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**EUROPEAN HUMAN RIGHTS MOOT COURT
COMPETITION**

Hannah and Ygritte Olaria v. Argoland

Hannah and Ygritte Olaria

VS

Argoland

SUBMISSION OF THE APPLICANT

TABLES OF CONTENTS

LIST OF REFERENCES	III
LIST OF ABBREVIATIONS	V
SUMMARY OF THE RESULTS	V
LEGAL PLEADINGS.....	1
I. VIOLATION OF ARTICLE 2 REGARDING THE RIGHT TO LIFE OF THE CHILD.....	1
A) Admissibility	1
B) Merits.....	1
II. VIOLATION OF ARTICLE 8 REGARDING THE CHILD’S RIGHT TO RESPECT FOR PRIVATE LIFE AND THE MOTHER’S RIGHT TO RESPECT FOR FAMILY LIFE.....	2
A) Admissibility	2
B) Merits.....	3
III. THE VIOLATION OF ARTICLE 9 REGARDING THE RIGHT TO FREEDOM OF RELIGION OF THE MOTHER AND THE CHILD	6
A) Admissibility	6
B) Merits.....	6
IV. VIOLATION OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 9 AND PROTOCOL NO. 12 REGARDING THE DISCRIMINATORY LEGISLATION.....	10
A) Admissibility	10
B) Merits.....	11
V. VIOLATION OF ARTICLE 6 REGARDING THE LACK OF IMPARTIALITY OF THE COURT OF APPEAL TOWARDS THE MOTHER.....	15
A) Admissibility	15
B) Merits.....	15
VI. VIOLATION OF ARTICLE 13 REGARDING THE ABSENCE OF AN EFFECTIVE REMEDY IN RESPECT OF THE VIOLATIONS OF ARTICLES 6 AND 14.....	17
VIII. CONCLUSIONS.....	19

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LIST OF ABBREVIATIONS

- ECHR European Convention on Human Rights
- ECJ European Court of Justice
- ECtHR European Court of Human Rights
- EU European Union
- UN United Nations

SUMMARY OF THE RESULTS

1. The applicants contend that the child's right to life was violated under Article 2 as the seven compulsory vaccines imposed by the government of Argoland could pose a potential health risk which was not verified by the local authorities.
2. The applicants also argue that the government of Argoland violated their right to respect for their private and family life under Article 8 by unduly interfering with the child's right to physical integrity and the mother's right to make decisions for her child.
3. The applicants further contend that the imposition of an 800-euro fine for refusing to have the daughter undergo compulsory vaccination on religious grounds, as members of the Argoland Reformist Church, violated their rights to freedom of thought, conscience and religion under Article 9.
4. The applicants claim that the government of Argoland violated their right not to be discriminated against on the ground of religion, both under Article 14 alongside with Article 9 and the general clause of non-discrimination under Protocol No. 12 by failing to provide effective accommodation to meet their specific religious needs in applying the legislation in question and sentencing them to the fine.
5. The applicants also contend that the mother's right to a fair trial under Article 6 was violated because of the behaviour of the judge during the hearings before the Court of Appeal which raises a doubt on the partiality of the aforementioned judge.
6. The applicants allege that the mother's right under Article 13 has been violated regarding the absence of an effective remedy to complain about the violation of Article 6, and regarding the impossibility to avail herself of an effective remedy before the Supreme Court of Argoland to complain about the violation of a right of constitutional value in the legal system of Argoland, namely Article 14 and Article 1 of Protocol No. 12.

LEGAL PLEADINGS

I. VIOLATION OF ARTICLE 2 REGARDING THE RIGHT TO LIFE OF THE CHILD

1. The applicants contend that the State violated the rights of the child on the grounds of Article 2 of the ECHR¹ as the mandatory vaccines² could pose a potential health risk³ which was not verified by the local authorities.

A) Admissibility

2. In respect of Article 34, the Court has recognised that a claimant could be a potential victim, in cases where the violation has not actually happened but was likely to occur⁴. Moreover, regarding the concept of indirect victim, the Court examines claims raised by persons who, although not directly affected by the fact or the act that has caused a violation of the Convention, are affected by the effects⁵. The indirect victim is therefore necessarily a close relative, such as the parent.

3. Ygritte qualifies as a potential victim given that the compulsory vaccines, even though not actually injected to the child, pose a potential risk to her life. As for Ms. Olaria, she qualifies as an indirect victim since she has a considerable moral interest regarding the violation of her child's right to life as the mother.

4. Therefore, the requirements as to the admissibility of the claim in respect of Article 2 are satisfied.

B) Merits

5. Article 2 forms part of the body of primordial or unconditional rights protected by the Convention. It is often referred to as an intangible right, as in theory, no derogation is allowed. It imposes upon signatory States both negative and positive obligations.

6. In respect of the positive obligations, the State must take all the necessary measures to protect the lives of people under its jurisdiction, notably through the adoption of an adequate legal framework⁶. It also encompasses the protection of individuals in their relations with each other and from themselves in application of the horizontal effect theory⁷. The article also includes a procedural obligation of investigation⁸ not only when a death has been established,

¹ All articles mentioned afterwards pertain to the ECHR, unless otherwise specified.

² Case, § 19.

³ Case, § 4.

⁴ *Soering v. United Kingdom* [GC], 07 July 1989, app. no. 14038/88.

⁵ *Ouardiri v. Switzerland* [GC], 28 June 2011, app. no. 65840/09.

⁶ *Osman v. the United Kingdom*, 28 October 1998, app. no. 23452/94.

⁷ *Tanribilir v. Turkey*, 16 November 2000, app. no. 21422/93.

⁸ *Edwards v. the United Kingdom*, 14 March 2002, app. no. 46477/99.

but also in the event of such a risk. In addition, Article 2 imposes upon states to protect in particular the lives of vulnerable youth who may or may not be sick that are found under their jurisdiction⁹.

7. In respect of the negative obligations, the State is for example prohibited from proceeding to the murder of those found on its soil, or to any act that could place the health of individuals at risk¹⁰. Additionally, the Court has already admitted that the right to life also encompasses the accidental endangering of someone's life¹¹ when such a risk can be sufficiently established.

8. As it relates to the case of the applicants, the State had adopted a legal framework of mandatory vaccinations in order to protect their population from contracting certain diseases¹². Ms. Olaria refused and justified her decision before the court with a number of documents which suggested a correlation between certain vaccines and diseases such as autism¹³. However, the procedural requirement which was incumbent upon the State was not fulfilled as no further investigation was done to verify such claims. And while the court has already acknowledged that these investigations must be carried out in case of death, the State must also protect the lives of its citizens, and should therefore investigate any possible threat to the sanctity of human life.

9. Therefore, by failing to proceed with such investigations, the State violated the child's right to the protection of her life under Article 2 as it did not seek to ascertain more in-depth knowledge of the eventual side effects of the vaccinations.

II. VIOLATION OF ARTICLE 8 REGARDING THE CHILD'S RIGHT TO RESPECT FOR PRIVATE LIFE AND THE MOTHER'S RIGHT TO RESPECT FOR FAMILY LIFE

10. The applicants argue that the State violated Article 8 by unduly interfering with the child's right to physical integrity and the mother's right to make decisions in relation to her child.

A) Admissibility

11. All the requirements as to the admissibility under Articles 34 and 35 are satisfied. Indeed, Ms. Olaria qualifies both as a direct and indirect victim in respect of Article 8 as she is directly affected by the compulsory nature of the legislation which prevents her from making decisions for her child on one hand, and has a considerable moral interest regarding the violation of her

⁹ *Nencheva et al v. Bulgaria*, 18 June 2013, app. no. 48609/06, § 106.

¹⁰ *Ilhan v. Turkey*, 27 June 2000, app. no. 22277/93, § 76.

¹¹ *L.C.B. v. U.K.* (dec.), 09 June 1998, app. no. 23413/94.

¹² Case, § 13.

¹³ Case, § 4.

child's right to physical integrity on the other hand. As for Ygritte, she is a direct victim since it is her physical integrity that is directly affected by the compulsory obligation to vaccinate.

B) Merits

1. Applicability of Article 8 § 1 to the present case

a. Regarding the right to physical integrity of the child

12. Article 8 encompasses “*the physical and moral integrity of a person*”¹⁴. A person's body is an intimate aspect of his or her private life¹⁵. The Court has recognised that even minor interferences with one's physical integrity may fall within the scope of Article 8 if they are against the person's will¹⁶. Compulsory medical treatment, regardless how minor, will thus be covered by Article 8¹⁷, such as compulsory vaccination, dental treatment, tuberculin skin tests or X-rays for children¹⁸.

13. In the present case, the child is subjected to compulsory vaccination without consent, which is incontestably an intrusive medical intervention, that has already been considered as falling within the scope of Article 8 § 1 by the Court¹⁹.

14. Therefore, Article 8 § 1 is applicable in respect of the child's right to physical integrity.

b. Regarding the parental rights of the mother on her child

15. The term ‘*family life*’ in the meaning of this article is interpreted in a very flexible way by the Court, and obviously covers the relationship between the parents and their child²⁰.

16. In the present case, Ms. Olaria being the biological mother of Ygritte, their relationship, including the issue of parental rights, indeed falls within the notion of family life.

17. Therefore, Article 8 § 1 is applicable in respect to the mother's parental rights.

2. Violation of Article 8 regarding the child's right to physical integrity and the mother's parental rights

a. Interference with Article 8 § 1 as to the compulsory nature of the legislation

i. Regarding the right to physical integrity of the child

18. As mentioned previously, the Court has already expressly stated that compulsory vaccination, as an involuntary medical treatment, constitutes an interference with the right to

¹⁴ *Salvetti v. Italy* (dec.), 09 July 2002, app. no. 42197/98; *Solomakhin v. Ukraine*, 6 May 2008, app. no. 24429/03, § 33; *Baytöre v. Turkey* (dec.), 12 March 2013, app. no. 3270/09, § 28.

¹⁵ *Y.F. v. Turkey*, 22 July 2003, app. no. 24209/94, § 33.

¹⁶ *Storck v. Germany*, 16 June 2005, app. no. 61603/00, § 143.

¹⁷ *Y.F. v. Turkey*, *op.cit.*; *X. v. Austria*, 13 December 1979, app. no. 8278/78, p. 155.

¹⁸ *Acmanne and Others v. Belgium* (dec.), 10 December 1984, app. no. 10435/83, p. 253; *Association X. v. the United Kingdom* (dec.), 12 July 1978, app. no. 7154/75, p. 34.

¹⁹ *Salvetti v. Italy*, *op. cit.*; *Solomakhin v. Ukraine*, *op. cit.*, § 33.

²⁰ *Hoffmann v. Austria*, 27 July 1993, app. no. 12875/87; *V S v. Germany* (dec.), 22 May 2007, app. no. 4261/02.

physical integrity of a person²¹. Moreover, the Court has recognized that Article 8 covers the right to self-determination, especially regarding medical treatment²² which therefore implies that the State should do all in its power to put measures in place which allow independent decision-taking. It has also declared that “*children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives*”²³.

19. In the instant case, the obligation to undergo vaccination concerns a very young child and does not take into account any form of consent from the persons involved. The obligatory nature of the legislation is thus in complete contradiction with the notion of self-determination as all elements of choice have been withheld from the applicants.

20. By adopting such a restrictive legal framework that interferes with the ability of the applicant to choose what medical treatments she would like to undergo, the State has effectively infringed upon the rights of the child under Article 8.

ii. Regarding the parental rights of the mother in respect of her child

21. The right to respect for family life under Article 8 implies that States should refrain from interfering with the parents’ right to be involved in the decision-making process regarding their own children as much as possible. The Oviedo Convention as well as the jurisprudence of the Court state that no medical intervention can be carried out on a person without his or her consent and in the event that the involved party be a minor, the intervention may only be pursued after having received the authorisation of his or her legal guardian²⁴. The Convention on the Rights of the Child also guarantees parental rights, by stating that States Parties shall respect “*the responsibilities, rights and duties of parents*”²⁵ and “*the rights and duties of the parents [...] to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child*”²⁶.

22. As it relates to the affair at hand, the legislation in question includes a specified schedule which spans over the first 18 months of the life of the child which is supposed to be respected by the legal guardians of the said child. While said immunisations can be postponed or even foregone for medical reasons, similar arrangements have not been made to accommodate objections based on religious or conscientious grounds. In respect of the Oviedo Convention,

²¹ *Salvetti v. Italy, op. cit.; Solomakhin v. Ukraine, op. cit.*, § 33.

²² *Pretty v. the United Kingdom*, 29 April 2002, app. no. 2346/02, § 4.

²³ *Stubbings and Others v. the United Kingdom*, 22 October 1996, app. nos. 22083/93; 22095/93, § 64.

²⁴ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, Article 6.

²⁵ UN Convention on the Rights of the Child, *op.cit.*, Article 5.

²⁶ *Ibid*, Article 14 § 2.

Ms. Olaria attempted to exercise her parental authority by opposing the administering of these vaccines which she judged unnecessary, potentially health-threatening and against her religion²⁷. However, the mandatory nature alone of the national legislation stripped Ms. Olaria of any chance of exercising her parental rights, her right to self-determination as well as her right to make decisions for her daughter.

23. Therefore, by adopting a law which makes absolutely no provisions for a parent to make a decision concerning the well-being of his or her child and by adopting a legal framework which imposes mandatory vaccinations before a child can even develop its own opinion, it would be remiss of the Court to not acknowledge this violation of Article 8 as the national jurisdictions refused to consider the plights of the applicant and simply convicted her to pay a fine.

b. Absence of justification under Article 8 § 2 as to the necessity of the measure

24. Should the court not decide to follow the reasoning outlined herein, the onus still lies on the respondent State to prove how such a legislation and a consequent fine could be deemed justifiable according to the exceptions permitted by Article 8 § 2. Pursuant to this paragraph, any infringement on the free exercise of the right to a private and family life must first be prescribed by law, that is to say must have a basis in domestic law and be accessible, precise and foreseeable²⁸. It must then pursue one of the aims expressly enunciated in the article. Finally, it must be necessary in a democratic society, which means that the interference must answer a “*pressing social need*” and, in particular, be proportionate to the legitimate aim pursued²⁹. These tests must be examined *in concreto*, on a case by case basis³⁰.

25. In the current case, the interference is indeed prescribed by law³¹ and also pursues a legitimate aim, namely the protection of public health³², which is expressly mentioned in Article 8 § 2. However, the condition as to the necessary nature of such a measure in a democratic society cannot be considered satisfied. Indeed, more suitable and proportionate options could have been used to achieve this aim: in light of the applicant’s religious objections and the opaque veil which exists regarding the long-term side effects of such vaccines, the national legislation could have established a legal framework allowing for children whose parents thought best to not administer certain vaccines to them to stay home

²⁷ Case, § 4.

²⁸ *Gorzelic and Others v. Poland* [GC], 17 February 2004, app. no. 44158/98, § 64.

²⁹ *Chapman v. United Kingdom*, 18 January 2001, app. no. 27238/95, § 90.

³⁰ *Belgian Linguistics Case No. 2*, 23 July 1968, app. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, §§ 5-10.

³¹ *Ibid.*

³² Case, § 3.

from school during outbreaks³³. Besides, the State did not prove that the compulsory vaccines in question are still useful nowadays to protect public health. Indeed, as the French National Academy of Medicine reports, the current compulsory vaccines are not corresponding to the diseases currently spreading in the country³⁴. Furthermore, many Member States do not impose compulsory vaccination³⁵ and some, like the United Kingdom, even recognise a positive right to conscientious objection³⁶. Studies also show that States which leave the choice to parents as to the vaccination of their children have a similar vaccination coverage as States where it is compulsory³⁷, and moreover they do not experience any epidemics. Argoland currently has a vaccination coverage of 80-90%³⁸, whereas the United Kingdom reached an even better rate of 93.6% in 2016³⁹. The interference cannot, therefore, be considered necessary in a democratic society.

26. It is therefore for these reasons that the Court should conclude that the said interference is unjustified as it is disproportionate to the aim pursued and therefore in breach of Article 8.

III. THE VIOLATION OF ARTICLE 9 REGARDING THE RIGHT TO FREEDOM OF RELIGION OF THE MOTHER AND THE CHILD

27. The applicant alleges that her rights enshrined by Article 9 were infringed when she received an 800-euro fine for refusing to have her daughter undergo compulsory vaccination because of her religious beliefs as a member of the Argoland Reformist Church.

A) Admissibility

28. All the requirements as to the admissibility under Articles 34 and 35 are satisfied.

B) Merits

1. Applicability of Article 9 to the present case

a. As regards to the freedom of conscience

29. Freedom of conscience includes the right to manifest one's conviction. In its ordinary meaning, the word "convictions", taken on its own, is not synonymous with the words "opinions" and "ideas", and is more akin to the term "beliefs" and denotes views that attain a certain level of cogency, seriousness, cohesion and importance⁴⁰. Judge Pinto de Albuquerque

³³ Case, § 12.

³⁴ Written Observations submitted to the ECtHR as a third party by the European Centre for Law and Justice in the case *Pavel Vavricka and Others v. Czech Republic*, 01 mars 2016, app. no. 47621/13, p. 11.

³⁵ *Ibid.*

³⁶ UK's Vaccination Act 1898.

³⁷ *Ibid.*

³⁸ Clarification question n°10.

³⁹ NHS Immunisation Statistics, England – 2015-2016, published on the 22nd of September 2016.

⁴⁰ *Campbell and Cosans v. UK*, 25 February 1982, app. no. 7511/76, § 36.

underlined for instance that the fact the applicant opposed hunting on his lands “*for absolute and unconditional ethical reasons [...] cannot but be found to constitute a serious conscientious objection*”⁴¹. Indeed, “*it is irrelevant that the applicant is not himself obliged to hunt or to take part in or support hunting*” as he is faced “*with a true conflict of conscience*”: breaking domestic law or being faithful to his convictions⁴². Moreover, the ECJ recognized the possibility of a link between hepatitis B vaccine and multiple sclerosis⁴³, and its jurisprudence is often taken into account by the ECtHR⁴⁴.

30. In the present case, the applicant refused to have her child undergo vaccination on two grounds. Firstly, the applicant refused to have her daughter vaccinated for absolute and unconditional religious reasons as it goes against God’s will according to her religion⁴⁵; her objection is therefore serious. It is not relevant that Ms. Olaria is not forced to tolerate compulsory vaccination or to change her religious beliefs. Secondly, the applicant relies on scientific evidence revealing connections between vaccines and certain medical conditions. Also, the hepatitis B vaccine is one of the compulsory vaccines in the present case⁴⁶, for which the ECJ has recognised potential risks for health⁴⁷.

31. Therefore, the applicant's conviction has sufficient cogency, seriousness and importance to be protected by Article 9 as far as the freedom of conscience is concerned.

b. As regards to the freedom of religion

32. Freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. Two strands can be identified in Article 9 § 1. While religious freedom is primarily a matter of individual conscience linked to the *forum internum* of a person, it also implies freedom to manifest one’s religion alone and in private or in community with others, in public and within the circle of those whose faith one shares⁴⁸. Article 9 lists a number of forms which manifestation of one’s religion or belief may take, namely worship, teaching, practice and observance.

33. Regarding who is protected by Article 9, the Court has a very flexible interpretation and has recognised in several cases that the minorities belonging to main religions as well as to

⁴¹ Partly concurring and partly dissenting opinion of Judge Pinto de Albuquerque, *Herrmann v. Germany* [GC], 26 June 2012, app. no. 9300/07, p. 41.

⁴² *Ibid.*, p. 42.

⁴³ ECJ, *N.W e.a./Sanofi Pasteur MSD e.a.*, 21 June 2017, C-621/15.

⁴⁴ *Nada v. Switzerland* [GC], 12 September 2012, app. no. 10593/08, §§ 82-85.

⁴⁵ Case, § 4.

⁴⁶ Case, § 2.

⁴⁷ ECJ, *N.W e.a./Sanofi Pasteur MSD e.a.*, 21 June 2017, C-621/15.

⁴⁸ *Kokkinakis v. Greece*, 25 May 1993, app. no. 14307/88, § 31.

new or relatively new religious movements fall within the scope of the article⁴⁹, regardless of its recognition as a sect and not as a religion by the State⁵⁰.

34. On the particular issue of conscientious objection, the Court stated in the case *Bayatyan v. Armenia* that this article “does not explicitly refer to a right to conscientious objection”⁵¹. The latter is defined as the right not to act against one's conscience and convictions. It is true that the Commission has ruled that the obligation to undergo vaccination, applying to everyone whatever their religion, does not violate Article 9⁵². However, the Court takes into account the living instrument doctrine, which means that the Convention should be construed in the light of present day conditions. For instance, the Court has taken into consideration the Charter of Fundamental Rights of the EU, which recognises in its Article 10 § 2 a right to conscientious objection, and the Court recognized that opposition to compulsory military service could “entail a serious and insurmountable conflict between the obligation to perform it and an individual's conscience or genuinely and deeply held beliefs”⁵³, leading to a violation of Article 9. Whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the circumstances of the case⁵⁴.

35. In the present case, Ms. Olaria and her child both belong to the Argoland Reformist Church, which has been created in the beginning of the 1980s and is recognised as an official Church in eight Contracting States⁵⁵. In addition, 6% of the population of Argoland belongs to this religious movement⁵⁶, which is already quite a significant number. In addition, “some pastors of this church have been vocal in newspapers and other media”⁵⁷ so, this religious minority is also known in the country. Moreover, the applicants' objection to vaccination is indeed motivated by their genuinely held religious beliefs as the Church of Argoland is opposed to vaccination as it considers that it would “interfere with the believers' relationship with God”⁵⁸. Moreover, some vaccines such as rubella had been developed using cells originating from tissue of legally aborted fetuses⁵⁹, and the Reformist Church is also strictly against abortion.

⁴⁹ E.g. *Leela Förderkreis E.V. and Others v. Germany*, 06 November 2008, app. no. 58911/00, § 81.

⁵⁰ E.g. *Affaire Association des Chevaliers du Lotus d'Or v. France*, 31 January 2013, app. no. 50615/07 ; *F.L. v. France* (dec.), 3 November 2005, app. no. 61162/00.

⁵¹ *Bayatyan v. Armenia* [GC], 07 July 2011, app. no. 23459/03, § 110.

⁵² *Boffa and 13 others v. San Marino*, (dec), 15 January 1998, app. no. 26536/95, § 3.

⁵³ *Papavasylakis v. Greece*, 15 September 2016, app. no. 66899/14, § 52.

⁵⁴ *Bayatyan v. Armenia* [GC], *op. cit.*, § 110.

⁵⁵ Case, § 16.

⁵⁶ Clarification question n° 40.

⁵⁷ Case, § 16.

⁵⁸ Case, § 4.

⁵⁹ *Ibid.*

37. Accordingly, the facts of the case do fall within the scope of Article 9.

2. Violation of Article 9 regarding the non-acceptance of the religious objection

a. Interference with Article 9 § 1 as to the conviction

37. Article 9 § 2 prescribes that the right to manifest one's religion may be restricted. Indeed, the Court has regularly recalled that Article 9 does not protect every act motivated or inspired by a religion or belief⁶⁰ as in a democratic society it may be necessary to place restrictions on this freedom to reconcile the interests of the various groups and ensure that everyone's beliefs are respected⁶¹. However, in exercising this regulatory power and in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial⁶². Moreover, The Court has already recognized that the conviction of a conscientious objector for refusal to comply with his military obligations on religious grounds is an interference with Article 9⁶³. The Convention on the Rights of the Child also states that “*States Parties shall respect the right of the child to freedom of thought, conscience and religion*”⁶⁴.

38. In the present case, by comparison with the case of *Bayatyan*, the applicants are conscientious objectors who were convicted and obliged to pay an 800-euro fine because they refused to follow a compulsory measure under domestic law on the ground of their religious beliefs. There is thus a serious and insurmountable conflict between the legislation and their religious beliefs. Accordingly, the conditions set by the Court in the *Bayatyan v. Armenia* case, regarding conscientious objection to military service, are met and hence the outcome should be transposable in the present case.

39. Therefore, there is an interference with Article 9.

b. Absence of justification under Article 9 § 2 as to the necessity of the measure

40. An interference is a violation of Article 9 unless it is prescribed by law, pursues one or more of the legitimate aims set out in paragraph 2 and is necessary in a democratic society⁶⁵.

41. As to the legitimate aim, “*the enumeration of the exceptions to the individual's freedom to manifest his or her religion or beliefs, as listed in Article 9 § 2, is exhaustive and that their definition is restrictive*”⁶⁶. As to the necessity, a limitation must correspond to a “*pressing*

⁶⁰ *Kalaç v. Turkey*, 01 July 1997, app. no. 20704/92, § 27.

⁶¹ *Kokkinakis v. Greece*, *op.cit.*, § 33.

⁶² *Hasan and Chaush v. Bulgaria*, 26 October 2000, app. no. 30985/96, § 78.

⁶³ *Bayatyan v. Armenia*, *op.cit.*, § 112.

⁶⁴ UN Convention on the Rights of the Child of 2 September 1990, Article 14 § 1.

⁶⁵ *Buscarini and Others v. San Marino* [GC], 18 February 1999, app. no. 24645/94, § 34.

⁶⁶ *S.A.S v. France* [GC], 01 July 2014, app. no. 43835/11, § 113.

social need” and be proportionate to the legitimate aim pursued⁶⁷. Regarding the proportionality, the Court insists that a fair balance should be sought between the interests of the society as a whole and those of the applicant⁶⁸. In cases involving the relations between religions and States, for which there is no consensus in Europe, a broader margin of appreciation is afforded to the Member States⁶⁹, however this is not an unlimited one. Indeed, the Court often emphasises that pluralism, tolerance and broadmindedness are hallmarks of a democratic society, and democracy does not mean that the views of a majority must always prevail. A balance must be achieved to ensure a fair and proper treatment of people from minorities and to avoid any abuse of a dominant position⁷⁰.

42. In the present case, while the legislative nature of the measure upon which the mandatory vaccination is based and the alleged legitimate aim to protect public health⁷¹ are not contested, the last condition as to the necessity of the measure cannot be regarded satisfied for several reasons. First, the vaccination plan established by the State is a limitation that goes beyond the protection of public health, as undergoing vaccination also represents a risk for the health of the child, some of which had been recognised by the ECJ⁷². Plus, as previously explained, the State can achieve a similar vaccination coverage by opting for a voluntary vaccination system, such as that of the United Kingdom, which would thus ensure the safety and respect the rights of all involved parties. Finally, convicting the applicants to a fine cannot be considered proportionate since, as said before, alternative measures could have permitted the State to achieve the same objective.

43. Therefore the three conditions under Article 9 § 2 are not all satisfied, and, as a result, the State has violated Article 9.

IV. VIOLATION OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 9 AND PROTOCOL NO. 12 REGARDING THE DISCRIMINATORY LEGISLATION

44. The applicants claim that the respondent State has violated their right not to be discriminated against on the ground of religion, both under Article 14 alongside with Article 9 and the general clause of non-discrimination under Protocol No. 12.

A) Admissibility

45. All the requirements as to the admissibility under Articles 34 and 35 are satisfied. Indeed,

⁶⁷ *Bayatyan v. Armenia*, *op.cit.*, § 123.

⁶⁸ *Ibid*, § 124.

⁶⁹ *Cha'are Shalom Ve Tsedek v. France*, *op. cit.*, § 84.

⁷⁰ *Leyla Sahin v. Turkey* [GC], 10 November 2005, app. no. 44774/98, § 108.

⁷¹ Case, § 12.

⁷² ECJ, *N.W e.a./Sanofi Pasteur MSD e.a.*, 21 June 2017, C-621/15.

all domestic remedies have been exhausted by the applicants given that the Supreme Court of Argoland has no competence *ratione materiae* over civil actions prescribed under special legislation⁷³ as it was the case for the applicants' claim based on the Anti-Discrimination Act.

B) Merits

46. The applicants claim that the respondent State has violated their right not to be discriminated against on the ground of religion, both under Article 14 alongside with Article 9 and the general clause of non-discrimination under Protocol No. 12.

47. As the Court has stated⁷⁴, the same term “discrimination” from Article 14 was used in Article 1 Protocol No.12. Notwithstanding the difference in scope between those two provisions, the meaning of the terms was intended to be identical⁷⁵. The test of those two articles being the same, it is considered appropriate to look at this complaint under Article 14 taken in conjunction with Article 9 and Article 1 of Protocol No.12 at the same time.

1. Applicability of Article 14 and Article 1 of Protocol No.12

48. Article 14 complements the other substantive provisions of the Convention⁷⁶. It has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by those provisions⁷⁷. Furthermore, Article 14 does not presuppose a breach of those provisions and to this extent is autonomous⁷⁸. Nevertheless, for Article 14 to apply, the facts at issue must fall within the ambit of one or more of the latter⁷⁹. In contrast, Article 1 of Protocol No. 12 has effect in relation to the enjoyment of any right set forth by law⁸⁰.

49. It is not disputed in the present case that the facts complained of fall within the ambit of Article 9. Furthermore, “religion” is specifically mentioned in the text of Article 14 as a prohibited ground of discrimination. Hence, it is clearly an issue which comes within the scope of Article 14 taken in conjunction with Article 9.

50. Therefore, Article 14 is applicable, and so is Protocol 12.

2. Violation of Article 14 alongside with Article 9, and of Article 1 Protocol No.12

⁷³ Case, § 17.

⁷⁴ *Sejdic and Finci v. Bosnia and Herzegovina* [GC], 22 December 2009, app. nos. 27996/06; 34836/06, § 55; *Zornic v. Bosnia and Herzegovina*, 15 July 2014, app. no. 3681/06, §27; *Slaku v. Bosnia and Herzegovina*, 26 May 2016, app. no. 56666/12, § 25.

⁷⁵ Explanatory Report to Protocol No.12 to the ECHR, § 18; *Sejdic and Finci v. Bosnia and Herzegovina*, *op.cit.*, §§ 53-55.

⁷⁶ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, app. nos. 9214/80; 9473/81; 9474/81, § 71.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Explanatory Report to Protocol No.12 to the ECHR, §§ 21-22.

a. Existence of an indirectly discriminatory situation

51. According to the Court's settled case law, in order for an issue to arise under Article 14, there must be a difference in treatment of persons in relevantly similar situations⁸¹. Such difference of treatment is discriminatory if it has no objective and reasonable justification, that is to say if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised⁸². The Court has also pointed out that Article 14 is not only violated when there is an unjustifiable difference of treatment but also when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different⁸³. Moreover, a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group⁸⁴. In this respect, it is important to note that the existence of a discriminatory intent is not required⁸⁵.

52. In the case of *Thlimmenos*⁸⁶, the Court found a violation of Article 14 in conjunction with Article 9 concerning a Jehovah's Witness who was convicted for refusing to wear the military uniform. The Court held that he had been discriminated against in the exercise of his religious freedom, in that he was treated like any other person convicted of a serious crime although his own conviction resulted from the exercise of this freedom. The Court added that even though the authorities had no option under the law but to sanction the applicant, this cannot absolve the respondent State from responsibility under the Convention as the State failed to introduce appropriate exceptions to the rule⁸⁷.

53. In the present case, the legislation in question⁸⁸ is of general application⁸⁹ and so it does not make any distinction between citizens that could amount to a difference of treatment of persons in similar situations, in other words, to a situation of direct discrimination. However, although apparently neutral, the legislation does not have the same effects on every citizen. The Reformist Church strictly rejects abortion and all types of vaccines⁹⁰. As such, for members of this religious minority such as the applicants, complying with the national

⁸¹ *Belgian Linguistics Case No. 2*, 23 July 1968, app. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64; *Burden v. the United Kingdom* [GC], 29 April 2008, app. no. 13378/05, § 60.

⁸² *S.A.S. v. France* [GC], 15 August 2014, app. no. 43835/11, § 161.

⁸³ *Thlimmenos v. Greece* [GC], 6 April 2000, app. no. 34369/97, § 44.

⁸⁴ *D.H. and Others v. Czech Republic* [GC], 13 November 2007, app. no. 57325/00, § 175.

⁸⁵ *Ibid* - § 184.

⁸⁶ *Thlimmenos v. Greece, op.cit.*, §§ 44-47.

⁸⁷ *Ibid*, § 48.

⁸⁸ I.e. the Act on Protection from Infection Diseases; Article 120 of the Law on Misdemeanours; Case, §§ 19-20.

⁸⁹ Case, § 13.

⁹⁰ Case, § 4.

legislation implies contravening their religion. There is a serious and insurmountable conflict between the legislative obligation on one side, and their deeply and genuinely held religious beliefs on the other side⁹¹. Thus, religious minorities that are against vaccination such as the applicants' are being particularly disadvantaged in the application of the legislation, in comparison with other individuals who do not hold such a religious duty.

54. The only possible exemption to the general obligation to vaccination provided for in the national legislation being based on medical grounds⁹², the applicant had to pay an 800-euro fine⁹³ solely due to the exercise of her right to manifest her religion guaranteed by Article 9. The State does not allow for an exception to the application of the obligation to vaccination and the subsequent sanction that would permit to distinguish people who object for religious reasons from others.

55. Therefore, by failing to treat differently the applicants whose situation is significantly different from others, the State has not provided effective accommodation under Article 14 to meet the specific needs of that religious minority. This is thus a situation of indirect discrimination that may fall within the scope of the prohibition of discrimination, in virtue of Article 14 taken together with Article 9 and of Article 1 of Protocol No.12.

b. Absence of an objective and reasonable justification

56. In order for a discriminatory measure to be considered to have an objective and reasonable justification, it must pursue a legitimate aim and there must be a reasonable relationship between the means employed and the aim sought to be realised⁹⁴.

57. It is necessary to examine whether the effects of the treatment fail to strike a fair balance between the protection of the interests of the community and respect for the rights under the Convention⁹⁵. The State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment⁹⁶ and *vice versa*. The scope of this margin will vary according to the circumstances, the subject matter and the background⁹⁷. It is generally wider in cases where there is no consensus among the Contracting Parties⁹⁸. Nevertheless, the Court pays close attention to what is at stake, namely the need to protect the rights and freedoms of others, to preserve public order and to secure

⁹¹ *Bayatyan v. Armenia* [GC], 7 July 2011, app. no. 23459/03, § 110.

⁹² Case, § 19.

⁹³ Case, § 5.

⁹⁴ E.g. *Belgian Linguistics Case No. 2*, *op. cit.*

⁹⁵ *Ibid.*, §§ 34-35.

⁹⁶ E.g. *Sahin v. Germany* [GC], 8 July 2003, app. no. 30943/96, § 53.

⁹⁷ E.g. *Stec and Others v. the United Kingdom* [GC], 12 April 2006, app. nos. 65731/01; 65900/01, § 52.

⁹⁸ *Evans v. the United Kingdom*, 10 April 2007, app. no. 6339/05, § 77; *X, Y and Z v. the United Kingdom*, 22 April 1997, app. no. 21830/93, § 44.

true religious pluralism, which is vital to the survival of a democratic society⁹⁹ and entails the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions and identities and religious convictions¹⁰⁰. Indeed, the Court has always emphasised that freedom of religion is one of the most vital elements that make up the identity of believers and their conception of life¹⁰¹, and in cases where a particularly important facet of an individual's identity or existence is at stake the State is only given a narrow margin of appreciation¹⁰². Furthermore, the Court has held in several discrimination cases¹⁰³ that the margin must also be narrowed when the restriction on a right guaranteed by the Convention applies to a vulnerable person such as children, who are directly recognised as vulnerable persons by the Court¹⁰⁴.

58. In the present case, the respondent State has claimed that the aim pursued by the obligation to vaccinate is the protection of public health against infectious diseases¹⁰⁵. Being one of the legitimate justifications expressly mentioned in the Articles of the Convention that may be subject to restrictions¹⁰⁶, and as an essential element of public order, there is no doubt that it is recognised as a legitimate aim by the Court. However, the second question whether there is a reasonable relationship between the measure employed and the aim sought is more disputable.

59. Firstly, the usefulness of the compulsory nature of vaccination has not yet been proven, since as stated before, a quite significant number of Contracting Parties do not impose any compulsory vaccines¹⁰⁷ and yet those European States have about the same vaccination coverage as States where vaccination is compulsory¹⁰⁸. Even though the absence of consensus among European States usually involves a wider margin of appreciation, vaccination is a very intrusive medical act that touches the core of the applicants' right to manifest religious beliefs in the present case, and thus affects an important facet of their identity. In addition, as a newborn baby, the applicant is particularly vulnerable. Finally, given the importance of protecting pluralism and tolerance, the State should do its best to find a compromise. Thence, the margin of appreciation left to the State should be narrowed.

⁹⁹ *Kokkinakis v. Greece*, 25 May 1993, app. no. 14307/88, § 31; *Manoussakis and Others v. Greece*, 26 September 1996, app. no. 18748/91, § 44.

¹⁰⁰ *Izzettin Dogan and Others v. Turkey*, 26 April 2016, app. no. 62649/10, § 178.

¹⁰¹ *Kokkinakis v. Greece*, *op. cit.*, § 31.

¹⁰² *Evans v. the United Kingdom*, *op. cit.*, § 77; *Dudgeon v. the United Kingdom*, 22 October 1981, app. no. 7525/76, § 52.

¹⁰³ E.g. *Aksu v. Turkey* [GC] 15 March 2012, app. nos. 4149/04; 41029/04.

¹⁰⁴ E.g. *Blokhin v. Russia* [GC], 23 March 2016, app. no. 47152/06, § 199.

¹⁰⁵ Case, § 3.

¹⁰⁶ Articles 8, 9, 10 and 11 ECHR.

¹⁰⁷ C.f. Germany, Austria, Cyprus, Denmark, Spain, Estonia, Finland, Ireland, Latvia, Luxembourg, Norway, the Netherlands, Portugal, the United Kingdom, Sweden; results of the VENICE 2010 survey on the ways of implementing national vaccination programmes. Euro Surveill. 2012.

¹⁰⁸ Written Observations submitted to the ECtHR as a third party by the European Centre for Law and Justice in the case *Pavel Vavricka and Others v. Czech Republic*, 01 mars 2016, app. no. 47621/13, p. 11.

60. Secondly, providing for an exception in respect to religious objection would most likely not have had a significant impact on the risks of epidemic. The obligation to vaccinate is actually outdated given the fact that some of the compulsory vaccines¹⁰⁹ concern diseases that have nearly disappeared in Europe, such as polio, diphtheria and tetanus. Even though it is most likely thanks to vaccination, the proportionality of the measure should be assessed within the current context, and currently all the seven vaccines cannot be considered indispensable.

61. Finally, the aim of protection of the society against infectious diseases could have been achieved by less restrictive measures permitting to reconcile that aim with the right to freedom of religion, for instance by a legal provision that children without certain vaccines could be let off school during outbreaks of the disease¹¹⁰.

62. For these reasons, the obligation to undergo those vaccines is no longer a necessity in order to safeguard public health and the respondent State could have found a compromise safeguarding the applicants' rights under Articles 14 and 9. As a result, there is no objective and reasonable justification to the discrimination.

63. In conclusion, the right of the applicants not to be discriminated against on the basis of religion, guaranteed by Article 14 alongside with Article 9 of the Convention, as well as Article 1 of Protocol No.12, has been violated.

V. VIOLATION OF ARTICLE 6 REGARDING THE LACK OF IMPARTIALITY OF THE COURT OF APPEAL TOWARDS THE MOTHER

64. The applicant, Ms Olaria, contends the violation of her right to a fair trial regarding the partiality of the court of appeal.

A) Admissibility

65. All the requirements as to the admissibility under Articles 34 and 35 are satisfied. Indeed, no appeal was possible regarding the decision of the Chamber of Judges¹¹¹ on one hand, and on the other hand, the applicant complained about the impartiality of the judge during the civil proceedings and thus exhausted all the remedies offered by the judiciary system of Argoland to complain about this matter.

B) Merits

66. The Court stated in its jurisprudence that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal

¹⁰⁹ Case, § 2.

¹¹⁰ Case, § 12.

¹¹¹ Case, § 7

proceedings are concerned, in the accused¹¹². To that end, Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or absence can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect¹¹³.

67. In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary. As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will. The principle saying that a tribunal shall be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court¹¹⁴.

68. Although in some cases it may be difficult to procure evidence with which to rebut the presumption, it must be remembered that the requirement of objective impartiality provides a further important guarantee. In other words, the Court has recognised the difficulty of establishing a breach of Article 6 on account of subjective partiality, and for this reason, has in the vast majority of cases raising impartiality issues focused on the objective test. However, there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test), but may also go to the issue of his or her personal conviction (subjective test)¹¹⁵.

69. The Court stresses, above all, that the judicial authorities are required to exercise maximum discretion with regard to cases over which they preside in order to preserve their image as impartial judges. That discretion should for example dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of the judicial office which impose that duty¹¹⁶.

70. In the present case, in contrary to the maximum discretion that is required from a judge with regard to the case he is dealing with, the judge laughed in reaction to a comment of the representative of the Public Administration Agency¹¹⁷. This comment was directly targeting the applicant since “*one of those bio-mothers*” includes herself, and the term “*bio-mothers*” is

¹¹² *Şahiner v. Turkey*, 25 September 2001, app. no. 29279/95, § 44.

¹¹³ *Kyprianou v. Cyprus* [GC], 15 December 2005, app. no. 73797/01, § 118.

¹¹⁴ *Kyprianou v. Cyprus* [GC], *op. cit.*, § 119.

¹¹⁵ *Ibid.*

¹¹⁶ *Buscemi v. Italia*, 16 September 1999, app. no. 29569/95, § 67.

¹¹⁷ Case, § 7.

here clearly used in a pejorative way. The applicant contends that there is no doubt as to the partiality of the representative since his comments were a display of hostility and ill-will towards the applicant. Even though the judge was not the author of this comment, laughing at this remark can, in this situation, be subjectively interpreted as a gesture of sympathy and approval of the judge towards the remark of the representative. Moreover, this comment had been widespread through a microphone to the entire public hearing, and, as a result, the laugh of the judge had also been heard by the entire court room. This situation can thus objectively justify a doubt as to his partiality.

71. Therefore, Article 6 § 1 has been violated as to the partiality of the Court of Appeal.

VI. VIOLATION OF ARTICLE 13 REGARDING THE ABSENCE OF AN EFFECTIVE REMEDY IN RESPECT OF THE VIOLATIONS OF ARTICLES 6 AND 14

72. The applicant, Ms Olaria, contends the violation of her right under article 13 regarding the absence of an effective remedy to complain about Article 6 and 14.

A) Admissibility

73. All the requirements as to the admissibility under Articles 34 and 35 are satisfied.

B) Merits

1. Absence of an effective remedy in respect of the complaint based on Article 6

74. Under Article 13, “*everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority*”. Article 13 does not prescribe a specific form of remedy. The Contracting States are afforded some discretion as to the manner in which they must provide the relief required by Article 13 and in conformity with their obligations under that provision¹¹⁸. However, even if the “authority” referred to in that provision does not necessarily have to be a judicial authority, its powers and the guarantees which it affords are relevant elements in assessing whether the remedy is effective¹¹⁹.

75. In the present case, the applicant agrees on the fact that she had access to a remedy to complain about the partiality of the judge, namely before the Chamber of Judges. However, the applicant contends that this remedy was not effective since the guarantees offered by the Chamber of Judges were not sufficient to make the remedy effective. The applicant emphasises that the Chamber of Judges, which is composed of a panel of 3 judges of the Court

¹¹⁸ *Kudla v. Poland* [GC], 26 November 2000, app. no. 30210/96, §§ 154-157.

¹¹⁹ *Ibid.*

of Appeal¹²⁰, can thus validate the applicant to question the objective partiality of this Chamber regarding the link that could exist between the allegedly biased judge and that panel. The lack of motives regarding the decision as well as to the impossibility to make an appeal against it, can also challenge the guarantees offered by this Chamber.

76. Therefore, Article 13 has been violated.

2. Absence of an effective remedy in respect of the complaint based on Article 14 and Article 1 of Protocol No. 12

77. The Court has considered in its jurisprudence that a remedy before a constitutional court could be an effective remedy within the scope of Article 13 when the rights protected by the Constitution of a Contracting Party corresponds in facts to rights recognised by the Convention¹²¹. The Court also recalls that regarding legal systems which provide constitutional protection for fundamental human rights and freedoms, it is incumbent on the aggrieved individual to test the extent of that protection¹²². Moreover, the Court has stated that in order for a remedy to be effective, it must provide adequate redress for any violation that had already occurred¹²³, thanks to an appropriate and sufficient remedy considering all circumstances of the case¹²⁴.

78. In the present case, the applicant did not have the chance to avail herself of an effective remedy to complain about a right of constitutional value¹²⁵, namely the right not to be discriminated against. The applicant was unable not complain in relation to this matter before the highest Court of the judiciary system of Argoland, namely the Supreme Court, which yet has to be able to deal with the violation of rights of constitutional value. However, in this case, the Supreme Court has no competence *ratione materiae* over civil actions prescribed under special legislation such as the Anti-Discrimination Act¹²⁶. Even though the applicant agrees that she had the possibility to complain before a Court of First Instance and a Court of Appeal, she contends that in a case of a violation of a right of constitutional value, that is moreover protected by the Convention, it should be possible to challenge a violation of this right before the Supreme court, which is not possible in this case¹²⁷. A simple remedy before a Court of

¹²⁰ Clarification question no. 54.

¹²¹ *Apostol v. Georgia*, 28 November 2006, app. no. 40765/02, § 38.

¹²² *Vincic and others v. Serbia*, 01 November 2000, app. nos. 44698/06 and others, § 51.

¹²³ *Kudla v. Poland* [GC], *op. cit.*, § 152

¹²⁴ *Gäfgen v. Germany* [GC], 01 June 2010, app. no. 22978/05, § 116.

¹²⁵ Case, §§ 18-21.

¹²⁶ Case, § 17.

¹²⁷ *Ibid.*

First Instance or a Court of Appeal cannot be considered as an effective remedy regarding the circumstances of the case.

79. Therefore, Article 13 has been violated.

VIII. CONCLUSIONS

For all the reasons stated above, the applicants respectfully request the Court:

1. To adjudge and declare that the State of Argoland has violated the rights of the Ms Olaria under Articles 8, 9, 14, 6 and 13 of the Convention, as well as Article 1 of Protocol No.12, and the rights of Ygritte Olaria under Article 2, 8, 9, 14 as well as Article 1 of Protocol No. 12.
2. To award just satisfaction under Art 41 of the Convention in respect to the applicants' non-pecuniary damage and order the reimbursement of the full costs and expenses incurred.