GIBSON DUNN

April 16, 2024

# European Court of Human Rights Rules on the Positive Obligations of Convention States in the Face of the Climate Crisis – Key Takeaways

*The Climate Change Cases are the first of their kind decided by the Court and constitute a significant legal development requiring considered analysis and reflection.*

On 9 April 2024, the Grand Chamber of the European Court of Human Rights ("**Court**") rendered its rulings in the "**Climate Change Cases**": (i) *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ("***KlimaSeniorinnen***"), (ii) *Carême v. France* ("***Carême***"), and (iii) *Duarte Agostinho and Others v. Portugal and 32 Others* (the "**Portuguese Youth Climate Case**"). The Climate Change Cases are the first of their kind decided by the Court. They constitute a significant legal development requiring considered analysis and reflection.

In *KlimaSeniorinnen,* the Court held that Switzerland had not implemented the measures necessary to fulfil its positive obligations to cut greenhouse gas ("**GHG**") emissions in conformity with the requirements under Article 8 (the right to private and family life and the right to a home) of the European Convention on Human Rights ("**Convention**"). The Convention does not spell out an autonomous right to a clean and healthy environment. However, *KlimaSeniorinnen* creates what may be seen as a novel right accompanied by a new positive duty on the 46 member States of the Council of Europe ("**Convention States**") in the field of climate change. As the Convention is incorporated into the national laws of all Convention States, this finding may directly affect domestic legislation within these jurisdictions.

By contrast, the applications in both *Carême* and the *Portuguese Youth Climate Case* were declared inadmissible. In the former, the Court held that the applicant did not have victim status as he no longer had a link to Grande-Synthe, the area of France allegedly affected by the climate crisis where he had served as mayor. In the latter case, the application was dismissed on both jurisdictional grounds and for non-exhaustion of domestic remedies. Below, these decisions are considered separately to *KlimaSeniorinnen* although it is important to view these rulings as a trilogy of climate cases decided by the Court on the same date.

Overall, the judgment in *Klimaseniorinnen*, which is the most significant of the three rulings, may have the potential to reverberate on a global level—including exerting a considerable influence on other pending climate change cases both nationally and internationally. Inversely, the findings in *Carême* and the *Portuguese Youth Case* are well in line with the existing case law of the Court.

This alert provides an overview of the Court's findings in each of the three Climate Change Cases and offers our thoughts on some of the potential impacts.

**1. *KlimaSeniorinnen***

**(a) Background**

The *KlimaSeniorinnen* proceedings against Switzerland began over nine years ago before the Swiss national courts. The claims were dismissed at all levels (including before the Swiss Federal Supreme Court) on jurisdictional grounds, including for lack of standing (the claims constituting an *actio popularis*), and were therefore not examined on the merits. Proceedings were then lodged before the Court in 2020.

The applicants ("**Applicants**") in the case were: (i) "*KlimaSeniorinnen*", a Swiss-registered association established to promote and implement effective climate protection on behalf of its 2,000 female members who all live in Switzerland, and who have an average age of 73 years (the "**Association**"), and (ii) four individual women who are members of the Association ("**Individual Applicants**").

The Applicants argued that they were part of the most vulnerable group affected by climate change owing to their age and sex. They submitted testimony and medical evidence demonstrating, in their view, the negative effects of global warming on their health (including suffering from cardiovascular and respiratory diseases). According to the Applicants, there was no doubt that climate change-induced heatwaves in Switzerland had caused, were causing and would cause further deaths and illnesses to older people and particularly women, in Switzerland.

The Applicants further submitted that Switzerland's actions to tackle climate change through domestic legislative measures were inadequate, despite being aware of the relevant risks and scientific evidence such as reports by the United Nations Intergovernmental Panel on Climate Change ("**IPCC**").

Against this background, the Applicants contended that Switzerland had failed and continued to fail to protect them effectively in violation of Articles 2 (right to life) and 8 of the Convention. Specifically, they argued that the State had a positive duty to put in place the necessary regulatory framework to mitigate climate change, taking into account its particularities and the level of risk. Further, the Applicants complained of a lack of access to a court in violation of Article 6(1) of the Convention, and the lack of an effective remedy in violation of Article 13.

As an evidentiary matter, the Court began by accepting that "*anthropogenic climate change exists*" 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 and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target*". The Court attached importance to relevant international standards, the decisions of domestic courts and the conclusions of reports and studies by relevant international bodies, such the IPCC (the findings of which had not been called into doubt by Switzerland or intervening States (of which there were a number)). On this basis, the Court examined the admissibility and merits of the complaints.

**(b) The Issue of Standing Before the Court**

"*Victim status*", which is the Court's threshold standing requirement as set out in Article 34 of the Convention, was one of the salient issues in all three of the Climate Change Cases.

Under Article 34 to the Convention, the Court may receive applications from any person, NGO or group of individuals claiming to be the victim of a violation under the Convention. Therefore, the Court's well-established case law requires an applicant to establish causation between the alleged violation and the harm allegedly suffered. A complaint to the Court must thus identify a concrete and particularised harm directly or indirectly suffered by the applicant. A so-called *actio popularis,* in which the applicant only asserts a general public interest in bringing proceedings, is in principle prohibited.

In *KlimaSeniorinnen*, the Court emphasised that, in accordance with its case law, victim status "*cannot be applied in a rigid, mechanical and inflexible way*" and that the concept of "*victim*" must be interpreted in an "*evolutive*" fashion. The Court considered that in the climate change context, a special approach to victim status was warranted, reasoning that there exists a causal link between State actions or omissions (causing or failing to address climate change) and the harm affecting individuals.

The Court then went on to establish novel tests to be applied to the victim status of applicants in the context of climate change. First, with respect to individual applicants, the Court established the following "**Individual Victim Status Criteria**":

(a) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and

(b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm.

The Court emphasised that the threshold for fulfilling the Individual Victim Status Criteria "*is especially high*" and will depend on circumstances such as the prevailing local conditions and individual specificities and vulnerabilities. The Individual Applicants in *KlimaSeniorinnen* did not, in the Court's view, meet the high threshold, as it could not be said that they suffered from any critical medical condition whose possible aggravation linked to climate change could not be alleviated through adaptation measures available in Switzerland.

Second, with respect to associations, the Court took an inverse approach, setting out a new and accommodating test for determining their standing in the climate change context—the Court considering that associations play a particularly important function in this context since recourse to such bodies may be "*the only mean*[s] *available*" to certain groups of applicants (such as "*future generations*", a consideration borrowed from environmental law). Namely, the association must fulfil the following "**Associations Victim Status Criteria**":

(a) be lawfully established in the jurisdiction concerned or have standing to act there;

(b) be able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned; and

(c) be able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.

However, the Court then also went further, holding that the standing of an association to act on behalf of members or other affected individuals will **not** be subject to a separate requirement of showing that those on whose behalf the case has been brought would themselves have met the Individual Victim Status Criteria.

Applying this novel Criteria to the Association, the Court found that these were met, and noted that this represented "*a vehicle of collective recourse aimed at defending the rights and interests of individuals against the threats of climate change in the respondent State*". Therefore, the Court proceeded with examining the merits of the application on this basis.

**(c) The Merits: Articles 2 and 8**

Assessing the Court's **margin of appreciation** (i.e., the deference that it would accord to Convention States) in the climate change context, the Court made a distinction between (i) the State's commitment to the necessity of combating climate change, and the setting of the requisite aims and objectives in this respect on the one hand, and, on the other, (ii) the choice of means designed to achieve those objectives. As regards (i), the Court explained that the nature and gravity of the threat of climate change, and the general international consensus around the need to reduce GHG emissions through targets, called "*for* ***a reduced margin of appreciation***". However, as regards (ii)—the choice of means (including operational choices and policies)—Convention States should be accorded a wide margin of appreciation.

The Court then set out the scope of the Article 2 and 8 Convention rights as considered in previous environmental harm cases before the Court but noted that given the special nature of climate change "*the general parameters of the positive obligations must be adapted to th*[is] *specific context*".

As regards Article 2, the Court referred to the established test that there must be a "*real and imminent*" risk to life, which may extend to complaints of State action and/or inaction in the context of climate change. In the climate change context, it would be possible to assume this threshold had been met where victim status had been established. That said, the Court examined the Association's complaint primarily on the basis of Article 8, noting that to a great extent the Court had in its case law applied the same principles to both articles in the context of environmental claims. As such, the Court found that it was unnecessary to examine the applicability of Article 2 in the present case.

Then, for the first time in its history, the Court prescribed the **content of the States' positive obligations** under Article 8 in the context of climate change. Significantly, the Court held that Article 8 affords individuals a right to enjoy effective protection by State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change. Accordingly, under Article 8, States must "*do* [their] *part*" to ensure such protection. As such, States' primary duty is to adopt, and to effectively apply in practice, "*general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same timeframe*". This includes setting out intermediate GHG emissions reduction targets and pathways (to be updated through due diligence), including by sector, and providing evidence that States have duly complied with the relevant GHG reduction targets. Importantly, States' positive obligations include acting in "*good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures*". Unprecedently, the Court then held that States should have "***a view to reaching net neutrality within, in principle, the next three decades***".

Furthermore, the Court explained that effective protection of the rights of individuals from serious adverse effects on their life, health, well-being and quality of life requires that the above-noted mitigation measures be supplemented by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection.

Applied to the case, the Court concluded that Switzerland had failed to fulfil its positive obligation derived from Article 8 to devise a regulatory framework setting out the requisite objectives and goals. In particular, the Court pointed to the fact that the 2025 and 2030 period remains unregulated in Switzerland in terms of GHG emissions, pending the enactment of new legislation, and that Switzerland had not quantified national GHG emissions limitations through, for example, a carbon budget. Furthermore, Switzerland had previously failed to meet its past GHG emission reduction targets. As such, the Court found that there had been a violation of Article 8 of the Convention.

**(d) Articles 6 and 13: Victim Status and the Merits**

In addition to the substantive complaints made under Articles 2 and 8 of the Convention, the Applicants brought complaints under Articles 6 and 13 alleging a failure of the Swiss national courts to grant them access to court. In *KlimaSeniorinnen*, the Applicants complained that they had been denied being heard on the merits on jurisdictional grounds, including for lack of standing.

The Court examined the Applicants' victim status with respect to Article 6 finding that the Association had victim status under this provision because the domestic litigation was "*directly decisive*" for its "*rights*" under the Convention. By contrast—and in line with its victim status findings pursuant to Articles 2 and 8—the Court found that the Individual Applicants lacked standing because the dispute they pursued was not directly decisive for their specific rights, and had a tenuous connection with the rights relied upon under national law.

Applied to the merits of the Association's case, the Court found a violation of its Article 6 right of access to the national courts. The Court furthermore found it unnecessary to examine the Association's Article 13 complaint, having found in its favour on Article 6.

**(e) The Dissenting Opinion of Judge Eicke**

Judge Eicke of the United Kingdom issued a strongly worded dissent in *KlimaSeniorinnen*, opining that the majority had gone "*well beyond what I consider to be, as a matter of international law, the permissible limits of evolutive interpretation*". In particular, he questioned the Court's unnecessary expansion of "*victim status*" and unjustifiable creation of (i) "*a new right (under Article 8 and, possibly, Article 2)*"; and (ii) a new "*primary duty*" on Convention States. He was of the view that neither of these "*have any basis in Article 8 or any other provision of or Protocol to the Convention*".

He further expressed concern that, at a policy level, there is a significant risk that the new right / obligation created by the majority (alone or in combination with the much enlarged standing rules for associations) would prove an unwelcome and unnecessary distraction for the national and international authorities in that "*it detracts attention from the on-going legislative and negotiating efforts being undertaken as we speak to address the – generally accepted – need for urgent action*". He specifically referred to the "*significant risk*" that national authorities "*will now be tied up in litigation about whatever regulations and measures they have adopted (whether as a result or independently) or how those regulations and measures have been applied in practice…*".

As regards Article 6, although Judge Eicke agreed with the majority that there had been a violation of the right of access to court, his conclusion was on a different (and what he called "*more orthodox*") approach. In Judge Eicke's view, the Individual Applicants' victim status as it related to Article 6 had been clearly established and not challenged by the Swiss Government. As such, it would "*have been more obvious and more appropriate to address the complaint about the denial of access to court first; before then, if necessary, moving on to consider the complaint(s) under Articles 2 and 8 of the Convention*". In his view, such an approach could have vitiated the need for developing a "*novel approach*" to the issue of the Applicants' victim status under Articles 2 and 8.

**(f) Key Takeaways**

As stated at the outset, the Climate Change Cases are the first of their kind decided by the Court. They constitute a significant legal development. At this stage, there are a number of observations which can be highlighted.

First, due to the fact that the Convention is incorporated into the national laws of all 46 Convention States, the findings of the Court in *KlimaSeniorinnen* may require such States to consider amending national laws to take account of the expansion of victim status. In other words, some Convention States may have to amend their standing laws to reflect the Association Victim Status Criteria in cases leveraging Convention rights in the context of climate change cases.

Second, the Court in *KlimaSeniorinnen* found, for the first time, an independent actionable right to effective protection by the State for climate change-related harms under Article 8 (leaving the scope and content of any such right under Article 2 undetermined for the time being). This right includes the imposition of positive obligations on Convention States. While these positive obligations remain general on their face, they may be interpreted to require that climate change

mitigation measures are "*incorporated into a binding regulatory framework*", and, the Court expressly referred to the aim of reaching net neutrality "*within, in principle, the next three decades*". This finding may prompt Convention States to enact more rigorous national legislation relating to GHG reductions. This could, in turn, have a significant impact on the private sector operating within those States.

Third, such regulatory changes could also prompt new investor State claims, if such legislative changes (for example, the phase out of production of electricity from certain fossil fuels) were implemented in such a manner that could be considered a breach of the States' investment treaty obligations. In that context, Convention States may attempt to use the positive obligations imposed by the Court in *KlimaSeniorinnen* as a defence to such claims. However, we note that the Court's judgment seems to leave States flexibility in how they seek to accomplish their climate targets.

Lastly, this ruling may influence other pending climate change litigation—especially where claimants are advancing human rights-based arguments. This includes cases pending before the Court which have been adjourned awaiting the rulings in the Climate Change Cases, including *Greenpeace Nordic and Others v. Norway* (no. 34068/21) (which relates to the issuance of new licenses for oil and gas exploration in the Barents Sea), amongst others—but also proceedings against State parties currently pending before national European courts. In addition, whilst the judgment in KlimaSeniorinnen is limited in application to Convention States as a jurisdictional matter, NGOs and other claimants may seek to leverage the judgment to support new and existing climate lawsuits against private parties. This could, in turn, have an effect on domestic standing laws related to climate change actions. Notably, there have already been examples of claims against private actors in the climate change context in Convention State courts where Convention-based arguments have been put forward.

In jurisdictions outside of the Council of Europe, *Klima Seniorinnen* may also prove influential where human rights arguments have been raised by the claimant(s). Further, on the international plane, *KlimaSeniorinnen* may have a persuasive effect on the International Court of Justice's ("**ICJ**") pending decision in connection with UN General Assembly's request for an advisory opinion relating to States' international law obligations to ensure protection from climate change for present and future generations. The ICJ is expected to deliver its opinion in this judgment in early 2025.

**2. *Carême* and The Portuguese Youth Climate Case**

**(a) The Court's Findings**

*Carême* concerned an action by an individual, Mr Carême, acting on his own behalf and in his capacity as mayor of Grande-Synthe, and in the name and on behalf of the latter municipality. In proceedings before the French courts, the Conseil d'État declared admissible the action brought by the municipality and inadmissible the action brought by Mr Carême. The Conseil d'État found that the measures taken by the French authorities to tackle climate change had been insufficient and ordered the authorities to take additional measures by 31 March 2022 to meet the GHG emissions reduction targets set out in the domestic legislation and Annex I of Regulation (EU) 2018/842.

The Grand Chamber concluded that the complaint in *Carême* was inadmissible on the basis that Mr Carême lacked "*victim status*" as required by Article 34 of the Convention. This was because Mr Carême had moved away from Grande-Synthe, the area in France that he alleged was affected by climate change, to Brussels, and otherwise had no other links to Grande-Synthe for the purposes of Articles 2 and 8 of the Convention (which were the articles upon which Mr Carême relied).

Meanwhile, the *Portuguese Youth Climate Case* was brought by six young persons (who all resided in Portugal) against Portugal and 32 other Convention States, alleging that the respondents had violated human rights by failing to take sufficient action on climate change in violation of Articles 2 and 8, with particular reference to forest fires and heatwaves in Portugal in 2017 and 2018. The applicants sought an order from the Court requiring the respondent States to take more ambitious climate change action.

The Court concluded that although Portugal had territorial jurisdiction for the purposes of Article 1 of the Convention, extra-territorial jurisdiction could not be established in respect of the other 32 respondent States. The Court thus confirmed its existing jurisprudence on extra-territorial jurisdiction and refused to expand that jurisprudence in the climate change context. The claims against the 32 other respondent Convention States were declared inadmissible on that basis. Additionally, the Court declared the claim inadmissible on a second ground: that the applicants had not exhausted domestic remedies available in Portugal.

**(b) Key Takeaways**

First, and importantly, the Court's refusal to extend its case law on extraterritorial jurisdiction in the Portuguese Youth Climate Case on the basis of specific arguments grounded on climate change considerations means that climate change related claims brought under the Convention will, in principle, have to be directed at and first resolved in the State in which the individual persons alleging harms are situated.

Second, the Court's emphasis that domestic remedies must be exhausted in the context of climate change confirms that climate change litigation is, first and foremost, a matter for the national courts in the respective Convention State.

The Gibson Dunn team would be very happy to discuss the wide-ranging ramifications of the Climate Change Cases in more detail with clients.

---

The following Gibson Dunn lawyers prepared this update: Robert Spano, Stephanie Collins, and Alexa Romanelli.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any leader or member of the firm's International Arbitration or Transnational Litigation practice groups, or the following authors:

Robert Spano – London/Paris (+33 1 56 43 14 07, rspano@gibsondunn.com)
Stephanie Collins – London (+44 20 7071 4216, SCollins@gibsondunn.com)
Alexa Romanelli – London (+44 20 7071 4269, aromanelli@gibsondunn.com)