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

FIFTH SECTION

DECISION

Application no. 41994/21
Guillaume ZAMBRANO
against France

The European Court of Human Rights (Fifth Section), sitting on 21 September 2021 as a Chamber composed of:

Síofra O'Leary, *President*,
Mārtiņš Mits,
Ganna Yudkivska,
Stéphanie Mourou-Vikström,
Ivana Jelić,
Arnfinn Bårdsen,
Mattias Guyomar, *judges*,

and Martina Keller, *Deputy Section Registrar*,

Having regard to the above application lodged on 17 August 2021,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Guillaume Zambrano, is a French national who was born in 1981 and lives in Montpellier.

A. The circumstances of the case

2. In his application form the applicant included a statement with information about: the content of Law no. 2021-689 of 31 May 2021 on managing the end of the public-health crisis; Decree no. 2021-724 of 7 June 2021, amending Decree no. 2021-699 of 1 June 2021 introducing the general measures necessary for ending the public-health crisis; the measures announced by the President of the Republic on 12 July 2021; the enactment of Law no. 2021-1040 of 5 August 2021 on management of the public-health crisis; the penalties to which certain individuals were liable (Article L. 3136-1 of the Public Health Code); the Constitutional Council's

decision no. 2021-824 of 5 August 2021, concerning the presentation of a health pass; and, lastly, Decree no. 2021-1059 of 7 August 2021, amending Decree no. 2021-699 of 1 June 2021.

3. On 11 March 2020 the World Health Organization declared that the world was facing a pandemic caused by a new coronavirus, labelled SARS-CoV-2, which was responsible for an infectious disease, essentially respiratory in nature, known as COVID-19. The Court notes that the spread of this new coronavirus in France and elsewhere led the French authorities, from March 2020 onwards, to take measures to prevent and reduce the consequences of the public-health threats to the population. The relevant legislative provisions enacted between May and August 2021 are set out in more detail below (see paragraphs 12-15). In sum, Law no. 2021-689 of 31 May 2021 introduced a transitional regime for lifting the public-health state of emergency, valid until 30 September 2021; it authorises the Prime Minister, among other measures, to limit travel and the use of public transport (by, for example, making it mandatory to wear a mask) and to impose protective measures in shops. It also introduced a "health pass" system, effective until 30 September 2021, for persons travelling to and from France and in order to gain access to large gatherings, whether related to leisure activities (cinemas, theatres, museums, and so on), or to trade fairs and similar events. Law no. 2021-1040 of 5 August 2021 extended the regime for lifting the public-health state of emergency until 15 November 2021 and also broadened the use of the health pass to other areas of daily life, also until 15 November 2021 (bars and restaurants, including patio areas, with the exception of workplace canteens; department stores and shopping centres, on a decision by the prefect of the relevant *département*, where a risk of contamination is considered to exist; seminars; long-distance public transport by train, coach and aeroplane; hospitals, nursing homes for dependent elderly persons and retirement homes, to be shown by persons accompanying or visiting persons who have been admitted and patients with scheduled appointments (admissions for a medical emergency are exempt)). The health pass has been mandatory for adults wishing to take part in activities in the relevant facilities, and for staff working in them, since 30 August 2021. Penalties may be imposed on members of the public for failure to present a health pass or for fraudulent use of a pass, and also on venue owners and the staff responsible for verifying health passes should they fail to comply with this requirement. Law no. 2021-1040 of 5 August 2021 also made it compulsory for persons working in the health and social-care sectors to be vaccinated against COVID-19, except in cases of a recognised medical contraindication. A deadline of 15 September 2021 was set, which was extended to 15 October 2021 for individuals who had already received a first dose of the vaccine (see *Thevenon v. France*, no. 46061/21, case communicated on 7 October 2021).

4. The applicant relied on Articles 3, 8 and 14 of the Convention and Article 1 of Protocol No. 12.

5. In order to provide some context to the present case, the Court notes that, on an internet site (called "NO PASS !!!", at the web address nopass.fr) set up by the applicant to oppose the French health pass, he suggested that visitors to the site copy his application, with a view to submitting a form of collective application to the Court. A tutorial explained how to do this: visitors had only to fill in an online form with their surname, first name, sex, date and place of birth and contact details; they would then receive an automatically generated and standardised PDF document, which they had then only to print out and sign. In the "Question and answer" section of his site, under the question "Can I provide personal reasons in the box on the application form?", the applicant also stated:

> "That is not necessary. This is a collective application, [and] is the same for everybody in the group. You are asked to provide your personal reasons in your enrolment form so that we can take note of and classify this information. These reasons will be communicated to the Court if they are pertinent and contain valid arguments. If you wish to add personal details, you are free to do so, but this will make my task of corresponding with the Court more difficult."

6. The applicant further suggested watching several videos, also available on YouTube, which explained the idea behind his approach.

7. In the first video, entitled "NOPASS.FR #1 RECOURS COLLECTIF CEDH – 21 JUILLET 2021" ("NOPASS.FR 1st collective application to ECHR – 21 July 2021"), he stated, *inter alia*, as follows:

> "I suggest that we join forces [and] that we submit this application together, because there is strength in numbers; ... so I have prepared this application form on the nopass.fr internet site; it's my application, the one that I sent to the European Court of Human Rights, and you can simply fill in your name and send your application in turn."

8. In the third video, entitled "UN PETIT PEU DE PLOMBERIE JUDICIAIRE : SAISIR LA CEDH ÇA SERT À QUOI ? – 22 JUILLET 2021" ("A bit of judicial plumbing: what's the point in applying to the ECHR? – 22 July 2021"), and referring to *Vavřička and Others v. the Czech Republic* ([GC], nos. 47621/13 and 5 others, 8 April 2021), which concerned the possibility of imposing a fine for refusal to comply with the statutory duty to vaccinate children in the Czech Republic, the applicant stated, in particular:

> "... Nothing to worry about, move along, nothing to see here ... but this judgment is nonetheless a political message. Is it just a lucky coincidence that the Court happened to deliver a judgment on compulsory vaccination in April 2021? Not at all. ... This case gave the European Court of Human Rights an opportunity to send a message; various European governments used this case to submit observations arguing in favour of compulsory vaccination, and the European Court of Human Rights sent back a message, a very clear message that can be summarised as follows: go for it lads, we're on your side, it's open season, vaccinate, vaccinate, vaccinate and penalise people, we won't do anything, we're all for it. It's not very legal as summaries go, but you get the idea."

9. Continuing his remarks by referring to the aim of the collective application he had initiated, the applicant stated:

> "So what's the point of applying to the European Court of Human Rights ...? Our aim isn't to win the case, our aim is to lodge the highest number of applications possible with the Court. Why? Because the European Court of Human Rights is obliged to respond to each of those applications, and that takes time; even if each one takes only a little bit of time, multiplied by tens of thousands, this adds up to a lot of time ..."

10. Having evaluated the Court's maximum capacity to process applications at 40,000 [per year], he continued:

> "Once you get over 40,000 applications per year, there's an obstruction, things get blocked, everything spills over, and the European Court of Human Rights overflows. So why do this? To create a relationship of power ... Just opening a letter, even if it takes only five seconds, requires time. So, very quickly, the drips of applications against the health pass will build up and up, until they cause a flood. And that's when we'll be able to negotiate. They'll negotiate so that we leave them in peace, so that we stop sending in application forms. So either they'll agree to rule on the matter and we'll turn off the tap. Or they'll carry on, they'll dig in, they'll continue to refuse to rule and the applications will keep coming. Inexorably, little by little, what was just a small amount of water damage will become a very serious flood. This is my legal strategy. We can't lose, when the aim was never to win but rather to derail the system."

11. In a video entitled "SATURER LES JUGES POUR FAIRE DÉRAILLER LE PASSE SANITAIRE – 7 AOÛT 2021" ("Flood the Court to derail the health pass – 7 August 2021"), the applicant set out the aim of the collective application he had initiated:

> "[We need] to continue lodging applications with the European Court of Human Rights until the health pass has been done away with. Why? Quite simply to break down the doors of the European Court of Human Rights ... We don't expect a favourable response from the European Court of Human Rights to our collective application. If there are tens of thousands of us, the time alone taken to deal with every letter received ... will quickly make the situation untenable for the European Court of Human Rights ... In short, that is the strategy. This is not at all a matter of legal arguments ..., but we are primarily squaring up to a system, squaring up to a system which is about to crush us, which is putting laws in place, which controls the courts, which controls the media, and it is this system that we have to derail. This is exactly the strategy I am proposing to you: to derail the system, or more precisely a link in the chain, the European Court of Human Rights ... It doesn't matter what the European Court of Human Rights decides ... Paralysing the European Court of Human Rights will send a strong and clear message, not only to the French government, but to all the European governments."

B. Relevant legal framework

12. The relevant provisions of Law no. 2021-689 of 31 May 2021 on managing the end the public-health crisis read as follows:

Article 1

> "I. – From 2 June 2021 to 30 September 2021 inclusive, the Prime Minister, by a decree issued on the basis of a report from the Minister of Health, may, in the interests

of public health and for the sole purpose of combating the spread of the COVID-19 pandemic:

(1) Regulate or, in those parts of the territory where the virus has been found to be circulating actively, prohibit the free movement of persons and vehicles, access to public transport and the conditions for the latter's use, and, in respect of air and sea travel only, prohibit or restrict individual travel and the operation of these modes of transport, with the exception of journeys which are absolutely essential for family, professional or health reasons;

(2) Regulate the opening to the public of one or several categories of public buildings and meeting places, including the conditions for admission to and presence therein, with the exception of residential premises, while guaranteeing access to essential goods and services.

...

(3) Without prejudice to Articles L. 211-2 and L. 211-4 of the National Security Code, regulate gatherings, meetings and activities being held on the public highway and in places open to the public.

II. – A. From 2 June 2021 to 30 September 2021 inclusive, the Prime Minster, by a decree issued on the basis of a report from the Minister of Health, may, in the interests of public health and for the sole purpose of combating the spread of the COVID-19 pandemic:

(1) Require persons wishing to travel to or from mainland France, Corsica or one of the territorial communities indicated in Article 72-3 of the Constitution to present the results of a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate attesting to recovery from COVID-19;

(2) Make access to certain premises, venues or events at which large numbers of people will be involved in recreational activities, trade fairs and similar events subject to presentation of a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate attesting to recovery from COVID-19. In applying this provision, regard is to be had to the number of people that the premises, venues or events can accommodate, including outdoors, in order to ensure that measures to limit the risk of spreading the virus can be implemented.

...

B. – The negative PCR test for COVID-19, proof of full vaccination against COVID-19 or certificate attesting to recovery from COVID-19 to be presented in the cases provided for in sub-paragraph A of paragraph II may be in paper or digital format.

The documents referred to in the first paragraph of B, whether in paper or digital format, are to be in a format which does not allow the persons or services authorised to verify them to have knowledge of the type of document concerned or the data contained therein.

C. – The named individuals and services authorised to verify the documents referred to in (1) and (2) of sub-paragraph A for transport companies and at the premises, venues or events concerned may only require presentation of the documents in the format referred to in the second paragraph of B, and they are not authorised to retain or reuse them for any other purpose.

Retention of the documents referred to in (1) and (2) of sub-paragraph A in the context of the verifying process or reusing them for any other purpose shall be punishable by one year's imprisonment and a fine of 45,000 euros.

D. – Other than in the cases provided for in (1) and (2) of sub-paragraph A, no one may impose on another person the presentation of a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate attesting to recovery from COVID-19.

Imposing the presentation of the documents referred to in the first paragraph of D in order to access premises, venues or events other than those set out in (2) of sub-paragraph A shall be punishable by one year's imprisonment and a fine of 45,000 euros.

...

IV. – The measures prescribed in application of the present Article are to be strictly proportionate to the risk to health occasioned and adapted to the circumstances of time and place. They are to be lifted as soon as they are no longer necessary. Individual measures are to be notified without delay by the territorially competent public prosecutor.

V. – Measures taken in application of the present Article may be subject, before the administrative courts, to appeals that are to be lodged, investigated and adjudicated in accordance with the procedures set out in Articles L. 521-1 and L. 521-2 of the Administrative Courts Code.

..."

13. Among other measures, Law no. 2021-1040 of 5 August 2021 on managing the public-health crisis amended Article 1 of Law no. 021-689 of 31 May 2021, which now reads as follows:

Article 1

"I. – From 2 June 2021 until 15 November 2021 inclusive the Prime Minister, by a decree issued on the basis of a report from the Minister of Health, may, in the interests of public health and for the sole purpose of combating the spread of the COVID-19 pandemic:

1. Regulate or, in those parts of the territory where the virus has been found to be actively circulating, prohibit the free movement of people and vehicles, access to public transport and the conditions for its use, and, in respect of air and sea travel only, prohibit or restrict individual travel and the operation of these modes of transport, with the exception of journeys which are absolutely essential for family, professional or health reasons;

2. Regulate the opening to the public of one or several categories of public venues and meeting places, including the conditions on admission and presence therein, with the exception of residential dwellings, while guaranteeing access to essential goods and services.

...

3. Without prejudice to Articles L. 211-2 and L. 211-4 of the National Security Code, regulate gatherings, meetings and activities being held on the public highway and in places open to the public.

II. – A. From 2 June 2021 until 15 November 2021 inclusive the Prime Minster, by a decree issued on the basis of a report of the Minister of Health, may, in the interests of public health and for the sole purpose of combating the spread of the COVID-19 pandemic:

1. Require persons aged 12 years and over wishing to travel to or from mainland France, Corsica or one of the territorial communities indicated in Article 72-3 of the Constitution, and the personnel of the transport services in question, to present the results of a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate attesting to recovery from COVID-19;

2. Make access to certain premises, venues, services or events at which the following activities listed in (a) to (f) take place subject to presentation of a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate attesting to recovery from COVID-19:

(a) Recreational activities;

(b) The sale of food or drinks, with the exception of canteens, take-away sales of pre-prepared food and catering facilities in motorway service stations and on trains;

(c) Seminars, trade fairs and other similar events;

(d) Except in an emergency, health, social and social-care services and institutions, solely to persons accompanying or visiting persons admitted to these services or institutions and patients with scheduled procedures. A person who fulfils the requirements set out in the present (2) may not be subject to any other access restrictions related to the COVID-19 pandemic in order to visit a patient, and may only be denied access to the above-mentioned services or institutions in application of the operational and security regulations of the institution or service, including for health and safety reasons;

(e) Long-distance inter-regional travel on public transport in the territories indicated in (1) of sub-paragraph A, except in an emergency making it impossible to obtain the certificate required;

(f) Where the nature and seriousness of the risk of contamination so require, and on a reasoned decision by the prefect of the *département* in question, department stores and shopping centres, over a certain size, to be defined by decree and under conditions ensuring access to essential goods and services and, where needed, means of transport.

This regulation is applicable to the general public and, from 30 August 2021, to persons working in or at these premises, venues, services and events, where the seriousness of the risk of contamination arising from the exercise of the activities performed there so requires, having regard, in particular, to the actual or expected density of people attending.

This regulation is applicable to minors of 12 years and over from 30 September 2021.

The application of this regulation does not remove the obligation to implement measures to prevent the risk of the spread of the virus, where the type of activity so permits.

B. – The negative PCR test for COVID-19, proof of full vaccination against COVID-19 or certificate attesting to recovery from COVID-19 to be presented in the cases provided for in sub-paragraph A of paragraph II may be in paper or digital format.

The documents referred to in the first paragraph of B are to be presented by the persons set out in (2) of sub-paragraph A of the present paragraph II in a format which

allows the persons or services authorised to verify them to have knowledge only of the data strictly necessary to carry out their task.

The documents referred to in the first paragraph of B are to be presented by the persons set out in paragraph 2 of A of the present paragraph II in a format which does not allow the persons or services authorised to verify them to have knowledge of the type of documents concerned, and is accompanied by verification of the individual's official identity document only if this is required by law-enforcement officials.

...

D. – Failure to comply with the requirements laid down in application of (1) and (2) of sub-paragraph A of the present paragraph II shall be punishable under the same conditions as those set out in Article L. 3136-1 of the Public Health Code, punishing any person who enters an institution open to the general public in breach of a measure introduced on the basis of (5) of paragraph I of Article L. 3131-15 of that Code.

Failure by a transport worker to verify the documents (mentioned in (1) of sub-paragraph A of the present paragraph II) of persons wishing to use the form of transport in question shall be punishable by a fine at the rate applying to fifth-class petty offences (*contraventions*). This petty offence may be subject to the standard-fine procedure provided for in Article 529 of the Code of Criminal Procedure. If a person is fined more than three times over a thirty-day period, the punishment is increased to one year's imprisonment and a fine of 9,000 euros.

Where the operator of premises, a venue or an event fails to verify the documents (mentioned in (1) of sub-paragraph A of the present paragraph II) of persons wishing to gain access to them, it is served by the administrative authority with notice to comply with the obligations concerning access to the relevant premises, venue or event, except in an emergency or if the failure to verify was a one-off act. ... If the notice to comply is unsuccessful, the administrative authority may order the closure of the premises, venue or event in question for a maximum of seven days. ... If the above-mentioned failure to comply takes place more than three times over a forty-five-day period, it shall be punishable by one year's imprisonment and a fine of 9,000 euros.

...

The fact of presenting a document belonging to another person indicating a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate attesting to recovery from COVID-19, or of proposing to another person the fraudulent use of such a document, whether or not for material gain, including by online means of communication, shall be punishable under the conditions provided for in the third and fourth paragraphs of Article L. 3136-1 of the Public Health Code for the prohibitions and obligations laid down in application of Articles L. 3131-1 and L. 3131-15 to L. 3131-17 of the same Code.

...

F. – Other than in the cases provided for in (1) and (2) of sub-paragraph A of the present paragraph II, no one may oblige a person to present the results of a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate attesting to recovery from COVID-19.

The fact of obliging a person to present the documents set out in the first paragraph of the present sub-paragraph F in order to access premises, venues, services or events other than those laid down in (2) of sub-paragraph A of the present paragraph II shall be punishable by one year's imprisonment and a fine of 45,000 euros.

...

J. – A decree, adopted further to an opinion from the High Authority for Health, shall indicate the cases of medical contraindication to vaccination and for issuing, to the person concerned, a document for use in the cases provided for in (2) of sub-paragraph A of the present paragraph II.

...

IV. – The measures prescribed in application of the present Article are to be strictly proportionate to the risk to health occasioned and adapted to the circumstances of time and place. They are to be lifted as soon as they are no longer necessary. Individual measures are to be notified without delay by the territorially competent public prosecutor.

V. – Measures taken in application of the present Article may be subject, before the administrative courts, to appeals lodged, investigated and adjudicated in accordance with the procedures set out in Articles L. 521-1 and L. 521-2 of the Administrative Courts Code.

..."

14. Implementing decrees were adopted in respect of these Laws, namely Decrees nos. 2021-724 of 7 June 2021 and 2021-1059 of 7 August 2021, which successively amended Decree no. 2021-699 of 1 June 2021 introducing the general measures necessary for ending the public-health crisis.

15. Moreover, in decision no. 2021-824 of 5 August 2021, the Constitutional Council declared the provisions on the "health pass" to be in conformity with the Constitution, with the exception of those relating to the early termination of certain employment contracts and to "automatic" placement in isolation, which were deemed to be unconstitutional. In respect of the health pass, the Constitutional Council stated:

"... As regards the provisions making access to certain premises, venues, services and events subject to presentation of a 'health pass':

36. The impugned provisions provide that the Prime Minister may make the general public's access to certain premises, venues, services and events, where particular activities take place, subject to presentation of the results of a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate attesting to recovery from COVID-19. They also provide that, from 30 August 2021, this measure can be applicable to persons who work in or at these premises, venues, services and events.

37. These provisions, which are likely to limit access to certain places, infringe the right to freedom of movement and, in so far as they are also likely to restrict the right to freedom of assembly, the right to the collective expression of ideas and opinions.

38. In the first place, however, the legislature considered that, in the light of the scientific knowledge available to it, the risk of circulation of the COVID-19 virus is significantly reduced among persons who have been vaccinated, are recovering from the virus or have just received a negative test result. In enacting the impugned provisions, the legislature sought to enable the public authorities to put in place measures aimed at limiting the spread of the COVID-19 virus. As such, it pursued the objective of the protection of health, which has constitutional status.

39. Secondly, these measures can only be imposed for the period from the entry into force of the law referred for review until 15 November 2021, a period during which the legislature considered that there was a significant risk of the pandemic spreading owing to the appearance of new, more contagious, variants of the virus. For the reasons outlined in paragraph 29, this assessment is not, on the basis of the information available, manifestly inadequate in the light of the current situation.

40. Thirdly, the impugned measures may apply in specific premises, venues, services or events in or at which recreational activities or commercial dining or drinking activities occur. They may also apply to seminars, trade fairs and similar events; health, social and social-care services and institutions; long-distance travel by inter-regional public transport; and to certain department stores and shopping centres.

41. On the one hand, by providing that these measures apply to seminars, trade fairs and similar events, long-distance travel by inter-regional public transport, and certain department stores and shopping centres, the legislature has limited their application to activities which bring large numbers of people into contact with one another in the same place, thus increasing the risk of transmitting the virus. In a similar vein, by providing that these same measures are applicable to health, social and social-care services and institutions, and to recreational activities, catering and beverage services, with the exception of collective dining premises, take-away sales of pre-prepared food, motorway service stations and railway catering services, the legislature has limited their application to places in which the activity being carried out presents, by its very nature, a particular risk of spreading the virus .

42. At the same time, however, the legislature has provided several safeguards for the application of these measures. With regard to ... health, social and social-care services and institutions, the legislature has specified that only persons accompanying or visiting persons admitted to these services or institutions and those admitted for scheduled treatment are required to present the ‘health pass’. As such, this measure, which does not apply in cases of emergency, does not limit access to medical care. With regard to the application of the measures to department stores and shopping centres, the legislature has specified that access to essential goods and services, and to accessible means of transport within these stores and centres, must be ensured. The legislature also stated that the measures could only be imposed [in respect of premises] over a certain size, to be defined by decree and on a reasoned decision by the prefect of the *département* in question, where justified by the nature of the premises in question and the seriousness of the risk of contamination. As to long-distance inter-regional travel by public transport, the legislature ruled that the measures would not apply in ‘an emergency situation where it [is] impossible to obtain the certificate required’. Further, as the Constitutional Council held in its ... decision of 31 May 2021, the term ‘recreational activities’ does not include political, trade union or religious activities.

43. Lastly, as stated above, the regulatory measures taken on the basis of the impugned provisions may only be adopted, subject to judicial control, in the interests of public health and for the sole purpose of combating the spread of the COVID-19 pandemic. They must be strictly proportionate to the health risks involved and adapted to the circumstances of time and place. They are to be lifted as soon as they are no longer necessary.

44. Fourthly, the impugned provisions provide that the requirement imposed on the general public can be fulfilled by presenting proof of vaccination, the results of a negative PCR test or a recovery certificate. As such, the provisions do not, in any event, impose an obligation to receive medical care or to be vaccinated. In addition, the legislature has provided that a list of cases of medical contraindication to vaccination is

to be determined, by way of a decree, adopted further to an opinion from the High Authority for Health, and that a document is to be supplied to the persons concerned, for use in or at the premises, services or venues where presentation of a 'health pass' will be required.

45. Fifthly, verification that individuals have the documents required to access premises, a venue, service or events may only be carried out by law-enforcement officials or the operators of the above-mentioned sites. Furthermore, the documents are to be presented in a format which does not allow [the persons or services authorised to verify them] 'to have knowledge of the type' of documents concerned and entails presentation of the individual's identity document only where these are requested by law-enforcement officials.

46. Lastly, (a) the measures will apply to the general public and, from 30 August 2021, to persons working in or at these premises, venues, services or events, only where this is justified by the seriousness of the risk of contamination arising from the exercise of the activities performed therein, having regard in particular to the actual or expected density of people attending.

47. The legislature has considered (b) that, on the basis of the available scientific knowledge, minors of 12 years and over are, like adults, vectors for transmission of the virus; it has thus decided that the presentation of a 'health pass' will also apply to them from 30 September 2021.

48. It follows from all of the above that the impugned provisions strike a proper balance between the above-cited constitutional requirements.

As regards the complaint concerning a breach of the right to equality:

...

50. In the first place, department stores and shopping centres bring together large numbers of people under the same roof over a long period of time. They thus increase the risk of transmission of the virus. Businesses in these premises are thus in a different situation to those located outside them. Thus, by providing that the impugned measures apply only to department stores and shopping centres, the [impugned] measures introduce a difference in treatment which is based on a difference in situation and is directly related to the purpose of the law.

51. Secondly, by providing that the Prime Minster may require presentation of one of the medical certificates set out in the impugned measures in order to access department stores and shopping centres, above a certain size, to be defined by decree and on a reasoned decision by the prefect of the *département* in question, subject to judicial review, where the nature of the places in question and the seriousness of the risk of contamination justify it, the impugned measures do not in themselves create a difference in treatment between these types of business.

52. Thirdly, the impugned measures, under which a vaccination certificate is not obligatory since the 'health pass' can also take the form of a recovery certificate or the results of a negative PCR test, do not create a difference in treatment in respect of persons who could not be vaccinated before the entry into force of the law or who received a vaccine that was not approved by the European Medicines Agency.

53. Fourthly, the impugned measures do not concern either the conditions for obtaining the documents required in order to access the premises, venues or events, or whether payment for such documents is required.

54. Finally, the verification of possession of the documents required to access the premises, venue, service or events may only be carried out by law-enforcement officials or the operators of the above-mentioned places. It may only be conducted on the basis of criteria which exclude any form of discrimination between individuals.

55. It follows from the above that, subject to the proviso in the previous paragraph, the complaint concerning a breach of the right to equality must be dismissed.

56. It follows from the above that, subject to the above-mentioned proviso, the measures provided for in sub-paragraph A (2) and paragraph II B of Article 1 of the Law of 31 May 2021, which do not breach any other constitutional requirement, are in conformity with the Constitution. ...”

COMPLAINTS

16. Relying on Article 3 of the Convention, the applicant complained about Laws nos. 2021-689 and 2021-1040 which, in his opinion, were essentially intended to coerce individuals to consent to vaccination. In particular, he complained about what he described as the reprisal measures provided for, alleging intense physical suffering and a serious risk of physical injury, without, in his view, medical justification and despite the fact that the available vaccines were still at the clinical-trial phase.

17. He also alleged, under Articles 8 and 14 of the Convention and Article 1 of Protocol No. 12, that by creating and imposing a health-pass system, these laws amounted to a discriminatory interference with the right to respect for private life which was not “in accordance with the law”, in that it was not foreseeable, did not pursue a legitimate public-interest aim and, lastly, was not necessary in a democratic society, despite the States’ margin of appreciation being strict.

THE LAW

A. Preliminary observations

18. The Court notes, first, that opposition to the above-mentioned measures gave rise to public demonstrations in France. However, it should be pointed out that the present application does not concern either the right to freedom of expression under Article 10 of the Convention or the right to freedom of association within the meaning of Article 11.

19. The Court further notes that the applicant lodged an individual application in his own name. In his application form (in the section entitled “Any other comments – Do you have any other comments about your application?”), he also stated: “Application lodged on behalf of 7,934 applicants. List appended. Authority forms submitted with individual applications.”20. The Court observes that the figure 7,934 is, in reality, far smaller than the almost 18,000 applications which have since been lodged with it as part of the applicant’s initiative. The Court also notes that these

thousands of applications did not comply with all of the requirements set out in Rule 47 § 1 of its Rules of Court. The President of the Court decided to apply, temporarily, the exception provided for in Rule 47 § 5.1 (c) in respect of the absence from the forms of an original signature by the applicants' representative, Mr Zambrano. As regards the failure to comply with the other requirements of Rule 47 § 1, by a letter and an email of 17 August 2021, the applicant, since he had been automatically designated as representative in all these standardised applications, was invited, under Rule 47 § 5.2, to complete the files and was warned that, were this not done, these applications might not be examined. The Registry's correspondence went unanswered.

21. It follows that the present application cannot be considered to have been duly lodged by Mr Zambrano on behalf of the other applicants, as he claimed, although the Court's conclusions as to the admissibility of his application are likely to apply to the thousands of standardised applications arising from it.

B. Admissibility

22. The Court must examine whether the applicant's application fulfils the admissibility criteria, regard being had to the requirements of the Convention and its well-established case-law.

1. Exhaustion of domestic remedies

23. The Court would begin by observing that the applicant did not bring an application on the merits before the administrative courts against the regulations in question, namely the implementing decrees in respect of the contested Laws (see paragraph 14 above). Admittedly, he argued in his application that, in so far as he was challenging the Convention-compliance of Laws nos. 2021-689 and 2021-1040 *per se* and given that these texts had been found by the Constitutional Council to be in conformity with the Constitution (see paragraph 15 above), there had been no effective and available remedy which he ought to have used before applying to the Court.

24. The Court reiterates, however, that it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. The Court is concerned with the supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of the Contracting States, whose responsibility it is [in the first place] to ensure that the fundamental rights and freedoms enshrined in the Convention are respected and protected at domestic level (see, among many other authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014). In the context of the exhaustion of domestic remedies and having regard to the subsidiary character of the supervision mechanism set up by the Convention, the Court has always

recognised that the national authorities have direct democratic legitimation in so far as the protection of human rights is concerned and that, 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 (see, for example, *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 175, 15 November 2016, and *Maurice v. France* [GC], no. 11810/03, § 117, ECHR 2005-IX, with further references).

25. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged violation. The rule is therefore an indispensable part of the functioning of this system of protection. Those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to first use the remedies provided by the national legal system.

26. The obligation to exhaust domestic remedies is particularly important in the context of complaints under Article 8, whether taken alone or in conjunction with Article 14. It is of utmost importance, when the Court considers the complex and delicate question of the balancing exercise to be carried out between the rights and interests at stake in the context of the application of these provisions, that this balancing exercise should have been carried out beforehand by the domestic courts, who are in principle better placed to do so (see *Charron and Merle-Montet v. France* (dec.), no. 22612/15, § 30, 16 January 2018), while remaining subject to the external supervision provided for by the Convention.

27. Under French law, therefore, an application for judicial review, in the context of which it is possible to develop arguments alleging a violation of the Convention in support of a request for a text to be set aside, is a domestic remedy that has to be exhausted (see, most recently, *Graner v. France* (dec.), no. 84536/17, § 44, 5 May 2020). The Court also reiterates that an appeal on points of law is one of the remedies which should be used in order to comply with Article 35 of the Convention (see, for example, *Renard and Others v. France* (dec.), nos. 3569/12 and 4 others, 25 August 2015, and *Graner*, cited above, § 61). In order to fully exhaust domestic remedies, it is thus in principle necessary to pursue domestic proceedings, where applicable, up to the cassation level, and submit to the relevant court the complaints under the Convention that are likely to be raised subsequently before the Court. This requirement is independent of obtaining a decision from the Constitutional Council, which does not rule on provisions of the Convention (see *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 9 others, § 59, ECHR 1999-VII). Scrutiny of an individual measure's conformity with the Convention as conducted by the "ordinary courts" is different from scrutiny of a law's conformity with the Constitution as

conducted by the Constitutional Council: a measure adopted pursuant to a law (a regulation or individual decision) whose conformity with constitutional provisions protecting fundamental rights has been established can be ruled incompatible with the same rights as safeguarded by the Convention on the grounds, for instance, of its disproportionate nature in the particular circumstances of a case (see *Charron and Merle-Montet*, cited above, § 28, and *Graner*, cited above, § 53). Furthermore, an applicant who submits a request to the *Conseil d'État* for judicial review of a decree implementing a law, or of a decision refusing to repeal such a decree, is entitled to argue, exceptionally and in support of his or her arguments for it to be set aside, that the law in question does not comply with the Convention. An effective remedy was thus available in domestic law, which would have enabled the applicant to challenge the compliance of the Law of 5 August 2021 with the provisions of the Convention relied on before the Court.

28. In addition, where there is a doubt regarding the effectiveness of a domestic remedy, that issue should be submitted to the domestic courts (see *Roseiro Bento v. Portugal* (dec.), no. 29288/02, ECHR 2004-XII (extracts); *Lienhardt v. France* (dec.), no. 12139/10, 13 September 2011; and *Vučković and Others*, cited above, § 74.

29. In consequence, even supposing that the applicant could claim to have victim status (see below), the application is in any event inadmissible for failure to exhaust domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

30. While this conclusion is in itself sufficient to find an application inadmissible, the Court nevertheless considers it useful, even essential in the specific circumstances of this case, to examine whether the present application might fail to meet other admissibility criteria.

2. Abuse of the right of application

31. The Court reiterates that its only duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the States Parties to the Convention.

32. Moreover, it is acutely conscious of the difficulties caused by the COVID-19 pandemic and of the fact that certain measures taken by national authorities are likely to raise issues with regard to the requirements of the Convention. It observes in this respect that a number of applications have already been notified to the Governments of several High Contracting Parties (see, for example, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, no. 21881/20, case communicated on 11 September 2020; *Spînu v. Romania*, no. 29443/20, case communicated on 1 October 2020; *Toromag, s.r.o. v. Slovakia and four other applications*, nos. 41217/20 and 4 others, cases communicated on 5 December 2020; *Association of Orthodox Ecclesiastical Obedience v. Greece*, no. 52104/20, case communicated on

25 February 2021; and *Magdić v. Croatia*, no. 17578/20, case communicated on 31 May 2021).

33. The fact remains, however, that an application may be rejected as an abuse of the right of individual application under Article 35 § 3 of the Convention. The implementation of this provision is an "exceptional procedural measure" and the concept of "abuse" refers to its ordinary meaning, namely, the harmful exercise of a right by its holder in a manner that is inconsistent with the purpose for which such right is granted (see *Miroļubovs and Others v. Latvia*, no. 798/05, § 62, 15 September 2009, and *S.A.S. v. France* [GC], no. 43835/11, § 66, ECHR 2014 (extracts)). The applicant's direct responsibility must always be established with sufficient certainty, a mere suspicion not being sufficient to reject an application as an abuse of the right of individual application under Article 35 § 3 of the Convention (see *Miroļubovs and Others*, cited above, §§ 63-66).

34. On this latter point, the Court has noted that for such "abuse" to be established on the part of an applicant, the conduct in question must not only be manifestly contrary to the purpose of the right of application but also impede the proper functioning of the Court or the proper conduct of the proceedings before it (ibid., § 65; see also *Zhdanov and Others v. Russia*, nos. 12200/08 and 2 others, § 81, 16 July 2019).

35. In the present case, the Court notes that the applicant chose, using his internet site nopass.fr, to oppose the introduction of the health pass in France by encouraging visitors to his site to join him in lodging a collective application with the Court. As the Court has already noted, the present application concerns neither the right to freedom of expression under Article 10 of the Convention nor the right to freedom of association within the meaning of Article 11 (see paragraph 18 above).

36. In the videos published on his internet site and on YouTube, however, it is clear that the applicant made repeated calls for multiple applications through the use of an automatically generated and standardised application form; he urged visitors to his site to use this technique in order to exceed tens of thousands of applications, and repeated, in unambiguous terms, that the objective being pursued was not to succeed in the normal exercise of the right of individual petition provided for by the Convention but, on the contrary, to cause "an obstruction, things [to] get blocked, everything [to spill] over" (see paragraph 10 above), "[p]aralysing" it (see paragraph 11 above), and to "create a relationship of power" in order to "negotiate" with the Court by threatening its operations (see paragraph 10 above), "to break down the [Court's] doors" (see paragraph 11 above) and to "derail the system" in which the Court is "a link in the chain" (see paragraphs 10-11 above).

37. The Court points out, however, that for nearly two decades it has been dealing with mass litigation arising out of various different structural or systemic problems in the Contracting States; these human rights deficiencies in the member States give rise to an ever-increasing number of applications

to the Court. Nonetheless, the Court seeks to ensure the long-term effectiveness of the human rights protection system set up by the Convention, while maintaining the right of individual petition, the cornerstone of this system, and access to justice. It is clear that a massive influx of applications such as those submitted in support of the applicant's objective is liable to affect the Court's ability to fulfil its mission under Article 19 in relation to other applications, lodged by other applicants, which do fulfil the conditions for allocation to judicial formations and, prima facie, the admissibility conditions provided for in the Convention, including those referred to above. Indeed, protection of the Convention system is a concern which is also reflected in the provisions of Article 17 of the Convention, the purpose of which "in so far as it refers to groups or to individuals, ... is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms ..." (see, among many other authorities, *Lawless v. Ireland (no. 3)*, 1 July 1961, p. 45, § 7, Series A no. 3).

38. In view of these findings, and in particular of the objectives openly pursued by the applicant, the latter's approach is manifestly contrary to the purpose of the right of individual application. He is deliberately seeking to undermine the Convention system and the functioning of the Court as part of what he describes as a "legal strategy", which is in reality contrary to the spirit of the Convention and the objectives pursued by it.

3. Victim status

39. Lastly, for the sake of completeness, the Court observes that an application such as the present one could raise issues concerning its compatibility *ratione personae* with the provisions of the Convention.

40. The Court reiterates that in order to rely on Article 34 of the Convention, an applicant must be able to claim to be a victim of a violation of the Convention. According to the Court's established case-law, the concept of "victim" must be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act. The individual concerned must be able to show that he or she was "directly affected" by the measure complained of (see *Lambert and Others v. France* [GC], no. 46043/14, § 89, ECHR 2015 (extracts); *S.A.S. v. France*, cited above, § 57; and *Le Mailloux v. France* (dec.) [Committee], no. 18108/20, § 10, 5 November 2020).

41. Furthermore, Article 34 of the Convention does not permit individuals to complain *in abstracto* of violations of the Convention. The Convention does not provide for the institution of an *actio popularis*, meaning that applicants may not complain about a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the

Convention (see, among many other authorities, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014, and *Garib v. the Netherlands* [GC], no. 43494/09, § 136, 6 November 2017).

42. In order for applicants to be able to claim to be a victim, they must produce reasonable and convincing evidence of the likelihood that a violation affecting them personally will occur; mere suspicion or conjecture is insufficient in this respect (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 101, and the cases cited therein, and *Le Mailloux*, cited above, § 11).

43. The Court observes, first, that the applicant is complaining *in abstracto* about the unsuitability and inadequacy of the measures taken by the French State to combat the spread of COVID-19. He has not provided information about his individual situation and has not explained how, in practice, the national authorities' alleged failings are likely to affect him directly or to target him on the basis of any of his personal characteristics.

44. The abstract nature of the applicant's application is also demonstrated by the other applications lodged on his initiative. These applications take the form of an identical document, automatically filled in using the information (surname, first name, sex, date and place of birth, contact details) submitted by any person wishing to join the applicant's initiative, on a form available to the general public on his internet site. Moreover, the information made available by the applicant in the "Question and answer" section specified that it was not necessary to provide personal reasons, and that the inclusion of such facts was even discouraged, in order not to make the "task of corresponding with the Court more difficult" (see paragraph 5 above).

45. With more specific regard to the complaint under Article 3 of the Convention, the Court observes that, contrary to the applicant's submission, the contested laws do not impose any general obligation to be vaccinated. In this connection, it points out that the applicant has not submitted evidence that he is employed in one of the specific professions subject to compulsory vaccination under Law no. 2021-1040 of 5 August 2021, a matter which falls outside the scope of this case and which the Court thus considers it unnecessary to determine in the present case. Under Law no. 2021-689, certain journeys and access to certain places, for activities exhaustively listed therein, were limited only to those persons able "to present the results of a negative PCR test for COVID-19, proof of full vaccination against COVID-19 or a certificate attesting to recovery from COVID-19" (see paragraph 12 above). Thus, it did not contain any reference to vaccination, in contrast to Law no. 2021-1040 of 5 August 2021, which expressly laid out an obligation to be vaccinated for employees working in establishments subject to this obligation or whose specific profession, in application of the law, is subject to the obligation to be vaccinated. The Court notes, however, that Law no. 2021-1040 does not impose vaccination on persons wishing to undertake

certain journeys or to be able to access certain premises, venues, services or events at which the activities set out therein are practised. On the contrary, it specifically provides for the possibility of presenting the document of one's choice from three options: the results of a negative PCR test for COVID-19; proof of full vaccination against COVID-19; or a certificate attesting to recovery from COVID-19. Lastly, the Court notes that Law no. 2021-1040 of 5 August 2021 also sets out the option of obtaining a document indicating a medical contraindication to vaccination (see paragraph 13 above).

46. Accordingly, the Court considers that the applicant has not demonstrated the existence of any duress that was applied to him as an individual who did not wish to be vaccinated, and that was likely to come within the scope of Article 3 of the Convention.

47. With regard to his victim status under Article 8 of the Convention, the applicant referred, among other case-law, to the judgment in *S.A.S. v. France* (cited above). The Court points out that in that case, which concerned the wearing of the full-face veil, there was no doubt that the disputed legislation directly related to what was, for certain Muslim women, a form of practical observance of their religion (ibid., § 145) and that it could be seen as a "practice" within the meaning of Article 9 of the Convention (ibid., § 57). The applicant in that case, like certain other Muslim women, was confronted with a dilemma: either she complied with the ban on wearing the full-face veil and thus refrained from dressing in accordance with her approach to religion; or she refused to comply and faced criminal sanctions. The Court described this dilemma as comparable, *mutatis mutandis*, to that which it had identified in *Dudgeon v. the United Kingdom* (22 October 1981, § 41, Series A no. 45) and *Norris v. Ireland* (26 October 1988, §§ 30-34, Series A no. 142) in which the Court had recognised homosexuals as victims on account of the very existence of laws imposing criminal sanctions for consensual homosexual acts, on the ground that the choice they faced was between refraining from prohibited behaviour or risking prosecution, even though such laws were hardly ever enforced (see *S.A.S. v. France*, cited above, § 57). However, as already noted, the applicant has not provided information about his personal situation or details explaining how the contested laws are liable to affect directly his individual right to respect for his private life (see paragraph 43 above). Furthermore, while describing how they apply to unvaccinated individuals, he has emphasised that vaccinated persons are also concerned. In the Court's view, this lack of precision in the application can be explained, *inter alia*, by the failure to comply with the obligation to exhaust domestic remedies (see paragraphs 23-30 above), an admissibility criterion that is closely linked to the question of victim status, particularly with regard to a general measure such as a law (see *S.A.S. v. France*, cited above, §§ 57 and 61). Nevertheless, the application is in any event inadmissible for the reasons set out above and, in the circumstances of

the case, the Court does not consider necessary to decide conclusively whether the applicant can claim to be a victim.

48. As to Article 1 of Protocol No. 12, relied on by the applicant, the Court observes that France has not ratified that Protocol. This part of the application is therefore incompatible *ratione personae* (see *De Saedeleer v. Belgium*, no. 27535/04, §§ 68-69, 24 July 2007).

49. It follows from the above considerations that the application lodged by the applicant is inadmissible for several reasons, in particular the failure to exhaust domestic remedies and the fact that the application amounts to an abuse of the right of individual application within the meaning of Article 35 §§ 1 and 3 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 7 October 2021.

Martina Keller Deputy Registrar	Síofra O'Leary President