

European Human Rights Grow Teeth

An Analysis of the rulings of 9 April 2024

The ECtHR rendered its rulings at a public hearing on 9 April 2024. The hearing attracted presence of media from all over the world. This reflects the importance the decisions will have on governments and courts worldwide. Some courts such as the South Korean constitutional court have even stayed proceedings to wait for the ECtHR judgement to be laid down.

The core message of the rulings is that an evolutive approach must be taken in order to adapt human rights reasoning to the emergency of climate change effects.

Three cases had been joined and decided by the same Grand Chamber.

The case of the **Swiss Verein KlimaSeniorinnen** and others v Switzerland was brought by an association of Swiss elderly women and five individuals of them. They alleged that the Swiss authorities have violated their rights to health and well-being by insufficient climate protection measures.

The judgment of the Court is an almost complete victory for the applicants. Concerning the admissibility of the complaint the court on the one-side sticks to its narrow understanding that applicants must prove to be personally and seriously concerned, which the Court denied looking at their individual situation. On the other side, however, the Court accepts standing of the association. This is a major step because the Court's case law so far had only accepted actions of individuals. The Court finds that an association action better reflects the collective nature of causes, effects, and necessary mitigation measures. Not any association has standing, though, but only those that are legally recognised, are constitutionally aimed at climate protection, and legitimately represent members or other persons suffering from climate change.

Concerning the substance of the case the Court does not accept, as many legal systems do, a general right to a healthy environment, but insofar as climate change adversely affects individuals they can claim 'effective protection by the State authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life'. The Court acknowledges that states enjoy a broad margin of appreciation on how to provide such protection. But there are limits to observe including that emissions reduction targets must be set, appropriate regulations be introduced, implementation be monitored, the public be informed and be given an opportunity to comment. Examining the climate policy of the Swiss authorities the Court concludes with majority of 16 to 1 that the measures taken were insufficient. In particular, the government lacked to quantify the emissions budget available for Switzerland.

Although not being conclusive on this issue the Court shows sympathy with the budget approach accepting 1.5°C as a warming limit and equal per capita as a legitimate criterion of calculating a state's share in the global budget. The Court even accepts responsibility of the state for emissions caused abroad by imported products.

The Court was also asked to rule on access to national courts. The Convention, Art. 6(1), guarantees such access if a civil right is disputed in a national proceeding and the outcome of the dispute has effect on the enjoyment of the right. The Court found that the right to physical integrity provided by Swiss law is to be regarded as such right, but that the impact of the outcome of the proceedings, i.e. any requirements concerning GHG emissions, on the individual applicants was too tenuous. However, in relation to the association action the Court found that the Swiss authorities and courts had not engaged seriously or at all with the applications brought by the applicant association. The reason seems to be that an effect of the out-

come of proceedings on the enjoyment of the human right is better noticeable concerning the general interests represented by the association. The Court concluded that there was a violation of Art. 6(1) ECHR in relation to the applicant association.

This result is disappointing for the individual claimants but in a way consequential because their standing was also denied in relation to access to the ECHR. National actions if oriented at the ECtHR case law will therefore need to be brought by persons who are personally and seriously concerned. Of course, national courts are free to go further in this respect. Nevertheless, the ruling will be of importance for climate litigation brought by associations.

In contrast to the *KlimaSeniorinnen* case, the judgment in the **Duarte Agostinho** case is a full defeat. The case was brought by 6 young Portuguese persons against Portugal and 32 other states, including the 27 EU member states and the UK, Norway, Turkey, and Russia. The Ukraine was struck out as respondent upon motion of the applicants. Russia remained because the case was pending at the date of stepping out of Russia from the Council of Europe.

A core issue of the case was that the applicants claimed to be affected by emissions not only from their home state Portugal but also from foreign states. Although this is of course a fact, it is a problem in legal terms. States are bound by the human rights of the ECHR only within their jurisdiction. The Court understands this to be the territory of a state. The respondent states in the Duarte case do not have jurisdiction in Portugal in that sense. Case law of the Court has nevertheless accepted exceptions of this principle in two situations, i.e. when the state had established public power over a foreign territory or its agents committed isolated violence in a foreign country. Although the court had in a case alluded to a third exception concerning 'special features' it was not prepared to rely on this in the present case or develop one more exception. Its major reason was that otherwise any person in the world would be entitled to bring an action.

In consequence, the Court ruled that applicants could only bring an action against their home state Portugal. But for that purpose they had first to exhaust national legal remedies which were readily available under Portuguese law. Considering the lack of external reach of the human rights the Court did not thoroughly examine whether the applicants could claim legal standing.

Concluding that the action was inadmissible the Court did not examine the merits of the case.

The narrow understanding of jurisdiction the Court adopts will be a drawback for future climate litigation because domestically controlled external emissions, also called scope 3 emissions, are a major question raised in a number of cases. Anyway, though, the view of the Court is not binding on other courts. National and other international courts are free to develop their own concept, as for instance, the German Constitutional Court has done in its climate ruling of 2021.

A further transnational issue raised by the applicants in the Duarte case was whether states are also responsible for emissions caused by products (such as coal) exported to other countries, also called scope 3 emissions. The Court did not address this issue at all in the Duarte case.

The question did nevertheless appear in the *KlimaSeniorinnen* case. The Court had acknowledged that a country does have responsibility for emissions caused abroad by products imported to the same. This appears as standing in some contrast to the strict denial of transnational responsibility for transnational effects of emissions in the Duarte case. The difference however is that in the *KlimaSeniorinnen* case the applicants live within the responsible country while in the Duarte case they live abroad. Swiss citizens can claim to be affected by Swiss-caused external emissions that have reverse effect on them while persons living abroad cannot invoke human rights against the responsible state because the state has no jurisdiction abroad.

Concerning the case of **M. Carème** the application was dismissed as inadmissible because the applicant did not anymore have his domicile in the community Grand Synthe, i.e. the location that the Conseil d'Etat

had in a previous French proceeding acknowledged as being endangered by sea level rise caused by climate change.

Influence on further climate litigation may result from the evolutive approach taken by the Court in view of the urgency of mitigating climate change. Further, the admissibility of an association action will also encourage courts, maybe including the BVerfG and even the CJEU to follow. Core is of course the foundation of a subjective human right to be protected from climate change effects with deleterious for human health and life conditions. Interesting is also the sympathy of the Court with the budget approach. Although its examination of the Swiss measures still follows its tradition to carefully assess whether the state has done what is feasible for it. The Court has avoided to go into details of fair share and modelled pathway reasoning.

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