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The Power of Persuasion of the Ruling of European Court of Human Rights in *Vavříčka and Others Case***

Keywords: COVID-19 and human rights, European system of human rights, compulsory/mandatory vaccination, medical intervention

Summary. In its activity the European Court of Human Rights¹ goes far beyond that of a mere judicial body dealing with the complaints of states and individuals. It maintains and promotes the ideals and the values of a democratic society; it disseminates the spirit and the significance of the Convention on Human Rights and Fundamental Freedoms 1950; it also develops the legal doctrine of human rights². It essentially informs us what it takes to stand by on the sidelines as a citizen or public functionary and act in the name of the state when it comes to human rights. With regard to the role of the Court, the expectations of the international community towards jurisprudence are constantly increasing. In the eyes of this community the Court designs the present and future standards of human rights law. Acting as a role model in the sphere of law means the Court must pay particular attention to the broad implications of its judgements: in other words not only to what has been expressed in its judgements, but also to what is unexpressed. The authors are fully aware of the importance attached to the Court's ruling in *Vavříčka and others* against the Czech Republic and of the impact that this ruling may have on the state's public health policy, including the state's approach with regard to mandatory vaccination during the COVID-19 pandemic. The aim of these considerations are twofold. The authors have investigated whether what has gone unexpressed in the Court's ruling might be interpreted in favour of compulsory vaccination against COVID-19 and so used in a public debate as an argument for the introduction of such course of action. A secondary question here would also determine whether the Court deliberately left such a door open for a broader interpretation of this famous ruling and, if so, the reason behind this. The authors have also closely monitored the way the Court pays attention to the clarity of its message, including the linguistic aspects of the judgement.

* The authors joined forces because of some private discussions they shared regarding the differences between legal language and everyday language, and their impact on modern society.

** Applications N^os 47621/13 and 5 others, ECHR (Grand Chamber) Judgement 8th of April 2021.

¹ Further as: the Court or ECHR.

² J. Viljanen, *The Role of the European Court of Human Rights as a Developer of International Human Rights Law*, "Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol" 2008, n^o 62/63, pp. 250-265.

Słowa kluczowe: COVID-19 a prawa człowieka, europejski system ochrony praw człowieka, obowiązkowe szczepienia, interwencja medyczna

Streszczenie. W swojej działalności Europejski Trybunał Praw Człowieka wykracza daleko poza zwykły organ sądowy rozpatrujący skargi państw i jednostek. Utrzymuje i promuje ideały i wartości społeczeństwa demokratycznego, upowszechnia ducha i znaczenie Konwencji Praw Człowieka i Podstawowych Wolności z 1950 r., rozwija również doktrynę prawną praw człowieka. Zasadniczo informuje nas, co trzeba zrobić, aby stanąć u boku państwa jako obywatel lub funkcjonariusz publiczny i działać na rzecz praw człowieka. W odniesieniu do roli Trybunału oczekiwania społeczności międzynarodowej wobec orzecznictwa stale rosną. W oczach tej społeczności Trybunał projektuje obecne i przyszłe standardy prawa dotyczącego praw człowieka. Pełnienie roli wzoru do naśladowania w dziedzinie prawa oznacza, że Trybunał musi zwracać szczególną uwagę na szerokie implikacje swoich wyroków: innymi słowy, nie tylko na to, co zostało wyrażone w jego orzeczeniach, ale także na to, co niewyrażone. Autorzy są w pełni świadomi wagi, jaką przywiązuje się do orzeczenia Trybunału w sprawie Vavřička i innych przeciwko Republice Czeskiej oraz wpływu, jaki to orzeczenie może mieć na politykę państwa w zakresie zdrowia publicznego, w tym na podejście państwa do obowiązkowych szczepień podczas epidemii COVID-19. Cel tych rozważań jest dwojaki. Autorzy zbadali, czy to, co nie zostało wyrażone w orzeczeniu Trybunału, może zostać zinterpretowane na korzyść obowiązkowych szczepień przeciwko COVID-19 i wykorzystane w debacie publicznej jako argument za wprowadzeniem takiego trybu postępowania. Drugie pytanie określałoby również, czy Trybunał celowo pozostawił furtkę dla szerszej interpretacji tego słynnego orzeczenia, a jeśli tak, to jaki jest tego powód. Autorzy bacznie obserwowali również sposób, w jaki Trybunał zwraca uwagę na klarowność swojego przekazu, w tym na aspekty językowe wyroku.

Introduction

As the COVID-19 pandemic spread, interest grew across the world in introducing compulsory vaccinations and to some extent continues. The pandemic also caused a deal of controversy polarising opinion those for compulsory vaccinations and the so-called anti-vaxxers. No matter the extent to which the achievements of modern medicine are appreciated, the mandatory introduction of vaccinations raised resistance and posed a threat to the rights of individuals. At the same time, the pandemic with its unpredictable course raise serious concerns not only regarding health, but also regarding the way societies work in general if the pandemic persists indefinitely. In such difficult circumstances we look for an authority on whom may rely for guidance. The activity of the European Court of Human Rights goes far beyond that of the merely judicial body that deals with the complaints of states and individuals³. It maintains and promotes the ideals and the values of a democratic society; it disseminates the spirit and the significance of the Convention on Human Rights and Fundamental Freedoms 1950; it also develops the legal doctrine of human rights. It essentially informs us what it takes to stand by on the sidelines as a citizen or public functionary and act in the name of the state when it comes

³ As rightfully Judge K. Wojtyczek states in his dissenting opinion to the considered judgement: "The first and most fundamental question about any judicial proceedings concerns their purpose and the role of the judicial body".

to human rights. Governments have a number of tools at their disposal, among which are found legal devices, to try to prevent injury and disease, and promote the health of the populace. Laws, like other preventative strategies, may intervene at a variety of levels, designed to secure improved behaviour among the populace. Those governments that wish to refer to and endorse their health policies by dint of the Court's jurisprudence are keen to cite the Court's judgements in their favour. The same governments would not hesitate to exploit any loophole in the Court's reasoning if such deficiencies might strengthen their arguments. Bearing all this in mind, the authors initiated their thought-provoking journey through the given ECHR ruling with open minds, curiosity and a pinch of criticism.

1. The core of the case

The case Vavříčka and Others⁴ settled by the European Court of Human Rights has its origin between 2013 and 2015, when the main applicant Mr Vavříčka was fined for his refusal to have his two adolescent children vaccinated against three diseases for which vaccinations were provided in the domestic mandatory vaccination scheme. The applications addressed to the European Court of Human Rights are based on the consequences of the implementation of a law in force in the Czech Republic, according to which all permanent residents and all foreigners authorised to reside in the country indefinitely are obliged to undergo a set of routine vaccinations. All resident children under the age of fifteen are required to receive several vaccines against the main infectious diseases. For children under the age of fifteen their statutory guardians are responsible for compliance with this duty.

Every country has its own vaccination policy. It may be mandatory, recommended or entirely at the discretion of the citizen. The number of vaccines and the timing of the vaccination plan vary in different countries, according to local legislation. In the Czech Republic, vaccination at the time was compulsory (mandatory, obligatory), so was *required by a law or rule*⁵. The domestic law in the Czech Republic, however, provided some exceptions from this rule based mainly on the medical contra-indications or conscientious objection.

The consequences for failure to comply with the mandatory vaccination were twofold. The first was a fine of 400 Euros and the second was a denial of access to pre-school nurseries. The former punishment aimed directly at the parents, while the second represented the loss of an important social opportunity for their children.

⁴ The case originates from six joint applications. The other five applicants were children, whose parents had failed to comply with the obligation to have their children vaccinated.

⁵ <https://www.merriam-webster.com/dictionary/mandatory> [access: 30.03.2022].

The case of one of the applicants reached the Czech Constitutional Court, the jurisprudence of which developed the concept of the “secular objection of conscience” to vaccinations. Nevertheless, this specific exception is interpreted restrictively and was not granted to the applicant.

The only position taken by the Court in this case was in the sphere of the private life of the applicants regarding the protection safeguarded by Article 8 of the European Convention of Human Rights. The Court considered it unnecessary to examine the complaints from any additional point of view (i.e. claims referring to the violation of the right to respect for family life; complaints under Article 9 of the Convention according to right to parental care in compliance with parental conscience; complaints regarding Article 2 of Protocol N° 1 to the Convention relating to the alleged violation of the right of education). A thorough substantive analysis under Article 8 has not been followed up by equally advanced considerations regarding the other applicants’ allegations or their own convoluted arguments.

The ECHR found by sixteen votes to one that there had been no violation of Article 8 of the Convention. The duty to be vaccinated has been considered an element of “social solidarity” to protect the health of others, particularly vulnerable groups of people. It is worthy of note that the right to a private life not only means the State is obliged to abstain from unlawful interference in a person’s private life, but also includes a generally recognised obligation to protect the life and well-being of other persons from health risks.

The purpose of these considerations allows us to omit the Court’s finding in favour of its decision and to focus instead on issues not addressed or insufficiently clarified by the court.

2. The argumentation of the applicants and its complexities

The applicants’ main allegation was that, in imposing on them the sanctions prescribed by domestic law, the Czech Republic breached their right to personal autonomy, a right protected under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁶ (1950) in making decisions concerning the health of their children. The parents’ applicants also recalled the right of parents to care for their children in accordance with their opinions, convictions and conscience, as protected in the scope of Article 9 of the Convention. Despite the variety of reasons for refusing to have their children vaccinated invoked by their parents, the real reasons were essentially the alleged harmfulness of vaccines and

⁶ Further as the “Convention” or “European Convention on Human Rights”. See the full text of the Convention and its additional protocols here: https://www.echr.coe.int/documents/convention_eng.pdf [access: 28.03.2022].

unspecified health risks rather than any religious or philosophical arguments against the immunisation of children. It is worthy of note that the adult applicants saw the best interests of their children as being primarily assessed by parents, while any state intervention should be “as a last resort in the most extreme circumstances”⁷.

The child applicants quoted their rights to personal development, which according to them had been violated by their exclusion from pre-school facilities and allegedly breached Article 2 of Protocol No 1 to the Convention safeguarding the right to education. The curtailment of the right to attend pre-school, in the opinion of the child applicants, compromised their position at the beginning of their education. The child applicants also invoked damage to their family life as a result of the actions taken by the state.

3. Is there anything missing in the Court’s ruling?

The Court sits at the heart of a system in which individuals may bring their cases against states when their rights and freedoms have been flouted, so its role has to be seen more broadly than that of any other court. The Court is not just the arbiter in the cases between individuals and states, but it is also the mediator, the connector and putatively society’s most meticulous teacher. In cases of international judicial bodies, especially those with great authority, the wider scope of their duties has to include the role in which “the court communicates with people”. In this role any court’s explanation, even in simple cases apparently is of special importance.

As the authors noted in the beginning, what the Court states in a given judgement is as important as what it neglects to say *expressis verbis*, because both lawyers and other members of society will interpret in their own way what the Court neglects to say. In fact, according to the authors, the Court forwent the opportunity to clarify several things important as much for lawyers as for society.

3.1. Is “mandatory” better than “forced”?

Let us begin with the notion of “mandatory/compulsory medical intervention” (or “mandatory/compulsory vaccination”). Every state will likely have its own definition of this kind of intervention established by law⁸ or at least made in legal doc-

⁷ See K. Ważyńska-Finck, *Anti-vaxxers Before the Strasbourg Court: Vavříčka and Others V. Czech Republic*, who rightfully notes, that the Court was aware of the importance of the case even before the COVID-19 outbreak. See full text: <https://strasbourgoobservers.com/2021/06/02/anti-vaxxers-before-the-strasbourg-court-vavricka-and-others-v-the-czech-republic/> [access: 29.03.2022].

⁸ See i.e.: J. Przybylska, *Cywilnoprawne aspekty instytucji zgody pacjenta na interwencję medyczną i jej definicja*, “Monitor Prawniczy” 2003, no 16, p. 742. According to Przybylska “medical intervention means any legally allowed medical action into the patient’s body connected with providing health services undertaken by authorized entities”. According to international law the term “medi-

trine. If an action is by definition mandatory, imposed by law, it would be logical to conclude that the non-execution of this obligation implies legal consequences in accordance with non-compliance with duty, including a fine. According to the Czech government and the Court, the sentence imposed on the applicant was not particularly severe, but according to the applicant's statement the amount to be paid was too high, given that his family was suffering temporary financial difficulties and lack of access to pre-school deprived his children of the right to education. Regarding this second aspect, some statistics dated to 2018 show that in the Czech Republic 91.5% of those entitled to pre-school education availed themselves of it⁹. The analysts neglected to investigate the reasons why the parents of almost 10% of children entitled to pre-school education prefer to keep them at home until compulsory education begins, but the word "compulsory" may be the key to interpreting this analysis, as parents are free to choose whether they want their children to attend a "non-compulsory" pre-school. The applicant, on the other hand, wanted his children to attend a (non-compulsory) kindergarten and complained at the lack of access to this service, although he refused to comply with the requirements prescribed by law. There is therefore a price to pay for upholding one's choices. In Mr Vavříčka's case, these choices are unconnected with well-defined philosophical or religious convictions¹⁰. As M. L. Lo Giacco states "[...] it was rather the fruit of a personal conviction interpreted as an imperative of conscience. Convinced of the harmfulness of vaccinations, they refused to subject their children to a practice that they considered dangerous, and asked that their right to secular conscientious objection be recognised. This, the Court emphasises, is the first time that Strasbourg jurisprudence assesses the applicability of Art. 9 to this particular type of belief[...]"¹¹. In paragraph 258 of its decision the Court notes that, even if the complaint concerns the penalties imposed for the non-vaccination of one's children, it implicitly calls into question the very mandatory nature of vaccines and that precisely in this respect the application should be considered.

Indeed, in some member States of the Council of Europe, vaccinations are not compulsory, or at least they were not at the time of the application in question.

cal intervention", without defining it, however, is used, for instance, in the Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo 4.06.1997) (see full text here: <https://rm.coe.int/168007cf98>, access: 30.03.2022). In Article 4 it also uses the synonymous term "intervention in the sphere of health".

⁹ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Early_childhood_and_primary_education_statistics [access: 30.03.2022].

¹⁰ "[...] the Court finds that [...] critical opinion on vaccination is not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 [...]" para 335 of the ECHR's judgment in Vavříčka case.

¹¹ M.L. Lo Giacco, *Vaccini obbligatori e obiezione di coscienza dei genitori. (La decisione della Corte Europea dei Diritti dell'Uomo Vavříčka ed altri c. Repubblica Ceca, 8 aprile 2021)*, "Osservatorio Costituzionale" 2021, no 3, pp. 272-286, 281 (translated from Italian by Angelo Sollano).

In Lithuania, for example, where a debate on the regulation of the vaccination of children began only in 2021¹², this form of protection was highly recommended and offered free of charge by the state, but not declared mandatory. Failure to have one's child vaccinated against measles, mumps and rubella, however, precluded access to preschool¹³. This therefore represents a case in which vaccination may not be mandatory, but non-vaccination results in limitations for the citizen. A course of action "recommended" by the Lithuanian government and "mandatory" in the Czech Republic has the same consequences for a citizen who decides against complying with it: disqualification of one's children from pre-school.

In a judgment dated 22 November 2017, cited in paragraph 115 of the considered document, the Italian Constitutional Court declared that *there was no qualitative difference between compulsory and recommended vaccinations, the key issue being the essential objective of preventing infectious diseases that was pursued by both types*. The judgement concerned the compliance with the Constitution of a compensation for damage to health caused by a vaccination, but it is worthy of emphasis the alignment of the two types of approach towards vaccination here.

One may think that emigrating to a country where vaccinations are not mandatory might be a solution for those who want to uphold their approach and criticism of the vaccination... The applicant could have chosen Germany, where some vaccines became mandatory as late as 2020 and non-compliance with this leads to fines, as well as exclusion from certain institutions and services. Consulted by the Court as a third-party intervener, the German government justifies these recent decisions with the sudden drop in voluntary adherence to the vaccination plan, which implied a dangerous departure from the safety threshold guaranteed by herd immunity. In other words, Germany has prided itself on a permissive attitude and has let its inhabitants decide whether to have their children vaccinated until citizens, motivated by a campaign of scientific information and by a strong civic sense, voluntarily joined the vaccination programme *en masse*. Whilst individuals participated in the good of the community, the German government has been able to boast of not interfering in people's private lives, but in the face of danger they have preferred to make vaccines mandatory by law. In this declaration the German government stated that the differences between two words that could be confused are underlined: "mandatory/compulsory/obligatory" and "coercive/enforced/forcibly imposed"¹⁴. The latter means *using force to persuade people to do things that they*

¹² <https://www.lrt.lt/en/news-in-english/19/1113986/compulsory-vaccination-makes-way-in-lithuanian-parliament> [access: 30.03.2022].

¹³ <https://ednh.news/it/vaccini-ecco-la-mappa-di-quelli-obbligatori-nellue/> [access: 30.03.2022].

¹⁴ See i.e.: *Collins' dictionary*: <https://www.collinsdictionary.com/dictionary/english/compulsory> [access: 29.03.2022].

are unwilling to do¹⁵. Failure to fulfil a duty is considered an infringement and may result in a variety of sanctions, but may not be resolved by the forced implementation of the obligation. Indeed, none of the countries of the Council of Europe envisages enforced vaccination, as it represents direct interference with that person's physical integrity. Vaccines are never forcibly administered, as the duty is only enforced indirectly. With this statement, the German government proposes a new, more literal interpretation of the sense of the application of the duty of vaccination. While the Court sees in the complaint about the sanctions an implicit protest against the obligation to vaccinate in the Czech Republic, Germany, whose authorities interpret the obligation as *a situation of strongly encouraging individuals to submit to the duty of vaccination by means of the threat of a sanction* (235), shifts focus to the fairness of the applied sanctions.

As rightfully states Z. Vikarská, who followed the applicants' case: "Although the Court initially accepted that there had been an interference with their right to a private life [...] some doubts about the intensity of that interference arose in the Court's reasoning on the merits. [...] the Court first referred to an effective enjoyment of intimate rights but then reiterated (in para 276) that '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' [...] The fact that the state had not even attempted to enforce the vaccination duty seems to be of high importance; one could even doubt whether the applicants suffered any tangible interference with the rights guaranteed in Article 8"¹⁶. It seems therefore that the sole fact that the applicants (or their children) had not been vaccinated against their will and "the only consequences" they faced were the fine and exclusion from pre-school education makes the further considerations of the Court irrelevant. In pre-pandemic times such a Court's conclusions might seem justifiable. After all, the Court does not consider what has not been raised in the application. There are, however, clear references to the issue of compulsory vaccination in the background to the case of Vavříčka and Others and, even if the Court itself rejected any possibility of using this ruling to argue for the introduction of mandatory vaccination against COVID-19, it might make the argumentation much more careful and foresight being fully aware how societies look up to the Court. The field of public health is firmly connected with the communication of ideas and is consequently a battleground of conflicting and confusing communications, especially today. Taking into consideration the importance of the judgement in

¹⁵ <https://dictionary.cambridge.org/dictionary/english/coercive> [access: 29.03.2022].

¹⁶ Z. Vikarská, *Is compulsory Vaccination Compulsory?*, <https://verfassungsblog.de/is-compulsory-vaccination-compulsory/> [access: 29.03.2022].

the context of the COVID-19 pandemic and the controversies surrounding the possibility of the introduction of mandatory vaccination, a thorough substantive analysis regarding the meaning of the terms “obligatory/compulsory/mandatory” and “forced/coercive” and the differences between them would have been of particular value for society, given the common opinions about “forced vaccination” and in consequences “sanitary segregation” often surface.

3.2. A somewhat uncertain judicial message

Any sentence issued by a court is clearly a performative speech act. In the specific case of the European Court of Human Rights it needs to be established whether violations of the provisions of the European Convention of Human Rights have taken place and what form of compensation these violations should elicit. The accompanying document contains the entire procedure, lists the laws taken into consideration, the necessary definitions, the interventions of the interested parties and third parties, in a structure divided into well-defined sections. All these elements serve to validate the judgment of the court, introduced by the formula *For these reasons, the Court...* and followed by some performative verbs such as “dismisses”, “holds”, “joins to the merits”, “declares”, “decides”, “refuses”¹⁷. The impartial judgment of a court, according to Peter Tiersma, also contains a persuasive function, since *a judge actually aims to persuade the reader that her decision was correct, but the objective tone suggests that the outcome is the only rational conclusion in light of the law and the facts*¹⁸.

Before making a final judgment in the Vavříčka case, the Court examined and evaluated the opinions of different institutions who testified for or against vaccination. While not expressing *a priori* a judgment in favour of one of the factions, it is significant that in one of the introductory paragraphs (158), the Court *points out that the present case relates to the standard and routine vaccination of children against diseases that are well known to medical science*. This emphasises that, as is universally acknowledged, these diseases are eradicated by vaccines. Apparently this part of the sentence could have been more manifest if the Court had firmly wished to distinguish the Vavříčka judgement from the obvious context of the COVID-19 pandemic¹⁹ because any specific indication as to the difference between COVID-19 and “*diseases that are well known to medical science*” would have this effect. Choosing

¹⁷ K. Peruzzo, *National law in supranational case-law: a linguistic analysis of European Court of Human Rights judgments in English*, EUT Edizioni Università di Trieste 2019.

¹⁸ P.M. Tiersma, *Legal Language*, University of Chicago Press 1999, p. 199.

¹⁹ A. Nilsson, *Is Compulsory Childhood Vaccination Compatible with the Right to Respect for Private Life? A Comment on Vavříčka and Others v. the Czech Republic*, “European Journal of Health Law” 2021, no 28(3).

to make no comment on this issue, the Court equated, whether purposely or not, both types of vaccination: against diseases that modern medicine is certain to stem the spread of and against COVID-19, which is on many levels still something of an unknown for modern medicine.

3.3. Lack of European consensus over compulsory vaccination

In the considered judgement the Court noted that clearly there is no European consensus as to whether the vaccination of children should be compulsory²⁰, though with a simultaneous conviction that vaccination is one of the most successful and cost-effective health interventions and that all states should aim to achieve the highest possible level of vaccination among its population. This reference underlined that States enjoy a wide margin of appreciation, since they are in the best position to assess the measures necessary to protect public health, in the light of the health situation in their countries and the means at their disposal. The implementation of the aim to achieve the highest possible level of vaccination among its population therefore diverges in European states, including different methods of presenting the necessity of vaccination for citizens. Some of a state's health policies are based on mere recommendations, while others (i.e. the Czech Republic) are more restrictive²¹. This lack of European consensus affects people's conscience and it may suggest that if vaccination is not compulsory in other states (neighbour states rather than those outside Europe), then there is no reason for it to be compulsory in yours. European consensus on the matter could mean an easier way of presenting scientific consensus as to the efficacy and safety of vaccines. It would also allow the adoption of certain instruments (e.g. medical, legal, technological) on a supranational level. It would accelerate the spread of reliable and proven information. It would equip the procedure to develop the vaccination scheme with increased transparency and public involvement, which may consequently avoid conflicts of interests. There is no certainty, however, that the Court recognised the lack of such consensus as a difficulty or that it would decide that this lack suits the applicants.

3.4. Lack of a child-centred perspective

One may think that the Court's approach to the complaints made by child applicants is somewhat problematic. The reasoning seems confused and fails clearly to define and distinguish the separate and even conflicting interests, rights and re-

²⁰ Para 278.

²¹ See i.e.: M. Massa, *The Italian "No Job, No Job" Law*, *VerfBlog*, 2021/4/07, <https://verfassungsblog.de/the-italian-no-jab-no-job-law/>, doi: 10.17176/20210408-172757-0.

sponsibilities of parents and children. The burden of the Court's reasoning is clearly on the side of adult applicants and their complaints. Most human rights, including the right to respect for one's private and family life, raise positive and negative obligations for the state. Apart from refraining from interfering in someone's private and family life there is also an obligation to ensure that children's wellbeing and their rights are uncompromised by the actions of third parties, including their own parents. It also introduces for the parents obligation always to consider the best interests of the child, so Article 8 of the European Convention cannot justify actions that could harm the child's health and personal development. As mentioned above, the adult applicants see the best interests of a child as being primarily assessed by parents, while any state intervention should be allowed only as a last resort in the most extreme circumstances. There is room for the Court to present a different rule: state interference with parents' right to respect for family life is justified in the best interests of the child. The Court therefore missed opportunity to address the case from a child-centred perspective, which was rather unexpected bearing in mind the Court's *aquis* as to the children's rights including all the cases in which the Court relied on the UN Convention on the Rights of the Child²². In the case of *Vavříčka* and Others the child applicants were very young children, all aged about 5 when the decisions regarding their vaccinations were taken. The child applicants were most likely represented before the Court by their parents, which, while understandable in the situation, meant that it was their parents who submitted arguments on behalf of them. In fact, the children's applications only supported the adults' applications. It could raise the question of child representation and the possible conflict of interests, which went entirely unaddressed by the Court. This question was of vital importance in the case because it is unacceptable that a child's fundamental rights depend entirely on the will or decision of parents. Bearing in mind the child's best interests, the child's right to health, survival and personal development, the child's access to effective protection against preventable illnesses should be considered as an important aspect of children's bodily integrity, while the Court addressed this aspect of the case only for adult applicants. These two different aspects of the case cannot be automatically equated with each other or treated as identical.

Conclusions

The idea of this small investigation regarding what is missing in the European Court of Human Rights judgement in the case of *Vavříčka* and Others came to

²² <https://www.unicef.org/child-rights-convention/convention-text> [access: 29.03.2022].

the authors unexpectedly during an emotional discussion about the impact that international courts make, or could make, on societies' opinions, trends and behaviours. This idea has been strengthened by participation at the international Conference "Public Health and Mass Democracies. 2nd Human Rights and Public Health Webinar" on 19 January 2022. The exceptional nature of the world's health situation prompted the authors to look for scientific but not medical arguments for compulsory vaccination against COVID-19. Paradoxically some of them could have been found in what has not been expressed in the ECHR judgement in the case of *Vavříčka and Others*. The authors were convinced from the first moment after they read the judgement that the pronouncement of this ruling favours compulsory vaccinations. This corresponds with the personal opinions of the authors, according to which the promotion of compulsory vaccination needs the strong voice of the European Court of Human Rights²³. Human nature, however, suffers from the weakness that it tends to look for faults.

The pandemic has limited the enjoyment of personal freedoms to an extent that was unprecedented in democratic countries before²⁴ and this has created a situation in which any step forward could cause a serious resistance in society. The states are in an extremely difficult position, on the one hand having an urgent need to protect public health and on the other trying to avoid damaging the democratic system by introducing instruments that may be seen as an attack on personal freedoms. Known as a promotor and protector of human rights, the Court is an authority for both sides: states and individuals, and both sides treat it as a sounding board. This challenging role requires even more effort than ever, not just in the sphere of the application of law, but also in the sphere of public conscience.

The aim of the authors is not to prove that the Court failed in any of its duties. The Court's position in society is special and requires from it to take a broader perspective and to assess in advance what impact some of its judgements may have in people's lives. This broader perspective goes along with the utmost professional skill and care.

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²³ A. Donald, P. Leach, *Human Rights and COVID-19: Forging Recovery After a Pandemic of Abuses?*, *VerfBlog*, 2021/4/10, <https://verfassungsblog.de/human-rights-and-covid-19-forging-recovery-after-a-pandemic-of-abuses/>, doi: 10.17176/20210410-101028-0.

²⁴ Some authors call it rightfully "the war-like responses to the pandemic", see: A. Spadaro, *COVID-19. Testing the Limits of Human Rights*, "European Journal of Risk Regulation" 2020, no 11, pp. 317-325, doi: 10.1017/err.2020.27.

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