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# **Mandatory Covid-19 vaccinations for adults in England & Wales: a justified interference with Article 8 of the European Convention on Human Rights?**

*Emily Ottley*

## **Abstract**

In light of the Covid-19 pandemic and the Grand Chamber's recent decision in *Vavřička and others v the Czech Republic*, it is time to re-examine the contentious issue of mandatory vaccinations. This raises a number of difficult political, ethical, and legal issues. However, the focus of this paper is on compliance with human rights obligations. More specifically, it asks whether mandatory Covid-19 vaccinations for adults in England and Wales would be a justified interference with Article 8 of the European Convention on Human Rights. The question of mandating vaccines for adults has so far been under analysed in the case law and legal literature. The conclusion reached here is that the interference could be justified for the protection of health and the economic wellbeing of the country. This supposes that the necessary legislation will be passed by Parliament. It is also contingent on both the way in which the scheme is set up and the ineffectiveness of education/awareness campaigns.

## **Introduction**

Mandatory vaccination is used here to refer to a legal requirement to be vaccinated. It does not necessarily follow from this that those who are unwilling to comply will be forced to receive a vaccine. Rather, they may be penalised in some way. Having to pay a fine is one example. Another is being excluded from a particular place, activity, or work. Mandatory vaccination schemes can be found in some European countries and elsewhere in the world,<sup>1</sup> but no vaccines have been mandated in

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<sup>1</sup> Katie Gravagna, Andy Becker, Robert Valeris-Chacin, Inari Mohammed, Sailee Tambe, Fareed Awan, Traci Toomey and Nicole Basta, 'Global assessment of national mandatory vaccination policies and consequences of non-compliance' (2020) 38 *Vaccine* 7865, 7868.

England and Wales since the smallpox outbreak in the 19<sup>th</sup> century.<sup>2</sup> More recently, the Covid-19 pandemic has caused significant disruption. With vaccination now providing hope for the return to normality, it is time to re-examine the contentious issue of mandatory vaccinations.<sup>3</sup> The Prime Minister of the United Kingdom (UK) has expressly rejected the possibility of mandatory vaccinations for Covid-19.<sup>4</sup> Since then, government ministers have announced that care home staff in England will have to be vaccinated.<sup>5</sup> They have also suggested that this may be extended to other health and care settings.<sup>6</sup>

Mandatory vaccination raises a number of difficult political, ethical, and legal issues. Exploring all of these issues is outside the scope of this paper.<sup>7</sup> Instead, the analysis is limited to compliance with human rights obligations. This is because other government measures in response to the pandemic have already been challenged on these grounds. An example of this can be seen in the (unsuccessful) challenge to “lockdown” at the Court of Appeal in *R (on the application of Dolan) v Secretary of State for Health and Social Care*.<sup>8</sup> The primary focus here will be on Article 8 of the

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<sup>2</sup> See The Vaccination Acts 1853, 1867 and 1871. Conscientious objection was available later, under the Vaccination Acts 1898 and 1907. The Vaccination Acts were eventually repealed by the National Health Service Act 1946, s26(5).

<sup>3</sup> Dr Hans Kulge, World Health Organization Regional Director for Europe, said in a statement that ‘[v]accines present our best way out of this pandemic’ - WHO, ‘Slow vaccine rollout prolonging pandemic’ (WHO, 31 March 2021) <<https://www.euro.who.int/en/media-centre/sections/press-releases/2021/slow-vaccine-roll-out-prolonging-pandemic>> accessed 21 April 2021. The United Kingdom’s Health Secretary made the same point in the House of Commons - HC Deb 19 April 2021, 692, col 655.

<sup>4</sup> Boris Johnson PM, ‘Covid-19 Press Conference’ (London, 23 November 2020).

<sup>5</sup> Department of Health and Social Care, ‘Making vaccination a condition of deployment in older adult care homes’ (GOV.UK, 17 June 2021) <<https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes#policy-intention>> accessed 17 June 2020.

<sup>6</sup> *ibid.*

<sup>7</sup> For discussion of the ethical justifications for mandatory vaccination, see for example: Ben Bamberry, Michael Selgelid, Hannah Masien, Andrew Pollard, Julian Savulescu, ‘The case for mandatory flu vaccination of children’ (2013) 13 *American Journal of Bioethics* 38 (harm/risk of harm to others); Jason Brennan, ‘A Libertarian Case for Mandatory Vaccination’ (2018) 44 *Journal of Medical Ethics* 37 (clean hands principle); Roland Pierik, ‘Mandatory Vaccination: an Unqualified Defence’ (2018) 35 *Journal of Applied Philosophy* 381 (State obligation to protect the vulnerable); Alberto Giubilini, *The Ethics of Vaccination* (Springer 2019) (fairness).

<sup>8</sup> [2020] EWCA Civ 1605, [2020] 12 WLUK 5 [91]-[114].

European Convention on Human Rights (ECHR), which affords an individual the right to respect for his/her private and family life.<sup>9</sup>

Mandatory vaccination schemes are more often discussed in the context of routine childhood vaccinations. This can be seen in both the human rights literature and jurisprudence.<sup>10</sup> Indeed, the recent decision of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Vavříčka and Others v the Czech Republic* concerned mandatory vaccinations for children.<sup>11</sup> However, this paper will only consider mandating the Covid-19 vaccination for adults (18+). Unlike children,<sup>12</sup> adults with capacity have an absolute right to refuse medical treatment 'notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent'.<sup>13</sup>

Nevertheless, some general principles relating to mandatory vaccination can be extracted from the decision in *Vavříčka*. It is therefore of some relevance, but careful attention must be paid to the context in which it was decided. Indeed, this differs from the context under consideration here in two important respects. As noted above, *Vavříčka* concerned the mandatory vaccinations for children rather than adults. Additionally, *Vavříčka* did not involve a global pandemic such as Covid-19.

It is crucial to note at the outset of this paper that the situation in relation to the pandemic in England and Wales and indeed across the world is fast moving.

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<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 8(1).

<sup>10</sup> For a recent example in the human rights literature, see: Francesca Camilleri, 'Compulsory vaccinations for children: Balancing the competing human rights at stake' (2019) 37 *Netherlands Quarterly of Human Rights* 245. See also: *Boffa and Others v San Marino* (1998) 92 DR 27. The applicants complained about laws requiring their children to be vaccinated.

<sup>11</sup> [GC] App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15 (ECtHR, 8 April 2021). Five of the applicants were children who had not been allowed to attend nursery school because they had not had the relevant vaccines. One applicant was a father who had been fined for failing to get his children vaccinated.

<sup>12</sup> *Re R (A Minor)(Wardship: Consent to Treatment)* [1992] Fam 11, 26; *Re W (A Minor)(Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, 81, 86-87, 91. For a recent discussion of these cases, see: *An NHS Trust v X* [2021] EWHC 65, [2021] 4 WLR 11, [32]-[53].

<sup>13</sup> *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 102.

Contemporary references accurate at the time of writing may therefore need to be read in light of later developments. Part 1 of this paper will acknowledge that mandating the Covid-19 vaccination would amount to an interference with Article 8(1) ECHR. Part 2 will consider whether this interference might reach the threshold for the purposes of Article 3 ECHR. Having found that it would not, Part 3 will examine whether the interference with Article 8 can be justified. It will be concluded that the interference could be justified for the protection of health and the economic wellbeing of the country. This is supposing that the necessary legislation is passed by Parliament. It is also contingent on both the way in which the scheme is set up and the ineffectiveness of education/awareness campaigns.

## **I. Does mandating the Covid-19 vaccine amount to an interference with Article 8(1) ECHR?**

The first step in the analysis must be to establish that mandating the Covid-19 vaccination would amount to an interference with Article 8(1). It is clear from ECtHR jurisprudence that any medical intervention, even something minor, against the wishes of the individual amounts to an interference.<sup>14</sup> The Commission have also held that a *requirement* to undergo medical treatment, for which non-compliance is punishable, may amount to an interference under Article 8(1).<sup>15</sup> This point was later repeated by the Commission with express reference to vaccination in *Boffa and Others v San Marino*.<sup>16</sup>

Other ECtHR decisions have directly addressed the question of the interference caused by mandatory vaccinations. In *Salvetti v Italy*, for example, it was noted that ‘...compulsory inoculations as non-voluntary medical treatments amount to an interference with the right to respect for private life as guaranteed by Article 8(1).’<sup>17</sup> In *Solomakhin v Ukraine*, the ECtHR restated this and offered some explanation:

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<sup>14</sup> *YF v Turkey* 2003-IX 171, para 33; *Matter v Slovakia* App no 31534/96 (ECtHR, 5 July 1999) para 64.

<sup>15</sup> *Acmagne and others v Belgium* (1984) 40 DR 251, 255.

<sup>16</sup> *Boffa* (n10) 34.

<sup>17</sup> (dec.) App no 42197/98 (ECtHR, 9 July 2002) 6. The applicant had been vaccinated in compliance with the law, but suffered permanent disability as a result of the vaccination. He complained about the lack of a satisfactory compensation scheme to accompany the obligation to be vaccinated.

'[c]ompulsory vaccination - as an involuntary medical treatment - amounts to an interference with the right to respect for one's private life, *which includes a person's physical and psychological integrity*, as guaranteed by Article 8(1).'<sup>18</sup> This was confirmed by the Grand Chamber in *Vavříčka*.<sup>19</sup> In this case, the interference was found despite the fact that no vaccines had actually been administered against the wishes of the applicants.<sup>20</sup>

However, interference with physical/psychological integrity is not the only way in which Article 8 may be engaged.<sup>21</sup> If the government were to record and monitor the vaccination status of individuals, this would likely engage Article 8. It is clear from the ECtHR jurisprudence that the collection, storage, or disclosure of personal information about an individual by the State will amount to an interference with Article 8(1).<sup>22</sup> *Chave néé Jullien v France* is an example of this where the information in question was medical history.<sup>23</sup> It is significant that a person's vaccination status is medical data, because the ECtHR has repeatedly stressed that the protection of medical data '...is of *fundamental importance* to a person's enjoyment of the right to respect for his or her private life as guaranteed by Article 8...'<sup>24</sup>

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<sup>18</sup> App no 24429/03 (ECtHR, 15 March 2012) para 33. (Emphasis added) The applicant complained that he had been vaccinated with a poor quality diphtheria vaccine against his will whilst in hospital for a respiratory illness.

<sup>19</sup> *Vavříčka* (n11) para 263.

<sup>20</sup> *ibid.*

<sup>21</sup> The right of parents' to make decisions in the best interests of their children was also raised by the applicants in *Vavříčka* (n10) para 173. However, this is not relevant in the context under consideration here.

<sup>22</sup> *Leander v Sweden* (1987) Series A no 116, para 48; *Amann v Switzerland* 2000-II 245, para 69; *S and Marper v UK* [GC] 2008-V 167, para 67.

<sup>23</sup> (1991) 71 DR 141, 155.

<sup>24</sup> *LH v Latvia* (2014) 61 EHRR 329, para 56; *Z v Finland* (1997) 25 EHRR 371, para 95. (Emphasis added) Given this, there is also an important discussion to be had about a possible interference with Article 8 ECHR where there is a legal requirement for persons to disclose their vaccination status in order to participate in normal activities undertaken as part of daily life. However, this is ancillary to the legal requirement to be vaccinated and could exist independently of a mandatory vaccination scheme. It is therefore beyond the scope of this paper.

Private life under Article 8 also includes ‘the right to establish and develop relationships with other human beings’.<sup>25</sup> This may be another way in which Article 8 is engaged, depending on how the mandatory vaccination scheme is set up. If non-compliant persons are excluded from social spaces such as pubs, they are arguably deprived of the opportunity to ‘develop relationships with the outside world’.<sup>26</sup> The ECtHR has also made it clear that ‘activities of a professional or business nature’ are included,<sup>27</sup> so Article 8 might also be engaged where non-compliant persons are prevented from undertaking particular work.

However, it may be that these relationships must contribute to the development of personality to amount to an interference with Article 8. In *Botta v Italy* and *Sentges v The Netherlands*, for example, the ECtHR framed the right to establish/develop relationships in this way: ‘...the development, without outside interference, of the personality of each individual in his relations with other human beings...’<sup>28</sup> However, the ECtHR did not elaborate further on this requirement.

As such, it has been interpreted in different ways by academics. Palmer, for example, suggests that an individual’s life must be ‘...so circumscribed and so isolated as to be deprived of the possibility of developing his personality.’<sup>29</sup> If Palmer’s interpretation is correct, this is a very high threshold. It seems unlikely that it would be met where an unvaccinated individual could meet with people in other places and/or get a different job. It might be met where children are unable to attend school, though, which were the facts in *Vavříčka*.<sup>30</sup> In contrast, Greene suggests that the question is whether the relationships/interactions in question are ‘fundamental to a person’s identity’.<sup>31</sup> Again, this may not be satisfied in the pub example, but it may be

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<sup>25</sup> *Vavříčka* (n11) para 261; *Paradiso and Campanelli v Italy* [GC] App no 25358/12 (ECtHR, 24 January 2017) para 159; *Niemietz v Germany* (1993) 16 EHRR 97, para 29.

<sup>26</sup> *Niemietz* (n25) para 29.

<sup>27</sup> *ibid.*

<sup>28</sup> *Botta v Italy* (1998) 26 EHRR 241, para 32; *Sentges v The Netherlands* (dec.) App no 27677/02 (ECtHR, 8 July 2003) 6.

<sup>29</sup> Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Bloomsbury Publishing 2007) 75.

<sup>30</sup> *Vavříčka* (n11) para 261.

<sup>31</sup> Alan Greene, *Emergency Powers in a Time of Pandemic* (Policy Press 2020) 129.

relevant where an unvaccinated individual cannot get a job in the career they have trained for.

## **II. Might the interference reach the threshold of inhuman and degrading treatment for the purposes of Article 3 ECHR?**

Article 3 ECHR prohibits inhuman and degrading treatment.<sup>32</sup> Unlike Article 8, Article 3 is a non-derogable right. It would therefore be beneficial to claimants challenging a mandatory vaccination scheme if they could bring a claim under Article 3. The question, then, is whether the interference described above reaches the threshold required for Article 3.

This is a high threshold. Indeed, the Grand Chamber has made it clear that a 'minimum level of severity' must be reached.<sup>33</sup> This threshold is also 'relative', so '...it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.'<sup>34</sup> To be 'inhuman' treatment, it must cause 'either actual bodily injury or intense physical or mental suffering'.<sup>35</sup> For 'degrading' treatment, it must '...arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them.'<sup>36</sup> The difference, then, is whether the focus is humiliation/debasement or physical/mental suffering.

Applying these principles to a mandatory vaccination scheme, it seems likely that physically forcing someone to be vaccinated would meet this high threshold.

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<sup>32</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 3.

<sup>33</sup> *Kudla v Poland* [GC] 2000-XI 197, para 91.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*, para 92.

<sup>36</sup> *ibid.*



Seeking out and restraining someone to forcibly administer a vaccine would certainly arouse feelings of fear, anguish and inferiority. A needle puncture constitutes bodily injury, though it may only cause minimal physical pain. However, the act of pinning someone down to forcibly administer a vaccine may cause more severe pain, especially if that person is resisting. There is also the potentially very serious mental suffering to consider where somebody has something in their body which they perceive as being undesirable.

In such circumstances, might there be some kind of rebuttal available to the State? The ECtHR have traditionally held that '...as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading.'<sup>37</sup> This seems to have created an 'exception' to Article 3, as Donnelly notes.<sup>38</sup> However, this will be of no assistance in the context of a mandatory vaccination scheme where vaccines are forcibly administered to those who are unwilling to comply. This is for two reasons.

Firstly, it is doubtful that vaccinations are a therapeutic necessity and this must be 'convincingly shown to exist'.<sup>39</sup> Whether or not a vaccine is a therapeutic necessity depends how this concept is understood. But the scope of therapeutic necessity is unclear, as Bartlett notes.<sup>40</sup> Vaccines are clearly relevant to concern for health in a way that the forced administration of emetics by police in *Jalloh v Germany* were not.<sup>41</sup> The applicant was made to vomit up drugs to provide evidence, not because they posed a threat to his health.<sup>42</sup> Nevertheless, there are some potential difficulties with regards to vaccinations in general.

One potential difficulty is that, generally, vaccines are *preventative*. They do not treat an illness the individual is currently suffering with. Rather, it is intended that they will prevent the individual from being unwell (or more unwell) in the future. With

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<sup>37</sup> *Herczegfalvy v Austria* App (1993) 15 EHRR 437, para 82.

<sup>38</sup> Mary Donnelly, 'Treatment for a Mental Disorder: The Mental Health Act 2001, Consent and the Role of Rights' (2005) 40 *Irish Jurist* 220, 253.

<sup>39</sup> *Herczegfalvy* (n37) para 82.

<sup>40</sup> Peter Bartlett, 'The necessity must be convincingly shown to exist: Standards for compulsory treatment for mental disorder under the Mental Health Act 1983' (2011) 19 *MLR* 1, 12.

<sup>41</sup> [GC] 2006-IX 281, para 82.

<sup>42</sup> *ibid.*

regards to Covid-19, an individual may not have been unwell had they contracted the disease, even without the vaccine.<sup>43</sup> Treatment that has been regarded as a therapeutic necessity in the case law typically responds to some immediate condition. In *Bogumil v Portugal*, for example, the applicant was at risk of death by intoxication without surgery to remove the packet of cocaine he had swallowed.<sup>44</sup>

Another potential difficulty is that, generally, vaccines are to some extent for the benefit of *others*. The hope is that they will reduce the spread of some virus and contribute to herd immunity. This is particularly relevant in the context of Covid-19 for most young people (without underlying health issues) because they are less likely to suffer severe illness from Covid-19 themselves.<sup>45</sup> So far, therapeutic necessity has not been interpreted by the ECtHR to include what is necessary for others. But concern for others may underlie the ECtHR's conclusion in *Dvořáček v the Czech Republic* that protective sexological treatment was a therapeutic necessity.<sup>46</sup> Indeed, the applicant had multiple convictions for sex offences against minors.<sup>47</sup>

The second reason why the therapeutic necessity 'exception' would not help the State is the unique context in which the ECtHR have found this to be pertinent. Typically, this is where patients have been detained under mental health law.<sup>48</sup> Where the treatment of adults with capacity is at issue, the ECtHR has made it clear that consent is required - even if treatment is medically necessary.<sup>49</sup>

But in any event, it is unimaginable in a liberal society that those who are unwilling to comply would be forced to receive a vaccine. Instead, non-compliance with mandatory vaccination is likely to be penalised via a fine or exclusion from a particular place, activity, or work. In these circumstances, it is much less clear that

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<sup>43</sup> Daniel Oran and Eric Topol, 'Prevalence of asymptomatic SARS-CoV-2 infection: a narrative review' (2020) 173 *Annals of Internal Medicine* 362, 366.

<sup>44</sup> App no 35228/03 (ECtHR, 7 October 2008) para 77.

<sup>45</sup> Seung-Ji Kang and Sook In Jung, 'Age-Related Morbidity and Mortality among Patients with COVID-19' (2020) 52 *Infection and Chemotherapy* 154, 155.

<sup>46</sup> App no 12927/13 (ECtHR, 6 November 2014) para 104.

<sup>47</sup> *ibid*, para 7.

<sup>48</sup> *Herczegfalvy* (n37) para 79; *Dvořáček v the Czech Republic* (n46) para 68.

<sup>49</sup> *VC v Slovakia* App no 18968/07 (ECtHR, 8 November 2011) para 110.

the high threshold would be met. Certainly no bodily injury or intense physical suffering is endured. There may be a degree of mental suffering however, particularly where someone is unable to do their job. But it is doubtful whether this would be sufficiently intense. It is also unlikely that these penalties would arouse fear. There may be a degree of anguish and inferiority felt where someone is unable to do their job. But again, it is not obvious that this would be to a great enough extent.

Where the interference potentially falls within both Articles 3 and 8, a claim is more likely to succeed under Article 8.<sup>50</sup> It is worth noting too, that Article 3 was not even raised in *Boffa and Others v San Marino* (where the law required the applicant's children to receive a vaccination and non-compliance would be punished under the criminal code) nor *Vavříčka* (where the law required the applicants' children to receive a vaccination and non-compliance would be penalised by fines and not allowing children to attend school).<sup>51</sup> Therefore, Article 8 seems to offer the stronger argument to potential applicants - though the interference may yet be justified.

### **III. Can this interference be justified under Article 8(2) ECHR?**

Before considering whether an interference with Article 8(1) ECHR can be justified, it is important to note that matters of health care policy fall within a State's margin of appreciation.<sup>52</sup> This means that States are afforded some degree of discretion by the ECtHR.<sup>53</sup> It is difficult to predict exactly how wide the margin of appreciation

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<sup>50</sup> *López Ostra v Spain* (1995) 20 EHRR 277, paras 58-60.

<sup>51</sup> *Boffa* (n10) 28-29; *Vavříčka* (n11) paras 11-21.

<sup>52</sup> *Hristozov and Others v Bulgaria* 2012-V 457, para 119; *Vavříčka* (n11) para 280.

<sup>53</sup> *Handyside v UK* (1976) Series A no 24, paras 48-49.

will be in any given case, as Hutchinson notes.<sup>54</sup> A summary of 'broadly and vaguely formulated'<sup>55</sup> factors was provided by the Grand Chamber in *S and Marper v UK*:

The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights...Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted... Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider...<sup>56</sup>

These factors will now be applied to mandatory Covid-19 vaccinations for adults to establish the extent of the margin of appreciation in this context.

The importance of the interests at stake in these circumstances must first be observed. As mentioned above, the protection of a person's medical data '...is of fundamental importance to a person's enjoyment...' of his/her Article 8 right.<sup>57</sup> Additionally, the ECtHR has acknowledged that '...a person's body concerns the most intimate aspect of private life'.<sup>58</sup> This might suggest that the margin of appreciation here should be a narrow one. However, it will be shown that *more* factors seem to pull in the opposite direction.

The first of these factors is the lack of European consensus on the issue of mandatory vaccination.<sup>59</sup> In *Vavříčka*, the Grand Chamber recognised that there was a 'spectrum of policies' on childhood vaccination which included pure recommendation, *some*

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<sup>54</sup> Michael Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *The International and Comparative Law Quarterly* 638, 641.

<sup>55</sup> Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80, 107.

<sup>56</sup> *S and Marper v UK* (n22) para 102.

<sup>57</sup> *Z v Finland* (n24) para 95.

<sup>58</sup> *YF v Turkey* (n14) para 33.

<sup>59</sup> *X, Y and Z v UK* [GC] (1997) 24 EHRR 143, para 44.

childhood vaccines being mandated, and *all* childhood vaccines being mandated.<sup>60</sup> Data from empirical research undertaken before the pandemic indicates that there is also some variation in mandatory vaccination policies for adults across Europe.<sup>61</sup> It seems likely, therefore, that there will be variation in mandating Covid-19 vaccinations. At the time of writing, Italy is the only European country to have mandated Covid-19 vaccinations (for healthcare workers only).<sup>62</sup> But a similar requirement for care home staff is due to come into force soon in England.<sup>63</sup>

Another of these factors is that ‘sensitive ethical issues’ are raised by the issue of mandatory vaccination.<sup>64</sup> As the Grand Chamber noted in *Vavříčka* with regards to childhood vaccination, it is ‘making vaccination a matter of legal duty’ (rather than vaccination itself) that raises such issues.<sup>65</sup> This is just as much the case for the mandatory vaccination of adults as it is for the mandatory vaccination of children, though the ethical issues at stake are different. Here, it is infringing the autonomy of adults that is contentious.

Other relevant factors may include the fact that the government are having to strike a balance between competing public and private interests and that the aim is (presumably) to save lives.<sup>66</sup> It therefore seems likely that the margin of appreciation would be a wide one in the context of mandating Covid-19 vaccinations for adults, as it was in the case of childhood vaccinations in *Vavříčka*.<sup>67</sup> With this in mind, the paper will consider whether an interference with Article 8(1) can be justified under Article 8(2) ECHR.<sup>68</sup> Mariner, Annas and Glantz (writing in the context of

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<sup>60</sup> *ibid.*

<sup>61</sup> Dimitrios Cassimos, Evgnosia Effraimidou, Snezana Medic, Theoharis Konstantinidis, Maria Theodoridou and Helena Maltezou, ‘Vaccination Programs for Adults in Europe 2019’ (2020) 8 *Vaccine* 34, 47.

<sup>62</sup> Marta Paterlini, ‘Covid-19: Italy makes vaccination mandatory for healthcare workers’ (2020) 373 *BMJ* <<https://www.bmj.com/content/373/bmj.n905>> accessed 22 April 2021.

<sup>63</sup> Department of Health and Social Care (n5).

<sup>64</sup> *Hämäläinen v Finland* [GC] 2014-IV 369, para 75.

<sup>65</sup> *Vavříčka* (n11) para 279.

<sup>66</sup> On competing public and private interests, see: *Odièvre v France* [GC] 2003-III 51, para 49; *Frette v France* 2002-I 345, para 42. On the aim to save lives, see: *Boffa* (n10) 35.

<sup>67</sup> *Vavříčka* (n11) para 280.

<sup>68</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 8(2).

compliance with the Constitution of the United States rather than the ECHR) suggest that '[a] law that authorises mandatory vaccination during an epidemic of lethal disease, with refusal punishable by a monetary penalty...' would be an easy case.<sup>69</sup> But in fact it is not quite so straightforward. Rather, there are many important considerations to unpack.

### **A. Is the interference in accordance with law?**

No existing law currently empowers the government to mandate Covid-19 vaccinations. Indeed, the Public Health (Control of Disease) Act 1984 makes it clear that any regulations a Minister makes for the protection of health under s45B and s45C of the Act cannot include a requirement to be vaccinated.<sup>70</sup> The Coronavirus Act 2020 does not change this.

This position in England and Wales can be contrasted with legislation from other jurisdictions. In New Jersey (United States of America), for example, the Emergency Health Powers Act allows the Commissioner to require the vaccination of persons.<sup>71</sup> And in Victoria (Australia), the Public Health and Wellbeing Act allows the Chief Health Officer to make a public health order requiring the person/s to whom the order applies to receive a vaccination.<sup>72</sup>

New primary legislation would therefore have to be passed by Parliament in order to mandate Covid-19 vaccinations for adults in England and Wales.<sup>73</sup> The government may be able to fast-track the legislation, as they did with the Coronavirus Act 2020. This must be sufficiently transparent, accessible and clear in

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<sup>69</sup> Wendy Mariner, George Annas and Leonard Glantz, 'Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law' (2005) 95 *American Journal of Public Health* 581, 586.

<sup>70</sup> Public Health (Control of Disease) Act 1984, s45E.

<sup>71</sup> NJ Rev Stat § 26:13-14 (2018).

<sup>72</sup> *Public Health and Wellbeing Act* 2008 (VIC) s117(5)(i).

<sup>73</sup> Cf. To implement their plans to require care home staff to be vaccinated, the government will (subject to Parliamentary approval) insert a new provision into the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, SI 2014/2936, reg 12.

order for the interference to be in accordance with law.<sup>74</sup>

## B. Does the interference pursue a legitimate aim?

Here, the legitimate aim pursued is obviously the protection of health.<sup>75</sup> In *Solomakhin v Ukraine* no further explanation was given.<sup>76</sup> However, there are a couple of important points with regards to the concept of health that must be developed. Firstly, it is important to clarify whose health is being protected. In *Vavříčka*, the Grand Chamber referred to both the health of the individual and the public:

[T]he objective of the relevant legislation is to protect against diseases which may pose a serious risk to health. This refers both to those who receive the vaccinations concerned as well as those who cannot be vaccinated and are thus in a state of vulnerability, relying on the attainment of a high level of vaccination within society at large for protection against the contagious diseases in question.<sup>77</sup>

However, the health of the individual receiving the vaccination will not be such an important factor if the ECtHR were to consider the mandatory vaccination of adults. The child's best interests are of 'paramount importance' in cases involving children, but this principle does not apply to adults with capacity.<sup>78</sup> This is not to say that the vaccine would not be of individual benefit to an adult. An important purpose of any vaccine is to prevent the individual from being unwell (or more unwell) in the event that they contract the disease they were vaccinated against. Nevertheless, the legitimate aim in this context must be protection of *public* health.

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<sup>74</sup> *The Sunday Times v UK* (1979) Series A no 30, para 49.

<sup>75</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 8(2).

<sup>76</sup> *Solomakhin* (n18) para 35. For the facts of this case see paras 5-16.

<sup>77</sup> *Vavříčka* (n11) para 272. See also: *Boffa* (n10) 34.

<sup>78</sup> *Vavříčka* (n11) para 287. Domestic courts take the same approach - for example, see: *F v F (Welfare of Children: Immunisation)* [2013] EWHC 2683, [2013] 9 WLUK 83.

In the context of a global pandemic, this is not just the health of the public in any particular jurisdiction, but the health of people all over the world. Indeed, the protection of third parties during an epidemic was explicitly cited by the ECtHR as an example of a good reason to interfere with an individual's self-determination in *Jehovah's Witnesses of Moscow and Others v Russia*.<sup>79</sup> As Gostin asserts, '...public health law is concerned with...trade-offs...', by which he means the invasion of individuals' freedom for the public good.<sup>80</sup> In this way, the legitimate aim overlaps with the protection of the rights of others - as the Grand Chamber noted in *Vavříčka*.<sup>81</sup>

Secondly, 'health' may include more than just the direct risk to health from contracting Covid-19. Indeed, the detrimental physical and mental health consequences of living through a pandemic (including the public health interventions in response to it) are also very concerning. There are many aspects to this, but some examples include: a reduction in primary care contacts for mental and physical health conditions;<sup>82</sup> delayed cancer diagnoses;<sup>83</sup> isolation;<sup>84</sup> and an increase in domestic violence.<sup>85</sup> The broad phrasing of 'protection of health' could allow these concerns to be taken into account.

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<sup>79</sup> App no 302/02 (ECtHR, 10 June 2010) para 136.

<sup>80</sup> Lawrence Gostin, *Public Health Law: Power, Duty, Restraint* (3<sup>rd</sup> edn, University California Press 2016) 143.

<sup>81</sup> *Vavříčka* (n11) para 272; ECHR art 8(2).

<sup>82</sup> Kathryn Mansfield and others, 'Indirect acute effects of the COVID-19 pandemic on physical and mental health in the UK: a population based study' (2021) 3 *The Lancet Digital Health* E217, E225.

<sup>83</sup> Camille Maringe, James Spicer, Melanie Morris, Arnie Purushotham, Ellen Nolte, Richard Sullivan, Bernard Rachet and Ajay Aggarwal, 'The impact of the COVID-19 pandemic on cancer deaths due to delays in diagnosis in England, UK: a national, population-based, modelling study' (2020) 21 *The Lancet Oncology* P1023, P1031.

<sup>84</sup> Samantha Brooks, Rebecca Webster, Louise Smith, Lisa Woodland, Simon Wessely, Neil Greenberg, Gideon Rubin, 'The psychological impact of quarantine and how to reduce it: rapid review of the evidence' (2020) 395 *The Lancet* 912, 919.

<sup>85</sup> Alex Piquero, Wesley Jennings, Erin Jemison, Catherine Kaukinen and Felicia Knaul, 'Domestic violence during the COVID-19 pandemic - evidence from a systematic review and meta-analysis' (2021) 74 *Journal of Criminal Justice* 101806, 101813.



In addition to the protection of health, mandatory vaccinations may be in the interests of the economic wellbeing of the country.<sup>86</sup> This aim is not typically cited in the context of mandatory vaccinations.<sup>87</sup> Indeed, the Grand Chamber said that there was no need to decide whether this aim might be relevant in *Vavříčka*.<sup>88</sup> However, such an omission could not be justified if the ECtHR were to consider the issue of mandatory vaccinations in the context of the Covid-19 pandemic. This is because the direct health effects of an infectious disease such as Covid-19 and any preventative public health measures imposed in an attempt to contain it have a potentially severe economic cost.<sup>89</sup> It therefore seems right to acknowledge this, even though the protection of health alone would be sufficient to satisfy the requirement for a legitimate aim. Additionally, economic recession may itself have a negative impact on health - particularly for people who are socio-economically vulnerable.<sup>90</sup>

### C. Is the interference necessary in a democratic society?

Whether or not the interference from mandating Covid-19 vaccinations is necessary is perhaps the most contentious aspect of the analysis. For an interference to be necessary, there must be a 'pressing social need' for the interference, it must be 'proportionate to the aim', and there must be 'relevant and sufficient reasons'.<sup>91</sup> Each of these requirements will now be considered in turn.

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<sup>86</sup> ECHR art 8(2).

<sup>87</sup> For an example where economic wellbeing was a legitimate aim of the interference, see: *Hatton and Others v UK* [GC] 2003-VIII 189, para 121 (government plans to expand an airport).

<sup>88</sup> *Vavříčka* (n11) para 272.

<sup>89</sup> Marcus Keogh-Brown, Henning Jensen, William Edmunds and Richard Smith, 'The impact of Covid-19, associated behaviours and policies on the UK economy: a computable general equilibrium model' (2020) 12 SSM Population Health

<<https://www.sciencedirect.com/science/article/pii/S2352827320302883>> accessed 21 May 2021.

<sup>90</sup> Miriam Forbes and Robert Krueger, 'The Great Recession and Mental Health in the United States' (2019) 75 Clinical Psychological Science 900, 911; Mireia Jofre-Bonet, Victoria Serra-Sastre, Sotiris VANDOROS, 'The Impact of the Great Recession on health-related risk factors, behaviours and outcomes in England' (2018) 197 Social Science and Medicine 213, 233; Claire Margerison-Zilko, Sidra Goldman-Mellor, April Falconi and Janelle Downing, 'Health Impacts of the Great Recession: a Critical Review' (2016) 3 Current Epidemiology Reports 81, 88.

<sup>91</sup> *The Sunday Times* (n74) para 62; *Boffa* (n19) 35.

The importance of reducing the spread of Covid-19 and preventing serious illness/death is obvious. In *Solomakhin v Ukraine*, the ECtHR made it clear that ‘...the interference...could be said to be justified by the public health considerations and necessity to control the spreading of infectious diseases in the region.’<sup>92</sup> It is also important to note, as the Grand Chamber did in *Vavříčka*, that States have positive duties under Articles 2 and 8 ECHR to protect the health and lives of the people in their jurisdiction.<sup>93</sup> There has even been a more specific suggestion by the ECtHR that States may have a positive duty to ‘eradicate or prevent the spread of disease or infection’ where there is a serious threat to health.<sup>94</sup>

Although other public health measures such as “lockdowns” may be able to reduce the spread of Covid-19,<sup>95</sup> a “lockdown” may have detrimental consequences of its own. One example of this might be economic damage when non-essential businesses are closed.<sup>96</sup> Another might be a negative impact on the education of young people who are unable to attend school.<sup>97</sup> In contrast, vaccines have the potential to protect people from Covid-19 whilst enabling life to get back to some degree of normality. As such, the importance of getting as many people as possible vaccinated is clear. The requirement for ‘pressing social need’ is therefore satisfied.

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<sup>92</sup> *Solomakhin* (n18) para 36.

<sup>93</sup> *Vavříčka* (n11) para 282; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 2 (right to life).

<sup>94</sup> *Shelley v UK* (dec.) App no 23800/06 (ECtHR, 4 January 2008) 11.

<sup>95</sup> Vincenzo Alfano and Salvatore Ercolano, ‘The Efficacy of Lockdown Against COVID-19: A Cross-Country Panel Analysis’ (2020) 18 Applied Health Economics and Health Policy 509, 514.

<sup>96</sup> Data from the Office of National Statistics suggests that there is a correlation between the introduction of lockdown measures and a fall in Gross Domestic Product (GDP). See: Daniel Harari, Matthew Keep and Philip Brien, ‘Coronavirus: Economic Impact’ (*UK Parliament*, 9 April 2021) <<https://commonslibrary.parliament.uk/research-briefings/cbp-8866/>> accessed 21 May 2020. See also: ONS, ‘GDP Monthly Estimate, UK: April 2020’ (ONS, 12 June 2020) <<https://www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/gdpmonthlyestimateuk/april2020>> accessed 21 May 2021; ONS, ‘GDP Monthly Estimate, UK: November 2020’ (ONS, 15 January 2021) <<https://www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/gdpmonthlyestimateuk/november2020>> accessed 21 May 2021; ONS, ‘GDP Monthly Estimate, UK: January 2021’ (ONS, 12 March 2021) <<https://www.ons.gov.uk/economy/grossdomesticproductgdp/bulletins/gdpmonthlyestimateuk/january2021>> accessed 21 May 2021.

<sup>97</sup> Andy Eyles, Stephen Gibbons, Piero Monteburano, ‘Covid-19 school shutdowns: what will they do to our children’s education’ (*CEP LSE*, May 2020) 6 <<https://cep.lse.ac.uk/pubs/download/cepcovid-19-001.pdf>> accessed 21 May 2021.

It has just been noted that “lockdowns” could be considered an intrusive measure. This is also relevant to the proportionality assessment of a mandatory vaccination scheme because there seems to be a worse alternative. Nevertheless, there may be less intrusive ways to increase vaccination uptake (where this is too low to achieve herd immunity) as compared with mandating vaccinations. The Grand Chamber in *Vavříčka* did not consider any such alternatives, which could include information campaigns and education programmes. However, it may be that such measures will not be effective and vaccination uptake will remain too low. In these circumstances, there is ‘no other less coercive means available to staunch the outbreak’ and the vaccine would be a ‘medical necessity’.<sup>98</sup>

In any event, a mandatory vaccination scheme may not be as intrusive as first thought - providing that two conditions are met. Firstly, no vaccines must be administered forcibly. In *Vavříčka*, it was significant that vaccines were not forcibly administered but enforced ‘indirectly’ via sanctions.<sup>99</sup> It was also relevant that the sanctions were not ‘unduly harsh or onerous’,<sup>100</sup> so the legislature in England and Wales must keep this in mind when designing the mandatory vaccination scheme. An example of this might be to ensure that fines are not excessive.<sup>101</sup> Preventing those who do not comply from entering particular places or doing particular jobs would likely be acceptable sanctions, assuming that the intention behind this is ‘protective rather than punitive’.<sup>102</sup> It seems that there must also be an opportunity for individuals to challenge the consequences of their non-compliance.<sup>103</sup>

Secondly, exemptions must be allowed in limited circumstances. Indeed, the Grand Chamber in *Vavříčka* found that compulsory vaccination ‘is not an absolute duty’

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<sup>98</sup> William Ehrenreich, ‘Toward a Twenty-First Century *Jacobson v Massachusetts*’ (2008) 121 *Harvard Law Review* 1820, 1820.

<sup>99</sup> *Vavříčka* (n11) para 293.

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.* Cf. Fixed penalty notices that were issued to those who breached the Covid-19 restrictions have been criticised by the Joint Committee on Human Rights for being disproportionate - see: Joint Committee on Human Rights, *The Government response to covid-19: fixed penalty notices* (2019-21, HL 272, HC 1364) para 94.

<sup>102</sup> *Vavříčka* (n11) para 294.

<sup>103</sup> *ibid.*, para 295.

where exemptions are permitted.<sup>104</sup> Obviously there must be exemptions for those who cannot have the vaccine for medical reasons. Whether this would cover trypanophobia (needle-phobia) is debatable, given that this may erode or destroy capacity to refuse treatment involving needles under domestic law.<sup>105</sup> There could also be an opportunity to conscientiously object. Under the Czech law at issue in *Vavříčka*, there was the right to a ‘secular objection of conscience’.<sup>106</sup> Starting from a baseline assumption that all adults will be vaccinated should ‘minimise the number of opt-outs’, even where the opportunity to do so exists.<sup>107</sup>

The safety of the Covid-19 vaccines is also of critical importance for the proportionality assessment. A vaccine that invariably causes harm would ‘...be to the applicant’s detriment to the extent that would upset the balance of interests between the applicant’s personal integrity and the public interest of protection health of the population.’<sup>108</sup> No medical intervention is without some risk and none can be labelled as “safe”. Some significant - but extremely rare - possible side effects of the Covid-19 vaccines have been reported through the Medicines and Healthcare products Regulatory Agency’s (MHRA) Yellow Card scheme. These include anaphylaxis and blood clots.<sup>109</sup> Currently, more work is needed to be certain about the link between these incidences and the vaccines. Other serious, but as yet unknown, risks may be discovered later. For most people, however, side effects from the vaccine are typically mild and short lived.<sup>110</sup>

The Grand Chamber in *Vavříčka* also suggested three possible conditions regarding safety that are relevant for the purposes of satisfying the requirement for proportionality. Firstly, medical staff must check an individual’s suitability for

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<sup>104</sup> *ibid*, para 291.

<sup>105</sup> *Re MB* [1997] 2 FLR 426, 438.

<sup>106</sup> *Vavříčka* (n11) para 292.

<sup>107</sup> Cass Sunstein and Richard Thaler, ‘Libertarian Paternalism is Not an Oxymoron’ (2003) 70 *University of Chicago Law Review* 1159, 1195.

<sup>108</sup> *Solomakhin* (n18) para 36.

<sup>109</sup> MHRA, ‘Coronavirus Vaccine - weekly summary of Yellow Card reporting’ (*GOV.UK*, 6 May 2021) <<https://www.gov.uk/government/publications/coronavirus-covid-19-vaccine-adverse-reactions/coronavirus-vaccine-summary-of-yellow-card-reporting>> accessed 12 May 2021.

<sup>110</sup> Christina Menni and others, ‘Vaccine side-effects and SARS-CoV-2 infection after vaccination in users of the COVID Symptom Study app in the UK: a prospective observational study’ [2021] *The Lancet Infectious Diseases* <[https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(21\)00224-3/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00224-3/fulltext)> accessed 30 April 2021.

vaccination beforehand.<sup>111</sup> This was also a crucial factor in *Solomakhin v Ukraine*,<sup>112</sup> and it links back to the point made earlier about the availability of exemptions on medical grounds. Secondly, there must be continual monitoring of vaccine safety.<sup>113</sup> This would likely be satisfied by the MHRA's Yellow Card scheme, whereby side-effects can easily be reported. There is even a dedicated website for the Covid-19 vaccines.<sup>114</sup> Indeed, the recommendation of the Joint Committee on Vaccination and Immunisation (JCVI) that an alternative vaccine should be offered to adults aged 18-39 in light of emerging data on blood clots associated with the AstraZeneca vaccine is a good illustration of this continual monitoring.<sup>115</sup> Thirdly, there may need to be a compensation scheme for incidents of injury to health as a result of the vaccine.<sup>116</sup>

Some members of the general public may nevertheless have concerns about safety given the speed at which the Covid-19 vaccines were developed.<sup>117</sup> The ECtHR has arguably been sceptical of *unauthorised* medicinal products in the past,<sup>118</sup> but the Covid-19 vaccines do not fall into this category as they have received temporary authorisation from the MHRA.<sup>119</sup> This necessarily involved a review of vaccine

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<sup>111</sup> *Vavříčka* (n11) para 301.

<sup>112</sup> *Solomakhin* (n18) para 36.

<sup>113</sup> *Vavříčka* (n11) para 301.

<sup>114</sup> MHRA, 'Coronavirus Yellow Card reporting site' (MHRA) <<https://coronavirus-yellowcard.mhra.gov.uk/>> accessed 30 April 2021.

<sup>115</sup> JCVI, 'Use of the AstraZeneca COVID-19 (AZD1222) vaccine: updated JCVI statement' (GOV.UK, 7 May 2021) <<https://www.gov.uk/government/publications/use-of-the-astrazeneca-covid-19-vaccine-jcvi-statement-7-may-2021/use-of-the-astrazeneca-covid-19-azd1222-vaccine-updated-jcvi-statement-7-may-2021>>

accessed 22 June 2021.

<sup>116</sup> *Vavříčka* (n11) para 302.

<sup>117</sup> David Freeman, Bao Loe, Andrew Chadwick, Cristian Vaccari, Felicity Waite, Laina Rosebrock, Lucy Jenner, Ariane Petit, Stephan Lewandowsky, Samantha Vanderslott, Stefania Innocenti, Michael Larkin, Alberto Giubilini, Ly-Mee Yu, Helen McShane, Andrew Pollard and Sinéad Lambe, 'COVID-19 vaccine hesitancy in the UK: the Oxford coronavirus explanations, attitudes, and narratives survey (Oceans) II' [2020] *Psychological Medicine* 1, 13 <<https://www.cambridge.org/core/journals/psychological-medicine/article/covid19-vaccine-hesitancy-in-the-uk-the-oxford-coronavirus-explanations-attitudes-and-narratives-survey-oceans-ii/C30FDB5C3D87123F28E351FDAAD5351A>> accessed 21 May 2021.

<sup>118</sup> *Hristozov* (n52) paras 125-127.

<sup>119</sup> MHRA, 'Conditions of Authorisation for Pfizer/BioNTech COVID-19 vaccine' (GOV.UK, 31 March 2021); <<https://www.gov.uk/government/publications/regulatory-approval-of-pfizer-biontech-vaccine-for-covid-19/conditions-of-authorisation-for-pfizerbiontech-covid-19-vaccine>> accessed 21

safety. It is therefore possible for a mandatory vaccination scheme to satisfy the proportionality requirement.

Preventing serious illness/death is clearly a relevant reason for the interference caused by a mandatory vaccination scheme, but it will not be a sufficient reason unless the vaccines are effective in this regard. Clinical trials found that the vaccines were effective at preventing severe disease,<sup>120</sup> and this has since been confirmed by studies of the real world effects of the vaccines.<sup>121</sup> Real world data from Public Health England (not currently peer reviewed) extends this conclusion to the Delta variant.<sup>122</sup> Of course, this must be reviewed in light of any new variants. Reducing the spread of Covid-19 is clearly another relevant reason for the interference caused by a mandatory vaccination scheme. But again, it will not be a

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April 2021; MHRA, 'Conditions of Authorisation for Covid-19 Vaccine AstraZeneca' (GOV.UK, 15 April 2021) <<https://www.gov.uk/government/publications/regulatory-approval-of-covid-19-vaccine-astrazeneca/conditions-of-authorisation-for-covid-19-vaccine-astrazeneca>> accessed 21 April 2021; MHRA, 'Summary of the Public Assessment Report for Covid-19 Vaccine Moderna' (GOV.UK, 19 April 2021) <<https://www.gov.uk/government/publications/regulatory-approval-of-covid-19-vaccine-moderna/summary-of-the-public-assessment-report-for-covid-19-vaccine-moderna>> accessed 5 May 2021; MHRA, 'Summary of Product Characteristics for COVID-19 Vaccine Janssen' (GOV.UK, 28 May 2021) <<https://www.gov.uk/government/publications/regulatory-approval-of-covid-19-vaccine-janssen/summary-of-product-characteristics-for-covid-19-vaccine-janssen>> accessed 28 May 2021.

<sup>120</sup> Merryn Voysey and others, 'Safety and efficacy of the ChAdOx1 nCoV-19 vaccine (AZD1222) against SARS-CoV-2: an interim analysis of four randomised controlled trials in Brazil, South Africa and the UK' (2021) 397 *The Lancet* 99, 108; Linsey Baden, 'Efficacy and Safety of the mRNA-1273 SARS-CoV-2 Vaccine' (2021) 384 *The New England Journal of Medicine* 403, 415; Fernando Polack and others, 'Safety and Efficacy of the BNT162b2 mRNA Covid-19 Vaccine' (2020) 383 *The New England Journal of Medicine* 2603, 2613; Jerald Sadoff and others, 'Safety and Efficacy of Single-Dose Ad26.COV2.S Vaccine against Covid-19' [2021] *The New England Journal of Medicine* <<https://www.nejm.org/doi/full/10.1056/NEJMoa2101544>> accessed 28 May 2021.

<sup>121</sup> See for example: Eleftheria Vasileiou and others, 'Interim findings from first-dose mass COVID-19 vaccination roll-out and COVID-19 hospital admissions in Scotland: a national perspective cohort study' (2021) 397 *The Lancet* 1646, 1652.

<sup>122</sup> Julia Stowe, Nick Andrews, Charlotte Gower, Eileen Gallagher, Lara Utsi, Ruth Simmons, Simon Thelwall, Elise Tessier, Natalie Groves, Gavin Dabrera, Richard Myers, Colin Campbell, Gayatri Amirthalingam, Matt Edmunds, Maria Zambon, Kevin Brown, Susan Hopkins, Meera Chand, Mary Ramsay and Jamie Lopez Bernal, 'Effectiveness of COVID-19 vaccines against hospital admission with the Delta (B.1.617.2) variant' (*Public Health England*, 2021) <<https://khub.net/documents/135939561/479607266/Effectiveness+of+COVID-19+vaccines+against+hospital+admission+with+the+Delta+%28B.1.617.2%29+variant.pdf/1c213463-3997-ed16-2a6f-14e5deb0b997?t=1623689315431>> accessed 17 June 2021.

sufficient reason unless the vaccines actually reduce the spread of Covid-19. Initially, it was not clear whether the vaccines would reduce transmission of Covid-19. Nevertheless, newly emerging data from Public Health England (yet to be peer reviewed) looks positive in terms of the efficacy of the vaccines in reducing transmission of Covid-19.<sup>123</sup>

For both reasons to be sufficient, mandating vaccination must also increase the uptake of vaccinations. A concern expressed by Annas is that mandating vaccinations might create resentment and therefore prove to be counter-productive.<sup>124</sup> Indeed, the Royal College of Paediatrics and Child Health (on the subject of mandating childhood vaccinations) have suggested that ‘...some parents who were not initially anti-vaccine, may object to the State telling them what to do and therefore refuse to have their children immunised.’<sup>125</sup> In fact, Victorian England faced riots and anti-vaccination leagues when vaccination for Smallpox was mandated.<sup>126</sup> It is worth noting, though, that vaccination techniques in the nineteenth and early twentieth centuries were very different to today.<sup>127</sup>

However, some studies show an increase in the uptake of vaccinations where they are mandated, so Annas’ concern does not seem to have been borne out there.<sup>128</sup>

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<sup>123</sup> Ross Harris, Jennifer Hall, Asad Zaidi, Nick Andrews, Kevin Dunbar and Gavin Dabrera, ‘Impact of vaccination on household transmission of SARS-COV-2 in England’ (*Public Health England*, 2021) <<https://khub.net/documents/135939561/390853656/Impact+of+vaccination+on+household+transmission+of+SARS-COV-2+in+England.pdf/35bf4bb1-6ade-d3eb-a39e-9c9b25a8122a?t=1619601878136>> accessed 1 May 2021.

<sup>124</sup> George Annas, ‘Blinded by Bioterrorism: Public Health and Liberty in the 21<sup>st</sup> Century’ (2003) 13 *Health Matrix* 33, 56.

<sup>125</sup> RCPCH, ‘Vaccination in the UK - Position Statement’ (*RCPCH*, 10 December 2020) <[https://www.rcpch.ac.uk/resources/vaccination-uk-position-statement#footnote10\\_75phqo5](https://www.rcpch.ac.uk/resources/vaccination-uk-position-statement#footnote10_75phqo5)> accessed 1 May 2021.

<sup>126</sup> Colin Howard, ‘The impact on public health of the 19<sup>th</sup> century anti-vaccination movement’ (2003) 30 *Microbiology Today* 22, 23; Nadja Durbach, *Bodily Matters: The Anti-Vaccination Movement in England 1853-1907* (Duke University Press 2005) 51.

<sup>127</sup> Durbach (n126) 3.

<sup>128</sup> See for example: Hilary Babcock, Nancy Gemeinhart, Marilyn Jones, Claiborne Dunagan, Keith Woeltje, ‘Mandatory influenza vaccination of health care workers: translating policy to practice’ (2010) 50 *Clinical Infectious Diseases* 459, 461; Elyse Olshen, Barbara Mahon, Shuang Wang and Elizabeth Woods, ‘The Impact of State Policies on Vaccine Coverage by Age 13 in an Insured Population’ (2007) 40 *Journal of Adolescent Health* 405, 408; Jaffar Al-Tawfiq, Abbas AbuKhamzin and Ziad Memish, ‘Epidemiology and impact of varicella vaccination: A longitudinal study 1994-



Allowing very wide and easily attainable exemptions may undermine uptake to some extent though, so this must be kept in mind when the scheme is being designed.<sup>129</sup> On balance, it seems possible that a court would accept that the decision to mandate vaccination is supported by relevant and sufficient reasons. *Vavříčka* unfortunately offers little relevant guidance on this point.<sup>130</sup>

## Conclusion

This paper has argued that mandating Covid-19 vaccinations for adults in England and Wales would be an interference with Article 8 ECHR, which protects physical/psychological integrity, personal data, and the development of relationships with others. However, this interference would not reach the threshold of inhuman and degrading treatment for the purposes of Article 3 ECHR, unless vaccines were forcibly administered.

The interference with Article 8 ECHR could be justified for the protection of health and the economic wellbeing of the country. Of course, primary legislation would have to be passed by Parliament to satisfy the requirement for the interference to be in accordance with law. A pressing social need is demonstrated by the importance of both reducing the spread of Covid-19 and preventing death/serious illness. It is therefore essential to vaccinate as many people as possible. Empirical data tentatively suggests that mandating vaccinations could achieve these goals, so the reasons for the interference are relevant and sufficient.

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2011' (2013) 11 *Travel Medicine and Infectious Disease* 310, 313; Cecilia Lee and Joan Robinson, 'Systematic review of the effect of immunization mandates on uptake of routine childhood immunizations' (2016) 72 *Journal of Infection* 659, 665; Giovanni Rezza, 'Mandatory vaccination for infants and children: the Italian experience' (2019) 113 *Pathogens and Global Health* 291, 293-294; Daniel Lévy-Bruhl, Laure Fonteneau, Sophie Vaux, Anne-Sophie Barret, Denise Antona, Isabelle Bonmarin, Didier Che, Sylvie Quelet and Bruno Colgnard, 'Assessment of the impact of the extension of vaccination mandates on vaccine coverage after 1 year, France, 2019' (2019) 24 *Eurosurveillance* <<https://www.eurosurveillance.org/content/10.2807/1560-7917.ES.2019.24.26.1900301>> accessed 22 May 2021.

<sup>129</sup> See for example: Daniel Feikin, Dennis Lezotte, Richard Hamman, Daniel Salmon, Robert Chen and Richard Hoffman, 'Individual and Community Risks of Measles and Pertussis Associated With Personal Exemptions to Immunization' (2000) 284 *Jama* 3145, 3149. It is worth noting that smallpox vaccination rates declined after conscientious objection was permitted from 1907 - Durbach (n126) 196.

<sup>130</sup> *Vavříčka* (n11) paras 286-289.



Whether the interference can be said to be necessary is contingent on certain conditions being met. The first of these is that education/awareness campaigns have been ineffective at increasing vaccination uptake, such that the number of vaccinated individuals is too low to achieve herd immunity. All the other conditions relate to the way in which the mandatory vaccination scheme is set up. No vaccines should be administered forcibly, the penalties must not be unduly harsh or onerous, and there must be (limited) exemptions. There must also be safety precautions in place, such as checking an individual's suitability prior to vaccination and continual safety monitoring. A compensation scheme may also need to be established.