

[2022] PILARS CC 1

Vavříčka and Others v The Czech Republic: Objections to compulsory childhood vaccinations

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In light of the Covid-19 pandemic and the subsequent discussions around Covid vaccinations, the case of *Vavříčka and Others v The Czech Republic*, which concerned objections to childhood vaccinations against ten diseases well-known to science, is topical.² The Chamber relinquished this case to the Grand Chamber of the European Court of Human Rights (ECtHR) because it was considered to raise serious questions concerning the interpretation of the European Convention on Human Rights (ECHR).³ Whilst the majority of the judgment focused on the right to private life under ECHR Article 8, this case is interesting in terms of understanding of the reach of the right to freedom of thought, conscience and religion under Article 9 because the Grand Chamber considered that the critical opinion in question did not constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to fall within the scope of this Article.⁴

The Article 8 Assessment

In *Vavříčka*, the applicants alleged that the consequences which followed their non-compliance with the statutory duty to vaccinate their children were incompatible with their right to respect for private life under Article 8. The first application was lodged by a parent (Mr Vavříčka) on his own behalf and the other five applications were lodged by parents on behalf of their children.

The ECtHR examined the Article 8 complaint in extensive detail. It began by explaining that ECtHR case law has established that ‘compulsory vaccination, as an involuntary medical intervention’ represents an interference with the right to respect for private life under Article 8.⁵ Whilst none of the contested vaccinations had been administered in this case, the ECtHR considered that the statutory duty and the various consequences which followed from the non-compliance with this duty (including a fine and the non-admission of children to preschool or nurseries) also constituted an interference with Article 8.

However, the ECtHR held that the interference was prescribed by law and pursued the legitimate aim of protecting the health and the rights of others. It explained that the State has a wide margin of appreciation in this area; in considering whether there was a pressing social need the ECtHR found that the policy was consistent with the best interests of the children, accepted that there were relevant and

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² *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021).

³ *Ibid.*, para. 163. Under ECHR Article 30 Chamber can relinquish cases to the Grand Chamber if the case raises serious questions affecting the interpretation of the ECHR or its Protocols, or if there is a risk that there may be an inconsistency with a previous ECtHR decision, see Council of Europe, ‘European Court of Human Rights: Grand Chamber’ (Council of Europe, 2022) available at: <https://www.echr.coe.int/Pages/home.aspx?p=court/grandchamber&c=>.

⁴ *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), para. 335.

⁵ *Ibid.*, para. 263. This is consistent with the Commission’s assessment under Article 8 in *Boffa and 13 Others v San Marino* (1998) 92-B DR 27, 34.

sufficient reasons to support the policy, and considered that the measures were proportionate to the aims pursued. The ECtHR concluded, therefore, that the State had not overstepped its wide margin of appreciation and the measures taken by the State could be regarded as being necessary in a democratic society. Consequently, it found no Article 8 violation.

In terms of understanding the ECtHR's approach under Article 9 in this case, it is worth noting a point made in the proportionality assessment under Article 8. The ECtHR observed that whilst the system in the Czech Republic 'espouses compulsory vaccination, this is not an absolute duty', and there are permitted exemptions from it.⁶ Firstly children with a permanent contraindication to vaccination can be exempted⁷ and, secondly, exemptions may also be allowed on grounds of conscience.⁸ However, the ECtHR observed that during the domestic proceedings the child applicants (Ms Novotná, Mr Hornych, Mr Brožík And Mr Dubský And Mr Roleček) did not seek to rely on this exemption.⁹

The Article 9 Complaint

Under Article 9, Mr Vavříčka complained about the fine imposed on him, arguing that his 'main motivation' for refusing to vaccinate his children had been the protection of their health.¹⁰ As he was 'convinced' of the health damage caused by vaccination, 'his conscience would not allow him to have them vaccinated'.¹¹ Ms Novotná and Mr Hornych also complained under Article 9, arguing that the State's refusal to permit enrolment to nursery school was contrary to their right to freedom of thought, conscience and religion.

The government submitted that personal views on 'compulsory vaccination based on wholly subjective assumptions about its necessity and suitability did not constitute a "belief" within the meaning of Article 9'.¹² It observed that there was 'no clear line in the existing case-law as to what beliefs were or were not regarded as a "religion or belief" within the meaning of Article 9 § 2', and suggested that even if the Article could be considered to apply, on the facts of the case in question, no interference would be found;¹³ this is because, the government argued, the applicants had not substantiated their objections to the duty to vaccinate their children by giving relevant and sufficient reasons.¹⁴ The government also pointed to lack of consistency in the views of Mr Vavříčka and Ms Novotná, and lack of clarity in the argument advanced by Mr Hornych. Further, the government argued that Ms Novotná's reliance on the views and convictions of her parents was incompatible *ratione personae* with Article 9, and pointed out that neither she nor Mr Hornych could have held a view on the matter of 'sufficient cogency, seriousness, cohesion and importance to come within the ambit of Article 9' given their age at the time.¹⁵ Finally, the government argued that the legislation was general and neutral, and applied to all individuals regardless of their thought, conscience or religion.

The ECtHR's Article 9 Assessment

⁶ *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), para. 291.

⁷ *Ibid.*

⁸ *Ibid.*, para. 292.

⁹ For detail on the individual arguments of Ms Novotná, Mr Hornych, Mr Brožík and Mr Dubský and Mr Roleček, see *ibid.*, paras. 32-64.

¹⁰ *Ibid.*, para. 321.

¹¹ *Ibid.*

¹² *Ibid.*, para. 315.

¹³ *Ibid.*, para. 316.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para. 318.

The ECtHR opened the Article 9 assessment by noting that there was no indication by the applicants that their critical stance towards vaccination was ‘religiously inspired’, therefore, it considered that it was not their religious freedom which was potentially at stake, but rather their freedom of thought and conscience.¹⁶ Whilst the ECtHR noted that the particular conviction in question had not previously been examined by it, it observed that the Commission did consider a similar complaint in *Boffa and 13 Others v San Marino*.¹⁷ In that case, the Commission set out the general principles that, i) in protecting the sphere of personal beliefs, Article 9 did not always guarantee the right to behave in the public sphere in a way which was dictated by such beliefs and, ii) the term “practice” did not cover each and every act which was motivated or influenced by a belief.¹⁸ Furthermore, in *Boffa and Others* the Commission observed 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’ and, therefore, found no Article 9 interference.¹⁹

In *Vavříčka and Others*, the ECtHR also recalled *Bayatyan v Armenia*, which concerned the applicability of Article 9 to conscientious objection to military service on religious grounds. Notably, for the first time in the ECtHR jurisprudence, the Grand Chamber explained in *Bayatyan v Armenia*, that ‘opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.’²⁰ However, the ECtHR also pointed to *Pretty v The United Kingdom* in which it had explained that whilst it did not doubt the ‘firmness of the applicant’s views concerning assisted suicide, not all opinions or convictions constitute beliefs in the sense protected by Article 9’.²¹

Applying this to Mr Vavříčka, the ECtHR referred to the Constitutional Court’s ruling in which it was observed that Mr Vavříčka’s claims lacked consistency and reasons of conscience had only been introduced at a late stage in the proceedings. The ECtHR noted that this was confirmed by the Supreme Administrative Court before which Mr Vavříčka had ‘failed to advance any concrete argument concerning his beliefs and the intensity of the interference with them caused by vaccination’.²² The ECtHR considered that the approach of the domestic courts was reasonable and consistent with the ECtHR’s interpretation of Article 9. Bearing in mind the findings of the domestic courts, and the fact that the applicant had offered no further substantiation in respect of his Article 9 complaint before the ECtHR, the ECtHR found that the ‘critical opinion on vaccination’ was ‘not such as to constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9’.²³ It also found that there was stronger evidence in respect of this finding in relation to Ms Novotná and Mr Hornych because neither had even raised such arguments during the domestic proceedings. Consequently, the ECtHR rejected the Article 9 complaints on the basis that there were incompatible *ratione materiae* with the provision.

¹⁶ *Ibid.*, para. 330.

¹⁷ See *Boffa and 13 Others v San Marino* (1998) 92-B DR 27.

¹⁸ *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), para. 331. See *Boffa and 13 Others v San Marino* (1998) 92-B DR 27, 33-34.

¹⁹ *Ibid.*

²⁰ *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), para. 332. See also *Bayatyan v Armenia* ECHR 2011-IV 1, para. 110.

²¹ *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), para. 333. See also *Pretty v The United Kingdom* ECHR 2002-III 155, paras. 82-83.

²² *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), para. 334.

²³ *Ibid.*, para. 335.

Comment

The ECtHR's approach to the claims under Article 9 in *Vavříčka and Others v The Czech Republic*, particularly its approach to Mr Vavříčka's complaint, may be open to criticism. In its consideration of the domestic proceedings, the ECtHR observed that Mr Vavříčka had only introduced his claim based on reasons of conscience at a late stage in the proceedings. However, it is worth reflecting on this finding in more detail. During the domestic proceedings there was a development in the domestic case law so that an exemption not previously permitted was introduced. The ECtHR itself noted that in the Czech Republic, 'an exemption may also be permitted on the basis of the *Vavříčka* case-law of the Constitutional Court...subsequently developed into the right to a "secular objection of conscience"'.²⁴

Judge Wojtyczek, who dissented in relation to the finding under Article 8 largely on procedural grounds, also raised issues with the majority's approach to the Article 9 complaint. He argued that it is problematic to refer to developments in the domestic case law which occurred at a later stage than the facts of the case and 'to blame the applicants, with the benefit of hindsight, for failing to explore the avenues opened by this subsequent case-law and to assert certain rights which were not previously protected'.²⁵ Indeed, in the proceedings before the ECtHR, the applicants had claimed that whilst the exemption had been introduced by the government, it 'would almost never be granted in practice',²⁶ and Mr Vavříčka complained specifically that his 'conscientious stance had been assessed negatively in accordance with a standard that had been developed at a late stage in the domestic proceedings'.²⁷

However, it is perhaps going too far to suggest that the ECtHR 'blamed' the applicants for their failure to raise claims based on conscience after the government introduced such a permissible exemption. Take Mr Vavříčka's complaint, for instance. It appears that he had the opportunity to provide further detail on his conscientious stance before the ECtHR, yet his response was limited; he simply argued that his conscience would not allow him to have his children vaccinated because of his concern for the protection of his children's health.²⁸

Freedom of conscience is an essential aspect of Article 9, which protects the right to freedom of thought, conscience and religion. In addition to being able to hold a conscientious position internally (in the *forum internum*), it is also important to be able to take actions in conformity with one's conscientious positions externally (in the *forum externum*). This may be in the positive sense of acting in a way that is consistent with one's conscience or in the negative sense of refusing to act, or conscientiously objecting to acts, which conflict with one's conscience and convictions.²⁹ An individual's conscience is intrinsically linked to their moral identity, and it is often inherently linked with their religious or belief related identity too.³⁰ In *Vavříčka and Others*, Judge Wojtyczek commented that the question of

²⁴ *Ibid.*, para. 292.

²⁵ *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), Dissenting Opinion of Judge Wojtyczek, para. 17.

²⁶ *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), para. 292.

²⁷ *Ibid.*, para 335

²⁸ *Ibid.*, para 321.

²⁹ For further comment on 'conscience', see Heiner Bielefeldt, 'Conscientious Objection in the Medical Sector. Towards a Holistic Human Rights Approach' in Sabine Klotz, Heiner Bielfeldt, Martina Schmidhuber and Andreas Frewer, *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation* (Columbia University Press, 2018), 207-212.

³⁰ *Ibid.*, 210.

whether a risk inherent in a medical procedure is a risk worth being taken, ‘may be a matter of personal belief’ protected under Article 9.³¹

However, the ECtHR has been consistently clear that in order to gain protection under Article 9, convictions must be sufficiently cogent, serious, cohesive and important.³² Whilst, following *Bayatyan v Armenia*, the ECtHR now offers protection to conscientious objection to military service under Article 9—as a manifestation of religious or other convictions—it does not always find that the basis for objections to military service, in cases before it, meet the necessary criteria to attract the guarantees under Article 9. The ECtHR has limited conscientious objection to military service to religious or other convictions comprising a ‘firm, permanent and sincere objection’ to participating in war or bearing arms.³³ In *Enver Aydermir v Turkey*, for instance, in which it considered that the applicant’s objection was not based on a religious conviction, or on a pacifistic or antimilitaristic philosophy, it found no violation of Article 9.³⁴ And, in the civilian context, the ECtHR does not give protection to vague claims. For example, in a case in which a doctor who provided medical reports to health insurance companies refused to carry out a medical examination and provide such a report for an apprentice because, he claimed, there may be a risk of bias if he were to work with the apprentice in the future, the ECtHR rejected the complaint under Article 9 that his freedom of conscience had been infringed.³⁵ The ECtHR took into account the domestic court’s finding that the applicant ‘did not substantiate that he had experienced a moral dilemma’, and the ECtHR considered that the refusal to examine the apprentice did not ‘constitute an expression of a coherent view on a fundamental problem’ and as such could not be regarded as a manifestation of his personal beliefs protected by Article 9.³⁶

The main stumbling block in relation to the Article 9 complaints in *Vavříčka and Others*, also appears to be the lack of substantiation for the claims made. With respect to Mr Vavříčka, in particular, as no further information was provided by the applicant it would have been difficult for the ECtHR to have found, on the limited evidence available, that Mr Vavříčka’s critical opinion towards childhood vaccinations was sufficiently cogent, serious, cohesive and important to merit protection under Article 9.³⁷ In light of the cases discussed above, the ECtHR’s decision in relation to the Article 9 complaint in *Vavříčka and Others* appears consistent with the jurisprudence.

28 July 2022

³¹ *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), Dissenting Opinion of Judge Wojtyczek, para 17. The applicants in *Boffa v San Marino* claimed that there was a high risk of death associated with vaccinations, see *Boffa and 13 Others v San Marino* (1998) 92-B DR 27, 30.

³² This was first set out in *Campbell and Cosans v The United Kingdom* (1982) Series A no 48, para. 36. The ECtHR has protected a range of religious and non-religious beliefs and positions of thought and conscience under Article 9. In terms of healthcare, for instance, in *Nyyssönen v Finland*, the Commission was of the opinion that ‘alternative medicine as a manifestation of medical philosophy’ fell within the ambit of Article 9, see *Nyyssönen v Finland* App. no 30406/96 (Commission Decision, 15 January 1998).

³³ *Enver Aydermir v Turkey*, App. no 26012/11 (ECtHR, 7 June 2016), para. 81.

³⁴ *Ibid.*, paras. 83-84. See also *Dyagilev v Russia*, App. no 49972/16 (ECtHR, 10 March 2020), paras. 93-95.

³⁵ *Blumberg v Germany* App. no 14618/03 (ECtHR, 8 March 2008).

³⁶ *Ibid.*

³⁷ Additionally, whilst it was not examined explicitly by the ECtHR, the government had argued that Mr Vavříčka had accepted the vaccination of his children against some diseases. If correct, this may have further undermined his conscience claim, see *Vavříčka and Others v The Czech Republic* App. nos 47621/13 3867/14 43094/14 and others (ECtHR, 8 April 2021), para. 316.

