Right to protection from climate change: the ECtHR weighs in

On 9 April 2024, the Grand Chamber of the European Court of Human Rights (ECtHR) handed down a landmark judgment in *Verein KlimaSeniorinnen Schweiz and others v Switzerland* (*application no 53600/20*) and two further decisions in three much anticipated cases regarding climate change (*Carême v France* (*application no 7189/21*); *Duarte Agostinho and others v Portugal and others* (*application no 39371/20*)).

While *Carême* and *Duarte Agostinho* failed on admissibility or jurisdictional grounds, the ECtHR in *KlimaSeniorinnen* found that, in its approach to tackling climate change, Switzerland had violated Article 8 (right to respect for private and family life) and Article 6(1) (access to court) of the European Convention on Human Rights (ECHR) (*see box "Key findings"*).

Key findings

In *Verein KlimaSeniorinnen Schweiz and others v Switzerland*, the European Court of Human Rights (ECtHR) held that:

- Switzerland had violated Article 8 of the European Convention on Human Rights (ECHR) by failing to comply with its positive obligations under the ECHR concerning climate change. It held that the Swiss authorities had not acted in good time and in an appropriate way and a consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework to mitigate the effects of climate change.

- Switzerland had violated Article 6(1) (access to court) of the ECHR. The ECtHR held that the national administrative authority and the national courts had given inadequate and insufficient consideration when rejecting the applicants' original Swiss legal action and, under national law, no other avenues had been available to bring the complaints to court.

The applicants also alleged violation of Article 2 (right to life) and Article 13 (right to an effective remedy) of the ECHR. The ECtHR found that, while it would have regard to and apply many of the same principles developed under Article 2 when examining environmental issues, its judgment examined the complaint from the perspective of Article 8 alone, while the Article 13 arguments were subsumed within the consideration of Article 6 and dealt with in that context.

Standing of the applicants

The complaint was brought by four women and a Swiss association, Verein KlimaSeniorinnen Schweiz, whose approximately 2,500 members are women, most over the age of 70, and who are concerned about the consequences of climate change on their living conditions and health.

The ECtHR held that the individuals' applications were inadmissible because they did not fulfil the high threshold for victim-status criteria under Article 34 of the ECHR. Individual applicants are required to show that they are personally and directly affected by governmental action or inaction for climate change complaints.

However, the ECtHR held that the Swiss association did have standing. The ECtHR outlined some considerations specific to climate change that pointed in favour of recognising the Swiss association, and associations more generally, as having standing. It found that intergenerational burden-sharing has particular importance in the climate context, as collective action through associations, or other interest groups, may be one of the only means through which those at a representational disadvantage can be heard and through which they can seek to influence decision making.

In granting standing, the ECtHR set out some key principles:

- The specific considerations relating to climate change weigh in favour of recognising that an association has standing as the representative of individuals whose rights are or will be affected.

- It is appropriate in the context of climate change to acknowledge the importance of allowing associations to have recourse to legal action for the purpose of protecting the human rights of those affected by, and those at risk from, adverse effects of climate change.

The ECtHR set out the following test for standing in the context of climate change. The association must be:

- Lawfully established in the jurisdiction concerned or have standing to act there.

- Able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of its members', or other affected individuals', human rights against the threat of climate change.

- Able to demonstrate that it is genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction from the threats of climate change.

The test is broad and many civil society organisations and non-governmental organisations (NGOs) will be able to meet the threshold. This contrasts with the high bar for individuals to establish victim status. It may signal a departure from conventional thinking on standing under the ECHR in light of climate change risk, which the ECtHR was at pains to emphasise, and give rise to an increase in associations bringing complaints as the sole applicant.

Access to court

The ECtHR held that there had been a breach of Article 6(1) because the original Swiss legal action was rejected, firstly by an administrative authority and then by domestic courts at two levels of jurisdiction, importantly, without the merits of the complaints being assessed. This was held to be a limitation on the right of access to a court, which impairs the very essence of the right.

Positive obligation under Article 8

The ECtHR observed that signatory states have a positive obligation to put in place a relevant legislative and administrative framework to provide effective protection for human health and life. The national authorities have the primary responsibility to secure the rights and freedoms under the ECHR and, in doing so, they enjoy a "margin of appreciation" (that is, the room for manoeuvre that the ECtHR allows national authorities in fulfilling their obligations under the ECHR). Those are well-established matters. But the ECtHR emphasised the urgency and importance of climate change and concluded that, in this instance, the margin of appreciation is not as wide.

Considering the scientific evidence on the manner in which climate change affects ECHR rights, the urgency of combating the adverse effects of climate change and the grave risk of their reaching the point of irreversibility, the ECtHR found that climate protection should carry considerable weight in the assessment of competing considerations. As a result, it held that Article 8 requires:

- States to have measures for the substantial and progressive reduction of their respective greenhouse gas emission levels with a view to reaching net neutrality within the next 30 years.

- Authorities to act in good time, and in an appropriate and a consistent manner.

It further found that immediate action needs to be taken and adequate intermediate reduction goals must be set. These measures should be incorporated into a binding regulatory framework at the national level with the relevant targets and timelines forming an integral part of the domestic regulatory framework.

As a result, the ECtHR found that the margin of appreciation afforded to states for the setting of aims and objectives is reduced, whereas the choice of how to pursue those aims and objectives remains wide. This is a key finding.

This is a tangible shift in approach and will likely be viewed by possible applicant NGOs as the foundation to bring complaints that are based on states overstepping their margin of appreciation. This is perhaps particularly relevant in the context of upholding the international commitments of states under the Paris Agreement and national net-zero emissions reduction targets under domestic legislation, such as the UK's Climate Change Act 2008.

Relief ordered

The ECtHR noted that, given the complexity and nature of the issues involved, it was unable to be prescriptive as regards any measures that Switzerland should implement to effectively comply with the judgment. Instead, it left it to Switzerland to assess what it should do under the supervision of the Committee of Ministers, comprising the Ministers for Foreign Affairs of the 46 members of the Council of Europe.

Ramifications for the UK and businesses

KlimaSeniorinnen is an important judgment, establishing for the first time the engagement of human rights protection in relation to climate change mitigation, and will be pertinent to domestic climate change disputes. It is expected that claimants will seek to rely on it to bring their own complaints, both in the UK and the other 45 Council of Europe member states.

The test laid down on a state's positive obligations in the context of climate change will surely be a source of litigation in assessing how states measure up in comparison to pledges made under the Paris Agreement.

As far as the UK is concerned, section 2(1) of the Human Rights Act 1998 requires domestic courts to take into account judgments of the ECtHR. This means that *KlimaSeniorinnen* may have a trickle-down effect on the UK's national measures to mitigate the effects of climate change and may be relied on by claimants seeking to hold the government to account through judicial review.

It is likely that the judgment will also inspire, or inform, claims against companies and financial institutions in relation to climate change. Litigation against corporates has already succeeded on the basis of arguments rooted in international human rights law (*Milieudefensie et al v Royal Dutch Shell plc, District Court of the Hague, 26 May 2021; www.practicallaw.com/w-031-4775*). The *KlimaSeniorinnen* judgment will provide support for similar claims.

There remains the issue of defining practical relief in climate change cases, whether against states, companies or financial institutions. The approach of the ECtHR in *KlimaSeniorinnen* is illustrative in this regard. It declined to order any detailed or prescriptive measures with which Switzerland had to comply. In the English derivative claim brought by ClientEarth against the directors of Shell plc, in which ClientEarth sought an order requiring the directors to implement an effective climate risk strategy, one of the factors in favour of the court declining permission for the claim to proceed was that any injunctive relief against the directors was "too imprecise to be suitable for enforcement" (*ClientEarth v Shell Plc and others [2023] EWHC 1897 (Ch); see feature article "ESG claims against directors: contending with the changing climate ", www.practicallaw.com/w-040-9447*).

The complexity of climate change, and what courts should order defendants to do in order to respond to it, will remain a challenge for those seeking to advance climate claims through litigation.

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