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Client Alert Commentary

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European Court of Human Rights Delivers Three Landmark Rulings on Climate Change

For the first time, the Court has confirmed that the adverse impacts of climate change fall within the ambit of human rights protection under the European Convention of Human Rights, obliging States to implement effective mitigation measures.

On 9 April 2024, the European Court of Human Rights delivered three Grand Chamber rulings in climate change-related cases. These three separate judgments are the latest in a number of climate litigation in recent years. While two of the cases were dismissed as inadmissible on varying grounds, the Court concluded that Switzerland had breached Article 8 of the European Convention of Human Rights (ECHR) by failing to implement effective measures to combat climate change. This development is highly likely to lead to similar challenges to governments' climate policies in the near future, and likely influence the litigation strategy of those bringing actions against both States and companies.

The Court's rulings have already been described by many as novel, given it is the first occasion on which the Court has held that climate change-related harm fell within the scope of the ECHR and concluded a State had violated the ECHR by failing to adopt sufficient measures to combat climate change. However, while a landmark decision for this Court, it is generally consistent with recent developments in other arenas. This includes, by way of example, the recent decision of the Human Rights Committee (HRC) under the International Covenant on Civil and Political Rights (ICCPR) in *Daniel Billy et al v. Australia*. In that decision, the HRC considered that adverse climate change impacts could qualify as a reasonably foreseeable threat to life under the ICCPR. The HRC did not find there had been a violation of the right to life by Australia in that case, but found against Australia on other grounds.

Some courts of States party to the ECHR have also had the opportunity to consider the scope of Articles 2 and 8 of the ECHR in recent climate change-related cases, with several finding that various provisions of the ECHR, together with other international instruments, meant that States should be required to meet certain reduction targets. This was the approach taken, for example, by the German Federal Constitutional Court in *Neubauer and others v. Germany* and the Dutch Supreme Court in *Urgenda*.

That being said, certain aspects of the Court's rulings raise a number of further, complex questions. By finding that a State has "its own responsibilities within its own territorial jurisdiction in respect of climate change" under the ECHR, the Court's judgment in *Verein KlimaSeniorinnen Schweiz* arguably conflicts with the carefully crafted architecture of State obligations under the UNFCCC climate change regime and the Paris Agreement, under which no State is considered responsible for its contribution to climate

change. On the other hand, the Court does not attempt to impose more onerous obligations than the UNFCC regime, under which States are already committed under that international treaty structure to take certain measures, and must take into account climate change considerations to the extent feasible in their policy-making. Little guidance is given by the Court with respect to the nature or scope of mitigation measures which may or may not be ECHR-compliant; the Court suggests that "mere legislative commitment" to adopt mitigation measures is not sufficient, and "effective protection" measures are required, but refrains from commenting on what "effective" measures might entail. This ambiguity is not altogether surprising, given the complex, polycentric, and systemic issues that transitioning to a net zero society presents. However, States party to the Convention will undoubtedly be concerned whether steps need to be taken to modify their climate policies to ensure they are ECHR-compliant.

As we look ahead, we expect to see a continued increase in human rights-related climate litigation. These landmark rulings by the Court, which cannot be appealed, are now binding legal precedent for all States party to the ECHR and will undoubtedly trigger further challenges to government policy in future. We would also not be surprised to see the Court's findings refashioned by litigants to also support cases brought against companies.

This article provides (1) a short background to the rulings, (2) an overview of the admissibility and jurisdictional hurdles that many of the applicants were unable to overcome, and (3) the Court's ruling on the positive obligations imposed by Article 8 of the ECHR to combat climate change.

Background to the Case

The three judgments of the Court relate to three separate applications, which overlap with respect to the alleged harm suffered by the applicants as a result of climate change and the complex legal issues the applications raised:

1. In *Verein KlimaSeniorinnen Schweiz and others v. Switzerland,* a complaint had been made by a Swiss association and four Swiss nationals (who were members of that association), sharing concerns about the consequences of climate change on their living conditions and health. In their application, the claimants alleged that the Swiss authorities had made several serious omissions in the area of climate-change mitigation, in violation of certain Articles of the ECHR. Before the Swiss administrative authorities and courts, they had requested relief by way of, *inter alia,* an order that the Swiss authorities develop a new plan that will ensure Switzerland achieves the Paris Agreement targets.

2. *Carême v. France* concerned a complaint by a former inhabitant and mayor of the municipality of Grande-Synthe, claiming that France had failed to take sufficient measures to prevent global warming in violation of the right to life under Article 2 ECHR and the right of access to the court.

3. In *Duarte Agostinho and others v. Portugal and others*, the applicants argued that climate change events, such as recent forest fires in Portugal, had impacted their right to life under Article 2, their right to privacy under Article 8, and their right to not experience discrimination under Article 14 of the ECHR.

While the Court had on several previous occasions considered that severe environmental harms, including air, water, and noise pollution, may have pervasive effects on the human rights protected by the ECHR, the Court had never extended ECHR protection to climate change.

Admissibility and Jurisdictional Hurdles

Standing

The first hurdle that the applicants faced was the victim status requirement prescribed by Article 34 of the ECHR. According to this Article, an applicant must prove that they are directly affected by a violation of the ECHR, which in turn requires reasonable and convincing evidence of impact, rather than mere suspicion or conjecture. The majority of applicants were unable to show they had been directly affected for the purposes of Article 34. For example, in *Carême v. France,* the Court found that, as a former resident of Grande Synthe, the applicant no longer had relevant links with the French city where he used to live, nor did he currently live in France. The Court reached the same conclusion for the individual applicants in *Verein KlimaSeniorinnen Schweiz.* As such, he could not claim to have victim status under Article 34 ECHR. This outcome is not entirely surprising, given that standing has been a similar obstacle for claimants in climate change litigation in previous applications to the Court and in other jurisdictions, such as the United Kingdom and the United States.

Exhaustion of Domestic Remedies

The second hurdle facing the applicants was the exhaustion of the local remedies requirement found in Article 35 ECHR. This Article provides that an applicant must first exhaust local remedies in a Contracting State to the ECHR before making an application to the Court. While the fact that the applicants in *Duarte Agostinho* had not satisfied this requirement was uncontested, the applicants argued that, as children and youths, they faced significant barriers to access grievance mechanisms, stating that complying with Article 35 ECHR would take too long, as domestic courts would not respond in time to meet the targets set by the Paris Agreement. This was rejected by the Court on the basis that, *inter alia,* a comprehensive system of remedies was available to the applicants in Portugal.

Extraterritorial Jurisdiction

Another hurdle for the applicants in *Duarte Agostinho* related to the ability of the respondent Contracting States to exercise jurisdiction outside their own territorial boundaries. The Court will only consider that a State has exercised extraterritorial jurisdiction in exceptional circumstances; however, in the application of *Duarte Agostinho,* the applicants argued that the 32 respondent Contracting States exercised extra-territorial jurisdiction over the climate change harms that their activities caused abroad. The Court disagreed, finding the application inadmissible on the basis that the Convention offered no basis to extend the Court's jurisdiction in this manner. The Court only had jurisdiction in relation to Portugal, but the application was nevertheless inadmissible as the applicants had failed to exhaust local remedies as required under Article 35 ECHR. In reaching this conclusion, the Court took a different approach than other human rights forums, including the Inter-American Court of Human Rights and the United Nations Committee on the Rights of the Child*,* where the respondent Contracting State was deemed to have jurisdiction over transboundary harm caused by climate change.

Contracting States' Positive Obligations to Combat Climate Change

In its decision in *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, the Court held that Article 8 of the ECHR encompasses a right to effective protection by State authorities from the serious adverse effects of climate change on lives, health, well-being, and quality of life. In response to the Swiss association's application, which unlike the individuals had standing, the Court determined that Switzerland failed to comply with those positive obligations, given the "critical gaps" in its domestic regulatory framework, including the failure by the Swiss authorities to quantify a national greenhouse gas (GHG)

emissions limit. The Court also held that Switzerland had fallen short of its own GHG emission reduction targets in the past.

In its judgment, the majority of the Court (Judge Eicke dissenting) considered that Contracting States' positive obligations should be interpreted in line with the United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris Agreement, as well as the reports of the Intergovernmental Panel on Climate Change (IPCC). In the Court's opinion, this meant that States were required to implement necessary regulations and measures aimed at reducing their GHG emission levels, with a view to reaching net neutrality, within the next three decades. This required States to adopt relevant targets and timelines within their regulatory framework as a basis for mitigation measures.

In order to establish a breach of Article 8 ECHR, the Court had to assess whether, *inter alia,* a sufficient causal link existed between the risks caused by climate change and Switzerland's alleged failure to fulfil its positive obligations (i.e., adopting measures to combat climate change). The Court accepted that while the causal link was "more tenuous and indirect" than in the context of local sources of harmful pollution (such as pollution caused by a coal mine), the State's failure to perform its duties to reduce the risks of harm would still entail an "aggravation" of those risks.

The Court also considered the margin of appreciation that is typically afforded to Contracting States in determining what measures should be implemented in order to comply with their positive obligations under the ECHR. In the Court's view, Switzerland had exceeded this margin by failing to implement appropriate and necessary measures in a timely manner.

The Court also held that the Swiss administrative authority and courts which had first heard the application had failed to provide convincing reasons as to why they had dismissed it. This amounted to an interference with the applicants' right of access to court under Article 6(1) of the Convention.

Representing clients in a number of key climate litigation matters, we are well positioned to help clients navigate the issues raised in this Client Alert.

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

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