

# COMPULSORY CHILDHOOD VACCINATION: THE EUROPEAN COURT OF HUMAN RIGHTS PERSPECTIVE

## POVINNÉ OČKOVANIE DETÍ: STANOVISKO EURÓPSKEHO SÚDU PRE ĽUDSKÉ PRÁVA

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### ABSTRACT

*Vaccination of children is of particular importance not only for their parents, but also for Governments in upholding their obligations under international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights or the Convention on the Rights of the Child. In the last years, however, the amount of children vaccinated against life-threatening diseases is declining. One of the most frequent arguments against vaccination (especially in case of compulsory vaccination) is the interference with the right to private and family life and the freedom of thought, conscience and religion. The aim of this paper is to analyse the judgement of the European Court of Human Rights in the case of Vavříčka and Others v. the Czech Republic and to highlight its relevance to Slovakia and international human rights law.*

### ABSTRAKT

*Očkovanie detí má osobitný význam nielen pre rodičov, ale aj pre vlády štátov pri dodržiavaní ich povinností podľa medzinárodných nástrojov v oblasti ľudských práv, ako je napríklad Medzinárodný pakt o hospodárskych, sociálnych a kultúrnych právach alebo Dohovor o právach dieťaťa. V posledných rokoch však klesá počet očkovaných detí proti život ohrozujúcim chorobám. Jedným z najpoužívanejších argumentov proti očkovaniu (najmä v prípade povinného očkovania) je zásah do práva na súkromný a rodinný život a slobody myslenia, svedomia a náboženského vyznania. Cieľom tohto príspevku je analyzovať rozsudok Európskeho súdu pre ľudské práva v prípade Vavříčka a ostatní proti Českej republike a poukázať na jeho význam pre Slovenskú republiku a medzinárodné právo v oblasti ľudských práv.*

### I. INTRODUCTION

For thousands of years, mankind has been confronted with a number of epidemics<sup>2</sup> and pandemics<sup>3</sup>, which ultimately have a major impact on almost every aspect of our lives, from

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<sup>2</sup> According to the *ReliefWeb Glossary of Humanitarian Terms*, epidemic is defined as „the occurrence in a community or region of cases of an illness, specific health-related behaviour, or other health-related events clearly in excess of normal expectancy. The community or region and the period in which the cases occur are specified precisely. The number of cases indicating the presence of an epidemic varies according to the agent, size, and type of population exposed, previous experience or lack of exposure to the disease, and time and place of occurrence.“; *ReliefWeb: Glossary of Humanitarian Terms*, 1 August 2008, p. 26. Online: <https://www.who.int/hac/about/reliefweb-aug2008.pdf> (visited 31 May 2021).

<sup>3</sup> According to the World Health Organization (WHO), pandemic is “the worldwide spread of a new disease. An influenza pandemic occurs when a new influenza virus emerges and spreads around the world, and most people do not have immunity.” For more see: WHO: *What is a pandemic?*, 24 February 2010. Online: [https://www.who.int/csr/disease/swineflu/frequently\\_asked\\_questions/pandemic/en/](https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/) (visited 31 May 2021).

economic, social to political.<sup>4</sup> One of the best known epidemics/pandemics are the Athenian plague of 430 BC, the Black death of 14<sup>th</sup> century, the Spanish flu pandemic of 1918 – 1920, or the more recent Ebola and ZIKA outbreaks<sup>5</sup>, or the current COVID-19 pandemic. One of the most successful methods of eradicating of contagious diseases is vaccination which dates back to the late 18<sup>th</sup> century, when a smallpox vaccine was developed.<sup>6</sup> Since then, we have witnessed development of numerous vaccines against, for instance, polio, tetanus, human papillomavirus, which have significantly increased the prospects of achieving the highest attainable standard of health. The use of vaccines is primarily regulated by individual States, which raises several legal and ethical issues. When analysing individual State vaccination policies, there are many differences as to the compulsory or voluntary vaccination, or the amount of compulsory vaccines required to be administered at a certain age. In the last years we have witnessed many petitions<sup>7</sup>, strikes and heated debates against compulsory vaccination, especially in the European region, which has the highest degree of vaccine hesitancy in the world.<sup>8</sup> To achieve the herd immunity, Germany, France or Italy imposed compulsory vaccination duty due to the continuing decline in the number of persons vaccinated against measles and other contagious diseases.<sup>9</sup> Australia, for instance, adopted the so-called “No Jab No Play” and “No Jab no Pay” legislation which withholds nursery childcare and child benefits (Family Tax Benefits or child care fee assistance) in order to achieve herd immunity.<sup>10</sup> To date, sixteen Member States of the European Union have adopted legislature on compulsory vaccination of children against at least one disease.<sup>11</sup> Each of these States has also adopted policies and consequences for non-compliance by parents, which according to the 2020 survey can be categorized into four types: (1) financial penalties (those designed to impact an individual’s finances, i.e. fines), (2) parental rights penalties (those designed to impact parental status, referring to children under parental legal care, i.e., loss of custody), (3) educational penalties (those designed to impact a child’s access to education, e.g. denial of enrolment), and (4) liberty penalties (those designed to impact an individual’s freedom, i.e. jail time).<sup>12</sup>

The main reason behind the vaccination hesitancy in developed States is the alleged violation of human rights, in particular the right to private life or the freedom of thought, conscience and religion, as well as the potential harm, that vaccines can cause. In the midst of COVID-19 pandemic, the European Court of Human Rights (hereinafter “ECtHR”) issued a judgment in

<sup>4</sup> MADHAV, N., OPPENHEIM, B., GALLIVAN, M.: *Pandemics: Risk, Impacts and Mitigation*, in: JAMISON DEAN, T., GELBAND, H., HORTON, S., eds.: *Disease Control Priorities: Improving Health and Reducing Poverty*, 3<sup>rd</sup> Edition, Washington (DC), 2017, ISBN: 978-1-4648-0527-1. Online: [https://doi.org/10.1596/978-1-4648-0527-1\\_ch17](https://doi.org/10.1596/978-1-4648-0527-1_ch17) (visited 31 May 2021).

<sup>5</sup> For more details see HUMEROVIĆ, D.: *Brief History of Pandemics (Pandemics Throughout History)*, in: HUMEROVIĆ, D. (eds): *Psychiatry of Pandemics*, Springer, Cham, 2019, ISBN: 978-3-030-15346-5, pp. 7 – 35. Online: [https://doi.org/10.1007/978-3-030-15346-5\\_2](https://doi.org/10.1007/978-3-030-15346-5_2).

<sup>6</sup> PLOTKIN, S.: *History of vaccination*, Proceedings of the National Academy of Sciences of the United States of America, Vol. 111, No. 34, August 2014, ISSN: 1091-6490 pp. 12283 - 12284. Online: <https://doi.org/10.1073/pnas.1400472111> (visited 31 May 2021).

<sup>7</sup> For instance, see: *Petition No. 0180/2015 M P (Italian) on behalf of the European Forum for Vaccine Vigilance (EFVV), on the abolishment of compulsory vaccinations in all European countries*, European Parliament, 30.5.2016. Online: [http://www.europarl.europa.eu/doceo/document/PETI-CM-584027\\_EN.doc](http://www.europarl.europa.eu/doceo/document/PETI-CM-584027_EN.doc) (visited 31 May 2021).

<sup>8</sup> LARSON HEIDI, J., et al.: *The State of Vaccine Confidence 2016: Global Insights Through a 67-Country Survey*, EBioMedicine, Vol. 12, 2016, pp. 295 – 301. Online: <https://doi.org/10.1016/j.ebiom.2016.08.042> (visited 31 May 2021).

<sup>9</sup> SPRENGHOLZ, P., BETSCH, C.: *Herd immunity communication counters detrimental effects of selective vaccination mandates: Experimental evidence*, EClinicalMedicine, The Lancet, Vol. 22, 2020, ISSN: 2589-5370, p. 1. Online: <https://doi.org/10.1016/j.eclinm.2020.100352> (visited 31 May 2021).

<sup>10</sup> National Centre for Immunisation Research and Surveillance: *No Jab No Play, No Jab No Pay*. Online: <https://www.ncirs.org.au/public/no-jab-no-play-no-jab-no-pay> (visited 31 May 2021).

<sup>11</sup> Belgium, Bulgaria, the Czech Republic, France, Germany, Greece, Hungary, Italy, Latvia, Macedonia, Malta, Poland, Portugal, Romania, Slovakia and Slovenia.

<sup>12</sup> GRAVAGNA, K., et al.: *Global assessment of national mandatory vaccination policies and consequences of non-compliance*, Vaccine, Vol. 38, 2020, ISSN: 0264-410X, p. 7868. Online: <https://doi.org/10.1016/j.vaccine.2020.09.063> (visited 31 May 2021).

the case of *Vavříčka and Others v. the Czech Republic* on the compulsory vaccination of children and its possible violation of Art. 8 (right to respect for private and family life) of the European Convention on Human rights and Fundamental Freedoms (hereinafter “ECHR”). Although the judgement concerns the children compulsory vaccination, it may also be relevant in the ongoing roll-out of COVID-19 vaccines and national vaccination policies. The newly issued judgement clarifies several legal aspects, that are closely related to this medical procedure. The aim of this paper is to analyse the judgement of the ECtHR in the case of *Vavříčka and Others v. the Czech Republic* and to highlight its special relevance to Slovakia and international human rights law.

## II. VAVŘIČKA AND OTHERS V. THE CZECH REPUBLIC (APPLICATIONS NO. 47621/13 AND FIVE OTHER APPLICATIONS)

On the 8 April 2021 the Grand Chamber of the ECtHR issued judgement in the case of *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13 and five other applications)<sup>13</sup> in which the Court for the first time addressed the possible infringement of several human rights in connection to the compulsory vaccination of children and consequences for non-compliance with the statutory duty of vaccination. In this case, five Czech nationals – *Mr. Pavel Vavříčka, Ms. Markéta Novotná, Mr. Pavel Hornych, Mr. Radomír Dubský, Mr. Adam Brožík and Mr. Prokop Roleček* (“the applicants”) alleged 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 Art. 8 ECHR.<sup>14</sup> Furthermore, some of the applicants also alleged the violation of the freedom of thought, conscience and religion (Art. 9 ECHR) and the right to education (Art. 2 of Protocol No. 1 to the ECHR). In the following chapters, we will highlight the facts of the analysed case, as well as the alleged violation of the abovementioned rights, which are enshrined in the ECHR and in other international human rights instruments, such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, or the Convention on the Rights of the Child.

### 1. Facts of the case

In the Czech Republic, section 46 (1) and (4) of the Public Health Protection 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 the Decree no. 439/2000 Coll. as amended, on Vaccination against Infectious Diseases.<sup>15</sup> Routine vaccinations are carried out to prevent the development and spread of serious infectious diseases with a high risk of further epidemic spread in groups and life-threatening infectious diseases, taking into account the recommendations of the World Health Organization and the European Centre for Disease Control. For children under the age of fifteen, it is their statutory representatives who are responsible for compliance with this duty.<sup>16</sup> When it comes to consequences for non-compliance with the compulsory vaccination duty, the section 50 of the Public Health Protection 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.<sup>17</sup> In accordance with the Minor Offences Act, minor offence in

<sup>13</sup> ECtHR: *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021.

<sup>14</sup> *Ibid.*, para. 3.

<sup>15</sup> Decree no. 439/2000 Coll., as amended, on Vaccination against Infectious Diseases. To date, in force is the Decree no. 537/2006 Coll., as amended, on Vaccination against Infectious Diseases.

<sup>16</sup> Act no. 258/2000 Coll., as amended, on Public Health Protection, section 46 (1) and (4).

<sup>17</sup> *Ibid.*, section 50.

the health care area resulting from the failure to discharge a duty imposed in order to prevent the occurrence or spread of infectious diseases is punishable by a fine of up to 10 000 Kč (the equivalent of some 400 EUR).<sup>18</sup> The vaccination duty in the Czech Republic concerns vaccination against diphtheria, tetanus, whooping cough, *Haemophilus influenzae* type B infections, poliomyelitis, hepatitis B, measles, mumps, rubella and for children with specified health indications pneumococcal infections.<sup>19</sup>

The first application regarding the compulsory vaccination of children before the ECtHR was lodged by *Mr. Pavel Vavříčka*<sup>20</sup> on 23 July 2013. In 2003 *Mr. Vavříčka* was fined for refusing to have his two children (then aged 14 and 13) vaccinated against poliomyelitis, hepatitis B and tetanus, as required under domestic law (the Public Health Protection Act no. 258/2000 and Decree of the Ministry of Health no. 439/2000). The appeals lodged by *Mr. Vavříčka* against the decision were dismissed by the domestic courts.

The second application was lodged on 9 January 2014 by *Ms. Novotná*.<sup>21</sup> The applicant's parents agreed to have her vaccinated against all diseases for which vaccination was compulsory, except for measles, mumps and rubella. In 2006 the applicant was admitted to nursery school. Two years later, having been informed by the paediatrician that the applicant had not received the rubella vaccine, the head teacher decided to reopen the admission procedure and to refuse her admission. The applicant unsuccessfully challenged the head teacher's decision in domestic courts, which took the view that the applicant had failed to establish any disproportionate interference with her fundamental rights: her continued attendance at the nursery school was capable of endangering the health of others, and the right to health protection took precedence.

The third application was lodged by *Mr. Hornych* on 16 November 2014.<sup>22</sup> Having suffered from various health problems, the applicant was not vaccinated, his parents arguing that this was due to the lack of an individualised vaccination recommendation by his paediatrician. In 2011, at the time of the applicant's enrolment in nursery school, the paediatrician certified in writing that the applicant had not been vaccinated. Despite this a handwritten note was added that he "was not lacking any regular vaccination prescribed by law". In the same year, he was refused admission to nursery school because he had not proved that he had been vaccinated. Appeals against this decision were unsuccessful.

On 16 April 2015 two applications were lodged by *Mr. Brožík*<sup>23</sup> and *Mr. Dubský*<sup>24</sup>. The applicants' parents refused to have them vaccinated against some of the illnesses defined by law on the grounds of their beliefs and convictions. In 2014 the head teacher refused to admit the applicants to nursery school, stating that compulsory vaccination constituted a permissible restriction of the right to freely manifest one's religion or belief because it was a necessary measure for the protection of public health and the rights and freedoms of others. The applicants unsuccessfully challenged this decision and sought an interim measure to enable immediate enrolment in the establishment.

The last application in this case was lodged by *Mr. Roleček*<sup>25</sup>. The applicant's parents decided to have an individual vaccination plan drawn up for the applicant, who was vaccinated later than scheduled by the vaccination calendar. In addition, he was not vaccinated against tuberculosis, poliomyelitis, hepatitis B, measles, mumps or rubella. In 2010 the head teachers

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<sup>18</sup> Act. no. 200/1990 Coll., as amended, on Minor Offence, section 29 (1) (f) and (2). The cited Act is no longer in force as of July 1, 2017.

<sup>19</sup> Decree no. 537/2006 Coll. on Vaccination against Infectious Diseases, section 2 (1).

<sup>20</sup> ECtHR: *Application no. 47621/13*.

<sup>21</sup> ECtHR: *Application no. 3867/14*.

<sup>22</sup> ECtHR: *Application no. 73094/14*.

<sup>23</sup> ECtHR: *Application no. 19306/15*.

<sup>24</sup> ECtHR: *Application no. 19298/15*.

<sup>25</sup> ECtHR: *Application no. 43883/15*.

of two nursery schools refused to admit the applicant on the grounds that the conditions laid down in the Public Health Protection Act had not been met. The applicant challenged this decision, but his appeal was dismissed.

In 2019, a Chamber of the First Section relinquished jurisdiction in favour of the Grand Chamber in accordance with Art. 30 ECHR.<sup>26</sup>

## 2. Right to respect for private and family life (Art. 8 ECHR) regarding the compulsory vaccination of children

The Art. 8 ECHR provides that:

- “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.”<sup>27</sup>

The primary purpose of Art. 8 ECHR is to protect against arbitrary interferences with private and family life, home, and correspondence by a public authority.<sup>28</sup> The Court has a rich case-law regarding the right to respect for private and family life. In the *X and Y v. the Netherlands* the Court concluded that physical integrity of a person is covered by the concept of “private life” protected by Art. 8 ECHR.<sup>29</sup> 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.<sup>30</sup> The applicants formulated their Art. 8 complaints primarily with reference to the fine imposed on *Mr. Vavříčka* and to the non-admission of the child applicants to nursery school as a consequence of non-compliance with the vaccination duty. The Court based its judgment on the existing case-law, particularly on the judgement in the *Solomakhin v. Ukraine* case, where the Court confirmed that compulsory vaccination presents an involuntary medical intervention, which represents an interference with the right to respect for one’s private life, which includes a person’s physical and psychological integrity, as guaranteed by Art. 8 (1) ECHR.<sup>31</sup> Despite the fact that in the present case none of the child applicants, as well as children of *Mr. Vavříčka* were not forcefully vaccinated, the subject matter of this case and 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 concluded that there has been an interference with their right to respect for private life.<sup>32</sup> In determining whether an impugned measure violates Art. 8 ECHR, the Court must consider whether the reasons adduced to justify that measure are relevant and sufficient for the purposes of Art. 8 (2) ECHR, namely, if the measure: (a) is “in accordance with the law”; (b) pursue one or more of the legitimate aims, and if it is (c) “necessary in a democratic society”.<sup>33</sup>

<sup>26</sup> Art. 30 ECHR: “Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at anytime before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.”

<sup>27</sup> Council of Europe: *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Art. 8.

<sup>28</sup> ECtHR: *Libert v. France* (Application no. 588/13), 2 July 2018, para. 40 – 42.

<sup>29</sup> ECtHR: *X and Y v. the Netherlands* (Application no. 8978/80), 26 March 1985, para. 22.

<sup>30</sup> ECtHR: *Y.F. v. Turkey* (Application no. 24209/94), 22 October 2003, para. 33.

<sup>31</sup> ECtHR: *Solomakhin v. Ukraine* (Application no. 24429/03), 15 March 2012, para. 33. See also: ECtHR: *Salvetti v. Italy* (Application no. 42197/98), 9 July 2002; and ECtHR: *Matter v. Slovakia* (Application no. 31534/96) 5 July 1999, para. 64.

<sup>32</sup> ECtHR: *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021, para. 263.

<sup>33</sup> *Ibid.*, para. 265.

Regarding the lawfulness of the interference, the Court reiterated 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.<sup>34</sup> The Court noted that the vaccination duty has its specific basis in section 46(1) and (4) of the Public Health Protection Act, applied in conjunction with the Ministerial Decree issued by the Ministry in the exercise of the power conferred on it to this end by sections 46 (6) and 80(1) of the Public Health Protection Act. The consequences of non-compliance with the duty stem, for *Mr Vavříčka*, from the application of section 29 (1) (f) and (2) of the Minor Offences Act and, for the child applicants, from the application of section 34 (5) of the Education Act, in conjunction with section 50 of the Public Health Protection Act. The term “law” as it appears in the phrases “in accordance with the law” and “prescribed by law” in Art. 8 to 11 ECHR, 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.<sup>35</sup> Therefore, the Court concluded that the interference in question was in accordance with the law within the meaning of Art. 8 (2) ECHR.<sup>36</sup>

The legitimate aim pursued by the interference with Art. 8 ECHR was analysed in para. 272 of the judgement. The objective of the Public Health Protection Act and Ministerial Decree 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 Art. 8 ECHR.<sup>37</sup>

In the assessment of the test of necessity in a democratic society, the Court often needs to balance the applicant’s interests protected by Art. 8 ECHR and a third party’s interests protected by other provisions of the Convention and its Protocols, as it was concluded in *Gaskin v. the United Kingdom*,<sup>38</sup> *Hämäläinen v. Finland*,<sup>39</sup> or in *Roche v. the United Kingdom*.<sup>40</sup> Whether the interference was necessary in a democratic society for the achievement of a legitimate aim, it is analysed through: (a) pressing social need; (b) relevant and sufficient reasons; and (c) proportionality.

Particular importance in this regard is placed on the States’ margin of appreciation, whose main idea is that a distinction can be made between the definition of fundamental rights and the possibilities for limitations of these rights.<sup>41</sup> The ECHR 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 Art. 8 ECHR. The margin

<sup>34</sup> Ibid., para. 266. See also: ECtHR: *Dubská and Krejzová v. the Czech Republic* (Applications nos. 28859/11 and 28473/12), 15 November 2016, para. 167.

<sup>35</sup> Ibid., para. 269. See also: ECtHR: *Sanoma Uitgevers B.V. v. the Netherlands* (Application no. 38224/03), 14 September 2010, para. 83.

<sup>36</sup> Ibid., para. 271.

<sup>37</sup> Ibid., para. 272.

<sup>38</sup> ECtHR: *Gaskin v. the United Kingdom* (Application no. 10454/83), 31 May 1989, para. 42.

<sup>39</sup> ECtHR: *Hämäläinen v. Finland* (Application no. 37359/09), 16 July 2014, para. 65.

<sup>40</sup> ECtHR: *Roche v. the United Kingdom* (Application No. 32555/96), 19 October 2005, para. 157.

<sup>41</sup> GERARDS, J.: *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, Human Rights Law Review, Vol. 18, Issue 2, 2018, ISSN 1461-7781, p. 498. Online: <https://doi.org/10.1093/hrlr/ngy017>.

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.<sup>42</sup> 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.<sup>43</sup> There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights.<sup>44</sup>

In the present case, the Court has held that matters of healthcare policy are in principle within the margin of appreciation of the domestic authorities, who are best placed to assess priorities, use of resources and social needs.<sup>45</sup> Furthermore, the Court concluded that the margin of appreciation regarding the compulsory vaccination should be a wide one. The vaccination duty may be regarded as relating to the individual's effective enjoyment of intimate rights. 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.<sup>46</sup> Different opinion was, however, raised by judge *Wojtyczek*, who argued, that "the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Art. 8, a principle which is invoked to narrow the margin of appreciation even in the absence of European consensus. 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. 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."<sup>47</sup> On the existence of a consensus, the Court discerned two aspects. Firstly, that 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. Accordingly, the Court concluded that there is no doubt about the relative importance of the interest at stake.<sup>48</sup> Secondly, when it comes to the best means of protecting the interest at stake, the Court noted 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.<sup>49</sup> Although the compulsory vaccination of children may raise moral and ethical issues, it should also be seen as encompassing the value of social solidarity. The purpose of the duty is 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.<sup>50</sup>

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<sup>42</sup> ECtHR: *Evans v. the United Kingdom* (Application no. 6339/05), 10 April 2007, para. 77; ECtHR: *Dickson v. the United Kingdom* (Application no. 44362/04), 4 December 2007, para. 78.

<sup>43</sup> ECtHR: *X, Y and Z v. the United Kingdom* (Application no. 21830/93), 22 April 1997, para. 44; ECtHR: *Fretté v. France* (Application no. 36515/97), 26 February 2002, para. 41.

<sup>44</sup> *Ibid.*, para. 42.

<sup>45</sup> ECtHR: *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021, para. 274. See also: ECtHR: *Hristozov and Others v. Bulgaria* (Application nos. 47039/11 and 358/12), 13 November 2012, para. 119.

<sup>46</sup> *Ibid.*, para. 276.

<sup>47</sup> *Dissenting opinion of judge Wojtyczek to the Vavříčka and Others v. the Czech Republic Case*, para. 7.

<sup>48</sup> *Ibid.*, para. 277.

<sup>49</sup> *Ibid.*, para. 278.

<sup>50</sup> *Ibid.*, para. 279.

Regarding the “pressing social need”, the existing ECtHR case-law provides that the Contracting States are under a positive obligation, by virtue of the relevant provisions of the ECHR, notably Art. 2 and 8, to take appropriate measures to protect the life and health of those within their jurisdiction.<sup>51</sup> It was concluded, that Czech Republic’s vaccination duty represents the answer of the domestic authorities to the pressing social need to protect individual and public health against the diseases in question and to guard against any downward trend in the rate of vaccination among children.<sup>52</sup>

In the analysis of the “relevant and sufficient reasons”, the Court focused on the best interests of children. The applicants maintained that it must be primarily for the parents to determine how the best interests of the child are to be served and protected, and that State intervention can be accepted only as a last resort in extreme circumstances. On the other hand, the Czech Government argued that, in the context of health care, the best interest of the child was served by enjoying the highest attainable standard of health,<sup>53</sup> as well as 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. 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.<sup>54</sup> The Court therefore accepted that the choice of the Czech legislature to apply a mandatory approach to vaccination is supported by relevant and sufficient reasons.<sup>55</sup> Different opinion was expressed by *judge Wojtyczek* in his dissenting opinion, where he stated that 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, which established in the ECtHR case-law<sup>56</sup>. Parental rights may be limited only in exceptional circumstances<sup>57</sup> 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 present 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.<sup>58</sup> Furthermore, *judge Wojtyczek* argued that a rational assessment of whether the obligation to vaccinate complies with the ECHR 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: (a) the manner and speed of its transmission; (b) the risks for infected persons; (c) the average cost of individual treatment for the disease in the case of non-vaccinated patients, and the prospects of success of such treatment; (d) the precise effectiveness of the available vaccines; (e) the average cost of a vaccination; (f) the risk of side effects of vaccination; (g) the

<sup>51</sup> ECtHR: *Budayeva and Others v. Russia* (Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), 29 September 2008, para. 128 – 130; ECtHR: *Hristozov and Others v. Bulgaria* (Application nos. 47039/11 and 358/12), 13 November 2012, para. 106 and 116.

<sup>52</sup> ECtHR: *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021, para. 284.

<sup>53</sup> *Ibid.*, para. 286.

<sup>54</sup> *Ibid.*, para. 288.

<sup>55</sup> *Ibid.*, para. 289.

<sup>56</sup> ECtHR: *M.A.K. and R.K. v. the United Kingdom* (Applications nos. 45901/05 and 40146/06), 23 March 2010, para. 75-79.

<sup>57</sup> ECtHR: *Strand Lobben and Others v. Norway* (Application no. 37283/13), 10 September 2019.

<sup>58</sup> *Dissenting opinion of judge Wojtyczek to the Vavříčka and Others v. the Czech Republic Case*, para. 13.



average costs of treating the undesirable effects of the vaccination; and (h) the minimum percentage of vaccinated persons which would prevent the disease from spreading (if applicable) and the prospects of achieving such an objective.<sup>59</sup>

Lastly, the Court considered whether the interference regarding the compulsory vaccination of children is proportional to the legitimate aims pursued by the Czech Republic. While vaccination is a legal duty in the Czech Republic, the compliance with it cannot be directly imposed, meaning that vaccination cannot be forcibly administered. However, indirectly the duty is enforced through the applications of sanctions, that are stated in the Public Health Protection Act, Education Act, Decree on Vaccination against Infectious Diseases, and the Minor Offences Act. In *Mr. Vavříčka's* case, where he was fined, the Court noted that the amount was towards the lower end of the relevant scale, and cannot be considered as unduly harsh or onerous.<sup>60</sup> The Court notes that there were no repercussions for the education of this applicant's children, who were already teenagers when the sanction was applied to him. Regarding the child applicants, the Court has viewed their non-admission to preschool as an "interference" within the meaning of Art. 8 (2) ECHR. The exclusion of the applicants from preschool meant the loss of an important opportunity for these young children to develop their personalities and to begin to acquire important social and learning skills in a formative pedagogical environment. However, that was the direct consequence of the choice made by their respective parents to decline to comply with a legal duty, the purpose of which is to protect health, in particular in that age group. The Court considered 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.<sup>61</sup> 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.<sup>62</sup> The Court concluded 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 Czech Republic through the vaccination duty.<sup>63</sup>

### **3. Freedom of thought, conscience and religion (Art. 9 ECHR) regarding the compulsory vaccination of children**

Art. 9 ECHR provides that:

- “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.”<sup>64</sup>

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<sup>59</sup> Ibid., para. 9.

<sup>60</sup> ECtHR: *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021, para. 293.

<sup>61</sup> Ibid., para. 306.

<sup>62</sup> Ibid., para. 307.

<sup>63</sup> Ibid., para. 309.

<sup>64</sup> Council of Europe: *European Convention on the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Art. 9.

In this case, the applicants *Vavříčka*, *Novotná* and *Horných* complained that the imposed fine and the non-admission to nursery school was contrary to their rights under Art. 9 ECHR. The abovementioned applicants have sought to invoke the protection of Art. 9 for their critical stance towards vaccination. The Court concluded after the examination of evidence provided by the applicants, that there is no suggestion 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.<sup>65</sup> The Court in regards to the freedom of thought, conscience and religion in connection with the compulsory vaccination of children pointed to the case of *Boffa and Others v. San Marino*, where the Commission held that, in protecting the sphere of personal beliefs, Art. 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 Art. 9 ECHR.<sup>66</sup> The ECtHR case-law also provides, that the word “convictions”, is not synonymous with the terms “opinions” and “ideas”. It denotes views that attain a certain level of cogency, seriousness, cohesion and importance.<sup>67</sup>

In the present case *Mr. Vavříčka* 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 considered, on the contrary, that the approach of the domestic courts was reasonable and indeed in keeping with its own interpretation of Art. 9, which has been set out above. Having regard to the conclusions reached by the domestic courts in this regard, and considering that the applicant has not further specified or substantiated his complaint under Art. 9, the Court found 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 Art. 9.<sup>68</sup> The Court found that the complaints are incompatible *ratione materiae* with the provisions of Art. 9 ECHR within the meaning of Article 35 (3) (a),<sup>69</sup> and must be rejected in accordance with Article 35 (4).<sup>70</sup>

#### **4. Right to education (Art. 2 of Protocol No. 1 to ECHR) regarding the compulsory vaccination of children**

In the last part of the judgment, the Court somewhat disappointingly addressed the alleged violation of Art. 2 of Protocol No. 1 to ECHR, which provides that:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”<sup>71</sup>

The Court concluded, that in the light of the scope of its examination and findings as regards the child applicants’ complaints under Art. 8 ECHR, there is no need to examine the

<sup>65</sup> ECtHR: *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021, para. 330.

<sup>66</sup> ECtHR: *Boffa and Others v. San Marino* (Application no. 26536/95), 15 January 1998, p. 33.

<sup>67</sup> ECtHR: *Valmasis v. Greece* (Application no. 21787/93), 18 December 1996, para. 25 and 27.

<sup>68</sup> ECtHR: *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021, para. 335.

<sup>69</sup> The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application.

<sup>70</sup> ECtHR: *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021, para. 337.

<sup>71</sup> Council of Europe: *Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, Art. 2.

applications separately under Art. 2 of Protocol No. 1.<sup>72</sup> For this reason, we are presented with only a brief analysis of the right to education without assessing whether a preschool education falls within the right to education. The Court acknowledged that the exclusion from preschool meant the loss of an important opportunity to develop their personalities and to begin to acquire important social and learning skills in a formative pedagogical environment<sup>73</sup>, however, 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 and the effects of such a exclusion were limited in time.<sup>74</sup> While the latter statements may seem to suggest that the complaint under Art. 2 of Protocol No. 1 cannot succeed, such an inference is not certain if it is not drawn explicitly.<sup>75</sup> It is worth mentioning the submissions of the Governments of Germany, France and Slovakia which point to several legal aspects, that are relevant regarding the alleged violation of the right to education. Firstly, 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 Art. 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. Secondly, the Government of France commented that the non-admission of an unvaccinated child to school was a justified restriction of the right to education. Lastly, the Government of Slovakia pointed out that the right to education was not absolute and argued that the existing ECtHR case-law did not specifically acknowledge its applicability to preschool establishments such as kindergartens. From the existing ECtHR case-law, it may be concluded that Art. 2 of Protocol No. 1 concerns elementary schooling<sup>76</sup>, secondary education<sup>77</sup>, higher education<sup>78</sup> and specialized courses. The holders of the right to education are not only children, but also adults wishing to benefit from the right to education.<sup>79</sup> However, there is no evidence, that preschool education falls within the right to education. Case-law of other international judicial and quasi-judicial organs, such as the Committee on Economic, Social and Cultural Rights, Commission on the Rights of the Child, African Commission on Human and Peoples' Rights, or the Inter-American Court of Human Rights also confirm such conclusion.

Finally, another possible issue under Art. 2 of Protocol No. 1 is to what extent the children should suffer the consequences of their parents' refusal to have them vaccinated. Restrictions on the right to education do exist even though no express restriction can be found in Art. 2 of Protocol No. 1. However, any restrictions must not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness. They must be foreseeable for those concerned and pursue a legitimate aim, although there is no exhaustive list of "legitimate aims" under Art. 2 of Protocol No. 1.<sup>80</sup> Although the final decision as to the observance of the Convention's requirements rests with the Court, the Contracting States enjoy a certain margin of appreciation in this sphere.<sup>81</sup> It may be reiterated that the interference suffered by the children applicants did not violate Art. 8 (2) ECHR, since the measures were in accordance with the law, pursued a legitimate aim and it was necessary in a democratic society to fulfil obligation of the

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<sup>72</sup> ECtHR: *Vavříčka and Others v. the Czech Republic* (Applications no. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15), 8 April 2021, para. 345.

<sup>73</sup> *Ibid.*, para. 306.

<sup>74</sup> *Ibid.*, para. 307.

<sup>75</sup> *Partly concurring and partly dissenting opinion of judge Lemmans to the Vavříčka and Others v. the Czech Republic Case*, para. 3.

<sup>76</sup> ECtHR: *Sulak v. Turkey* (Application no. 24515/94), 17 January 1996.

<sup>77</sup> ECtHR: *Cyprus v. Turkey* (Application no. 25781/94), 12 May 2014, para. 278.

<sup>78</sup> ECtHR: *Leyla Şahin v. Turkey* (Application no. 44774/98), 10 November 2005, para. 141.

<sup>79</sup> ECtHR: *Velyo Vele v. Bulgaria* (Application no. 16032/07), 27 August 2014.

<sup>80</sup> ECtHR: *Leyla Şahin v. Turkey* (Application no. 44774/98), 10 November 2005, para. 154.

<sup>81</sup> ECtHR: *Velyo Vele v. Bulgaria* (Application no. 16032/07), 27 August 2014, para. 33.

Czech Republic under the European Convention of Human Rights and Fundamental Freedoms. Moreover, the children applicants were not deprived of the right to education, since the non-compliance with the vaccination duty did not prevent them from attending primary education.

### III. LEGAL IMPLICATIONS OF *VAVŘIČKA AND OTHERS V. THE CZECH REPUBLIC FOR SLOVAKIA*

#### 1. Compulsory childhood vaccination in Slovakia

Slovakia, like some other EU Member States, applies legal duty on vaccination of children against selected diseases, namely, diphtheria, tetanus, pertussis (whooping cough), polio, viral hepatitis B, invasive haemophilic infections, pneumococcal invasive diseases, measles, mumps and rubella.<sup>82</sup> For this reason, there are several civil initiatives in Slovakia that oppose compulsory vaccination of children for the same reasons as those analysed in the *Vavříčka and Others v. the Czech Republic* case. When we look at the statistics of the Slovak Public Health Authority up to 31 August 2019, it indicates that the national results of vaccination within the framework of regular compulsory vaccination of children exceeded the limit of 95% in all types of compulsory vaccination of children. Nationwide vaccination coverage in the controlled years of birth ranged from 95.7% to 97.8%. Compared to the previous period, vaccination coverage under regular compulsory vaccination of children has remained at about the same level, with a slight increase in some types of vaccination.<sup>83</sup> Unfortunately, there is no more up-to-date statistic on compulsory vaccination of children for 2020 that would inform about the current vaccination hesitancy in Slovakia.

From the legal perspective, the compulsory childhood vaccination is regulated by Act no. 355/2007 Coll., as amended, on the Protection, Promotion and Development of Public Health, and Decree of the Ministry of Health of the Slovak Republic no. 585/2008 Coll., as amended, on the Prevention and Control of Communicable Diseases (hereinafter “Decree”), where the method of vaccination, its types and control of vaccination in Slovakia is defined. Under section 51 (1) (d) of the Act no. 355/2007 Coll., natural persons are obliged to undergo, among others, compulsory vaccination. In case of a minor, legal representative (commonly its parent) is responsible for the vaccination duty.<sup>84</sup> Offences regarding the non-compliance with vaccination duty are stated in the Act no. 355/2007 Coll. in section 56 (1) (k) and (3). A fine of a total of 331 EUR may be imposed for failure to undergo compulsory vaccination.<sup>85</sup> Exemptions from the vaccination duty concern a permanent contraindication to vaccination or the child has overcome a disease from which vaccination is intended to protect or has laboratory evidence of antibody positivity. Regarding the admission to preschool facilities, only vaccinated children can be admitted. This condition, however, will be waived when a child reaches the age of five, i.e. the age for compulsory preschool education.<sup>86</sup>

The Constitutional Court and the Supreme Court of the Slovak Republic addressed the matter of compulsory vaccination in their judgments, in not so distant past. The Constitutional Court of the Slovak Republic in its decision *PL ÚS 10/2013* analysed whether the section 51 (1) (d) and section 62 of the abovementioned Act no. 355/2007 Coll. and section (6) of the Decree no. 585/2008 are inconsistent with the Constitution of the Slovak Republic. As it was concluded by the Constitutional Court, that compulsory vaccination (and vaccination as such)

<sup>82</sup> Decree of the Ministry of Health of the Slovak Republic no. 585/2008 Coll., as amended, on the Prevention and Control of Communicable Diseases, section 6.

<sup>83</sup> Slovak Public Health Authority: *Evaluation of administrative vaccination control in the Slovak Republic up to 31 August 2019*, p. 1. Online: [https://www.uvzsr.sk/docs/info/ockovanie/Vyhodnotenie\\_administrativnej\\_kontroly\\_ockovania\\_v\\_SR\\_k\\_31082019.pdf](https://www.uvzsr.sk/docs/info/ockovanie/Vyhodnotenie_administrativnej_kontroly_ockovania_v_SR_k_31082019.pdf) (visited 31 May 2021).

<sup>84</sup> Act. no. 355/2007 Coll., as amended, on the Protection, Promotion and Development of Public Health, section 51 (1) (d), (3).

<sup>85</sup> Act. no. 355/2007 Coll., as amended, on the Protection, Promotion and Development of Public Health, section 56 (3).

<sup>86</sup> Act. no. 245/2008 Coll., as amended, on Upbringing and Education, section 28a.

is also an interference with human integrity. However, the purpose and consequence of the obligation to undergo compulsory vaccination is not the end of life or the direct threat of ending it, but, on the contrary, the purpose is to protect life and prevent the emergence and spread of communicable and fatal diseases.<sup>87</sup> The Supreme Court of the Slovak Republic in the judgement *2Szd/1/2013* declared that the right to respect for private life (Art. 8 (1) ECHR) cannot be considered an absolute right and therefore an interference with this right does not automatically constitute a violation. Compulsory vaccination, as involuntary medical care, does constitute an interference with the right to respect for private life, which includes the personal, physical and mental integrity guaranteed by Art. 8 (1) ECHR, but such a medical intervention does not automatically constitute a violation of the law if it is carried out in accordance with the law, pursues a legitimate goal of protecting health and is necessary in a democratic society (Art. 8 (2) ECHR).<sup>88</sup>

If the current Slovak legislation and domestic case-law on compulsory childhood vaccination had been analysed through the lenses of *Vavříčka and Others v. Czech Republic* case, it could be concluded that in the current state the measures are in accordance with the ECHR and its Protocols, as well as the existing ECtHR case-law. As it was mentioned in the judgment of case no. *2Szd/1/2013* the compulsory vaccination is an involuntary medical intervention, which interferes with the right to respect for private life. The interference with the right to respect for private life is justified when it is in accordance with the law, pursues the legitimate aim and it has to be necessary in a democratic society. The aim of the vaccination duty as declared in *PL ÚS 10/2013* is to protect life and prevent the emergence and spread of communicable and fatal diseases. Furthermore, the proportionality of the interference (fine, non-admission of a child to preschool facility before its compulsory attendance) in relation to the aim pursued is in our view proportional to the risk they pose for a non-vaccinated persons, that cannot be vaccinated due to medical contraindications. Regarding the potential violation of Art. 9 ECHR, we conclude that the outcome would depend on facts of a particular case, where the applicant would have to prove that his/hers conviction or belief is of sufficient cogency, seriousness, cohesion and importance. However, it is questionable whether such convictions or beliefs of a parent are also in the best interest of a child, especially when it comes to their highest attainable standard of health, or in the most extreme case, the child's right to life. Lastly, regarding the potential violation of the right to education, we conclude that there would have been no violation in case of non-admission to preschool education before the child would reach the age for compulsory preschool education. After reaching the age for compulsory preschool education, the non-compliance with the vaccination duty would not prevent them from attending preschool education. Furthermore, according to the ECtHR case-law, preschool education does not fall within the right to education.

#### IV. CONCLUSION

Vaccination of children against infectious life-threatening disease is of particular importance for most States of the international community. Increasing vaccination hesitancy forces States to apply vaccination campaigns or to introduce compulsory vaccination policies to ensure herd immunity. Gradually, domestic and international courts are assessing whether this medical procedure is contrary to human rights and fundamental freedoms, which are guaranteed under universal and regional instruments of international human rights law. Especially in the current situation, when the international community is struggling with the ongoing COVID-19 pandemic, the issue of vaccination is of particular importance. The recently issued judgment in the *Vavříčka and Others v. the Czech Republic* case is a milestone decision in the contemporary international human rights law, since no other judicial or quasi-judicial organ addressed legal

<sup>87</sup> Ruling of the Constitutional Court of the Slovak Republic case no. *PL ÚS 10/2013*, 10 December 2014, p. 21.

<sup>88</sup> Judgment of the Supreme Court of the Slovak Republic case no. *2Szd/1/2013* of 16 April 2014, p. 6.

aspects of compulsory childhood vaccinations in connection to violation of human rights and fundamental freedoms. The Court addressed alleged violation of the right to respect for private and family life (Art. 8 ECHR), freedom of thought, conscience and religion (Art. 9 ECHR) and the right to education (Art. 2 of Protocol No. 1 ECHR). The assessment of the case was based on principles and extensive case-law related to the abovementioned articles of the ECHR. The Court concluded that compulsory vaccination is an involuntary medical intervention, which interferes with the right to respect for private life. Further analysis, however, pointed to the limitations that may be applied towards some of the human rights and fundamental freedoms, namely that the measures adopted to secure a herd immunity in the States Parties of the ECHR must be in accordance with the law, pursue the legitimate aim and they have to be necessary in a democratic society. It was accepted that vaccination duty encompasses the value of social solidarity, the purpose of which was to protect the health of all members of society, particularly those who were especially vulnerable and on whose behalf the remainder of the population was asked to assume a minimum risk in the form of vaccination. The Court concluded that the State's margin of appreciation in this case should be a wide one. Regarding the pressing social need, the Court concluded that the vaccination duty in the Czech Republic represents the national authorities' answer to the pressing social need to protect individual and public health against selected diseases and to secure high rate of vaccination to maintain herd immunity. As for the relevant and sufficient reasons of the compulsory childhood vaccination, the Court concluded that in matters of health-care policy, the national authorities are the best placed to assess priorities, the use of resources and the needs of society. The utmost importance in cases concerning children health care and development is given to the best interests of the child. The Court also concluded, regarding the proportionality of the interference in relation to the aim pursued, that the sanction imposed on *Mr. Vavříčka* was relatively moderate and that the non-admission of children applicants to preschool had been a measure intended to safeguard the health of young children in particular and was essentially protective rather than punitive in nature. Therefore, the adopted measures had been proportional to the legitimate aims pursued by the Czech Republic through the vaccination duty. The Court also declared the complaints under Art. 9 ECHR as inadmissible. The critical opinions of *Mr. Vavříčka* on vaccination, as declared by the Court, are not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Art. 9. Lastly, the Court concluded that there was no need to examine the case separately under Art. 2 of Protocol No. 1 ECHR. As it was highlighted in the Chapter II (4), according to the ECtHR case-law, preschool education does not fall within the right to education. The outcome of the mentioned judgment is also important for Slovakia, where similar measures are adopted regarding compulsory childhood vaccination. It may be concluded that the current Slovak legislation and case-law of the Slovak judicial organs is in accordance with the ECtHR case-law, as well as with the *Vavříčka and Others v. the Czech Republic*. As for the current situation regarding the COVID-19 vaccines roll out, it is important to state that the domestic authorities must weight the burden on the individual and the overall benefit for the society. Important aspect in every compulsory vaccination scheme is whether a disease is highly contagious and poses a serious risk for the society while the vaccines offered are regarded safe and effective under credible scientific research.

#### **KEY WORD**

Compulsory Vaccination of Children, European Court of Human Rights Freedom of thought, conscience and religion, Right to Education, Right to Respect for Private and Family Life.

**KLÚČOVÉ SLOVÁ**

Povinné očkovanie detí, Európsky súd pre ľudské práva, sloboda myslenia, svedomia a náboženstva, právo na vzdelanie, právo na rešpektovanie súkromného a rodinného života.

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