



GFN Adaptation CoP – May 2024

Recent Developments at the European Court of Human Rights (ECtHR)

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Outline

- The ECHR and ECtHR
- The ECtHR Grand Chamber judgments in the three climate cases
- Initial reflections

The ECHR and ECtHR

ECHR:

- An international treaty.
- Council of Europe.
- Voluntarily signed up to by CoE States; legally binding.

ECtHR:

- An international court (of regional scope).
- Individuals and States can take cases against States re alleged violations of Convention rights.
- Divided into 'chambers'; cases can be referred to the Grand Chamber.



Convention rights

European Convention on Human Rights (ECHR):

Art. 2 Right to life

Art. 3 Prohibition of torture

Art. 4 Prohibition of slavery and forced labour

Art. 5 Right to liberty and security

Art. 6 Right to a fair trial

Art. 7 No punishment without law

Art. 8 Right to respect for private and family life

Art. 9 Freedom of thought, conscience and religion

Art. 10 Freedom of expression

Art. 11 Freedom of assembly and association

Art. 12 Right to marry

Art. 13 Right to an effective remedy

Art. 14 Prohibition of discrimination



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Convention rights

- Most are not absolute, e.g. ‘Everyone has the right to respect for his private and family life...’ and ‘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...’ (Art. 8).
- The Art. 3 prohibition is absolute – ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.
- In certain circumstances, Contracting States may derogate from (i.e. deviate from or relax) Convention right(s).
- Margin of appreciation.
- Exhausting domestic remedies.
- Extraterritoriality.

The three climate cases

- Grand Chamber judgments handed down in April 2024. Three of many cases; expedited.
- *Duarte Agostinho and Others v Portugal and 32 Others* (Application no. 39371/20)
- *Carême v France* (Application no. 7189/21)
- *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (Application no. 53600/20)
- <https://hudoc.echr.coe.int/eng>

KlimaSeniorinnen v Switzerland

- Article 6(1) – right to a fair trial
 - ‘The foregoing considerations are sufficient to enable the Court to conclude that, to the extent that the applicant association’s claims fell within the scope of Article 6 § 1, its right of access to a court was restricted in such a way and to such an extent that the very essence of the right was impaired’ (para 638).
 - ‘In this connection, the Court considers it essential to emphasise the key role which domestic courts have played and will play in climate-change litigation, a fact reflected in the case-law adopted to date in certain Council of Europe member States, highlighting the importance of access to justice in this field. Furthermore, given the principles of shared responsibility and subsidiarity, it falls primarily to national authorities, including the courts, to ensure that Convention obligations are observed’ (para 639).

KlimaSeniorinnen v Switzerland

- Article 8 – right to respect for private and family life
 - ‘As the Court has already recognised, Article 8 is capable of being engaged because of adverse effects not only on individuals’ health but on their well-being and quality of life ... and not only because of actual adverse effects but also sufficiently severe risks of such effects on individuals ... The Court has already established that Article 8 may apply in environmental cases whether ... directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly’ (para 435).

KlimaSeniorinnen v Switzerland

- Article 8 – right to respect for private and family life
 - ‘there were some critical lacunae in the Swiss authorities’ process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets ... By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context’ (para 573).

KlimaSeniorinnen v Switzerland

- Article 2 – right to life
 - ‘The applicability of Article 2, however, cannot operate *in abstracto* in order to protect the population from any possible kind of environmental harm arising from climate change. In accordance with the case-law cited in paragraph 507 above, in order for Article 2 to apply in the context of an activity which is, by its very nature, capable of putting an individual’s life at risk, there has to be a “real and imminent” risk to life. This may accordingly extend to complaints of State action and/or inaction in the context of climate change ...’ (para 511).
 - ‘the term “real” risk corresponds to the requirement of the existence of a serious, genuine and sufficiently ascertainable threat to life ... The “imminence” of such a risk entails an element of physical proximity of the threat ... and its temporal proximity ...’ (para 512).

KlimaSeniorinnen v Switzerland

‘[E]ffective 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. Such adaptation measures must be put in place and effectively applied in accordance with the best available evidence (see paragraphs 115 and 119 above) and consistent with the general structure of the State’s positive obligations in this context (see paragraph 538 (a) above)’ (para 552).

Initial reflections

- Groundbreaking? The Court's role (and the role of domestic courts).
- Progressive? Taking mitigation action.
- The relative uniqueness of the Swiss facts.
- Extraterritoriality.
- Standing as an individual and as an association.
- Article 2 not successful but not ruled out.
<https://wires.onlinelibrary.wiley.com/doi/10.1002/wcc.879>
- State responsibility to act (albeit within its margin of appreciation).