

European Court of Human Rights—compulsory vaccination—margin of appreciation—best interests of the child—European consensus—social solidarity

VAVŘIČKA AND OTHERS V. THE CZECH REPUBLIC. App. Nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15. At <https://hudoc.echr.coe.int/fre?i=001-209039>. European Court of Human Rights (Grand Chamber), April 8, 2021.

In *Vavříčka and Others v. the Czech Republic*, the Grand Chamber of the European Court of Human Rights (ECtHR or Court) addressed whether compulsory childhood vaccination is in line with the European Convention on Human Rights (ECHR). Provided all necessary precautions are taken, states may require childhood vaccination in the interest of “social solidarity.” While concerned with mandatory vaccination of children for diseases such as measles and tetanus, the judgment was issued in the context of the COVID-19 pandemic (ongoing at the time of writing), for which it has obvious implications. We argue that the Court’s deference to European consensus is warranted for public health decision making, and *Vavříčka* demonstrates that the Court would most likely accept mandatory vaccinations for COVID-19 as being in line with the ECHR. At the same time, the judgment still has some pitfalls—most notably, that the Court failed meaningfully to engage with the concepts of “best interests of the child” and “social solidarity” on which its decision relied.

The proceedings originated in the six applicants’ refusal to comply with a legal duty of childhood vaccination against nine well-known diseases, including measles, mumps, rubella, and tetanus. Under Czech law, failure to vaccinate children may result in fines, and only vaccinated children may be admitted to preschool facilities, which receive children of up to six years old (although unvaccinated children may be admitted to primary school). One of the applicants, Mr. Vavříčka, was fined an amount equivalent to 110 euros for having refused to vaccinate his two teenage children against three diseases included in the compulsory vaccination program. The other five applicants are children who were denied admission to preschool facilities as a result of their parents’ failure to comply with the vaccination duties.

The applicants brought their case to the ECtHR, alleging violations of their right to private life (Article 8), right to freedom of thought, conscience, and religion (Article 9), and right to education (Article 2, Protocol No. 1). Taken together, the applicants argued that vaccines are risky and harmful to human health, and that the vaccination duty contravenes their religious and philosophical beliefs.

The Court focused its assessment on the complaints under Article 8, as the applicants failed to substantiate their conscientious stance for their Article 9 complaint. It concluded that the applicants’ right to private life had not been violated (sixteen votes to one). As the legislation requiring vaccination pursued the legitimate aim of protecting against diseases that may pose a serious risk to health (para. 272), the decision centered around means—whether the measure was “necessary in a democratic society.” In ECtHR jurisprudence, the requisite means-ends testing demands that the interfering measure address a “pressing social need”; that the reasons invoked to justify it are “relevant and sufficient”; and that the interference is proportionate to the aim (para. 273).

The Court first acknowledged that there is a European consensus, supported by a consensus among specialized international bodies, that vaccination is “one of the most successful and cost-effective health interventions” and that states should aim to achieve the highest level of vaccination possible (para. 277). The Court often places considerable interpretative weight on the finding of a European consensus, which exists when the bulk of member states have adopted similar legislation or practice on a certain issue, to justify applying a narrow margin of appreciation. The Court also observed that the interest at stake is crucial to the individual’s effective enjoyment of intimate or key rights, a factor that would normally narrow the margin of appreciation (paras. 273, 276). Nevertheless, the Court proceeded to establish that states have a wide margin of appreciation in determining whether to make childhood vaccination compulsory (para. 280). For the Court, this conclusion was bolstered by the observations that vaccination was not administered against the will of the applicants; that there is no consensus between member states over a single model to achieve the highest level of vaccination; that the introduction of a legal duty to vaccinate children raises sensitive moral or ethical issues; and that the case concerns matters of healthcare policy (paras. 276–79).

In considering the “pressing social need” of the measure, the ECtHR recalled that states have a positive obligation under Article 2 (right to life) and Article 8 to protect the life and health of the population. Czech medical authorities took a “firm view” that childhood vaccination should remain compulsory in order to ensure that vaccination rates would not decline. The Court observed that similar concerns can be found at European and international levels. It thus agreed that the Czech vaccination duty indeed answered the pressing social need of protecting individual and public health (paras. 282–84).

The Court moreover held that there were relevant and sufficient reasons for mandatory childhood vaccination because of the “weighty public health rationale underlying this policy choice, notably in terms of the efficacy and safety of childhood vaccination” (para. 285). In this regard, it reiterated scientific consensus supporting the objective of attaining the highest possible degree of vaccine coverage (*id.*). Here, the Court invoked the “best interests of the child” (paras. 286–87), a concept which can also be found under Article 3 of the United Nations Convention on the Rights of the Child.¹ It considered that states have an obligation to place the best interests of the child at the center of all decisions affecting their health and development. In this vein, the Court found that where states deemed voluntary vaccination insufficient to achieve or maintain herd immunity, or when herd immunity is irrelevant (as in the case of tetanus), they may introduce mandatory childhood vaccination to protect children from serious diseases (para. 288).

Finally, the Court considered that the measure satisfied the proportionality test. The ECtHR balanced several considerations: the scientific consensus on the efficacy and safety of the vaccines in question; that Czech law provides for exemptions in cases of medical contraindications (para. 291) and conscientious objection (para. 292); and that vaccination is never forcibly administered, as the duty is indirectly enforced through “relatively moderate” sanctions (para. 293). In the Court’s view, the Czech law’s financial sanctions were moderate because they may be imposed only once and are not too high (*id.*).

Regarding the sanction of refusal of admission to preschool, the Court acknowledged “the loss of an important opportunity for these young children to develop their personalities and to

¹ Convention on the Rights of the Child, Art. 3, Nov. 20, 1989, 1577 UNTS 3.

begin to acquire important social and learning skills in a formative pedagogical environment” (para. 306). However, this educational loss was considered a result of their parents’ choice. The Court held 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. (*Id.*)

The Court also stated that “[t]he notional availability of less intrusive means to achieve this purpose, as suggested by the applicants, does not detract from this finding” (*id.*). Furthermore, the Court underlined the temporal nature of the exclusion, as all children—also when not vaccinated—can still be enrolled in primary school (para. 307).

Thus, the Court concluded that the Czech Republic had not overstepped its margin of appreciation and consequently that there was no violation of the right to private life (paras. 310–11). The Court also rejected the three applicants’ complaints under Article 9 by sixteen votes to one, as they were incompatible *ratione materiae* with the Convention. The Court considered that the applicants failed to substantiate the seriousness of their beliefs (paras. 335–36). Finally, the Court held, also by sixteen votes to one, that it was unnecessary to examine separately the complaints of the five child applicants under Article 2, Protocol No. 1 in light of the previous findings under Article 8 (para. 345).

Two separate opinions are attached to the judgment. The first is an opinion by Judge Lemmens, who underlined that the value of social solidarity underpins the judgment in the case at hand. He emphasized that the reference to “the value of social solidarity,” which “requires respect by each member of society for certain minimum requirements,” sends the message “that apart from fundamental rights, there are also fundamental duties and responsibilities” (part. concur., part. diss. op., Lemmens, J., para. 2). He moreover disagreed with the majority when they found it unnecessary to examine the complaint under Article 2, Protocol No. 1, as in his opinion it did raise several distinct issues worth investigating (part. concur., part. diss. op., Lemmens, J., para. 3).

The second separate opinion is an elaborate dissent by Judge Wojtyczek. He argued that the specific arguments relied upon by the majority are not sufficient and therefore disagreed with the finding that Article 8 was not violated. Nevertheless, he clarified that he agreed “with the general view that the Convention does not exclude the introduction of an obligation to vaccinate in respect of certain diseases, coupled with objections based upon conscientious objection” (diss. op., Wojtyczek, J., para. 1). He adduced two main arguments to underpin his dissent. First, Judge Wojtyczek found that at the procedural level there is a lack of predictability regarding some choices the Court made in its reasoning, more specifically regarding: the role of the Court as establishing the truth by its own motion versus based on the submissions of the parties alone (diss. op., Wojtyczek, J., para. 3); the distribution of the burden of proof among the parties as well as the applicable standard of proof (diss. op., Wojtyczek, J., para. 4); and the basis and justification of factual findings (diss. op., Wojtyczek, J., para. 5). Second, he disagreed with the majority’s substantive approach to the establishment of the margin of appreciation, which he argued should have been a narrow one (diss. op., Wojtyczek, J., paras. 7–8), and the factual basis of the judgment, in relation to

which he stated that an assessment should have been made separately for each disease for which vaccination was compulsory (diss. op., Wojtyczek, J., para. 9). Additionally, he disagreed with the majority on the inadmissibility of the complaint regarding conscientious objection under Article 9 (diss. op., Wojtyczek, J., para. 17).

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The Court in *Vavrička* has attached significant weight to the state's wide margin of appreciation. In this case note, we scrutinize how the Court has weighed the different factors that could widen or narrow the margin. We also argue that the Court did not meaningfully engage with the concept of the "best interests of the child." The case note will moreover discuss a new concept that was introduced in the judgment, namely "social solidarity." Finally, we conclude with an exploration of the implications of the judgment for COVID-19 vaccination requirements.

To determine the breadth of the margin accorded to states, *Vavrička* relies on "consensus" in two ways. First, the Court used European consensus (supported by consensus between "specialized international bodies") in order to demonstrate that there is an interest in achieving the highest level of vaccination possible. Second, the Court also held that there is no European consensus about the best means to protect that interest. This case thus demonstrates that when it comes to public health matters, the Court will defer to European consensus where one exists and otherwise to national authorities.

We submit that this deference is warranted, since public health decision making is not only restricted to the realm of "factual judgment," i.e., demonstrating the scientific truth of facts. As pointed out by Judge Wojtyczek in his dissenting opinion (diss. op., Wojtyczek, J., para. 11), public health decision making necessarily involves "value judgment," namely determining how conflicting interests *should* be balanced and/or how much risk *should* be tolerated at what cost. Within the context of COVID-19 vaccination, for instance, experts may debate whether a state *should* prioritize full vaccination in its own territory or whether it *should* assist other countries first. In terms of compulsory vaccination, experts may also make a value judgment that vaccination *should* be compulsory irrespective of whether the disease *is* communicable, or irrespective of whether there *is* a significant difference in outcome between prescriptive and recommendatory approaches. There is no objective formula on how to balance these different normative considerations. Hence, the Court's deference is appropriate for public health cases, as member states are better situated than the Court is to exercise this sort of value judgment and determine the most suitable measure to protect life and health.

Also relevant for the margin of appreciation is how the ECtHR has classified compulsory vaccination for children as raising "sensitive moral or ethical issues," while childhood vaccination in general does not because it constitutes "a fundamental aspect of contemporary public health policy." For the Court, this sensitivity is "attested by the examples of constitutional case-law" in several European states. The Court also specifically noted that the change of policy in Germany was preceded by "extensive societal and parliamentary debate" (para. 279). The Court's approach here is puzzling for two reasons. First, the Court does not specify at all what was exactly attested by "the examples of constitutional case-law." Second, the Court's reference to "extensive societal and parliamentary debate" in Germany is also questionable, as policies in general are subject to extensive societal and parliamentary debate before they are enacted. For instance, a tax hike may be subject to an extensive heated debate between

libertarians who believe that taxation treads on their rights and socialists who want to redistribute wealth. In fact, “extensive social and parliamentary debate” lies at the heart of liberal democracy. Does the mere existence of political debate establish sensitivity, and thus widen the margin of appreciation available to the state under this human rights convention? Such an approach would surely create perverse incentives and risks of arbitrariness. More clarity is needed, as moral or ethical sensitivity can widen the margin of appreciation granted to states in areas that are labeled as such.²

The Court’s “best interests of the child” analysis also leaves something to be desired. The present case directly raises the question of whether the child’s will can be equated with the parents’ will, and what happens when a child’s parents do not authorize a medical intervention that is for the child’s benefit. In the judgment, the majority held that there is an obligation on states to place the best interests of the child first and that “[w]hen it comes to immunisation, the objective should be that every child is protected against serious diseases” (para. 288). Thus, the Court implicitly prioritized the best interests of the child over the parent’s assessment when the parent’s view is against vaccination. In this way, the Court has effectively allowed the state to determine what constitutes the best interests of the child.

Judge Wojtyczek argued that the Court’s approach to determining the best interests of the child clashes with its previous case law, where the ECtHR has established that it is for the parents, not the state, to define the best interests of the child,³ and that parental rights may be limited only in exceptional circumstances (diss. op., Wojtyczek, J., para. 13).⁴ He also pleaded in his dissenting opinion that it is the parents who understand the specific circumstances of their children’s health, and that they “may identify certain very individual risk factors which escape the attention of other persons” (*id.*). It is true that the Court found itself in a difficult situation in *Vavříčka*, as the applicants did not believe in the scientific consensus on vaccination. Nevertheless, the Court failed sufficiently to explain who should determine the best interests of the child and why. It also failed to consider Article 6 of the Oviedo Convention, which provides: (1) that a medical intervention may only be carried out on a person who does not have the capacity to consent for their direct benefit; and (2) that an intervention on a minor may be carried out *only with the authorization of their representative*.⁵

In addition, the Court failed adequately to consider the state’s restrictive measure in light of the best interests of the child. As pointed out by Katarzyna Ważyńska-Finck, it is the children who bear the consequences of their parents’ choices, as they have been denied access to preschool.⁶ Since the Court acknowledged that this constitutes the loss of an important opportunity, and the Czech Constitutional Court itself had stated that preschool education in the Czech Republic “involved a process of acquiring skills, attitudes and knowledge, rather than

² KANSTANTIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 34–36 (2015).

³ M.A.K. and R.K. v. the UK, Nos. 45901/05 and 40146/06 (Eur. Ct. Hum. Rts. Mar. 23, 2010).

⁴ Strand Lobben and Others v. Norway [GC], No. 37283/13, paras. 206–07 (Eur. Ct. Hum. Rts. Sept. 10, 2019).

⁵ Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Art. 6, Apr. 4, 1997, 164 ETS 5.

⁶ Katarzyna Ważyńska-Finck, *Anti-vaxxers Before the Strasbourg Court: Vavříčka and Others v. the Czech Republic*, STRASBOURG OBSERVERS (June 2, 2021), at <https://strasbourgobservers.com/2021/06/02/anti-vaxxers-before-the-strasbourg-court-vavricka-and-others-v-the-czech-republic>.

just childcare or child-minding” (para. 62), is it not against the best interests of these children effectively to punish them for what their parents have decided? This consideration merited closer scrutiny by the Court, as it could raise issues regarding the right to private life of the child, or, if the Court would consider preschool to fall under Article 2, Protocol No. 1, their right to education.

It is also striking that the ECtHR found the potential availability of less restrictive means irrelevant (para. 306). The Court did grant a wide margin of appreciation to states in determining whether to make childhood vaccination compulsory, yet this does not imply that the Court can completely defer the proportionality assessment to the state. Under its own regular approach, it still needs to exercise supervision. As a result, the Court’s reference to the “best interests of the child” seems to constitute mere window dressing. In reality, the whole judgment hinges on the finding of a wide margin of appreciation and the lack of strict scrutiny that followed from this.

In *Vavříčka*, the ECtHR has also invoked the value of “social solidarity” (*id.*). Judge Lemmens in his partially concurring, partially dissenting opinion interpreted this reference as sending a message that individuals are subject to “fundamental duties and responsibilities” under the ECHR (part. concur., part. diss. op., Lemmens, J., para. 2). In the ECHR itself, the term “duties and responsibilities” can only be found under Article 10 on the right to freedom of expression,⁷ and not under the articles that are invoked in this case. However, in *Vavříčka*, “social solidarity” seems to have had only a marginal impact on the outcome of the case; in the end, states still enjoy a wide margin of appreciation in determining the prescriptiveness of their childhood vaccination policy. It would thus be dubious to interpret the Court’s judgment as establishing a “fundamental duty” to be vaccinated, particularly in states that have not resorted to a prescriptive approach. Instead, the Court has concluded that it would not be disproportionate for states to impose a vaccination duty in the name of social solidarity. This implies that the Court does not really go as far as Lemmens, and thus one should not read too much into the reference to “social solidarity.”

Finally, given the timing, the *Vavříčka* judgment can and will naturally be read in relation to the ongoing COVID-19 pandemic, and the highly politicized disputes over COVID-19 vaccinations. However, it should first be noted that *Vavříčka* concerned compulsory childhood vaccination. At the time of writing, many countries still had not approved the use of COVID-19 vaccines for children, particularly below twelve years old. Moreover, most children only experience mild symptoms when infected with COVID-19; children are less likely to transmit SARS-CoV-2; and some public health experts believe that the available doses should be allocated to developing countries first.⁸ While the Court held in *Vavříčka* that there is a consensus with regards to vaccinations in general (para. 277), if the “consensus” doctrine is applied *specifically* to childhood vaccination for COVID-19, there is not yet a European, international, or scientific consensus that such vaccination is required. Nevertheless, the current scientific understanding on COVID-19 may change rapidly as more and more findings are being published.

As for mandatory vaccination for adults, it is difficult to draw relevant conclusions from *Vavříčka*, as this case primarily concerns access to education (under Article 8). For adults,

⁷ EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 429–30 (2001).

⁸ *Should We Vaccinate Children Against SARS-CoV-2?*, 21 LANCET INFECTIOUS DISEASES 889 (2021).

vaccination requirements may significantly implicate other rights, such as freedom of movement under Article 2, Protocol No. 4. Nevertheless, the Court's use of the term "social solidarity" seems to send a message that it would not be disproportionate for states to impose compulsory COVID-19 vaccination *in the name of that solidarity*, as having the highest level of vaccination would protect people who are vulnerable to COVID-19, including the elderly, the immunocompromised, and people with comorbidities. At the same time, there is no uniform practice as to how the highest level of COVID-19 vaccination should be achieved. As a result, if a state were to introduce mandatory COVID-19 vaccination, *Vavrička* indicates that such a state would enjoy a wide margin of appreciation under the ECHR. This is further underpinned by the observation that the Court tends to grant a particularly wide margin of appreciation in the field of bioethics.⁹ On our reading, unless the measure would be clearly disproportionate (such as the imposition of a blanket obligation without possibilities of exemptions for those with contraindications), the ECtHR would probably accept mandatory vaccination for COVID-19 to be in accordance with the ECHR.

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Personal data—national security—intelligence—international intelligence sharing—surveillance—data privacy—European Convention on Human Rights

BIG BROTHER WATCH AND OTHERS V. THE UNITED KINGDOM. App. Nos. 58170/13, 62322/14, 24960/15. Judgment. At <http://hudoc.echr.coe.int/eng?i=001-210077>. European Court of Human Rights (Grand Chamber), May 25, 2021.

On May 25, 2021, the Grand Chamber of the European Court of Human Rights (ECtHR) ruled in joined cases *Big Brother Watch and Others v. the United Kingdom (Big Brother Watch)*¹ that some aspects of the United Kingdom's surveillance regime violated the rights to privacy and freedom of expression, guaranteed under Articles 8 and 10 of the European Convention on Human Rights (ECHR).² The program enabled the UK authorities to bulk intercept communications data, acquire data from communications service providers, and receive material from foreign intelligence services, all with wide discretion. The ECtHR found that the UK program violated the Convention due to several procedural

⁹ CARMEN DRAGHICI, THE LEGITIMACY OF FAMILY RIGHTS IN STRASBOURG CASE LAW: "LIVING INSTRUMENT" OR EXTINGUISHED SOVEREIGNTY? 134 (2017).

¹ *Big Brother Watch and Others v. the United Kingdom*, App. Nos. 58170/13, 62322/14, 24960/15, Grand Chamber Judgment (Eur. Ct. Hum. Rts. May 25, 2021), at <http://hudoc.echr.coe.int/eng?i=001-210077>.

² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ETS 5 (1953), available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.