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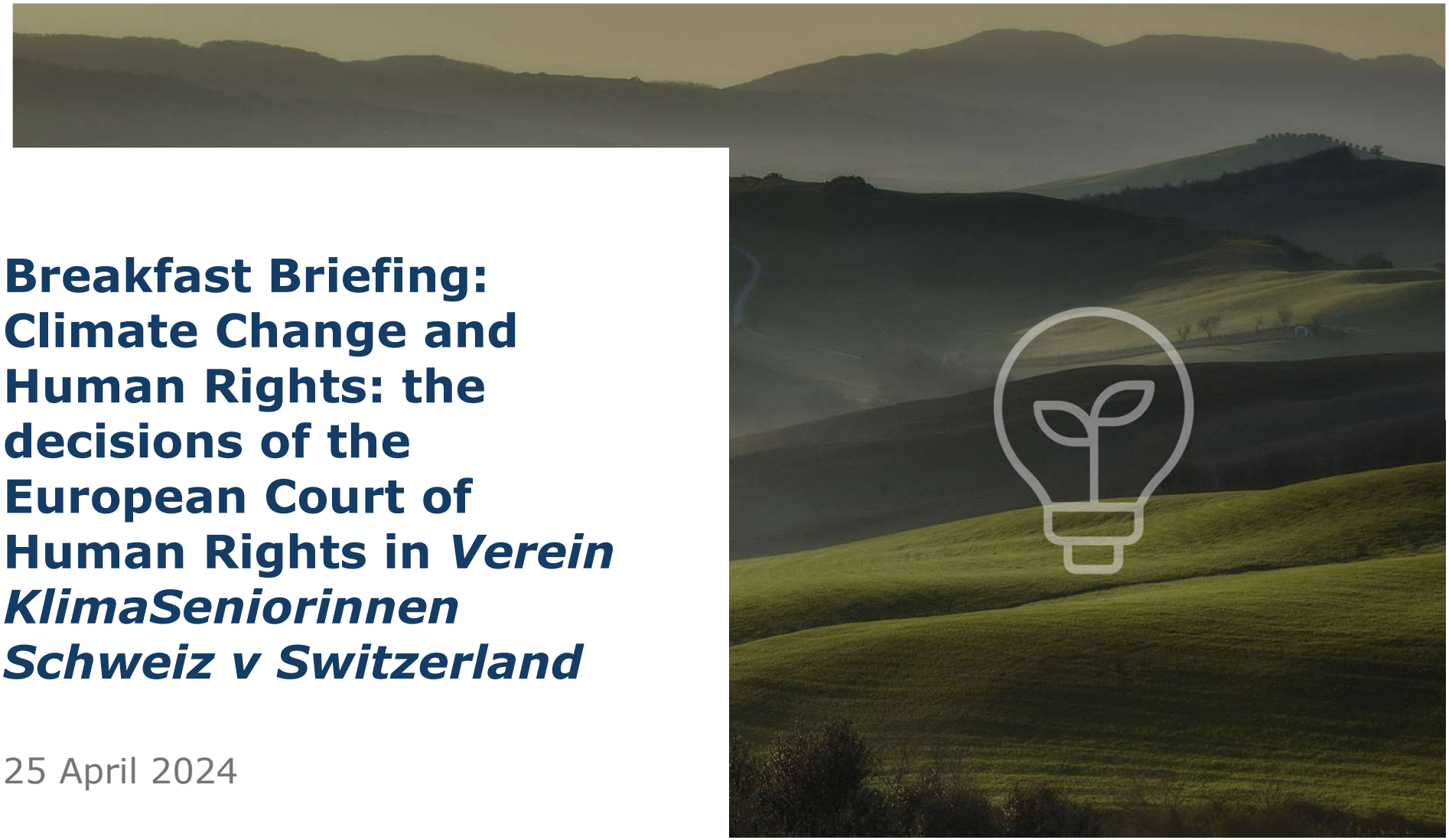

Breakfast Briefing: Climate Change and Human Rights: the decisions of the European Court of Human Rights in *Verein KlimaSeniorinnen Schweiz v Switzerland*

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Meet the speakers

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What's in store...

1. Introduction
2. Summary of facts
3. Key findings in VKS
4. Dissenting judgement in VKS
5. Where do we go from here?

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The Three Cases Decided by Grand Chamber of

Duarte Agostinho v Portugal & 32 Others (application 39371/20)

Carême v France (7189/21)

Verein KlimaSeniorinnen Schweiz & Ors v Switzerland (53600/20)

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Duarte Agostinho

Brought by 6 Portuguese nationals born between 1999 and 2012 (i.e. currently aged between 12 and 25)

Defendants were Portugal and 32 other Convention States

Essential argument was that they were exposed to a risk of harm from climate change which was expected to increase during their lifetime and also affect their own future children in breach of Articles 2 (right to life), 3 (torture), 8 (private and family life), and 14 (discrimination).

Complainants relied upon the adverse effects of climate change including:

- Heat-related impacts, saying during period of extreme heat they had to curtail their "usual youthful activities of playing and exercising outdoors" and also made it more difficult for them to sleep, making them more tired and less productive.
- Wildfires and smoke, which caused them anxiety and had prevented them from attending school.
- Air pollution and allergens, stating that it would exacerbate respiratory diseases such as asthema.
- Mental-health impacts, stating that climate change resulted in "Adverse Childhood experience" linked to prolonged climate anxiety and "moral injury"

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Carême v France

Mr Carême was a former mayor of Grande-Synthe in Northern France

November 2018 he (acting on own behalf and as mayor) requested that the French Authorities implement various climate measures.

Following a failure to act, he applied to the Conseil D'Etat for judicial review of that failure.

Conseil d'Etat ordered the French authorities to enact measures to mitigate climate change, but rejected the request brough on Carême own behalf.

Mr Carême complained to the European Court of Human Rights that France had failed to take appropriate steps to prevent climate change in violation of Articles 2 (life) and 8 (private and family life).

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Verein KlimaSeniorinnen Schweiz v Switzerland (Swiss Women Against Climate Change)

Swiss NGO established to fight climate change on behalf of elderly women living in Switzerland, together with four Swiss Nationals.

Filed a complaint alleging that the Swiss authorities' failure to mitigate climate change breached the convention.

Argued that climate change induced heatwaves posed particular health risks to older women in breach of their Article 2 (right to life) and Article 8 (right to a private and family life) and Article 6(1) (access to a court) rights.

The central allegation was that the Swiss authorities were well aware of these risks, but had failed to take measures to achieve the Paris Agreement's 1.5°C limit, or to impose binding targets to meet is 2030 and 2050 climate goals.

Duarte Agostinho and Carême

In *Duarte Agostinho* and *Carême* the ECtHR found that the Complaints were inadmissible.

Mr Carême could not claim victim status because he had moved to Brussels in May 2019 and therefore no longer lived in France, such that he had no real connection with the place he alleged to be affected.

In *Duarte Agostinho* the ECtHR held that it did not have jurisdiction over claims other than against Portugal, on the grounds that save in exceptional circumstances States guaranteed Convention rights only within their own territory.

In any event, the complainants had failed to exhaust their domestic remedies before Portuguese courts, and had impermissibly elected to bring their claims directly to the ECtHR

Key findings

- Preliminary points:
  - Separation of powers
  - Novel point of law: *"The particular nature of the problems arising from climate change in terms of the Convention issues raised has not so far been addressed in the Court's case-law."* [414]
  - *"422. Because of these fundamental differences, it would be neither adequate nor appropriate to follow an approach consisting in directly transposing the existing environmental case-law to the context of climate change. The Court considers it appropriate to adopt an approach which both acknowledges and takes into account the particularities of climate change and is tailored to addressing its specific characteristics. In the present case, therefore, while drawing some inspiration from the principles set out in the Court's existing case-law, the Court will seek to develop a more appropriate and tailored approach as regards the various Convention issues which may arise in the context of climate change."*

Key findings

- Having addressed a number of arguments raised to suggest that legal obligations relating to climate change are not justiciable, the Court said:

- "*the global climate regime established under the UNFCCC rests on the principle of common but differentiated responsibilities and respective capabilities of States*" and

- "*each State has its own share of responsibilities to take measures to tackle climate change and that the taking of those measures is determined by the State's own capabilities*" [442].

Key findings

- Causation:

436. In sum, on the basis of the above findings, the Court will proceed with its assessment of the issues arising in the present case by taking it as a matter of fact that there are sufficiently reliable indications that anthropogenic climate change exists, that it poses a serious current and future threat to the enjoyment of human rights guaranteed under the Convention, that States are aware of it and capable of taking measures to effectively address it, that the relevant risks are projected to be lower if the rise in temperature is limited to 1.5°C above pre-industrial levels and if action is taken urgently, and that current global mitigation efforts are not sufficient to meet the latter target.

Key findings

- Victim status: individuals: key paragraphs [487] and [488]
- *"487. …in order to claim victim status under Article 34 of the Convention in the context of complaints concerning harm or risk of harm resulting from alleged failures by the State to combat climate change, an applicant needs to show that he or she was personally and directly affected by the impugned failures. This would require the Court to establish…the following circumstances concerning the applicant's situation:*
- *(a) the applicant must be subject to a high intensity of exposure to the adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant; and*
- *(b) there must be a pressing need to ensure the applicant's individual protection, owing to the absence or inadequacy of any reasonable measures to reduce harm."*

Key findings

- Victim status: individuals: key paragraphs [487] and [488]

> 488. The threshold for fulfilling these criteria is especially high. In view of the exclusion of *actio popularis* under the Convention, as discussed in paragraphs 483 to 484 above, whether an applicant meets that threshold will depend on a careful assessment of the concrete circumstances of the case. In this connection, the Court will have due regard to circumstances such as the prevailing local conditions and individual specificities and vulnerabilities. The Court's assessment will also include, but will not necessarily be limited to, considerations relating to: the nature and scope of the applicant's Convention complaint, the actuality/remoteness and/or probability of the adverse effects of climate change in time, the specific impact on the applicant's life, health or well-being, the magnitude and duration of the harmful effects, the scope of the risk (localised or general), and the nature of the applicant's vulnerability.

Key findings

- Victim status: associations: key paragraphs [502]
- Capable of victim status where conditions met:
- (a) lawfully established in the jurisdiction concerned or have standing to act there;
- (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and
- (c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention

Key findings

- Article 2: held to apply but court preferred to consider case through Art.8
- Article 2 would be engaged where there is a "real and imminent" risk to life. [513]
- Where the victim status of an individual applicant has been established it is possible to assume that there is a serious risk of a significant decline in a person's life expectancy owing to climate change, triggering Art. 2 [513]

Key findings – Art.8

548. It follows from the above considerations that effective respect for the rights protected by Article 8 of the Convention requires that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades. In this context, in order for the measures to be effective, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner (see, *mutatis mutandis*, *Georgel and Georgeta Stoicescu v. Romania*, no. 9718/03, § 59, 26 July 2011).

Key findings – Art.8

549. Moreover, in order for this to be genuinely feasible, and to avoid a disproportionate burden on future generations, immediate action needs to be taken and adequate intermediate reduction goals must be set for the period leading to net neutrality. Such measures should, in the first place, be incorporated into a binding regulatory framework at the national level, followed by adequate implementation. The relevant targets and timelines must form an integral part of the domestic regulatory framework, as a basis for general and sectoral mitigation measures. Accordingly, and reiterating the position taken above, namely that the margin of appreciation to be afforded to States is reduced as regards the setting of the requisite aims and objectives, whereas in respect of the choice of means to pursue those aims and objectives it remains wide, the Court finds it appropriate to outline the States' positive obligations (see paragraph 440 above) in this domain as follows.

Key findings – Art.8

- This means [550]:
- (a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
- (b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
- (c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction targets (see sub- paragraphs (a)-(b) above);
- (d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
- (e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.

Key findings – Art.8

552. Furthermore, effective protection of the rights of individuals from serious adverse effects on their life, health, well-being and quality of life requires that the above-noted mitigation measures be supplemented by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change, taking into account any relevant particular needs for protection. Such adaptation measures must be put in place and effectively applied in accordance with the best available evidence (see paragraphs 115 and 119 above) and consistent with the general structure of the State's positive obligations in this context (see paragraph 538 (a) above).

Key findings – Art.8

- Procedural safeguards material in determining whether the respondent State has remained within its margin of appreciation

- As to what is required:

- (a) information held by public authorities of importance for setting out and implementing the relevant regulations and measures to tackle climate change must be made available to the public and

- (b) Procedures must be available through which the views of the public, and in particular the interests of those affected or at risk of being affected by the relevant regulations and measures or the absence thereof, can be taken into account in the decision-making process.

Key findings – Art.8

573. In conclusion, there were some critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework, including a failure by them to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Furthermore, the Court has noted that, as recognised by the relevant authorities, the State had previously failed to meet its past GHG emission reduction targets (see paragraphs 558 to 559 above). By failing to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework, the respondent State exceeded its margin of appreciation and failed to comply with its positive obligations in the present context.

574. The above findings suffice for the Court to find that there has been a violation of Article 8 of the Convention.

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The Dissenting Judgment of Judge Eickie (Judge in respect of the UK at ECtHR)

"To my regret, I am unable to agree with the majority either in relation to the methodology they have adopted or on the conclusions which they have come to both in relation to the admissibility…Despite a careful and detailed engagement with the arguments advanced… I find myself in a position where my disagreement goes well beyond a mere difference in the assessment of the evidence or a minor difference as to the law. The disagreement is of a more fundamental nature and, at least in part, goes to the very heart of the role of the Court within the Convention system and, more generally, the role of a court in the context of the unique and unprecedented challenges posed to humanity (including in but also across our societies) by anthropogenic climate change."

Victim Status/ Standing (1)

Only in "highly exceptional circumstances" can a person can either (a) seek a review of the relevant law and practice *in abstracto* or (b) claim to be a "victim" in relation to the risk of a "future violation".

Other than in "highly exceptional circumstances" no basis on which the applicants in this case can be the victim of a "future risk" under Articles 2 and/or 8 or seek an *in abstracto* review of the relevant law and practice The principal examples of such "highly exceptional circumstances" recognised to date are

(a) in relation to "future" risk, complaints concerning a prima facie risk of inhuman and degrading treatment faced by the individual applicant in the receiving country in case of expulsion or extradition where, in the context of a negative obligation arising under the Convention, "a person [...] contend[s] that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted (...) or if he is a member of a class of people who risk being directly affected by the legislation"

(b) in relation to an alleged present or past risk, in cases of secret surveillance where "an exception to the rule denying individuals the right to challenge a law *in abstracto* is justified ... only if [the individual] is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures"

Victim Status/ Standing (2)

It might, in principle, be permissible, exceptionally and subject to clear conditions including the availability and effectiveness of the available domestic remedies, for the Court to recognise an exception to the established rules on "victim" status and standing This could only be the case where it is accepted – as I think it has to be in the context of climate change – that, in fact, no individual applicant complaining about a State's failure to take adequate mitigation measures is likely ever to be able to establish victim status

Unfortunately, rather than go down this path, the majority has chosen what, in my view, is the worst of both worlds. It has (at least implicitly) accepted that the application of the established "victim" test would not, in fact, lead to a situation where there would be a real risk that important rights of the individual applicants "would not be vindicated" at all.

The majority's desire to ensure inter-generational justice and to "avoid a disproportionate burden on future generations" is understandable (and shared) However, not having sought (or having been unable) to establish the necessary "highly exceptional circumstances" to justify the need for an exception to the traditional "victim"/standing test the inevitable conclusion is that there is no basis for drawing any enforceable obligation from the current text of the Convention to combat "future risk" in respect of the applicants before the Court and even less to combat a "future risk" in respect of "future generations", i.e. by or on behalf of individuals who are, by definition, not even before the Court.

The conclusions reached in §§ 532 – 534 of the judgment should have led the Court to declare this part of the application (under Articles 2 and/or 8) inadmissible; leaving the issues raised in relation to the alleged failure to take the necessary and/or appropriate mitigation measures in relation to the risks created by climate change for an appropriate future case in which the applicants could show, by reference to the traditional test or an exception.

There was no need and no justification for the innovation of granting "victim" status/standing to the applicant association whether "as representatives of the individuals whose rights are or will allegedly be affected". Nevertheless, that is exactly what the majority did and, in doing so, they created exactly what the judgment repeatedly asserts it wishes to avoid, namely a basis for *actio popularis* type complaints

Articles 2 and 8 – ”The Creation of a New Right” (1)

It is telling of the majority’s whole approach, in the context of Article 2, that the reasoning moves from a quote taken from Nicolae Virgiliu Tănase v. Romania [GC], (in § 507) requiring evidence of an individual having been “the victim of an activity, whether public or private, which by its very nature put his or her life at real and imminent risk” to the (first, but in my view, questionable) conclusion (at § 509) that “the alleged failures of the State to combat climate change most appropriately fall into the category of cases concerning an activity which is, by its very nature, capable of putting an individual’s life at risk”.

In so far as there is a causal connection at all, for the reasons set out above (when considering the question of “victim” status/standing) this is plainly too remote to be capable of engaging Article 2.

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”. Again, this is clearly not the scenario presented by these applicants.

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Articles 2 and 8 – ”The Creation of a New Right” (2)

The Court has repeatedly stressed that no Article of the Convention is specifically designed to provide general protection of the environment as such (see Kyrtatos v. Greece) and that other international instruments and domestic legislation are more adapted to dealing with such protection.

It is one of the characteristics of climate change that its effects have become – at least by reference to any comparators within the respondent State – “environmental hazards inherent to life in every modern city” and, as such, no applicability of Article 8 is capable of being derived from such a comparison which, in the Court’s case-law, tended to be tied to or triggered by an identified source of (potential) pollution within the geographical vicinity.

Nevertheless, the majority went on, by reference to some of that very case-law, to

(a) create a new “right for individuals to effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change” and

(b) impose a new “primary duty” on High Contracting Parties “to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change, an obligation which the majority translates into a requirement “that each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG emission levels, with a view to reaching net neutrality within, in principle, the next three decades”

neither of which have any basis in Article 8 or any other provision of or Protocol to the Convention

The Margin of Appreciation

Compliance with either margin of appreciation will now be supervised by the Court (by means of an overall assessment relating both to mitigation as well as adaptation measures)

This assessment is due to be carried out by reference to a detailed catalogue of criteria set out in § 550, including by reference to "the need to ... keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence", an assessment which, in my respectful view, the Court is ill-equipped and ill-suited to perform.

The nature of this part of the test alone underlines why "the nature and gravity of the threat and the general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall GHG reduction targets in accordance with the Contracting Parties' accepted commitments to achieve carbon neutrality" is wholly inadequate to explain or justify the adoption of such a fundamentally different approach to the margin of appreciation than the one Court has hitherto adopted.

Concluding Remarks

In having taken the approach and come to the conclusion they have, the majority are, in effect, giving (false) hope that litigation and the courts can provide "the answer" without there being, in effect, any prospect of litigation (especially before this Court) accelerating the taking of the necessary measures towards the fight against anthropogenic climate change.

In fact, there is a significant risk that the new right/obligation created by the majority (alone or in combination with the much enlarged standing rules for associations) will prove an unwelcome and unnecessary distraction for the national and international authorities, both executive and legislative, in that it detracts attention from the on-going legislative and negotiating efforts being undertaken as we speak to address the – generally accepted – need for urgent action.

"Consequently, while I understand and share the very real sense of and need for urgency in relation to the fight against anthropogenic climate change, I fear that in this judgment the majority has gone beyond what it is legitimate and permissible for this Court to do and, unfortunately, in doing so, may well have achieved exactly the opposite effect to what was intended."

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Where do we go from here?

- VKS case establishes a legal foundation in the ECtHR jurisprudence to argue a breach of human rights as a result of a State's failure to take reasonable and proportionate positive actions to prevent harm due to the effects of climate change.
- Likely to see further arguments based on Articles 2, 8, and A1P1 of the ECHR based on the argument that climate change represents an imminent and serious threat to life, quality of life, and property.
- Further development of the law on standing – as individual victims try to bring themselves within the parameters of victim status
- (Even) greater scrutiny of Government decisions in this field
- Section 2(1) Human Rights Act 1998 requires the domestic courts to take into account judgments of the ECHR.
- Nation States will be tested against the requirements in [548]-[552]

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