

***Verein KlimaSeniorinnen and others v Switzerland* (Application no. 53600/20)**

Observations on the Facts / Reply to the Respondent's observations on the facts

Observations on the Law / Reply to the Respondent's observations on the law

**Summary**

**1. Preliminary comments**

- 1 The adverse impacts of climate change are threatening the rights to life and health of the Applicants as members of a particularly vulnerable group. It is the Respondent's human rights obligation towards the Applicants to take urgent, meaningful and ambitious action to mitigate climate change, through preparing, committing and implementing ambitious climate action plans to limit global warming to no more than 1.5°C.
- 2 Undoubtedly, the protection of individual human rights is a matter for the courts. The Convention is designed to protect the rights of all individuals, including vulnerable persons and groups. The individual human rights of the members of a vulnerable group, or vulnerable individual applicants, can hardly be effectively protected by democratic means, given that democratic decisions are made by the majority principle. Furthermore, the Applicants respectfully submit that the Convention cannot be undermined with reference to democracy.

**2. Summary of the Observations on the Facts**

**2.1. Complements to the facts presented in the Application and new developments since the submission of the Application**

- 3 It is unequivocal that human influence has warmed the atmosphere, ocean and land. Some of the hot extremes observed in the past years would have been *extremely unlikely* without anthropogenic disruption of the climate system, and with every additional increment of global warming the intensity and frequency of heat waves increases, as has recently been confirmed by the Intergovernmental Panel on Climate Change ('IPCC') in its recently published AR6.<sup>1</sup>

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<sup>1</sup> IPCC, Sixth Assessment Report (AR6), Climate Change 2021: The Physical Science Basis, Summary for Policymakers, A.3.1, available at [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf) (last visited 10 October 2021).

- 4 Climate-induced heat waves have caused, are causing and will cause further deaths and illnesses to older women, as the Applicants are. Recent attribution studies have found that in Switzerland 30% of heat-related deaths can be attributed to anthropogenic climate change<sup>2</sup> and 2021 studies confirmed that women over 75 years old are the demographic group with the highest risk of heat-related health damage in Switzerland.<sup>3</sup> That heat waves have already caused physical and mental suffering to the Applicants is confirmed again in recent medical certificates and personal statements. In Switzerland, the average temperature has risen twice as much as the global average. Staying within the 1.5°C temperature limit would significantly reduce the risk of heat-related excess mortality and morbidity.
- 5 Although the Respondent knows about the aforementioned facts, the Respondent does not do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels, which is needed to protect the Applicants. Recent studies confirm that the Respondent's climate ambitions are not in line with the 1.5°C limit. Also, the Respondent failed to set any binding targets for 2030 and 2050, and it failed to implement and enforce sufficient measures to meet its 2020 target.
- 6 To be in line with the 1.5°C limit, according to recent studies, the Respondent needs to ensure a greenhouse gas emission level in 2030 that is net-negative in comparison to the emission levels in 1990.<sup>4</sup> This entails achieving a *domestic* greenhouse gas emission reduction of 61% below 1990 levels by 2030.<sup>5</sup> Furthermore, as most of the Respondent's emissions occur abroad (consumption based emissions, indirect emissions caused by the finance sector), the Respondent needs to prevent and reduce such emissions accordingly.

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<sup>2</sup> VICEDO-CABRERA/SCOVRONICK/SERA ET AL., The burden of heat-related mortality attributable to recent human-induced climate change, *Nature Climate Change* 11, 492–500 (2021), p. 1, available at <https://doi.org/10.1038/s41558-021-01058-x> (*doc. 1*).

<sup>3</sup> RAGETTLI/RÖÖSLI, Hitzebedingte Sterblichkeit im Sommer 2019, *Primary and Hospital Care* 2021;21(03):90-95, 3 March 2021, available at <https://doi.org/10.4414/phc-d.2021.10296>; SAUCY ET AL., The role of extreme temperature in cause-specific acute cardiovascular mortality in Switzerland: A case-crossover study, *Science of The Total Environment*, Vol. 790, 10 October 2021, available at <https://doi.org/10.1016/j.scitotenv.2021.147958>.

<sup>4</sup> See *inter alia* RAJAMANI ET AL., National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law, *Climate Policy* Volume 21 Issue 8, pp. 983–1004, 7 September 2021, available at <https://doi.org/10.1080/14693062.2021.1970504>.

<sup>5</sup> See Climate Analytics, *A 1.5°C compatible Switzerland*, 15 June 2021, available at [https://climateanalytics.org/media/final\\_clean\\_icci\\_1406\\_aligning\\_switzerlands\\_2030\\_emissions\\_target\\_with\\_the\\_1-5c\\_paris\\_agreement\\_temperature\\_limit\\_2.pdf](https://climateanalytics.org/media/final_clean_icci_1406_aligning_switzerlands_2030_emissions_target_with_the_1-5c_paris_agreement_temperature_limit_2.pdf) (last visited 12 October 2021).

## 2.2. Reply to the Respondent's arguments

- 7 The Respondent justifies its inadequate level of ambition *inter alia* with its alleged “low greenhouse gas intensity”. However, in the global ranking of countries, Switzerland ranks 9th in terms of CO<sub>2</sub> emissions of consumption per capita, a ranking that would be even higher if emissions from aviation and indirect emissions from the finance sector were taken into account. The Respondent further claims that the costs of reducing emissions are high in Switzerland, yet it has not provided any evidence proving this assertion at any point. Also, this is no justification for an inadequate level of ambition, and for letting large mitigation potential unused. Switzerland is one of the wealthiest countries in the world that is and will continue to be particularly affected by global warming. The potential to reduce greenhouse gas emissions, including cost-effective mitigation potential, has been severely under-used even in main sectors like transport, agriculture and finance, and the available measures were insufficiently enforced.
- 8 Although the Respondent admits that to combat global warming, it is essential to base decisions on best scientific knowledge, it is clear from the Respondent's Government public communications that the decisions and proposals regarding climate action, particularly regarding emissions reduction targets, are *not* based on best scientific knowledge, but on political considerations. The Respondent asserts regularly that its climate targets, as entailed in its nationally determined contribution (NDC), would put it on an emission pathway in line with the 1.5°C limit. However, the Respondent has even failed to assess its fair share of the necessary global emissions reductions following an approach which, if followed by all countries, would make it possible to stay within the 1.5°C limit.
- 9 Contrary to the Respondent's assertions, the scientific consensus has clearly indicated that there is no period of grace to take action to limit global warming to 1.5°C.<sup>6</sup> Because greenhouse gases remain in the atmosphere for a long time, emissions must be reduced as quickly as possible. The longer the

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<sup>6</sup> IPCC, Special Report: Global Warming of 1.5°C, 2018 (1.5°C SR), p. 61, available at [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf) (last visited 12 October 2021); UNEP, Emissions Gap Report 2020, 9 December 2020, p. 33 f., available at <https://www.unep.org/emissions-gap-report-2020> (last visited 12 October 2021); IPCC, AR6, Climate Change 2021: The Physical Science Basis, Chapter 4, Executive Summary, available at [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_Chapter\\_04.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Chapter_04.pdf) (last visited 12 October 2021).

delay in emissions reduction, the larger the likelihood of exceeding the limit of 1.5°C.<sup>7</sup>

### **3. Summary of the Observations on the Law**

#### **3.1. Climate Change in European Court Decisions and International Human Rights bodies**

- 10 In many Member States of the Council of Europe, domestic courts have established the need to implement and enact rapid measures to limit global warming to 1.5°C to protect civil rights, constitutional rights, human rights and the rights of future generations.
- 11 Various international human rights bodies including the Committee on the Elimination of all forms of Discrimination against Women, the Committee on Economic, Social, Committee on Economic, Social and Cultural Rights and the Human Rights Council have recognised that climate change has a wide range of negative implications for the effective enjoyment of human rights, including the rights to life and health. It has been recognized that factors such as gender, age and disability increase people’s vulnerability to climate change, and therefore, measures to limit climate change should be gender-responsive and sensitive to the needs and vulnerabilities of older women.

#### **3.2. The Court's question 1: Victim Status**

##### **3.2.1. Preliminary comments**

- 12 Global warming has clearly significant impacts on human rights. If victim status were denied to the Applicants as members of a most vulnerable group due to their age and gender who are enduring and are increasingly facing clearly evidenced impacts by excessive greenhouse gas emissions, it is questionable who would then be entitled to this status. If acts and failures by states in fighting climate change remain outside the scope of human rights law, this would be an unacceptable consequence in light of the Court’s practice in comparable environmental law cases.

##### **3.2.2. Answer to the Court’s question**

- 13 The Applicants are direct and potential victims, within the meaning of Art. 34 ECHR as interpreted by the Court, of a violation of Arts. 2 and 8 ECHR due

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<sup>7</sup> IPCC, 1.5°C SR (n 6), p. 34.

to the Respondent's failure to effectively protect them against the effects of climate change. The Applicants fully uphold the statements made in the Application.

- 14 The Court should recognise the Applicant association's (Applicant 1) victim status for the following reasons:
- The wording of Art. 34 ECHR is very open and does not contain anything that would preclude a group from bringing a claim;
  - a flexible interpretation of standing requirements ensures access to justice;
  - the term “victim” ought to be interpreted in an “evolutive manner”;
  - recourse to collective bodies—such as associations— is one of the accessible means, sometimes the only means, reasonably available to vulnerable groups to defend their interests effectively (*Gorraiz Lizarraga and Others v. Spain*);
  - the Applicant association enables a particularly vulnerable group to exercise its rights in the long term, regardless of the natural age-related retirement of some of its members;
  - in this case in particular, it is of great importance that not only an individual applicant but also an association is awarded standing. This is because the alleged human rights violations are closely related to the advanced age of the women concerned. The risk that individual applicants could die during the proceedings before the Court and that their application could no longer be heard is therefore high.
- 15 The Applicants are also victims in respect of Art. 6 and 13 ECHR, as laid down in the Application.

### **3.2.3. Reply to the Respondent's arguments**

#### *Causation is not a precondition for victim status*

- 16 The Applicants submit that as long as they make an arguable claim that they are likely to suffer harm, as they did, the Court should accept the application as admissible. Considerations related to the causal link between the Respondent's omissions and the Applicants' harm should be joined with and examined on the merits.

*Applicant 1 has victim status*

17 Contrary to the Respondent's claim, given that the association's first purpose is to prevent health hazards caused by dangerous climate change, Applicant 1 is directly affected by the Respondent's failure to do its share to limit temperature increase to 1.5°C. Further, Applicant 1 is a direct victim under the Association's second purpose: to defend the interests of its members, which also have the status of victims as regards to Arts. 2 and 8 ECHR.

*Applicants 2-5 are personally and as members of a vulnerable group particularly affected by the consequences of climate change*

18 The Applicants submit that contrary to the Respondent's claims, they are both *personally*, and as *members of a particularly vulnerable group* of older women, *especially* affected by the effects of rising temperatures in comparison with the general public. *They* have suffered and continue to suffer personally from severe heat-related afflictions, and *they* were and continue to be at a real and serious risk of mortality and morbidity with every heatwave, because they are older women.

*Applicants are not circumventing Paris Agreement*

19 The Respondents' wrongly claimed that the Applicants were attempting to circumvent the Paris Agreement. The Applicants are asking the Court to assess whether the Respondent's omission to take effective climate action to protect the Applicants from climate-induced heatwaves *violates the Convention*. That the Applicant's Convention rights are violated by the Respondent's omissions in climate protection would be the case even in absence of the Paris Agreement. Clearly, the Paris Agreement was not intended to undermine existing human rights obligations.

**3.3. The Court's question 2: Applicability and violation of Arts. 2 and 8 ECHR**

**3.3.1. Answer to the Court's question**

20 The Applicants submit that given the real and serious risk of harm posed by climate induced heatwaves to the Applicants, a risk of which the Respondent is perfectly aware and which can be reduced by the Respondent, Arts. 2 and 8 ECHR are applicable.

21 The Applicants further submit that the Respondent has failed to fulfil its positive obligations under Arts. 2 and 8 ECHR to protect the Applicants from the risk of harm posed by climate induced heatwaves, because the

Respondent has not adopted appropriate regulations and implemented them by means of adequate and sufficient measures to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels. Besides measures to mitigate emissions occurring within Switzerland, the Applicants are of the view that this requires the Respondent also to prevent and reduce emissions occurring abroad that are directly or indirectly attributable to and within the control of the Respondent.

- 22 Also, the Applicants submit that there is no discretion as to the level of ambition, namely to do the Respondent's share to stay within the 1.5°C limit. The Respondent's margin of appreciation is limited to determining the measures with which to fulfil its duty to protect, provided they are actually implemented and are appropriate for achieving the objective.

### **3.3.2. Reply to the Respondent's arguments**

#### *Causation*

- 23 The Applicants reject the Respondent's argument that a causal link between the Respondent's omissions and the harm caused to the Applicants' rights has not been established.
- 24 First, based on extensive scientific evidence the Applicants have proven the complex yet direct causal link between greenhouse gas emissions and harmful effects on the Applicants' rights; second, the contribution by multiple states to the emission of greenhouse gases in the atmosphere does not preclude the Court from establishing that the Respondent bears responsibility for its part in this. Partial responsibility arises from partial causation, even if a single State cannot prevent its outcome on its own. The Court has explicitly rejected the 'but for' test in the context of the positive obligation to protect in the cases of *E. and Others* and *O'Keeffe v Ireland* and adopts a more flexible notion between the harm and the State's omission, such as the "real prospect of altering the outcome or mitigating the harm" standard. Hereto, the Applicants submit that reasonable preventive measures with a real prospect of mitigating the harm are available but have not been taken by the Respondent.

#### *Legal Nature of Paris Agreement*

- 25 The Applicants submit that contrary to the Respondent's claim, the legal nature of the specific provisions of the Paris Agreement is not decisive in determining the scope of the obligation to protect under Arts. 2 and 8 ECHR.

All provisions of the Paris Agreement are part of the international law basis that can be taken into account when determining the scope of the obligation to protect in terms of Arts. 2 and 8 ECHR.

*Compatibility of Switzerland's commitments with 1.5°C limit and Convention rights*

- 26 The Respondent's climate strategy has never been and is not planned to be in line with the 1.5°C limit. Particularly, in light of the best available science and international environmental law and principles, the Respondent's NDC as well as its long-term climate strategy fall short of meeting the 1.5°C limit necessary to protect the Applicants.
- 27 The Respondent has not shown whether and how it will meet its human rights obligations, namely to do its share to stay within the 1.5°C limit, and continues to argue there would still be time to combat climate change, despite clear scientific evidence to the contrary. The Respondent has also failed in its procedural obligations, as it has not conducted appropriate surveys and studies to assess and set a level of climate protection following an approach which, if followed by all countries, would be capable of staying within the 1.5°C limit.

**3.4. The Court's question 3: Applicability and violation of Art. 6 ECHR**

- 28 The Applicants reiterate that Art. 6 ECHR is applicable in the case at hand, and they did not have an effective legal remedy at their disposal to assert their civil rights.
- 29 Contrary to the Respondent's claim, the Applicant's application does not fall under the general ban on 'fourth instance' complaints. The domestic courts applied the standing requirements *arbitrarily*, impairing the essence of the Applicant's rights under Art. 10 Swiss Constitution and Arts. 2 and 8 ECHR.

**3.5. The Court's question 4: Effective remedy within the meaning of Art. 13 ECHR**

- 30 The Applicants submit that they did not have an effective remedy at their disposal within the meaning of Art. 13 ECHR concerning the alleged violations of Arts. 2 and 8 ECHR. The Applicant's complaints were not examined in substance because the domestic courts applied standing requirements in an arbitrary manner.



31 Contrary to Respondent’s claims, the possibility to make an appeal is not deemed in itself an effective remedy. Art. 13 ECHR guarantees the availability at national level of a remedy to enforce the substance of the Convention rights in whatever form they might happen to be secured in the domestic legal order. The remedy must be “effective” in practice as well as in law. And such a remedy must be available as soon as there is an “arguable” complaint or grievance under the Convention. Given the nature of the complaints made under Arts. 2 and 8 ECHR, the Applicants respectfully submit that there is such an “arguable complaint”, and that the Respondent was accordingly under an obligation to ensure that the Applicants had access to an effective remedy.

#### 4. Requests to the Court

The Applicants respectfully request the Court to declare that:

- (1) All of the Applicants are recognised as having victim status, and that each of their claims is admissible under Arts. 34 and 35 ECHR, respectively.
- (2) The Respondent failed to protect the Applicants' rights to life and private life under Arts. 2 and 8 ECHR, by failing to adopt the necessary legislative and administrative framework to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels. This includes:
  - a. ensuring a greenhouse gas emission level in 2030 that is net-negative as compared to the emissions in 1990;
  - b. reducing domestic emissions by 61% below 1990 levels by 2030, and to net-zero by 2050, as the domestic component of *a.*;
  - c. preventing and reducing any emissions occurring abroad that are directly or indirectly attributable to the Respondent, in line with the 1.5°C above pre-industrial levels limit;
  - d. permanently removing greenhouse gas emissions from the atmosphere and storing them in safe, ecologically and socially sound greenhouse gas sinks, if, despite *a.*, *b.*, *c.*, any greenhouse gas emissions continue to occur within the control of the Respondent, or the concentration of greenhouse gases in the atmosphere is

exceeding the level corresponding to the 1.5°C above pre-industrial levels limit.

- (3) The Applicants' right of access to court under Art. 6 ECHR, and their right to an effective remedy under Art. 13 in conjunction with Art. 2 and 8 ECHR, have been violated.

Zurich, 13 October 2021

Yours faithfully,



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