

APPLICATION N° 26536/95

Carlo BOFFA and 13 others v/SAN MARINO

DECISION of 15 January 1998 on the admissibility of the application

Article 2 of the Convention *Even assuming that this provision guarantees a right not to be physically injured, a vaccination does not in itself constitute a prohibited interference with that right*

Article 5 of the Convention *The "right to liberty" concerns the physical liberty of a person*

Article 8, paragraph 1 of the Convention *A requirement to undergo medical treatment or a vaccination is an interference with the exercise of the right to respect for private life*

Article 8, paragraph 2 of the Convention *Requirement to undergo vaccination interference in accordance with the law and considered necessary in a democratic society for the protection of health. The notion of necessity implies that the interference corresponds to a pressing social need and is proportionate to the aim pursued. Margin of appreciation left to the State in this area*

Article 9, paragraph 1 of the Convention

- a) *This provision primarily protects the sphere of private, personal beliefs, i.e. the area called the forum internum, and not necessarily every act in the public sphere which is dictated by such convictions*
- b) *The term "practice" in this provision does not cover an act which does not directly express a belief even though it is motivated or influenced by it*

- c) *A requirement to undergo a vaccination does not constitute an interference with the freedom protected by this Article since it applies to everyone regardless of their religion or personal convictions*

Article 10 of the Convention

- a) *The freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him*
- b) *Court examining constitutional legitimacy of legislation challenged by applicants sitting in camera to discuss the case and vote on the outcome - Article 10 does not guarantee a right of access to hearings at which the competent organs discuss or deliberate as to whether or not a law is constitutional*

Article 25 of the Convention

- a) *The concept of 'victim' is autonomous. It must be interpreted independently of concepts of domestic law concerning such matters as interest or capacity to take legal proceedings*
- b) *In order for an applicant to claim to be a victim of a violation of the Convention there must be a sufficiently direct link between him and the injury which he claims to have suffered as a result of the alleged violation*
- c) *A person who is unable to demonstrate that he has been personally affected by the application of the measure he criticises cannot claim to be the victim of a violation of the Convention*

Applicants complaining of requirement to have their minor children vaccinated. Only the applicant who was ordered to have compulsory vaccinations carried out can claim to be a victim. However this applicant cannot claim to be a victim where the administrative decisions ordering the vaccination to be carried out have been annulled

THE FACTS

The present application has been introduced by fourteen residents of San Marino

The facts of the case as submitted by the applicants, may be summarised as follows

A *Particular circumstances of the case*

On 11 February 1993, the San Marino *Direzione servizio medicina di base* (primary health-care agency) ordered the second, third, fourth and fifth applicants to have their minor children vaccinated against hepatitis B pursuant to Decree No 128 of 23 October 1991 which lays down the timetable for childhood vaccinations. It appears from the evidence on the case-file that the order stated that this vaccination was compulsory and that refusal to comply would be punished under section 259 of the Criminal Code.

On 16 February 1993, the primary health-care agency ordered the first applicant to have his child vaccinated against a number of diseases, including hepatitis B.

On 15 April 1993, all the above-mentioned applicants lodged an application with the Administrative Court of First Instance, seeking to have the agency's orders suspended and annulled on the basis that Decree No 128 of 1991 simply laid down a timetable for childhood vaccinations and that, in the absence of any specific legal provision, there was no obligation to be vaccinated against hepatitis B. The applicants reserved the right to challenge the constitutional legitimacy of Decree No 128 of 1991 should the court find that such an obligation did arise under it.

On 28 April 1993, the Administrative Court, after joining the two cases, suspended the operation of the orders issued by the agency.

On 2 July 1993, the applicants filed a motion concerning constitutional legitimacy with the Administrative Court. They argued that any law laying down an obligation to undergo a vaccination was incompatible with fundamental rights and liberties.

On 27 July 1993, the Administrative Court declared that it intended to proceed with the case. It held that the motion challenging the constitutional legitimacy of the relevant legislation was manifestly ill-founded, as that legislation provided that compulsory vaccinations should not be carried out if they would endanger a child as a result of its particular state of health.

On 6 August 1993, the Administrative Court allowed the main application and annulled the administrative orders in so far as they related to the hepatitis B vaccine.

According to the judgment, Decree No 128 of 1991 should be considered as a mere vaccination timetable which did not make vaccinations compulsory in the absence of a specific legal provision. Hence, the orders issued by the primary health-care agency should be annulled as *ultra vires*.

The applicants appealed against the judgment in so far as it had held that the challenge to the constitutional legitimacy of the legislation making vaccinations compulsory was manifestly ill-founded

In a judgment of 18 March 1994, the Administrative Court of Second Instance transferred the file to the *Consiglio Grande e Generale*, which, under San Marinese law, has jurisdiction over matters relating to the lawfulness of legislation

On 5 April 1994, the *Consiglio Grande e Generale* instructed an expert to prepare a legal opinion on the compatibility with the Constitution of Law No. 19 of 1943 (concerning vaccination against diphtheria and smallpox), Decree No. 1 of 1966 (concerning vaccination against poliomyelitis), Decree No. 19 of 1974 (concerning vaccination against whooping cough) and Decree No. 128 of 1991 (laying down the timetable for childhood vaccinations)

On 8 April 1994, the expert filed his opinion, in which he concluded that legislation creating an obligation to undergo vaccinations was unlawful because it was incompatible with fundamental personal rights

On 26 April 1994, the *Consiglio Grande e Generale* discussed the case *in camera*

On 15 June 1994 the *Consiglio Grande e Generale* voted to reject the legal opinion given by the expert

B *Relevant domestic law*

Law No. 19 of 27 May 1943 made it compulsory to be vaccinated against diphtheria and smallpox. Under section 2, children to whom such vaccinations would pose a risk because of their particular state of health are exempt from this requirement

Decree No. 1 of 17 February 1966 made it compulsory to be vaccinated against poliomyelitis. Decree No. 19 of 5 March 1974 made it compulsory to be vaccinated against whooping cough. These Decrees also provided that children who would be put at risk by the relevant vaccination should be excused from having it

Under section 259 of the San Marinese Criminal Code, refusal to obey a lawful order of a public authority relating to safety, health, hygiene or public order is punishable by "second degree imprisonment"

COMPLAINTS

1 The applicants complain of the existence of laws making it compulsory for residents of San Marino to undergo vaccinations. They argue that the risk of death associated with vaccinations is high and claim a violation of Article 2 of the Convention. Further, they complain that parents' inability freely to choose whether or

not to have their children vaccinated constitutes an unjustified interference with their freedom of thought and conscience, contrary to Article 9 of the Convention. Finally, the applicants complain that their inability to choose whether or not to be vaccinated constitutes an unjustified infringement of their right to liberty as guaranteed in Article 5 of the Convention and their right to respect for their private and family life as protected by Article 8 of the Convention.

2 The applicants complain of the fact that the discussions and vote in the *Consiglio Grande e Generale* on the issue of the constitutional legitimacy of the legislation in question took place *in camera*. They allege that this amounted to a violation of Article 10 of the Convention.

THE LAW

The applicants complain of the existence of laws making it compulsory for their minor children living in San Marino to undergo vaccinations. They allege a violation of Articles 2, 5, 8 and 9.

1 The Commission must first examine the question whether the applicants can claim to be victims of a violation of the Articles invoked.

The relevant section of Article 25 of the Convention provides:

"1 The Commission may receive petitions from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention."

In order to rely on that provision, two conditions have to be satisfied: the applicant must fall into one of the categories of applicants referred to in Article 25 and must be able to claim to be the victim of a violation of the Convention.

In the present case, the first condition is satisfied: the applicants are physical persons and, as such, clearly fall into one of the categories referred to in Article 25 of the Convention.

As regards the second condition, the Commission recalls that the concept of "victim" must be interpreted as an autonomous concept and independently of concepts of domestic law concerning such matters as interest or capacity to take legal proceedings.

In the Commission's view, an applicant cannot claim to be the victim of a breach of one of the rights or freedoms protected by the Convention unless there is a sufficiently direct connection between the applicant as such and the injury he claims to have suffered as a result of the alleged breach (see No. 10733/84, Dec. 11.3.85, D.R. 41 pp. 211-222).

In that regard, the Commission recalls its case-law, according to which no one can claim to be a "victim" unless he can show that he is directly affected by the law which he criticises (see No 10733/84, *op cit*, and No 15117/89, Dec 16 195, D R 80-B, pp 5, 10-11)

The sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth applicants have not demonstrated that they have been directly affected by the contested laws, since they have not been ordered to have their children vaccinated. It follows that these applicants cannot claim to be victims, within the meaning of Article 25, of a violation of the Convention.

This part of the application is, therefore, incompatible *ratione personae* with the provisions of the Convention and must be rejected pursuant to Article 27 para 2 of the Convention.

It must now be determined whether the first, second, third, fourth and fifth applicants can claim to be victims under Article 25 of the Convention.

With regard to the hepatitis B vaccine, about which the first, second, third, fourth and fifth applicants complain, the administrative decisions ordering the vaccination to be carried out have been annulled by the domestic courts as *ultra vires*, so that the Commission considers that those applicants cannot claim to be victims of a violation of the provisions of the Convention in that respect (see, *mutatis mutandis*, No 16360/90 Dec 23 94, D R 76-B, pp 13, 17).

It follows that the application is incompatible *ratione personae* within the meaning of Article 27 para 2 of the Convention on this point also.

With regard to the other types of vaccine in issue, the Commission notes that the second, third, fourth and fifth applicants, albeit parties to the domestic proceedings, have not received any orders from the medical services concerning compulsory vaccinations. The Commission considers that there is no evidence that they are at risk of being directly affected by the contested laws and, hence, they cannot claim to be victims of a violation of the provisions of the Convention.

It follows that, on this point, the application is incompatible *ratione personae* within the meaning of Article 27 para 2 of the Convention.

However, the Commission is of the opinion that the first applicant does run the risk of being directly affected by the contested legislation, since he has been ordered to have compulsory vaccinations carried out (see, *mutatis mutandis*, Eur Court HR, *Marckx v Belgium* judgment of 13 June 1979, Series A no 31, p 13, para 27, No 6959/75 Dec 19 5 76, D R 5, pp 103, 115 and No 31924/96 Dec 10 7 97, unpublished).

In these circumstances, the Commission considers that the applicant can claim to be a victim within the meaning of Article 25, of a violation of the provisions he invokes.

2 The first applicant complains of the dangers associated with the relevant vaccinations. He alleges a violation of Article 2 of the Convention.

Under that provision everyone's right to life is to be protected by law. No one is to be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The Commission recalls that this Article primarily provides protection against deprivation of life. Even assuming that it may be seen as providing protection against physical injury, an intervention such as a vaccination does not, in itself, amount to an interference prohibited by it. Moreover, the applicant has not submitted any evidence that, in the particular case of his child, a vaccination would create a real medical danger to life (see *mutatis mutandis*, No. 8278/78, Dec. 13 12 79, D.R. 18, pp. 154 156).

For these reasons the Commission can find no appearance of a violation of the provision relied on.

It follows that this complaint is manifestly ill founded within the meaning of Article 27 para. 2 of the Convention.

3 The first applicant complains that the system of compulsory vaccination constitutes an interference with his right to freedom of thought and conscience. He claims a violation of 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 in private, to manifest his religion or belief, in worship, teaching, practice and observance."

The Commission recalls that Article 9 of the Convention primarily protects the sphere of personal and religious beliefs, i.e. the area which is sometimes called the *forum internum*. In addition, it protects acts which are intimately linked to those beliefs, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form (see, *mutatis mutandis*, No. 14331/88 and 14332/88, Dec. 8 9 89, D.R. 62, pp. 309, 318 and No. 10678/83, Dec. 5 7 84, D.R. 39, pp. 267, 268).

However, in protecting this personal sphere, Article 9 of the Convention does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief. The Commission recalls that the term "practice" does not cover each and every act which is motivated or influenced by a religion or belief (No. 10678/83, loc. cit.).

The Commission notes that the obligation to be vaccinated, as laid down in the legislation at issue, applies to everyone, whatever their religion or personal creed

Consequently, the Commission considers that there has been no interference with the freedom protected by Article 9 para 1 of the Convention

It follows that this complaint is manifestly ill-founded within the meaning of Article 27 para 2 of the Convention

4 The first applicant complains that the system of compulsory vaccination constitutes an interference with his right to respect for his private and family life. He alleges a violation of Articles 5 and 8 of the Convention

The Commission considers that this part of the application should be examined under Article 8 of the Convention alone, since Article 5 deals exclusively with the deprivation of physical liberty (see, for example, No 12541/86, Dec 27 5 91, D R 70, pp 103, 122)

Article 8 of the Convention provides as follows

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

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

The Commission has already found that a requirement to undergo medical treatment or a vaccination, on pain of a penalty, may amount to interference with the right to respect for private life (see No 10435/83, Dec 10 12 84, D R 40, pp 251, 255)

It remains to be examined whether such an interference is compatible with paragraph 2 of Article 8 of the Convention. In this regard, the Commission must establish whether the interference permitted under the San Marinese legislation in issue is inspired by one or more of the legitimate aims referred to in paragraph 2 and is necessary in a democratic society

The Commission considers that, as regards the aim of the contested legislation, the interference is based on the need to protect the health of the public and of the persons concerned, and so is justified

It must now be examined whether the interference in the applicant's private life is "necessary in a democratic society". According to the case-law of the Court, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. However, the domestic authorities enjoy a certain margin of appreciation, the extent of which depends, not only on the aim of, but also on the form taken by, the interference (see, *mutatis mutandis*, Eur. Court HR, Olsson v. Sweden judgment of 24 March 1988, Series A no. 130, pp 31-32, para 67).

The Commission notes, first, that the applicant has not demonstrated a probability that, in the particular case of his child, the relevant vaccine would cause serious problems.

Further, the Commission considers that a vaccination campaign such as exists in most countries, which obliges the individual to defer to the general interest and not to endanger the health of others where his own life is not in danger, does not go beyond the margin of appreciation left to the State (see No 10435/83, Dec. 10.12.84, D.R 40, pp. 251-256).

Having regard to these factors, the Commission considers that the interference of which the applicant complains is proportionate to the aim pursued and may be deemed necessary in a democratic society for the protection of health as referred to in paragraph 2 of Article 8 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected under Article 27 para 2 of the Convention.

5. The applicants complain about the fact that the discussion and vote within the *Consiglio Grande e Generale* on the issue of the constitutional legitimacy of the laws in issue took place *in camera*

They allege that this constitutes a violation of Article 10 of the Convention, which reads as follows:

"1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary "

Even assuming that the applicants can claim to be victims of a violation of the provision which they invoke, within the meaning of Article 25 of the Convention the Commission considers that this complaint is in any event inadmissible for the following reasons

The Commission recalls that "the freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" (see Eur Court HR, judgments in the cases of Leander v Sweden of 26 March 1987, Series A no 116, p 29, para 74 and Gaskin v the United Kingdom of 7 July 1989, Series A no 160, p 21, para 52)

The Commission notes that the applicants in the present case had access to the legal opinion prepared by the expert appointed by the *Consiglio Grande e Generale*. The Commission considers that the right safeguarded by Article 10 of the Convention cannot be interpreted as guaranteeing access to hearings at which the competent organs discuss or deliberate as to whether or not a law is constitutional

Consequently the Commission considers that there has been no interference with the applicants' right to receive information

It follows that this complaint is manifestly ill-founded and must be rejected pursuant to Article 27 para 2 of the Convention

For these reasons the Commission unanimously,

DECLINES THE APPLICATION INADMISSIBLE