they reach the age of six) 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 due to a permanent contraindication (section 50).

3. Decree on Vaccination against Infectious Diseases

74. As provided for in the PHP Act, the Ministry adopted the Decree on Vaccination against Infectious Diseases. In the period under consideration in the present case, there were two successive Decrees in force: Decree no. 439/2000 Coll., as amended, until 31 December 2006, replaced by Decree no. 537/2006 Coll., as amended, from 1 January 2007 onwards. Since the provisions that are relevant to the present case are essentially identical in both instruments, further references to the Decree in this judgment mean the 2006 Decree, unless otherwise indicated.

75. The Decree determines the classification of vaccinations, the conditions for the administration of vaccines and the methods for examining immunity (section 1 (a)).

76. It defines the scope of compulsory vaccination as comprising vaccination against diphtheria, tetanus, whooping cough (pertussis), *Haemophilus influenzae* type b infections, poliomyelitis, hepatitis B, measles, mumps, rubella and – for children with specified health conditions – pneumococcal infections (sections 4, 5 and 6).

77. The Decree also defines the sequence in which the vaccinations are to be administered, normally starting from the ninth week after birth, with at least two months between the first two rounds of vaccination and the third round being administered between the ages of eleven and thirteen months (sections 4 and 5). In the case of some illnesses, initial vaccination (section 2(2)(a)) is to be followed by booster vaccination (section 2(2)(b)).

4. Pharmaceutical Drugs and Medications Act (Law no. 378/2007 Coll.)

78. Sections 25 to 50 regulate the registration of pharmaceutical drugs, including vaccines, by the State Agency for Drug Control.

79. Under section 93b(1), all doctors, dentists and other health-care workers have to report to the above Agency any suspected serious or unexpected side-effects of pharmaceutical drugs, on pain of a fine of up to CZK 300,000 pursuant to section 108(7) (currently equivalent to some EUR 11,350).

5. Education Act (Law no. 561/2004 Coll., as amended)

80. Section 33 defines the aim of preschool education as being to support the development of the personality of the child of preschool age. Such education plays a role in the healthy emotional, intellectual and physical development of children, in their acquisition of basic rules of conduct and fundamental life values, and in their developing of interpersonal relations. Preschool education provides the basic preconditions for continuing with education. It assists in equalising differences in the

development of children before entering basic education and provides adapted pedagogical care to children with special educational needs.

81. Section 34(1) provides that preschool education is organised for children who are generally aged from three to six, but not younger than two. A child younger than two is not entitled to admission to nursery school. This provision was amended with effect from 1 September 2017, making preschool education mandatory from the beginning of the school year following the child's fifth birthday until the beginning of mandatory school attendance. Paragraph 5 of this section includes among the conditions for school admission the vaccination requirement under section 50 of the PHP Act (see paragraph 73 above).

82. Under section 36(3), mandatory school attendance commences at the beginning of the school year following the date on which the child reaches the age of six, unless the child is granted a postponement.

6. Minor Offences Act (Law no. 200/1990 Coll., as amended)

83. At the relevant time, section 29(1)(f), dealing with minor offences in the area of health care, made it a minor offence punishable by a fine of up to the equivalent of some EUR 400 (subsection 2) to fail to discharge a duty imposed in order to prevent the occurrence or spread of infectious diseases.

7. Compensation for Health Damage due to Compulsory Vaccination Act (Law no. 116/2020 Coll.)

84. The Act entered into force on 8 April 2020. It provides for strict liability on the part of the State for damage to health due to compulsory vaccination (section 1). Such compensation is provided for in the event of a particularly grave injury to the health (*zvlášť závažné ublížení na zdraví*) of the vaccinated person and in respect of suffering, loss of income, impairment of one's ability to be useful in society (*ztížení společenského uplatnění*), expenses in respect of the medical care of the vaccinated person, and care for his or her person and his or her household (section 2). The Act provides for an irreversible presumption of a causal connection between the vaccination and the symptoms appearing after the vaccination, in so far as such symptoms are recognised – in secondary legislation yet to be adopted – as likely consequences of the given vaccine (sections 3 and 8).

B. Domestic practice

1. SAC case-law

85. In judgment no. 3 Ads 42/2010 of 21 July 2010, an ordinary chamber of the SAC held that the 2000 Ministerial Decree exceeded the permissible limits in that it regulated matters that were reserved to the legislature. It held that, as a result of the very general wording of

section 46(1) of the PHP Act, the 2000 Ministerial Decree provided for primary rights and duties beyond the limits fixed by the law. Accordingly, the court quashed an administrative decision imposing a fine on parents for failure to comply with their vaccination duty in relation to their children.

86. This opinion was, however, overruled by an extended chamber of that court in a decision of 3 April 2012 (no. 8 As 6/2011) in the case of Ms Novotná. In particular, the extended chamber found as follows:

> "The framework regulation in section 46 of the [PHP] Act on the duty for individuals to undergo vaccination and the precisions added to it by the [2006 Ministerial] Decree satisfy the constitutional requirements to the effect that duties may only be imposed on the basis and within the bounds of the law (Article 4 § 1 of the Charter) and that limitations on fundamental rights and freedoms may only be imposed by the law (Article 4 § 2 of the Charter)."

87. A situation in which primary duties were provided for by law (i.e. by an Act of Parliament) and clarified by secondary legislation within the limits set by that law was compatible with Article 4 § 2 of the Charter. With regard to Article 26 § 1 of the Oviedo Convention, it was similar to Articles 8-11 of the European Convention on Human Rights. In the European Court's case-law, the term "prescribed by law" used in those provisions was interpreted in the substantive sense, so as to include not only a legislative act by a Parliament, but also any accessible and foreseeable legal rule. None of those provisions thus prevented the finer points of the vaccination duty from being regulated by an implementing instrument, provided that this was done on the basis of the law and within its limits. In the present case, the PHP Act provided for a sufficiently clear and precise framework, placing a duty, in a valid and specific manner, on certain groups of individuals to undergo vaccination after having undergone an immunity test. Although it did not define them, section 46 nonetheless brought out the fundamental meaning of the words "valid and specific vaccination". The 2000 Ministerial Decree then specified the types of illnesses, the timetable and other details of the vaccination process. Such a legislative approach made it possible to react with flexibility to a given epidemiological situation and to developments in medical science and pharmacology. However, it did not prevent the limitations on fundamental rights provided for in the Ministerial Decree from being subjected, in specific cases, to an assessment of proportionality by the courts.

88. In judgment no. 4 As 2/2011 of 25 April 2012, the SAC pointed out, *inter alia*, that unlike for the MMR vaccination, the 2006 Ministerial Decree set out legally binding deadlines and age limits for compliance with the vaccination duty in respect of initiation of the primary immunisation series and/or booster doses for diphtheria, tetanus, whooping cough, poliomyelitis, hepatitis B and *Haemophilus influenzae* type b vaccination (under section 4(1) the last dose of the hexavalent vaccine was to be administered before the age of 18 months). It was therefore an error-free and complete

legal norm (*perfektní právní norma*), i.e. non-compliance with it could entail a penalty under the MO Act.

89. In judgment no. 8 As 20/2012 of 29 March 2013, the SAC noted, with regard to the exceptional circumstances capable of outweighing the need for protection of public health within the meaning of the *Vavřička* jurisprudence, that the appellant was not alleging, for example, that submitting to the vaccination would compromise his status, or that of his parents, were they to be members of a religious community, or that it would otherwise prevent them from manifesting their beliefs. A different opinion on the part of the appellant's parents was not sufficient. The vaccination duty pursued a legitimate aim, that of the protection of public health, which outweighed the different views of the parents of the children concerned. While everyone had the right to hold an opinion and to express it freely (Articles 15 and 16 of the Charter), this did not authorise, in a democratic State governed by the rule of law, non-compliance with the regulations in force. A failure to comply entailed the consequences provided for by law.

2. *Case-law of the Constitutional Court*

(a) Judgment no. Pl. ÚS 19/14 of 27 January 2015

90. In the context of proceedings on constitutional appeal no. I. ÚS 1253/14 (see paragraph 93 below), in which the parents of an underage child complained that they had each been fined CZK 4,000 for having refused the routine vaccination of their child, the relevant chamber referred to the plenary formation the appellants' free-standing request (*akcesorický návrh*) to have section 46 of the PHP Act and section 29(1)(f) of the MO Act set aside. The parents relied on the SAC's judgment no. 3 Ads 42/2010 (see paragraph 85 above) and argued that the said provisions were contrary to Article 4 of the Charter. They further argued that the regulations on compulsory vaccination were contrary to Articles 5, 6 and 26 of the Oviedo Convention, since it was not a necessary measure for the protection of public health, in the absence of an objective basis in the form of a complex and independent analysis. Relying on their rights to dignity and respect for their physical integrity, as well as their freedom of thought and conscience, they claimed to have refused vaccination in the child's interests, in order to protect his health. They were thus eligible for an exception within the meaning of the *Vavřička* jurisprudence. They noted in this respect that each individual's attitude towards vaccination was based on his or her personal position, not on objective data. It was thus unthinkable that an administrative authority could re-examine the "correct" or "justified" nature of the parents' conviction in this respect. Referring to Article 24 of the Oviedo Convention, the appellants noted that the State did not assume any liability for the side effects or damage to health caused by vaccination. There was accordingly no fair balance between the demands of the public interest and the individual's rights.

91. By judgment no. Pl. ÚS 19/14 of 27 January 2015, the plenary formation of the Constitutional Court dismissed the above-mentioned free-standing request.

It noted that the regulations on compulsory vaccination fell fully within the competence of the national legislature. As to the rule that certain matters could only be regulated by an Act of Parliament (Article 4 of the Charter), the Constitutional Court endorsed the conclusions of the extended chamber of the SAC in its judgment no. 8 As 6/2011 (see paragraph 86 above). The wording of section 46 of the PHP Act was sufficiently clear and understandable and it duly defined all necessary parameters for the regulation of details by secondary legislation. This arrangement made it possible to react promptly to the epidemiological situation and to the current state of medical and pharmacological knowledge.

Compulsory vaccination amounted to an interference with the individual's physical integrity and, accordingly, with his or her right to respect for private or family life. As a restriction on this fundamental right, the vaccination duty was accompanied by safeguards to minimise any potential abuse and to prevent this medical intervention from being carried out where the conditions were not met (section 46(2) and (3)). The compatibility of this restriction with the right to respect for private life was to be established on the basis of the following five-step test. Firstly, the issue in question had to fall within the material scope of the rights that were limited, which in the present case it manifestly did. Secondly, there had to be an interference with the right in question, which in the case at hand there was, by virtue of an intrusion into the personal integrity of the vaccinated individual and, in the case of children under fifteen, an interference with the right of their parents to decide on matters concerning their care and education, or even, where applicable, with the right to manifest one's religion or beliefs freely. Thirdly, the restriction had to be in accordance with the law, which it was, the term "law" being understood in the substantive sense, including texts of secondary legislation. Fourthly, the restriction had to pursue a legitimate aim, in this instance the protection of health. Fifthly, the restriction had to be necessary, and it was, as it was clear from data provided by national and international experts – the assessment of which was a matter for the legislature and the executive, not for the Constitutional Court – that the approach of general vaccination against the specified infectious diseases was to be recommended and that the interest in protecting public health outweighed the arguments of appellants who were opposed to vaccination.

In an *obiter dictum*, referring to Article 24 of the Oviedo Convention, the Constitutional Court considered that if the State imposed penalties for non-compliance with the vaccination duty, it ought also to envisage the situation where vaccination damaged the health of the individual concerned. Thus, it was incumbent on the legislature to give consideration to

regulations governing State liability for such consequences, which was not uncommon in other States.

(b) Decision no. III. ÚS 3311/12 of 17 August 2015

92. By this decision, the Constitutional Court dismissed a constitutional appeal of parents fined in minor-offence proceedings for having refused the routine vaccination of their child. The court noted, *inter alia*:

> "29 ... [T]he present case is not ... an exceptional case in which compulsory vaccination cannot be enforced due to specific circumstances. In the appellants' case ... the Constitutional Court did not find any exceptional reasons for them not to be penalised for having refused compulsory vaccination of their [child], on the grounds that the penalty would amount to an interference with their freedom of thought and conscience. The Constitutional Court did not find any exceptional or convincingly and consistently claimed reasons for which the appellants had refused to have their [child] vaccinated and which would fundamentally call for respecting their autonomy despite the undisputed and significant public interest in vaccination.
>
> 30. The appellants' arguments ... remained at a completely general level; the appellants ... acted on a general conviction regarding the child's best interest. They refused vaccination on the basis of an opinion that they had reached (only) by studying literature and other resources. A general opinion so presented cannot be understood as unique and constitutionally relevant reasons for refusing vaccination. The appellants' assertions are not sufficiently convincing. Over the course of time they were even inconsistent, because in the proceedings before the administrative authorities the appellants cited their reasons ... in a much more urgent manner than in the proceedings before the administrative courts in which, instead of their personal reasons for refusing compulsory vaccination, the mainstay of their arguments was a general analysis of the ... compliance of compulsory vaccination legislation with the constitutional order. Before the Constitutional Court, they once again focused on the reasons for refusing vaccination in their specific case. However, the appellants did not state any relevant circumstances (they noted that their [child] was a healthy child who only suffered from occasional common illnesses) to support [the existence of] any interference with the constitutionally guaranteed rights and freedoms."

(c) Judgment no. I. ÚS 1253/14 of 22 December 2015

93. The case was brought by parents fined for having refused several of the compulsory vaccinations of their child. In its judgment on their constitutional appeal, the Constitutional Court developed and clarified its conclusions reached in *Vavřička* (see paragraph 28 above). As to the right to a "secular objection of conscience", it held:

> "42. The existence of the constitutional judgment [in the *Vavřička* case] leads to the following postulates regarding the justifiability of the secular objection of conscience, which must be satisfied cumulatively. These are (1) the constitutional relevance of the claims contained in the objection of conscience, (2) the urgency of the reasons that the holder of the fundamental freedom cites in support of his objection, (3) the consistency and persuasiveness of that person's claims, and (4) the social impact that the acceptance of a secular objection of conscience may have in the specific case.
>
> 43. [In the *Vavřička* judgment] the Constitutional Court held that if all of the above requirements were satisfied then compulsory vaccination of the particular person was

not to be insisted upon, i.e. non-compliance with the vaccination duty was not to be penalised, nor was the duty in that case to be enforced by other means. ...

44. The claims underlying the secular conscientious objection to compulsory vaccination acquire a constitutional dimension due to the collision between the protection of public health and the health of the person in whose favour the objection of conscience is applied ... Nor can the parents' claim of an interference with their right of parental care be ignored ... Article 15 § 1 [of the Charter] on freedom of conscience or conviction of holders of a fundamental right remains immanent to the case. Nor can a very frequent argument that vaccination is an interference with bodily integrity be ignored ... Moreover, all these cases involve fundamental rights that can be weighed against each other (with a view to finding an optimal balance).

45. The urgency of the reasons underlying the conscientious objection to compulsory vaccination remains, undoubtedly, subjective in its nature. It is the proverbial aspect of "here and now" which impedes compliance with a lawful order without any exception. It is difficult to define the variety of the content of the objection; undoubtedly, it potentially includes the conviction that irreversible damage can be caused to the health of a close person. If this is a minor who is represented by a statutory representative, the specific aspects of his or her interest in avoiding the vaccination must be taken into consideration.

46. The convincing and consistent character of the claims underlying a secular conscientious objection must be assessed *ad personam* and cannot be subjected to the test of objective truthfulness; the content of those claims must not lack an element based on values or strongly contradict the social environment, but it must pass muster above all with the person making such claims and those who are the closest to him. The Constitutional Court has previously required [in the *Vavřička* case] the author of the objection to communicate with the competent public authority, i.e. to refrain from justifying his conviction only at the later stages of the proceedings. This still applies, and unambiguity and appropriate (reasonable) clarity of the manifestation of that person's conscience must be a matter of course.

47. Finally, with all due respect for the autonomy of manifestations of will, the social impact of the secular objection of conscience, if it is to be accepted, must not exceed the sphere of the legitimate aims relevant for the given field of law to an excessive degree. In this specific case this means, *inter alia*, that the desirable level of vaccination coverage ... must be taken into account. The exception granted must not be associated with conclusions that would allow such exceptions to become the rule.

...

49. As regards the relation between the two types of conscientious objections, both religious and secular, the Constitutional Court concludes that in a secular State (Article 2 § 1 of the Charter) there is no reason to treat them differently. ...

50. ... [R]efusal of compulsory vaccination on the grounds of religion and belief, which cannot be completely ruled out depending on the specific circumstances, must remain a restrictively perceived exception, for which the Constitutional Court has already opened some space on account of strong reasons, but not a dispensation granted automatically to a specific religion or a group of persons professing a specific belief.

51. All of the above applies with equal force also in cases where a certain person is to undergo compulsory vaccination and a secular objection of conscience is raised ... [A]n exception from the statutory duty may be considered only in exceptional cases closely linked to the person subject to the vaccination duty, or to persons closely

related to such person (a highly adverse reaction to previous vaccination in the case of that person, that person's child, etc.). The opposite finding would contradict the fact that compulsory vaccination serves the protection of public health, such protection being the preferred option in the law as approved by the Constitutional Court in its judgments nos. Pl. ÚS 19/14 and Pl. ÚS 16/14."

II. COMPARATIVE MATERIAL

A. Constitutional case-law

94. The following relevant constitutional judgments are included in the CODICES database of the Venice Commission.

1. France

95. In case no. 2015-458 QPC, the Constitutional Council considered a request from the Court of Cassation for a preliminary ruling on the constitutionality of certain provisions of the Public Health Code. Those provisions related to compulsory vaccination against diphtheria, tetanus and poliomyelitis for minor children under the responsibility of their parents. The applicants in the original proceedings claimed that the compulsory vaccinations could entail a health risk, in breach of the constitutional requirement of health protection.

96. In a decision of 20 March 2015, the Constitutional Council ruled that the provisions in question were in conformity with the Constitution. It observed that, by making the given vaccinations compulsory, the legislature had intended to combat three diseases that were very serious and contagious or could not be eradicated. In doing so, it had made each of these vaccinations compulsory only on condition of there being no known medical contraindication.

97. The Constitutional Council ruled that the legislature was free to shape a vaccination policy to protect individual and public health. It was not for the Constitutional Council, which did not enjoy the same general power of assessment and decision-making as Parliament, to call into question the provisions enacted by the legislator, having regard to the state of scientific knowledge, or to seek to establish whether the objective of health protection set by the legislature might have been attained by other means, since the arrangements provided for by the law were not manifestly inappropriate to the objective pursued.

2. Hungary

98. In a constitutional judgment of 20 June 2007 in case no. 39/2007, the Constitutional Court examined a petition lodged by a married couple who were refusing to have their child vaccinated, and who had challenged the constitutionality of the 1997 Health Act providing for compulsory vaccination. A failure to comply warranted an administrative order for the

given vaccine to be carried out, the order being directly enforceable, regardless of any appeal.

99. The court found, *inter alia*, that the protection of children's health justified compulsory vaccination at certain ages and accepted the legislature's position, based on scientific knowledge, that the benefits of vaccination for both the individual and society outweighed any possible harm due to side-effects. The system of compulsory vaccination thus did not contravene children's right to physical integrity. At the same time, the court acknowledged that the system of compulsory vaccination might result in more significant harm for parents who, for reasons of religious conviction or conscience, did not agree with vaccination. The regulation was however in accordance with the requirements of the neutrality of the State. The legal norms in question, being binding on everybody and protecting the health of the children concerned, all other children, and in fact society as a whole, were based on postulates of the natural sciences, rather than the acceptance of the truth content of different ideologies.

100. However, there had been an unconstitutional omission to legislate, as the legislature had failed to provide an effective legal remedy against the refusal of exemptions from compulsory vaccination. In particular, the statutory provision permitting the immediate enforcement of an order for vaccination, with no recourse to any legal remedy, was unconstitutional and accordingly repealed.

3. North Macedonia

101. In case no. U.Br. 30/2014 the Constitutional Court reviewed the constitutionality of certain statutory provisions pertaining to the compulsory vaccination of children and the consequences of non-compliance with it. The legislation in question provided for the compulsory vaccination of all persons of a certain age against tuberculosis, diphtheria, tetanus, whooping cough, polio, measles, mumps, rubella, *Haemophilus influenzae* type b infections and hepatitis B. In its judgment of 8 October 2014, the court held, *inter alia*, as follows.

102. Mandatory vaccination could not be called into question with regard to the constitutional provisions on the rights and duties of citizens in relation to the protection and promotion of their own health and that of others. Neither could it be questioned with regard to the provisions on the right and duty of parents to take care of and raise their children. A refusal of a vaccination by the parents not only endangered the health of their children, but also the health of other persons who had not been vaccinated on account of medical contraindications, and it thus denied them the right to a healthy life.

103. In order to safeguard the health of the child and the child's right to health, which was subject to a special level of protection, it was justified

to deny the parents' freedom to refuse vaccination, since the right of the child to health prevailed over the parents' right to choose.

104. Moreover, the legislature was not prevented from regulating penal policy in respect of a breach of the vaccination duty by making it punishable by a fine.

105. Similarly, there was no obstacle for the legislature to make enrolment in primary school dependant on the parents' submitting proof of vaccination of the child. In that regard, the court noted specifically that since all children of the given age were eligible for enrolment in the first grade, a large number of students would enrol from different areas and backgrounds, which carried an inherent risk of the spread of certain diseases. Moreover, parents who refused to vaccinate their children were to be reminded that other parents also had the right to protection from serious illness in respect of their children, and that unvaccinated children posed a greater risk of spreading the disease, especially in child-care facilities, schools and other educational establishments.

4. Italy

(a) Constitutional judgment no. 5/2018

106. In this judgment, delivered on 22 November 2017, the Constitutional Court considered the constitutional validity of a decree-law introduced as a matter of urgency to increase the number of compulsory vaccinations from four to ten. The decree-law made access to early childhood educational services conditional on the receipt of all ten vaccines. The sanction for failure to comply was an administrative fine. This was challenged on a number of grounds, including as an unjustifiable interference with the constitutional guarantee of individual autonomy. This argument was dismissed with the following reasoning.

107. The court noted the preventive nature of vaccination, the critically unsatisfactory level of vaccination in Italy at the given time, and the existing trends suggesting that the rate of vaccination was deteriorating. It found that the legislation was within the scope of the discretion and political responsibility of the authorities, who were expected to assess the overriding need to intervene urgently and prior to the emergence of crisis scenarios, and to do so in the light of new data and new epidemiological phenomena. Furthermore, they were expected to act consistently with the principle of precaution, which was inherent in the approach to preventive medication, and was of fundamental importance where public health was concerned.

108. Pointing out that there was no scientific basis for the existing trends in popular opinion which considered vaccination to be futile or dangerous, the court noted that, in medical practice, recommendation and obligation were conjoined concepts and, therefore, moving six vaccinations from being simply recommended to being compulsory did not represent a significant change in their status. It also held that requiring a certificate for school

enrolment and imposing fines were both reasonable measures for the legislature to take, not least where it had provided for initial steps to be taken before the imposition of such sanctions, i.e. one-to-one meetings with parents and guardians to inform them about the efficacy of vaccinations.

109. The court drew attention to its established case-law to the effect that, in the area of vaccinations, there was a requirement for balance between the individual right to health (including freedom concerning treatment) and the coexistent and reciprocal rights of others and the interests of the community, as well as, in the case of compulsory vaccinations, the interests of children, who required protection even *vis-à-vis* parents who did not fulfil their duties of care.

110. As to the interests of minor children, they were to be pursued first of all through their parents' exercise of their joint right and duty to take action that was well-suited to protecting the health of their children. That freedom did not however extend to making choices that were potentially detrimental to the health of minor children.

111. A law imposing a health-related treatment was not incompatible with the Constitution if: the treatment was intended not only to improve or maintain the health of the recipient, but also to preserve the health of others; the treatment was not expected to have a negative impact on the health of the recipient, with the exclusive exception of those consequences that normally arose and, as such, were tolerable; and, in the event of further injury, the payment of just compensation to the injured party was provided for, separate and apart from any damages to which they might be entitled.

112. The court also noted that the issue of vaccination involved many constitutional values, the coexistence of which left room for legislative discretion in choosing the means by which to ensure the effective prevention of infectious diseases. That discretion had to be exercised in the light of the various health and epidemiological conditions, as ascertained by the responsible authorities and of the constantly evolving discoveries of medical research, to which the legislature had to turn for guidance when making its choices in that area.

(b) Constitutional judgments nos. 307/1990 and 118/1996

113. In its earlier judgment no. 307/1990, given on 14 June 1990, the Constitutional Court declared unconstitutional a law making provision for compulsory anti-poliomyelitis vaccination, due to its failure to provide for compensation for those suffering damage to their health caused by the vaccine, in the absence of liability for negligence.

114. The legislation subsequently enacted (Law no. 210 of 25 February 1992) was examined by the Constitutional Court in judgment no. 118/1996, of 18 April 1996. The court noted the two aspects of health in constitutional law: the individual and subjective aspect concerning a fundamental right of the individual; and the societal and objective aspect concerning health as a

public interest. The risk of damage to an individual's health could not be completely avoided. The legislature had therefore struck a balance, giving precedence to the collective aspect of health. Yet nobody could be asked to sacrifice their health to preserve that of others without being granted just compensation for damage caused by medical treatment. The court found the law to be contrary to the Constitution, in that it failed to make provision for compensating those whose health was injured by compulsory vaccination before the law entered into force. It observed that such damage gave rise to a claim for compensation under the Constitution itself without any liability for negligence being taken into consideration.

(c) Constitutional judgment no. 268/2018

115. This judgment, which was delivered on 22 November 2017 as judgment no. 5/2018 (see paragraph 106 above), concerned a legislative situation in which no compensation was available for damage to health caused by a vaccination which was recommended rather than compulsory. The court observed that there was no qualitative difference between compulsory and recommended vaccinations, the key issue being the essential objective of preventing infectious diseases that was pursued by both types. Accordingly, the exclusion of compensation was contrary to the Constitution.

5. Republic of Moldova

116. In its judgment no. 26 of 30 October 2018, the Constitutional Court examined a challenge to certain legislative provisions making the admission of children to community groups and educational and recreational institutions contingent upon their systematic prophylactic vaccination, the complaint being that this restricted the access of children to education.

117. Among other things, the court noted that the legitimate aims pursued by the challenged provisions were the protection of children's health and public health from severe illnesses which spread more when vaccination rates were lower. A restriction on access by unvaccinated children, who had no contraindications, for a limited time pending their vaccination, was a less intrusive measure in terms of the right to respect for private life and to education and would efficiently achieve the aims pursued.

118. The court balanced the principle of health protection with the principles of access to education and respect for private life. Refusing to vaccinate children with no contraindications might not only entail their possible exclusion, pending their vaccination, but also exposed them to the risk of contracting an illness. The damage to their health also had negative effects on other rights they were entitled to enjoy.

119. Children with contraindications, while eligible for admission, were also exposed to the risk of contracting a communicable illness from unvaccinated children who had no contraindications. The consequences of

an individual's action on their innocent peers could not be ignored. In the given context, the rights of the individual were not exercised in an existential vacuum, but within an organised society.

120. The children of parents who did not wish them to be vaccinated in the absence of any contraindications had alternative means of learning. Also, from the perspective of leisure opportunities for children in this category, the exercise of social private life was not a central aspect of their right to respect for private life.

121. The differential treatment of vaccinated children compared to those who could be vaccinated but were not was objectively justified and reasonable.

6. Serbia

122. In case no. IUz-48/2016, the Constitutional Court examined several challenges to the constitutionality of certain legislative provisions concerning compulsory vaccination and their conformity with international agreements ratified by Serbia.

123. As regards the necessity in a democratic society of the measures mandated by the contested provisions, the court noted that the available 2015 immunisation records for the vaccines in the immunisation schedule showed the lowest vaccination rate in ten years. This increased the risk of epidemics of communicable diseases which had been prevented for decades by vaccination, because a high level of collective immunity was needed to prevent an outbreak of an epidemic. In view of all the circumstances, including the duty of everyone to respect the public interest and not jeopardise the health of others, the court found that the criterion of necessity was fulfilled.

124. Concerning the argument that, compared to children who had been vaccinated, those who remained unvaccinated were discriminated against because they were deprived of their constitutionally guaranteed right to education, the court found that the fact that children's attendance at educational institutions was conditional on their having been vaccinated could not be construed as being relevant in constitutional terms to any form of discrimination in respect of the right to education. This was so because all children in certain age groups were subject to vaccination, unless this was contraindicated on health-related grounds. As that duty pertained equally to all persons belonging to the given group, those who did not comply with it could not be considered discriminated against *vis-à-vis* those who did, because they were not in the same or a similar situation.

7. Slovakia

125. The relevant case-law is referred to in paragraph 229 below.

8. Slovenia

126. In a judgment of 12 February 2004 in case no. U-I-127/01, the Constitutional Court upheld the constitutionality of a system of compulsory vaccination against tuberculosis, diphtheria, tetanus, whooping cough, infantile paralysis, measles, mumps, rubella and hepatitis B. However, it found deficiencies in the existing rules and their operation as regards the mechanism for individuals to claim exemption from the vaccination duty on the grounds of health contraindication.

127. Moreover, the court found a further deficiency in that the legislation did not regulate the right to compensation for damage to health resulting from vaccination side-effects. In particular, under the principle of solidarity, which itself was the basis for making vaccination compulsory, the State ordering such a measure for the benefit of everyone must be required to pay compensation to those who experienced harmful side-effects.

B. United Kingdom

128. In a case concerning the vaccination of a baby placed in the care of the local authorities, notwithstanding the objections of the parents (*Re H (A Child)(Parental Responsibility: Vaccination*), [2020] EWCA Civ 664), the judgment of the Court of Appeal of 22 May 2020 concluded as follows:

> "(i) Although vaccinations are not compulsory, the scientific evidence now clearly establishes that it is in the best medical interests of children to be vaccinated in accordance with Public Health England's guidance unless there is a specific contra-indication in an individual case.
>
> (ii) Under [the applicable statutory provision] a local authority with a care order can arrange and consent to a child in its care being vaccinated where it is satisfied that it is in the best interests of that individual child, notwithstanding the objections of parents.
>
> (iii) The administration of standard or routine vaccinations cannot be regarded as being a 'serious' or 'grave' matter. Except where there are significant features which suggest that, unusually, it may not be in the best interests of a child to be vaccinated, it is neither necessary nor appropriate for a local authority to refer the matter to the High Court in every case where a parent opposes the proposed vaccination of their child. To do so involves the expenditure of scarce time and resources by the local authority, the unnecessary instruction of expert medical evidence and the use of High Court time which could be better spent dealing with one of the urgent and serious matters which are always awaiting determination in the Family Division.
>
> (iv) Parental views regarding immunisation must always be taken into account but the matter is not to be determined by the strength of the parental view unless the view has a real bearing on the child's welfare."

III. INTERNATIONAL AND EUROPEAN LAW AND PRACTICE

A. International Covenant on Economic, Social and Cultural Rights

129. The Covenant, which is a part of the legal order of the Czech Republic (Decree of the Minister of Foreign Affairs no. 120/1976 Coll., in conjunction with Article 1 of Constitutional Law no. 4/1993 Coll.), reads in its relevant part as follows:

Article 12

"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

...

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

..."

130. In General Comment No. 14 on the right to the highest attainable standard of health, published on 11 August 2000 (E/C.12/2000/4), the UN Committee on Economic, Social and Cultural Rights noted, *inter alia*:

"[Article 12.2 (c). The right to prevention, treatment and control of diseases]

16. ... The control of diseases refers to ... the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

...

[Specific legal obligations]

36. The obligation to fulfil requires States parties, *inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases ....

...

[Core obligations]

44. The Committee also confirms that the following are obligations of comparable priority:

...

(b) To provide immunization against the major infectious diseases occurring in the community;

(c) To take measures to prevent, treat and control epidemic and endemic diseases."

131. In its Concluding observations as part of the periodic review of individual States, the UN Committee on Economic, Social and Cultural Rights has repeatedly emphasised the duty of preventive vaccination of the

highest possible percentage of the population (see, for example, observations of 7 June 2010 on Kazakhstan (E/C.12/KAZ/CO/1), § 4). It has also criticised a decreased rate of vaccination (see, for example, observations of 13 December 2013 on Egypt (E/C.12/EGY/CO/2-4), § 21) and called for a reversal of that negative trend (see, for example, observations of 13 June 2014 on Ukraine (E/C.12/UKR/CO/6), § 19).

B. United Nations Convention on the Rights of the Child

132. This Convention is likewise a part of the legal order of the Czech Republic (Notice of the Federal Ministry of Foreign Affairs no. 104/1991 Coll., in conjunction with Article 1 of Constitutional Law no. 4/1993 Coll.).

Article 3 § 1 provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 24 provides as relevant:

> "1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health ... States Parties shall strive to ensure that no child is deprived of his or her right of access to ... health care services.
>
> 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
>
> (a) To diminish infant and child mortality;
>
> (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
>
> (c) To combat disease ..., including within the framework of primary health care ...;
>
> ...
>
> (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health ...;
>
> (f) To develop preventive health care ..."

133. According to General Comment No. 15 by the United Nations Committee on the Rights of the Child in relation to the right of the child to the enjoyment of the highest attainable standard of health, published on 17 April 2013 (CRC/C/GC/15), the realisation of this right entails the universal availability of immunisation against the common childhood diseases.

134. In its Concluding observations as part of the periodic review of individual States, the UN Committee on the Rights of the Child often emphasises the need to strengthen the system of vaccination of children, including increased vaccination coverage, and recommends the full vaccination of all children. As regards the Czech Republic, in observations

of 18 March 2003 the Committee noted that the vaccination uptake was excellent (CRC/C/15/Add.201, § 3).

C. Documents of the World Health Organisation (WHO)

135. In its "Global Vaccine Action Plan" published in 2013 the WHO recommended attaining a national coverage rate of at least 90% in relation to all vaccines that form part of national immunisation programmes. As regards vaccination in general, it made the following observations:

> "Overwhelming evidence demonstrates the benefits of immunisation as one of the most successful and cost-effective health interventions known. Over the past several decades, immunization has achieved many things, including the eradication of smallpox, an accomplishment that has been called one of humanity's greatest triumphs. Vaccines have saved countless lives, lowered the global incidence of polio by 99 percent and reduced illness, disability and death from diphtheria, tetanus, whooping cough, measles, *Haemophilus influenzae* type b disease, and epidemic meningococcal A meningitis.
>
> ...
>
> Immunization is, and should be recognized as, a core component of the human right to health and an individual, community and governmental responsibility. Vaccination prevents an estimated 2.5 million deaths each year. Protected from the threat of vaccine-preventable diseases, immunized children have the opportunity to thrive and a better chance of realizing their full potential. These advantages are further increased by vaccination in adolescence and adulthood. As part of a comprehensive package of interventions for disease prevention and control, vaccines and immunization are an essential investment in a country's – indeed, in the world's – future.
>
> ...
>
> The last century was, in many respects, the century of treatment, resulting in dramatic reductions in morbidity and mortality, with the discovery and use of antibiotics as one of the biggest agents of change in health. This century promises to be the century of vaccines, with the potential to eradicate, eliminate or control a number of serious, life-threatening or debilitating infectious diseases, and with immunization at the core of preventive strategies."

136. One of the main aims of the WHO's Global Immunisation Vision and Strategy is to immunise "more people against more diseases".

D. European Social Charter

137. The Social Charter entered into force in respect of the Czech Republic on 3 December 1999 (Notice of the Ministry of Foreign Affairs no. 14/2000 Collection of international treaties). It forms part of the legal order of the Czech Republic and in case of conflict has precedence over statute (Article 10 of the Constitution). The relevant provision reads as follows:

Article 11 – The right to protection of health

"With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

...

3. to prevent as far as possible epidemic, endemic and other diseases."

138. In the case of *Médecins du Monde – International v. France* (collective complaint no. 67/2011, decision on the merits of 11 September 2012) the European Committee of Social Rights explained, *inter alia*:

"160. Article 11 § 3 requires states to ensure high immunisation levels, in order to not merely reduce the incidence of these diseases, but also to neutralise the reserves of viruses and thus to reach the objectives set by the [WHO]. The Committee underlines that vaccinations on a large scale are recognised as the most efficient and most economical means of combating infectious and epidemic diseases (see Conclusions XV-2, Belgium, Article 11 § 3). This concerns the population in general ..."

139. If the vaccination coverage in a Council of Europe Member State is too low, the Committee will find that the situation is not in conformity with Article 11 § 3 of the Charter (see e.g. Conclusions XV-2, Belgium, 31 December 2001), or it can warn the State concerned. The Committee considers the WHO targets to be the reference criteria.

140. In the conclusions of 2 January 2010 (XIX-2/def/CZE/11/3/EN) on review of the Czech Republic, the Committee found, pending receipt of the information requested, that the situation in the Czech Republic, including that in matters of immunisation, was in conformity with Article 11 § 3 of the Charter.

E. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention)

141. The Oviedo Convention was opened for signature on 4 April 1997 and entered into force in respect of the Czech Republic on 1 October 2001 (Notice of the Ministry of Foreign Affairs no. 96/2001 Collection of international treaties). It forms part of the legal order of the Czech Republic and has precedence over statute in case of conflict (Article 10 of the Constitution). The relevant parts read as follows:

Article 5 – General Rule

"An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time."

Article 6 – Protection of persons not able to consent

"...

2. Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law.

The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity.

..."

Article 24 – Compensation for undue damage

"The person who has suffered undue damage resulting from an intervention is entitled to fair compensation according to the conditions and procedures prescribed by law."

Article 26 – Restrictions on the exercise of the rights

"1. No restrictions shall be placed on the exercise of the rights and protective provisions contained in this Convention other than such as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others.

..."

F. Recommendation 1317 (1997) of the Parliamentary Assembly of the Council of Europe (PACE), entitled "Vaccination in Europe"

142. The relevant passages of the Recommendation, which was adopted on 19 March 1997, read as follows:

"5. The Assembly considers that efforts to improve the immunisation level should not be concentrated solely on the plight of the countries undergoing transition. The immunisation level of populations in western Europe has been steadily declining in recent years. The low percentage of fully vaccinated people, coupled with outbreaks of infectious diseases in the same geographic area, raises fears of major epidemics in Western Europe too.

6. The Assembly therefore recommends that the Committee of Ministers invite member states:

6.1. to devise or reactivate comprehensive public vaccination programmes as the most effective and economical means of preventing infectious diseases, and to arrange for efficient epidemiological surveillance;

...

7. The Assembly furthermore invites the Committee of Ministers:

7.1. to define a concerted pan-European policy on population immunisation, in association with all partners concerned, for example the WHO, Unicef and the European Union, aimed at the formulation and observance of common quality standards for vaccines, and to ensure an adequate supply of vaccines at a reasonable cost;

7.2. to call upon member states to ratify the European Social Charter of the Council of Europe, in particular Article 11, securing 'The right to protection of health', and to instruct the Charter's supervisory bodies to pay due attention to the fulfilment of this undertaking."

G. Resolution 1845 (2011) of the PACE, entitled "Fundamental rights and responsibilities"

143. The relevant passages of the Resolution, which was adopted on 25 November 2011, read as follows:

"1. Rights, duties and responsibilities cannot be dissociated from each other. Living as members of society inevitably entails duties and responsibilities as well as rights.

...

4. Some duties are already established in international human rights instruments and national legal orders. These duties are indicative of the existence of unwritten fundamental responsibilities.

5. Duties imposed by law are subject to the proportionality principle. When a burden is placed on an individual, in the name of the general interest, a fair balance has to be struck between the various interests at stake.

6. Likewise, responsibilities can never be so heavy that assuming them would bring the individual's rights, particularly his or her fundamental rights, into jeopardy. Responsibilities should remain reasonable at all times.

...

8. The Assembly:

8.1. hereby identifies the following set of fundamental responsibilities:

8.1.1. all individuals have the general fundamental responsibility ... to respect the rights of others whilst exercising their own rights;

8.1.2. furthermore, all individuals have specific fundamental responsibilities to respect and protect human life, ... to show solidarity, to act responsibly towards children, ...;

8.2. emphasises that these fundamental responsibilities can never be construed as impairing, restricting or derogating from the rights and freedoms contained in the [Convention], the revised European Social Charter ... and other international and regional human rights instruments;

8.3. calls on the member states of the Council of Europe to take these general and specific fundamental responsibilities into account in a proportional way when dealing with individuals."

H. Law of the European Union

144. Title XIV of Part Three of the Treaty on the Functioning of the European Union, in its consolidated version, deals with public health. Its relevant part reads:

Article 168

"1. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical ... illness and diseases, and obviating sources of danger to physical ... health. Such action shall cover the fight against the major health scourges, ... , their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.

...

2. The Union shall encourage cooperation between the Member States in the areas referred to in this Article ...It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas.

...

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

...

5. The European Parliament and the Council ... may also adopt incentive measures designed to ... combat the major cross-border health scourges, measures concerning ... combating serious cross-border threats to health..."

145. Article 35 of the Charter of Fundamental Rights of the European Union, dealing with health care, and appearing under Title IV, "Solidarity", provides:

"Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities."

146. In response to a reference for a preliminary ruling submitted by the Supreme Court of Slovakia, originating in proceedings concerning parents' duty to have their underage children vaccinated against certain diseases, the Court of Justice of the European Union issued an Order of 17 July 2014 in *Milica Široká v Úrad verejného zdravotníctva Slovenskej republiky* (Case C-459/13, EU:C:2014:2120, paragraph 25) to the effect that:

"... there is no evidence in the order for reference to indicate that the objective of the main proceedings, relating to the vaccination of underage children against certain diseases, concerns the interpretation or application of a rule of Union law other than those set out in the Charter. It follows that the main proceedings do not correspond to a situation in which Union law is being implemented within the meaning of Article 51, paragraph 1, of the Charter."

147. In 2005 the European Centre for Disease Prevention and Control was established. Its mission is to identify, assess and communicate current and emerging threats to human health posed by infectious diseases.

148. On 1 December 2014 the Council of the European Union adopted conclusions concerning vaccination as an effective tool in public health, noting, *inter alia*, that:

> "... communicable diseases, including some re-emerging ones, such as Tuberculosis, measles, pertussis and rubella, still present a public health challenge and can cause a high number of infections and deaths, and that the recent emergence and outbreaks of communicable diseases, such as polio, avian influenza H5N1 and H7N9 ... and Ebola virus disease have confirmed that vigilance must remain high also with respect to diseases that are not currently present in the territory of the Union.
>
> ...
>
> [V]accination programmes are the responsibility of individual Member States and ... various vaccination schemes exist in the EU ...
>
> [M]any vaccines used in community vaccination programmes have been able to prevent disease in individuals and at the same time interrupt the circulation of pathogens through the so-called 'herd immunity' phenomenon, contributing to a healthier global society. Community immunity could thus be considered an objective in national vaccination plans."

149. The resolution of the European Parliament adopted 19 April 2018 on vaccine hesitancy and the drop in vaccination rates in Europe calls on Member States to ensure sufficient vaccination of health-care workers, take effective steps against misinformation, and implement measures for improving access to medicines. It also calls on the Commission to facilitate a more harmonised schedule for vaccination across the European Union.

150. On 7 December 2018 the Council of the European Union adopted its recommendation on strengthened cooperation against vaccine-preventable diseases. The recommendation recognises that vaccination is one of the most powerful and cost-effective public-health measures developed in the twentieth century and remains the main tool for primary prevention of communicable diseases. Moreover, among the recommendations for Member States it includes the following:

> "1. Develop and implement vaccination plans, at national and/or regional level, as appropriate, aimed at increasing vaccination coverage with a view to reaching the goals and targets of the WHO's European Vaccine Action Plan by 2020. These plans could include, for example, provisions for sustainable funding and vaccine supply, a life-course approach to vaccination, capacity to respond to emergency situations, and communication and advocacy activities.
>
> 2. Aim to achieve by 2020, for measles in particular, a 95 % vaccination coverage rate, with two doses of the vaccine for the targeted child population, and work towards closing the immunity gaps across all other age groups, with a view to eliminating measles in the EU.
>
> 3. Introduce routine checks of vaccination status and regular opportunities to vaccinate across different stages of life, through routine visits to the primary healthcare system and through additional measures taken, for example when beginning (pre-)school, in the workplace or in care facilities, according to national capacities."

151. The 2018 report by the European Commission on the state of vaccine confidence in the EU includes the following observations:

> "High confidence in vaccination programmes is crucial for maintaining high coverage rates, especially at levels that exceed those required for herd immunity. Across the European Union (EU), however, vaccine delays and refusals are contributing to declining immunisation rates in a number of countries and are leading to increases in disease outbreaks. Recent measles outbreaks – the highest in the EU for seven years – illustrate the immediate impact of declining coverage on disease outbreaks."

IV. EXPERT MATERIAL RELIED ON BY THE GOVERNMENT

152. On 6 November 2015 the Czech Vaccinology Society (*Česká vakcinologická společnost*), the key advisory body in the field of State vaccination policy in the Czech Republic, and the Czech Paediatric Society (*Česká pediatrická společnost*) issued a joint statement for the purposes of these proceedings before the Court. They, as well as the Association of General Practitioners for Children and Youth (*Sdružení praktických lékařů pro děti a dorost*) and the Czech Medical Chamber (*Česká lékařská komora*), resolutely supported maintaining the compulsory vaccination system as it exists in the Czech Republic. It was noted, *inter alia*, that vaccination was undoubtedly one of the most efficient preventive public-health measures and that, since the introduction of compulsory vaccination, the occurrence of and deaths caused by vaccine-preventable diseases had radically dropped. Aiming mainly to protect children suffering from severe chronic diseases, for whom vaccination was ineffective or contraindicated, it secured high global vaccination coverage and averted human deaths and economic losses.

Any failure to follow the immunisation schedule was dangerous both for the unvaccinated individual, since it increased the risk of health damage and even death caused by a preventable infectious disease in extreme cases, and for the entire population, if a higher percentage of children were not properly vaccinated. Should vaccination coverage even slightly decline and the non-immune population percentage rise, disease outbreaks could reappear even for diseases that are no longer common nowadays.

153. The Chief Medical Officer of the Czech Republic (*Hlavní hygienik České republiky*) issued an opinion for the purposes of the present proceedings before the Court. He referred to the concept of "herd immunity" as a special immunity phenomenon occurring when a significant proportion of the population was vaccinated against a specific disease, thereby providing a measure of indirect protection for individuals who had not been vaccinated or in whom immunity gained by vaccination had not developed. A dramatic drop in that coverage, for example to less than 95% in relation to measles, would mean that the herd immunity threshold would

not be achieved, transmission of infections within the population could increase and the incidence of new cases of the disease could rise.

154. In 2010 the National Immunisation Commission (*Národní imunizační komise*) ("the NIC") was set up as an advisory body of the Ministry with the principal mission to identify infectious diseases in respect of which the outbreak rate could be influenced by vaccination, to determine the optimum strategy for vaccination policy in the Czech Republic, to determine the State's priorities in vaccination and to discuss proposals to amend the vaccination strategy. The NIC is composed of representatives of the Ministry and of a number of learned societies with relevant expertise. It has the power to request cooperation from other external experts. The minutes of its meetings are published on the Ministry's website.

155. In 2015, in a special issue of its information bulletin, the State Agency for Drug Control (see paragraph 78 above) addressed the issue of adverse side-effects of vaccines, as reported in 2014. The vast majority of those effects had in fact been expected reactions, already described in the summary of product characteristics for the medicinal product concerned.

156. In June 2015 the Ministry set up the Working Commission for Vaccination (*Pracovní komise pro problematiku očkování*) to provide a broad platform for discussions between experts and the public about vaccination strategy in the Czech Republic, and included in its membership the Czech Human Rights League and ROZALIO, a third-party intervener before the Court in the present case.

157. In 2012 the Vaccine European New Integrated Collaboration Effort (VENICE), a network of national experts from all Member States of the European Union and Iceland and Norway working in the field of immunisation, published a study entitled "Mandatory and recommended vaccination in the EU, Iceland and Norway: results of the VENICE 2010 survey on the ways of implementing national vaccination programmes". This study provides, *inter alia*, an overview of the compulsory vaccination situation in the countries concerned. Another overview of this situation was carried out by the Czech Parliamentary Institute in a report of June 2014. According to these sources, fifteen countries did not impose any compulsory vaccinations and fourteen countries required one or more vaccinations. In eight of the latter, vaccination was compulsory against the same or a higher number of diseases as in the Czech Republic. Although in some States vaccination of children was not compulsory in general, it could be ordered in specific cases, either collectively in response to an emergency or in other circumstances. As regards legislation on strict liability for health damage caused by vaccination, according to a WHO study published in 2011, only nineteen countries in the world had special compensation schemes, of which thirteen were Council of Europe member States.

THE LAW

I. PRELIMINARY OBSERVATION

158. At the outset, the Court points out that the present case relates to the standard and routine vaccination of children against diseases that are well known to medical science. These six applications, as indicated above, were lodged between 2013 and 2015 and concern the policy of the respondent State to make the set of relevant vaccines compulsory.

II. JOINDER OF THE APPLICATIONS

159. Having regard to their similar subject matter, the Court finds it appropriate to examine the applications jointly in a single judgment (Rule 42 § 1 of the Rules of Court).

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

160. The applicants complained that it had been arbitrary to impose a fine on Mr Vavřička 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."

A. Admissibility

1. Application of Mr Vavřička

161. In relation to the amount of the fine imposed on the applicant, the Government pointed out that it had been rather negligible (equivalent to EUR 110 at the relevant time). The applicant had not therefore suffered any significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention. Moreover, in their view the remaining conditions for the application of this provision were also fulfilled, as a result of which the application was inadmissible as a whole.

162. The applicant argued that, at the relevant time, he had been unemployed, had had no income and had been going through divorce proceedings. The amount of the fine represented more than half of the statutory minimum monthly wage at the time. In addition to the financial

burden it had placed on him, he had been distressed by uncertainty as to what other measures the authorities would take in response to his failure to respect the vaccination schedule concerning his children.

163. The Court will examine the Government's objection in so far as it concerns the applicant's complaint under Article 8. It considers that this objection cannot be accepted. This application, along with the others, is now before the Court's Grand Chamber specifically because it was considered to raise serious questions affecting the interpretation of the Convention or the Protocols thereto and therefore relinquished in accordance with Article 30 of the Convention, neither of the parties having availed themselves of their right to object to this. Moreover, the application of Mr Vavřička raises a distinct aspect, as he alone was subject to a fine for non-compliance with the vaccination duty. The Court is thus of the view that the conditions set down in Article 35 § 3 (b) are not met, since in any event respect for human rights as defined in the Convention and the Protocols thereto requires an examination of this part of Mr Vavřička's application on the merits.

164. The Government's objection under Article 35 § 3 (b) of the Convention, in so far as it relates to this applicant's complaint under Article 8, must accordingly be dismissed.

2. Applications of Mr Brožík and Mr Dubský

165. In relation to their applications as a whole, the Government pleaded non-exhaustion of domestic remedies, pointing out that the merits of the case had been decided by the judgment of the Hradec Králové Regional Court of 10 May 2016 (see paragraph 55 above) and that the applicants could and should have pursued their case further by way of a cassation appeal and a constitutional appeal.

166. In reply, the applicants pointed out that their applications concerned their request to the Regional Court of 18 July 2014 for an interim measure and the outcome of those proceedings. In that regard, the final domestic decision had been that of the Constitutional Court of 23 October 2014 (see paragraph 54 above). As that decision was final and not subject to any further appeal, the requirement of exhaustion of domestic remedies had undoubtedly been satisfied.

167. The Court will start by examining the Government's objection in so far as it concerns the applicants' complaints under Article 8. To put both the objection and the applicants' reply in perspective, the Court notes that, in their application forms, the applicants relied on Article 6 § 1 of the Convention and directed their complaints against the dismissal of their application for an interim measure in the course of the proceedings on the merits. Anticipating that the latter proceedings would last beyond their preschool age and that their outcome could by then no longer bring about any change in the fact that they had been prevented from attending nursery school, the applicants argued that by not granting them the interim measure

the domestic courts had in fact denied them an effective remedy under Article 13 in respect of what they considered to be a violation of their rights under Articles 8 and 14 of the Convention and Article 2 of Protocol No. 1.

168. The Court has already characterised these complaints as falling, *inter alia*, under Article 8 of the Convention and it was on that basis that the two applications were communicated, to which there was no objection from the parties.

169. The Court reiterates that it is the master of the characterisation to be given in law to the facts of a case, and is not bound by the characterisation given by an applicant or a Government (see, for example, *Molla Sali v. Greece* [GC], no. 20452/14, § 85, 19 December 2018, and also *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 123-26, 20 March 2018). In view of the Court's interpretation of the object of all the applicants' Article 8 complaints, as addressed in more detail below, it considers that the Government's non-exhaustion plea in relation to the cases of *Brožík* and *Dubský* raises issues that are closely linked to the merits of their Article 8 complaint.

170. Accordingly, in so far as it relates to that aspect of these two applications, the Government's objection should be joined to the examination of the merits of the complaint raised under Article 8.

3. Conclusion in relation to all the applications

171. The Court notes that the applicants' Article 8 complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

172. Mr Vavřička complained that it had been arbitrary to impose a fine on him for his failure to have his children vaccinated in accordance with the applicable schedule. The child applicants argued that it had been arbitrary to refuse them admission to nursery school for the same failure on the part of their respective parents.

173. As regards the applicability of Article 8, the applicants invoked their right to personal autonomy in making decisions concerning their health and, in the case of Mr Vavřička, the health of his children. The child applicants also relied on their right to personal development in the context of attending nursery school. The applicants further referred to the right of parents to care for their children in accordance with their opinions, convictions and conscience and in keeping with the children's best interests. In that regard, they submitted that the best interests of a child were to be

primarily assessed and protected by his or her parents, any State intervention being permitted only as a last resort in the most extreme circumstances.

174. They further submitted that since the detailed arrangements for the vaccination duty had been laid down only in secondary legislation (the Ministerial Decree), it could not be considered as being "prescribed by law" within the meaning of Article 8.

175. Moreover, in their view the process of defining the vaccination schedule had not been transparent, had lacked proper analysis and any public debate and had suffered from a conflict of interest on the part of some members of the official bodies involved. In particular, relying on a reply of the Ministry dated 7 February 2020 to their enquiry, the applicants argued that the authorities had failed to provide them with sufficient information showing that the existing compulsory vaccinations were in fact necessary and justified. Furthermore, in defining the vaccination policy, the Ministry had wielded unlimited discretion.

176. In addition, the applicants contended that in a system with compulsory vaccination there was an incentive for fraudulent reporting of vaccination status. This problem did not arise in systems based on voluntary vaccination, which for this reason produced more reliable statistical data on vaccination uptake. In turn, these data could serve to shape the system in a more adapted and efficient way.

177. In so far as the Government relied on the authority of the learned societies specialised in the area of vaccinology in the Czech Republic or of the WHO (see paragraphs 152 et seq. above), the applicants submitted that these were broadly sponsored by pharmaceutical corporations. In particular, the applicants disagreed on matters such as the impact of vaccination on reducing mortality, the susceptibility of infants to infections, the negative impact of non-vaccination and the effectiveness of some of the prescribed vaccines. Moreover, they addressed various aspects of the functioning and development of the vaccination system, for example the interpretation in the Czech Republic of the criterion of permanent contraindication to vaccination. Furthermore, the applicants submitted that in so far as potential side-effects of compulsory vaccines played a role in the assessment of their necessity and justification, these should include not only the immediate side-effects but also long-term side-effects consisting of a general weakening of the vaccinated persons' immunity to various illnesses.

178. It was not justified to refuse access to nursery schools as a form of punishment for the fact that the children were not vaccinated. The refusal of admission to preschool had meant that the families of the child applicants had had to provide care for them by their own means, which had impacted on the family as a whole, both financially and socially. Depriving the child applicants of preschool education had put them at a significant disadvantage in their subsequent education. This had been particularly important for

Ms Novotná, who had been interested in pursuing a particular educational model.

179. The applicants argued that the *Vavřička* jurisprudential exception to the vaccination duty (see paragraphs 28 and 93 above) was almost never granted in relation to admission to nursery school. Moreover, Mr Vavřička argued that in his case it had been defined by the Constitutional Court in a retroactive manner. On that ground, he claimed that the law at the relevant time had been lacking in quality and that he could not have made proper use of it.

180. As regards the consistency of the attitude of Mr Vavřička towards the issue of vaccination, given that he had had his children vaccinated against all of the illnesses except for poliomyelitis, hepatitis B and tetanus, he submitted through his lawyer that he was entitled to change his convictions over the course of time. As recognised by the Constitutional Court, what counted was whether or not the conviction remained constant throughout the respective proceedings, and this had been so in his case.

181. In addition, the applicants argued that any judicial review available was merely formal and did not involve any real substantive review of the rationality and proportionality of the vaccination duty.

182. Furthermore, at the relevant time the law did not provide for any means of claiming compensation in respect of non-culpable vaccine injury to health. Under the compensation mechanism that had subsequently been introduced, compensation was available only in the event of a "particularly grave injury to health", which was a prohibitively high threshold (see paragraph 84 above).

183. In contrast to the child applicants, for whom having been vaccinated was a prerequisite for admission to nursery school, there was no such condition for the employment of nursery-school staff. Some of the statutorily prescribed vaccines concerned illnesses that were not transmissible, or not transmissible in a nursery-school setting.

184. In the view of the applicants, the aim of protecting the health of other children could be achieved by less intrusive means, such as the exclusion of unvaccinated children from educational establishments only in the event of a threatened or actual outbreak of one of the diseases.

185. The applicants acknowledged that vaccination involved issues of general interest, social solidarity and shared responsibility. The problem was one of proportionality. A voluntary vaccination model was based on positive motivation and was therefore both more efficient overall and more proportionate than the mandatory model based on compulsion that was in place in the Czech Republic, which they considered unacceptable.

186. The interference with the applicants' Article 8 rights had accordingly not been necessary in a democratic society.

(b) The Government

187. The Government emphasised that it was important to clarify who the applicant was in each case – child or parent – so as to determine whether and to what extent the matters complained of fell within the Court's jurisdiction *ratione personae*.

188. Regarding the issue of the best interests of the child, which was at stake in cases such as the present ones, the Government considered that it was reflected in the right of the child to the enjoyment of the highest attainable standard of health within the meaning of Article 24 of the Convention on the Rights of the Child. In individual cases, the child's best interests were to be assessed in the light of any objections of the parents, which were to be examined in the appropriate proceedings, ultimately with an element of judicial control.

189. It was accordingly not possible *a priori* to presume that the interests of the parents were identical to those of the children. There was at least a potential for conflict between the respective interests.

190. Responding to Mr Roleček's argument that in consequence of his non-admission to nursery school his mother had been obliged to stay at home with him and that, as a result, their family life had been impacted, the Government noted that the fact that family members were required to enjoy each other's company in this way could not constitute an interference with the right to respect for family life.

191. Moreover, the Government pointed out that the parameters of the present applications were limited to the facts that directly concerned the applicants and did not include other aspects of the Czech vaccination scheme as it had evolved over time.

192. Nevertheless, the Government did not contest that the facts of the six applications fell within the scope of the right to respect for private life and acknowledged that, regarding Mr Vavřička, the fine imposed on him had constituted an interference with that right.

193. As to the child applicants, irrespective of slight distinctions in how their Article 8 complaints before the Court had been formulated, in view of the actual consequences for them, consisting of their non-admission to nursery school, they were all in fact in the same position. The existence as such of the applicable legal framework did not amount to an interference with their Article 8 rights. To that end, the Government sought to distinguish the child applicants' cases from those in, for example, *Dudgeon v. the United Kingdom* (22 October 1981, § 41, Series A no. 45), *Norris v. Ireland* (26 October 1988, § 38, Series A no. 142) and *Modinos v. Cyprus* (22 April 1993, § 29, Series A no. 259), in that the legislative restrictions imposed on the child applicants had not been absolute but subject to exceptions and applied only for a limited time (until the mandatory school attendance age – see paragraph 82 above).

194. Moreover, the non-admission of the child applicants to nursery school had been due to their parents' failure to comply with a statutory duty, on subjective grounds put forward by the parents. It was questionable whether it had been in the best interests of the applicants to have been prevented by their parents from attending nursery school and spending time with children of a similar age. The Government pointed out that, unlike in *Boffa and Others v. San Marino* (no. 26536/95, Commission decision of 15 January 1998, Decisions and Reports (DR) no. 92-B, p. 27), these applicants were the children and what was at stake in their case had been their non-admission to a childcare establishment rather than a fine or any other type of penalty. Furthermore, attending nursery school was a public activity and it accordingly fell outside the scope of Article 8 of the Convention. In addition, there were alternative ways of developing one's personality and the child applicants' inability to attend nursery school had not fundamentally interfered with their right to development and education. Accordingly, in the Government's submission, there had been no interference with the child applicants' Article 8 rights.

195. Should the Court nevertheless find that there had been an interference, the Government maintained that it had been duly "prescribed by law". The domestic legal framework consisted of the rules on the duty to vaccinate in conjunction with the rules on liability for a minor offence where the duty was not complied with, and also the rules governing admission to childcare establishments. Those rules had the quality of "law" in terms of the Court's case-law; in so far as they originated in secondary legislation, they were subject to judicial review. Moreover, the constitutionality of the given legislative arrangement had been repeatedly examined and upheld by both the SAC and the Constitutional Court.

196. There was no real dispute about the legitimacy of the aim served by the impugned interference, which was the general interest of society in protecting public health as well as the protection of the rights and freedoms of others. In more concrete terms, vaccination protected those vaccinated as well as others, in particular vulnerable persons who could not themselves be vaccinated or in respect of whom immunisation had been ineffective. While vaccinations were voluntary in some countries and compulsory in others, the underlying aim was the same and vaccination was the safest and the most cost-effective way of achieving it.

197. In relation to the necessity of any interference *in abstracto*, the Government relied on their positive obligations under the Convention to take measures in the sphere of the protection of life and referred to their similar obligations under other international legal instruments. More specifically, States were under a positive obligation to put in place effective public-health policies for combating serious and contagious diseases and to protect the life and physical integrity of those within their jurisdiction. In that regard, it was relevant that the diseases in respect of which vaccination was compulsory were all very serious and mostly highly contagious. The

risk of these diseases spreading was amplified by the current high level of migration. As these diseases had now effectively been controlled, public and media attention had shifted away from disease prevention to vaccine safety. This had the potential to distort the perception of reality and to generate vaccine misinformation, which in turn could result in decreasing vaccination rates and the possible return of previously controlled vaccine-preventable diseases. Vaccine hesitancy was recognised as a serious global problem. Making vaccination compulsory was a natural response, in that it was demonstrated that it led to an improvement of the vaccination coverage. Other European States were resorting to this approach.

198. In the Czech Republic, vaccines were provided free of charge by the State. The vaccination duty was primarily aimed at children because they were the most vulnerable. In a preschool setting they were inevitably exposed to a higher risk of infection. Therefore, carrying out vaccination at a young age was conducive to achieving the overall aims of the vaccination policy. In that regard, the Government acknowledged that not all of the vaccines that were mandatory in the Czech Republic were aimed at achieving herd immunity and submitted that the herd-immunity thresholds varied according to the specific illness in question.

199. The vaccination duty was not directly enforceable and any sanctions for a failure to respect it were merely administrative, with a fine only being imposable as a last resort and only once.

200. The scope of the vaccination duty was determined by the Ministry on the recommendation of its advisory board of epidemiologists and, since 2010, the NIC (see paragraph 154 above). In compliance with the requirements of the Disclosure Code of the European Federation of Pharmaceutical Industries and Associations and those of the WHO, at the beginning of every meeting of the NIC each of its members had to make a declaration as to any conflict of interests he or she might have in relation to any item on the meeting's agenda. As for the NIC's membership, the fact that it was limited to officials and experts reflected the prevailing practice among European States.

201. The Government rejected the applicants' criticism that the Czech vaccination scheme had not been based on proper scientific analysis. In particular, publicly available serological surveys had been performed since 1960. Both the scope and the parameters of the scheme were under constant review and there was a comprehensive mechanism in place for monitoring any adverse effects of pharmaceuticals, including vaccines.

202. A vaccination could only take place after a check-up for fitness and there were statutory as well as case-law exceptions. The latter had been defined by the Constitutional Court in the *Vavřička* case (see paragraph 28 above) and required no legislative implementation. Although it was true that there were no concrete examples that could be cited of application of the case-law objection of conscience in relation to nursery-school admission, the exception was applicable in that context, in particular if there had been

any adverse health effects of vaccination in the family of the child concerned.

203. In addition, the legislation left a certain leeway to the parents in selecting the vaccines to be used and the relevant dates, within a defined period for vaccination. Moreover, experience showed that the vaccination policy in place was in fact successful and all relevant Czech expert societies were clearly in favour of preserving it (see paragraphs 152 et seq. above). Any fines or non-admissions to nursery school in connection with a failure to comply with the vaccination duty had to be based on a reasoned decision that was subject to judicial review at several levels of jurisdiction. As there was clearly no European consensus on the matter of compulsory vaccination, the margin of appreciation left to the member States was wide. An additional reason for allowing a wide margin was that the issue involved the assessment of expert and scientific data by the national authorities.

204. As regards the six applications *in concreto*, the Government emphasised that as no vaccination had actually taken place against any parent's wishes, there had been no interference with anyone's physical integrity. None of the applicants had shown at the national level that any of the criteria for an exemption from the vaccination duty on the basis of religion, conscience or otherwise, had been met. The applicants had rather relied on no more than a generally dismissive attitude towards vaccination. In particular, in the proceedings brought by Ms Novotná, Mr Hornych and Mr Roleček, the SAC had specifically noted that they had neither invoked any fundamental rights or freedoms nor relied on any exceptional circumstances at all.

205. While it was true that no specific vaccination requirement applied to the hiring of nursery-school personnel, such persons were subject to the general vaccination duty applicable to anyone residing on the territory of the Czech Republic. It was thus highly unlikely that such personnel would not have previously received the relevant primary or booster vaccinations, in line with that duty.

206. As regards the possibility to claim compensation in respect of damage to health due to vaccination performed in accordance with the applicable rules and standards, the Government confirmed that there was no provision for granting compensation in respect of any such damage occurring after 31 December 2013. However, any damage caused prior to that date would be covered by the previous legislative regime, which had provided for compensation. New legislation adopted in 2020 made provision for this once again (see paragraph 84 above). This legislative development was due to the fact that, under the original regime, it was the health-care provider administering the vaccine who could be held strictly liable for damage to the patient's health. However, as that liability essentially had to do with the public interest, it should rest with the State.

207. Moreover, the costs of the treatment of any harmful side-effect of vaccination would be covered by public health insurance. Nevertheless,

serious side-effects, that is, those with lifelong health consequences, were rare, with no more than six such incidents per year for 100,000 vaccinated newborns.

208. Although the jurisprudential exception to the vaccination duty on the basis of the right to freedom of religion or belief had been recognised for the first time by the Constitutional Court in the *Vavřička* case, this did not render the domestic courts' interpretation and application of the existing legislation arbitrary. Regarding Ms Novotná, the fact that the decision not to admit her to nursery school had been taken in reopened proceedings after she had initially been admitted and had in fact been attending the school for two years had to be considered in the light of the fact that the original admission had been granted on the basis of incorrect information, provided by her. In providing that information she had assumed the risk that the admission decision might be reviewed once this came to light. Regarding Mr Hornych, there was a similar anomaly in the information provided by his parents in the context of his application to nursery school. Finally, in relation to Ms Novotná, the Government argued that attendance at a particular type of nursery school was not in fact a precondition for enrolment in an elementary school using the same teaching methodology. In any event, the non-admission of the child applicants to nursery school had not prevented them from developing social relations in other settings and contexts.

209. Relying on the Constitutional Court's case-law, the Government concluded by submitting that, as an immunisation tool preventing selected diseases, vaccination in general constituted a social benefit calling for shared responsibility on the part of the members of society and for social solidarity from each individual, who assumed a minimum risk in order to protect public health.

2. Submissions of the third-party interveners

(a) The Government of France

210. The French Government emphasised the importance for States to be able to adopt effective public-health policies to combat serious and contagious diseases, as clearly illustrated by the COVID-19 pandemic.

211. In France, the law of 30 December 2017 provides for the compulsory vaccination of children aged up to 24 months against eleven diseases. Previously, vaccination was compulsory in relation to three of these diseases; regarding the other eight, it was simply recommended. With one exception, the list of illnesses is identical to that in the Czech Republic. Under French law, persons with a medical contraindication are exempted from the duty. The law of 30 December 2017 increased the potential penalty for a breach by a parent of the child vaccination duty, from a term of imprisonment of up to six months and a fine of up to EUR 3,750 to a term of imprisonment of up to two years and a fine of up to EUR 30,000.

Compliance with the vaccination duty is a prerequisite for admission to childcare structures and services as well as to the education system (*collectivité*). In the absence of a required vaccination, a child may be admitted provisionally on condition that they are fully vaccinated within three months. Continued attendance is subject to proving each year that the vaccination duty has been complied with.

212. Accepting that compulsory vaccination is an interference with the right to respect for private life, the French Government underlined that it served the legitimate aim of protecting health. The necessity of the interference should be assessed in the light of the States' positive obligations to protect the life and physical integrity of those within their jurisdiction. The importance of those obligations had recently been emphasised by the Secretary General of the Council of Europe in a document entitled "A toolkit for member states – Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis". As there were competing Convention rights at stake and no European consensus over compulsory vaccination, the French Government invited the Court to recognise that, in matters of public-health policy and the prevention of the spreading of very serious diseases, the States enjoy a wide margin of appreciation, since they were in the best position to assess, in the light of the health situation on their territory and the means at their disposal, the measures necessary to protect public health.

213. Compulsory vaccination was justified by the serious adverse public-health effects of low vaccination coverage. It was important to protect children from an early age and before the onset of a period of risk. In order to protect the community effectively, a vaccination policy had to apply to the greatest possible number of people. A high rate of vaccination was particularly important to protect those who could not be vaccinated.

214. If vaccination were merely voluntary, it was clear that some would seek to benefit from the effect of herd immunity without exposure to the residual risk associated with vaccination. If such behaviour were to become widespread, it would inevitably cause a decrease in vaccination coverage and ultimately the reappearance of pathologies that were thought to be in decline.

215. The French Government referred to Recommendation No. 1317 (1997) of the Parliamentary Assembly of the Council of Europe entitled "Vaccination in Europe", to Article 11 of the European Social Charter (Revised), and to the Recommendation of the Council of the European Union on strengthened cooperation against vaccine-preventable diseases (2018/C 466/01) (see paragraphs 137, 142 and 150 above). The diseases in question were all very serious, and most of them highly contagious. The effectiveness of the compulsory vaccines was recognised, their negative side effects were limited and medical contraindications were taken into account. The interference represented by such a compulsory vaccination scheme with the right to respect for private life was accordingly proportionate to the

objective of promoting the degree of vaccination coverage needed to reach the herd immunity threshold for the benefit of the entire population.

(b) The Government of Germany

216. The German Government clarified that compulsory vaccination referred to a duty to receive vaccination in defined situations, not to the coercive administration of a vaccine. They described the context in which domestic legislation had been adopted after an extensive societal and parliamentary debate, with effect from 1 March 2020, providing for compulsory vaccination against measles. Certain categories of persons are required to provide proof of vaccination, immunity or medical contraindication to vaccination before receiving care or being employed in specified types of facilities, including schools and other educational establishments. The vaccination duty is enforced indirectly by the threat of a penalty of up to EUR 2,500, which may be repeated under certain circumstances, and exclusion from educational institutions. The latter are under a duty to report unvaccinated children to the public-health authorities. It is not possible to coerce a person into vaccination; consent is always required. Children under the age of one year are exempted. Other exemptions are based either on purely medical grounds or on the non-availability of a vaccine. There are no exceptions permitted on the basis of religion or belief. Compensation is available for any adverse effects even where the vaccine has been administered in conformity with the applicable rules.

217. The German Government observed that compulsory vaccination aimed to protect not only those vaccinated but also society as a whole and, in particular, vulnerable persons who cannot be vaccinated themselves on account of their age or state of health. If the vaccination rate is sufficiently high, the threshold for measles being 95% of the population, a given disease can be eliminated. Despite efforts to raise awareness, the rate of voluntary vaccinations achieved in Germany never reached more than 93%. This was the challenge faced by the legislature when adopting the legislation.

218. In the interest of achieving the 95% threshold, compulsory vaccination starts at a young age. Moreover, young children are particularly vulnerable to measles, given their immature immune systems. In that context, the German Government referred to the recommendation by the respective body of the Robert Koch Institute, the country's central scientific institution in the field of biomedicine, to the effect that children should be vaccinated twice against measles before they reach the age of two. Moreover, the German Government considered that the compulsory vaccination scheme was best managed in the context of long-term care such as preschools and nurseries, all the more so in view of the increasing number of children attending such facilities.

219. As already established in the relevant Convention case-law, compulsory vaccination constituted an interference with the right to respect for private life, its compatibility with the provisions of Article 8 depending mainly on respect for the principle of proportionality.

220. A penalty for disrespecting the vaccination duty and exclusion from educational institutions as a consequence of it constituted a real but merely indirect interference with personal integrity. The interest in protecting public health and above all the health of those who cannot be vaccinated was of fundamental significance. The State had positive obligations under Article 2 of the Convention in that regard. The vaccinated person not only carried the burden of vaccination but also benefited from the protection it procured. The above-mentioned 93% vaccination rate had been achieved voluntarily, showing that vaccination was widely accepted by the population. The reasons for parents not to have their children vaccinated had mostly to do with convenience and carelessness. Such cases were easily addressed by a legal duty of vaccination. This constituted no major interference with individual rights but merely a small individual sacrifice. Only a small proportion of the population opposed vaccination as a matter of principle. Once the 95% threshold was reached, the disease would be eliminated, further vaccination would no longer be necessary and the vaccination duty would become dispensable.

221. In any event, the Contracting Parties enjoyed a wide margin of appreciation with regard to their health-care systems and policies.

(c) The Government of Poland

222. The Polish Government submitted that compulsory vaccination schemes did not constitute a violation of the Convention and the sanctions applicable in this context were compatible with the second paragraphs of Articles 8 and 9.

223. Consent to medical treatment was vital to the principles of self-determination and personal autonomy. An involuntary medical treatment constituted an interference with physical and moral integrity. Epidemics of infectious diseases might lead to sanitary, social and economic crises. The Contracting Parties were obliged to combat such diseases in humans. Vaccinations were an optimal preventive measure in that they not only reduced the number of those infected but also could lead to a complete elimination of a given illness. By promoting “herd immunity”, they protected not only those vaccinated but also others who could not be vaccinated. The more people were vaccinated, the better the community’s resilience. Vaccinations were therefore primarily addressed to the youngest generation. According to the current state of medical knowledge, there were no better preventive measures. Widespread vaccination was also recommended by the European Centre for Disease Prevention and Control (see paragraph 147 above).

224. Vaccinations played an important role in shaping public health. They reduced the social consequences of health complications in connection with infectious diseases, including those related to the costs of the necessary treatment. The compulsory vaccination system thus enabled effective prevention of the spreading of dangerous infectious diseases, striking a balance between the fulfilment of the State's obligations towards citizens to provide the highest level of public health to as many persons as possible and those of citizens towards the State to comply with the vaccination duty. The cost-effectiveness of vaccinations was also a relevant factor.

225. In Poland, a vaccination duty had existed for nearly 60 years as a duty of an administrative nature. It was currently provided for by a statute of 2008, accompanied by a 2011 ordinance of the Minister of Health, adopted on the basis of that statute. In addition, every year the Chief Sanitary Inspector issued Protective Vaccination Programmes addressed to health-care professionals implementing the compulsory vaccination scheme. Vaccination against eleven diseases currently found on the territory of Europe was compulsory for anyone residing in the Polish Republic. The State Sanitary Inspection was required to enforce compliance with the vaccination duty in relation to children by using administrative powers, the respective regulation and its enforcement never having been challenged. The State was responsible for the safety of the vaccination procedures and it bore the cost of vaccination as well as of the treatment of any possible side-effects. There was also the possibility of opting for commercially obtainable vaccines, the cost of which was not borne by the State.

226. As there was a diversity of legal and health-care systems, it was inevitable that the Contracting Parties resorted to varying solutions to ensure a sufficient level of vaccination, reflecting the social, economic and cultural differences between them and the local conditions, habits and expectations as well as each country's economic possibilities. In the absence of a pan-European consensus, the Contracting Parties had a wide margin of appreciation to make arrangements to the best of their knowledge and possibilities. The assessment of the specific system of sanctions in each Contracting Party should not lead to the undermining of the compulsory vaccination system in general. The proportionality of the solutions adopted was rather to be assessed on a case-by-case basis.

(d) The Government of Slovakia

227. The Government of Slovakia noted that the present cases were not about the vaccination duty as such but rather about the consequences of non-compliance with that duty, a distinction that was relevant for the assessment under Article 8 of the Convention.

228. Observing that there was no uniform approach among Council of Europe member States, the Government referred to the arrangement in place in Slovakia. There the vaccination duty was laid down in legislation,

consisting of an Act of Parliament and an implementing executive decree. The duty applied to everyone, except if there were health contraindications. There was no mechanism for physically enforcing compliance. However, the attending doctor was duty bound to explain to the patient, or to his or her statutory representatives, all relevant aspects and effects of the vaccination to be given. If still not accepted, the doctor had to report the case to the relevant public-health authorities, who would summon the person in question for an interview. A persistent refusal to comply could then be seen as a minor offence punishable by a fine of up to EUR 331. The legislation in force did not provide for the exclusion of unvaccinated children from preschool establishments.

229. The Government referred to a judgment of 10 December 2014 (case no. PL. US 10/2013), in which the Constitutional Court of Slovakia found the vaccination duty to be constitutional. It considered that the State was under a positive obligation to ensure the protection of public health. The legislature's decision to comply with that obligation by means of compulsory vaccination was primarily of a political and expert nature falling within a broad margin of appreciation. It could contravene the individual right to protection of health if it were to be administered despite medical contraindications or if any general adverse effects of vaccination were demonstrated. However, such was not the case. Mandatory vaccination set two constitutional principles in opposition with one another: the protection of public health and respect for private life. It was not possible to reconcile both principles without fundamentally limiting one of them. The specific contraindication exemption was accompanied by a duty on the attending doctors to enquire into the existence of any contraindications prior to administering any vaccine. As with regard to any medication, the quality and safety of vaccines were supervised by the State Agency for Drug Control. In addition to health-care providers, who were under a duty to report any suspicion of serious or unexpected side-effects of vaccines, any patient, or – in the case of child patients – their parents, could do so. Moreover, the legislative framework provided for compensation in respect of damage to health resulting from a vaccination performed contrary to the applicable rules. There were, to the existing level of medical knowledge, no other effective means to reduce or eradicate infectious diseases. The interference represented by compulsory vaccination with an individual's right to respect for private life was accordingly justified by the interest in the protection of public health that it served. While it was true that some countries provided for compensation also in respect of health damage resulting from a vaccination performed in accordance with the applicable rules, the absence of such a scheme in Slovakia had no impact on the above conclusion.

230. The Government added that, specifically with regard to children, the crucial criterion was that of their best interests. This was to be determined by whether or not there was any health contraindication to

vaccination. A refusal to vaccinate a child without contraindications could be seen as being contrary to his or her best interests. It was accordingly necessary to ensure compliance with the applicable rules by way of sanctions. It was important to protect children from a young age and especially those who could not be vaccinated on account of contraindications.

(e) Společnost pacientů s následky po očkování, z.s. (Association of Patients Injured by Vaccines)

231. The intervening association represents patients who suffer from health problems as a result of having been vaccinated. On that basis it described the situations of children who had not been vaccinated at all or were not in full compliance with the applicable vaccination schedule. Those situations mostly involved the children not being admitted to nursery schools, the mother losing her job as she was left with no alternative but to stay at home with her child and the family losing a source of income. Nonetheless, those families would rather change their lifestyle than expose their children to the risks inherent in vaccination.

232. The existing system in fact ignored individual needs stemming, for example, from previous adverse effects on the child in question or its relatives. This was partly the result of an insufficient level of independent knowledge of the risks and negative effects of vaccination among paediatricians, whose continuing education was often sponsored by the pharmaceutical industry. Moreover, there was a lack of transparency as to the criteria for and the method of defining the compulsory vaccination schedule at the expert level. This created room for arbitrariness on the part of the executive and gave rise to mistrust and resistance on the part of the public. This in turn called for counter-measures by the proponents of vaccination, with the overall effect of polarising society and stigmatising those opposed to vaccination. Such counter-measures consisted of: (i) enforcing the duty on paediatricians to perform vaccination; (ii) massive media campaigns promoting vaccination, funded by the pharmaceutical industry; (iii) the exercise of judicial power in a manner sympathetic to the vaccination duty, in particular by the Constitutional Court; and (iv) a disinformation campaign by official bodies promoting vaccination.

233. The number of compulsory vaccinations and the tight schedule for administering them did not allow in practice for the assessment of any individual needs. For similar reasons, vaccination was also performed in situations in which the patient was not sufficiently healthy to receive it. In addition, in view of the interpretation given in practice to the term "permanent contraindication", it was not feasible to satisfy this ground for an exemption from the vaccination duty.

234. These features of the existing system had an extensive impact on the children concerned and their families. There was a variety of other and

strikingly different arrangements at the European level, including in neighbouring countries with an epidemiological situation similar to that in the Czech Republic, where the vaccination system was the strictest. Were the Court to find that the Czech approach was not at odds with Convention requirements, the situation could even worsen and this trend could spread to other jurisdictions. Should the Court find the opposite, the respondent State would be required to limit the power of the executive to define and apply the criteria for and the method for establishing the vaccination schedule and to open this matter to a wider public and political debate.

(f) European Centre for Law and Justice (ECLJ)

235. In so far as the intervention of the ECLJ concerned Article 8, this third-party intervener pointed to the importance of the present case in that it concerns respect for the physical and moral welfare of the human being, as guaranteed by the principles that such welfare must prevail over the sole interest of society or science and that an intervention in the health field may be carried out only with the free and informed consent of those concerned, as established in Articles 2 and 5 of the Oviedo Convention. It emphasised the need for regulating these matters, in particular in view of the experience of several countries in the 20th century with regard to various policies in the fields of health and eugenics, and considered that in so doing use could be made of the case-law principles stemming from the cases decided by the Court concerning forced sterilisation. The present cases involved a situation of strongly encouraging individuals to submit to the vaccination duty by means of the threat of a sanction. As no forced vaccination had taken place, the principal question was not so much the legitimacy of the vaccination duty but rather of the sanction imposed on the applicants for failing to comply with it.

236. The intervener submitted that the physical integrity of a person was covered by the concept of "private life" protected by Article 8 of the Convention and that compulsory vaccination – as an involuntary medical intervention – amounted to an interference with that right. The main problem was the question of the necessity of the measures taken by the authorities in relation to the applicants in support of the vaccination policy.

237. In that respect, an adequate approach was to seek to reconcile the competing rights and interests rather than merely to set them against each other. The conciliatory approach involved seeking compromise and applying principles of pluralism and tolerance.

238. The intervener noted that in countries such as Austria, Cyprus, Denmark, Estonia, Finland, Germany, Ireland, Lithuania, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom, vaccination was not compulsory. Other countries imposed vaccination in respect of between one (Belgium) and twelve (Latvia) diseases. The

usefulness and necessity of compulsory vaccination had not been established.

239. Placing emphasis on information and recommendations, combined with more flexible procedures, was an alternative to coercion, and was more respectful of the moral and physical integrity of individuals guaranteed, *inter alia*, under Article 8 of the Convention.

(g) ROZALIO – Rodiče za lepší informovanost a svobodnou volbu v očkování, z.s.

240. This third-party intervener submitted the following information, based on its experience. There was an increasing number of parents in the Czech Republic who wished to be informed on matters concerning vaccination, who questioned its necessity and timing and who were conscious of their inalienable right to take informed decisions on all matters concerning their children. The majority of such parents did not oppose vaccination of their children *en bloc* but rather desired an individual approach. They did not know how to communicate on these matters with doctors and authorities and the State failed to provide adequate sources of relevant information.

241. Repressive tools for promoting the vaccination rate were inappropriate because they gave rise to mistrust. Verifiable data showed that an increasing repression level corresponded to a decreasing vaccination rate. A better approach was to promote dialogue with parents on an equal footing.

242. The core of the problem was that the PHP Act provided for sanctions on parents who failed to ensure vaccination of their children and excluded such children from public and private preschool facilities, and from further activities such as school trips and retreats.

243. As regards the sanctions on the parents, the intervener referred to the secular objection of conscience as defined by the Constitutional Court in the case of *Vavřička* and developed in its judgment of 22 December 2015 in another case (see paragraphs 28 and 93 above). In that connection, it pointed out that after 2011 minor-offence proceedings were no longer instituted in the event of parents' failure to have their children vaccinated but that since 2018 such proceedings were again being instituted. However, the administrative bodies involved in such proceedings did not grant the exception provided for by the constitutional case-law in any individual case and no such exceptions were applied with regard to the admission of children lacking any prescribed vaccination to preschool establishments. Furthermore, the statutory exception from the duty on health grounds required a permanent contraindication and doctors generally interpreted that category restrictively.

244. The threat of a sanction also applied to preschool establishments if they admitted an unvaccinated child, and the inability to have one's children

admitted to such an establishment resulted in the parents either having to stay and provide for their children at home or to bear the costs of alternative care. The affected parents sometimes organised themselves to provide day-care for their children in informal groups. However, all of this had financial and career implications.

245. The intervener then described the legal regime applicable to vaccinations and its functioning in a wider context, its reform, and the consequences of the vaccination duty for various groups of stakeholders. In 2017/18 preschool attendance became mandatory for children aged five (see paragraph 81 above). Those children were no longer obliged to be vaccinated. Nevertheless, there had been no dramatic effects on public health although such children would usually be kept together with younger children whose vaccination remained compulsory. Any consultative processes at the level of the Ministry in connection with the definition of the vaccination schedule were inadequate: a specialised working commission established in 2015 (see paragraph 156 above) had only met five times, had reached no conclusions and had been dormant since 2018.

(h) European Forum for Vaccine Vigilance

246. This intervener submitted that, in contrast to other areas of societal importance in a democratic society, where opposing views were institutionally represented, there were no trade unions of any specific profession in the area of public health to defend an individual's health-related choices. While in the area of justice there were rules adopted by the lawmaker and adjusted by the judiciary, there was no equivalent to this in the area of health. Whilst there had traditionally been a doctors' professional body and an administrative body in charge of matters of health, there was generally no institution representing the patient. The need for representation of the patient in relation to the health authorities was, in France, reflected in the creation of a specific university doctorate for patient-experts.

247. However, sworn experts in the area of health in France were appointed by a tribunal and operated in a regime that was open to criticism, *inter alia*, in view of the scope of their specialisation and expertise. For various reasons, basic, pre-clinical and clinical research in relation to vaccines had a limited potential.

248. Moreover, the intervener criticised the use of aluminium-based compounds in the production of vaccines and attributed it to economic considerations on the part of the pharmaceutical industry.

249. In addition, the intervener described in detail various physiological aspects of immunity and commented on an individual clinical case of adverse health effects arising from vaccination.

250. Public pronouncements by health authorities on the side-effects of vaccines were generally prejudiced and official studies in the area of

vaccination would commonly not cite their authors and sources. Yet issues such as the efficiency of booster-vaccination of adults and vaccines administered subcutaneously in general were open to debate.

251. Just as there was the premise *in dubio pro reo* in matters of liability, doubts in the area of vaccination should be interpreted in favour of a free choice by an individual under the principles of *primum non nocere* and *in dubiis abstinere*.

252. It was common in the health-care world to confuse the categories of "informed consent" and a "permission to proceed with a specific procedure granted by the patient". This might be because despite long studies doctors were not trained to transmit scientific and medical information to patients in a language that the latter understood. It was unclear whether the state of the science regarding therapeutic approaches adequately took into account individual's physiological responses.

253. Although the vaccination procedure was intrusive in terms of the law and thus normally subject to the requirement of informed consent, in France it was imposed administratively and not subject to free and informed individual consent.

254. There were many reports of serious pathologies which had emerged as a result of a vaccination, such as autism, multiple sclerosis, Guillain-Barré syndrome, *macrophage myofasciitis*, etc. Some had been demonstrated before the courts in individual cases against pharmaceutical corporations. It was necessary and a matter of scientific and medical responsibility in a democratic society to rule out potential risks by demonstrating that there was no causal link between the pathologies observed after the vaccination and the administration of the vaccine. Failure to do so could not be justified by economic considerations.

255. The current understanding of physiology was still in its infancy and vaccination as practiced presently was an archaic procedure which was provided by the laboratories and the institutions above them.

256. Many of the illnesses against which vaccination was compulsory did not produce serious consequences and the effect of vaccinating against them was that they would mutate and become more pernicious.

257. Lastly, broad immunisation coverage was currently promoted by many governments through an aggressive vaccination policy, although no scientific studies had proven the effectiveness of this approach. On the other hand, some other European countries provided for a free individual choice in the matter. The first imperative step was to ensure that those concerned were amply informed on all relevant aspects of vaccination and it was questionable whether doctors were able to do so. Secondly, there should be a free choice between informed consent and refusal.

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 Vavřička 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 directly 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; see 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 pointed out, 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 their private life.

264. As regards Mr Vavřička, 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 children vaccinated, and that the consequences of non-compliance with it, that is, 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 Vavřička may also 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 section 46(6) and section 80(1) of the PHP Act (see paragraphs 11, 13 and 74 above). The consequences of non-compliance with the duty stemmed, for Mr Vavřička, 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

(α) General principles and margin of appreciation

273. The applicable principles may be summarised as follows (see, in particular, *Dubská and Krejzová*, cited above, §§ 174-78, 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 health-care 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).

(β) 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 Governments 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 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 health-care 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.

(γ) 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 respond 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, §§ 128-30, 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 pointing out the risk to individual and public health to which a possible decline in the rate of vaccination would give rise were it to become merely a 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 domestic authorities' response 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.

(δ) 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 had 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 primarily be 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 interests of the child were 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, that is, 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 (for example, 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 Vavřička and the non-admission of the child applicants to preschool stemmed directly from the application of the statutory framework.

(ε) Proportionality

290. Finally, the Court must assess the proportionality of the interferences complained of, in the 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 conditions (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 third-party interveners 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 *Vavřička* 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 in 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 Mr Vavřička'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 be imposed only once. In Mr Vavřička's case, while he argued that the fine was high for him given his 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 their private life (see paragraphs 306-307 below).

295. The Court notes the procedural safeguards provided for in domestic law. As shown by 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 Vavřička, 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 lack 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 intervener ROZALIO indicated that few meetings had been held and that these 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 lack 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 X 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 X*, 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 health-care professionals concerned being under a specific duty to report any suspicion of serious or unexpected side-effects (see paragraphs 78-79 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 observes 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 the event 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 and 113-115 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 (that is, before 31 December 2013). Moreover, in none of the domestic proceedings brought by the various applicants was the issue of compensation specifically raised. The *obiter 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 his 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 of that age group. As stated by the respondent Government, and by some of the intervening Governments, who relied on extensive scientific evidence (see paragraphs 213, 218 and 223 above), early childhood is the optimum time for vaccination. Moreover, the possibility for children who cannot be vaccinated for medical reasons to attend preschool depends on a very high rate among other children of vaccination 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 Ms 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.

(στ) 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 Mr Brožík and Mr Dubský (see paragraphs 169-170 above).

IV. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

313. Mr Vavřička, Ms Novotná and Mr Hornych also complained that the fine imposed on Mr Vavřička and the non-admission of Ms Novotná and Mr Hornych to nursery school had been 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."

A. The parties' submissions

1. The Government

314. The Government considered that the complaints made in reliance on Article 9 were essentially a restatement of those made under Article 8 and that they should be examined under the latter provision only. As regards Article 9, they argued mainly that the complaints were incompatible *ratione materiae* with that provision, or in any event manifestly ill-founded on account of a lack of any interference with the applicants' Article 9 rights.

315. Personal views on compulsory vaccination based on wholly subjective assumptions about its necessity and suitability did not constitute a "belief" within the meaning of Article 9 of the Convention. That provision essentially aimed to protect religions or theories about philosophical or ideological universal values. Lacking sufficient specification and substantiation, the views professed by the applicants did not constitute a coherent view on a fundamental problem and accordingly did not amount to a manifestation of personal beliefs in the sense of Article 9 of the Convention.

316. The Government submitted that there was no clear line in the existing case-law as to what beliefs were or were not regarded as "religion or beliefs" within the meaning of Article 9 § 2 of the Convention. Even if that provision were in principle to apply to a situation such as that which obtained in the present case, on the specific facts there had been no interference with the applicants' rights protected by it. This was because, as the domestic courts had established, the applicants had failed to substantiate their objection to the vaccination duty by giving relevant and sufficient reasons. Moreover, the views of Mr Vavřička and Ms Novotná had not been consistent and so had not been convincing. Mr Vavřička had accepted the vaccination of his children against some diseases. The same was true for Ms Novotná.

317. Furthermore, although Mr Hornych had claimed before the Court that in his case there had been a medical contraindication to vaccination, in the formulation of his complaints he referred to his parents' philosophical convictions. Yet his argumentation at the national level had been specifically health-related. His complaint before the Court was accordingly inadmissible for non-exhaustion of domestic remedies or, as the case may be, as manifestly ill-founded.

318. In addition, to the extent Ms Novotná relied in her Article 9 complaint on the views and convictions of her parents, such complaint was incompatible *ratione personae* with that provision. Moreover, in view of

their age and maturity at the relevant time, neither she nor Mr Hornych could have held any views on the subject of sufficient cogency, seriousness, cohesion and importance to come within the ambit of Article 9.

319. The measures complained of had been the result of the application of general and neutrally formulated legislation which applied to all persons regardless of their thought, conscience or religion. Under the Convention case-law, such legislation could not, in principle, interfere with the rights protected under Article 9.

320. Moreover, the Government's objection under Article 35 § 3 (b) of the Convention in relation to Mr Vavřička's application (see paragraph 161 above) extended also to his complaint under Article 9.

2. The applicants

321. Mr Vavřička submitted that his main motivation had been to protect the health of his children. Being convinced that vaccination caused health damage, his conscience had not allowed him to have them vaccinated.

322. Ms Novotná and Mr Hornych relied on a right to parental care in conformity with parental conscience. On the basis of this, it was their parents who had held views protected under Article 9 of the Convention on the applicants' behalf since at the relevant time, in view of their age, the applicants could not themselves have had any attitude towards vaccination.

323. As regards the consistency of the views asserted under Article 9, the applicants argued that under the Constitutional Court's case-law what was essential was that the views be constant throughout the proceedings in question. Yet a development of those views prior to or after those proceedings was no impediment to the applicability of the "secular objection of conscience", as specified by the Constitutional Court.

324. Lastly, the reply of Mr Vavřička to the Government's objection based on Article 35 § 3 (b) of the Convention extended also to his complaint under Article 9 (see paragraph 162 above).

B. Submissions of the third-party interveners

1. The Government of France

325. The French Government invited the Court to uphold the existing case-law that a neutral statutory duty applicable to everyone regardless of their thought, conscience or religion could not, in principle, interfere with the rights protected by Article 9. However, even if the duty were to be regarded as an interference, for the reasons already set out above it should be accepted as compatible with the requirements of that provision.

2. The Government of Germany

326. The German Government considered it open to doubt whether compulsory vaccination or measures for its enforcement amounted to an interference with the rights protected under Article 9. Not all opinions or convictions constituted beliefs protected by that provision, and the position of the person opposing vaccination would mostly not attain the level of cogency, seriousness, coherence and importance for its applicability.

3. European Centre for Law and Justice

327. This intervener contested the premise adopted by the Commission in *Boffa and Others* (cited above) as regards the applicability of Article 9 of the Convention to an individual's reason for opposing a neutral statutory duty applicable to everyone and proposed a different approach. In the ECLJ's view, the quality of the conviction invoked as well as of the objection based on it should be examined in order to determine which objections warranted respect in a democratic society and which constituted merely a matter of personal convenience that would fall rather within the ambit of Article 8 of the Convention. In determining the quality of the conviction, the questions to be asked were as follows – Is it "sincere" or, depending on the terminology, does it correspond to a "deeply and genuinely held religious or other belief"? Can the content of the conviction be identified and is it substantial? If the conviction is of a religious nature, does it concern a known religion? If the conviction is not of a religious nature, does it warrant respect in a democratic society and does it not offend human dignity? As to the quality of the objection, the intervener argued that it had itself to be a conviction attaining sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9. An objection only on an intermittent or opportunistic basis would not enjoy the protection of that provision. The objector had to be coherent and the objection had to be motivated by a serious and insurmountable conflict between the obligation objected to and the objector's conscience or convictions and to rest not on reasons of personal benefit or convenience but on genuinely held religious convictions. As regards moral convictions, as distinct from religious convictions, the respect they deserved depended more directly on the nature of the conviction, since objections based on a moral conviction called into question the very justice of the order objected to, whereas objections based on a religious conviction simply tested the tolerance of society. Objections based on moral convictions were to be examined with great care because, if accepted by society, they afforded the objector immunity both from the duty objected to and from sanctions for having disrespected it. Society had acknowledged the legitimacy of such moral objections only in a very few cases, usually in situations where it tolerated an evil because it was considered necessary or inevitable, such as war, abortion or prostitution.

328. In order to determine whether a conscientious objection of a moral nature was genuinely based on moral convictions and rested on a need for justice, four criteria should apply: the objection had to be aimed at respect for the just and the good; the rule objected to had to derogate from a fundamental right or principle; it had to be possible to generalise the objection as being available to everyone; and the objection had to concern an ethically sensitive issue.

329. Where the refusal was motivated by a genuine belief within the meaning of Article 9, and accordingly deserved the respect of society, but without being acknowledged as a requirement of justice, the existence of a sanction was not in itself sufficient to constitute a breach of Article 9. What needed to be examined then was the necessity of the sanction imposed in a given case, which was not different from the examination carried out under Article 8. The difference between the two provisions lay in the fact that Article 9 protected personal conscience, which was linked to the perception of what was just and good, while Article 8 protected only "individual autonomy", which was independent of it.

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 had to 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, §§ 82-83, 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 Mr Vavřička, 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 emphasised the importance of the consistency and credibility of the person's claims in this regard, and remarked on the lack of consistency on Mr Vavřička'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 Vavřička had been put 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. Mr Vavřička 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 this 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 Ms Novotná and Mr Hornych, neither of whom even presented such arguments in the domestic proceedings (see paragraphs 37 and 45-46 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 to admit them to nursery school had been contrary to their rights under Article 2 of Protocol No. 1.

340. The Government submitted that the complaints fell to be examined under the first sentence of that Article. In so far as the applicants complained of any repercussions on their parents, such complaints were incompatible *ratione personae* with this provision. Moreover, and in any event, the complaints were incompatible *ratione materiae* since Article 2 did not apply to preschool education. In addition, in so far as the complaint had been brought by Mr Brožík and Mr Dubský, it was also subject to the Government's objection of non-exhaustion of domestic remedies (see paragraph 165 above).

341. Mr Brožík and Mr Dubský replied to the said objection as indicated above (see paragraph 166 above). Other than that, all of the applicants did no more than reiterate their complaints, referring in particular to the constitutional judgment of 27 January 2015, recognising that the right to education, within the meaning of Article 33 of the Charter of Fundamental Rights and Freedoms, concerned all types and levels of education, including preschool education (see paragraph 62 above).

B. Submissions of the third-party interveners

342. The Government of Germany noted that the exclusion of non-vaccinated children from nursery schools might amount to an interference with their right to education, although it was not clear from the relevant case-law that this level of education was covered by Article 2 of Protocol No. 1. Even if that provision were held to be applicable, the low education level should be taken into account in assessing the proportionality of the restriction.

343. The Government of Slovakia pointed out that the right to education was not absolute and argued that the existing Convention case-law did not specifically acknowledge its applicability to preschool establishments such as kindergartens.

344. The Government of France commented that the non-admission of an unvaccinated child to school was a justified restriction of the right to education.

C. The Court's assessment

345. In the 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 remainder 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 Mr Brožík and Mr 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 Mr Brožík and Mr 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.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 April 2021.

Johan Callewaert	Robert Spano
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring and partly dissenting opinion of Judge Lemmens;
(b) dissenting opinion of Judge Wojtyczek.

R.S.
J.C.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE LEMMENS

1. I fully agree with the Court's decisions, except for that concerning the complaint under Article 2 of Protocol No. 1.

In this separate opinion I would like briefly to highlight one element of the judgment with which I am in agreement, and also explain why I respectfully disagree on the above-mentioned point.

I. SOCIAL SOLIDARITY

2. As to the main issue in this case, namely whether the vaccination duty is compatible with Article 8 of the Convention, I would like to stress the importance of the Court's reference to the value of social solidarity (see paragraph 279 of the judgment; see also paragraph 306).

While everyone enjoys fundamental rights in a given society, a fact which must be respected by the State, individuals do not live in isolation. By the nature of things, they are members of that society. Life in society ("living together") requires respect by each member of society for certain minimum requirements (see *S.A.S. v. France* [GC], no. 43835/11, § 121, ECHR 2014 (extracts)).

One of these requirements is respect for the human rights of the other members of society.

As the judgment makes clear, the vaccination duty is one way by which the authorities choose to fulfil their positive obligation to protect the right to health. While the right to health is not as such protected by the Convention, it is a fundamental right.

The Court has since long recognised that in democratic societies it may be necessary to place restrictions on an individual's freedom in order to reconcile the interests of the various individuals and groups and to ensure that everyone's rights are respected (to paraphrase *Kokkinakis v. Greece*, 25 May 1993, § 33, Series A no. 260-A). Restrictions not for the sake of restrictions, but in order to make sure that everyone's rights are respected. The present judgment is in line with that view: a restriction, in the form of an obligation to vaccinate, may be placed on the applicants' right to physical integrity in order to "protect the health of all members of society, particularly those who are especially vulnerable with respect to certain diseases" (see paragraph 279 of the judgment).

As such, the judgment sends the message that apart from fundamental rights, there are also fundamental duties and responsibilities (see Resolution 1845(2011) of the Parliamentary Assembly of 25 November 2011 on fundamental rights and responsibilities, quoted in paragraph 143 of the judgment).

II. EXCLUSION OF NON-VACCINATED CHILDREN FROM PRESCHOOL EDUCATION

3. I regret that the majority do not find it necessary to examine the complaint under Article 2 of Protocol No. 1 (see paragraph 345 of the judgment). This complaint raises various issues.

A preliminary issue is whether Article 2 of Protocol No. 1 is applicable to preschool education (see paragraphs 340, 342 and 343 of the judgment).
A further issue, which seems to be the main one, is touched upon by the Court within its discussion of the Article 8 complaint. There, the Court accepts that "the exclusion [of the applicant children] 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" (see paragraph 306 of the judgment). The Court goes on to point out that these children "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", as well as to the fact that "the effects on the child applicants were limited in time" (see paragraph 307 of the judgment). While the latter statements may seem to suggest that the complaint under Article 2 of Protocol No. 1 cannot succeed, such an inference is not certain if it is not drawn explicitly.

Finally, another possible issue under Article 2 of Protocol No. 1 is to what extent the children should suffer the consequences of their parents' refusal to have them vaccinated.

I would have preferred to have had all these issues properly and separately examined.

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I agree with the general view that the Convention does not exclude the introduction of an obligation to vaccinate in respect of certain diseases, coupled with exceptions based upon conscientious objection. Objectively, there are strong arguments in favour of such a system and they may justify such an interference, even under the very high standards of scrutiny set out in Article 8. At the same time, I consider that the specific arguments adduced by the respondent Government and relied upon by the majority in the instant case to justify the compatibility with the Convention of mandatory vaccination in general and of the interference with the rights of the applicants in particular are not sufficient. Moreover, the judgment raises important issues of procedural justice.

I. QUESTIONS OF PROCEDURE

A. Preliminary remarks

2. A fair procedure requires legal rules which are determined with sufficient precision to allow the parties to choose their argumentative strategies. While the parties to proceedings should display due diligence and procedural caution, they cannot be guided by a principle requiring them to expect and anticipate the least favourable procedural decisions ("always expect the worst"). In the instant case, at least three problems arise in this context. The first is connected with the purpose of the proceedings and the role of the Court. The second concerns the burden and standard of proof and argumentation. The third concerns the establishment of facts on the basis of their tacit acknowledgment by the parties.

B. The role of the Court

3. The first and most fundamental question about any judicial proceedings concerns their purpose and the role of the judicial body. Should the proceedings before the Court be based upon the principles of material (substantive) truth and the possibility for the judge to act *proprio motu*, or should they be based upon the principles of formal truth and the activity of the parties alone? Or should they mix elements from these two systems? (For a deeper examination of this question, see K. Wojtyczek: "La procédure devant la Cour européenne des droits de l'homme – principaux dilemmes" in: O. Dubos (ed.), *Mélanges en l'honneur de Bernard Pacteau, Cinquante ans de contentieux publics*, s.l., Mare et Martin 2018.)

Article 38 of the Convention does not give a clear answer to this question but empowers the Court, "if need be", to "undertake an investigation". The Court may therefore, under certain circumstances, act *proprio motu* in the form of an "investigation" in order to establish the relevant facts.

Obviously, it should seek to establish the material truth. The existing case-law does not shed much light on the precise meaning of Article 38 with regard to the role of the Court. In many cases, the Court's reasoning states that the Court can rely upon evidence introduced *proprio motu* and suggests that its role is to establish the material truth (see, for instance: *Ireland v. the United Kingdom*, 18 January 1978, § 160, Series A no. 25; *McCann and Others v. the United Kingdom,* 27 September 1995, § 173, Series A no. 324; *Andronicou and Constantinou v. Cyprus*, 9 October 1997, § 174, *Reports of Judgments and Decisions* 1997-VI; *Osman v. the United Kingdom,* 28 October 1998, § 114, *Reports* 1998-VIII; *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 210, ECHR 2004-III; *N. v. Finland,* no. 38885/02, § 160, 26 July 2005; *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, § 116, ECHR 2012 (extracts); *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 116, ECHR 2012; *J.K. and Others v. Sweden,* no. 59166/12, § 90, 4 June 2015; and *Guðmundur Andri Ástráðsson v. Iceland* [GC]*,* no. 26374/18, § 257, 1 December 2020). Under such an approach the outcome of the case should not depend upon the quality of the pleadings.

In other cases, the Court relies on the submissions of the parties alone and, in so doing, suggests that it refrains from acting *proprio motu* (see, for instance, *Turek v. Slovakia*, no. 57986/00, § 99, ECHR 2006-II (extracts), *Peev v. Bulgaria*, no. 64209/01, § 62, 26 July 2007; *Starokadomskiy v. Russia*, no. 42239/02, § 83, 31 July 2008; *Gubkin v. Russia*, no. 36941/02, § 155, 23 April 2009; *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 185, 21 July 2015; *Ibrahimov and Others v. Azerbaijan*, nos. 69234/11 and 2 others, § 80, 11 February 2016; *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, §§ 193-199, 23 February 2016; *Biržietis v. Lithuania*, no. 49304/09, § 58, 14 June 2016; *Kryževičius v. Lithuania*, no. 67816/14, §§ 67-70, 11 December 2018; *P.T. v. the Republic of Moldova*, no. 1122/12, §§ 29-33, 26 May 2020; and *Yunusova and Yunusov v. Azerbaijan (no. 2)*, no. 68817/14, §§ 152-159, 16 July 2020). Under this approach, the outcome of a case may depend upon the quality of the pleadings of the parties (see my separate opinion appended to the *Biržietis* judgment, cited above, and especially point 2).

The comprehensive system of presumptions developed in the Court's case-law suggests that the Court relies upon formal truth and the activity of the parties alone. Similarly, the fact that the Court usually accepts as established those factual allegations that are made by one party and not rebutted by the other party also points to this conclusion (for factual allegations not contested by the Government, see, for instance: *Kudła v. Poland* [GC], no. 30210/96, §§ 95-97, ECHR 2000-XI; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 235, ECHR 2000-VIII; *Hermi v. Italy* [GC], no. 18114/02, § 82, ECHR 2006-XII; *Catan and Others*, cited above, § 142; *Mozer*, cited above, §§ 193-199; *Cirino and Renne v. Italy*, nos. 2539/13 and 4705/13, §§ 72, 75-77, 26 October 2017;

Černius and Rinkevičius v. Lithuania, nos. 73579/17 and 14620/18, § 70, 18 February 2020; for factual allegations not contested by the applicants, see, for instance: *Dimitras v. Greece*, no. 11946/11, § 46, 19 April 2018; *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 91, 4 December 2018; *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, §§ 225, 228, 13 February 2020; *Bahaettin Uzan v. Turkey*, no. 30836/07, §§ 53-55, 24 November 2020; and *L.B. v. Hungary,* no. 36345/16, § 57, 12 January 2021).

In some cases, certain elements of both typical systems coexist, although their interaction is not explained (see, for instance, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII, in §§ 13 and 18 for one approach and §§ 142 and 145 for the other).

The existing case-law and judicial practice are highly unclear and ambiguous with regard to the role of the Court and the purpose of the proceedings (establishing the material or formal truth). While the answer to this question may admittedly in some instances have no bearing on the manner in which the parties plead or on the outcome of the case, in many other cases it may be fundamental for the parties' pleading strategies and determinative for the outcome. There is therefore an urgent need to clarify this issue in order to ensure procedural fairness. At the same time, the choice between the available options is not easy, because there are strong arguments for and against each one. A possible solution could consist in a system based upon formal truth and the activity of the parties alone as a general rule, with some exceptions which would allow for the Court's *proprio motu* activity, directed at the establishment of material truth. These possible exceptions should be circumscribed by clearly defined principles. In any event, the rules of the game must be clear and known in advance to the parties.

In the instant case, the evidence which, in my view, would be necessary to show that the interference complained of was compatible with the Convention does exist, but has neither been submitted by the parties nor gathered *proprio motu* by the Court. However, I cannot rely upon my own knowledge of the matter and scientific data gathered by my own means in order to supplement the shortcomings in the material gathered by the Court (compare *Mehmet Ulusoy and Others v. Turkey*, no. 54969/09, §§ 109-110, 25 June 2019). The parties must have an opportunity to express their views on all the evidence, whether adduced by the other party or introduced *proprio motu*. Since the instant case concerns a general issue that is important for all 47 High Contracting Parties, its resolution should not depend upon the quality of the parties' pleadings. In a case such as this one, there are strong reasons to rely upon the principle of material truth and the Court's entitlement to act *proprio motu* and, in particular, to appoint independent experts. In the absence of such steps, the remaining – although highly unsatisfactory – option is to apply the principle of formal truth and to

decide the case on the basis of submissions and evidence put forward by the parties.

C. The burden and standard of proof and argumentation

4. The Court has established the following procedural requirement as an essential element of a fair trial (see *Čepek v. the Czech Republic,* no. 9815/10, § 48, 5 September 2013, French original; confirmed by *Alexe v. Romania,* no. 66522/09, § 37, 3 May 2016):

> "Courts must exercise special diligence where the dispute takes an unexpected turn, especially where it concerns a matter that is left to the discretion of the court concerned. The principle of adversarial proceedings requires that courts should not base their decisions on elements of fact or law which have not been discussed during the proceedings and which give the dispute an outcome which neither party would have been able to anticipate".

Procedural fairness depends upon clear principles concerning the burden and standard of proof and argumentation. These principles are intrinsically linked to the standards of scrutiny applied in specific proceedings. Predictability in this domain is essential, because principles enshrining the standards of scrutiny and allocating the burden and the determining standards of proof and argumentation will guide the parties in devising their pleading strategies. The issue is important in any proceedings but has a special bearing in proceedings based upon the principles of formal truth and the activity of the parties alone.

The existing case-law clearly determines that in disputes concerning the compatibility with the Convention of an interference with Article 8 rights, the burden of proof and argumentation lies upon the Government. Under this case-law, the Government must justify the interference complained of, by providing relevant and sufficient reasons (see, for instance, *K. and T. v. Finland* [GC], no. 25702/94, § 154, ECHR 2001-VII; *Kutzner v. Germany,* no. 46544/99*,* § 65, ECHR 2002-I; *P., C. and S. v. the United Kingdom,* no. 56547/00, § 114, ECHR 2002-VI; *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 101, ECHR 2008; *S.H. and Others v. Austria* [GC], no. 57813/00, § 91, ECHR 2011; *Piechowicz v. Poland*, no. 20071/07, § 212, 17 April 2012; *Hanzelkovi v. the Czech Republic*, no. 43643/10, § 72, 11 December 2014; *Parrillo v. Italy* [GC], no. 46470/11, § 168, ECHR 2015; *Zaieţ v. Romania*, no. 44958/05, § 50, 24 March 2015; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, §§ 89, 121, 27 June 2017; and *Pavel Shishkov v. Russia*, no. 78754/13, §§ 95, 97, 2 March 2021). This case-law entails a legitimate procedural expectation for the parties. Applicants bringing cases under Article 8 have a strong legitimate expectation that the Court will continue to impose upon the respondent Government the burden of justifying the given interference. Relying upon this expectation, applicants may in good faith decide to refrain from

pleading against the rationality of the interference complained of. In the instant case, it is for the Government to show a pressing social need and to provide relevant and sufficient reasons justifying the obligation to vaccinate for each and every one of the diseases in question.

Moreover, the existing case-law suggests that any interference with the freedom not to undergo an unconsented medical intervention requires a strong justification and that the margin of appreciation left to the States parties is narrow (see point 7 below). The applicants in the present case could reasonably have expected that the Court would continue to apply this standard in cases concerning bodily integrity. Taking into consideration (i) the relatively high threshold for the justification of an interference with the freedom to dispose of one's own body; and (ii) the nature of the arguments put forward by the Government, the applicants might have considered that it was not necessary to respond and to argue the case further.

The Court, however, established a standard of scrutiny based upon a wide margin of appreciation (see in particular paragraphs 284, 285 and 310 of the present judgment), justified by questionable arguments and coupled with a marked deference to the choices made by the domestic authorities (see in particular paragraphs 285, 288, 289 and 306). The standard of scrutiny actually applied is even lower than that stated. In my view, this approach amounts to an unexpected jurisprudential development, impacting upon the litigation. In any event, even assuming that the applicable standard of scrutiny may be open to dispute, it would have been necessary to warn the parties in advance about the envisaged standard of review and to request their views on this issue, enabling them also to bring – if they considered it necessary – additional substantive submissions under a more precisely identified standard of scrutiny.

D. Basis and justification of factual findings

5. As stated above (see point 4), under its established case-law the Court usually considers facts that are alleged by one party and not contested by the other party to be established, even if the factual allegations are not substantiated or corroborated by any evidence. The parties might reasonably have expected that the same principle would be applied in the instant case and would have adapted their pleadings accordingly.

I note in this context that the applicants formulated an important number of factual allegations which are relevant in the instant case and which have not been contested by the Government. The applicants allege, for instance: the existence of unlimited discretion on the part of the Minister of Health in determining the scope of mandatory vaccination (see the Applicants' observations, pp. 5-6); a failure to analyse the medical necessity of mandatory vaccination for each and every disease in question (ibid., pp. 4-5); the fact that the Government did not provide various documents requested by citizens (ibid., pp. 7-8); certain specific facts indicating

conflicts of interest within the WHO and certain expert bodies, such as income received by certain experts from pharmaceutical companies (ibid., pp. 4, 8-11, attachments nos. 7 and 8); detailed information concerning the efficiency of some vaccines (attachment no. 9).

The parties could have expected that such uncontested allegations would be considered as established by the Court. However, they do not form part of the factual findings made in the instant case. Some allegations pertaining to the integrity of the decision-making process were dismissed as unsubstantiated (see paragraph 279 of the judgment) while others were simply ignored. One may argue that the Court found these allegations to be devoid of relevance, yet I am not persuaded by this possible argument in respect of some of these allegations.

In this context, the Court should clarify the issue of tacit recognition of facts. In particular, it is necessary to explain in detail under which conditions the Court considers allegations made by one party and not contested by the other to be established. Clarity in this respect is essential for the parties.

II. SUBSTANTIVE QUESTIONS CONCERNING THE JUSTIFICATION OF THE INTERFERENCE

A. Preliminary remarks

6. In order to assess whether an interference with rights is compatible with the Convention, it is necessary, in particular, to establish the applicable standards of scrutiny and the relevant factual circumstances and to weigh the conflicting values. My objections pertain in particular to: (i) the standard of scrutiny established by the majority; (ii) the factual basis of the judgment; (iii) the way in which the conflict of values has been approached; and (iv) the assessment of the decision-making process at the national level.

The question to be answered is not whether vaccination campaigns serve public health but whether it is acceptable under the Convention to impose sanctions for non-compliance with the legal obligation to undergo vaccination. More specifically, the question is whether the added value brought by the obligation justifies the restriction on freedom of choice. For this purpose, it is necessary to demonstrate that the values protected in such a system outweigh the values which are affected. It is necessary to show, in particular, that the benefits for society as a whole and for its members outweigh the individual and social costs and justify taking the risk of suffering the side-effects of a vaccination. Given the weight of the values at stake, such an assessment requires extremely precise and comprehensive scientific data about the diseases and vaccines under consideration. Without such data the whole exercise becomes irrational.

B. Standard of scrutiny

7. The Court has expressed the following views in its earlier case-law (*Solomakhin v. Ukraine*, no. 24429/03, § 33, 15 March 2012):

> "The Court reiterates that according to its case-law, the physical integrity of a person is covered by the concept of "private life" protected by Article 8 of the Convention (see *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91). The Court has emphasised that a person's bodily integrity concerns the most intimate aspects of one's private life, and that compulsory medical intervention, even if it is of a minor importance, constitutes an interference with this right (see *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX, with further references). Compulsory vaccination – as an involuntary medical treatment – amounts to an interference with the right to respect for one's private life, which includes a person's physical and psychological integrity, as guaranteed by Article 8 § 1 (see *Salvetti v. Italy* (dec.), no. 42197/98, 9 July 2002, and *Matter v. Slovakia*, no. 31534/96, § 64, 5 July 1999)."

It further stated in other cases (here, *Parrillo*, cited above, §§ 168-9; see also *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, §§ 179-184, 24 January 2017):

> "168. The Court reiterates that in determining whether an impugned measure was "necessary in a democratic society", it will consider whether, in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, among many other authorities, *S.H. and Others v. Austria*, cited above, § 91; *Olsson v. Sweden* (no. 1), 24 March 1988, § 68, Series A no. 130; *K. and T. v. Finland* [GC], no. 25702/94, § 154, ECHR 2001-VII; *Kutzner v. Germany*, no. 46544/99, § 65, ECHR 2002-I; *and P., C. and S. v. the United Kingdom*, no. 56547/00, § 114, ECHR 2002-VI).
>
> 169. Furthermore, a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will usually be restricted (see *Evans*, cited above, § 77, and the other authorities cited therein, and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *S.H. and Others v. Austria*, cited above, § 94; *Evans*, cited above, § 77; *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports of Judgments and Decisions* 1997-II; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002-VI; and *A, B and C v. Ireland*, cited above, § 232)."

Moreover, under the existing case-law the freedom to dispose of one's own body is a fundamental value that is protected by the Convention (see, for instance, *Pretty v. the United Kingdom*, no. 2346/02, § 66, ECHR 2002-III, and *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 83, 17 February 2005). The Court further stresses that "a person's body concerns the most intimate aspect of private life" (see *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003-IX). "The notion of personal autonomy is an important principle underlying the interpretation of the

guarantees of Article 8" (see *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, § 123, 6 April 2017), a principle which is invoked to narrow the margin of appreciation even in the absence of European consensus (ibid., §§ 121-123). "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" (see *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 178, 15 November 2016; see also, for instance, *A.D.T. v. the United Kingdom*, no. 35765/97, § 37, ECHR 2000-IX, and *Hämäläinen v. Finland* [GC], no. 37359/09, §§ 68-69, ECHR 2014).

One might add that, in a completely different context, the Court has found that a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 82, ECHR 2005-IX).

8. The majority in the instant case defines the applicable standard in the following way:

> "280. As reiterated above (see paragraph 274), the Court has previously held that health-care 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."

This approach is difficult to accept. Under the established case-law, when determining the margin of appreciation, the Court considers that the following factors may plead in favour of widening it, without however prejudging its precise scope:

(i) a lack of consensus within the member States of the Council of Europe as to the relative importance of the interest at stake;

(ii) a lack of consensus within the member States of the Council of Europe as to the best means of protecting it;

(iii) the fact that the case under examination raises sensitive moral or ethical issues.

Against this backdrop it should be noted that there is a broad consensus within the member States of the Council of Europe that:

(i) bodily integrity should be protected against involuntary medical treatment;

(ii) the most appropriate method of protecting it consists in subjecting such interventions to the consent of the persons concerned.

It is worth recalling, in this context, that the Oviedo Convention contains the following provision:

> "Article 5 – General rule
>
> An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

> This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.
>
> The person concerned may freely withdraw consent at any time."

Obviously, some exceptions to free consent may be justified but they require particularly strong justifications.

As stated by the majority in paragraph 279, "childhood vaccination, being a fundamental aspect of contemporary public-health policy, does not in itself raise sensitive moral or ethical issues".

Moreover, there is no consensus that the interference under consideration, namely the obligation to vaccinate, is necessary for protecting public health (see point 14 below). According to the majority themselves, it is the fact of making vaccination a matter of legal duty which can be regarded as raising sensitive moral or ethical issues (see paragraph 279 of the judgment).

Furthermore, the margin of appreciation in the field of health-care policy has – rightly – been stressed in the context of complaints about access to certain forms of medical treatment (see, for instance, *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, ECHR 2012 (extracts), relied upon in paragraph 274). The instant case is neither about access to health services nor the manner in which they are organised (positive rights) but about the freedom to dispose of one's own body and freedom from unconsented medical intervention (negative rights).

The issue at stake is crucial to the individual's effective enjoyment of the most intimate rights, in a context in which there is no direct conflict between two or more rights and in which the right-holder asserts freedom from interference and does not claim any positive entitlements. Restrictions on the freedom to make choices about one's own body, imposed outside the context of a direct conflict between two or more rights, require strong justifications. In this domain, the margin of appreciation should be narrow and the threshold to justify the interference very high. The approach adopted may give the impression that without a low standard of scrutiny the finding of no violation would not have been possible.

C. The factual basis of the judgment

9. In the Czech Republic, the list of compulsory vaccinations encompasses nine diseases. These diseases are very different to each other. A rational assessment of whether the obligation to vaccinate complies with the Convention requires that the case be examined separately for each disease, proceeding on a disease-by-disease basis. For each and every disease, it is necessary to establish:

- the manner and speed of its transmission;
- the risks for infected persons;

- the average cost of individual treatment for the disease in the case of non-vaccinated patients, and the prospects of success of such treatment;
- the precise effectiveness of the available vaccines;
- the average cost of a vaccination;
- the risk of side effects of vaccination;
- the average costs of treating the undesirable effects of the vaccination;
- the minimum percentage of vaccinated persons which would prevent the disease from spreading (if applicable) and the prospects of achieving such an objective.

10. The majority's overall approach is summarised in the following quote (see paragraph 300 of the judgment): "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)".

It seems that both the respondent Government and the majority consider that the answer is so self-evident that it is unnecessary to resort to more detailed considerations to justify the interference. I do not share this view. The assessment of the legitimacy of the interference in the instant case requires expert medical knowledge.

Although the materials presented to the Court and summarised in the reasoning, particularly in paragraphs 152-157, include extensive expert statements, they do not contain the crucial data listed above. It is therefore not true that extensive scientific evidence has been gathered in the instant case (see paragraph 306). In particular, it is not sufficient to establish that the specific risk posed to an individual's health by a vaccination is "very rare" (as indicated in paragraph 301). It is necessary to calculate with the utmost precision the risk for each and every disease separately, on the basis of comprehensive and reliable data, collected not only in the Czech Republic but also in other States. The possible counterargument that the vaccines have been tested, considered as safe and approved by the competent public bodies does not suffice to justify the obligation to vaccinate.

In my view, given that the evidence submitted by the parties is not sufficient to decide on the general issues raised in the case and that the decision-making process at the domestic level was not fully satisfactory (see point 16 below), the Court should have appointed independent experts in order to have sufficient grounds to evaluate the possible risks properly and to take a rational judicial decision in the instant case.

11. It is important in this context to delimit the mandate of such experts. For this purpose, one must distinguish between theoretical and practical reason. Theoretical reason formulates propositions about facts and demonstrates their truth, resorting, in so far as possible, to scientific knowledge and method. Practical reason identifies and weighs the

conflicting values and interests at stake and takes decisions, choosing between the possible trade-offs. The role of experts is limited to matters of theoretical reason, that is, to providing and explaining factual elements. Taking decisions is a matter of practical reason and as such belongs to the political authorities, acting under the supervision of the domestic and international courts. Experts, like any citizens, may of course formulate value judgments – which, according to the Court, are not susceptible of proof although they should have a sufficient factual basis (see, for instance, *Morice v. France* [GC], no. 29369/10, § 126, 23 April 2015) – but even if experts master the factual basis better than anyone else, they have no specific competence or any other title to express practical reason. Expertise in medicine does not endow one with specialist knowledge for deciding conflicts of values and interests. In particular, experts may calculate risk, but they cannot price it in axiological terms.

I note in this context that the majority shows a reluctance to rely on hard scientific data. They prefer to rely on value judgments and policy recommendations formulated by experts as if these had the same value as experts' statements concerning facts.

D. The approach to the conflict of values

12. I would like to note, firstly, the following specificity of the interference. The obligation to vaccinate concerns children and constitutes a State interference with the bodily integrity of children. This is an important argument for applying even higher standards of scrutiny to the justification of the interference.

Small children usually resist vaccination. It is not true that "there is no provision allowing for vaccination to be forcibly administered" (see paragraph 293 of the judgment). While it is true that the State cannot apply coercion directly in respect of children in this context, the whole system relies upon the following principle: sanctions are imposed upon parents so that they convince their children or, if necessary, use coercion to force their own children to undergo vaccination.

13. The majority addresses in this context the issue of the best interests of the child. They express, in particular, the following views (see paragraph 288 of the judgment):

> "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. ... 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 ...."

This approach triggers the following remarks. It is for the parents, not the State, to take decisions pertaining to children, to define their best interests and to guide the children in the exercise of their rights (compare *M.A.K. and R.K. v. the United Kingdom,* nos. 45901/05 and 40146/06, §§ 75-79,

23 March 2010*)*. Parental rights may be limited only in exceptional circumstances (see *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019) and, in principle, the best interests of a child may be invoked against parents only once the latter's parental rights have been limited or forfeited.

In the instant case, the central question around the best interests of the children is not whether the general health policy of the respondent State promotes the best interests of children as a group, but instead how to assess in respect of each and every specific child of the applicant parents, with the child's specific health background, whether the different benefits from vaccination will indeed be greater than the specific risk inherent in it. The parents – sometimes rightly, sometimes wrongly, but in good faith – may identify certain very individual risk factors which escape the attention of other persons.

14. The applicants rely upon the argument that less restrictive alternatives are available, in that the same aims can be achieved without imposing the obligation to vaccinate. They rely for this purpose on comparative law, which indicates that many States consider that public-health objectives may be achieved without making vaccinations compulsory. This argument has not been convincingly rebutted by the Government, which merely mentioned, in a very general way, the risk that "a possible decline in the rate of vaccination would [arise] were it to become a merely recommended procedure" (see paragraph 283 of the judgment). However, the applicants' argument deserves very thorough consideration and requires a persuasive rebuttal.

I note in this context that the Court has previously expressed the following views on these questions:

> "65. As to the Federal Court's argument that the question whether there were other possibilities apart from the dissolution of the association was of little importance in the present case (see point 4.3 of the Federal Court judgment, paragraph 23 above), the Court would observe that it has ruled in a different context that, in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned (see *Glor v. Switzerland*, no. 13444/04, § 94, ECHR 2009). In the Court's opinion, in order to satisfy the proportionality principle fully, the authorities should have shown that no such measures were available." (*Association Rhino and Others v. Switzerland*, no. 48848/07, § 65, 11 October 2011),

and

> "... in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned. In the Court's opinion, in order to satisfy the proportionality requirement, the burden is on the authorities to show that no such measures were available (see *Association Rhino and Others*, cited above, § 65)." (*Biblical Centre of the Chuvash Republic v. Russia*, no. 33203/08, § 58, 12 June 2014).

For further examples, see also: *Ürper and Others v. Turkey*, nos. 14526/07 and 8 others, § 43, 20 October 2009; *Nada v. Switzerland*, [GC], no. 10593/08, § 183, ECHR 2012; *Stanev v. Bulgaria* [GC], no. 36760/06, § 242, ECHR 2012; *Piechowicz*, cited above, § 220; *P. and S. v. Poland*, no. 57375/08, § 148, 30 October 2012; *Saint-Paul SA Luxembourg v. Luxemburg*, no. 26419/10, § 44, 18 April 2013; *R.M.S. v. Spain*, no. 28775/12, § 86, 18 June 2013; *Fernández Martínez v. Spain* [GC], no. 56030/07, § 146, ECHR 2014 (extracts); and *Ivinović v. Croatia*, no. 13006/13, § 44, 18 September 2014.

The Court has also sometimes expressed the opposite view (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 110, ECHR 2013 (extracts):

> "The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (*James and Others v. the United Kingdom*, § 51; *Mellacher and Others v. Austria*, § 53; and *Evans v. the United Kingdom* [GC], § 91, all cited above)."

It is not clear why in some cases the Court addresses the issue of the existence of less restrictive alternatives, whereas in most cases it passes the question under silence and in other cases it explicitly rejects the test in question. The issue is important for devising pleading strategies. Had the applicants known that the "less restrictive alternative" test would be rejected, they would have probably pleaded the case differently. In my view, it is necessary to provide clarity concerning the scope of application of the "less restrictive alternative" test, so that the parties may rely upon more precise principles in future cases.

I also note that no evidence was presented to the Court which would show that those States which have introduced the obligation to vaccinate perform better in terms of public health than the States which have not introduced such an obligation. In this second group, no decline in the rate of vaccination below the recommended targets has been established before the Court. The fact that in many States the objectives of health policy can apparently be achieved without introducing an obligation to vaccinate is a very powerful argument that less restrictive means are indeed available and that the impugned interference is not necessary in a democratic society. The fact that the majority explicitly dismisses the "less restrictive alternative" test without further explanations for this rejection gives the impression that the applicants' point under this test would have been taken had it been applied.

15. The majority relies upon a number of specific but questionable arguments.

In paragraph 272 of the judgment the majority states:

> "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 in question 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."

In paragraph 306 they further argue:

> "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."

The problem is that this argument is valid for some diseases only. It does not work for a disease like tetanus, which is not contagious (WHO, *Tetanus,* https://www.who.int/immunization/monitoring_surveillance/burden/vpd/surveillance_type/passive/tetanus/en/) and is problematic for pertussis because of the specificity of vaccine protection (*Pertussis vaccines: WHO position paper – August 2015*, Weekly epidemiological record, No. 35, 2015, 90, 433–460 https://www.who.int/wer/2015/wer9035.pdf?ua=1).

In paragraph 288 the majority argues:

> "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."

I do not see any logical link between the first and the second sentence: this is a *non sequitur*. Moreover, the fact that "herd immunity is not relevant due to the nature of the disease (e.g. tetanus)" does not suffice to justify the power of the domestic authorities to "introduce a compulsory vaccination policy in order to achieve an appropriate level of protection against serious diseases".

In paragraph 308 the following argument is raised:

> "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."

The problem is that the obligation to vaccinate in respect of certain diseases was introduced after some older staff members had become adults,

so they would have not received all the currently prescribed vaccinations at the relevant time. For instance, the vaccine against rubella became available only in the late 1960s, while the vaccines against hepatitis B and *Haemophilus influenzae* type b infections became available only in the 1980s. Moreover, any staff members who spent their childhood abroad have not necessarily received all the vaccinations currently prescribed in the Czech Republic.

In paragraphs 279 and 306 the majority refers to "social solidarity" ("*solidarité sociale*"). It is not clear what this concept (bringing to mind the work of Émile Durkheim) means here. The *New Oxford Dictionary of English* (Oxford 1998, p. 1772), provides the following definition of solidarity *tout court*: *unity or agreement of feeling or action, especially among individuals with a common interest; mutual support within a group.* The *Dictionnaire Larousse 2019* (Paris 2018, p. 1081) gives the following meanings of the word "*solidarité*" in French: *1) dépendance mutuelle entre des personnes liées par des intérêts communs, esprit de corps ; 2) sentiment qui pousse les hommes à s'accorder une aide mutuelle* (the meanings in legal language have been omitted here; see also E. Littré, *Dictionnaire de la langue française*, Paris, Hachette 1874, t. 4, p. 1968). Although the French word *solidarité* may also have a different meaning (*le fait de faire contribuer certains membres d'une collectivité nationale à l'assistance (financière, matérielle) d'autres personnes* (*Le Petit Robert*, Paris, Le Robert 2013, p. 2390)), the very idea of solidarity, as initially understood in ordinary language (stemming from legal language), presupposes spontaneous self-organisation, not sacrifices imposed by State power. The two underlying concepts of social organisation are very different, the second approach (based upon legal obligations) compensating for shortcomings in the first.

E. The quality of the decision-making process at the national level

16. In assessing the proportionality of measures restricting Convention rights the Court takes sometimes into account the quality of the domestic decision-making process (see *Animal Defenders*, cited above, §§ 113-116; see also *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, § 136, ECHR 2008 (extracts); *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, § 101, 24 July 2014; *Parrillo*, cited above, § 170; *Garib v. the Netherlands* [GC], no. 43494/09, § 138, 6 November 2017; and *Lekić v. Slovenia* [GC], no. 36480/07, §§ 109, 117-118, 11 December 2018). The applicants point to numerous deficiencies in the decision-making process at the domestic level. They restate and endorse very precise factual allegations made in the Czech press. They allege, in particular, conflicts of interests among persons involved in the decision-making process and the fact that documents on which the risk evaluation of the different vaccines were based have not been made public.

The majority replies with this argument in paragraph 297 of the judgment:

> "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)."

With all due respect, the system of declarations described in paragraph 200, which is apparently devoid of sanctions for making false declarations, is clearly insufficient.

The majority further argues in the same paragraph:

> "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."

This is precisely where the problem lies: many citizens no longer trust public institutions. It is not sufficient that decision-making processes are fair: they must be perceived to be fair, and there should therefore be far-reaching legal arrangements to protect the integrity of the process and build public confidence. The pro-choice attitude in the field of vaccination reflects a broader problem of mistrust among citizens *vis-à-vis* the democratic institutions.

I further note that no national document containing a precise assessment of the various vaccines' efficiency and the attendant risks has been presented to the Court, as though no such assessment had ever been made in the respondent State or had ever been the subject of public debate. The fundamental issues enumerated above (see point 6 of this *votum separatum*) appear to have been left unaddressed in publicly available documents related to the decision-making process at national level. The persons affected by the obligation to vaccinate are entitled to know not only the precise risk for each and every disease, but also how this risk was calculated and assessed by those who took the decision to introduce the obligation to vaccinate. Their legitimate queries in this respect remain without a satisfactory answer.

F. Article 9 of the Convention

17. Concerning the complaint under Article 9, I consider that the applicants made a sufficient prima facie case that the legislation under consideration interferes with their rights as protected by this provision. The issue of whether a risk inherent in a medical intervention is one that is worth being taken may be a matter of personal belief, protected by this provision. Moreover, it is problematic to refer to developments in the domestic case-law subsequent to the facts of the case and to blame the applicants,

with the benefit of hindsight, for failing to explore the avenues opened by this subsequent case-law and to assert certain rights which were not previously protected (see paragraphs 292 and 335 of the judgment). In any event, the legal recognition of exceptions to the obligation to vaccinate based upon conscientious objection is a very important argument in favour of the compatibility of the obligation in question with the Convention.

G. Conclusion

18. The instant judgment is flawed by certain procedural shortcomings. Moreover, certain essential factual elements have not been established. The majority expresses strong value judgments without a sufficient factual basis.

In my view, there are strong objective arguments in favour of finding a non-violation of the Convention rights. These possible arguments would have prevailed – at least in respect of most of the diseases in question – over possible counterarguments, even if we apply a very strict standard of scrutiny and give credence to a number of factual allegations made by the applicants. Without entering into detail, it suffices to note here that vaccinations save numerous human lives and prevent substantial damage to health, and also liberate enormous financial and social resources by lowering the costs incurred by the health protection system. These resources may then be allocated to saving lives threatened by other diseases.

However, the precise factual elements at the basis of these and many other possible arguments in favour of finding a non-violation are missing in the materials submitted to the Court. Under these specific circumstances and without any prejudice for possible future cases concerning similar issues, I have no other option than to rely on the principle of formal truth and to find that the respondent Government failed to adduce sufficient reasons capable of justifying the interference complained of by the applicants in the instant case.