High Thresholds and Wide Margins

Fliegenschnee and Others v. Austria and the Consolidation of the ECtHR's Climate Jurisprudence

Anna Lumerding & Melanie Maurer

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The European Court of Human Rights (ECtHR) issued an inadmissibility declaration in the climate case of *Fliegenschnee and Others v. Austria*. While an unsuccessful outcome was expected, the decision nevertheless clarifies three aspects of the Court's climate jurisprudence, which this blog post examines. Taken together, the case shows that the Court neither demanded more than in previous cases nor reneged on its requirements as laid down in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.

The application was brought by three individuals and an environmental association. The applicants requested that the then Federal Minister for Digital and Economic Affairs issue an ordinance prohibiting the sale of fossil fuels by mineral oil and petroleum distributors as of specified future dates (para. 2-4). The Federal Minister rejected the request. Both the competent Regional Administrative Court and the Austrian Constitutional Court upheld the rejection, finding that the Federal Minister lacked the authority to issue such a ban under the Austrian Constitution (para. 5-7).

In principle, the ECtHR upheld the Austrian Constitutional Court's decision and confirmed that the Convention does not grant a right to any particular climate mitigation measure (para. 33). And while it is not surprising for the ECtHR to reject the victim status of the individual applicants, it is questionable why the association was denied standing as well (para. 31-32). For the first time, the Court was also faced with a complaint over an applicant's property rights under Article 1 of Protocol No. 1 to the Convention in relation to climate change (para. 36).

No right to a specific mitigation measure

In *Fliegenschnee,* the ECtHR continues to develop its case law on positive obligations under Article 8 in the context of the climate crisis. The Court clarified that Article 8 does not "guarantee a right to a specific mitigation measure by a specific State body under a certain sectoral law of an applicant's choice" (para. 33). It reiterated that States enjoy a wide margin of appreciation in their choice of measures to achieve their climate goals. This is not new: In *KlimaSeniorinnen*, the Court held that mitigation measures are necessarily part of a wider regulatory framework spanning various sectors (*KlimaSeniorinnen*, para. 418). Similarly, in *Greenpeace Nordic and Others v. Norway*, the Court confirmed that this margin includes "operational choices and the adoption of policies [...] in light of the State's priorities and resources" (*Greenpeace Nordic*, para. 315).

It is therefore not surprising that the Court accorded a wide margin of appreciation – especially as the requested measure lay outside the competence of the particular authority engaged.

The Court's engagement with evidence

The Court repeatedly emphasised that there was insufficient evidence to establish victim status or a substantial threat to the applicants' Convention rights. This is significant in two respects: first, the Court found that none of the applicants – neither the individuals nor the association – had provided sufficient evidence to substantiate their victim status (para. 31-32). This is not particularly surprising with regard to the individual applicants. In *KlimaSeniorinnen*, the Court established that (1) an individual applicant must show that they are subject to a high intensity of exposure to the

adverse effects of climate change, that is, the level and severity of (the risk of) adverse consequences of governmental action or inaction affecting the applicant must be significant, and (2) the absence or inadequacy of any reasonable measures to reduce harm owes to a pressing need to ensure the applicant's individual protection (*KlimaSeniorinnen*, para. 487).

The exceptionally high threshold for individual victim status set out in *KlimaSeniorinnen* was likely to hinder the individual applicants' access to the Court, especially after the Court clarified in *Greenpeace Nordic* that individual applicants must submit medical evidence showing both a diagnosis and the severity of the alleged condition affecting each applicant individually (*Greenpeace Nordic*, para. 304). In *Fliegenschnee*, the Court concluded that none of the applicants had provided "any evidence to substantiate the alleged vulnerabilities that would render them particularly at risk" (para. 31).

The more interesting – and perhaps more concerning – aspect of the Court's decision is its treatment of the association's *locus standi*. The association is a recognised environmental association under Austrian law and has standing in domestic environmental proceedings under the Austrian Environmental Impact Assessment Act. The Court accepted that this satisfied the first part of its criteria for associations' *locus standi*, namely that the association is lawfully established within the jurisdiction, has standing there, and pursues a dedicated purpose – based on its statutes – related to environmental protection (para. 32). However, it questioned whether the association could be said to have a dedicated purpose of defending human rights in the environmental context and whether it could be regarded as a representative of its members or other affected individuals, as no statutes or other membership information were submitted to the Court (ibid.). The Court avoided giving a definitive answer on what exactly an association must prove to obtain standing before it, stating that the complaints were inadmissible for other reasons and that it was therefore unnecessary to determine the association's standing (ibid.). Yet, in *Greenpeace Nordic* the Court had no problem accepting the standing of one of the associations despite it not being a membership organisation (*Greenpeace Nordic*, para. 309). It remains unclear why the Court was so restrictive with the association in *Fliegenschnee* but willing to accept the standing of the association in *Greenpeace Nordic*. Additionally, the applicants in *Fliegenschnee* lodged their complaint before *KlimaSeniorinnen* was decided, meaning they did not know at the time of application which documents were considered necessary evidence.

Protection of property under Article 1 of Protocol No. 1 to the ECHR

Fliegenschnee is the first climate decision in which the Court had to address the protection of property under Article 1 of Protocol No. 1 to the Convention. One of the applicants complained that her economic livelihood as a farmer – and thus her property rights – had been endangered because of climate-induced droughts (para. 36).

However, the Court was unwilling to examine the implications for rights beyond those already applied to climate change in *KlimaSeniorinnen*. It confined itself to merely observing that previous case law does not indicate that Article 1 of Protocol No. 1 applies to climate cases (para. 37). It is understandable that the Court did not engage in a detailed substantive analysis when declaring an application inadmissible. Nevertheless, particularly in light of the Inter-American Court of Human Rights' (IACtHR) Advisory Opinion, which recognizes that the climate crisis heavily impacts the use and enjoyment of individuals' property, that climate-related disasters may violate property rights, and that States are obliged to protect these rights (Advisory Opinion AO-32/25, para. 406 et seq.), climate litigants may have wished for a clearer position by the ECtHR on whether Article 1 of Protocol No. 1 is applicable to climate-related damage. Still, by leaving the door to the applicability of the right to property slightly ajar, the Court may, in future climate-related cases, further develop its case law, just as it did in *KlimaSeniorinnen*, in order to respond to the specific features of the climate crisis.

A look at the Court's general jurisprudence on property rights in relation to the environment can

shed some light on how the Court could develop its case law with respect to climate change. The Court has previously examined interferences with property rights caused by natural disasters, such as landslides, and has held that States generally bear protective obligations. Although these positive obligations are narrower for natural hazards beyond human control than for dangerous activities of a man-made nature (*Budayeva and Others v. Russia*, 2008, para. 174), this distinction does not apply to climate-related disasters, which are inherently shaped by human action. Still, a distinction must be drawn between the positive obligations under Articles 2 and 8 ECHR and those under Article 1 of Protocol No. 1 to the Convention. States enjoy a wider margin of appreciation in deciding on the measures to protect property rights than on those needed to protect lives (*Budayeva*, para. 175). This would likewise apply to cases in the particular context of the climate crisis.

The Court further stated that – even if Article 1 of Protocol No. 1 were applicable – the applicant would not fulfil the criteria for victim status under Article 34 of the Convention. Referring to *KlimaSeniorinnen*, the Court reiterated that the threshold for individual victim status is especially high in climate cases (para. 37). Accordingly, it may be presumed that in future climate litigation alleging violations of property rights, the ECtHR would rely on the criteria for victim status of individuals developed in *KlimaSeniorinnen*. These restrictive criteria, however, cannot be applied in cases where the applicant does not just claim the risk of an infringement of their property rights but is already affected by the alleged violation.

If the Court indeed chooses to restrict the victim status of individuals under Article 1 of Protocol No. 1, this must be accompanied by the possibility for collective legal protection. Thus, the reference to *KlimaSeniorinnen* would furthermore indicate that associations have legal standing regarding climate cases alleging a violation of the protection of property.

Outlook

Fliegenschnee neither broadened nor narrowed down the Court's overall assessment of climate protection cases. The three points we covered in this blog post do not change the overall climate jurisprudence of the Court. While some points should be evaluated further in future cases, several other points were neither evaluated nor in question in *Fliegenschnee*. Most importantly, *Müllner v. Austria* will likely shed light on how high the threshold for victim status of individuals will play out in practice, potentially being the first case to succeed on that front. There are two more climate cases pending before the ECtHR to look out for: *Ecodefense & Other NGOs v. Russia,* which in the context of Indigenous rights also relates to the protection of property, and *The Norwegian Grandparents' Climate Campaign and Others v. Norway,* challenging the granting of petroleum licenses. The Russian case may allow the Court to expand its jurisprudence to property rights. The Norwegian case will be interesting as the applicants challenge a specific measure, and if the Court upholds *Fliegenschnee,* it might prove difficult for this case to succeed.

ABOUT THE AUTHORS

Anna Lumerding
Anna Lumerding is a research assistant and PhD candidate at the Institute of Public and Administrative Law at the University of Vienna.
Melanie Maurer
Melanie Maurer is a Post-Doctoral Researcher at the Institute of Public and Administrative Law at the University of Vienna.

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