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Requête n.º 53600/20 — VEREIN KLIMASENIORINNEN SCHWEIZ AND OTHERS V. SWITZERLAND

Third-party intervention by the Portuguese Government

I. Inroduction

1. This application falls within what can be called the "*new environmental litigation*" before the European Court of Human Rights, by which the applicants in this case (as others in similar and concomitant cases pending before the Court) aim to obtain, in an approach that is intended to be pioneer, a Court's ruling on the complex issue of climate change, more particularly on the alleged non-compliance by the member states of the Council of Europe with internationally agreed commitments to mitigate and combat global warming.

2. This application raises several new questions on which the Court has not yet decided, raising the need for a wider debate on the intervention of the Court and on the judicial review of the European Convention on Human Rights in this field, taking into account its procedural and substantive requirements.

3. It is in this context that the Portuguese Government requested the necessary authorization - which was granted - to intervene in this case as a third party.

4. The Portuguese Government is well aware of the seriousness of the situation we are all living and of the urgency that is imposed on Governments so they adopt, with real determination and ambition, the most effective measures in the fight against global warming.

5. The Portuguese authorities do not ignore that the climate issue is here to stay and it is up to States parties to take the initiative and lead public and private actors on the way to effectively mitigate the harmful effects of climate change. In defining this path, the authorities must rely on other players, namely those who promote responsible environmental activism, since they are essential in the definition of the most effective strategies and policies.

6. However, this does not mean that due process can be waived on behalf of the pursuit of such aims. In particular, the procedural requirements laid down by the States Parties on the European Convention on Human Rights cannot be removed or omitted, as specified in the Practical Guide on Admissibility Criteria prepared by the Court in 2009 (and updated in the meantime).

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7. The scope of this case concerns Switzerland's obligations regarding global warming. The applicants – one association (hence, a legal person) and four individual applicants, all women over 75 years of age – claim that the health problems they suffer from (or those of their associates) would worsen during the ever more frequent heat peaks, which would produce a strong impact on their living conditions, health and general wellbeing, endangering their lives, with the risk of suffering a premature death.

8. According to the provisions ruling third-party's interventions, the Portuguese Government is not supposed to comment on the facts nor on the merits of the case.

9. Therefore, the Portuguese Government confines itself to addressing general principles governing the victim status, the applicability of articles 2 and 8 of the Convention, the nature of the obligations agreed upon by the States in the Paris Agreement and the scope of the ECHR's competence in this field.

I. Victim Status

10. According to established case-law, the concept of "victim" provided for in Article 34 of the Convention must be interpreted autonomously, so it does not have to coincide with the notions provided for in the domestic legal orders concerning the interest in acting or legal capacity.

11. The concept of victim comprises primarily the ***direct victims*** of the alleged violation, that is, those who are directly affected by the facts that presumably constitute the impugned interference.

12. But Article 34 concerns not just the direct victim or victims of the alleged violation, but also any ***indirect victims*** to whom the violation would causes indirect harm or who has a valid and personal interest in seeing it brought to an end.

13. Hence, the Court receives and examines applications submitted by individuals who indirectly suffer the effects of an alleged violation of Convention rights. That has been the case of applications submitted by close relatives of a deceased or disappeared person in situations which allegedly may engage the responsibility of the State under article 2 of the Convention.

14. In certain specific situations, however, the Court has accepted that an applicant may be a ***potential victim*** of an alleged interference. However, in such cases it is required from those who claim to be a *victim* that they produce reasonable and convincing *evidence* of the *likelihood that a violation affecting him or her personally will occur*. A mere suspicion or conjecture is insufficient.

15. When such evidence is not produced it is necessary to inquire if the applicants wish to have individual subjective rights safeguarded or if - as we believe is the case - that the applicants wish to obtain the protection of *collective* or *diffuse interests*, such as the protection of the right to a healthy environment. In this case, one should take into account what is the established jurisprudence of the Court.

16. And, accordingly, one should bear in mind that the Convention does not provide for the institution of an *actio popularis* and it is not for the Court to review the relevant law and practice "*in abstracto*", but to determine whether the manner in which they were applied to or affected the applicant's subjective individual rights gave rise to a violation of the Convention (for example, *Roman Zakharov v. Russia [GC], § 164*).

17. The Portuguese Government recalls the jurisprudence established by the Court particularly in the cases *Le Mailloux v. France; Caron and Others v. France; Aly Bernard and 47 Other private individuals, and the Association Greenpeace Luxembourg v. Luxembourg* **and** *Centre de Ressources Juridiques au Nom de Valentim Campeanu v. Romania.*.[1]

[1] We now transcribe the relevant passages of the judgments given by the Court in these cases:

Case *Le Mailloux v. France*:
«11. (...) l'article 34 de la Convention n'autorise pas à se plaindre in abstracto de violations de la Convention. Celle-ci ***ne reconnaît pas l'actio popularis****, ce qui signifie qu'un requérant ne peut se plaindre*

18. According to the relevant case-law, the *victim status* requires therefore the demonstration of a ***sufficiently direct link*** between the applicants' subjective sphere and the harm they alleged having suffered. The applicants must provide reasonable and convincing *evidence* that they have been personally and directly affected.

19. Another question arises as to whether the advanced age of the applicants may constitute an increased danger. If so, should the applicants be considered as belonging to a group of the population especially vulnerable to climate change and which should therefore be given special protection?

20. We must remember that this case, as configured by the applicants, concerns the obligations incumbent on the respondent government according to the Paris Agreement and other instruments of international law to combat climate change and mitigate global warming.

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d'une disposition de droit interne, d'une pratique nationale ou d'un acte public simplement parce qu'ils lui paraissent enfreindre la Convention.
Pour qu'un requérant puisse se prétendre victime, il faut qu'il produise des indices raisonnables et convaincants de la probabilité de réalisation d'une violation en ce qui le concerne personnellement; de simples suspicions ou conjectures sont insuffisantes à cet égard (Centre de ressources juridiques au nom de Valentin Câmpeanu c. Roumanie [GC], no 47848/08, § 101, CEDH 2014 et les références citées). (...)»

Case *Caron and Others v. France*:
*«(...) S'agissant d'abord du volet du grief relatif à l'atteinte à la santé et à l'environnement des requérants, la Cour rappelle que pour pouvoir se prétendre victime d'une violation, au sens de l'article 34 de la Convention, un individu doit avoir subi directement les effets de la mesure litigieuse. Ainsi, la Convention n'envisage pas la possibilité d'engager une **actio popularis** aux fins de l'interprétation des droits reconnus dans la Convention (...).»*

Case *Aly Bernard and 47 Other private individuals, and the Association Greenpeace Luxembourg v. Luxembourg*:
*« (...) Ce n'est que dans des circonstances tout à fait exceptionnelles que le risque d'une **violation future** peut néanmoins conférer à un requérant individuel la qualité de «victime», sous réserve toutefois qu'il produise des indices raisonnables et convaincants de la probabilité de réalisation d'une violation en ce qui le concerne personnellement ; de simples suspicions ou conjectures sont insuffisantes à cet égard.*
En l'espèce, la Cour estime que la seule invocation des risques de pollution inhérents à la production d'acier à partir de ferrailles ne suffit pas pour permettre aux requérants de se prétendre victimes d'une violation de la Convention. Il faut qu'ils puissent prétendre, de manière défendable et circonstanciée, que faute de précautions suffisantes prises par les autorités, le degré de probabilité de survenance d'un dommage est tel qu'il puisse être considéré comme constitutif d'une violation, à condition que l'acte critiqué n'ait pas des répercussions trop lointaines (mutatis mutandis, arrêt Soering c. Royaume-Uni du 7 juillet 1989, série A n° 161, p. 33, § 85). De l'avis de la Cour, il ne ressort pas du dossier que les conditions d'exploitations fixées par les autorités luxembourgeoises, et notamment les normes de rejet des polluants atmosphériques, aient été insuffisantes au point de constituer une atteinte grave au principe de précaution».

Case *Centre de Ressources Juridiques au Nom de Valentim Campeanu v. Romania*:
« (...) iii. Victimes potentielles et actio popularis
*101. L'article 34 de la Convention n'autorise pas à se plaindre in abstracto de violations de la Convention. Celle-ci ne reconnaît pas **l'actio popularis** (Klass et autres c. Allemagne, 6 septembre 1978, § 33, série A no 28, Parti travailliste géorgien c. Géorgie (déc.), no 9103/04, 22 mai 2007, et Burden, précité, § 33), ce qui signifie qu'un requérant ne peut se plaindre d'une disposition de droit interne, d'une pratique nationale ou d'un acte public simplement parce qu'ils lui paraissent enfreindre la Convention.*
Pour qu'un requérant puisse se prétendre victime, il faut qu'il produise des indices raisonnables et convaincants de la probabilité de réalisation d'une violation en ce qui le concerne personnellement ; de simples suspicions ou conjectures sont insuffisantes à cet égard (Tauira et 18 autres c. France, no 28204/95, décision de la Commission du 4 décembre 1995, DR 83-A, pp. 112, 131), Monnat c. Suisse, no 73604/01, §§ 31-32, CEDH 2006X)».

21. The applicants claim that if the Swiss government does not act with more determination, ambition and urgency the health problems they are suffering from would worsen, thus endangering their lives, their health and general wellbeing.

22. Without wishing to enter into the facts object of this case it should be noted that in order to answer this question one must demonstrate, first of all, that there is actual inaction on the part of the Swiss authorities; secondly, that their inaction or omission actually affects differently distinct groups or segments of the population; thirdly, that this inaction amounts to a failure to afford effective protection against the effects of global warming.

23. Where they are unable to produce such evidence, they may not invoke a breach to a « general right to the environment ». But, if they do so, they must be aware that such right is not protected by the Convention.

24. As follows from the jurisprudence established in the case *Cordella and Others v. Italy*, nºs 54414/13 and 54264/15, 24 January 2019, §§ 100-101:

«100. La Cour rappelle que le mécanisme de contrôle de la Convention ne saurait admettre l'actio popularis (Perez c. France [GC], no 47287/99, § 70, CEDH 2004-I, et Di Sarno et autres c. Italie, no 30765/08, § 80, 10 janvier 2012). Par ailleurs, ni l'article 8 ni aucune autre disposition de la Convention ne garantissent spécifiquement une protection générale de l'environnement en tant que tel (Kyrtatos c. Grèce, no 41666/98, § 52, CEDH 2003VI (extraits)).

101. Selon la jurisprudence de la Cour, l'élément crucial qui permet de déterminer si, dans les circonstances d'une affaire, des atteintes à l'environnement ont emporté violation de l'un des droits garantis par le paragraphe 1 de l'article 8 est l'existence d'un effet néfaste sur la sphère privée ou familiale d'une personne, et non simplement la dégradation générale de l'environnement (Fadeïeva c. Russie, no 55723/00, § 88, CEDH 2005IV).»

25. Where the above requirements are not met - whenever the applicant is unable to show that he or she was a "victim" under article 34 of the Convention - the application must be declared inadmissible because it is incompatible *ratione personae* with the Convention.

II. Applicability of Articles 2 and 8 of the Convention

26. According to the applicants Switzerland failed to take sufficient preventive measures to contain climate warming. In particular, they claim Switzerland is failing to fulfil its positive obligations under Articles 2 and 8 of the Convention in the light of the commitments agreed upon under the Paris Agreement, the precautionary principle, the best available scientific data, and evolving standards of national and international law.

27. The Portuguese Government firstly recalls that the protection of the environment or the right to a healthy environment is not, *per si*, enshrined in the Convention. However, several judgements of the Court acknowledged that some issues related to the environment are likely to offend the rights enshrined in articles 2, 8, 6, 13, and 1 of Protocol 1.

28. However, the infringement of the rights protected under the Convention must reach a *minimum threshold of seriousness*.

29. According to the case of Nicolae Virgiliu Tănase v. Romania, a complaint falls only to be examined under Article 2 where the level of the injuries was such that the victim's life was put in serious danger (see Krivova, cited above, § 45; Igor Shevchenko, cited above, § 42; Cavit Tınarlıoğlu, cited above, § 68; and Kotelnikov, cited above, § 97).

30. In the present case, there is the need to demonstrate that global warming entails a ***real and imminent risk of death*** or a ***real and imminent risk to the applicants' health***. The applicants need to show they have suffered injuries that are truely serious and demonstrate that their life (or health) has been seriously endangered within the meaning of Article 2 of the Convention.

31. As far as the alleged violation of article 2 of the Convention is concerned, it should be noted that the Court applied this rule in cases related to environmental disasters or natural catastrophes, involving deaths or the development of a very serious life-threatening disease by one or more applicants or their relatives (see *Oneryldiz v. Turkey*, in which the death of 9 of the applicants' relatives was at stake; *Budayeva and Others v. Russia*, of 20 March 2008, in which the death of the first applicant's husband was at stake; *Ozel and Others v. Turkey*, of 17 November 2015, in which the death of several relatives of the applicants was at stake).

32. In such cases, the Court recalled the need for States to adopt appropriate legal and regulatory frameworks, in particular in the case of *dangerous activities*, in conjunction with the fulfilment of the duty to inform and, in the event of someone's death, the need to initiate appropriate procedures to investigate and determine the causes of death and possible liability.

33. In other words, not demonstrating that a ***real risk to life*** (or health) exists Article 2 is not applicable. Not proving that the shortcomings denounced on the fulfilment by the Swiss Government of its obligations under the Paris Agreement pose a ***serious and imminent threat to their lives*** (and their health), no breach of the positive obligations arising from Article 2 of the Convention can be demonstrated and therefore this provision is not applicable.

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34. Article 8 is not engaged every time environmental deterioration occurs: no right to nature preservation is included as such among the rights and freedoms guaranteed by the Convention or its Protocols (Case *Ivan Atanasov v. Bulgaria*, nº. 12853/03).

35. As far as the scope of article 8 is concerned (right to respect for private and family life, home and correspondence), the Court held that for a case to fall under this provision of the Convention the environmental factors complained of must directly and seriously affect the applicants' right to private and family life and their right to the quiet enjoyment of domicile.

36. On the other hand, the interference complained of must attain a *minimum threshold of seriousness*, that is to say that the nuisance, the physical or mental effects complained of by the applicants – as an allegedly effect or consequence of global warming and of the inadequacy of the measures adopted by the respondent government to mitigate and combat those harmful effects – must attain a certain intensity and duration in order for this article to be applicable.

37. This is summarised in the following excerpt of the judgement delivered in the case *Fadeyeva v. Russia*, §§ 68-70:

« *Article 8 has been relied on in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention (see Kyrtatos v. Greece, no. 41666/98, § 52, ECHR 2003-VI). Thus, in order to raise an issue under Article 8 the interference must directly affect the applicant's home, family or private life.*

The Court further points out that the adverse effects of environmental pollution ***must attain a certain minimum level if they are to fall within the scope of Article 8*** *(see López Ostra v. Spain,*

judgment of 9 December 1994, Series A no. 303-C, p. 54, § 51; see also, mutatis mutandis, Hatton and Others v. the United Kingdom [GC], no. 36022/97, § 118, ECHR 2003-VIII). The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.

Thus, in order to fall within the scope of Article 8, complaints relating to environmental nuisances have to show, firstly, ***that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained****.*»

38. Therefore, it is for the applicants to demonstrate that a causal link exists between the respondent government's conduct (by action or omission) and the health problems and life-threatening risks the applicants claim they are exposed to.

39. Not demonstrating this, that is, that there was *an actual interference with their private sphere,* and, secondly, that the interference complained of is in fact serious – or serious enough to attain the severity threshold – then Article 8 is not applicable in this case.

III. The obligations arising from the Paris Agreement

40. As follows from the above, in order for Articles 2 and 8 to be applicable the applicants will have to demonstrate the existence of a causal link between global warming and the interference they claim to have suffered in their rights.

41. The applicants claim that the obligations incumbent on the Swiss government according to the Paris Agreement to combat climate change and mitigate global warming are not being met. They argue that the pace of implementation of the established goals is too slow, which in the meantime causes irreversible damage.

42. The main goal is defined in article 2 of the Paris Agreement and consists in «*holding the increase in the global average temperature to well below 2ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5ºC above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change*».

43. In order to achieve this goal, article 4 of the Paris Agreement sets out that the Parties «*aim to reach global peaking of greenhouse gas emissions as soon as possible, (...) so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate proverty*».

44. For that purpose, each Party shall prepare, communicate and maintain successive nationally determined contributions (NDC) that it intends to achieve. Then, the same article sets out some procedural obligations, such as, the obligation to communicate their contributions (NDC's) every five years or the obligation to keep record on the public registry maintained by the secretariat of the NDC's to which it has committed itself.

45. Several authors have focused on the nature of these rules. There is a broad consensus on the flexibility of this Treaty and the wide margin of appreciation it accords the States to define the means and contributions (NDC's).

46. The Paris Agreement enshrines obligations of a distinct nature, mandatory and non-mandatory, the former providing for obligations of means but not of result. It is accepted that the Treaty contains essentially procedural obligations and as to the substantive obligations it is acknowledged that there is only an obligation for States to take appropriate measures to achieve the aims pursued, by maintaining and communicating the contribution, leaving the exact content of these measures in the sphere of discretion of the sovereign parties, without any sanctioning mechanism having been established.[2]

47. According to Agnès Michelot[3], the Paris Agreement addresses three areas: responsibility, equity and balance; however, the author emphasizes that responsibility is not based on lack but on the ability to act.

48. Sophie Lavallée[4] highlights the prevalence of the obligations of means over the obligations of results, as well as the fact that the Agreement does not provide for sanctions, but rather for a control and promotion mechanism which works in a transparent way, not in an accusatory or punitive way.

49. Mathilde Hautereau-Bouttonet and S. Maljean-Dubois[5], who also emphasize that the Paris Agreement has an incentive nature, and not an accusatory or punitive one, they add that the contributions «*sont determinées au nivel national et exclusivement au niveau nationale, sans droit de regard des autres Parties ou d'une instance internationale*».

50. The question therefore arises as to the extent to which another control system of a judicial nature – established within the scope of another treaty, with a different material and personal scope – may control the enforcement of this treaty (the Paris Agreement) which deliberately does not provide for external control mechanisms.

51. Furthermore, it must be noted that, within the framework of the environmental policies, the Court has always recognized the wide margin of appreciation of the States.

52. This is clearly stated in the following excerpt of the judgement delivered in case *Fadeyeva v. Russia*, §§ 102-104:

> «*La Cour rappelle qu'il convient de laisser aux autorités nationales une ample marge d'appréciation pour décider des mesures qui leur paraissent nécessaires pour atteindre un ou plusieurs des buts légitimes énumérés à l'article 8 § 2 de la Convention, ces autorités étant en principe mieux placées qu'une juridiction internationale pour évaluer les besoins et le contexte locaux. Si l'appréciation initiale de la nécessité d'une ingérence appartient auxdites autorités, il revient à la Cour de juger en définitive du caractère pertinent et suffisant au regard des exigences de la Convention des éléments avancés par l'Etat pour la justifier (voir, notamment, Lustig-Prean et Beckett c. Royaume-Uni, nos 31417/96 et 32377/96, §§ 80-81, 27 septembre 1999).*
>
> *Les atteintes à l'environnement sont devenues, au cours des dernières décennies, une source de préoccupation croissante pour l'opinion publique, ce qui a conduit les Etats à prendre diverses dispositions en vue de réduire les effets néfastes des activités industrielles.*

[2] See, for all of them, Marion Lemoine-Schonne, "La flexibilité de l'Accord de Paris sur les changements climatiques, in Revue Juridique de l'Environement, 2016, 1, page 37 and following.

[3] « La Justice Climatique et l'Accord de Paris sur le climat », in Revue Juridique de l'Environnement, 2016, 1, page 71 and following.

[4] « L'Accord de Paris : fin de la crise du multilatéralisme climatique ou évolution en clair-obscur ?", in Revue Juridique de l'Environnement, 2016, 1, page 19 and following.

[5] « Après l'Accord de Paris, quels droits face au changement climatique ? », in Revue Juridique de l'Environnement, numéro spécial, 2017, page 9 and following.

(...)

Dans une autre série d'affaires où était en cause l'inaction de l'Etat, la Cour a également préféré s'abstenir de porter un jugement sur les politiques écologiques internes. Dans un arrêt de Grande Chambre récent, elle a considéré « [qu'] il ne serait pas indiqué qu'[elle] adopte en la matière une démarche particulière tenant à un statut spécial qui serait accordé aux droits environnementaux de l'homme » (Hatton et autres, précité, § 122). Dans une affaire antérieure, la Cour s'était exprimée comme suit : «Il n'appartient certes pas à (...) la Cour de se substituer aux autorités nationales pour apprécier en quoi pourrait consister la politique optimale en ce domaine social et technique difficile. En la matière, on doit reconnaître aux Etats (...).»

53. The Court shall, therefore, recognise the wide margin of appreciation of the States, who define their policies based on a multiplicity of factors that they alone are in a position of knowing, in order to achieve a balance between the various interests at stake, namely climatic, economic, technical, scientific and social, provided they are not arbitrary or unreasonable.

IV. Competence of the European Court of Human Rights

54. It seems undisputed that the States in the Paris Agreement created a non-accusatory and non-punitive monitoring mechanism. However, this application, as configured by the applicants – and if it were to be examined on the merits – presupposes a judicial control (to be exercised by the ECtHR) of the fulfilment of the obligations assumed by the respondent Government under that treaty.

55. Therefore, it is legitimate for us to question the jurisdiction (or competence) of the Court in this matter. After all, it is well established that the Court has full jurisdiction when interpreting and applying the European Convention on Human Rights, but it is not clear whether the ECtHR is the competent jurisdiction to decide on compliance or non-compliance with other international treaties or with other obligations than those arising from the Convention for the Member States of the Council of Europe.

56. If the Court receives this application it accepts a power to exercise control that has not been deliberately assigned to it by the States Parties to the Paris Agreement. It will carry out a judicial review of policies, strategies and measures whose definition and implementation is - by nature and due to their specificity and complexity – for national executive powers to handle.

V. Conclusions

1. The procedural requirements laid down by the States Parties on the European Convention on Human Rights cannot be removed or omitted.
2. When serious, personal and direct harm affecting the subjective sphere of the applicants is not demonstrated a "general right to the environment" may not be invoked since it cannot provide the protection the applicants seek, for it is not protected by the Convention.
3. The Convention does not provide for the protection of *collective* or *diffuse interests*, such as the protection of the right to a healthy environment, since it does not contemplate the *action popularis*.

4. Not demonstrating that a ***real risk to life*** (or health) exists Article 2 is not applicable. Not proving that the shortcomings denounced on the fulfilment by the Swiss Government of its obligations under the Paris Agreement pose a ***serious and imminent threat to their lives*** (and their health), no breach of the positive obligations arising from Article 2 of the Convention can be demonstrated and therefore this provision is not applicable.
5. Not demonstrating that there was an actual interference with their private sphere, and that the interference complained of is in fact serious – or serious enough to attain the severity threshold – then Article 8 is not applicable in this case.
6. The States enjoy a wide margin of appreciation when defining their policies under the Paris Agreement, in order to achieve a balance between the various interests at stake, namely climatic, economic, technical, scientific and social, provided they are not arbitrary or unreasonable.
7. It is undisputed that the Court has full jurisdiction when interpreting and applying the European Convention on Human Rights, however, in the current state of affairs, it is debatable whether the Court is entitled to monitor the compliance or non-compliance by State Parties of other international treaties, especially when those international instruments deliberately do not provide for a mechanism of jurisdictional control.

The Agent for the Portuguese Government

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