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La CEDU su rifiuto dei vaccini anti-Covid-19: legittime le misure imposte agli operatori sanitari (CEDU, sez. I, sent. 29 agosto 2024, ric. n. 24622/22)

La Corte Edu si pronuncia sul caso riguardante le conseguenze derivanti per i ricorrenti – tutti operatori sanitari – dal loro rifiuto di farsi vaccinare contro il Covid-19.
Tenuto conto dell'ampio margine di apprezzamento di cui godono gli Stati in materia di politica sanitaria, i Giudici di Strasburgo hanno ritenuto che le misure impugnate fossero proporzionate e giustificate rispetto allo scopo legittimo perseguito, vale a dire la tutela della salute della popolazione in generale, compresa quella dei ricorrenti, nonché degli altrui diritti e libertà.
La Corte ha inoltre considerato che le perdite subite dai ricorrenti fossero una conseguenza inevitabile di un contesto "eccezionale e imprevedibile" di una pandemia globale che infuriava all'epoca dei fatti di causa.
Di qui la decisione unanime che esclude l'avvenuta violazione del diritto al rispetto della vita privata e familiare.

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

FIRST SECTION

CASE OF XXXXX AND OTHERS v. SAN MARINO

(Application no. 24622/22)

JUDGMENT
STRASBOURG
29 August 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of XXXXX and Others v. San Marino,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:
Ivana Jelić, *President*,
Alena Poláčková,

Lətif Hüseynov,
Péter Paczolay,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges*,
and Liv Tigerstedt, *Deputy Section Registrar*,
Having regard to:
the application (no. 24622/22) against the Republic of San Marino lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by nineteen nationals of San Marino, six Italian nationals and one Moldovan national whose details are found in the appended table ("the applicants"), on 30 April 2022;
the decision to give notice of the application to the San Marinese Government ("the Government");
the decision of the Governments of Italy and Moldova not to make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention);
the parties' observations;
Having deliberated in private on 9 July 2024,
Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns a group of health care and social health workers who refused to be vaccinated against Covid-19 (SARSCoV-2, hereinafter "Covid-19"). In consequence, they were affected by one or more measures, mainly, related to their employment.

THE FACTS

2. The applicants were represented by Ms F.M. Bacciocchi, a lawyer practising in Serravalle.
3. The Government were represented by their Agent Ms S. Bernardi, Representative of San Marino to the European Court of Human Rights.
4. The facts of the case may be summarised as follows.

I. BACKGROUND OF THE CASE

5. ln May 2021, the applicants, who are health and social and health workers employed by the Social Security Institute (hereinafter 'SSI' – a public body responsible for the management of the health and social and health sector) were urged by the same body to get vaccinated against Covid-19 pursuant to Section 14 of Law no. 85/2021 concerning the vaccination of public health and social and health personnel. Such invitation was declined by the applicants.
6. The provisions contained in the aforementioned law were amended, pending its implementation, by the subsequent Law no. 97/2021, later ratified by Law no. 107/2021 (which entered into force on 16 June 2021), which laid down specific provisions for the same public sector personnel. Its Section 8 established that in the case that the health and social and health personnel of the SSI declined the invitation formulated pursuant to Section 14 of Law no. 85/2021 the SSI, taking into account the need to ensure the continuity and adequacy of the service, should first consider the possibility of changing the organisation of the service in order to minimise contact with users and, where this was not possible, such employees were ordered to remain on duty, without prejudice to their obligation to take an antigenic test (for Covid-19) every forty-eight hours.

7. The law also provided for a further range of options for unvaccinated staff in the event that reorganisation of the service was not possible (see paragraph 24 below). In particular, the alternative options included the possibility of reassignment to other services of the SSI or to other offices of the Public Administration in vacant job positions with the right to receive the relevant salary or to use holidays and leave accrued in the year 2020, or, as an extreme alternative, if the other options were not viable or were not accepted, the temporary suspension from service with a suspension allowance of 600 euros (EUR) per month before taxes and social security contributions, in addition to the possibility to retain the full amount of any family allowances received.

8. Suspension from service with the relevant allowance also provided for the obligation for the worker to perform socially useful activities, without prejudice to the proportionality of the working hours to the amount of the aforementioned allowance, under penalty of loss of the right to receive such allowance.

9. In the case of health and social and health personnel who could not be vaccinated due to an objective danger caused by documented and certified health conditions, the law provided for them to be placed on leave of absence with the right to receive their full salary.

10. ln cases where the reorganisation of the service did not make it possible to avoid their contact with users, the applicants, having refused to be vaccinated, exercised their right of option pursuant to Section 8 (5) (6) and (7) of Law no. 107/2021. The measures applied to each of the applicants are indicated in the appended table.

II. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

11. In an application by popular initiative (lodged on 27 July 2021 upon the collection of 750 signatures as required by domestic law to obtain access to such a remedy) it was argued that Sections 2 and 6 of Law no. 107/2021 were violating the principle of equality and the correlative prohibition of discrimination, enshrined in the Declaration of the Citizens' Rights and Fundamental Principles of the San Marino Constitutional Order ("the San Marino Constitution"), the European Convention of Human Rights ("ECHR" or "the Convention") and its Protocol No. 12, and the Universal Declaration of Human Rights. It was argued that there was no reason, either legal or scientific, that could support the different treatment between vaccinated and unvaccinated persons because there was no certainty that those who received the Covid-19 vaccine were immune to infection and not contagious: rather, medical research, scientific studies, pharmaceutical companies and international bodies were emphasising this uncertainty, pointing out that vaccinated persons could still contribute to the spread of the virus, so adopting prudent norms even after receiving the vaccine was still recommended. It was further argued that Section 8 of Law no. 107/2021 constituted an abusive interference of public power in the private sphere of healthcare workers and was violating not only the principle of equality but also the right to work, the right to self-determination and the right to health, enshrined in the San Marino Constitution, the ECHR and its Protocol No. 12, and the Universal Declaration of Human Rights. Moreover, whereas the vaccines were experimental and pursuant to Commission Regulation (EC) No. 507/2006 received a "conditional marketing authorisation", the provision of Section 8 of Law no. 107/2021 was also violating the fundamental principles enshrined in the "Nuremberg Code", in the "Declaration of Helsinki", in the "Oviedo Convention", and in the "Universal Declaration on Bioethics and Human Rights" (which are all part of the San Marino legal system pursuant to Section 1 of Law no. 59/1974).

12. The applicants having the nationality of San Marino participated in this procedure, but not the applicants of Italian/Moldovan nationality, it being solely open to voting citizens of the electorate of San Marino (see paragraph 21 below).

13. By means of judgment no. 11 of 2 November 2021, the Constitutional Court admitted the application and, on the merits, confirmed the legitimacy of the impugned law and its compatibility with the San Marino Constitution, the ECHR and other instruments.

14. In particular it considered that according to the case-law of the European Court of Human Rights (ECtHR), although the right to health was not, as such, among the rights guaranteed under the Convention and its Protocols, the positive obligation under Article 2 of the Convention to take appropriate steps to safeguard the lives of those within a State's jurisdiction had to be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, including in the public-health sphere. Against that background, it had to be noted that on 30 January 2020 the World Health Organisation ("WHO") issued a statement declaring Covid-19 a public-health emergency of international concern ("PHEIC") and on 11 March 2020 it declared it a pandemic. While various States put in place emergency measures, the European Union ("EU") Parliament emphasised that the measures could only be justified if they were necessary, proportionate and limited in time. Given the nature of the virus, namely, the possibility of transmitting it due to its imperceptibility until symptoms appear, or until being made aware of the contagion, the principles of prevention and precaution where necessarily at play, nevertheless measures put in place had to reach a fair balance.

15. As to the argument put forward concerning the "legitimacy of the obligation to get vaccinated", the Constitutional Court considered that the law at issue had been enacted in extraordinary circumstances of necessity and urgency. Referring to the ECtHR case-law on the possible restriction of rights under Articles 8, 9, and 10 of the Convention it recalled that such restrictions were possible for the protection of public health which certainly came to play in a global pandemic. The provisions put in place in San Marino had not made it obligatory to get vaccinated but provided for a pre-specified and limited difference in treatment between vaccinated and unvaccinated persons. It was to be noted that according to the ECtHR case-law (see *Vavřička and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, 8 April 2021) even the obligatory vaccination of minors (in relation to certain serious pathologies) had been justified to protect the health of other persons, particularly vulnerable persons. It followed that, in relation to serious diseases, a State was even entitled to make vaccination obligatory and to apply sanctions in the absence of the fulfilment of this obligation.

16. The difference in treatment between Covid-19 vaccinated and unvaccinated persons was justified given the objective and evident different situation between the two. The principle of the collective protection of health implied a temporary sacrifice on behalf of those not vaccinated. The impugned law did not consider that vaccinated persons were immune to the disease but rather, and in line with scientific evidence, that they suffered less serious repercussions and fewer risks of death. Also "vaccinated persons spread the infection less than vaccinated persons". Given that the ECtHR case-law had approved of imposed vaccination, and consequent sanctions in the absence of vaccination, for the collective good, it was evident that the same would hold to simple differences in treatment. In San Marino there was no obligation to get vaccinated against Covid-19 (thus no issue related to consent or self-determination) but solely a recommendation to do so, and any measures

applied to those who chose not to do so had been proportionate to the aim pursued. As to the arguments raised related to the vaccine itself, it was noted that no medical treatment was 100 % risk free and the fact that all Covid-19 vaccines were also not risk free did not justify a declaration to the effect that it was useless or should not be administered.

17. In respect of the proportionality of the measures it was important to point out that the Government (*Congresso di Stato*) had gradually decreased any restrictions in line with the progress of the pandemic in order to limit their effects. The discretion applied by the State had therefore been reasonable and was moreover subject to judicial review. All the elements of the proportionality test (lawfulness, necessity and proportionality) had thus been fulfilled. Indeed, the exceptional and serious nature of the events at issue could not be overlooked together with the idea of social solidarity in such a crucial time. The EU texts relied on by the claimants did not lead to any different conclusion. Resolutions 2361(2021) and 2383(2021) of the Parliamentary Assembly of the Council of Europe (see paragraphs 26 and 27 below) did not exclude such measures rather they considered that they had to be justified, which in the present case they had been given the extraordinary situation of a pandemic.

18. In so far as the claimants complained about the impact on their employment, the law had only prohibited their contact with users. Thus, unvaccinated persons could be offered either other tasks within the same service which did not involve such contact, or reassignment to another service, or the possibility to make use of accumulated leave. If none of those options suited them, they could be suspended – during which time they would, however, receive a monthly indemnity of EUR 600 [maximum]. This had not been a disciplinary sanction, but rather a measure which sought a fair balance between the right to work and the right to health of persons using the health services. The latter group of persons included vulnerable individuals who necessitated health services and could not make the choice to avoid contact with health-care personnel. The more primordial interest of public health prevailed over a temporary restriction of the right to work of single individuals who refused to get vaccinated. Indeed, every individual freedom had its limits in the duty of solidarity towards the community they lived in. This duty of solidarity was all the more relevant in the public-health sector, to which the impugned measures had been limited.

19. In conclusion and bearing in mind that the ECtHR had already had occasion to note that the Covid-19 pandemic is liable to have very serious consequences not just for health, but also for society, the economy, the functioning of the State and life in general, and that the situation should therefore be characterised as an "exceptional and unforeseeable context" (see *Terheş v. Romania* (dec.), no. 49933/20, 13 April 2021) the plaintiffs' claims about the illegitimacy of the impugned law had to be rejected.

III. OTHER PROCEEDINGS

20. Pending the above-mentioned judicial review of constitutionality, four of the applicants (Ms or Mr Battistini, Ms Gabotti, Mr Vignali and Ms Felici), who had been suspended from service, lodged an application before the Judge of first instance (*Commissario della Legge*) in his administrative competence to annul the suspension measure applied to them. The applications lodged by Ms or Mr Battistini, Ms Gabotti and Mr Vignali were declared inadmissible, on procedural grounds (related to the power of attorney), on 7 October 2021. The applicant Ms Felici withdrew her application on 23 December 2021.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

A. Remedies

21. The relevant provision of Law no. 55/2003 concerning the "organisation, incompatibilities, functioning, forms of appeals and proceedings, effects of the decision of the Constitutional Court" reads as follows:

Section 12 (Direct review)

"1. Applications for review of constitutionality may be lodged [...] by a number of voting citizens making up at least 1.5% of the electorate resulting from the last and definitive annual review of the electoral lists.

2. The appeal shall be filed with the Registry of the Constitutional Court (*Collegio Garante della Costituzionalità delle Norme*), which shall transmit a copy thereof to the Heads of State (*Capitani Reggenti*). Appeals against laws or acts having the force of law shall be filed within the mandatory time-limit of forty-five days from the official publication of the law or of the act having the force of law subject to publication. In order to be admissible, the appeal shall clearly indicate the provisions of the law or those having the force of law whose legitimacy is doubtful or controversial, as well as the allegedly infringed provisions and principles of Law no. 59 of 8 July 1974 as amended by subsequent laws."

22. In so far as relevant, the provision of Law no. 68/1989 concerning "administrative jurisdiction, control of legitimacy and administrative sanctions" reads as follows:

Section 9 (Acts subject to appeal)

"The administrative judicial authorities shall be called upon to decide on appeals for lack of competence, excess of power or violation of law, against acts or measures adopted by institutional bodies of the Public Administration in general, including acts of the administrative bodies of the Social Security Institute and of Public Entities and autonomous State Corporations, when they pursue the interests of a natural or legal person.

This shall be without prejudice to different law provisions of judicial protection.

Acts relating to public employment shall be subject to the administrative jurisdiction provided for in this law ..."

B. Emergency legislation

23. Law no. 85/2021, concerning further provisions to loosen the measures of the management of the Covid-19 epidemic, in so far as relevant reads as follows:

Section 14 (Vaccination for health and social and health personnel)

"1. From the entry into force of this Decree-Law and until 31 December 2021, in order to protect public health and maintain adequate safety conditions in the provision of care and assistance, failure to be voluntarily vaccinated for the prevention of SARSCoV-2 infection by health, and social and health personnel working at the Social Security Institute [SSI] and publicly-owned health and social and health facilities, under any contractual formula, shall result in the suspension of the right to perform services or duties involving interpersonal contact with patients or users of the above facilities.

2. Within five days of the entry into force of this Decree-Law, the SSI Office of Personnel and Free Practice shall transmit to the Hospital Department Manager the list of health and social and health

personnel serving at the SSI and publicly owned health and social and health facilities under any contractual formula.

3. Within five days of the date of receipt of the list referred to in paragraph 2, the Hospital Department Manager shall verify the vaccination status of each worker listed therein and forward to the SSI Single Booking Centre the names of unvaccinated persons, also indicating any one of them who has received a certificate of recovery from COVlD-19, and relevant date.

4. Upon receiving the report referred to in paragraph 3, the Single Booking Centre shall formally urge unvaccinated people to be vaccinated against SARSCoV-2 taking into account the possible date of recovery in accordance with the Operational Document "Operational Indications for Anti Covid-19 Vaccinations", referred to in Company Procedure no. 71 of 25 February 2021, indicating the date, time and place of vaccination, by registered mail with acknowledgement of receipt. The notification shall be deemed to have been affected on the date of delivery of the registered letter to the addressee's domicile, and, in any case, on the date when the postal officer declares it undelivered.

5. If the expressly invited worker does not show up for vaccine administration, the Single Booking Centre shall forward his/her name to the SSI Head of Personnel for proper consideration.

6. The Head of Personnel shall consider possible alternative duties to which the unvaccinated worker may be assigned in order to protect public health and maintain adequate safety conditions in the provision of care and assistance, also taking into account actual service needs.

7. If it is not possible to assign the unvaccinated person to alternative duties, he/she shall be placed on compulsory unpaid leave of absence, which shall not be counted for the purposes of the leave referred to in Article 45 of Law no. 41 of 22 December 1972 and subsequent amendments.

8. As an alternative to the leave of absence referred to in paragraph 7, the unvaccinated person may use ordinary and other leaves, and overtime work hours accrued in 2020.

9. If the person is vaccinated, the leave referred to in paragraph 7 shall cease and the person shall be entitled to resume previously held work.

10. If failure to get vaccinated as referred to in paragraph 1 is consequent to a certified health hazard, in relation to specific clinical conditions documented and attested by a general practitioner, and it is not possible to assign the person to alternative duties pursuant to paragraph 6, the SSI Head of Personnel may order paid leave of absence."

24. The relevant provisions of Law no. 107/2021, ratifying Law no. 97/2021 – update of the provisions to loosen the measures of the management of the Covid-19 epidemic – in so far as relevant read as follows:

Section 1 (Purpose)

"1. The objective of this Decree-Law shall be to continue the gradual loosening of the restrictions provided for the containment of the spread of the Covid-19 virus, in line with the progression of the vaccination campaign and on the basis of data on the evolution of infections.

2. Where not in conflict with this Decree-Law and unless otherwise provided for in the following articles, the measures of Decree-Law no. 85 of 30 April 2021, Decree-Law no. 63 of 8 April 2021, Decree-Law no. 62 of 31 March 2021, Decree-Law no. 57 of 23 March 2021, Decree-Law no. 58 of 23 March 2021, and Decree-Law no. 26 of 26 February 2021 shall be extended until 5 a.m. of 2 July 2021."

Section 2 (General Provisions)

"1. It shall be mandatory to properly wear a mask, both outdoors and indoors, except when a person: a) is alone or together with the members of his household; b) is expressly exempted from wearing a mask.
2. As of 7 June 2021, wearing a mask outdoors shall be strongly recommended. Properly wearing a mask indoors shall remain mandatory with the exceptions referred to in paragraph 1, letters a) and b).
3. The requirement referred to in paragraphs 1 and 2 shall not apply to: a) children under the age of six; b) persons with forms of disability that are not compatible with the continuous wearing of a mask and persons interacting with them; c) vaccinated persons.
4. Workers in the private and public sectors who are vaccinated shall be exempt from the requirement to wear a mask.
5. Mass gatherings shall be prohibited in public or private places. A mass gathering shall be a grouping of more than ten persons where it is not possible to maintain a safety distance of at least one metre. This maximum number may be waived in the case of members of the same household or if all persons present, with the exception of cohabiting minors, are vaccinated.
6. The activities of institutional bodies and institutional activities in general shall be allowed in compliance with hygienic and sanitary measures or in the manner established by a special decision of the Government (*Congresso di Stato*). If all persons present are vaccinated or cannot be vaccinated, institutional activities shall be allowed as an exception to the rules on distancing and mask wearing.
7. In all possible cases, meetings and assemblies shall be held remotely. Meetings, conferences, congresses, conventions and the like shall be allowed, in compliance with the applicable sanitary and hygienic measures, with particular regard to social distancing and the proper use of personal protective equipment. The restrictions referred to in this paragraph shall not apply if all participants are vaccinated.
8. In-person educational activities shall be allowed, in compliance with the applicable sanitary and hygienic measures, with particular regard to social distancing and the proper use of personal protective equipment. The restrictions referred to in this paragraph shall not apply if all participants are vaccinated.
9. [...]
10. The declaration of being a member of the same group of cohabitants, as well as proof of being vaccinated or being a person who cannot be vaccinated in compliance with these regulations, shall be a matter of individual responsibility.
11. Buffet catering of food and beverages shall be allowed. It shall be allowed to consume food and drinks while standing, either indoors or outdoors, except at the counter, provided that the time spent at the counter is limited and an interpersonal distance of at least one metre can be guaranteed.
11 bis. In places open to the public where food and drinks are provided, customers shall be served only if they are seated at tables, based on the application of the requirement to maintain a distance of at least one metre between adjacent tables and an interpersonal distance of at least one metre, either indoors or outdoors, accommodating up to six people based on the application of the correct distancing. It shall be possible to derogate from such maximum number only if the persons sitting at the same table belong to the same group of cohabitants or are all vaccinated.

11 ter. The SSI Executive Committee may issue more restrictive provisions with regard to the wearing of masks in their premises."

Section 6 (Provisions on schools)

"1. Vaccinated teaching and non-teaching personnel in schools of all levels are exempt from the requirement to wear a mask inside and outside the school building.

2. Teaching and non-teaching personnel of schools of all levels, who are not or cannot be vaccinated, shall wear a mask at all times inside and outside the school building.

3. Pupils and students in schools of all levels, as well as students of the San Marino Music Institute and the University, shall no longer be required to wear a mask while sitting at their desks.

4. Where an adequate air exchange is not guaranteed as prescribed, and in cases where it is not possible to respect social distancing, wearing a mask shall be mandatory.

5. SSI Departments, in agreement with the Education Department, may amend the provisions referred to in this Article by issuing a special circular."

Section 8 (Vaccination for health and social and health personnel)

"1. Until 31 December 2021 or until the end of the health emergency, in order to protect public health and maintain adequate safety conditions in the provision of care and assistance, the failure of health and social and health personnel working at the Social Security Institute and publicly owned health and social and health facilities, under any contractual formula, to voluntarily be vaccinated for the prevention of SARS-CoV-2 infection may result in the suspension of their right to perform services or tasks involving interpersonal contact with patients or users of the above-mentioned facilities.

2. Upon receiving the notification referred to in Article 14, paragraph 3, of Decree-Law no. 85/2021, the Single Booking Centre shall formally urge those who have not been voluntarily vaccinated to be vaccinated against SARS-CoV-2, and notify the date, time and place of the vaccination by registered letter with acknowledgement of receipt. Notification shall be deemed to have been affected on the date of delivery of the registered letter to the addressee's domicile, and, in any case, on the date when the postal officer declares it undelivered.

3. If the expressly urged worker does not show up for vaccine administration, the Single Booking Centre shall forward his/her name to the SSI Head of Personnel for proper consideration.

4. In relation to employees who have not been voluntarily vaccinated, the SSI Head of Personnel, taking into account the need for continuity and adequacy of service, shall first consider the possibility of changing its organisation so that contact between the affected employee and the users is kept to a minimum. Where such reorganisation is possible, the person who has not been voluntarily vaccinated shall be required to take antigenic swabs every 48 hours at their own expense at a cost at the SSI of 7 Euro per swab.

5. If it is not possible to proceed in accordance with paragraph 4, the SSI Head of Personnel shall consider possible alternative duties to which the unvaccinated person may be assigned, in order to protect public health and maintain adequate safety conditions in the provision of care and assistance, also taking into account actual service needs. The person who has been voluntarily vaccinated may be reassigned only to vacant or temporarily vacant job specifications until the return of the incumbent, which are to be effectively filled either within the SSI or, after consultation with the Directorate General of Civil Service, within the Public Administration or another Public Entity or an Autonomous State Corporation of the Overall Public Sector. Should the person who has not

undergone voluntary vaccination be usefully reassigned pursuant to the preceding sentence, he/she shall receive the salary provided for the Job specification that he/she will temporarily fill, the costs, of which shall be borne by the Budget of the State or of the Public Entity or Autonomous Corporation of reassignment.

6. If it is not possible to assign the person who has not been voluntarily vaccinated to alternative duties and he/she does not wish to avail himself/herself of the alternatives for reassignment referred to in paragraph 5 or of the use of holidays, leave or recover overtime work hours, as referred to in paragraph 8, the SSI Head of Personnel shall temporarily suspend him/her from service. The suspension shall not be relevant for disciplinary purposes and does not result in the termination of incompatibilities provided for public employees. Employees who have not been voluntarily vaccinated shall also be suspended from the right to perform *intramoenia* or *extramoenia* professional activity.

7. Any employee who, as a result of the procedures described in the preceding paragraphs, is temporarily suspended from service shall be entitled to a suspension allowance of 600 EUR per month gross of relevant taxes and SSI and FONDISS contributions, in addition to the retention of the full amount of any family allowances received. The employee who is granted this allowance shall be called to perform socially useful activities specified by the Administration in accordance with the principles of Delegated Decree no. 200 of 29 December 2010 and subsequent amendments, and Regulation no. 8 of 4 November 2020, without prejudice to the proportionality of the working hours to the amount of the aforementioned allowance. The personnel who refuse to be assigned to socially useful activities shall lose the right to receive the suspension allowance, as well as the full amount of any family allowances.

8. As an alternative to the suspension referred to in paragraph 6 and 7, the unvaccinated person may use ordinary and other leave, and overtime work hours accrued in 2020.

9. In the event of vaccination, as of the date of administration of the first dose, the provisions of paragraphs 4, 5, and 6 shall cease, and the person shall be entitled to resume previously performed service.

10. If the failure to get vaccinated as referred to in paragraph 1 is consequent to a certified health hazard, in relation to specific clinical conditions documented and attested by a general practitioner, and it is not possible to proceed according to paragraphs 4 and 5, the SSI Head of Personnel may order a 100% paid leave of absence."

25. Law no. 72/2022 established the end of the health emergency on 1 April 2022. However, with regard to health and social and health personnel, Section 17 of the same law maintained the measures in place in respect of this sector of personnel, specifying that failure to get vaccinated and to receive the relevant booster doses within nine months of the completion of the previous vaccination cycle would entail the implementation of the options already provided for by the previous legislation. Section 17 was repealed on 29 September 2022 by means of Law no. 137/2022.

II. RELEVANT INTERNATIONAL MATERIAL

26. Resolution No. 2361(2021) of the Parliamentary Assembly of the Council of Europe, adopted on 27 January 2021, concerning Covid-19 vaccines: ethical, legal and practical considerations, in so far as relevant, reads as follows:

"1. The pandemic of Covid-19, an infectious disease caused by the novel coronavirus SARS-CoV-2, brought about much suffering in 2020. By December 2020, more than 65 million cases had been recorded worldwide and more than 1.5 million lives had been lost. The disease burden of the pandemic itself, as well as the public health measures required to combat it, have devastated the global economy, laying bare preexisting fault-lines and inequalities (including in access to healthcare), and causing unemployment, economic decline and poverty.

2. Rapid deployment worldwide of safe and efficient vaccines against Covid-19 will be essential in order to contain the pandemic, protect healthcare systems, save lives and help restore global economies ...

3. For the vaccines to be effective, their successful deployment and sufficient uptake will be crucial. However, the speed at which the vaccines are being developed may cause a feeling of mistrust that is difficult to combat. An equitable deployment of Covid-19 vaccines is also needed to ensure their efficacy. If not widely enough distributed in a severely hit area of a country, vaccines become ineffective at stemming the tide of the pandemic. Furthermore, the virus knows no borders and it is therefore in every country's interest to co-operate in ensuring global equity in access to Covid-19 vaccines. Vaccine hesitancy and vaccine nationalism have the capacity to derail the so-far surprisingly fast and successful Covid-19 vaccine effort, by allowing the SARSCoV-2 virus to mutate and thus blunt the world's most effective instrument against the pandemic so far.

...

7. Scientists have done a remarkable job in record time. It is now for governments to act. The Assembly supports the vision of the Secretary-General of the United Nations that a Covid-19 vaccine must be a global public good. Immunisation must be available to everyone, everywhere. The Assembly thus urges member States and the European Union to:

...

7.2.3. ensure that persons within the same priority groups are treated equally, paying special attention to the most vulnerable such as older persons, those with underlying conditions and healthcare workers, especially those who work closely with persons who are in high-risk groups, as well as people who work in essential infrastructure and public services, in particular in social services, public transport, law enforcement and schools, as well as those who work in the retail sector;

...

7.2.6. ensure that every country is able to vaccinate their healthcare workers and vulnerable groups before vaccination is rolled out to non-risk groups, and thus consider donating vaccine doses or accepting that priority be given to countries which have not yet been able to do so, bearing in mind that a fair and equitable global allocation of vaccine doses is the most efficient way of beating the pandemic and reducing the associated socio-economic burdens;

7.2.7. ensure that Covid-19 vaccines whose safety and effectiveness have been established are accessible to all who require them in the future, by having recourse, where necessary, to mandatory licences in return for the payment of royalties;

7.3. with respect to ensuring a high vaccine uptake:

7.3.1. ensure that citizens are informed that the vaccination is not mandatory and that no one is under political, social or other pressure to be vaccinated if they do not wish to do so;

7.3.2. ensure that no one is discriminated against for not having been vaccinated, due to possible health risks or not wanting to be vaccinated;
7.3.3. take early effective measures to counter misinformation, disinformation and hesitancy regarding Covid-19 vaccines;
7.3.4. distribute transparent information on the safety and possible side effects of vaccines, working with and regulating social media platforms to prevent the spread of misinformation;"
27. Resolution No. 2383(2021) of the Parliamentary Assembly of the Council of Europe, adopted on 22 June 2021, concerning Covid passes or certificates: protection of fundamental rights and legal implications, in so far as relevant read as follows:
"1. The socio-economic cost of Covid-19-related restrictions continues to be huge and the political pressure to limit and withdraw them is real and understandable. At the same time, the health situation remains very precarious: Covid-19 is still a disease that could easily get out of control, causing further widespread sickness and death. In this respect, the Parliamentary Assembly recalls its Resolution 2338 (2020) "The impact of the Covid-19 pandemic on human rights and the rule of law", in which it stated that "[t]he positive obligations under the European Convention on Human Rights (ETS No. 5, the Convention) require States to take measures to protect the life and health of their populations". Furthermore, sustainable socio-economic recovery will only be possible once the disease is durably under control. Vaccination will be an essential public health measure for achieving this, but it will be insufficient by itself.
...
3. Vaccination and recovery from past infection may well reduce the risk of transmission, but the extent and duration of this effect are currently uncertain. Furthermore, different vaccines and vaccination regimes may vary in their effectiveness at reducing transmission risk, and in their effectiveness against SARS-CoV-2 variants. A negative test result is only indicative of a historical situation, which can change at any moment after the sample is taken. These differences are relevant to whether specific use cases of Covid passes are medically justified and non-discriminatory.
...
10. If the consequences of refusing vaccination – including continuing restrictions on the enjoyment of freedoms and stigmatisation – are so severe as to remove the element of choice from the decision, it may be tantamount to making vaccination compulsory. This may lead to a violation of protected rights, and/or be discriminatory. The Assembly recalls its Resolution 2361 (2020) "Covid-19 vaccines: ethical, legal and practical considerations", in which it called on member States to "ensure that citizens are informed that the vaccination is not mandatory and that no-one is under political, social or other pressure to be vaccinated if they do not wish to do so". Any undue indirect pressure on people who are unable or unwilling to be vaccinated may be mitigated if Covid passes are available on grounds other than vaccination.
...
The Assembly therefore calls on the member States of the Council of Europe to:
13.1 continue implementing the full range of public health measures needed to bring Covid-19 durably under control, in accordance with their positive obligations under the European Convention on Human Rights, and institute Covid pass regimes only when clear and well-established scientific

evidence exists that such regimes lower the risk of transmission of the SARS-CoV-2 virus to an acceptable level from a public health point of view;

13.2 take full account of the latest evidence and expert advice, in particular from the World Health Organization (WHO), when implementing measures such as Covid passes that involve relaxation of restrictions intended to prevent the spread of the SARS-CoV-2 virus;

13.3 ensure that measures such as Covid passes that exempt their holders from certain restrictions on protected rights and freedoms are applied in such a way as to maintain effective protection against the spread of the SARS-CoV-2 virus and avoid discrimination ..."

28. Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021, on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic provided, in its preamble, as follows:

"(36) It is necessary to prevent direct or indirect discrimination against persons who are not vaccinated, for example because of medical reasons, because they are not part of the target group for which the COVID-19 vaccine is currently administered or allowed, such as children, or because they have not yet had the opportunity or chose not to be vaccinated ...

In addition, this Regulation cannot be interpreted as establishing a right or obligation to be vaccinated".

THE LAW

I. PRELIMINARY OBJECTIONS

A. The parties' submissions

1. The Government

29. The Government submitted, first and foremost, that the application was abusive in so far as the applicants had omitted to mention that four of them had instituted administrative proceedings.

30. In the alternative they considered that all the applicants had not exhausted domestic remedies in reference to the administrative proceedings, which most of the applicants did not undertake, and the ones who did, had not appealed their decisions before the Administrative Judge of Appeals, nor had the latter attempted to lodge a fresh application, or requested that court to suspend the measure temporarily pending proceedings. Moreover, Ms Felici had withdrawn her application before the administrative jurisdiction, she could therefore not even be considered a victim of the alleged violation.

31. As to the effectiveness of administrative proceedings, the Government submitted that despite the Constitutional Court's dismissal of their complaint and its confirmation of the legitimacy of the impugned law as well as its compatibility with the Constitution and the Convention, the applicants could have challenged the impugned law on other grounds such as "violation of legislation, incompetence of the body, inadequate statement of reasons, excess of power, and further procedural profiles". The Government further pointed out that "in the administrative proceedings the applicants could have submitted to the competent judge a further request for a review, through incidental action of the constitutionality of the rules applied to their case and held to be in conflict with other constitutional parameters".

2. The applicants

32. The applicants submitted that once the Constitutional Court had upheld the legitimacy of the impugned law, it was of no use to challenge the suspension measures resulting from that law before the administrative courts. The omission to pursue that avenue was therefore irrelevant to the application. Given that ordinary judges were bound by the findings of the Constitutional Court concerning the law, any applications to the administrative courts had no prospect of success. Moreover, administrative review only concerned "defects of legality" (*vizi di legittimità*) (incompetence, excess of power and violation of legislation) of an act issued by a body of the public administration not a law, which was what the applicants were challenging. Furthermore, contrary to that alleged by the Government at paragraph 31 above, according to Section 13 of Law no. 55/2003, where a question of constitutional legitimacy has been raised and settled in a direct way (by citizens' petition before the Constitutional Court), the same question cannot be reproposed by the administrative judge incidentally, by means of a referral.

33. The lack of any prospects of success was precisely the reason why Ms Felici withdrew her application before the administrative court. There was also no doubt that she had been a victim of the alleged violation under Article 8 alone and in conjunction with Article 14 given that she, like all the other applicants, had been subjected to measures as a result of the impugned law.

34. They concluded that the only remedy that could have examined the legitimacy of the law had been the Constitutional Court, and the applicants who had had access to it, did undertake that remedy relying on the provisions of the Convention and raising arguments to the same effect on the basis of domestic law in a manner which left no doubt that the same complaints that have been subsequently submitted to this Court had been raised at the domestic level. As to the applicants who had had no access to that remedy, the Court's case-law did not require applicants to pursue remedies to which they had no direct access.

B. The Court's assessment

1. General principles

35. The general principles concerning exhaustion of domestic remedies have been recently summarised in *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* ([GC], no. 21881/20, §§ 138-43, 27 November 2023).

36. In particular the Court reiterates that, where an applicant challenges a provision of a statute or regulation as being in itself contrary to the Convention, the Court has held that a remedy recommended under national law to review the compatibility of legislation with provisions of superior legal force is a domestic remedy that must be exhausted, provided that it is directly accessible to litigants (see *S.B. and Others v. Belgium* (dec.), no. 63403/00, 6 April 2004; and, *a contrario*, *Tănase v. Moldova* [GC], no. 7/08, §§ 122 and 123, ECHR 2010) and provided that the court applied to has jurisdiction, in theory and in practice, to abrogate a provision of a statute or of regulations that it considers contrary to a provision having superior legal force (see *Grišankova and Grišankovs v. Latvia* (dec.), no. 36117/02, ECHR 2003-II (extracts), and *Burden v. the United Kingdom* [GC], no. 13378/05, § 40, ECHR 2008). Generally speaking, it is clear from the Court's case-law that whether a particular remedy, allowing for review of a law's compatibility with provisions of superior legal force, is required under Article 35 § 1 of the Convention will depend largely on the particular features of the respondent State's legal system and the scope of jurisdiction of the court

responsible for carrying out this review (see *Communauté genevoise d'action syndicale (CGAS)*, cited above, § 145).

37. Further, the Court reiterates that an applicant is not obliged to have recourse to remedies which are inadequate or ineffective. It follows that the pursuit of such remedies will have consequences for the identification of the "final decision" and, correspondingly, for the calculation of the starting point for the running of the six-month rule (see *Barc Company Ltd v. Malta* (dec)., no. 38478/06, 21 September 2010, *Toniolo v. San Marino and Italy*, no. 44853/10, §§ 34 and 38, 26 June 2012, and the case-law cited therein). In other words, Article 35 § 1 allows only remedies which are normal and effective to be taken into account as an applicant cannot extend the strict time-limit imposed under the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue under the Convention (see *Zaghini v. San Marino*, no. 3405/21, § 47, 11 May 2023, and *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 132, 19 December 2017). However, the provision cannot be interpreted in a manner which would require an applicant to inform the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level, otherwise the principle of subsidiarity would be breached (see *Lopes de Sousa Fernandes*, cited above, § 131, and *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, § 260, ECHR 2014 (extracts)).

38. As concerns the rejection of an application on grounds of abuse of the right of application, it is an exceptional measure (see *Miroļubovs and Others v. Latvia*, no. 798/05, § 62, 15 September 2009) and has been applied only in a limited number of cases. For example, the Court has rejected applications as abusive under Article 35 § 3 of the Convention if they were knowingly based on untrue facts or misleading information (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014; *Pirtskhalaishvili v. Georgia* (dec.), no. 44328/05, 29 April 2010; *Khvichia v. Georgia* (dec.), no. 26446/06, 23 June 2009; *Keretchashvili v. Georgia* (dec.), no. 5667/02, 2 May 2006; and *Řehák v. Czech Republic* (dec.), no. 67208/01, 18 May 2004). Similarly, an application can be rejected as abusive if applicants – despite their obligation under Article 47 of the Rules of Court – fail to inform the Court about new, important developments regarding their pending applications given that such conduct prevents the Court from ruling on the matter in full knowledge of the facts (see *Bekauri v. Georgia* (dec.), no. 14102/02, §§ 21-23, 10 April 2012, and, *a contrario*, *Peňaranda Soto v. Malta*, no. 16680/14, § 35, 19 December 2017).

2. Application to the present case

39. The Court notes that the applicants formulated their complaints at the domestic level principally with reference to the law, its "illegitimacy" *vis à vis* the Convention and its Protocol No. 12 and other domestic and international instruments. In that light, given that the Constitutional Court in San Marino can review the compatibility of legislation with provisions of superior legal force and repeal them, if necessary, it would in principle be a domestic remedy that must be exhausted. However, the Court observes that, in San Marino, access to the Constitutional Court is not directly available to individuals and was not directly available to the applicants in the present case. In the first place, those applicants who were not voters of the electorate, namely the foreign applicants, had no access whatsoever to the procedure undertaken by the applicants of San Marino nationality. Secondly, even the applicants of San Marino nationality, as individual litigants, were not entitled to apply directly

to the Constitutional Court (compare *Parrillo v. Italy* [GC], no. 46470/11, § 101, ECHR 2015) but rather required 750 signatures to obtain such access, which therefore cannot be considered direct. It follows that a complaint before the Constitutional Court had not been required of any of the applicants in the present case, without prejudice to the Court's right to take account of those findings in line with the principle of subsidiarity, if it were to examine the merits of the case.

40. The Court finds it also relevant to point out that while in San Marino an administrative court hearing the merits of a case has the possibility of making a reference to the Constitutional Court, at the request of a party or of its own motion, such an application cannot be a remedy whose exhaustion is required under the Convention (see, *mutatis mutandis*, *Parrillo*, cited above § 101, in respect of the Italian context) in the absence of exceptional circumstances taking into account the specifics of the functioning of constitutional review proceedings in the domestic system at issue (see, for example, *Fizgejer v. Estonia* (dec.), no. 43480/17, §§ 73-77, 2 June 2020).

41. In so far as the Government argued that the applicants should have undertaken administrative proceedings *tout court*, the Court observes that contrary to the French system, ordinary administrative courts in San Marino could not enter into the Convention compatibility of a law (see, *a contrario*, *Zambrano v. France* (dec.), no. 41994/21, 21 September 2021, and *Thevenon v. France*, (dec.), no. 46061/21, 13 September 2022). Moreover, in the present case the matter was already before the Constitutional Court on 27 July 2021 (the same month in which the applicants became affected by these measures) which determined the issue on 2 November 2021. Therefore, there is little doubt that following the Constitutional Court's judgment, it would have been highly unlikely that the administrative courts would have offered any prospect of success, be it in respect of the law in general or the specific measures applied to each of the individual applicants given that the Constitutional Court had examined the Convention compatibility of the impugned provisions and confirmed it (see, *a contrario*, *Zambrano*, cited above § 27, where the *Conseil constitutionnel* did not take decisions on Convention compatibility).

42. Indeed, the Government appear to concede that this was the case given that their argument concerning the effectiveness of administrative proceedings is mainly that the applicants could have challenged the impugned law on other grounds. However, the Court emphasises that according to Article 35 § 1 it is the complaints intended to be made subsequently before the Court that should have been made to the appropriate domestic body (see, *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III, and *Vučković and Others v. Serbia* [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014). In the present circumstances it cannot be held that administrative proceedings had any prospects of success concerning the complaint brought before this Court.

43. In the absence of any accessible and effective remedies which the applicants were required to pursue, the Government's objection of non-exhaustion of domestic remedies, as well as that concerning Ms Felici's victim status, in so far as she had withdrawn the administrative proceedings she had undertaken after the Constitutional Court determination, are therefore dismissed.

44. Similarly, the administrative proceedings being futile, and of no relevance to the assessment of the complaints, there is no question of bad faith or improper behavior by the four applicants who had instituted administrative proceedings (see paragraph 20 above) and omitted to inform the Court thereof, and therefore the Court sees no reason to uphold the Government's objection of abuse of petition, which is therefore also dismissed (compare *Balsamo v. San Marino*,

nos. 20319/17 and 21414/17, § 48, 8 October 2019, and *Aboya Boa Jean v. Malta*, no. 62676/16, § 37, 2 April 2019).

II. OTHER ADMISSIBILITY CONSIDERATIONS

45. The Government raised no further objections. However, given the findings concerning the unavailability of remedies made at paragraph 43 above, the Court considers that it is necessary to examine the timeliness of the application lodged with the Court. In this connection, the Court points out that it is not open to it to set aside the application of this rule solely because the respondent Government have not made a preliminary objection to that effect (see *Blečić v. Croatia* [GC], no. 59532/00, § 68, ECHR 2006-III, and *Peňaranda Soto*, cited above, § 43, and the case-law cited therein).

46. The Court observes that before the entry into force of Protocol No. 15 to the Convention (1 August 2021), Article 35 § 1 of the Convention referred to a period of six months, from the final domestic decision, within which an applicant could lodge application with the Court. Article 4 of Protocol No. 15 has amended Article 35 § 1 to reduce the period from six to four months. According to the transitional provisions of the Protocol (Article 8 § 3), this amendment applies only after a period of six months following the entry into force of the Protocol (as from 1 February 2022), in order to allow potential applicants to become fully aware of the new deadline. Furthermore, the new time-limit does not have a retroactive effect, since it does not apply to applications in respect of which the final decision within the meaning of Article 35 § 1 of the Convention was taken prior to the date of entry into force of the new rule (see the Explanatory Report to Protocol No.15, § 22).

47. The Court reiterates that the requirements contained in Article 35 § 1 concerning the exhaustion of domestic remedies and the six-month (now four-month) period are closely interrelated (see *Jeronovičs v. Latvia* [GC], no. 44898/10, § 75, 5 July 2016). As a rule, the six-month (now four-month) period runs from the date of the final decision in the process of exhaustion of domestic remedies (see *Blokhin v. Russia* [GC], no. 47152/06, § 106, 23 March 2016). However, where it is clear from the outset that no effective remedy is available to an applicant the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Mocanu and Others*, cited above, § 259). Nevertheless, in cases where there is a continuing situation, the period starts to run afresh each day, and it is in general only when that situation ends that the period actually starts to run (see *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 159, ECHR 2009).

48. The Court refers to the extensive case-law to the effect that an application for retrial or similar extraordinary remedies such as requesting a court to review its decision, or requesting the reopening of proceedings, cannot, as a general rule, be taken into account for the purpose of applying Article 35 § 1 of the Convention (see, for example, *Tumilovich v. Russia* (dec.), no. 47033/99, 22 June 1999; *Prystavska v. Ukraine* (dec.), no. 21287/02, 17 December 2002; *Berdzenishvili v. Russia* (dec.), no. 31697/03, 29 January 2004; and *Çinar v. Turkey* (dec.), no. 28602/95, 13 November 2013) except in special circumstances where, for example, it is established under domestic law that such a request does in fact constitute an effective remedy (see, for example, *Shibendra Dev v. Sweden* (dec.), no. 7362/10, 21 October 2014). The Court has also accepted that situations in which a request to reopen the proceedings is successful and actually results in a reopening may be an exception to this rule (see *Sapeyan v. Armenia*, no. 35738/03, § 23, 13 January 2009, and the cases cited therein).

49. Similarly, the Court considers that the situation in the present case may be regarded as falling into a category of exceptional cases. While the Constitutional Court is not a remedy which the applicants were required to pursue in the absence of direct access to it (see paragraph 39 above), the Court cannot ignore that some of the applicants, together with other individuals, reached the threshold of 750 signatories and thus obtained access to that remedy, and that the Constitutional Court accepted their application and examined the same Convention complaints raised before this Court (see paragraph 13 above). The Court emphasises that the national courts should initially have the opportunity to determine questions regarding the compatibility of domestic law with the Convention. In particular, when the Court is called upon to address the complex and sensitive question of the balance to be struck between the various interests at stake for the purpose of verifying the necessity and proportionality of a given restrictive measure, it is essential that this balancing exercise has been carried out beforehand by the domestic courts (see *Communauté genevoise d'action syndicale (CGAS)*, cited above, § 138, and *Zambrano*, cited above, § 26, in the specific context of the Covid-19 pandemic). Furthermore, had the Constitutional Court upheld those arguments and repealed the impugned provisions this would have paved the way for the lifting of the measures applied to all the applicants.

50. The Court observes that the latter's assessment concerns a valuable contribution for its own assessment of the complaints before it, as State authorities are in principle better placed than an international court to assess the local needs and context (see *Communauté genevoise d'action syndicale (CGAS)*, cited above, § 138). In that light, and bearing in mind that Article 35 § 1 cannot be interpreted in a manner which would require an applicant to inform the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level, the Court considers that the relevant time period in respect of all the applicants must be considered to have started to run on the date of the delivery of the Constitutional Court's judgment, that is on 2 November 2021, and therefore that the application was introduced within six months (applicable prior to 1 February 2022).

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

51. The applicants complained that the obligation imposed upon them, as health care and social health workers, to get vaccinated against Covid-19 in accordance with Section 8 of Law no. 107/2021 and subsequent consequences, was contrary to Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The scope of the complaint

52. The Court notes that the applicants complained about the indirect obligation to get vaccinated against Covid-19 (despite this vaccination being still experimental) and about the consequent suspension from their posts or other employment related measures, arising from Section 8 of Law no. 107/2021. They explained that although Law no. 107/2021 did not contain a provision for

vaccination to be forcibly administered, the obligation for healthcare workers was surreptitious and enforced indirectly through the application of immoderate measures, consisting of relocation to another position, if possible, and of the suspension from the service, without salary, only with the possibility of performing socially useful activities in exchange for an allowance of EUR 600. They considered that both compulsory vaccination and restrictions related to a profession amounted to interference for the purposes of Article 8.

53. The Government challenged the attestation that there had been an obligation, as vaccination had been purely on a voluntary basis for the entire population in San Marino without distinction. With reference to the specific health and social and health sector at issue in the present case, the vaccination remained voluntary (contrary to the situation in, for example, Italy, Germany and France) and failure to choose that option only led to suspension in extreme circumstances where no other measure was possible.

54. The Court observes that in *Association of Parents v. the United Kingdom* (no. 7154/75, Commission decision of 12 July 1978, Decisions and Reports (DR) 14, p. 31), the Commission considered that a "voluntary vaccination", that is where States did not compel persons to vaccinate themselves, either directly or indirectly, by imposing sanctions on those who do not get vaccinated, did not amount to an interference with the right to respect for private and family life. Similarly, in *Baytüre and Others v. Turkey* ((dec.), no. 3270/09, §§ 24, 30 and 31, 12 March 2013) where the Government challenged the applicability of Article 8, on the basis that the vaccination administered to the daughter of the applicants (which caused her to be paralysed) concerned a "recommended vaccination", the Court fell short of qualifying the latter as an interference, rejecting the complaint *ratione materiae*.

55. Conversely, where the requirement to undergo vaccination was on pain of a penalty, it could amount to an interference with the right to respect for private life (see *Boffa and Others v. San Marino*, no. 26536/95, Commission decision of 15 January 1998, DR 92-B, p. 27, concerning compulsory vaccination of children against certain diseases). The fact that compulsory inoculations/vaccinations, as an involuntary medical treatment, amounted to interference was confirmed by the Court where the applicant had actually been vaccinated (see *Salvetti v. Italy* (dec.), no. 42197/98, 9 July 2002, and *Solomakhin v. Ukraine*, no. 24429/03, § 33, 15 March 2012) but also where there was an obligation or duty to get vaccinated (i.e. the law provided for vaccination to be compulsory), even if the applicant had not been vaccinated, and had not been forced to be vaccinated (because it could not be directly imposed in the sense that there was no provision allowing for vaccination to be forcibly administered). This was so on the basis that the applicants bore direct consequences of non-compliance with the vaccination duty (see *Vavřička and Others*, cited above, §§ 263 and 293). In the latter case the child applicants had been denied access to nursery school, and the parent applicant had been fined as a result of not vaccinating his child, both of which were found to be interference with the right to respect for private life (ibid., §§ 263 and 264). The significance of those measures was found to be relevant only to the assessment of the intensity of the interference (ibid., § 294).

56. However, the Court observes that in *Vavřička and Others*, the Grand Chamber acknowledged that there existed, among the Contracting Parties to the Convention, a spectrum of policies on vaccination, ranging from one based wholly on recommendation, through those that make one or more vaccinations compulsory, to those that make it a matter of legal duty (§ 278). The Court considered that, where the view is taken that a policy of voluntary vaccination is not sufficient to

achieve and maintain herd immunity, or herd immunity is not relevant due to the nature of the disease, domestic authorities may reasonably introduce a compulsory vaccination policy in order to achieve an appropriate level of protection against serious diseases (§ 288). Indeed, in that case it found that the choice of the Czech legislature to apply a mandatory approach had been justified and that the measures complained of by the applicants, assessed in the context of the domestic system, stood in a reasonable relationship of proportionality to the legitimate aims pursued by the respondent State through the vaccination duty (§ 309). It was not for the Court to determine whether a different, less prescriptive policy might have been adopted, as had been done in some other European States (§ 310).

57. In view of the above, the Court considers that whether the vaccination is compulsory or duty based, as opposed to voluntary or recommended, is relevant to determining the approach to be taken in a given case. It falls thus for the Court to assess what type of system existed in San Marino in relation to the Covid-19 vaccination campaign.

58. The Court observes that Section 8 of the impugned law referred to "voluntarily be vaccinated". Thus, statutorily, vaccination was not compulsory, and no direct vaccination duty was imposed on the applicants (see, conversely, *Vavřička and Others*, cited above, §§ 75 and 260). The same was confirmed by the San Marino Constitutional Court.

59. The applicants argued that "a voluntary or recommended vaccination" could become mandatory indirectly due to the consequences which ensued following the failure to get vaccinated. However, the Court notes that the law in the present case did not impose any statutory sanctions. In particular, failure to get vaccinated could in no way lead to a fine or other administrative sanction (see, conversely, *Vavřička and Others*, cited above, § 263), nor to any disciplinary sanction.

60. Additionally, it did not lead to any automatic consequences on the applicants (such as the non-admission into nursery school for all the unvaccinated children, which in *Vavřička and Others*, cited above, §§ 264 and 294, the Court considered was an interference for the purposes of Article 8 § 2). The impugned law in the present case, which was limited to health and socio-health workers, only referred to "may" have consequences (see paragraph 24 above). Indeed, where it was possible, unvaccinated personnel in this sector remained in their posts subject to minor arrangements limiting their contact with users. Where this was not possible, reassignment to other services or optional social work were offered (within the limits available) and, in the worst-case scenarios, where unvaccinated personnel refused the latter possibility, they were suspended without any remuneration. Each of these measures was based on individual situations and in the light of the needs of the State services. The Court thus considers that none of these measures can be considered as sanctions in disguise (see, *a contrario*, *Sodan v. Turkey*, no. 18650/05, § 49-50, 2 February 2016, concerning a permanent transfer based on private-life considerations).

61. To hold otherwise would mean to consider that any type of consequence, irrespective of its intensity and any other relevant factors, would make a recommended vaccination become compulsory. This cannot be the case, indeed even the Parliamentary Assembly of the Council of Europe in its Resolution No. 2383(2021) considered that "severe" consequences, and not any consequences, of refusing vaccination could be tantamount to making vaccination compulsory (see paragraph 27 above).

62. It follows that, in the present case, in the absence of nationwide or category-wide unescapable and serious consequences, it cannot be held that there was a general vaccination duty.

63. In light of the above, the Court distinguishes the present case from *Vavřička and Others* (cited above, §§ 259-60) where the Court considered that the subject matter of the complaint under Article 8 was the vaccination duty and the consequences on the applicants of non-compliance with it, which could not be dissociated.

64. In the present case, it considers that the subject matter of the case for the purposes of the complaint under Article 8 cannot concern a vaccination duty which did not exist, therefore it solely concerns the specific measures imposed on the applicants as a result, *inter alia*, of their choice not to get the optional vaccination and other relevant circumstances. Thus, it will be for the Court to assess the measures applied to the applicants (see the appended table for details) and to determine whether they fall within the scope of Article 8 in line with the Court's case-law in relation to employment disputes (see *Denisov v. Ukraine* [GC], no. 76639/11, §§ 115-16, 25 September 2018).

B. Admissibility

1. The parties' submissions

65. The Government raised no objections other than those set out above.

66. The applicants submitted that the notion of "private life" also includes activities of a professional or business nature, and according to settled case-law of the Court restrictions imposed on access to a profession can affect "private life", as can the loss of employment. Likewise, dismissal from office has been found to interfere with the right to respect for private life. In essence, employment-related disputes generally engaged Article 8 of the Convention either where a person lost a job because of something he or she had done in private life (reason-based approach) or when the loss of job impacted on private life (consequence-based approach).

67. They contended that, in the present application, the interference resulted from the applicants' choice not to get vaccinated, i.e., from something they did in their private lives. However, the interference also impacted their private lives, because they were removed and kept away from their regular work without their salary and forced to carry out socially useful activities to receive the suspension allowance. They considered that the measures imposed on unvaccinated healthcare workers had affected them to a very significant degree, both financially and emotionally, with serious consequences for their financial situation and their social and professional reputations, also considering their central role in responding to Covid-19 diseases during the pandemic. They relied on their claims for just satisfaction, where, for the purposes of pecuniary damage, the applicants claimed the difference between the allowance received (if any) for performing socially useful activities or the remuneration received as a result of relocation (if they had been relocated) and their regular/usual salary (i.e. the one to which they should have been entitled to in the absence of the legislative intervention at issue). Thus, in their view, Law no. 107/2021 crossed the "threshold of seriousness" for an issue to be raised under Article 8 of the Convention.

2. The Court's assessment

(a) General principles

68. The Court observes that the Government have not raised any objection to this effect. However, it reiterates that the applicability of a provision relates to the Court's competence *ratione materiae* to assess a complaint, and therefore is a matter which goes to the Court's jurisdiction and which it is

not prevented from examining of its own motion (see *Pasquini v. San Marino*, no. 50956/16, § 86, 2 May 2019, and *Pasquini v. San Marino (no. 2)*, no. 23349/17, § 31, 20 October 2020).

69. The Court reiterates that employment-related disputes are not *per se* excluded from the scope of "private life" within the meaning of Article 8 of the Convention. There are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include (i) the applicant's "inner circle", (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation. There are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measure (in that event the Court employs the reason-based approach) or – in certain cases – because of the consequences for private life (in that event the Court employs the consequence-based approach) (see, *Denisov*, cited above, § 115).

70. Under the reason-based approach, complaints concerning the exercise of professional functions have been found to fall within the ambit of "private life" when factors relating to private life were regarded as qualifying criteria for the function in question and when the impugned measure was based on reasons encroaching upon the individual's freedom of choice in the sphere of private life (see, *Denisov*, cited above, §§ 103-04, and the examples cited therein, which in the area of public service, refer to factors such as sexual orientation, close private relationships, choice of clothing and make up, living arrangements and an applicant's beliefs). When the underlying reasons for the impugned measure affecting professional life may be linked to the individual's private life, these reasons themselves may render Article 8 applicable (ibid., § 106).

71. If the consequence-based approach is at stake, the threshold of severity with respect to all the above-mentioned aspects assumes crucial importance. It is for the applicant to show convincingly that the threshold was attained in his or her case. The applicant has to present evidence substantiating consequences of the impugned measure. The Court will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree (ibid., §§ 115-16). The Court has established criteria for assessing the severity or seriousness of alleged violations in different regulatory contexts. An applicant's suffering is to be assessed by comparing his or her life before and after the measure in question. The Court further considers that in determining the seriousness of the consequences in employment-related cases it is appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. This analysis would have to cover both the material and the non-material impact of the alleged measure. However, it remains for the applicant to define and substantiate the nature and extent of his or her suffering, which should have a causal connection with the impugned measure. Having regard to the rule of exhaustion of domestic remedies, the essential elements of such allegations must be sufficiently raised before the domestic authorities dealing with the matter (ibid., § 117).

(b) Application to the present case

72. The Court notes first and foremost that while the suspension order in respect of the twenty-fifth applicant (Ms Vitali) indicated that suspension was to start on 19 July 2021, according to the information supplied by the Government in their observations no measures under Section of 8 Law

no. 107/2021 were applied to her given that she voluntarily vaccinated herself on 21 July 2021. The applicant did not dispute that in her observations in reply.

73. In consequence, in the absence of any measure which could constitute an interference, Article 8 is not applicable to her situation. It follows that the complaint in her regard must be dismissed as incompatible *ratione materiae* with the Convention pursuant to Article 35 §§ 3 (a) and 4.

74. The remaining applicants (hereafter "the applicants") have been affected by one or a combination of the following measures complained of: suspended without pay where they refused to carry out socially useful activities; undertook community service in exchange for an allowance proportionate to the hours worked (but not exceeding EUR 600 per month); or were relocated to vacant posts in the public administration at the same pay or at a lower pay level than they were entitled to prior to the transfer (see the appended table for details). All these measures (alone or in combination) were temporary and lasted between a minimum of less than two weeks and a maximum of around fifteen months; in the majority of cases the measures lasted less than seven months because the applicants either recovered from Covid-19 infection, got vaccinated, were transferred permanently or their contracts came to an end.

75. The Court must therefore answer the question whether these measures affected the applicants' private life, rendering Article 8 applicable.

76. The Court will first examine the way in which a private-life issue could arise in the present case: whether because of the underlying reasons for the measures applied to the applicants or because of the consequences for their private life (see paragraph 69 above, and, for example, *Mile Novaković v. Croatia*, no. 73544/14, § 47, 17 December 2020, and *J.B. and Others v. Hungary* (dec.), nos. 45434/12 and 2 others, § 130, 27 November 2018).

77. The Court has already held at paragraph 64 above that the specific measures imposed on the applicants were a result, *inter alia*, of their choice not to get the optional vaccination and other relevant circumstances. While it reiterates that optional vaccination schemes do not of themselves amount to an interference with Article 8, the Court is ready to accept that the choice whether to get vaccinated or not, which presumably in the present case is based solely on the applicants' concern for their physical integrity, is sufficiently linked to one's personal autonomy to consider that the measures which had been applied to the applicants, in consequence of their refusal to voluntarily vaccinate themselves, had been based, *inter alia*, on reasons encroaching upon the individual's freedom of choice in the sphere of private life. Since the underlying reasons for the impugned measure affecting professional life in the present case are linked, *inter alia*, to the individual's private life, these reasons suffice to render Article 8 applicable (see paragraph 70 above).

78. It follows that the measures complained of (see paragraph 74 above), constitute an interference with the applicants' private life, the significance of which will be relevant to the assessment of the intensity of the interference (see *Vavřička and Others*, cited above, § 294).

79. The Court notes that this complaint, in so far as it concerns all, but the twenty-fifth applicant, is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

1. The parties' submissions

(a) The applicants

80. The applicants claimed that Section 8 of Law no. 107/2021 represented an abusive and illegitimate interference by the public power in their private life and that the provision of relocation or temporary suspension from service (without salary) through their choice not to get vaccinated constituted a violation of their right to respect for private life. They noted that even if it were lawful and in pursuance of a legitimate aim, the measures had nevertheless to be necessary in a democratic society.

81. As to the consequences on their employment arrangements, they submitted that given the concept of human dignity underpinning the spirit of the Convention, the San Marino legislator had overstepped its margin of appreciation as "the penalty" imposed on the applicants had not been proportionate to the aim of stopping the spread of the virus. The "punishment" had thus infringed their human dignity, causing emotional disturbance which affected their psychological well-being, dignity and moral integrity, and it had impaired the very essence of the rights protected by Article 8.

82. The efficacy and safety of Covid-19 vaccines had never been recognised, given that they were new and experimental, against a disease not well known to medical science. The uncertainty of the vaccines, both in terms of efficacy in preventing the infection/contagion, and in terms of safety and adverse effects, could not (and had not to) be ignored by the legislator. The pharmaceutical companies, the scientific community and the relevant national and international organisations, bodies and agencies, have shown the scientific uncertainties of the Covid-19 vaccines, both in terms of efficacy (in preventing the infection and the contagion) and in terms of safety (given the lack of studies on possible medium and long-term side effects).

83. The applicants emphasised that all Covid-19 vaccines, as reported in their respective official datasheets, were licensed for the prevention of symptomatic Covid-19 disease and not for the prevention of asymptomatic infection. Accordingly, when scientists were talking about "efficacy" of the Covid-19 vaccines, they referred to the effect of the vaccine on the symptoms, and not to the prevention of infection; when pharmaceutical companies claimed that their product was 95% effective, it meant that the vaccine had reduced symptoms of the disease in a certain percentage of people who had tested positive in trials; it did not mean that, among the vaccinated people, 95% of them were immune. It followed that the vaccines were not expected to prevent infection, but only to modify the symptoms of infected people. The applicants submitted numerous supporting documents, including package leaflets of the vaccines, consent forms, various studies, information notices and guidelines by national and international bodies, emphasising the experimental nature of these vaccines and the scientific uncertainties about their efficacy in preventing infection and their safety or adverse effects.

(b) The Government

84. The Government submitted that the Constitutional Court had already held that the legislator had exercised its legislative power in full compliance with the principle of legality pursuant to Article 2, paragraph 2, of Constitutional Law no. 183/2005. Law no. 107/2021 was part of the overall regulatory framework adopted by the national legislator in order to update and adjust the restrictive measures to tackle and manage the Covid-19 epidemic and was based on the state of medical and scientific knowledge at that specific moment in time. Considering the positive evolution of symptomatic cases and infections in San Marino, on the one hand, Law no. 107/2021 intended to

make less burdensome or, in some cases eliminate, in the areas subject to lower risk, the restrictions already imposed by previous regulatory acts. On the other hand, with reference to health and social and health personnel, the legislator confirmed the provision, already contained in the previous Law no. 85/2021, in order to protect public health and maintain adequate safety conditions in the provision of care and assistance while introducing broader alternative employment opportunities in other sectors of the public administration other than the SSI, thereby increasing the chances of effective relocation. The option introduced by the legislator had been the result of the necessary balancing of the need to protect individual freedom and self-determination in relation to treatments affecting individual health with the need to protect public health.

85. In particular, Section 8 of Law no. 107/2021 provided several options for persons who chose not to vaccinate themselves, including, the reorganisation of the service so that contact between the affected employee and the users is kept to a minimum; alternative duties to which the unvaccinated person could be assigned, taking into account actual service needs; the use of holidays, leave or recover overtime work hours accrued in 2020; temporary suspension from service (with a suspension allowance in exchange for the performance of socially useful activities (see paragraph 24 above). It was only personnel who refused to be assigned to socially useful activities who lost the suspension allowance, as well as the full amount of any family allowances (sub-paragraph 7 of Section 8).

86. Moreover, according to sub-paragraph 10 of Section 8, persons who had chosen not to vaccinate themselves due to a certified health hazard, in relation to specific clinical conditions documented and attested by a general practitioner, could benefit of 100% paid leave of absence where reorganisation or reassignment was not possible.

87. The Government submitted that the need to balance the individual rights and those of the community had become dramatically topical during a health emergency with very specific characteristics, initially defined by the WHO as an internationally relevant public health emergency (30 January 2020) and then considering the levels of diffusion and seriousness reached at a global level, classified as a pandemic (11 March 2020). In such a situation, the right of each person to self-determination, not only in relation to his own health but in relation to every aspect of private life, could be legitimately restricted – as *de facto* had occurred in many States – for the sake of the entire community. This was by virtue of the principle of horizontal solidarity that connected each member of the community to the other members of the community. Thus, the San Marino legislator, adopted, on the basis of the scientific evidence available at the time, the impugned restrictive measures to cope with such emergency, with a purely public purpose.

88. The specific measures introduced by Section 8 for health and socio-health sector personnel were deemed necessary because of the increased risk associated with performing work duties in close contact with people who were particularly vulnerable because of their health conditions and in order to ensure the continuity and efficiency of the socio-health service at a particularly critical time. The timeliness of the measures aimed at preventing any increase in the epidemiological curve had been a decisive factor to combat the virus, and it was for that reason that the San Marino legislator promoted the vaccination campaign and adopted the measures referred to in Section 8 with respect to the personnel of the health and socio-health sector. The Government submitted that vaccination

of health and social health workers served the purpose of protecting both the employees and the patients from the risk of infection.

89. Contrary to what the applicants claimed, vaccination was introduced by the legislator after carefully assessing and examining the scientific evidence available at the time concerning the efficacy and safety of the Sputnik V and Pfizer vaccines used by the Republic of San Marino during the vaccination campaign. The outcome of the so-called phase 3 studies on the Sputnik V vaccine, a vaccine that had already been distributed on 11 August 2020 by the Russian Ministry of Health, had already been published in February 2021, where it had been shown that the vaccine had an overall efficacy rate of 91,6% and 100% efficacy in the ease of moderate to severe infections. Studies had also shown no unusual side effects, with only flu symptoms, headaches, asthenia or soreness in the area of inoculation. With reference to the Pfizer vaccine, on 28 January 2021, the EMA (European Medicines Agency) published the first pharmacovigilance report on this vaccine, which had been based on the available studies on the [then] current vaccinations in Europe. The report had highlighted the substantial safety of the Pfizer vaccine, noting that the benefits of vaccination outweighed the risks. In their view, scientific data had also been acquired regarding the efficacy of vaccines in reducing contagion.

90. The measures put in place had thus not been unreasonable or disproportionate in relation to the legitimate aim pursued. The measures imposed on the applicants had not definitively affected their working position, as they were limited to the period of the health emergency and had been terminated at the latest on 1 October 2022. They, moreover, had had no effect for disciplinary or social security purposes. Furthermore, the reduction in the payment, in some cases, or the non-payment, in other cases, of the allowance for socially useful activities was a consequence of the failure of the applicants to perform, in whole or in part, the socially useful activities on which the payment of that allowance depended. More globally, the reduction of their income was just a consequence of the impossibility to carry out their usual functions because of a force-majeure situation, and their decisions in that respect. In a nutshell, with Law no. 107/2021, the legislator, having to strike a prudent and correct balance between the protection of collective health and the rights of each individual, had undoubtedly deemed the former to prevail as had also been confirmed by the Court in its case-law.

2. The Court's assessment

(a) General principles

91. To determine whether an interference entailed a violation of Article 8 of the Convention, the Court must examine whether it was justified under the second paragraph of that Article, that is, whether the interference was "in accordance with the law", pursued one or more of the legitimate aims specified therein, and to that end was "necessary in a democratic society" (see *Vavřička and Others*, cited above, § 265). An interference will be considered "necessary in a democratic society" for the achievement of a legitimate aim if, it answers a "pressing social need" and, in particular, is proportionate to the legitimate aim pursued (see *Boffa*, cited above, § 4 *in fine*, and *Vavřička and Others*, cited above, § 273).

92. The Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the

Court. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to evaluate local needs and conditions and to decide what is in the public interest (see, among many other authorities, *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V; and *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 98, 25 October 2012). In particular, healthcare policy matters come within the margin of appreciation of the national authorities, who are best placed to assess priorities, use of resources and social needs. In this field, the Court has already had occasion to state that the margin of appreciation afforded to the States must be a wide one (see *Communauté genevoise d'action syndicale (CGAS)*, cited above, § 160, and *Vavřička and Others*, cited above, §§ 274 and 280).

(b) Application to the present case

93. The Court notes that none of the arguments brought to its attention are capable of putting into question the lawfulness of the measures put in place, which was also confirmed by the Constitutional Court.

94. With regard to the aims pursued by those measures, as argued by the Government and as recognised by the Constitutional Court, the objective of the measures was to protect public health and maintain adequate safety conditions in the context of a pandemic which posed a serious risk to the population at large. The Court has already had occasion to note that the Covid-19 pandemic was liable to have very serious consequences for health (see *Terheş v. Romania* (dec.), no. 49933/20, 13 April 2021, and *Fenech v. Malta*, no. 19090/20, § 96, 1 March 2022). As noted by the Constitutional Court, under Article 2 of the Convention member States have a positive obligation to take appropriate steps to safeguard the lives of those within their jurisdiction.

95. Indeed, in relation to the Covid-19 pandemic the Court did not exclude that individuals could be victims of an alleged violation of Article 2 upon substantiating that in their own circumstances the acts or omissions of the State have or could have put their life at real and imminent risk (see *Fenech*, § 104, cited above). In a prison context, the Court also held that given the nature of Covid-19, its well-documented effects, as well as the fact that it is easily transmitted from one person to another (*via* droplets or airborne particles containing the virus), in order to protect physical well-being of vulnerable individuals, the authorities had the obligation to put certain measures in place aimed at avoiding infection. It had also considered that the passage of time brought along extended scientific knowledge of the virus as well as relevant responses (both through vaccinations and medical treatment). All those factors had made it possible for Governments to adapt their policies and protocols to the changing circumstances (ibid., §§ 129-30).

96. There is therefore no doubt that a series of restrictive measures in the health sector adapted to the constant evolution of the Covid-19 pandemic, as the ones in the present case, pursued the legitimate aim of the protection of health and the protection of the rights and freedoms of others.

97. The Court notes that on 31 December 2020 WHO validated the first anti-Covid-19 vaccine through the emergency use procedure. On 5 May 2023, following a mass vaccination campaign (more than 13 billion vaccine doses administered worldwide) which had made it possible to contain the effects of the disease, WHO lifted the alert classifying Covid-19 as a public-health emergency of international concern. By that date, more than 766 million cases of Covid-19 infection and almost 7 million deaths had been recorded worldwide (see *Communauté genevoise d'action syndicale (CGAS)*,

cited above, §§ 17-18, and the references therein). The Court has already considered that that situation was to be characterised as an "exceptional and unforeseeable context" (see *Terheş*, and *Fenech*, § 96, both cited above).

98. It is in that context, and without the benefit of hindsight, that the Court must determine whether the measures imposed on the applicants were necessary in a democratic society.

99. The applicants argued that, as unvaccinated persons, they did not pose a higher risk to others than vaccinated persons. The Constitutional Court in San Marino found otherwise (see paragraph 16 above). The Court observes that on the material available at the time, the Parliamentary Assembly of the Council of Europe considered that "Vaccination and recovery from past infection may well reduce the risk of transmission, but the extent and duration of this effect are currently uncertain" (see paragraph 27 above). However, while the applicants' submissions are based to a large extent on that argument, the Court need not determine that question. This is so because it is undisputable that unvaccinated persons (which was the situation of all persons prior to the arrival of the vaccine) were and remained, both susceptible to the infection and in a position to contaminate and spread the virus, which was actively circulating at the time (2021-2022). Thus, the maintenance of protective measures in respect of the entire population, including the applicants, and particularly the vulnerable population dependent on health and socio-health facilities continued to pursue a pressing social need, at the time when the impugned measures were put in place, which was before 5 May 2023.

100. Further, the Court cannot ignore that the impugned law was a result of a global reduction of restrictive measures, in the light of the availability of vaccination in 2021, which became necessary to avoid the world coming to a standstill and further economic decline. Thus, the Court considers that even if the effectiveness of vaccination in limiting contagion was still dubious, it was not unreasonable to alleviate measures in respect of vaccinated persons who themselves were less at risk, while maintaining them for the applicants who, apart from certainly posing a risk to others, also remained themselves at risk of infection and serious consequences on their health. Indeed, the applicants did not dispute that vaccination was effective in terms of diminished symptoms, thus implicitly that unvaccinated people were more vulnerable to serious consequences of the disease (a factor already scientifically established at the time as admitted by the applicants, see paragraph 83 above). Moreover, besides concerns for the applicants' own health, it also cannot be ignored that in the likely event that the applicants fell ill, their sick-leave absence – which was possibly long-term in the event of serious symptoms – would also have been a burden on the State services, particularly in one of the most important sectors, namely health and socio-health care, which had been particularly solicited at the time.

101. As to whether a fair balance has been reached between the above-mentioned public interests and the individuals' rights under Article 8 concerning their employment, the Court observes that the applicants have been affected by one or a combination of the following measures complained of: suspension without pay where they refused to carry out socially useful activities; undertaking community service in exchange for an allowance proportionate to the hours worked (but not exceeding EUR 600 per month); or relocation to vacant posts in the public administration at the same pay or at a lower pay level than they were entitled to prior to the transfer (see the appended table for details). All these measures were temporary and lasted between a minimum of less than two

weeks and a maximum of fifteen months; in the majority of cases the measures came to an end in less than seven months because the applicants either recovered from Covid-19 infection, got vaccinated, were transferred permanently or their contracts came to an end.

102. Indeed, in relation to the implication of these measures on the applicants, the latter did not explain in what way they had been emotionally affected by them, or in what way their dignity had been affected. Given that the vaccination was voluntary, and the applicants were free not to take it – an opportunity which they availed themselves of – in reaching the relevant fair balance it was solely the applicants' financial interests which the State had to balance against the momentous competing interests of the community as a whole.

103. In so far as at the applicants referred to the financial repercussions which they had suffered, by relying on their non-pecuniary just satisfaction claims, the Court observes that they had suffered financial losses varying from around EUR 500 to around EUR 16,000 (with two exceptions, the seventh and twenty-fourth applicants, amounting to around EUR 26,000 and EUR 74,000 respectively – which in the latter case the Government claimed to be EUR 60,000) (see the appended table for details). The Government challenged parts of those calculations for some of the applicants, but the Court considers that any discrepancies are not sufficiently consequential to be determined at this stage. Indeed, the applicants failed to set out any argument as to how such a reduction in their salary, or no salary at all (where they chose to not to undertake the voluntary work option) had worsened the material well-being of each applicant and their respective families.

104. In this connection the Court notes that – always on the sole basis of the sums as set out by the applicants, which remained challenged by the Government – the losses allegedly incurred by some of the applicants amounted to a few hundred euros (see, for example, the second and eight applicants). While it is true that for the others it was significantly more substantial, the Court observes that with one exception (the ninth applicant) the applicants having suffered the biggest losses (around and over EUR 10,100) occurred where the applicants refused to undertake any socially useful work whatsoever (see, for example, the seventh and twenty-fourth applicants) or for a substantial amount of time (see, for example, the first, sixth and twenty-first applicants). The applicants presented no justification for their refusal to undertake the socially useful activities in cultural institutes, or other sectors, offered to them. In the Court's view it could not be expected of individuals to continue to receive a pay when refusing to undertake any work whatsoever.

105. As for the majority of the applicants, they were relocated for at least part of the time and continued to receive a pay in exchange for their services in another post, albeit, sometimes at a lower salary and/or received allowances in exchange for the hours of socially useful activities performed according to the needs available or their choice in this respect. Except for the ninth applicant, none of these applicants, who actually performed work for a substantial amount of time, lost more than EUR 10,100.

106. There is no denying that the Covid-19 pandemic demanded adaptation and special measures to counteract its effects, it nonetheless caused significant and even huge financial losses, as well as an increase in unemployment, in various sectors, businesses and industries. The Court considers that such losses are an unavoidable consequence of a global pandemic and the exceptional and unforeseeable context States found themselves in at the relevant time.

107. Moreover, the Court observes that the State of San Marino had put forward a number of possibilities, and that the measures ultimately applied to each applicant had been dependent on the possibilities of the services within which they worked, or any other needs in the public sector, as well as their own choices in that regard.

108. In view of the above and recalling that, in adopting legislation intended to strike a balance between competing interests, States must in principle be allowed to determine the means which they consider to be best suited to achieving the aim of reconciling those interests (see *Vavřička and Others*, cited above, § 273), the Court considers that the choice of the San Marino legislature to apply a graduated number of measures effecting employment to a small number of individuals involved in the health and socio-health sector with the aim of protecting the health of the population in general, including the applicants themselves, and the rights and freedoms of others, was justified and stood in a reasonable relationship of proportionality to the legitimate aims pursued by the respondent State. It thus cannot be said that the latter exceeded its wide margin of appreciation in health care policy matters.

109. It follows that there has been no violation of Article 8 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 AND ARTICLE 1 OF PROTOCOL No. 12

110. The applicants further complained under Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention that according to Section 8 of Law no. 107/2021 only vaccinated persons could continue pursuing their professions in their posts and that Sections 2 and 6 of Law no. 107/2021 provided special liberties from restrictions only to vaccinated persons. This in their view constituted discriminatory treatment, contrary to Article 14 of the Convention and Article 1 of Protocol No. 12, which read as follows:

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 1 of Protocol No. 12

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

A. The parties' observations

1. The applicants

111. The applicants submitted that Law no. 107/2021 had been discriminatory in respect of unvaccinated healthcare workers in so far as its Section 8 provided for them be moved and/or suspended from their service (with the relevant conditions mentioned above), and its Sections 2 and 6 had given preferential treatments to vaccinated people, exempting them from the restrictions: such as respecting the distancing requirement, the ban on gatherings and the use of face masks in public spaces.

112. They considered that no legal or scientific reason could support this difference of treatment. In particular, the need to protect public health could not constitute valid justification as there was no

certainty that those who got vaccinated were immune and not contagious: rather, the scientific community emphasised that vaccinated people might contribute to the spread of the virus, with the possibility of infection and contagion. It was for that reason that all the relevant bodies had recommended continued prudent norms even after receiving the vaccine. The applicants reiterated their submissions set out above (see paragraph 83).

113. The objective confirmation that the different treatment between vaccinated and unvaccinated persons was not justified, could also be seen through the data of contagions recorded by the SSI of San Marino, which demonstrated that compared to 2020, in 2021 the number of infections doubled. Comparing the update statements of 13 December 2021 and 12 December 2020, it transpired that over the same period in 2020 there had been 147 new cases detected and 269 active positive cases, while in 2021 there had been 375 new cases and 528 active positive cases.

2. The Government

114. The Government submitted that Parliament had carefully assessed the evolution of the epidemic curve and, as a result of the massive vaccination campaign that started in February 2021, had introduced Law no. 107/2021 with the aim of gradually loosening the restrictive measures previously imposed, establishing, in the areas of lower risk, a differentiated treatment for vaccinated and unvaccinated persons. This different regime had been introduced on the basis of the scientific evidence available during the relevant period which proved the effectiveness of the vaccination campaign, the reduced infections as a result of vaccination and in consequence the reduced possibility of vaccinated persons to spread the virus. Moreover, the legislator did not take into account only the subjective characteristics of the addressees of the rule, i.e. their status as vaccinated or unvaccinated persons, but also the objective context of its application. The loosening of preventive measures had thus been adapted to the context, including the workplace, in which the rules were to be implemented.

115. As to the impugned Section 8, the Government submitted that in the health and social health sector contact with people who were ill and therefore particularly vulnerable and fragile, and whose health had to be protected from the risk of possible Covid-19 infection through stricter pharmacological (vaccination) and non-pharmacological (masks) prevention measures, was very high. This could not be said of other contexts such as those concerned by Section 2 and 6 of Law no. 107/2021 where the diffusion of the virus entailed a lower risk compared to the health context.

116. As noted by the Constitutional Court those measures had been justified by the principle of community protection, which, in order to protect the health of all citizens, imposed the temporary and limited restriction of the rights of unvaccinated persons. Moreover, no legal text had stated that vaccinated persons were automatically immune. The basis for the differentiation with unvaccinated persons had been the statistical data corroborated by official science and health institutions, according to which vaccinated persons had a much lower risk of serious illness and/or death than unvaccinated persons. Likewise, vaccinated persons carried the infection less than unvaccinated persons.

117. In relation to the numerical data set out by the applicants the Government submitted that what was relevant was not the number of contaminations in 2021 but the reduced number of deaths and hospitalisations following vaccination.

B. The Court's assessment

1. The complaint in respect of Section 6 of Law no. 107/2021

118. The Government have not raised any objection in this respect. However, the Court has already held that it is not prevented from examining of its own motion an applicant's victim status since it concerns a matter which goes to the Court's jurisdiction (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 70, ECHR 2016 (extracts); *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, § 117, 14 December 2017; and *Unifaun Theatre Productions Limited and Others v. Malta*, no. 37326/13, § 64, 15 May 2018).

119. The Court reiterates that, in order to be able to lodge an application in accordance with Article 34 of the Convention, an individual must be able to show that he or she was "directly affected" by the impugned measure (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008, and *Communauté genevoise d'action syndicale (CGAS)*, cited above, § 105). The Court has consistently held in its case-law that the Convention does not provide for the institution of an *actio popularis* and that its task is not normally to review the relevant law and practice *in abstracto*, but to determine whether the manner in which they were applied to, or affected, the applicant gave rise to a violation of the Convention (see, among other authorities, *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 75, 14 January 2020; *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015; and *N.C. v. Italy* [GC], no. 24952/94, § 56, ECHR 2002-X). The Convention does not permit individuals or groups of individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, § 460, 9 April 2024, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014).

120. The Court notes at the outset that, although the burden is on the applicants to produce reasonable and convincing evidence as to their victim status (see *Mittendorfer v. Austria* (dec.) no. 32467/22, § 31, 32467/22, 4 July 2023) at no point in their applications or submissions have the applicants explained in what way they had been affected by Section 6 of Law no. 107/2021 which concerned schools. Indeed, none of them claimed to be students or to having worked in a school at the time when the provision was in force. It follows that the applicants cannot be considered as having been affected by the impugned provision of the law (compare *Zambrano*, cited above, § 43).

121. Accordingly, this part of the complaint must be declared inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention for being incompatible *ratione personae* with the provisions of the Convention.

2. The complaint in respect of Sections 2 and 8 of Law no. 107/2021

(a) General principles

122. The Court notes that whereas Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law" (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 53, ECHR 2009), and beyond, in so far as its paragraph 2 further provides that no one may be discriminated against by a public authority (see *Savez crkava "Riječ života" and Others v. Croatia*, no. 7798/08, § 104, 9 December 2010). According to the Explanatory Report on Article 1 of Protocol No. 12, the scope of protection of that Article concerns four categories of cases, in particular where a person is discriminated against: "i. in the enjoyment of any right specifically granted to an individual under national law; ii. in the enjoyment

of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies); iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)." Therefore, in order to determine whether Article 1 of Protocol No. 12 to the Convention is applicable, the Court needs to establish whether the applicants' complaints fall within one of the four categories mentioned in the Explanatory Report (ibid., §§ 104-05).

123. The notion of discrimination prohibited by both Article 14 of the Convention and Article 1 of Protocol No. 12 is to be interpreted in the same manner, namely, "discrimination" means treating differently, without an objective and reasonable justification, persons in similar situations (see *Sejdić and Finci*, cited above, § 55).

124. Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 61 and 70, ECHR 2010, and *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23). It lists specific grounds which constitute "status" including, *inter alia*, sex, race and property. However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see *Engel and Others v. the Netherlands*, 8 June 1976, § 72, Series A no. 22, and *Carson and Others*, cited above, § 70) and the inclusion in the list of the phrase "any other status" (in French "*toute autre situation*"). The words "other status" have generally been given a wide meaning (see *Carson and Others*, cited above, § 70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift v. the United Kingdom*, no. 7205/07, §§ 56-58, 13 July 2010; *Kiyutin v. Russia*, no. 2700/10, § 56, ECHR 2011; and the *Advisory opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date* [GC], request no. P16-2021-002, French *Conseil d'État*, § 72, 13 July 2022). The same holds true for the purposes of Article 1 of Protocol No. 12.

(b) Application to the present case

125. The Court considers that even assuming that any of the two provisions are applicable in the present case and particularly that a person's unvaccinated status can be considered as falling under "any other status", the complaint is inadmissible for the following reasons.

126. The Court has already held, at paragraph 108 above, in relation to Section 8 of the impugned law, that the choice of the San Marino legislature to apply a graduated number of measures effecting employment to a small number of individuals involved in the health and socio-health sector with the aim of protecting the health of the population in general, including the applicants themselves, and the rights and freedoms of others, was justified and stood in a reasonable relationship of proportionality to the legitimate aims pursued by the respondent State and that it cannot be said that the latter exceeded its wide margin of appreciation in health care policy matters.

127. For the same reasons the Court considers that any difference in treatment as a result of Section 8, as well as of Section 2 of the impugned law whose implications were even less intense for the

applicants, was objectively and reasonably justified. Indeed, the Court considers that mask-wearing and protective distancing (referred to under Section 2 of the impugned law) as temporary measures during a global pandemic, are measures of limited intensity, while the applicants have not indicated what mass gatherings they wished to attend and were prohibited from so doing (see in this connection the Court's reasoning at paragraph 120 above).

128. Furthermore, the Court notes that, as admitted by the applicants, their complaint in relation to Section 2 of Law no. 107/2021 concerns a preferential treatment given to vaccinated persons, in the framework of the alleviation of restrictive measures during the Covid-19 pandemic. The Court has already held at paragraph 100 above that it was not unreasonable to alleviate measures in respect of vaccinated persons who themselves were less at risk, while maintaining them for the applicants who remained themselves at risk of infection and serious consequences to their health. Additionally, a limited preferential treatment (see the preceding paragraph) was objectively and reasonably justified in so far as such preferential treatment encouraged the uptake of vaccination allowing for the Covid-19 pandemic to be durably under control (see paragraph 97 above with reference to *Communauté genevoise d'action syndicale (CGAS)*, cited above, §§ 17-18). Reiterating that the margin of appreciation afforded to the States in health care policy is a wide one (see *Communauté genevoise d'action syndicale (CGAS)*, cited above, § 160, and *Vavřička and Others*, cited above, §§ 274 and 280) and bearing in mind the temporary nature of the measures put in place, their limited intensity, and the exceptional context in which they took place, the legislature's policy choice in the alleviation of restrictive measures in respect of vaccinated persons cannot be considered discriminatory.

129. It follows that this part of the complaint must be rejected as manifestly ill-founded, in accordance with Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Article 8 in respect of all but the twenty-fifth applicant admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 29 August 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Ivana Jelić
President

APPENDIX

Omissis