CASE NOTES

Human rights – environmental damage – climate change – global warning – state responsibility - private and family life – effective remedies

Verien Klimaseniorinnen Schweiz v Switzerland Application No. 53600/20, decision of 9 April 2024

European Court of Human Rights

Background and facts

As global temperatures rise, the urgency to address climate change and protect those most at risk becomes paramount. The impacts of climate change are increasingly evident, disproportionately affecting vulnerable populations - heatwaves pose significant health risks and exacerbate existing conditions, particularly for the elderly. In this context, the case of *Verein KlimaSeniorinnen Schweiz v. Switzerland* highlights the pressing need for effective climate policies and the legal obligations of states to safeguard the well-being of their citizens.

The applicants were Verein KlimaSeniorinnen Schweiz, an association under Swiss law promoting effective climate protection on behalf of its 2000 members, primarily older women (one-third of whom are over 75), and four women, all members of the association and aged over 80. They complain of health problems exacerbated by heatwaves, significantly affecting their lives, living conditions, and well-being. Tragically, the eldest of the four applicants died during the proceedings before the Court.

In 2016, under section 25a of the Federal Law on Administrative Procedure, the applicants submitted a request to the Federal Council and other Swiss environmental and energy authorities, pointing to various failings in the area of climate protection and seeking actions to be taken (Realakte). They also called on the authorities to take the necessary measures to meet the 2030 goal set by the Paris climate agreement in 2015. In particular, that the Swiss state is compelled to enact legislation to reduce greenhouse gas emissions as part of the global effort to keep global temperatures increase to well below 2°C above and pursue efforts to limit it to 1.5°C above pre-industrial levels. In April 2017, the Federal Department of the Environment, Transport, Energy and Communications (DETEC) declared the request inadmissible, finding that the applicants were pursuing general-public interests and were not directly affected in terms of their rights and could not therefore be regarded as victims. They further held that the general purpose of the applicants' request was to achieve a reduction in CO2 emissions worldwide and not only in their immediate surroundings. In November 2018, the Federal Administrative Court dismissed an appeal, finding that women over 75 were not the only population group affected by climate change and that they had not shown that their rights had been affected in a different way to those of the general population. In May 2020, the Federal Supreme Court dismissed an appeal, finding that the individual applicants were not sufficiently and directly affected by the alleged failings in terms of their right to life under Article 10(1) of the Constitution (Article 2 of the European Convention: the right to life), or their right to respect for private and family life and their home (Article 8), so as to assert an interest worthy of protection within s.25a of the Federal Law on Administrative Procedure. The Federal Supreme Court left open the question whether the association had standing to lodge the appeal at all.

The applicants complained of various failures by the Swiss authorities to mitigate the effects of climate change, in particular the effect of global warming, which they claimed adversely affects their lives, living conditions and health. They complained that the Swiss Confederation had failed to fulfil its duties under the Convention to protect life effectively (Article 2), and to ensure respect for their private and family life, including their home (Article 8). In particular, they complained that the State had failed to introduce suitable legislation and to put appropriate and sufficient measures in place to attain the targets for combating climate change, in line with its international commitments. They further complained that

they had not had access to a court within the meaning of Article 6(1) of the Convention, alleging that the domestic courts had not properly responded to their requests and had given arbitrary decisions affecting their civil rights. Lastly, the applicants complained of a violation of Article 13 (right to an effective remedy), arguing that no effective domestic remedy had been available to them for the purpose of submitting their complaints under Articles 2 and 8. The President of the Court decided that in the interests of the proper administration of justice the case should be assigned to the same Grand Chamber as the applications in *Carême v. France*, Application no. 7189/21, and Duarte *Agostinho and Others v. Portugal and 32 Others*, Application No. 39371/20).

Decision of the European Court of Human Rights

Although the Court stressed that it could only deal with the issues arising from climate change within Article 19 of the Convention - to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention - it noted that inadequate State action to combat climate change exacerbated the risks of harmful consequences and subsequent threats for the enjoyment of human rights. These threats, therefore, involved compelling present-day conditions, confirmed by scientific knowledge, which the Court could not ignore in its role in the enforcement of human rights. Accordingly, the Court found that there are sufficiently reliable indications that anthropogenic climate change exists, and there is a causal relationship between the emissions of, and presence of increasing concentrations of atmospheric CO_2. Due to the capacity of CO_2 to retain heat energy, it can be a decade before the maximum effect on atmospheric chemistry is felt, thus it is a temporal, intergenerational issue for the law.

The Court accepted that such developments pose a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of this and are capable of taking measures to address it effectively, and that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5°C above pre-industrial levels, if action is taken urgently. It also noted that current global mitigation efforts are not sufficient to meet that target, and that while the legal obligations arising for States under the Convention extend to those individuals currently alive, it is clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change.

The Court then examined the individual applicants' victim status, the applicant association's right to submit a case to a court of law (*locus standi*), and the applicability of Articles 2 and 8 of the Convention to the claim. It stated that in order to claim victim status under Article 34 in the context of complaints concerning climate change, individual applicants needed to show that they are personally and directly affected by governmental action or inaction. This depends on two key criteria: (a) high intensity of exposure of the applicant to the adverse effects of climate change, and (b) a pressing need to ensure the applicant's individual protection. The threshold for establishing victim status in climate change cases is especially high, the Convention not admitting general public-interest complaints (*actio popularis*). Having carefully considered the nature and scope of the individual applicants' complaints and the evidence submitted by them, it found that the four individual applicants did not have victim-status under Article 34 of the Convention, and, therefore, declared their complaints inadmissible.

However, as regards the standing of associations, it held that the special feature of climate change as a common concern of humankind and the need to promote intergenerational burden sharing rendered it appropriate to make allowance for recourse to legal action by associations in this context. Nevertheless, the exclusion of general public-interest complaints under the Convention requires that in order for the association to have the right to act on behalf of individuals and to lodge an application on account of the alleged failure of a State to take adequate measures, it must comply with a number of conditions. The Court added that the right of an association to act on behalf of its members or other affected individuals is not subject to a separate requirement that those on whose behalf the case has been brought would themselves meet the victim-status requirements for individuals. On the facts, the Court found that the applicant association fulfilled the relevant criteria and had the necessary standing to act on behalf of its members in this case. They had representative rights over people (including young and future generations) who could arguably claim to be subject to specific threats or adverse effects on their life, well-being and quality of life.

Turning to the substantive claims, the Court first found that in view of its finding that Article 8 applied to the applicant association's complaint, below, it would not examine the case from the angle of Article 2, and the State's duty to protect life; although the principles developed under Article 2 are to a very large extent similar to those developed under Article 8.

With respect to Article 8, the Court found that the Article encompasses a right for individuals to effective protection by the State authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life. Thus, a State's main duty is to adopt, and to apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation, in the Court's view, flows from the causal relationship between climate change and the enjoyment of Convention rights, and that its provisions must be interpreted and applied so as to guarantee practical and rights. Although it is only competent to interpret the provisions of the Convention, in line with the international commitments undertaken by the member States (the United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris climate agreement), and the compelling scientific advice, States need to put in place the necessary measures aimed at preventing an increase in GHG concentrations and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights under Article 8.

This requires States to undertake measures to reduce their GHG emission levels, with a view to reaching net neutrality, in principle within the next three decades, and need to put in place relevant targets and timelines, which must form a basis for mitigation measures. As regards the applicant association's complaint in relation to Switzerland, it found that there had been critical gaps in the process of putting in place the relevant domestic regulatory framework, including a failure by the Swiss authorities to quantify, through a carbon budget or otherwise, national greenhouse gas (GHG) emissions limitations. Furthermore, Switzerland had previously failed to meet its past GHG emission reduction targets and had not acted in time and in an appropriate way to devise and implement the relevant legislation and measures in accordance with their positive obligations under the Convention. The Swiss Confederation had therefore exceeded its 'margin of appreciation' in this area and had failed to comply with its duties under Article 8.

Turning to Article 6, the Court noted that the association had victim status under that provision, whereas the individual applicants did not. The Court then accepted that the decisions of the domestic courts had sought to distinguish the issue of individual protection from general public interest complaints, as only the protection of individual rights were guaranteed under section 25a of the Federal Law. However, it found that the rejection of the applicant association's legal action amounted to an interference with their right of access to a court. The national courts had not provided convincing reasons as to why they had considered it unnecessary to examine the merits of the complaints, and had failed to take into consideration the compelling scientific evidence concerning climate change, and, thus had not taken the association's complaints seriously. Accordingly, as there had been no further legal avenues or safeguards available to the applicant association, or individual applicants/members of the association, it found that there had been a violation of Article 6. The Court emphasised the key role which domestic courts play in climate change litigation, and highlighted the importance of access to justice in this field. Thus, given the principles of shared responsibility and subsidiarity, it fell primarily to national authorities, including the courts, to ensure that Convention obligations are observed. Given its findings under Article 6, the Court did not examine the association's complaint separately under Article 13 of the Convention (duty to provide effective remedies for breach of ECHR rights).

As regards Article 46 ECHR (binding force and execution of judgments), in certain cases, the Court has indicated the type of measure that might be taken to put an end to the violation. In this case, given the complexity and the nature of the issues, it found that it could not be detailed or prescriptive as regards any measures to be implemented in order to effectively comply with the judgment. Given the discretion accorded the State in this area, it considered that the Swiss Confederation with the assistance of the Committee of Ministers was better placed to assess the specific measures to be taken. It thus left it to the Committee of Ministers to supervise the adoption of measures aimed at ensuring compliance with Convention requirements and this judgment. Under Article 41, the Court also held that Switzerland was

to pay the applicant association 80,000 euros (EUR) in respect of costs and expenses, but as no claim had been submitted for damages, no sum was awarded for pecuniary or non-pecuniary loss.

Judge Eicke expressed a partly dissenting and partly concurring opinion to the majority ruling. Thus, whilst recognising the nature or magnitude of the risks and the challenges posed by anthropogenic climate change and the urgent need to address them, in the judge's view, the Court should have focussed on a violation of Article 6 of the Convention. At a push, it could have focused on a *procedural* violation of Article 8 relating in particular to the right of access to court and of access to information necessary to enable effective public participation to ensure proper compliance with and enforcement of those policies. In the judge's view, therefore, the majority clearly 'tried to run before it could walk' and went beyond what was legitimate for the Court in ensuring 'the observance of the engagements by the High Contracting Parties in the Convention' by means of 'interpretation and application of the Convention' (Article 19).

Analysis

The decision is important in respect not only of the application of the Convention and human rights law to environmental disputes, but also to the question of legal standing required to bring such disputes, both in domestic law and under the machinery established by the European Convention on Human Rights. Climate case law has been notoriously difficult for the Court, as existing jurisprudence is largely comprised of situations in which there has been a specific environmental harm that had a direct effect on the applicant. Where these intergenerational, temporal issues are concerned, it is difficult to ascertain what each individual state will need and require within the context of its capacity to respond to climate change.

The decision on standing is both interesting and, it is argued, generous. Thus, the Grand Chamber found that the four individual applicants had failed to show that they were personally and directly affected or there was a pressing need to ensure their protection by the government's failure to take appropriate measures to mitigate the effect of climate change and global warning. Consequently, they were not victims for the purpose of Article 34, as they had not been directly and specifically affected by the state's failure to safeguard individuals from environmental harms. However, the Grand Chamber then proceeded to find that the association representing its members, including those who were found to have no standing in this case, *were* victims, as they had representative rights over people *who could arguably claim* to be subject to specific threats or adverse effects on their life, well-being and quality of life. The Court emphasising that climate change is different from previous environmental case law due to its unique characteristics, stressing that this created a pressing need for policies that involve intergenerational burden sharing, affecting both current and future generations. In this manner, the ECHR did not specifically refer to 'inter-generational equity' in the assessment of its decision, referring to it indirectly as they addressed the question of the 'intergenerational burden' created by climate change. Such a finding was not, in the Court's view, inconsistent with the finding on the status of the four individual applicants and was made possible by the Court's appreciation of the increasing risks of environmental harm, including future, and thus presently unidentifiable victims (to the exclusion of children within the definition).

The ECtHR acknowledged that future generations would bear a greater burden from present failures to combat climate change and lack a voice in current decision-making processes. This ruling from the Grand Chamber on standing and victim status is important with respect to domestic rulings on standing is such cases, as the Court found that there was a breach of Article 6 – right to access to the court as part of the right to a fair trial - by the domestic court's dismissal in the domestic proceedings. Thus, it found a breach of Article 6 in this case because the association's legal claims had been 'arbitrarily and without reason' rejected by the national courts, on the grounds that it was a general, public interest claim with no victims at the heart of the dispute. The state's argument here is that the European Court has entertained a public interest and political claim rather than dealing with breaches that effect specific victims. The Convention does not entertain general public interest claims - the *actio poularis* rule – but a flexible interpretation of representative victim claims in this context has provided the Court with jurisdiction in this case. This will also call for a more liberal application of the domestic rules on standing in cases where such representative groups are seeking to provide protection and redress on

such a fundamental issue as environmental damage, and where incorporated Convention rights are threatened.

Turning to the Court's ruling on the substantive Convention rights, as no identifiable person had been threatened with a breach of their right to life, there was no need for the Court to consider the claims under Article 2 (duty of the state to protect the life of individuals within its jurisdiction). In any case, in its view the claims made under Article 8 (respect for private life) covered the same relevant issues as those under Article 2, thus making a ruling on Article 2 unnecessary. The Court was then satisfied that on the facts there was a breach of Article 8, and the state's positive duty to safeguard the right to private and family life and home. This was because there had *been critical gaps* in the process of putting in place the relevant domestic regulatory framework, including a failure to quantify national greenhouse gas emissions, as there had been in the past. Similarly, the U.K. High Court will hear a judicial review claim concerning the UK NAP 3, where its statutory objectives have been replaced with 'risk reduction goals'.

It is also interesting to note that the Court stressed that it was only dealing with the application under the European Convention and its articles - in other words, whether there was there a breach of Article 8 - and not whether the state's actions complied with other environmental treaties, such as the Paris Agreement. Article 8 continues to be somewhat of a laboratory in climate case law, as avenues of action are explored when dealing with politically sensitive, polycentric issues under the absolute rights versus the qualified rights of the convention. The use of Article 8, within the context of intergenerational considerations, allows for a balance of interests between climate change as an issue in law, versus the difficult socio-political and financial decisions.

However, the Court then made it clear that whether the state had complied with those other treaties was relevant to the question whether the state had broken the positive duty to respect private life under the ECHR. Thus, other international obligations in this area, normally labelled as 'soft law', have become justiciable via the machinery under the European Convention, with the European Court being able to provide a full judicial hearing on the ECHR claim, whist considering the state's compliance with what in other forums would be judicially unenforceable. Equally, in appropriate cases, this allows the granting of just satisfaction to a victim, theoretically for breaching ECHR rights, but in reality for infringing its other international obligations. This provides a more effective international remedy in dealing with environmental breaches by individual states.

Conclusions

As jurisprudence on climate change is furthered, those sceptical of the ECHR and the expanding role of the Strasbourg Court, including of course, the United Kingdom, will argue that the Court has exceed its jurisdiction in this case, ruling on obligations from environmental 'soft law', involving itself with political policy, and at the same time threatening national sovereignty. This will, no doubt, increase the call for reform the ECHR, and the reform or repeal of our Human Rights Act 1998. On the other hand, the Court would normally be expected to give states a wide margin of appreciation, and it was only because the state had clearly failed to abide by their commitments, based on the clear scientific evidence, that the Court ruled against the state.

Aside from those political and diplomatic arguments, the practical questions will concentrate on the impact of this ruling on domestic challenges in this area. Indeed, in his partly dissenting opinion, Judge Eicke stated that the majority were giving (false) hope that litigation and the courts can provide 'the answer' without there being, in effect, any prospect of litigation (especially before this Court), thus accelerating the taking of the necessary measures towards the fight against anthropogenic climate change. In fact, in the judge's opinion, there was a significant risk that the new right/obligation created by the majority (alone or in combination with the much-enlarged standing rules for associations) will prove an unwelcome and unnecessary distraction for the national and international authorities, detracting attention from the on-going legislative and negotiating efforts to address the need for urgent action

That warning aside, case law in climate justice has grown year-on-year, often yielding mixed results. Cases like *Urgenda v. Kingdom of the Netherlands*, *Greenpeace & Norwegian Ungdom Duarte Agostinho and Others* (Hague Court of Appeal, 9 October 2018), have seen successful elements, but arguably they have provided symbolic victories as they all relied on provisions of the developing jurisprudence of the European Convention on Human Rights in holding their respective governments to account. Will this trend continue? Will victims (or representative groups) now bring cases against public bodies, using relevant articles of the ECHR, and what evidence of non-compliance will be necessary for the courts to interfere? Further, will, or should, the courts involve themselves in scientific and policy detail in making any judgment, and what form of compensation, if any, will be granted? All these questions will soon need to be addressed by government, private bodies whose practice imposes an environmental hazard, support groups and individuals affected by such hazards, and lawyers and judges.

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Trade unions – Trade union activities - Industrial action- Detriment – Right of Association - Declarations of incompatibility

Secretary of State for Business and Trade v Mercer [2024] UKSC 12

Supreme Court

Background and facts

Mercer had been employed as a support worker by a care services provider, was a workplace representative for the trade union, UNISON, and had been involved in planning lawful strike action. During the strike action, she was suspended, and although she received normal pay during her suspension, she received nothing for the overtime she would have worked in that period. She brought an action under s.146 of the Trade Union and Labour Relations (Consolidation) Act 1992. The employment tribunal found that s.146 of the Act did not protect workers from detriment short of dismissal whilst participating in lawful industrial action as a member of an independent trade union, and thus dismissed the claim.

On appeal to the Employment Appeal Tribunal ([2021] IRLR 1958], it was held that the phrase 'activities of an independent trade union' in s.146 could include industrial action. Although on the ordinary principles of construction, s.146 excluded industrial action, using s.3 of the Human Rights Act 1998, the provision could be read down to comply with the right to freedom of association in Article 11 of the Convention. Thus, it was not going against the 'grain' of the 1992 Act to achieve a conforming interpretation of s.146 by adding a new sub-paragraph (c) to the definition of 'appropriate time' in s.146(2), to read 'a time within working hours when he is taking part in industrial action'. That would not involve judicial legislation, but would simply give effect to a clear and unambiguous obligation under Article 11 to ensure that employees were not deterred, by the imposition of detriments, from exercising their right to participate in strike action

That decision was overruled the Court of Appeal ([2022] EWCA Civ. 379), which held that as a matter of legislative design lawful industrial action was not included within the phrase 'activities of an independent trade union', and to interpret that provision compatibly with the ECHR would result in impermissible judicial legislation. In the Court's view, when s.146 was viewed as part of the Act as a whole, industrial action was not included within the phrase. Although legislation should be read down to give an ECHR-compliant meaning wherever possible, that was subject to the modified meaning being consistent with the fundamental features of the relevant legislation. In this case a number of policy