

## Climate Change and the European Court of Human Rights: *Agostinho v Portugal & Ors* 39371/20



**07 September, 2022**

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### Introduction

The magnitude of the issue of climate change is reflected in its ever-increasing invocation and appearance in litigation across diverse jurisdictions, and its frequent reference in legislation and administrative decisions as a material consideration. Bearing this in mind, and despite living in the era of a mature human rights legal framework, there remains scope for definitive legal precedent on the interplay between climate change and human rights – and it is a fast-evolving global legal patchwork, as explored by [Merrow Golden in her ELB post last year on the topic](#). It is into this gap that the European Court of Human Rights (ECtHR) has been asked to step, in [Duarte Agostinho and Others v Portugal and Others \(communicated case\)](#) in which a group of young people (aged 10–23) [argue in their Application](#) that 33 States (including the UK) have failed to comply with positive European Convention on Human Rights (ECHR) obligations when read in the light of undertakings pursuant to the 2015 Paris Agreement. Although we still eagerly await a judgment, there have been some intriguing developments which provide a clue as to the importance of the case.

### Case Background

The Applicants (4 children and 2 young adults) [argue](#) that various consequences of climate change such as heatwaves, wildfires, powerful storms, prevalence of airborne pollutants have violated their ECHR Convention rights. The main thrust of the challenge relates to positive obligations concerning Article 2 right to life and Article 8 respect for private and family life, both paired (although not reliant on) an Article 14 prohibition of discrimination claim due to the greater impact climate change will have on young people over the course of their lives when compared to older generations.

Reliance is placed on ECtHR caselaw concerning positive obligations in the face of direct environmental degradation and hazards (i.e. where the link between cause and effect is more straightforwardly discernible), and in particular cases where the risks & harms may only materialise in the long term.

The Applicants say the duties are triggered by each Respondent's contribution to emissions through (a) permitting their release, (b) permitting fossil fuel export, (c) permitting imports resulting in emissions release, and (d) permitting entities within their jurisdiction to contribute to the release of emissions overseas e.g. through extraction of fossil fuels overseas or the financing thereof.

The Court is invited by the Applicants to take into account elements of international law in applying the Convention, and in particular the 2015 Paris Agreement and the need to limit global warming to the 1.5 degree target. It is asserted by the Applicants that given global warming is on course to vastly exceed the 1.5 degree target, the Respondents' mitigation measures must be presumed inadequate, meaning that this failure is "per se a violation of the [positive obligations]", and furthermore that any uncertainty as to each Respondent's 'fair share' of the global mitigation effort required to meet the 1.5 degree target is to be resolved in favour of the Applicants. Nor, say the Applicants, can the adverse effects on them be justified as "necessary in a democratic society".

In relation to the admissibility criteria, in particular the question of use of alternative remedies, the Applicants say that given the cumulative contributions of each Respondent to the violations and the urgency of the matter, pursuing an adequate remedy in each Respondent State's domestic courts would be unworkable and impractical.

The present case already had potential to become an important precedent from the time it was lodged on 7 September 2020. Since then, the ECtHR fast-tracked the claim on 13 November 2020, following which the Chamber previously allocated the case [relinquished jurisdiction to the Grand Chamber on 28 June 2022](#).

Clearly, the ECtHR is treating this case as a priority, seeking to give it the fullest possible consideration and aware of its potential precedent-setting nature. With this in mind, it is unsurprising that governments and rights advocacy organisations are giving this case a high degree of attention.

Before relinquishing jurisdiction to the Grand Chamber, the Chamber to which the case had previously been allocated [set out questions for the Respondents](#):

1. Whether the Applicants are subject to the jurisdiction of the Respondent States within the Court's interpretation of Article 1 of the Convention; and whether the facts disclosed are of a nature to engage the liability of the defendant States individually or collectively owing to their national policies and regulations seeking to decrease carbon footprint?
  - If the answer to the above is yes, whether the Applicants can be considered current or potential victims of a violation of one of the rights of the Agreement invoked owing to the greenhouse gas emissions emanating from the Respondent States, and as a result of the alleged insufficient action or inaction by the Respondent States to reach the target of 1.5 degrees?
  - If the answer to the above is in the affirmative, whether there is a violation of the Convention rights referred to, in particular given the States' margin of discretion in the environmental sector in how they perform obligations incumbent upon them; by adopting appropriate regulation and basing their regulations on appropriate enquiries and studies, ensuring effective public participation as provided for in the 1998 Aarhus Agreement?

## **Interventions and Observations**

Although the defences submitted by the responding States have not been made public, there have been a range of other interventions that hint at the likely terrain for debate. Most of these are from charities such as [Greenpeace](#), [Save the Children](#) and [Amnesty International](#), however three stand out: those of the [Council of Europe \(CoE\) Commissioner for Human Rights](#), [two UN Special Rapporteurs](#), and the [European Commission](#). They come to just under 40 pages between them and make for interesting reading.

The CoE Commissioner for Human Rights (who acts independently of the Court despite being derived from the same body) is clear that there is a right to a healthy environment separate to Articles 2 and 8. It will be interesting to see if the Court takes the same approach or if it will simply rely on the effects of an unhealthy environment on other rights. There is also a discussion on the inherent tension between the uncertainties of the effects of climate change and the usual necessity of a specific harm when bringing a claim, and the barrier to access to justice this could create. The Commissioner calls for an “evolutive” interpretation of the term “victim”, to enable necessary flexibility here. The Commissioner states that bearing in mind the negative impacts of climate change on human rights, there is a special onus on States to take concrete preventive measures rather than following a piecemeal approach that merely reacts to individual complaints. Crucially also, the Commissioner considers that the Paris Agreement and other key international environmental law instruments should be regarded as yardsticks by which States’ performance in fulfilling their human rights obligations should be assessed.

[The UN Special Rapporteurs emphasise](#) the opportunity the present case provides the Court to provide Respondent States with principled, rights-based guidance drawn from international environmental law and human rights law, with a focus on developing the application to this area of norms including the precautionary and preventive principles. The view is taken that the principle of due diligence entails that Convention Parties who fail to join the Paris Agreement or to take effective and equitable climate change measures can be found to breach the guarantees of the Convention.

A flavour of the defence to be provided by the Respondents may be able to be found in the [European Commission’s \(EC\) response](#). In a fact specific assessment of the case, the EC argue that domestic and EU policies have succeeded in meeting the relevant obligations under the Paris Agreement and related international instruments. Notably, the EC at no point dispute the idea that there is a human rights basis for combatting climate change, instead focussing on how the EU members named in the claim have met their obligations. It is reasonable to assume that this could be the approach adopted by Respondents which are EU members, at the least, in defence.

## **Conclusion**

There is a real prospect that the Court will accept the link between the effects of climate change and ECHR rights. The greatest areas of dispute seem likely to be: (i) how the issue of ‘fair share’ is to be approached as a matter of principle (on which, some detailed thinking – drawing analogy with domestic tort law principles where there are multiple tortfeasors – has been explored in an [academic article in the Cambridge Law Review](#)); and (ii) whether the responding States have met their obligations, on the facts of this case. To make the latter determination, the Court will first have to decide the extent of the obligations, and in doing so will (whatever the outcome of this particular case) establish a precedent approach which will inevitably have far-reaching impacts on future climate change litigation and debate. The Court will also have the opportunity to rule on the extent to which any right to a healthy climate or lower emissions stands alone in terms of the provisions of the Convention. Finally, should the Court rule in favour of the Applicants, there will be the issue of relief, which presents the Court with a range of orders/options, in terms of severity and complexity.

Whatever the outcome of this particular case, it is one to watch for those interested in environmental and human rights law. In the domestic context, it will likely stimulate further debate around the previous

Government's Bill of Rights Bill 2022. The relinquishment to the Grand Chamber promises, in due course, an important and thorough judgement that will make fascinating reading.

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