EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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The European Court of Human Rights declares inadmissible an application contesting the French "health pass"

In its decision in the case of Zambrano v. France (application no. 41994/21) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned a university lecturer, Guillaume Zambrano, who complained about the "health pass" introduced in France in 2021 and who created a movement to protest against it. On his website, he suggests that visitors complete a pre-filled form in order to increase the number of applications to the European Court and thus lodge a sort of collective application, while emphasising, in quite unambiguous terms, that his aim was to trigger "congestion, excessive workload and a backlog" at the Court, to "paralyse its operations" or even to "force the Court's entrance door" "in order to derail the system".

The Court noted that Mr Zambrano's application was inadmissible for several reasons, specifically the failure to exhaust domestic remedies and abuse of the right of application within the meaning of Article 35 §§ 1 and 3 (admissibility criteria) of the Convention. This decision is final. In particular, the Court noted that Mr Zambrano had not raised before the administrative courts the issue of whether the Law of 5 August 2021 complied with the Convention provisions which he relied upon before the Court. It noted that an applicant who submitted a request to the *Conseil d'État* for judicial review of a decree implementing a law, or a decision refusing to repeal such a decree, could, exceptionally, argue that the law was incompatible with the Convention in support of his or her arguments for it to be set aside. The Court also considered that Mr Zambrano's approach was clearly contrary to the purpose of the right of individual petition. It found that his approach was deliberately intended to undermine the Convention system and the functioning of the Court, as part of what he described as a "legal strategy" and was in reality contrary to the spirit of the Convention and the objectives pursued by it.

The Court also noted that the almost 18,000 standardised applications, lodged as a result of Mr Zambrano's approach, did not fulfil all the conditions set out in Rule 47 § 1 (contents of an individual application) of the Rules of Court, in spite of the time-limit given to their representative to comply with the relevant requirements. They could not therefore be examined by the Court.

The Court also stated that it has given notice, today, of the application in the case ***Thevenon v. France*** (no. 46061/21). This is a separate case, which concerns the compulsory Covid vaccination imposed on certain occupations (in this case, the fire service), under the Law of 5 August 2021 on the management of the health crisis. A separate press release has been published in that case: link.

Principal facts

Introduction of the health pass in France

On 11 March 2020 the World Health Organisation declared that the world was facing a pandemic caused by a new coronavirus labelled SARS-CoV-2, which was responsible for an infectious disease, essentially respiratory in nature, known as Covid-19. The spread of this new coronavirus in France and elsewhere led the French authorities to take measures to prevent and limit the consequences of the public-health threats to the population from March 2020 onwards.

Law no. 2021-689 of 31 May 2021 introduced a transitional regime for exiting the public-health state of emergency; it was effective until 30 September 2021 and authorised the Prime Minister, among other measures, to limit travel and the use of public transport (by requiring, for example, the wearing of face masks) or to impose protective measures in shops. It also introduced a "health pass", effective until 30 September 2021, for international travellers to and from France and for venues hosting large numbers of people (cinemas, theatres, museums, etc.) or trade fairs and similar events.

Law no. 2021-1040 of 5 August 2021 extended the regime for exiting the public-health state of emergency until 15 November 2021 and also broadened the use of the health pass to other areas of daily life, at least until 15 November 2021. (It is now required in: bars and restaurants, including patio areas, with the exception of workplace canteens; department stores and shopping centres, on a decision by the prefect of the relevant *département*, if he or she considers that there is a risk of contamination; seminars; long-distance public transport by train, coach and aeroplane; hospitals, institutions for dependent elderly persons and retirement homes, to be shown by accompanying staff, visitors and patients with scheduled appointments (admissions for a medical emergency are exempted)).

The health pass has been mandatory for adults wishing to take part in activities in the relevant premises, and for staff working in them, since 30 August 2021. Sanctions may be imposed on the public for failure to present a health pass or for fraudulent use of a pass, and on the tradespersons and staff responsible for checking passes should they fail to comply with this requirement.

The facts of the case

The applicant, Guillaume Zambrano, is a French national who lives in Montpellier (France). He is a lecturer in private law at the University of Montpellier. He created a movement "NO PASS !!!" to oppose the French health pass. On his internet site, he suggested that visitors to the site complete a pre-filled form with a view to submitting a sort of collective application to the European Court of Human Rights.

Mr Zambrano, who lodged an individual application on his own behalf, also made the following statement in his application form: "*Appeal on behalf of 7,934 applicants. List appended. Authority forms submitted with individual applications"*. By the date the Court adopted its decision in this case, it had received almost 18,000 applications as a result of the procedure put in place by Mr Zambrano. In addition, more than 3,000 identical applications have been received since that date.

Complaints, procedure and composition of the Court

Mr Zambrano's application was lodged with the European Court of Human Rights on 17 August 2021.

Relying on Article 3 (prohibition of inhuman or degrading treatment) of the Convention, Mr Zambrano complained about Laws nos. 2021-689 and 2021-1040, which, in his opinion, were essentially intended to compel individuals to consent to vaccination. In particular, he complained about what he described as the reprisal measures envisaged, alleging intense physical suffering and a serious risk of physical injury, purportedly without medical justification and although the available vaccines were at the phase of clinical trials.

He also alleged, under Articles 8 (right to respect for private life) and 14 (prohibition of discrimination) of the Convention and Article 1 of Protocol No. 12 (general prohibition of discrimination), that by creating and imposing a health pass system, these laws amounted to a discriminatory interference with the right to respect for private life, which was not "in accordance with the law", in that it was not foreseeable, did not pursue a legitimate public-interest purpose and,

lastly, although the States' margin of appreciation was strict, was not necessary in a democratic society.

The decision was given by a Chamber of seven judges, composed as follows:

Síofra **O'Leary** (Ireland), *President*,
Mārtiņš **Mits** (Latvia),
Ganna **Yudkivska** (Ukraine),
Stéphanie **Mourou-Vikström** (Monaco),
Ivana **Jelić** (Montenegro),
Arnfinn **Bårdsen** (Norway),
Mattias **Guyomar** (France),

and also Martina **Keller**, *Deputy Section Registrar.*

Decision of the Court

Preliminary observations

The Court noted, firstly, that opposition to the above-mentioned measures had given rise to public demonstrations in France. However, the present application did not concern either the right to freedom of expression referred to in Article 10 of the Convention or the right of freedom of association within the meaning of Article 11.

The other 18,000 applications

With regard to the thousands of standardised applications submitted to the Court as part of the approach initiated by Mr Zambrano, the Court noted that they did not fulfil all of the conditions laid down in Rule 47 § 1 (contents of an individual application) of its Rules of Court.

By a letter and an email of 17 August 2021, Mr Zambrano, who had been automatically designated as representative in all these standardised applications, was invited, under Rule 47 § 5.2 of the Rules of Court, to complete the files and warned that, were this not done, these applications might not be examined. The Registry's correspondence remained unanswered. It followed that Mr Zambrano's application could not be considered to have been duly lodged on behalf of the other applicants, as he claimed, although the Court's conclusions as to the admissibility of his application were likely to apply to the thousands of standardised applications arising from it.

Mr Zambrano's individual application

Exhaustion of the domestic remedies

Mr Zambrano had not submitted an appeal on the merits to the administrative courts against the regulatory acts which were the implementing decrees in respect of the contested Laws. He submitted in his application that, in so far as he was challenging the Convention-compliance of Laws nos. 2021-689 and 2021-1040 in themselves, and given that these texts had been found to be in conformity with the Constitution by the Constitutional Council (decision no. 2021-824 of 5 August 2021), there had been no effective and available remedy which he ought to have used before applying to the Court.

The Court pointed out that the review of compliance with the Convention conducted by the "ordinary courts" was separate from the review of a given law's conformity with the Constitution conducted by the Constitutional Council: a measure taken in application of a law (a regulatory act or an individual decision) which had been held by the Constitutional Council to be compatible with the constitutional provisions on the protection of fundamental rights could be found to be incompatible

with these same rights as guaranteed by the Convention because, for example, it was disproportionate in the circumstances of the case. Furthermore, an applicant who submitted a request to the *Conseil d'État* for judicial review of a decree implementing a law, or of a decision refusing to repeal such a decree, was entitled to argue, exceptionally and in support of the arguments for it to be set aside, that the given law did not comply with the Convention. An effective remedy had thus been available to Mr Zambrano. In addition, where there was a doubt regarding the effectiveness of a remedy, the issue had to be tested before the domestic courts. In consequence, even supposing that Mr Zambrano could claim to have victim status (see below), the application was in any event inadmissible for failure to exhaust the domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

While this conclusion was in itself sufficient to find an application inadmissible, the Court nevertheless considered it useful, even essential in the specific circumstances of this case, to examine whether the present application was liable to be incompatible with other admissibility criteria.

Abuse of the right of individual petition

Mr Zambrano had chosen to oppose the introduction of the health pass in France by inviting visitors to his internet site to join him in lodging a collective application with the Court.

The Court had already pointed out that this application did not concern either the right to freedom of expression referred to in Article 10 of the Convention or the right of freedom of association within the meaning of Article 11. However, it could be noted that, in the videos published on his internet site and on YouTube, the applicant had made repeated calls for multiple applications through the use of an automatically generated and standardised application form; he encouraged visitors to his site to use this technique in order to exceed tens of thousands of applications, and repeated, in unambiguous terms, that the objective being pursued was not to succeed in the normal exercise of the right of individual petition provided for in the Convention, but, on the contrary, to bring about "congestion, excessive workload and a backlog" at the Court, to "paralyse its operations", to "create a relationship of power" in order to "negotiate" with it by threatening its operations, to "force the Court's entrance door" and to "derail the system" in which the Court was a "link in the chain".

The Court reiterated that it had been dealing with mass litigation arising out of different structural or systemic problems in the Contracting States for nearly two decades and that these human rights deficiencies in the Contracting States gave rise to constantly growing numbers of applications to the Court. Nonetheless, the Court sought to ensure the long-term effectiveness of the human-rights protection system set up by the Convention, while maintaining the right of individual petition, the cornerstone of this system, and access to justice. It was clear that a major surge in applications such as those submitted in support of the applicant's objective was liable to affect the Court's ability to fulfil its mission in relation to other applications, lodged by other applicants, which did fulfil the conditions for allocation to judicial formations and, *prima facie*, the admissibility conditions provided for in the Convention, including those referred to above.

In view of these findings, and especially the objectives openly pursued by Mr Zambrano, the approach that he had taken was manifestly contrary to the purpose of the right of individual application. He was deliberately seeking to undermine the Convention system and the functioning of the Court, as part of what he described as a "legal strategy" and which was in reality contrary to the spirit of the Convention and the objectives pursued by it.

Victim status

The Court noted that Mr Zambrano had not provided detailed information about his own situation and did not explain in practice how the national authorities' alleged violations were likely to affect him directly or to target him on account of any personal characteristics.

With more specific regard to the complaint under Article 3 of the Convention, the Court noted that, contrary to Mr Zambrano's assertions, the contested laws did not impose any general obligation to be vaccinated. In this connection, it pointed out that the applicant had not submitted evidence that he worked in one of the specific occupations subject to compulsory vaccination under Law no. 2021-1040 of 5 August 2021, a matter which did not fall within the scope of this case and which the Court thus considered it unnecessary to determine in the present case (see, on the other hand, the above-cited *Thevenon* case, communicated today). It followed that Mr Zambrano had not shown that, as an individual who did not wish to be vaccinated, he was being subjected to duress.

With regard to his victim status under Article 8 of the Convention, Mr Zambrano had not provided information about his personal situation or details explaining how the contested laws were liable to directly affect his individual right to respect for his private life. Further, while describing how they applied to unvaccinated individuals, he emphasised that vaccinated persons were also concerned. In the Court's view, this lack of detail in the application could be partly explained by the failure to comply with the obligation to exhaust the domestic remedies, an admissibility criterion that was closely linked to the question of victim status, particularly with regard to a general measure such as a law. Nevertheless, the application was in any event inadmissible for the reasons set out above and, in the circumstances of this case, the Court considered it unnecessary to determine conclusively whether Mr Zambrano could claim to have victim status.

In conclusion, the application lodged by Mr Zambrano was inadmissible for several reasons, in particular the failure to exhaust the domestic remedies and the fact that it amounted to an abuse of the right of individual application within the meaning of Article 35 §§ 1 and 3 (admissibility criteria) of the Convention.

The decision is available only in French.

Press contacts
echrpress@echr.coe.int | tel: +33 3 90 21 42 08
Inci Ertekin (tel : + 33 3 90 21 55 30)
Tracey Turner-Tretz (tel : + 33 3 88 41 35 30)
Denis Lambert (tel : + 33 3 90 21 41 09)
Neil Connolly (tel : + 33 3 90 21 48 05)
Jane Swift (tel : + 33 3 88 41 29 04)