

Unofficial translation of the juridical relevant part of the order the KlimaSeniorinnen received the 26th of April 2017 by the Federal Department of the Environment, Transport, Energy and Communications

The original version is to be found on: <http://klimaseniorinnen.ch/uvek-entscheid/>

C. Grounds

1. Formal matters

1.1 Ruling concerning real acts in accordance with Article 25a

In accordance with Article 25a (1) APA (Administrative Procedure Act, Verwaltungsverfahrensgesetz, VwVG), any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it (a) refrains from, discontinues or revokes unlawful acts; (b) rectifies the consequences of unlawful acts; or (c) confirms the illegality of such acts. The authority shall decide by way of a ruling. (Art. 25a (2) APA).

The purpose of Article 25a APA is to take account of the legal protection guarantee of Article 29a of the Federal Constitution of the Swiss Federation and to pursue a broadening of the previously available opportunities for legal protection (cf. Isabelle Händer, in: Bernhard Waldmann/Philippe Weissenberger [eds.], Praxiskommentar zum Bundesgesetz über das Verwaltungsverfahren, Zurich 2009, Art. 25a margin number 2 f.).

Various prerequisites must be met for the authority to enter into a request for a ruling on real acts in accordance with Article 25a APA. Besides the applicants' capacity to sue and be sued and their ability to stand trial, about which there is no doubt in the present case, the prerequisites are as follows.

1. It must be about a "real act."
2. The request in accordance with Article 25a (1) APA must concern an action based on "federal public law."
3. The authority taking action must be a "federal administrative authority" (Art. 1 (1) and (2) APA).
4. The real act must "affect rights or obligations."
5. There must be an "interest worthy of protection."
6. Subsidiarity must be observed.

The prerequisites for entering into the case mentioned under numbers 1 to 3 can in principle be considered to have been fulfilled. Whether the applicants can prove an interest worthy of protection and whether subsidiarity has been observed is immaterial because – as explained below – the prerequisites of number 4 have not been fulfilled for any of the legal claims with a view to being affected by the real act in rights or obligations.

1.2 Being affected in rights or obligations

Article 25a APA concerns those cases in which actions of the authorities are not directed toward regulating rights and obligations, but nonetheless affect rights and obligations. According to the prevailing understanding, this presupposes an intervention in the personal legal sphere of the persons affected (BGE 140 II 315 E. 4.3). Moreover, this provision is to be viewed with reference to the guarantee of access to the courts of Article 29 Constitution; the provision is to ensure the realization of Article 29 Constitution in the area of real acts. The guarantee of access to the courts

grants a right to adjudication by a court in the case of legal disputes. In accordance with Federal Supreme Court case law, a legal dispute exists in the case of disputes in connection with an individual legal position worthy of protection (BGE 140 II 315 E. 4.4).

An individual legal position worthy of protection may exist, for example, in the case of interventions in religious freedom by means of government publications (BGE 121 I 87 E. 1b p. 91), in the case of interventions in the guarantee of ownership by making sufficient access to a house impossible (BGE 126 I 213), in the case of limitations on freedom of movement through real actions of the police (BGE 130 I 369 E. 6 S. 376 ff.; BGE 128 I 167 E. 4.5 p. 173 ff.), or through house rules in a residence for asylum seekers (BGE 133 I 49 E. 3 p. 55 ff.; BGE 128 II 156 E. 2c p. 161 f.).

The main goal of the applicants' request to the federal administrative authorities addressed is that they work out legislative provisions to reduce CO₂ emissions and take up measures to prepare them. The actions thus sought are not comparable with a ruling (individual-concrete decisions) or at least with a general ruling (general-concrete). The general purpose of the applicants' request is a reduction of the atmospheric CO₂ concentration. Thus, their goal is to reduce CO₂ emissions not only in the applicants' immediate surroundings, but worldwide.

For this reason, no individual legal positions are affected in the present case. The applicants' petitions do not serve to realize specifically such positions, but rather aim for general-abstract regulations and communications to be adopted. For this reason, their requests cannot be the object of a ruling in accordance with Article 25a APA. Lawmaking procedures are not determined by the APA. Citizens eligible to vote can influence lawmaking in particular by exercising their political rights in accordance with the Federal Act on Political Rights of 17 December 1976 (PRA, SR 161.1). Participation of citizens in political decision-making is also enabled by the consultation procedure, which is mandated by law and whose purpose is explicitly to allow the participation of the cantons, the political parties, and interested groups in the shaping of opinion and the decision-making process of the Confederation (Art. 2 of the Federal Act of 18 March 2005 on the Consultation Procedure [Consultation Procedure Act, CPA; SR 172.061]).

The criterion of "being affected in rights or obligations" in accordance with Art. 25a APA is thus not fulfilled in the present case.

2.1 Right to an effective remedy in accordance with Article 13 ECHR

In accordance with Article 13 of the European Convention on Human Rights (ECHR; SR 0.101), everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority even if the violation has been committed by persons acting in an official capacity. This provision is intended to ensure that the rights and obligations in accordance with the ECHR are already protected at the national level (cf. YVO HANGARTNER, Das Recht auf eine wirksame Beschwerde gemäss Artikel 13 EMRK und seine Durchsetzung in der Schweiz, AJP 1994 p. 3ff.). However, Article 13 cannot be invoked on its own, but only in connection with a defensible allegation of a violation of the Convention (BGE 130 I 369 E. 7.1, BVGE 2009/1 E 8.1).

In addition, the right to an individual application in accordance with the ECHR is dependent upon the fulfillment of various admissibility criteria. With respect to personal criteria, a person who would like to invoke the right to a remedy must assert in a defensible way that he/she is the victim of a violation of the ECHR. The notion of "victim" is to be interpreted autonomously here. Thus it is independent of national provisions concerning interest in legal protection or the ability to stand trial. It does not imply the existence of prejudice. An act that has only temporary legal effects may suffice. (European Court of Human Rights, Practical Guide on Admissibility Criteria, December 2010, p. 12 ff.).

The prerequisite for victim status is fulfilled if a sufficiently direct connection exists between the applicant and the disadvantage which has occurred or is impending and which brought about the alleged violation. Persons pursuing a public interest are excluded by this criterion. In principle, an *actio popularis*, i.e., an application in the name of an indeterminate number of third parties against a law as such or against a government policy, is not possible (MEYER-LADEWIG/NETTESHEIM/VON RAUMER [eds.], EMRK Europäische Menschenrechtskonvention, Handkommentar, 4th ed., Basel 2017, Art. 34 N. 28; BVGE 2009/1 E 8.2).

As already explained above, the applicants are basically demanding that the federal administrative authorities addressed adopt legislative provisions to reduce CO₂ emissions or perform preliminary work in this respect in order to prevent an increase in CO₂ emissions. This cannot take place only locally. The goal of the demands is thus the protection of the general public. Article 13 ECHR, however, permits only the review of a concrete state act in relation to an individual person. In the present case, the applicants are pursuing public interests which cannot provide the basis for victim status.