ATTORNEY GENERAL FOR CIVIL AFFAIRS

To the European Court
of Human Rights

OSLO, 16.08.2024

Supplementary observations by the Kingdom of Norway

represented by Henriette Busch advocate at the Office of the Attorney General for Civil Affairs, as agent, and by Gøran Østerman Thengs, advocate at the same office, in

application no. 34068/21, GREENPEACE NORDIC and others v. Norway

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1 INTRODUCTION

(1) Reference is made to the Court's letter 19 June 2024, inviting the parties to, if they so wish, submit supplementary observations on the admissibility and merits of the application in the light of developments in the Court's case-law in the context of climate change. By its letter of 5 July 2024, the Court granted an extension of the time-limit to 16 August 2024.

(2) The Court delivered three Grand Chamber decisions on 9 April 2024, namely the judgment in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, and the two admissibility decisions *Carême v. France* [GC], no. 7189/21; and *Duarte Agostinho and Others v. Portugal and 32 Others*, [GC], no. 39371/20.

(3) In *KlimaSeniorinnen*, the Court noted that "climate change is one of the most pressing issues of our times" (§ 410), and 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" (§ 436). The Government of Norway shares the Court's concern and remains deeply

committed to the efforts in reducing emissions and finding solutions to the global problem of climate change.

(4) However, and with due regard to the positive obligations conferred upon the States following the judgment in *KlimaSeniorinnen*, the Government overall maintains its views held in the written observations of 26 April and additional observations 15 September 2022, i.e. that the complaint in the present case is wholly; or in the alternative; partly, inadmissible, and in any event that there has been no violation should the complaint be considered admissible and any of the invoked Articles deemed to be applicable in the present case.

(5) The recent developments in the Court's case-law however calls for some brief supplementary observations. These are provided in Section 2 (admissibility) and 3 (merits) below.

2 SUPPLEMENTARY OBSERVATIONS ON ADMISSIBILITY

2.1 Brief reiteration of the scope of the case before the Court

(6) The case before the Court is limited according to the subject matter of the case before the domestic courts, which was to challenge the validity of a public administrative decision in 2016 granting licenses for petroleum exploration, cf. Article 35 § 1 of the Convention. Accordingly, the subject matter of the present case, differs from the subject matter in *KlimaSeniorinnen*.

(7) As underlined in the Government's written observations 26 April 2022, *inter alia* § 14 point iii) and §§ 97-99, cf. the Government's additional observations 15 September 2022 § 9, a general complaint before the Court (as first instance) against Norway's energy and climate policy is inadmissible as it falls wholly outside the scope of the case before the Court, cf. also *Duarte Agostinho* § 228.

2.2 On the legal standing of the applicant organisations in the present case

(8) Following *KlimaSeniorinnen* §§ 489-503, the legal standing of organisations before the Court in the climate-change context shall as of now be determined case-by-case based on a set of factors, see § 502.

(9) Based on these factors, the Government respectfully submits that it appears unclear whether the applicant organisations may be considered as having legal standing in the present case. The Government observes in particular that the applicant organisations do not appear to be acting on behalf of "affected individuals" who are subject to "specific threats or adverse effects of climate change" any more than the general population, cf. *KlimaSeniorinnen* § 502 c). Rather, the complaint constitutes an *actio popularis* on behalf of the population as a whole, which is not provided for by the Convention, cf. *KlimaSeniorinnen* §§ 500-501, cf. § 460, see also the Government's observations 26 April 2022 section 4.2.

(10) In contrast, the Government recalls that the organisation *KlimaSeniorinnen,* which was considered to have locus standi in those proceedings, was established "to promote and implement effective climate protection on behalf of its members", counting "more than 2,000 female members who live in Switzerland and whose average age is 73", cf. § 521. Furthermore, also distinguishing that case from the circumstances of the present case, the organisation was acting *inter alia* to "ensure that its members were able to exercise their rights regarding the effects of climate change on them", notably in a situation where "the individual applicants did not have access to a court" in the respondent state, cf. § 523. In those circumstances, viewed overall, the grant of standing to the applicant association before the Court was deemed to be in the interests of proper administration of justice.

2.3 The individual applicants do not satisfy the victim requirement

(11) Reference is made to the Government's written observations 26 April 2022 section 4.3. Taking into account the criteria formulated in *KlimaSeniorinnen* §§ 487-488 and applied in §§ 527-535, cf. also *Carême* § 80, the Government respectfully maintains its view that the six individual applicants do not have victim status under Article 34 of the Convention and that their complaints should therefore be declared inadmissible as being incompatible *rationae personae*, cf. Article 35 § 3.

(12) In any case, as the Court also noted in *Duarte Agostinho* § 230, the question of victim status is closely linked to the requirement to exhaust domestic remedies, particularly in the case of general measures such as those related to climate change. Similarly, in the present case, there is also a lack of clarity as regards the applicants' individual situations due to their failure to exhaust domestic remedies (see below), cf. also the written observations 26 April 2022 section 4.3 and 15 September 2022 section 2.3.2.

2.4 The individual applicants have not exhausted domestic remedies

(13) Reference is made to the Government's written observations 26 April 2022 section 5 and 15 September 2022 section 2.3.2. The Government observes that the Court in *Duarte Agostinho* § 215 confirms its case-law on the admissibility requirement to exhaust domestic remedies. In the light of this, the Government maintains its view that the application from the six individual applicants in the present case is inadmissible on account of not having lodged any complaints before domestic courts, while the case reveals no special circumstances that would absolve the applicants of this requirement, cf. Article 35 § 1 of the Convention.

3 SUPPLEMENTARY OBSERVATIONS ON THE MERITS

3.1 Preliminary remarks

(14) The issue of applicability may be examined separately as an admissibility issue or in the context of the examination of the complaint on the merits, cf. *KlimaSeniorinnen* § 506. Due to the degree of overlap between these assessments in the present case, the Government's

observations on the applicability of Article 2 and 8 respectively will be provided in the following in the context of the examination of the complaint on the merits.

3.2 On the applicability of Art. 2 and 8 in the present case

3.2.1 Article 2 of the Convention is not applicable in the present case

(15) Examining the issue of the applicability of Article 2 separately as an admissibility issue, the Court clarified the conditions in order for Article 2 to be considered admissible in the context of climate change, see *KlimaSeniorinnen* §§ 506-513, with reference to §§ 487 and 488 regarding the victim status of individuals in the climate-change context.

(16) In the light of the conditions set out in § 513, and with reference to the circumstances of the present case as observed in the written observations 26 April 2022 section 4.3, cf. section 2.3 above, the Government respectfully maintains its view that Article 2 of the Convention is not applicable in the present case.

3.2.2 Article 8 of the Convention is not applicable in the present case

(17) In *KlimaSeniorinnen*, the Court clarified that Article 8 must now 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", cf. § 519. The Government has duly noted this clarification.

(18) However, in this context, the question of 'actual interference' or the existence of a relevant and sufficiently serious risk entailing the applicability of Article 8, "essentially depends on the assessment of similar criteria" to those determining the victim status of individuals (§§ 487-488) and standing of organisations (§ 502), cf. § 520. In each case, these are matters that remain to be examined on the facts of a particular case and on the basis of the available evidence.

(19) In the light of the above, the Government first respectfully submits that Article 8 is not applicable in the present case regarding the complaint from the individual applicants, cf. the Government's observations in section 2.3 above.

(20) Furthermore, the Government respectfully submits that based on an examination on the facts of this particular case, Article 8 is neither applicable as regards the complaint by the applicant organisations.

(21) At the outset, the applicant organisations do not appear to represent individuals particularly affected by specific threats or adverse effects on account of climate change, cf. section 2.2 above.

(22) Furthermore, the Government observes that the complaint by the organisation *KlimaSeniorinnen* was considered as falling within the scope of Article 8 on account of, *inter alia*, alleging that the Swiss government in its general climate policy had failed to fulfil its positive obligations to take adequate measures to protect the organisation's elderly

members claiming to be particularly affected and who did not themselves have access to court, cf. § 525 of the judgment.

(23) Conversely, the applicants in the present case invoke Article 8 in an *actio popularis* claim that one decision to award licenses for petroleum exploration in 2016 – all of which were later relinquished – could have later resulted in a detrimental effect on society if profitable discoveries had been made, then later developed for production, and then presupposing a *net increase* in global GHG emissions through end user consumption in any given country of refined oil products and natural gas. The claim thus presupposes that potential climate effects of emissions arising from end user consumption in other jurisdictions – in the event that petroleum is discovered and then later extracted, refined and sold to customers elsewhere – is able to trigger the applicability of Article 8 as regards the state in which production occurs. More broadly, the claim is that the activity of petroleum activities as such falls within the ambit of and constitutes a breach of Article 8 of the Convention.

(24) In the Government's view, this presupposition is not supported by the tailored approach taken by the Court in developing its case law in the context of climate change under Article 8, cf. *KlimaSeniorinnen* § 422, cf. §§ 541-554. There is nothing to indicate that a state's awarding of licenses for petroleum activities within its jurisdiction, or other economic activities that may later give rise to emissions in other jurisdictions, in itself is a relevant matter capable of triggering the applicability of Article 8 in the climate-change context.

(25) This is so because each individual State is called upon to "define its own adequate pathway for reaching carbon neutrality" (§ 547) through adopting and effectively applying measures for the substantial and progressive reduction of national GHG emission levels (§ 548, cf. § 545). This tailored approach is intended to be "in line with the international commitments undertaken by member states", cf. *KlimaSeniorinnen* § 546, and must in the Government's view also be determinative in demarcating the applicability of Article 8 in the climate-change context. Notably, there is no basis in the climate change framework for one state to bear responsibility for emissions arising as a result of end user consumption on the territory of another state, nor is there any regulation of production, supply, international trade or overseas economic activity in the international framework.

(26) In this regard, the Court's rejection of any notion of extraterritorial jurisdiction in *Duarte Agostinho* is also of relevance to the question of applicability in the present case. In § 207, the Court emphasised that the "major sources of GHG emissions are in fields such as industry, energy, transport, housing, construction and agriculture and arise in the context of basic human activities within a given territory", ie. related to energy demand and imports. Combatting climate change through the reduction of GHG emissions at source is therefore "chiefly a matter of exercise of territorial jurisdiction". Accordingly, the Court rejected the notion of any extraterritorial jurisdiction as regards the consequences of GHG emissions occurring in another country's jurisdiction, as such a notion would be without any identifiable limits.

(27) In the light of the above, the Government respectfully maintains its view that Article 8 of the Convention is inapplicable in the present case as regards the complaint by the applicant organisations, cf. also the written observations 26 April 2022 § 136.

3.3 No grounds for any substantive violation of Article 8 if applicable

(28) Presupposing that Article 8 is considered applicable in the present case, ctr. the Government's observations in section 3.2.2 above, the Government holds that there are no signs of any substantive violation.

(29) The scope of the present case concerns the validity of an administrative decision in 2016 to award production licenses for petroleum activities. The impugned decision, as well as the preceding opening decision, did in itself not involve any significant environmental risks, and any actual production would be subject to further impact assessment and approval by the authorities. None of the licences resulted in commercial discoveries and all the awarded production licenses in respect of the decision were subsequently relinquished.

(30) Although with due regard to the positive obligations conferred upon the States following the judgment in *KlimaSeniorinnen*, there is nevertheless nothing in the Court's case-law to indicate a violation of Article 8 if a State undertakes economic activities within its own jurisdiction that may later give rise to a potential net increase in global GHGs as a result of end user consumption spurred by demand and activities in other jurisdictions, if at all capable of triggering the applicability of Article 8, cf. also section 3.2.2 above.

(31) In essence, therefore, the Government respectfully maintains that the Court's review of the impugned decision must be based on a wide margin of appreciation, taking into account that the present case concerns one administrative decision. Basing a potential review on a wide margin of appreciation would in the Government's view be in accordance with the Court's tailored approach in *KlimaSeniorinnen*. The Government observes that when assessing whether a State has remained within its margin of appreciation in exercising its positive obligation to reduce GHG emissions for which that State is accountable, the Court will examine whether the competent domestic authorities, be it at the legislative, executive or judicial level, have had due regard to a set of factors as spelled out in § 550 litra a) – e), based on an assessment of an overall nature (§ 551). While the margin of appreciation to be afforded to States is *"reduced"* as regards *"the setting of the requisite aims and objectives"* in relation to climate change mitigation through reducing national GHG emissions, the margin notably *"remains wide"* in respect of the *"choice of means to pursue those aims and objectives"*, cf. *KlimaSeniorinnen* § 549.

(32) In the light of the above, the Government respectfully maintains that, owing to the States' wide margin of appreciation in respect of the choice of means to pursue their climate aims and objectives, and in this regard in ensuring a fair balancing of individual versus societal interests, the question of whether or not to award licenses for petroleum activities is a matter that falls well within a State's wide margin of appreciation. This is a predominantly political and democratic exercise in the face of energy and climate policy – and in recent years in the face of a European energy crisis.

(33) Political considerations in this area depend, in part, on how one assesses if and to what degree a phase out of Norwegian petroleum production and export will actually lead to *net emission reductions* globally and thus if and to what degree it would have a real prospect of mitigating the risk imposed by climate change, cf. the disputed Supreme Court judgment § 234, cf. *KlimaSeniorinnen* § 444. It also depends on how, in the light of this prospect, one views the negative societal effects on a global level of curbing the access to oil, and in particular natural gas, until a sufficiently stable renewable energy supply is available.

(34) In this regard, the Government also reiterates that the disputed decision in the present case is from 2016. The expectation in Meld. St. 36 (2012-2013) on the opening of the Barents Sea Southeast, was first of all to find large reservoirs of natural gas, which was expected to be subject to increased demand by EU states over the coming decades. Subsequent events have overall confirmed this analysis. One of the other arguments in 2012-2013 for opening the Barents Sea Southeast was that it would facilitate preserving national interests in the border area towards Russia.[1]

(35) Following Russia's full-scale invasion of Ukraine in 2022, leading to an energy crisis in Europe, Norway has played a vital part in continuing its long-standing role as a stable democratic supplier of energy – and in particular natural gas – to the EU and UK, see also the Government's written observations 26 April 2022 section 2.2 and 15 September 2022 section 2.1.3.

(36) Norway maintains that this role is in full conformity with Norway's ambitious domestic efforts to become a low-emissions society and contribute to global efforts to combat climate change.

(37) Norway fully supports the EU's efforts to accelerate the renewable energy transition as part of the transition away from dependence on Russian gas, and also fully supports the agreement at the COP28 in December 2023 where Parties, agreed to *inter alia* contribute to the global efforts to transitioning away from fossil fuels in energy systems and to ambitious efforts on accelerating renewables and energy efficiency. This requires a substantial reduction in demand for fossil fuels through an unprecedently fast restructuring of a large and very complex global energy system. Nonetheless, specific policy considerations in relation to energy and climate, such as the impugned decision from 2016 in the present case, fall well within the wide margin of appreciation afforded to States in their choice of means and in defining their own pathways when pursuing the aims and objectives for combatting climate change pursuant to the positive obligations under Article 8 and in line with the international climate framework.

[1] Meld. St. 36 (2012-2013) p. 6.

3.4 No grounds for any procedural violation of Article 8 if applicable

(38) With reference to the written observations 26 April 2022 section 7.2.3, the Government maintains that there are no signs of a violation of any procedural aspects of Article 8, if applicable to the present case.

(39) Firstly, there is no basis for the applicants' claim of a procedural defect on account of an alleged inadequate impact assessment conducted at the opening of the southeast Barents Sea, nor is there any indication of any other procedural defect in the decision-making process related to the impugned decision.

(40) The Government is of the view that the decision-making process was in full compliance with domestic law implementing requirements from EU law. The domestic legislation applicable is intended to implement the Council Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. Under the terms of Article 19 and Article 32 § 1 of the Convention, the Court is not competent to apply or examine alleged violations of EU rules unless and in so far they may have infringed rights and freedoms protected by the Convention, cf. the Court's decision of 27 June 2024 in *Büttner and Krebs v. Germany,no. 27547/18,* § 59 with further references to established case-law.

(41) It is thus primarily for the national authorities to interpret the applicable domestic law provisions, if necessary, in conformity with EU law. In the present case, the Supreme Court did not find any breach of said procedural provisions on account of the impact assessment conducted concerning the preceding opening decision or other parts of the decision-making process related to the impugned decision, see the judgment §§ 185-241.

(42) Turning to the procedural requirements established under Article 8 for governmental decision-making processes concerning complex issues of environmental and economic policy, the Government recalls that these serve to ensure that due weight is afforded to rights affected and thus to allow the authorities to properly balance the competing individual rights and the interests of the community as a whole, see *Büttner and Krebs* § 73. Consequently, procedural requirements established under Article 8 are «not an end in themselves», but rather seek to ensure, ultimately, that the authorities properly balance the competing interests at stake and act within their margin of appreciation, cf. *Büttner and Krebs* § 73, with reference to, more generally, *KlimaSeniorinnen* § 539.

(43) As is thoroughly described by the Norwegian Supreme Court in §§ 65-70 and 185-241, the Norwegian regulatory system enables the domestic authorities to properly conduct this balancing exercise, and as shown in the Supreme Court's specific assessment, the decision-making process in the present case did properly balance the competing interests within the margin of appreciation.

(44) Secondly, and in any case, should the Court find a defect in the implementation of procedural requirements established under Article 8 in the present case, there is nevertheless no basis for finding a violation if the domestic courts demonstrate that the authorities took into account and balanced the rights at stake and ruled out, in accordance with the law and without there being any indications of arbitrariness, that the procedural

defect has influenced the outcome of the balancing exercise to the detriment of the applicant, and if there is no other indication that the authorities overstepped their margin of appreciation, see *Büttner and Krebs* § 73 with further references to CJEU case-law on similar principles of EU law in § 52.

(45) In the present case, the thorough assessment undertaken by the Norwegian Supreme Court demonstrates that there, firstly, were no signs of any procedural defects in the decision-making process leading up to the impugned decision, see §§ 208-241, and; in the alternative, as shown through this assessment, that it is in any case possible to rule out beyond any doubt that an alleged procedural defect in the form of a partly inadequate impact assessment could have influenced the outcome of the decision-making process, cf. § 243 of the Supreme Court's judgment.

(46) In the light of the above, the Government respectfully submits that the complaint of an infringement of the applicants' rights based on an alleged procedural defect under Article 8, is manifestly ill-founded and must be rejected pursuant to Article 35.

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