



Die Verfahrensbevollmächtigte
der Regierung der Bundesrepublik Deutschland

The Agent of the Government
of the Federal Republic of Germany

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de la République Fédérale d'Allemagne

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NO. IV C 1

DATE 17. April 2020

POSTAL ADDRESS Federal Ministry of Justice and Consumer Protection, 11015 Berlin

Mr Johann Callewaert
Deputy Grand Chamber Registrar of the
European Court of Human Rights
Council of Europe
F-67075 STRASBOURG - CEDEX

BY E-TRANSMISSION ONLY

Subject.: Individual Application No. 47621/13
Vavříčka v. Czech Republic

Reference: Your letters dated 10 March 2020 and 17 March 2020

Encl.: - 1 -

Dear Sir,

Please find enclosed the written comments of the Federal Government dated 17 April 2020.

Yours sincerely,

(Dr. Nicola Wenzel)



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Subject: Individual Application No. 47621/13
Vavříčka v. Czech Republic

here: Letters from the Court dated 10 March 2020 and 17 March 2020

**Written comments by the Federal Republic of Germany
in the case of *Vavříčka v. the Czech Republic*
pursuant to Article 36 § 2 of the Convention
for the Protection of Human Rights and Fundamental Freedoms**

- 1 The Federal Government of the Federal Republic of Germany would like to express its particular thanks to the President of the Grand Chamber for the opportunity to submit written comments pursuant to Article 36 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) regarding the case of Vavříčka v. the Czech Republic.

- 2 The Federal Government would like to take this opportunity to outline the current legal situation in Germany and to present to the Court its legal opinion on the compatibility of compulsory vaccination with the Convention. It should be emphasized however that compulsory vaccination in this context does not refer to the coercive administration of a vaccine. Compulsory vaccination refers to an obligation to get vaccinated in a number of specifically defined situations which is not enforced however by means of direct or physical coercion. In order to preserve personal autonomy, enforcement is rather limited to the imposition of a penalty or to the exclusion from educational institutions.

I. Compulsory vaccination in Germany – the German Act for the Protection against Measles (Masernschutzgesetz)

- 3 In Germany, compulsory vaccination has just recently been enacted for measles with the newly implemented Act for the Protection against Measles (Masernschutzgesetz). The Federal Government would first like to outline the essential elements of this new legislation. Secondly, it would like to give the Court an overview of the reasons for its enactment.
- 4 In Germany, compulsory vaccination applies to measles since 1 March 2020. Under the newly implemented Act for the Protection against Measles, certain categories of persons are required to provide proof of vaccination or immunity to measles before receiving care or before working in a number of facilities specified by the Act. This obligation extends to all persons born after 1970 who are at least one year of age and who receive care in a joint facility such as in day care centres, after-school care centres, schools and other educational establishments in which predominantly minors are looked after and to persons who receive care in a children's home or in community housing for asylum seekers and refugees. Additionally, vaccination is mandatory for persons who work in the above mentioned institutions or in health facilities such as hospitals and doctor's offices.
- 5 It should be stressed that vaccination as such cannot be administered coercively without the consent of the person concerned or their parents or legal guardian. However, persons who fall into one of the above-mentioned categories must provide proof of vaccination, immunity or of the fact that they cannot be vaccinated because of a medical contraindication to the management of the respective institution before starting to work or being cared of. Without proof, they are not permitted to work or to receive care in these places. Children under one year of age do not have to provide proof and can be admitted without proof.

Special transition periods apply to persons who were already in the care of or who already worked in the respective facilities when the law entered into force on 1 March 2020.

- 6** Under the Act, an exemption applies where compulsory education is concerned. School education is compulsory in Germany. Accordingly, even if they are not vaccinated, immune or medically excluded from being vaccinated, children who are legally obliged to attend school cannot be excluded from entering school facilities or from taking part in school activities. Hence, entry bans do not apply to children attending school in accordance with their corresponding obligation. However, where school children fail to provide adequate proof of vaccination, immunity or medical contraindication, their school is obliged to give a report to the responsible public health department. The latter may impose a fine of up to 2.500 Euros after it has once again unsuccessfully requested the relevant proof from the person in question. A repeated imposition of the fine is possible under certain circumstances.
- 7** It is important to note that exceptions to the obligation to get vaccinated can only be granted on medical grounds or in cases where no vaccine is available. The Act does not on the other hand, allow for exceptions based on religion or belief.
- 8** Under German law, a compensation scheme is available in the rare case where a person has side effects stemming from the vaccination which exceed the usual scope of a reaction to a vaccination. The claim for compensation does not presuppose illegality or fault, but is mainly based on the causality between the obligatory vaccination and its consequences.
- 9** The German legislation is based on similar considerations than the Czech legislation under review in the present case. The German Act for the Protection against Measles, like similar legislation on compulsory vaccination, serves to protect public health. Its aim is to protect not only the individual obliged to get vaccinated but society as a whole, in particular vulnerable persons who cannot be vaccinated themselves due to their age or state of health.
- 10** Measles are one of the most infectious diseases. The course of the disease is often severe and the risk of complications and serious consequences is high, including cases of death. Vulnerable groups such as young children who cannot be vaccinated, pregnant women or the seriously ill are particularly exposed to this risk. Germany has witnessed repeated outbreaks in the past. Prevention however is possible and vaccine that is well-tolerated and

effective is available. But vaccines only prevent a disease from spreading throughout a population if the level of protection is sufficiently high. In the long run, if vaccination coverage is high enough it would be possible to eliminate the disease as such, a goal that has been pursued with respect to measles on an international level by the states in the WHO European Region since 1984. Elimination would however require a vaccination rate of 95 % of the population, a coverage that has not been reached in Germany despite efforts to raise awareness in the population. In fact, the coverage in Germany has remained static for a number of years. According to the standing vaccine commission at the Robert Koch-Institute, which is the German government's central scientific institution in the field of biomedicine, children should be vaccinated twice against measles before they reach the age of two. In the years since 2008 however, even at the moment of enrolment in elementary school, the coverage among children for the second vaccination never reached more than 93 %. This is the situation the German legislator was faced with when implementing legislation on compulsory vaccination against measles. The legislation finally adopted was preceded by an intense debate both in the German society and in the German parliament where arguments against and in favour of this legislation were debated thoroughly.

- 11** In order to reach a sufficient vaccination coverage, compulsory vaccination should start at a young age. Moreover, young children are particularly affected by infectious diseases such as measles because their immune system is still immature. For compulsory vaccination to be the most effective, the respective legislation should target places where people come closely together on a daily basis. Besides, supervision of a compulsory vaccination scheme is best manageable in the context of long-term care, thus in particular in pre-schools and nurseries. As a consequence, it seemed appropriate to restrict compulsory vaccination to the above-mentioned categories of persons instead of including the entire population. It should be noted that such an approach seems all the more sensible with the increasing number of children attending day care facilities.

II. Compatibility of compulsory vaccination with the Convention

- 12** In the view of the Federal Government, compulsory vaccination is in principle compatible with the obligations of Member States under the Convention as long as the legislation in its specific form observes the principle of proportionality.

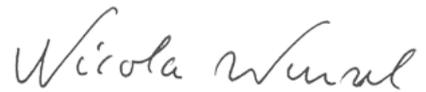
- 13** Compulsory vaccination constitutes an interference with Article 8 of the Convention. While respective legislation seems to affect the right to respect for family life only marginally if at all, the obligation to get vaccinated on pain of penalty or of exclusion from educational institutions amounts to an interference with the right to respect for private life (Solomakhin./ Ukraine, judgment of 15 March 2012, Application no. 24429/03, § 33; Salvetti./ Italy, decision of 9 July 2002, Application no. 42197/98; Boffa and others./ San Marino, decision of 15 January 1998 (Commission), Application No. 26536/95).
- 14** Furthermore, excluding children from preschool facilities such as day care centres and nurseries due to their failure to comply with a vaccination obligation might also amount to an interference with the right to education protected by Article 2 of Protocol No. 1. It is not entirely clear from the Court's previous rulings however whether the notion of education in the sense of Article 2 of Protocol No. 1 includes preschool facilities for such young children (Leyla Sahin./ Turkey, judgement of 10 November 2005, Application no. 44774/98, § 134; Velyo Velev./ Bulgaria, judgment of 27 May 2014, Application no. 16032/07, § 31 with further references). In any case, as will be elaborated further, where compulsory vaccination aims at facilities at this low educational level, this should be taken into account in the assessment of the proportionality of the respective legislation.
- 15** By contrast, in light of the Court's case law on Article 9 of the Convention, depending on the circumstances of the specific case, there is certainly often reason to doubt that compulsory vaccination or measures to ensure its enforcement such as a fine or exclusion from preschool amount to an interference with the right to freedom of thought, conscience and religion. As the Court has recognised, not all opinions or convictions constitute beliefs in the sense protected by Article 9 of the Convention (Pretty./ UK, judgment of 29 April 2002, Application no. 2346/02, § 82). In the view of the Federal Government, the position of a person opposing vaccination will in most cases not attain the level of cogency, seriousness, cohesion and importance required by the Court's case law (Bayatan./ Armenia, judgement of 7 July 2011, Application no. 23459/03, § 110).
- 16** In any case, none of the aforementioned Convention rights are guaranteed without limits. Articles 8 para. 2 and 9 para. 2 of the Convention explicitly allow restrictions for the protection of health. Despite the less explicit wording of Article 2 of Protocol No. 1, the right to education is not absolute either, but may as well be subject to limitations (Velyo Velev./ Bulgaria, judgment of 27 May 2014, Application no. 16032/07, § 32). With respect to all of these rights, the essential question is whether the obligation to get vaccinated on pain of a

penalty or exclusion from educational institutions is proportionate to the legitimate aim pursued, namely the protection of public health.

- 17** The expectation that a penalty will be inflicted or that a child will be excluded from educational institutions at least indirectly compels the persons concerned to subject themselves or their child to the injection of a vaccine. This is certainly a significant – albeit indirect – interference with a person's physical integrity. In the view of the Federal Government, a number of arguments however justify the proportionality of compulsory vaccination.
- 18** First of all, the protection of public health, above all the protection of vulnerable persons within a society is of fundamental significance. It is important to note in this context that the rights guaranteed by the Convention not only limit a state's possibility to interfere with them but also establish positive obligations on the Member States. As the Court has previously established with respect to health care, under Article 2 of the Convention, the Member States have to take appropriate steps to safeguard the lives of those within their jurisdiction (*Hristozov and Others./.* Bulgaria, judgment of 13 November 2012, Application nos. 47039/11 and 358/12; *Calvelli and Ciglio v. Italy*, judgment of 17 January 2002 (GC), Application no. 32967/96, § 48).
- 19** When weighing the different rights and interest at stake, one should take into account that vaccination protects the health of a large number of people, in particular the health of those who cannot be vaccinated themselves. What is more, the person vaccinated as well enjoys the protection of this health care measure. Its great benefit for individual health in fact motivates the vast majority of parents to have their children vaccinated on a voluntary basis. As stated before, almost 93 % of the children entering elementary school in Germany are sufficiently vaccinated against measles. This is not a vaccination rate high enough to eliminate the measles, as previously explained. However, it demonstrates that legislation on compulsory vaccination requires a behaviour widely accepted as necessary throughout the population.
- 20** On closer examination, the reasons for parents not to have their children vaccinated or for adults not to get vaccinated are mostly convenience and carelessness. Only a small share of the population opposes vaccination as a matter of principle. The main causes for an insufficient vaccination coverage in a society, namely convenience and carelessness, are easily eliminated by means of a legal obligation without any major interference with individual rights.

- 21** Besides, the faster a sufficiently high vaccination rate is reached, the faster a disease can be eliminated altogether. As a consequence, vaccination would no longer be necessary and the corresponding legal obligation would become dispensable, including for those who oppose it. The historical example of smallpox shows how in this way compulsory vaccination helps to eradicate an infectious disease.
- 22** It should further be emphasized that the individual sacrifice to be made by a person required to get vaccinated is rather small. While vaccinations may have side effects, serious health impairments are extremely rare. In case of the measles for example, the side effects are usually limited to a reddening of the skin where the vaccine was injected or to a fever. By contrast, as pointed out before, infectious diseases often have serious consequences.
- 23** Another aspect to be considered is that the vaccination as such is not administered by force under either the German or the Czech legislation on compulsory vaccination. In order to satisfy the requirement of proportionality, the consequences of a refusal to comply with the obligation to get vaccinated or to have your child vaccinated are limited to the imposition of a fine or to exclusion from a number of facilities. Hence, no direct interference with a person's physical integrity is allowed under these laws.
- 24** As indicated before, where the exclusion from educational facilities is concerned, an assessment of the proportionality of such a measure must also take into account that it only concerns preschool facilities. In Germany for example, entry bans do not apply where school education is compulsory such as for primary or secondary schools. The legislator has thus established very balanced regulations, considering that where compulsory school education is concerned, a crucial objective such as the need for general education outbalances the goal of a high vaccination rate.
- 25** Finally, the Court will have to take into account the wide margin of appreciation that Member States enjoy with respect to their health care systems. The Court has previously established that matters of health care policy, including preventive measures are in principle within the Member States margin of appreciation (*Shelley./.* United Kingdom, decision of 4 January 2008, Application no. 23800/06). This margin is particularly wide where sensitive moral and ethical issues are concerned. Moreover, there will usually be a wide margin if the State is required to strike a balance between competing private and public interests (*Evans./.* the United Kingdom, judgement of 10 April 2007, Application no. 6339/05, § 77; *Parrillo./.* Italy, judgement of 27 August 2015, Application no. 46470/11, § 169). As the Court has pointed out, domestic authorities are best placed to assess priorities and social needs with respect to health care policy (*Shelley./.* United Kingdom, decision of 4 January

2008, Application no. 23800/06). In the view of the Federal Government, this should include a state's choice, made after due considerations of all arguments for and against such legislation, as whether to fight infectious diseases by imposing compulsory vaccination.

A handwritten signature in black ink, reading "Nicola Wenzel". The script is cursive and fluid, with the first letters of "Nicola" and "Wenzel" being capitalized and prominent.

(Dr. Nicola Wenzel)