

HUMAN RIGHTS AND PROTECTING THE ENVIRONMENT A RECENT DEVELOPMENT

There is no provision in the European Convention on Human Rights (ECHR) that expressly provides for protection of environmental rights. Despite this, the European Court of Human Rights (ECtHR) has, over the years, implied environmental rights into Article 8(1):

'8 (1) Everyone has the right to respect for his private and family life, his home and his correspondence.'

In the case of *Lopez Ostra v Spain (1995)* the authority concerned had failed to deal adequately with a waste treatment plant built only 12 metres from the applicant's home and which was responsible for fumes, bad smells and contamination causing health problems. The court held, in this case and a number of similar others, that such environmental damage was a breach of Article 8, as it had such a direct negative impact on an individual's private and family life and on his home.

As Davis states:

"Though there is no explicit right to a clean environment in the Convention, Article 8 is engaged if pollution has a direct effect on a person's private and family life, or on his or her home." (*Human Rights Law* H Davis. 5th Edition [2021] p.327)

April 2024, however, saw a landmark decision by the ECtHR on this issue, which has attracted huge publicity. In **KlimaSeniorinnen v Switzerland**, initiated by an association of 2,500 elderly women, the ECtHR declared that the Swiss government had failed to protect the applicants' right to respect for private and family life under Article 8, by failing to adopt the necessary legislative and administrative framework to prevent a global temperature increase of more than 1.5°C above pre-industrial levels:

"The Court found that Article 8 of the Convention encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life. The Court found that Switzerland had failed to comply with its positive obligations under the Convention concerning climate change, with critical gaps in establishing a relevant domestic regulatory framework, including through a carbon budget or national GHG [Green House Gas] emissions limitations. Switzerland had also failed to meet its past GHG emission reduction targets." ('Human rights violated by Swiss in action on climate' Ajit Niranjana The Guardian 9.4.2024)

This decision by the ECtHR has major implications, not just for Switzerland. As well as stating that the Swiss state had breached Article 8, the court further decreed that climate protection is a human right, meaning that, as well as the Swiss government being obliged to protect citizens from the effects of global heating, the decision is also binding on all 46 countries that have signed the European Convention on Human Rights, which currently includes the United Kingdom.

As such, the decision has been described as “...a move which immediately established a potent precedent that people living in the nearly 50 nations under the jurisdiction of the court could potentially use to sue their own governments.” (*How a group of elderly Swiss women could take the UK out of the European Court* Andrew MacDonald Politico 11.4.2024)

THE 'LIVING INSTRUMENT' DOCTRINE

This case is an example of the 'living instrument' doctrine that the ECHR has developed in order to interpret the Convention in a way that it aims to ensure that the document remains up-to-date:

“The ECtHR treats the ECHR as a 'living instrument' and not as something whose meaning was set for all time by the drafters in 1950. The aim is to ensure that the application of the Convention can evolve as European society, culture and values change and that human rights can be effective, appropriate to present day conditions, and in step with developments found in international law generally.” (Davis *ibid* p.132)

However, the living instrument doctrine has been much criticised, particularly by those who are not supportive of the ECHR in general and call for the UK to withdraw from the Convention, replacing it with a British Bill of Rights. It is argued that, in developing this doctrine, the Court is guilty of 'mission creep'. Lord Sumption, the former Supreme Court judge, for example, argued in his 2019 *Reith Lectures* that:

“...[The] Strasbourg court...[has] changed the ECHR into a 'dynamic treaty', that ensures the treaty reflects the Court's 'own view of what additional rights a modern democracy ought to have'. This mission creep means that the rights which the court is now protecting are simply, in Sumption's view, 'not in the treaty.'”

<https://www.thejusticegap.com/jonathan-sumptions-reith-lectures-mission-creep-at-strasbourg/>