ALERT MEMORANDUM

Human Rights and Climate Change: Grand Chamber of European Court rules in three cases

April 23, 2024

On 9 April 2024, the Grand Chamber of the European Court of Human Rights (the "**ECtHR**") handed down its decisions in three cases relating to climate change: *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ("***KlimaSeniorinnen***"),[1] (ii) *Carême v. France* ("***Carême***"),[2] and (iii) *Duarte Agostinho and Others v. Portugal and 32 Others* (the "***Agostinho***").[3]

While declaring the complaints in *Carême* and *Agostinho* inadmissible for reasons unrelated to the substance of their claims, the ECtHR, in *KlimaSeniorinnen*, found for the applicants, ruling that Switzerland had violated its obligations under Article 8 of the European Convention on Human Rights ("**ECHR**")[4] by failing to take adequate measures to mitigate climate change.

The decision is of great significance, including because:

- Associations may have standing to lodge complaints for violations of Convention Rights, which may impact the range of potential claimants in domestic frameworks, including under the UK's Human Rights Act 1998 ("**HRA 1998**").
- States' duties under the ECHR now entail positive obligations to take measures in connection with climate change, which may put additional pressure on Convention States to increase their climate change mitigation efforts.
- The ECtHR's approach to climate change and its assessment of evidence may influence future litigation before both international and domestic courts.
- The findings in *KlimaSeniorinnen* are likely to influence litigation between private parties, including tort claims.

If you have any questions concerning this memorandum, please reach out to the authors or to your regular firm contact, including

LONDON

James Brady-Banzet
+44 20 7614 2364
jbradybanzet@cgsh.com

Andreas Wildner
+44 20 7614 2248
awildner@cgsh.com

Maurits Dolmans
+ 44 20 7614 2343
mdolmans@cgsh.com

Leonor Vulpe Albari
+44 20 7614 2244
lvulpealbari@cgsh.com

Noah D'Aeth
+44 20 7614 2259
ndaeth@cgsh.com

[1] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application no. 53600/20), accessible here.

[2] *Carême v. France* (Application no. 7189/21), accessible here.

[3] *Duarte Agostinho and Others v. Portugal and 32 Others* (Application no. 39371/20), accessible here.

[4] The ECHR is accessible here.

I. *KlimaSeniorinnen* - Facts

The applicants were (i) an association, Verein KlimaSeniorinnen Schweiz (the "**VKS**"), established to promote and implement effective climate protection on behalf of its members, mostly older women, and (ii) four individual members of the association.

In 2016, the applicants submitted to various Swiss authorities, under section 25a of the Swiss Federal Administrative Procedure Act (the "**APA Procedure**"), a request to take certain steps to address alleged omissions in climate protection.[5] The request pointed out the need to prevent the increase of the global temperature in the interest of safeguarding the applicants' lives and health, bearing in mind the severe impact of climate change (e.g., heatwaves) on older people.

In 2017, the Swiss authority rejected the request for lack of standing. This was on the basis that the applicants' individual legal positions were not affected and the request did not relate to their immediate surroundings; rather, the purpose of the applicants' request aimed to have "*general, abstract regulations and measures put in place*" with a view to reducing worldwide CO_2 emissions.[6]

In 2018, the Federal Administrative Court ("**FAC**") dismissed an appeal against this decision. The FAC found that the APA Procedure required applicants to establish that there was an "*interest worthy of protection*", which, in the FAC's view, meant that the applicant had to be affected individually, in a way that differed from the general population.[7] The FAC found that the applicants had failed to show this, as they were "*not affected…in a way that goes beyond that of the general public*".[8]

In 2020, the Swiss Federal Supreme Court ("**FSC**") dismissed a further appeal, finding that (i) the applicants' individual rights were not affected with sufficient intensity, meaning that the conditions for relying on the APA Procedure were not met; and (ii) in any case, the applicants sought to shape current policy areas, including by requesting public authorities to institute preparatory work for the enactment of laws and secondary legislation, which meant that their application was of a general public interest nature ("*actio popularis*") and, as such, inadmissible under the APA Procedure.

On 26 November 2020, the applicants lodged an application with the ECtHR, complaining of various omissions of the Swiss authorities in the areas of climate-change mitigation. In their application, the applicants relied on Articles 2 (*Right to life*), 6 (*Right to a fair trial*), 8 (*Right to respect for private and family life*), and 13 (*Right to an effective remedy*) of the ECHR.

II. *KlimaSeniorinnen* - Decision

Admissibility: the ECtHR held that, while the individual applicants did not have standing (and, therefore, their complaints were inadmissible), the VKS did.

Merits: the ECtHR found that Switzerland had infringed the applicant's rights under Article 8 and Article 6(1) of the ECHR. In view of these findings, the ECtHR did not examine the case under Article 2 or Article 13.

Remedies: as to the execution of the judgment (Article 46, ECHR), the ECtHR refused to indicate the type of measure to be implemented to comply effectively with the judgment, given the broad discretion accorded to the State in this area. Instead, it left it to the Committee of Ministers to supervise the adoption of measures to ensure that the national authorities comply with the ECHR requirements. The ECtHR also awarded the applicant costs at an amount of EUR 80,000 (damages / just satisfaction had not been sought by the applicants).

(a) Admissibility – victim status

As part of the ECtHR's determination of the admissibility of the applicants' complaints, the ECtHR had to consider whether the applicants could show that they qualified as "victims" of a violation of Convention Rights.[9]

Individual applicants: The ECtHR found that, in the context of climate change, individuals, in order to claim

[5] *KlimaSeniorinnen,* [22].

[6] *KlimaSeniorinnen,* [30].

[7] *KlimaSeniorinnen,* [37].

[8] *KlimaSeniorinnen,* [42].

[9] See ECHR, Article 34, which provides "*The Court may receive applications from any person, non governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right*."

victim status, need to show that they were personally and directly affected by the impugned failures. This requires them to show that (a) they are subject to a high intensity of exposure to the adverse effects of climate change (i.e., 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.[10]

The ECtHR noted that, while older people belong to some of the most vulnerable groups in relation to climate change effects, that in itself was not sufficient to grant the individual applicants victim status.[11] Further, while there was evidence that the applicants encountered difficulties during heatwaves, including medical conditions, the ECtHR did not consider it apparent that they were exposed to climate change effects with a degree of intensity that would give rise to a pressing need to ensure their individual protection (including because any relevant medical conditions could be alleviated by adaptation measures).[12] On that basis, the ECtHR concluded that the individual applicants did not have victim status.[13]

Applicant association: The ECtHR highlighted that associations generally do not qualify for victim status, even if the interests of their members could be at stake.[14] The reason for this is the prohibition on the bringing of an "*actio popularis*" under the ECHR system. However, the ECtHR found that this may be subject to "special considerations" where applications could be lodged by others on behalf of the victims even "*without a specific authority to act*".[15] In the context of climate change, the ECtHR further highlighted the complexity and global nature, urgency, severity of consequences, and potential irreversibility of climate change, which is a "*common concern of humankind*", and the importance of "*intergenerational burden-sharing*", which means that "*collective action through associations…may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making processes*".[16]

In light of these considerations, while acknowledging the "*actio popularis*" prohibition, the ECtHR considered that associations may have standing to bring actions. This is subject to the following conditions: an association must be (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 ECHR. In assessing these factors, the ECtHR will have regard to such factors as the purpose for which the association was established, that it is of non-profit character, the nature and extent of its activities within the relevant jurisdiction, its membership and representativeness, its principles and transparency of governance and whether on the whole, in the particular circumstances of a case, the grant of such standing is in the interests of the proper administration of justice.[17]

Applying these criteria, the ECtHR concluded that the VKS did have the necessary standing and that its complaint was therefore admissible.[18]

(b) Article 8 – Parties' arguments

Applicants' arguments: The applicants' position was that the Swiss Government had failed to protect their rights under Articles 2 and 8 of the ECHR. In particular, they argued that: (i) given the magnitude of the risks posed by climate change, the clear science, and the urgency of the situation, the State had a positive obligation to take all measures that were not impossible or disproportionately economically burdensome to reduce GHG emissions to a safe level, including, in

[10] *KlimaSeniorinnen,* [487] – [488].

[11] *KlimaSeniorinnen,* [530] – [531].

[12] *KlimaSeniorinnen,* [533].

[13] *KlimaSeniorinnen,* [535].

[14] *KlimaSeniorinnen,* [473] – [475].

[15] *KlimaSeniorinnen,* [476].

[16] *KlimaSeniorinnen,* [489] – [499].

[17] *KlimaSeniorinnen,* [502].

[18] *KlimaSeniorinnen,* [521] – [526].

particular, by establishing a legislative and administrative framework to accomplish that goal; (ii) the precise scope of the State's obligations is derived in particular from relevant rules and principles of international law, evolving norms of national and international law, and the consensus emerging from specialised international instruments and from the practice of Contracting States, which meant that the State's aim should be to prevent a global temperature increase of more than 1.5 degrees above pre-industrial levels; (iii) this involved consideration of the State's "fair share" of global mitigation efforts, which might take into account the State's commitments under the United Nations Framework Convention on Climate Change (the "**UNFCCC**") and the Paris Agreement; (iv) while the State enjoys a margin of appreciation in what precise measures to take to accomplish the relevant targets, its margin of appreciation in fixing the targets themselves and in putting in place a legislative and administrative framework was limited, given the need to comply with international standards and commitments, the urgency of the situation, and the risk of irreversible harm; and (v) Switzerland's actions were inadequate, including because it had failed to set certain emissions reduction targets, to meet some of the targets it did set, and to determine a national carbon budget.[19]

Swiss Government's arguments: The Swiss Government contended that it had complied with its Article 8 obligations. Its main arguments were that (i) climate change is a complex area raising social and technical issues, involving competing interests, and requiring operational and resource-allocation choices best made through democratic decision-making, which is why States should be afforded a wide margin of appreciation; (ii) the ECHR could not be used to circumvent (i.e., fill the gap in terms of judicial control mechanisms in) international climate-change frameworks, notably the Paris Agreement; (iii) in any case, relevant international instruments left various aspects of the matter to States' discretion; (iv) Switzerland's actions were adequate, as an adequate framework had been put in place, various actions at domestic level demonstrated a desire to mitigate climate change, key objectives (e.g., under the Kyoto Protocol) were met or only negligibly missed, and various adaptation measures had been put in place; (v) the applicant's position was based on assessments that applied subjective hypotheses, or on arguments (e.g., relating to Switzerland's "carbon budget") in respect of which no established methodology existed; and (vi) to the extent that applicants relied on the "principle of precaution", that principle was too vague to properly guide the relevant decision-making process.[20]

(c) Article 8 – the ECtHR's decision

General principles informing the ECtHR's approach: The ECtHR began by noting that, in cases involving environmental issues under Article 8, States have a positive obligation to put in place the relevant legislative and administrative framework designed to provide effective protection of human health and life, and to apply that framework effectively in practice.[21] States must be allowed a wide margin of appreciation, especially to choose means. Nonetheless, the ECtHR can assess the decision-making process and procedural safeguards available to individuals. This includes considering whether the authorities approached the matter with due diligence (including by conducting appropriate investigations and studies and evaluating the predicted effect of activities that may harm the environment) and gave consideration to all competing interests.

Climate change and Article 8: Importantly, the ECtHR held that "*Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life*".[22] It further noted that "*climate protection should carry considerable weight in the weighing-up of any competing considerations*", given its urgency, severity of consequences and irreversibility, as shown by scientific evidence.[23]

The content of States' obligations: In this context, the ECtHR agreed with the applicants that States are required "*to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change*".[24]

This means that, "*[i]n line with the international commitments undertaken by the member States, most notably under the UNFCCC and the Paris Agreement, and the cogent scientific evidence provided, in*

[19] *KlimaSeniorinnen,* [319] – [336].

[20] *KlimaSeniorinnen,* [351] – [365].

[21] *KlimaSeniorinnen,* [538].

[22] *KlimaSeniorinnen,* [519].

[23] *KlimaSeniorinnen,* [542].

[24] *KlimaSeniorinnen,* [545].

particular, by the [Intergovernmental Panel on Climate Change]…, the Contracting States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights, notably the right to private and family life and home under Article 8 of the Convention".[25]

From those considerations it followed that States are required to "*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*" and, for those measures to be effective, "*it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner*".[26]

The ECtHR further considered that, "*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*".[27]

ECtHR's approach to assessing compliance: In light of the above considerations, a distinction needed to be made between (a) the margin of appreciation States enjoy as to the choice of means how to address climate change (which is broad), and (b) a reduced margin of appreciation as regards to States' commitment to the necessity of combating climate change and its adverse effects, and the setting of the requisite aims and objectives in this respect.[28]

When assessing whether a State has remained within its margin of appreciation, the ECtHR will take into account whether the competent domestic authorities (be it at the legislative, executive or judicial level) have had due regard to the need to: (a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget (or another equivalent method); (b) set intermediate GHG emissions reduction targets and pathways; (c) provide evidence as to the State's compliance; (d) keep relevant GHG reduction targets updated, based on available evidence; and (e) act in good time and in an appropriate and consistent manner.[29] Further, mitigation efforts should be supplemented by adaptation measures aimed at alleviating the most severe or imminent consequences of climate change.[30]

In terms of procedural safeguards, the ECtHR emphasised the importance of making information held by public authorities (e.g., relevant studies, risk assessments, etc.) available to the public, and putting in place procedures through which the views of the public can be taken into account in the decision-making process.[31]

ECtHR's assessment of the Swiss Government's actions: The ECtHR concluded that Switzerland had violated Article 8 ECHR, given that it had failed 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 for mitigating the effects of climate change.[32]

In particular, the ECtHR noted that (i) there were some critical gaps in the Swiss authorities' process of putting in place the relevant domestic regulatory framework (including by a failure to specify certain interim emissions reduction targets,[33] and to quantify a carbon budget[34] or similar emissions limitations), and (ii) Switzerland had failed to meet its past GHG emission reduction targets.[35]

(d) Article 6

The content of Article 6 rights: Referring to its previous case law,[36] the ECtHR emphasised that access to a court is an inherent aspect of the Article 6 safeguards and that such access must be "practical and effective".[37] This implied that Article 6, in principle, includes not only the right to institute proceedings, but also to obtain a determination.[38] In light of the fact that the applicant's request was rejected by the Swiss administrative authority as well as domestic courts at

[25] *KlimaSeniorinnen,* [546].

[26] *KlimaSeniorinnen,* [548].

[27] *KlimaSeniorinnen,* [549].

[28] *KlimaSeniorinnen,* [543].

[29] *KlimaSeniorinnen,* [550].

[30] *KlimaSeniorinnen,* [551].

[31] *KlimaSeniorinnen,* [554].

[32] *KlimaSeniorinnen,* [573] – [574].

[33] *KlimaSeniorinnen,* [558] – [568].

[34] *KlimaSeniorinnen,* [569] – [572].

[35] *KlimaSeniorinnen,* [559]

[36] *Zubac v. Croatia* [GC], no. 40160/12, §§ 76-79.

[37] *KlimaSeniorinnen,* [626].

[38] *KlimaSeniorinnen,* [629].

two levels of jurisdiction *without assessment of the complaints' merits*, the ECtHR considered that there had been a limitation of the applicant association's Article 6 rights.[39]

Assessing limitations on Article 6 rights: While Article 6 rights are not absolute and may be subject to limitations, such limitations (i) must not restrict access to courts in a way or to an extent that the very essence of the right is impaired, (ii) must pursue a legitimate aim, and (iii) must be proportionate to the aim sought to be achieved.

As regards the aim of the limitation at issue, the ECtHR considered that, to the extent the Swiss courts' objective was to prevent "*actio popularis*" complaints, this could be seen as falling within the aim of maintaining separation of powers between the legislature and the judiciary. This has previously been held to be a legitimate aim.[40]

However, the ECtHR highlighted that the applicant's action was in fact hybrid in nature: while its main part concerned issues pertaining to the democratic legislative process, it also concerned issues affecting the protection of the rights defended by the applicant association and vindication of these rights. Accordingly, the fact that the domestic agencies and courts neither addressed the issue of standing of the applicant association nor dealt with the substance of the complaints meant that the association's right of access to a court was restricted in such a way and to such an extent that the very essence of the right was impaired.[41]

Conclusion: Accordingly, the ECtHR found that there had been a violation of Article 6(1) of the ECHR.[42]

III. Other cases

(a) Agostinho

In *Agostinho*, six young Portuguese nationals submitted complaints against Portugal and 32 other States. The applicants alleged that there had been a breach of Articles 2, 3, 8 and 14 of the ECHR owing to the existing, and serious future, impacts of climate change imputable to the respondent States, and specifically those in relation to heatwaves, wildfires and smoke from wildfires, which affected their lives, well-being, mental health and the amenities of their homes.

The ECtHR declared the applicants' complaints inadmissible. In respect of Portugal, the applicants had not pursued any legal avenue in Portugal and, as such, had not exhausted domestic remedies. In relation to the other 32 respondent States, the complaint was declared inadmissible on the basis that the applicants were not in the respective jurisdictions of these respondent States,[43] and that the applicants had not established sufficient grounds for extraterritorial jurisdiction.

(b) Carême

In *Carême*, the applicant, a former resident and mayor of the Grande-Synthe municipality in France (a municipality that was said to be particularly exposed to the adverse effects of climate change), complained that France had taken insufficient steps to prevent climate change and that this failure constituted a violation of his rights under Articles 2 and 8 of the ECHR.

The ECtHR declared the applicant's complaint inadmissible, since he had moved to Brussels and no longer retained any relevant link to Grande-Synthe, and so failed to establish victim status.

IV. Implications

The ECtHR's ruling is likely to have a wide-ranging effect, although assessing its precise impact, especially on businesses, is a matter of some complexity.

(a) Key aspects of the KlimaSeniorinnen ruling

Standing for associations: one potentially very impactful outcome of the *KlimaSeniorinnen* case is the recognition that associations may in certain circumstances have standings to bring claims for violations of Convention Rights. The conditions laid down for associations to be granted standing are likely to be satisfied by many NGOs. As such, despite the ECtHR's position that it does not entertain "*actio popularis*" complaints, there seems to be a good chance that the decision will drive an increase in climate-related human rights cases brought by NGOs.

[39] *KlimaSeniorinnen,* [630].

[40] *KlimaSeniorinnen,* [631].

[41] *KlimaSeniorinnen,* [633] – [638].

[42] *KlimaSeniorinnen,* [640].

[43] See Article 1 of the ECHR which imposes on Convention States the obligation to "*secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*".

Also noteworthy is the ECtHR's reasoning. The ECtHR noted that "*there has been an evolution in contemporary society as regards recognition of the importance of associations to litigate issues of climate change on behalf of affected persons*" and that "*climate-change litigation often involves complex issues of law and fact, requiring significant financial and logistical resources and coordination, and the outcome of a dispute will inevitably affect the position of many individuals*."[44] This raises the question of whether standing should be granted to associations also in other, non-climate-change contexts where individuals face difficulties litigating on their own.

ECtHR's general approach to climate change: Leaving aside the ruling on standing and the *specific* findings on Article 8, the decision in *KlimaSeniorinnen* is remarkable for its approach. Key aspects are the emphasis on the need to limit the global temperature increase to 1.5ºC,[45] the notion of "*intergenerational burden-sharing*", the consideration of Switzerland's "*embedded emissions*"[46] (emissions generated through the import of goods and their consumption), and the reduced margin of appreciation that States enjoy in respect of commitments to combatting climate change and its adverse effects and the setting of requisite aims and objectives in this respect. As a general approach, this aspect of the *KlimaSeniorinnen* ruling may impact on future litigation, both before international courts (e.g., the pending ECtHR case of Greenpeace Nordic against Norway[47] or the International Court of Justice's pending advisory opinion on Obligations of States in respect of Climate Change, the request for which[48] asked for consideration of this question specifically in light of human rights and the interests of future generations) and in domestic litigation (e.g., the *Fitch* case pending before the UK Supreme Court[49]).

(b) Impact on domestic human rights claims

As a party to the ECHR, the UK is required to give effect to the Convention rights and is subject to the ECtHR's supervisory jurisdiction. Following the ECtHR's judgment, this means that the UK is required, in order to give effect to Article 8 of the ECHR, to (i) undertake measures for the substantial and progressive reduction of GHG emission levels, with a view to reaching net neutrality within the next three decades, (ii) to set adequate intermediate reduction goals for the period leading to net neutrality, and (iii) in pursuing climate change mitigation objectives, to act in good time (which, as the ECtHR clarified, requires immediate action to be taken), and in an appropriate and consistent manner.

These obligations are, *prima facie*, a matter of *international* law. However, (i) unless directed at Parliament, or primary legislation, itself,[50] a challenge on human rights grounds may be brought in UK courts,[51] and (ii) in any case, the UK has a long history of responding to the ECtHR's judgments.[52]

An important implication of the *KlimaSeniorinnen* ruling is that the decision on the standing of associations may impact on the standing of associations in the context of HRA 1998 claims. This is because, under section 7 of the HRA, a person may bring proceedings under the HRA where they are a "victim", i.e., where they would be a victim for purposes of Article 34

[44] *KlimaSeniorinnen,* [497].

[45] See, e.g., *KlimaSeniorinnen,* [569].

[46] *KlimaSeniorinnen,* [280].

[47] *Greenpeace Nordic and Others v Norway* (Application no. 34068/21), accessible here.

[48] See Request for an Advisory Opinion on Obligations of States in Respect of Climate Change, accessible here.

[49] *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council and others* (Case ID: 2022/0064), accessible here.

[50] Acts of Parliament may be impacted by Convention Rights, specifically through the obligation for courts under section 3 of the HRA 1998 to read and give effect to primary legislation and subordinate legislation, so far as it is possible to do so in a way that is compatible with the Convention rights.

[51] See Sections 6 and 7 of the Human Rights Act 1998 (the "**HRA 1998**"). Section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Section 7(1) provides that a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may bring proceedings against the authority under the HRA 1998 in the appropriate court or tribunal, or rely on the Convention right or rights concerned in any legal proceedings, provided they are (or would be) a victim of the unlawful act in question.

[52] See the periodic Reports to the Joint Committee on Human Rights on the Government's response to human rights judgments (the "**Responding to Human Rights Judgment Reports**"), e.g., for 2022-2023 (here), for 2019-2020 (here) and for 2013-2014 (here). For example, the UK's violation of Article 8 by operating a blanket policy of retaining DNA samples and profiles, and fingerprints, from all those arrested or charged but not convicted of an offence, as determined by the ECtHR in *S & Marper v UK* (2008), was addressed through several legislative proposals, including for what is now the Protection of Freedoms Act 2012 (see, Responding to Human Rights Judgment Report 2013-2014, p. 25).

ECHR,[53] and the scope of who qualifies as "victim" for Article 34 purposes has now changed. As such, it would seem that, not only will it be possible (for individuals) to bring climate change related claims against public authorities on the grounds of Article 8 ECHR, but such claims may even be brought by NGOs, who will likely be better resourced and able to sustain such litigation.

Accordingly, to the extent that the UK's measures fall short of the standards to which Switzerland was held, it seems likely that the UK Government will come under pressure to amend its policies which, in turn, would almost certainly affect businesses.

Justiciability: Some have argued that the ECtHR exceeded its competence, and should have left the relevant questions to political and democratic decision making.[54] The ECtHR recognized that "*national authorities have direct democratic legitimation and are in principle better placed than an international court to evaluate the relevant needs and conditions*".[55] But even democratic decisions can cross the line. The ECtHR is therefore competent to review whether, in taking their decisions, the government and parliament have remained within the limits of the law by which they are bound. In the words of the ECtHR, "*the margin of appreciation for the domestic authorities is not unlimited and goes hand in hand with a European supervision by the Court, which must be satisfied that the effects produced by the impugned national measures were compatible with the Convention.*"[56]

(c) Impact on private actors

More difficult is the question to what extent the ECtHR's judgment may impact on claims between private actors – the question of the "horizontal effect" of Convention rights.

On the face of it, the ECHR imposes obligations only on the Contracting States, not on private entities or individuals. However, Section 6 of the Human Rights Act 1998 makes clear that courts, as public authorities, must not act in a way which is incompatible with a Convention Right.[57] It would therefore, in principle, be possible to argue – as has been done in the past – that English courts should develop English law in a way that ensures alignment with the ECHR.

Impact of the ECHR on tort law: The first question is what exactly is the potential impact of Convention rights on civil law and English common law on tort.

The District Court of The Hague found in *Shell* that human rights such as Articles 2 and 8 of the ECHR are one of the sources to define tort liability under Dutch law.[58] Dutch tort law (Article 6:162 of the Dutch Civil Code) imposes a general "duty of care" on anyone, including government[59] and companies, that requires anyone to take appropriate measures to avoid "knowingly or negligently endangering others" ("gevaarzetting" or "endangerment") where (i) the damage is likely serious, (ii) the damage is reasonably foreseeable, and (iii) preventative action can be taken within the bounds of proportionality. What constitutes a due level of care depends on the "norms prevailing in society", which can be derived from various sources including:

- international "soft law" instruments such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. Their principles are non-binding, but place a responsibility on companies to respect human rights, and become binding through the operation of tort law;
- Articles 2 and 8 European Convention on Human Rights (right to life and the right to respect for private and family life);

[53] HRA 1998, s. 7(1) and (7).

[54] See, e.g., *KlimaSeniorinnen,* dissenting opinion of Judge Eicke, [68].

[55] *KlimaSeniorinnen,* [449].

[56] *KlimaSeniorinnen,* [450].

[57] HRA 1998, Section 6(1) and (3).

[58] *Shell*, NL:RBDHA:2021:5339 (May 26, 2021) (being appealed), accessible here. For a detailed analysis of the decision, please refer to our dedicated alert memorandum here.

[59] See *Urgenda*, in which the Supreme Court of The Netherlands found that the Dutch government had obligations to urgently and significantly reduce emissions (setting a 25% target by the end of 2020 compared to 1990 levels), in line with its international human rights obligations. NL:HR:2019:2007 (December 20, 2019). In October 2021, the Paris administrative tribunal found the French State in breach of its obligations to fight climate change, ordering the government to take all necessary measures by the end of 2022 to make up for the harm caused by its failure to meet emissions targets between 2015 and 2018: *Notre Affaire à Tous and Others v. France*, n°1904967, 1904968, 1904972, 1904976/4-1 (3 February 2021), available here.

- the scientific consensus (including the IPCC reports); and
- the 'non-binding' but 'universally endorsed and accepted' provisions of the 2015 Paris Agreement on Climate Change.

The *Klimaseniorinnen* case reinforces the relevance of this approach for private tort-based litigation in a civil law context.

There is authority for the view that Convention rights should not lead English courts to "*invent a new cause of action to cover types of activity which were not previously covered*",[60] even where a gap in English law means that the UK is in breach of its ECHR obligations.[61]

On the other hand, it seems that, where existing causes of action are available, courts will take Convention rights into account. This has in certain instances led to the expansion of existing torts, as happened, for example, with breach of confidence.[62] However, it has subsequently been pointed that, as regards to privacy, "*the common law had long been regarded as defective*".[63] There is also authority suggesting that, for example, the duty of care concept in common law negligence should not be expanded for the purpose of reflecting human rights considerations.[64] It seems that courts' willingness to expand existing causes of action based on Convention rights alone may be limited. That being said, given the exceptional nature of climate cases, ECHR considerations may well be one factor to be taken into account by courts in considering whether the common law should develop in a certain way.[65]

Potential causes of action: This leads to the second question: what cause of action may claimants pursue in trying to hold private actors accountable in connection with climate change?

Nuisance: A cause of action that might be explored with some prospects of success is nuisance. Considering developments in other jurisdictions, in the recent *Smith v Fonterra*[66] decision, the Supreme Court of New Zealand ("**NZSC**"), overturning a decision of the New Zealand Court of Appeal, allowed a claim in public nuisance (and other causes of action) relating to damage caused by climate change to proceed to trial. While emphasising that "*a refusal to strike out a cause of action is not a commentary on whether or not the claim ultimately will succeed*",[67] the NZSC was not "*convinced, at this stage of the proceeding, addressing only strike out, that the common law is incapable of addressing tortious aspects of climate change*",[68] and, in fact, considered that "*[t]he principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to*

[60] *Campbell v MGN Ltd* [2004] 2 AC 457 ("***Campbell***", accessible here), [133] (Baroness Hale). Cf. *Smith v Fonterra* [2021] NZCA 552; *Smith v Fonterra Co-operative Group* [2024] NZSC 5 ("***Fonterra***"), accessible here.

[61] Leading authority on this point is *Wainwright v Home Office* [2004] 2 AC 406 (accessible here), where the House of Lords refused to recognise a new tort of invasion of privacy ([35]). This conclusion was reached despite recognising that the claimants' rights under Article 8 ECHR might have been breached ([52]), as was later found by the ECtHR in *Wainwright v UK* (2007) 44 EHRR 40.

[62] See *Campbell*. Another notable case is the decision of Neuberger J (as he then was) in *Mckenna v British Aluminium Limited* [2002] EnvLR 30: in an action in nuisance and based on the rule in *Rylands v Fletcher*, the Defendant applied for the claims to be struck out on the basis that the Claimants had no proprietary interest in the land in question, as was a requirement under common law (see *Hunter v Canary Wharf Limited* [1997] AC 655). Neuberger J refused to strike out the claims on the basis that (i) he considered he "*should proceed on the basis that the court should…develop the common law so as to be Convention-compliant*" ([36]), (ii) "*in order for the court properly to give Article 8.1 any teeth, there must be a power to grant damages in respect of any breach of the right to respect for a person's private family life, home or correspondence*" ([43]), and (iii) "*there is a real possibility of the court concluding that in light of … Article 8.1 now being effectively part of our law, it is necessary to extend or change the law*" ([52]). However, subsequent case law does not seem to have cast any doubt on the rule that only those with a proprietary interest can sue in nuisance, and, in *Dobson v Thames Water Utilities Ltd* [2009] 3 All ER 319, the parties as well as the Court of Appeal seemed to proceed on the basis that those without proprietary interests, while possibly having a remedy under the HRA 1998, cannot themselves sue in nuisance.

[63] *Michael v Chief Constable of South Wales Police* [2015] AC 1732 ("***Michael***", accessible here), [124] (Lord Toulson).

[64] See, e.g., *Smith v Chief Constable of Sussex Police* [2009] 1 AC 225 and *Michael*. The imposition of a duty of care on local authorities owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings in *D v East Berkshire Community NHS Trust and Others* [2004] QB 558 has sometimes been argued to contradict this view, but, in fact, the core of the Court of Appeal's decision in this case is a narrow one, namely that the possibility of bringing claims under the HRA 1998 defeated some of the policy arguments on which the prior refusal to recognise a duty of care (e.g., in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633) had been based.

[65] See *Campbell.*

[66] *Fonterra.*

[67] *Fonterra*, [143].

[68] *Fonterra*, [154].

human economic activity". [69] Notably for present purposes, the NZSC also considered that whether the defendants' actions amounted to a substantial and unreasonable interference with public rights, a question to be determined at trial, would partly depend on an "*analysis of policy factors and consideration of the human rights obligations*", derived from "*both domestic rights legislation and international instruments*". [70] Equally, one of the causes of action on which the claim filed by the State of California against several major oil companies is based is public nuisance. [71]

Negligence: Another cause of action to consider may be common law negligence. As mentioned above, in 2021, the Hague District Court imposed on Royal Dutch Shell plc certain GHG emissions reduction obligations based on tort law principles of negligence, taking into account several international instruments, including also the ECHR (Articles 2 and 8).

While imposing liability for contribution to climate change on the grounds of nuisance or negligence would be a significant development of English tort law, the foreign cases referred to above suggest that such developments are not, in principle, inconceivable. This is so, in particular, given that the ECtHR's ruling is only one of several international developments and sources of climate change related obligations. As Lord Sales said extrajudicially (when discussing directors' duties): "*the basic direction of travel … seems clear … environmental considerations may and, increasingly, must be taken into account*…". [72]

…

CLEARY GOTTLIEB

[69] *Fonterra*, [172].

[70] *Fonterra*, [169].

[71] *The People of the State of California, ex rel. Rob Bonta, Attorney General of California v Exxon Mobil Corporation and Others No.* CGC-23-609134 (Cal. Super. Ct. filed Sept. 15, 2023), accessible here, at [241] – [256].

[72] See Lord Sales JSC, "Directors' duties and climate change: Keeping pace with environmental challenges", 27 August 2019, accessible here.