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Mandatory vaccination and the infringement of children's article 8 rights for their parents' non-compliance

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On 8 April 2021 the Grand Chamber of the European Court of Human Rights handed down its judgement in the Case of *Vavříčka and others v. the Czech Republic* (Applications nos. 47621/13 and 5 others). In the Czech Republic there is a duty to vaccinate children against nine childhood diseases, and an additional vaccination duty for children with specific health indications. Failure to comply with these duties may result in a fine and exclusion of unvaccinated children from preschool. There is an exception for children who cannot be vaccinated for health reasons, or have obtained immunity against the relevant diseases by other means. The applicants in this case were Mr Vavříčka, who had been fined for failing to have his children vaccinated, and five children whose lack of vaccination had caused them to be excluded from preschool. The question before the Court was whether the vaccination duty infringed the applicants' right to private life under article 8 ECHR. Two separate aspects of the right were considered: whether the vaccination duty constituted an unjustified infringement of bodily integrity; and whether non-admission to preschool constituted an unjustified infringement of private life.

These complaints were found to be admissible, but the Court found that there had been no unjustified violation of article 8 (para 311). Additionally, the Court found that there was no need to examine separately whether there had been an infringement of the applicants' right to education under article 2 of Protocol No. 1 (para 345, Judge Lemmens partial dissent regarded this point). The complaints regarding the infringement of articles 2, 6, 9, 13 and 14 ECHR were held to be inadmissible. In general, the vaccination duty was held to be justified. Judge Wojtyczek dissented.

The Court readily accepted that vaccination infringed the right to bodily integrity (para 261). The question was whether there was sufficient justification. The Court held that states have a wide margin of appreciation when it comes to justifications based on health care policy (para 275). The Czech policy of imposing a vaccination duty was within that margin of appreciation (para 310). The Court considered that vaccination requires an assessment that the child would benefit from vaccination in each individual case (para 301). Nevertheless, issues of solidarity and communal health were heavily emphasised in deciding that the vaccination duty was justified and proportionate in light of the right to bodily integrity under article 8 (para 306).

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In its assessment that a vaccination duty may be considered necessary in a democratic society under Article 8(2), the Court reiterated that direct enforcement of this duty cannot be imposed: forcible administration of vaccines would not be considered justified. In a choice between forcible vaccination or the individual's right to bodily integrity, the latter takes prevalence over the community's interest in widespread vaccination (para 293). The Czech Republic only applied indirect enforcement measures: no children were forcibly subjected to vaccination against their parents' wishes. The question was whether the sanction for not complying with the vaccination duty was sufficiently mild to constitute an alternative for complying with the duty (para 260).

None of the applicants (or regarding Mr Vavříčka: his children) in this case had actually been vaccinated. Therefore, their right to bodily integrity had not been infringed through vaccination. The Court found the maximum fine to be relatively moderate (para 293), and asserted that non-admission to preschool is not punitive (para 294). The Court found that vaccination is not physically enforced, nor are people coerced to vaccination through unjustifiably high sanctions. Those who do not want to get vaccinated could refuse vaccination and face the sanctions. Therefore, the Court found no unjustified infringement of the right to bodily integrity (para 310). Using moderate sanctions as a threat to encourage people to comply with a vaccination duty was considered justified.

While the Court considered it justified to use threats to encourage compliance it also had to consider whether the *execution* of those threats was justified – in particular regarding the question whether non-admission to preschool constituted a justified infringement of the child's article 8 rights. Exclusion from preschool causes a child to miss out on important opportunities that preschool helps facilitate for developing its identity and relationships (para 306). The Court found that preschool falls within the scope of private life under article 8, and that children who had been denied access to preschool had suffered an infringement that right (para 261). However, the Court found this infringement to be justified and within the scope of the permissible limitations set out in article 8(2).

Despite individual children perceiving non-admission to preschool as a sanction for non-compliance with the vaccination duty, the Court held that exclusion from preschool is protective rather than punitive (para 294). The vaccination duty is emphasised to be in the interest of the community's interest in health, particularly regarding protection of those children who cannot physically be vaccinated (para 306). Non-admission to preschool of voluntarily unvaccinated children protects all children who have not been vaccinated, whether voluntarily- or involuntarily. However, the way in which they are protected is substantially different: involuntarily unvaccinated children are protected by excluding voluntarily unvaccinated children from the otherwise shared space of preschool, so that the risk of illness is reduced. Voluntarily unvaccinated children meanwhile are not permitted into those spaces to protect others and themselves. It means that – while neither group of children has the capacity to change their own situation – involuntarily unvaccinated children get to benefit from preschool, while voluntarily unvaccinated children do not. If children can justifiably be denied access to preschool for their own and others' protection it is not clear why that measure should not befall all

unvaccinated children. It seems to be the case that non-admission to preschool is mainly aimed at the protection of others, rather than the voluntarily unvaccinated child themselves, in which case it might better be framed as a punitive measure after all.

The Court holds that requiring vaccination as a matter of legal duty and social solidarity is not disproportionate. The exclusion of voluntarily unvaccinated children serves the opportunity of other children to attend preschool at a lower risk to their health: the Court explicitly noted that the admission of children unable to get vaccinated is dependent on a high vaccination rate among those who are (para 306). Non-admission to preschool is not a measure meant to protect the voluntarily unvaccinated child who has lost access to preschool, but rather those children unable to benefit from vaccination at all. The justification of the duty of childhood vaccination relies on the protection of the community's health, particularly of those who are not themselves able to be vaccinated and have to rely on herd immunity. If those children can also be kept safe by denying them access to preschool then any perceived or real infringement of bodily integrity through indirect enforcement of the vaccination duty might be avoided. Although the Court held otherwise, non-admission to preschool seems to bear distinct punitive characteristics: those children who are physically able to be vaccinated are required to do so or lose access to an opportunity important to their development (para 294). In the current situation, the article 8 right of children unable to get vaccinated seems to be better protected than the same right of those children who remain unvaccinated as a result of *their parents'* decision (para 306). The Court does not consider why it finds this infringement of children's rights as a result of their parents' failure to comply with a duty, justified. It is unclear why the non-admission into preschool should not simultaneously be considered a punitive measure to the individual child, as well as a protective measure towards more vulnerable children.

The exclusion from preschool seems to be considered appropriate because it helps safeguard the health of others, not because it serves the child's own health. It is not entirely clear what about the exclusion policy would be considered in the best interest of the individual voluntarily unvaccinated child. The Court avoided the question whether the vaccination duty could be considered a duty *of the child themselves*, rather than (only) their parents. The Court therefore did not consider whether a child might benefit from the state's assistance in complying with the duty against its parent: with the state's assistance the child might benefit from vaccination, help protect others in its community, and have access to preschool. There was no discussion as to whether direct enforcement of the vaccination duty could be justified in those cases where complying with the duty is held to be in the child's best interest. If parents refuse to comply with the duty on behalf of their child, they are denying the child the opportunity to comply with it, as well as causing the child to bear to consequences – both in terms of health and in terms of losing access to preschool (para 306). The Court does not consider whether that could be in the child's best interest. It does not balance the child's right to preschool education under article 8 against the child's own interest in health. Rather, the Court has restricted its judgement to weighing the interests of the

individual child in having access to preschool against the community's interest in having the lowest possible number of unvaccinated children in preschool. If the punitive nature of exclusion from preschool were better acknowledged, the Court might have engaged more explicitly with considerations regarding the justification of making children bear the consequences of their parents' failure to comply with a duty. In the current case however, the Court found that the child applicants' article 8 rights were justifiably infringed.

Disclosure statement

No potential conflict of interest was reported by the author(s).