# Environment law: update

**Marc Willers KC, Paul Clark and Tim Baldwin look at some of the key arguments being advanced by young and old applicants in climate change cases before the European Court of Human Rights.**

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This is the first in a new series on environment law from the Garden Court Chambers Environmental Law and Climate Justice Team, covering case law, legislation and policy updates, plus environmental protest and comparative/international developments. It will be published three times a year.

## Introduction

In 2019, the UN High Commissioner for Human Rights, Michelle Bachelet, described climate change and its threat to human rights in the following terms:

*Climate change is a reality that now affects every region of the world … The world has never seen a threat to human rights of this scope … The economies of all nations; the institutional, political, social and cultural fabric of every state; and the rights of all your people – and future generations – will be impacted* (*Global update at the 42nd session of the Human Rights Council – opening statement*, Office of the High Commissioner for Human Rights, 9 September 2019).

The physical reality of climate change is assessed by the Intergovernmental Panel on Climate Change (IPCC), whose consecutive reports over the past three decades have each described the nature and causes of the climate change our planet is experiencing with increasing scientific confidence.

At the launch of the IPCC's latest assessment in 2021, IPCC Working Group I co-chair Valérie Masson-Delmotte stated: 'It has been clear for decades that the Earth's climate is changing, and the role of human influence on the climate system is undisputed' ('Climate change widespread, rapid, and intensifying – IPCC', IPCC news release, 9 August 2021).

Global trends in climate change litigation demonstrate the importance of human rights law as a tool for improving the response of public authorities and corporations to climate change.[1] No region has seen more rights-based climate cases than Europe, both at the domestic and regional level.[2] At the domestic level, there have been setbacks but also notable successes, and following the groundbreaking decision in *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation*, Supreme Court of the Netherlands, 20 December 2019, an increasing number of pioneering claims have drawn attention to the disproportionate detrimental effect climate change will have on the rights of the most vulnerable members of our society: the elderly; the disabled; children; and future generations.

There have been a number of climate change complaints filed with the European Court of Human Rights (ECtHR) in the past two years. Three cases, *Verein KlimaSeniorinnen Schweiz and others v Switzerland* App No 53600/20, *Carême v France* App No 7189/21 and *Duarte Agostinho and others v Portugal and 32 others* App No 39371/20, have been fast-tracked by the court for consideration of their admissibility and merits. On 29 March 2023, the court's Grand Chamber heard the cases of *KlimaSeniorinnen* and *Carême*. The *Duarte Agostinho* case will be heard by the Grand Chamber in late September 2023. In this article, we consider the arguments advanced by the applicants in the *KlimaSeniorinnen* and *Duarte Agostinho* cases.

## Climate change science

Recent developments in scientific evidence underpin both the *KlimaSeniorinnen* and *Duarte Agostinho* cases and are summarised below.[3]

In October 2018, the IPCC reported that human activities had caused the Earth's surface to warm by more than 1°C since the industrial period of 1851–1900.[4] It reported two further significant findings: (i) the climate impacts of 2°C of warming would be very much more serious than those of 1.5°C of warming;[5] and (ii) there were then only 12 years in which to take action to prevent global temperature rise above 1.5°C.[6]

Human-induced climate change has adverse consequences for natural and human systems, in particular food and water security, and human health.[7] These adverse consequences will become even more significant in the coming decades as the climate continues to warm. Every fraction of a degree of warming increases the adverse effects of climate change.

In August 2021, the IPCC published the contribution of Working Group I to the IPCC's Sixth Assessment Report, regarding the physical science basis of climate change. Its key findings of fact can be summarised as follows:

- It is unequivocal that human influence has warmed the atmosphere, ocean and land. Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred.[8]
- The scale of recent changes across the climate system as a whole and the present state of many aspects of the climate system are unprecedented when compared with the globe's climate over many thousands of years.[9]
- Human-induced climate change is already affecting many weather and climate extremes in every region across the globe; evidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones and, in particular, their attribution to human influence, has strengthened since the IPCC published its Fifth Assessment Report in 2014.[10]
- Global warming of 2°C will be exceeded during the 21st century unless deep reductions in $CO_2$ and other greenhouse gas (GHG) emissions occur in the coming decades.[11]
- Limiting human-induced global warming to a specific level requires limiting cumulative $CO_2$ emissions, reaching at least net zero $CO_2$ emissions, along with strong reductions in other GHG emissions. Strong, rapid and sustained reduction in $CH_4$ (methane) emissions would also limit the warming effect resulting from declining aerosol pollution and would improve air quality.[12]

In February 2022, the IPCC published the contribution of Working Group II to the IPCC's Sixth Assessment Report. Its key findings of fact are:

- The extent and magnitude of climate change impacts are larger than estimated in previous assessments.[13]
- Climate change has caused increased heat-related mortality; hot extremes including heatwaves have intensified in cities, where they have aggravated air pollution events and limited functioning of key infrastructure.[14]
- Continued and accelerating sea level rise will encroach on coastal settlements and infrastructure,[15] and, combined with storm surge and heavy rainfall, will increase compound flood risks.[16]
- There have been irreversible losses, for example through species extinction driven by climate change.[17]
- 'The cumulative scientific evidence is unequivocal: climate change is a threat to human well-being and planetary health. Any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all.'[18]

## The Paris Agreement

The overarching international treaty addressing climate change is the UN Framework Convention on

Climate Change (UNFCCC). Article 2 articulates that the 'ultimate objective' of the convention 'and any related legal instruments that the Conference of the Parties may adopt' (which includes the Paris Agreement) is to achieve 'stabilisation of greenhouse gas concentrations in the atmosphere' at a level that would prevent 'dangerous' human interference with the climate system.

In December 2015, the state parties to the UNFCCC adopted the Paris Agreement in relation to climate change. Article 2 commits parties to three key goals, the first of which is known as the long-term temperature goal, to hold:

*... the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change*.

In order to achieve the long-term temperature goal, article 4(1) requires parties to 'aim to reach global peaking of greenhouse gas emissions as soon as possible'. This aim includes parties undertaking 'rapid reductions' after global peaking, 'in accordance with best available science, 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 poverty'. In other words, the Paris Agreement embodies not just a consideration concerning 2050 and beyond ('second half of this century'), but a significant focus on emissions reductions in the years up to that point.

Article 3 of the Paris Agreement imposes legal obligations on parties 'to undertake and communicate' nationally determined contributions (NDCs), which represent 'ambitious efforts', as defined by articles 4, 7, 9, 10, 11 and 13, 'with the view to achieving' the temperature goal in article 2. As set out in article 4(3), the NDCs must also 'represent a progression' over time and must reflect each state's 'highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

**Cases**

- **Verein KlimaSeniorinnen Schweiz and others v Switzerland**
  App No 53600/20

The applicants were: the Verein KlimaSeniorinnen Schweiz (the Association of Swiss Senior Women for Climate Protection, made up of more than 2,000 members) and four individuals.

In essence, the applicants complained that the Swiss government's failure to tackle climate change, by failing to adopt the necessary short- and long-term GHG emission reduction targets, breached their rights protected by articles 2 and 8 of the European Convention on Human Rights (ECHR), and that the Swiss courts' failure to determine their complaint and provide them with a remedy breached their rights protected by articles 6 and 13.[19]

In response, the Swiss state argued that the applicants were trying to 'circumvent' the Paris Agreement by seeking to construct an international judicial review of its climate measures and that the court should not admit and determine the complaint because that would involve it taking on the role of a 'supreme environmental court'.[20] It also argued that the unprecedented and complex issues and challenges of climate change, as well as Switzerland's democratic system, warranted it being granted an 'ample margin of appreciation' when determining how to tackle climate change and what targets for carbon emission reductions it should adopt.

There were a large number of interventions by member states, UN special rapporteurs, non-governmental organisations, universities and legal experts on international environmental law, as well as scientific experts.[21] In the event, the court directed that two of those interveners would be given permission to make oral submissions: the Republic of Ireland and the European Network of National Human Rights Institutions.

A few weeks before the hearing date, the court sent to the parties and the interveners a number of additional questions that it requested be addressed orally during the hearing, including two key questions:[22]

(a) Has the Swiss government adopted an overall national carbon budget for the period up to 2050 and, if so, on what basis has the budget been calculated?
(b) How should a country's 'fair share' be assessed in terms of national carbon budgets?

At the hearing before the Grand Chamber,[23] the applicants opened their case by making the point that the world is faced with an existential threat to which we must respond with action:

*Weariness – 'defeatism'; neither is an option: every country, institution and policymaker must meet their responsibility to do all that is necessary to mitigate the impending harm.*

They then made the following submissions.

First, they argued that the failure of the Swiss courts to determine the applicants' case *at all* – on the grounds that there was still time before the Paris Agreement temperature thresholds were reached and that accordingly the applicants could not yet claim that their rights were affected – breached their rights protected by ECHR articles 6 and 13.

Second, they addressed victim status, explaining the direct effect on the applicants of the Swiss government's ongoing failures to tackle climate change. They relied on scientific papers and data to show that the applicants were *already* suffering from the effects of climate change. As elderly women, the excessive and sustained high temperatures of increasingly frequent and severe heatwaves posed an extremely serious threat, not just to their health and well-being, but to their lives, and they referred the court to evidence which showed that:

- there were a disproportionate number of deaths among elderly women during heatwaves in Switzerland in the past 20 years; and
- exposure to extreme heat increases the risk of acute kidney injury, heat stroke, asthma attacks, respiratory, cardiovascular, immune and nervous system diseases and disorders.

The Swiss government accepted that elderly women are disproportionately affected by excessive heat but argued that the association's claim should be rejected as an actio popularis. In response, the applicants pointed to the fact that the association is no more than a 'group of individuals', each one of whom is directly affected. Thus, it was argued that all of the applicants are detrimentally affected.

Third, the applicants addressed the positive obligations owed to them by the Swiss government. They pointed to the groundbreaking decision of the Dutch Supreme Court in *Urgenda* that a state's positive obligations under articles 2 and 8 apply to activities, whether public or private, that contribute to climate change on the basis that climate change is known to involve a 'real and immediate' threat to human life and well-being, ie, a risk that is both genuine and imminent (*Urgenda* at paras 5.2.2–5.2.3). They argued that the court should follow the Dutch Supreme Court's lead and hold that Switzerland is 'under a positive obligation to take the necessary steps to guarantee effective protection for the applicants' lives, health and well-being'.

Fourth, the applicants addressed Switzerland's failure to take adequate steps to mitigate climate change. They made the point that the court was not being asked to determine whether Switzerland was in breach of any of its commitments under the Paris Agreement but rather to decide whether Switzerland had violated the applicants' rights under the ECHR.

They argued that to protect the rights of the applicants, the Swiss government must 'do everything in its power to do its share to prevent a global temperature increase of more than 1.5 degrees above pre-industrial levels'. This necessarily meant the adoption of a legislative and administrative framework to achieve that objective.

They demonstrated, by reference to evidence from experts in climate change science and the Climate Action Tracker (CAT) – an independent scientific project that tracks government climate action and measures it against the globally agreed Paris Agreement – that Switzerland's short- and long-term GHG emission reduction targets were woefully inadequate (and not embedded in legislation), and that Switzerland had not carried out any studies or due diligence in relation to the 1.5°C limit identified by the IPCC in its *Global warming of 1.5°C* Special Report.

Switzerland had no real answer to these points. It responded by referring to the fact that it had taken adaptation measures and argued that it should in any event be given a wide 'margin of appreciation'. On the latter point, the applicants accepted that it was for Switzerland to decide 'what measures to take to give effect to targets; to that extent it has a margin of appreciation. But no such margin exists in relation to the fixing of the targets themselves, nor the need for legislation to give them practical effect.'

Fifth, the applicants explained that if the remaining global carbon budget is distributed fairly on the basis of the principles of international environmental law, such as 'common but differentiated responsibilities and respective capabilities', then Switzerland is *already* using other countries' shares of the small remaining global carbon budget. They described this as 'carbon theft'.

In answer to the court's key question (b), the applicants relied on the CAT and an article by Lavanya Rajamani et al, 'National "fair shares" in reducing greenhouse gas emissions within the principled framework of international environmental law' (*Climate Policy*, vol 21, issue 8, 2021, page 983), and argued that Switzerland's fair share requires it to do the following:

- as a minimum, reduce its domestic emissions by more than 60 per cent by 2030 and achieve net zero domestically by 2050 as compared with 1990 levels, and not purchase emissions reductions from abroad in order to do so; and
- to discharge its global mitigation burden, its overall emissions reduction from 2030 should be net negative.

Sixth, the applicants addressed the Swiss government's general defences. Switzerland had argued that its actions alone would not prevent or avoid the risks that climate change posed to the applicants and that its failures could not therefore be considered causative of the relevant harm and risk.

The applicants noted that this argument has been roundly rejected by apex courts, including the Dutch Supreme Court in *Urgenda*, for very obvious reasons. It is common sense that the temperature goal in the Paris Agreement cannot be achieved without mutual trust between contracting states, and if a state as rich and technically advanced as Switzerland does not take the lead and do its fair share by pursuing its highest possible ambition, then it is likely that other states will also fail to do so.

Moreover, they argued, it should not be forgotten that every degree – indeed every fraction of a degree – of temperature increase matters.[24] Even today's global temperature increase of 1.13°C is causing enormous damage, and a 1.5°C global temperature increase will exacerbate that harm.

Switzerland had also argued that it could not be held responsible for its failures because proposed legislation that it had intended would tackle climate change was rejected in a referendum. The applicants countered that point by reminding the court that Switzerland is responsible for its ECHR violations irrespective of how they came about. Contracting states are not subject to different ECHR obligations depending on the technical operation of their democratic system.

Finally, the applicants stressed the urgent need for Switzerland to make the necessary emission reductions, and noted that its actions to date had been woefully inadequate and that there were no signs that it would change course, before arguing that it was essential that the court order Switzerland to take the necessary measures. The applicants concluded their oral argument with the following powerful submission:

*[T]here is no time left; dangerous climate change is with us; the applicants are suffering and fear the future. Switzerland has no excuse for its failures to protect the applicants' rights. It has known the harm that inadequate action would cause and, despite that knowledge, it has failed to act with sufficient urgency and application, undermining global efforts and mutual trust. If a country as rich and technologically advanced as Switzerland cannot do its fair share – I go further, does not even take the trouble to assess what its fair share should be – what hope is there that other countries will step up to the challenge we face?*

Judgment was reserved.

- **Duarte Agostinho v Portugal and 32 other states**
  App No 39371/20

On 3 September 2020, six Portuguese children and young adults filed an application with the ECtHR[25] against 33 European states, in which they argued that these states were breaching their obligations under the ECHR by failing to adopt adequate climate change mitigation measures.

The applicants invoked their rights to life and private and family life under ECHR articles 2 and 8. They also argued that the increasing effects that they are set to suffer over the course of their lifetimes – during which they face the possibility of living to see 4ºC of global warming – entail discrimination on grounds of age, and therefore breach article 14, when read with articles 2 and 8. The applicants alleged specifically that the respondents are failing to sufficiently reduce their territorial emissions and, further, to take responsibility for their contributions to 'overseas' emissions entailed by: (a) their export of fossil fuels; (b) the import of goods containing 'embodied' carbon; and (c) the contributions to emissions abroad of entities domiciled within their respective jurisdictions (eg, via fossil fuel extraction elsewhere or its financing). The applicants were supported in bringing their case by the Global Legal Action Network.

***Presumptive responsibility for breach of the ECHR***

The lynchpin to the application was that, because each of the respondents contribute to global emissions, they must be presumed responsible for the harm/risk that climate change at its current trajectory poses to the applicants and therefore for breaching the above-mentioned ECHR rights. In making their legal case as to shared responsibility, the applicants drew on the authoritative 'Guiding Principles on Shared Responsibility in International Law' (André Nollkaemper et al, *European Journal of International Law,* vol 31, issue 1, February 2020, page 15). In line with the Guiding Principles, they argued that states share responsibility for multiple internationally wrongful acts when each of them engages in separate conduct that:

(a) is attributable to each of them separately;
(b) constitutes a breach of an international obligation for each of those international persons; and
(c) contributes to the indivisible injury of another person.

The argument on presumptive responsibility is further supported by the general principle of law that where one or more of a number of potential wrongdoers must have caused a particular harm, but there is uncertainty as to which of them in fact caused that harm, then each of those potential wrongdoers is presumptively responsible in law for the harm in question, such that the onus is on those potential wrongdoers to show that they did not cause it.[26]

Accordingly, the starting point of the application was that the respondents share presumptive responsibility under the ECHR for the 'indivisible injury' that climate change causes the applicants, and therefore bear the onus of extricating themselves from this default position. It further followed from this position that the ambiguity surrounding what constitutes a state's 'fair share' (having regard to, for example, its historic emissions, its economic wherewithal, or its current per capita emissions) of the necessary global climate change mitigation effort must be resolved in favour of the applicants. In effect, this means that states' mitigation efforts must be assessed according to the relatively more demanding measures of their respective 'fair shares' (consistent with the methodology adopted by the CAT), with greater emphasis being placed on the extent to which they are consistent with their 'highest possible ambition' as per article 4(3) of the Paris Agreement.

These arguments aimed to prevent the otherwise inevitable attempt by states to shift responsibility for the impacts of climate change away from themselves and onto other states. Furthermore, they aimed to stop states from extricating themselves from their default position of responsibility on the basis of mitigation efforts that are not collectively consistent with preventing the indivisible injury to which that presumptive responsibility relates.

***The margin of appreciation and climate change***

Nor should the margin of appreciation doctrine be read as allowing states broad discretion in the area of climate change mitigation. There is a critical difference between the issues in cases such as *Hatton and others v UK* App No 36022/97, 8 July 2003 (at para 97), concerning the regulation of noise pollution, and that of climate change. In *Hatton*, the margin of appreciation was relied on to determine the extent of the interference to the rights protected by article 8 that was permissible in that case, having regard to the competing economic interests at stake. If, however, in the case of climate change, it is accepted that the ECHR must be read in light of the temperature target prescribed by the Paris Agreement, then the interference with article 8 rights that will result from global warming exceeding that target cannot ever be deemed 'necessary in a democratic society'. Accordingly, the question that the margin of appreciation was relied on to address in *Hatton* is, when it comes to climate change, already answered.

The 'best available science' is entirely clear as to the extent of the emissions reductions that are required, at a global level, to meet the goal of the Paris Agreement. Nonetheless, to the extent that there is any uncertainty in this regard, the precautionary principle comes into play as regards the precise amount by which the atmosphere will warm on the basis of current emissions. The most likely projected temperature rise will still cause devastating impacts to the applicants and others.

The uncertainty with which the application was principally concerned relates to the 'fair share' question. On this issue, and, ultimately, on the determination of the amount by which emissions must be reduced, states ought not to enjoy a wide margin of appreciation. This follows from the very nature of the margin of appreciation as a feature of the principle of subsidiarity: as the ECtHR first noted in *Handyside v UK* App No 5493/72, 7 December 1976 (at para 48), the margin stems from the observation that '[b]y reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on' certain matters

relating to the interpretation and implementation of the ECHR.

Clearly, states' 'contact with the vital forces of their countries' is of limited relevance when it comes to determining the extent of their respective obligations to mitigate the global problem that is climate change. Conversely, the ECtHR is particularly well positioned, from its vantage point as an international court, to determine whether a state's mitigation efforts are consistent with the temperature goal prescribed by the Paris Agreement (and therefore the ECHR). Indeed, put simply, giving states a broad margin of appreciation in this area would be incompatible with the imperative of achieving that goal. Therefore, in the area of climate change mitigation, the margin of appreciation is to be confined to 'choice of means'.

***Domestic climate change cases and exhaustion of domestic remedies***

In various domestic climate change cases decided to date, courts (in the UK, Ireland, Germany and Norway, for example) have referred to 'separation of powers'-type considerations when determining the scope of the margin of appreciation that states enjoy when determining their emissions reduction efforts. Even in the vitally important decision in the *Urgenda* case, the Dutch Supreme Court emphasised the need for judicial restraint when applying the ECHR to the Netherlands' climate mitigation policies. This led the court to endorse the lowest end of the equity range of emissions reduction (25–40 per cent on 1990 levels by 2020 for developed countries) that was presented to it – an approach that, if replicated, is inherently incapable of keeping global warming to the goal of the Paris Agreement. Moreover, the conflation of domestic constitutional law-based principles with the margin of appreciation conflicts with the ECtHR's understanding of that principle. As it held in *A and others v UK* App No 3455/05, 19 February 2009:

*The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the court. It cannot have the same application to the relations between the organs of state at the domestic level* (para 184).

This leads to the question of why the *Agostinho* case was filed directly with the ECtHR, before the applicants had exhausted domestic remedies. The applicants first made the entirely reasonable argument that it would not be practically feasible for them to pursue proceedings through the domestic courts of each of the 33 respondents. They also contended, however, that thus far domestic courts in Europe have not provided adequate remedies in respect of inadequate climate mitigation policies – largely because of how they have misapplied the margin of appreciation in this context. This, together with the exceptionally urgent need for the provision of adequate remedies in this context throughout Europe, further justified their filing of an application directly with the ECtHR.

This argument is entirely consistent with the principle of subsidiarity, which has always co-existed alongside the well-established exceptions to the exhaustion of domestic remedies rule on which the applicants relied. It is also worth noting in this regard that the remedy they sought from the ECtHR was a declaration that the respondents were in breach of the ECHR, rather than an order requiring them to reduce their emissions by specific amounts (as made in *Urgenda*). Crucially, however, the judgment that was sought from the ECtHR would encourage domestic courts to make *Urgenda*-type orders that, collectively, ensure that Europe's contribution to the global mitigation effort is consistent with the goal of the Paris Agreement: an example of subsidiarity in action.

***States' obligations in relation to their contributions to overseas emissions***

As held in *Budayeva and others v Russia* App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, ECHR article 2 imposes a 'duty to do everything within the authorities' power' (para 175) to protect human life in the environmental context. It is hardly consistent with this view that a state could, for example, export vast quantities of fossil fuels without any consequence for its responsibility under the ECHR.

In *Ilaşcu and others v Moldova and Russia* App No 48787/99, 8 July 2004, the ECtHR held:

*A state's responsibility may … be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the convention, even if those repercussions occur outside its jurisdiction* (para 317).

There is, furthermore, nothing in the UNFCCC to suggest that states' mitigation efforts should be confined to reducing their territorial emissions.

***Victim status and the interplay between domestic and international courts***

The applicants' case was firmly grounded on evidence of the direct effects that climate change – to which, of course, each of the respondents contribute – is having, and will have, on their lives. The fact that countless others stand to endure similar effects, and therefore to benefit from the decision they seek, does nothing to undermine their status as 'victims' for the purpose of ECHR article 34 (see, for example, *Zakharov v Russia* App No 47143/06, 4 December 2015 at paras 173–179). Indeed, it is a fact to which the ECtHR must have regard when addressing the responsibility of the respondents for breaching the applicants' rights (see, for example, *Broniowski v Poland* App No 31443/96, 22 June 2004 at paras 162 and 198).

Similarly, the fact that enforcement of the respondents' obligations to the applicants may ultimately depend, in practice, on other individuals bringing cases before the domestic courts throughout Europe does nothing to undermine their status as victims. Indeed, it is a reality that is consistent with their argument that it would not be feasible for them to exhaust remedies before each of the respondents' domestic courts.

Ultimately, when it comes to climate change litigation, realising the full potential of the law to tackle the climate emergency requires a symbiotic relationship between domestic and international courts, and, by extension, between domestic and international law.

***Progress of the application***

Within weeks of the application being filed, the court decided to fast-track the case based on the 'importance and urgency of the issues raised'. It then communicated the case to the respondent governments, thereby requiring the governments to respond. The respondent governments simultaneously wrote to the court asking it to overturn its decision to fast-track the case. They also asked the court for an opportunity to argue that the case is inadmissible and should not be heard prior to them having to defend their climate policies. The court rejected both requests. After several rounds of written submissions from the applicants and the respondents, the case was listed for hearing by the Grand Chamber in September 2023.

## Conclusions

This article demonstrates that the development of greater certainty in the scientific evidence underpinning climate change has created a proper foundation to bring legal challenges to state inaction to meet obligations to limit temperature increase. It is clear that climate change is a threat to life on Earth, and that it engages states' obligations under human rights law. Such litigation is still in its early stages in Europe and elsewhere, but the oft-cited 'rights turn' in climate litigation[27] clearly shows that it is central to the battle against the climate emergency. Harnessing scientific evidence that informs enforcement of human rights law in tackling climate change is beginning to yield results, and the legal strategies involved in doing so continue to develop and evolve. The authors consider that there is still considerable work to do to ensure that obligations under international treaties are enforced, and human rights litigation will become an ever more important tool in this endeavour.

1 Jacqueline Peel and Hari M Osofsky, 'A rights turn in climate change litigation?', *Transnational Environmental Law*, vol 7, issue 1, March 2018, page 37, and Annalisa Savaresi and Juan Auz, 'Climate change litigation and human rights: pushing the boundaries', *Climate Law*, vol 9, issue 3, June 2019, page 244.
2 Ibid.
3 The science is set out further in Joeri Rogelj and Marc Willers KC, 'Youth activists are forcing governments to take account of the intergenerational impact of climate change', *Energy and Climate Change Law Institute Review*, issue 3, Queen Mary University of London, 29 October 2021, page 7.
4 'Summary for policymakers', in *Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty,* Cambridge University Press, 2018, para A.1, page 4.
5 Ibid, paras B.1–B.5.7, pages 7–10.
6 Ibid, para C.1, page 12.
7 Ibid, para A.3.1, page 5, and *Making peace with nature*, UN Environment Programme, 18 February 2021, page 27.
8 'Summary for policymakers', in *Climate change 2021: the physical science basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change,* IPCC, 2021, para A.1, page 4.
9 Ibid, para A.2, page 8.
10 Ibid, para A.3, page 8.
11 Ibid, para B.1, page 14.
12 Ibid, para D.1, page 27.
13 'Summary for policymakers', in *Climate change 2022: impacts, adaptation and vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change,* IPCC, 2022, para B.1.2, page 9.
14 Ibid, para B.1.1, page 9, and para B.1.5, page 11.
15 Ibid, para B.3.1, page 13.
16 Ibid, para B.5.1, page 18.
17 Ibid, para B.1.2, page 9.
18 Ibid, para D.5.3, page 33.

19 *See Verein KlimaSeniorinnen and others v Switzerland – revised applicants' draft speech for the oral hearing of 29 March 2023 (for the court's interpreters).* The applicants' detailed arguments were well documented in written submissions and are all on the KlimaSeniorinnen website: www.klimaseniorinnen.ch/dokumente/.
20 See the online version of this article at: www.lag.org.uk/?id=214252 for a link.
21 Some of these are available at: http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/.
22 See the online version of this article at: www.lag.org.uk/?id=214252 for a link.
23 See the online version of this article at www.lag.org.uk/?id=214252 for a link. See also the draft speech per note 19 above.
24 See *Climate change 2021,* ibid, para B.1 and *Urgenda* at paras 4.4 and 5.7.8, referring to the judgment of the US Supreme Court in the case of *Massachusetts v Environmental Protection Agency* 549 US 497 (2007) at pages 22–23, which made precisely this point. See also *Neubauer and others v Germany,* Federal Constitutional Court, 24 March 2021 at paras 32, 119 and 122.
25 https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf.
26 See separate opinion of Judge Simma in *Oil Platforms (Islamic Republic of Iran v United States of America)* (2003) ICJ Rep 161 at paras 66–71.
27 See, for example, César Rodríguez-Garavito, ed, *Litigating the climate emergency: how human rights, courts, and legal mobilization can bolster climate action,* Cambridge University Press, November 2022.

Marc Willers KC, Paul Clark and Tim Baldwin are barristers at Garden Court Chambers.

# **Prison law:** recent developments

**Hamish Arnott, Simon Creighton and Jane Ryan highlight recent policy and legislative developments, and cases on parole.**


**Hamish Arnott**


**Simon Creighton**


**Jane Ryan**

## Policy and legislation

### Parole

### Parole Board (Amendment) Rules 2023

The Parole Board (Amendment) Rules 2023 SI No 397, amending the Parole Board Rules 2019 SI No 1038 (PBR), came into force on 3 April 2023 in response to the *Bailey* judgment (see below). The rules now state (by amendment to Schedule Part A para 1):

*Reports relating to the prisoner should present all relevant information and a factual assessment pertaining to risk, as set out in the paragraphs of Part B of this Schedule. Report writers may include in the report their professional opinion on whether the prisoner is safe to be managed in the community, or moved to open prison conditions, provided that they feel able to give such an opinion. Any such opinion should be made by reference to their particular area of competence, as well as to their specific interactions with the prisoner.*

This has accordingly remedied the principal unlawfulness identified in *Bailey*, namely that professional witnesses giving evidence to the board should not be prevented from providing an opinion as to whether a prisoner might meet the test for release or move to open conditions, where they feel able to.

The rules still allow the justice secretary to 'present an overarching view on the prisoner's suitability for release in accordance with the statutory release test' (in the new Schedule Part A para 2).

### Updated *Parole Board decision-making framework*

The *Parole Board decision-making framework* (version 1.2, October 2022) is guidance that was initially circulated to board members in April 2019. It was amended in July 2021 and October 2022. The purpose is to provide a structured approach in parole decision-making.

The decision-making framework applies at all stages where decisions on release and/or progression to open conditions are made, for example, member case assessment, oral hearing, decisions on the papers under PBR rr21 or 23 and decisions on the papers following an oral hearing adjournment.

It includes guidance on assessing risk (chapter 2), using the framework (chapter 3) and key themes (section 4.4), the latter being analysis of offending behaviour (4.4.1), analysis of the evidence of change (4.4.2) and analysis of the manageability of risk (4.4.3). Questions considered under assessing risk include:

- *What further offence(s) might the prisoner commit?*
- *Will they cause serious harm?*
- *Who might the victim(s) be?*
- *What features might contribute to serious harm (the risk factors)?*
- *What might protect against serious harm (the protective factors)?*
- *How and when could the above factors combine, either to increase or decrease risk (scenario planning)?*
- *How probable is a high-risk scenario (likelihood)?*
- *How soon could a further serious offence take place (imminence)?*
- *What measures can be put in place to reduce the likelihood and/or degree of harm occurring (risk management plan)?* (page 6).

The framework states that it is not designed to be rigid and that '[m]embers are free to consider the relevance and weight of any issue when making a decision. All issues which have influenced the decision should be recorded' (page 5).

Section 3.2 provides specific guidance on using the framework for an oral hearing decision. It states that '[u]sing the Framework for Analysis as a guide, work though the "Past, Present and Future" themes discussing the elements of relevance, gaps in understanding and important question topics' and that members should '[c]onsider the test. Come to a decision based on the evidence you have analysed. Ensure you have considered counter evidence and all options' (page 8).

This framework is essential reading for practitioners undertaking parole hearings.

### Prison discipline

### Prison and Young Offender Institution (Adjudication) (Amendment) Rules 2023

The expressed intention of the amendments under the Prison and Young Offender Institution (Adjudication) (Amendment) Rules 2023 SI No 321 to the Prison Rules 1999 SI No 728 (Prison Rules) and the Young Offender Institution