Judgement of the Supreme Administrative Court of the Czech Republic of 20 February 2023, No. 9 As 116/2022-166

Klimatická žaloba ČR

Summary

**** This is an unofficial summary of the Court decision. For the original version of the judgement in Czech language, see https://vyhledavac.nssoud.cz/DokumentOriginal/Index/708466***

1. THE PROCEEDINGS BEFORE THE FIRST LEVEL COURT

In April 2021, a group of plaintiffs filed a lawsuit before the Municipal Court in Prague against the national government and four subordinate ministries (Ministry of Environment, Ministry of Industry and Trade, Ministry of Agriculture and Ministry of Transport) for their inaction on climate change.

The plaintiffs included multiple entities including environmental NGO (Klimatická žaloba ČR), the ornithological society, a municipality, and individuals affected by climate change, such as farmers, foresters and urban residents.

The administrative action was brought as an action for 'unlawful interference' under the Administrative Procedure Code (Act No. 150/2002 Coll.). The action was based on the harm caused to the applicants' human rights, namely the constitutional right to a favourable environment, the right to local self-government, the right to property, the right to exercise economic activity, the right to health and the right to private and family life. As Czech law does not provide for a class action, this was several individual lawsuits filed at the same time, with joint representation.

According to the applicants, the unlawful interference consisted in the inaction of the executive in the field of climate protection, more precisely in the failure to adopt mitigation and adaptation measures in accordance with the obligations arising from the Paris Agreement. The failure to act related to the defendants' failure to set adequate climate protection objectives in the relevant strategic documents, to prepare the relevant legislation, or, in the case of the Government, to coordinate and control the activities of ministries and other central government bodies. The plaintiffs requested that the court order the defendants to take necessary and proportionate measures to reduce greenhouse gas emissions and adapt to climate change within six months.

On June 15, 2022, the Court granted the plaintiffs' claims regarding climate mitigation and ordered the defendants to take specific mitigation measures to achieve a 55% reduction in GHG emissions by 2030 compared to 1990 level (judgement No. 14 A 101/2021-248). The Court analysed the European Union’s

NDC, which states that the EU and its Member States, acting collectively, commit to reducing GHG emissions by at least 55% by 2030 compared to 1990 levels. This obligation is, according to the Court, sufficiently specific to be directly applicable and scrutinized under judicial review. In the view of the court, the EU NDC must be interpreted as an individual, not just an EU-wide obligation.

On the other hand, the Court declared the action against the government to be inadmissible, as the government does not have the status of an administrative authority under the Code of Administrative Justice because, in exercising its management function (coordinating the ministries in dealing with the climate crisis), it does not act in the field of public administration and cannot be subject to judicial review under the Code of Administrative Justice. The Court also rejected the claim related to the adaptation measures as these consist of increasing adaptive capacity, and not achieving specific targets by a certain date. In this regard, according to the Court, the defendants were making sufficient progress.

2. THE JUDGEMENT OF THE SUPREME ADMINISTRATIVE COURT

The ministries and two plaintiffs lodged a cassation complaint to the Supreme Administrative Court of the Czech Republic (SAC). Following the arguments in the cassation complaints, the SAC restricted the scope of review of the first instance judgement mainly to the question of existence of a positive obligation of the Czech Republic to take specific mitigation measures to achieve a 55% reduction in GHG emissions by 2030 compared to 1990 level. At this stage of judicial review, the SAC was unable to comment on the general question of whether or not the defendants' measures in response to climate change were sufficient.

On February 20, 2023, the SAC overturned and partially annulled the judgment of the Prague Municipal Court and referred the case back to the first instance court. According to the SAC, the collective commitment to reduce greenhouse gas emissions by 55% by 2030 compared to 1990 levels, which the EU adopted in 2020 pursuant to Article 4(16) of the Paris Agreement, does not imply an individual commitment by the Czech Republic in the same amount. The specific distribution of the obligations to Member States is currently still subject to legislative and political negotiations. The SAC provided an analysis of the international, EU and domestic law to conclude there is no basis for such precise and far-reaching obligation.

The approach advocated in the judgment of the Municipal Court in Prague would, according to the SAC, result in the collective commitment of the European Union and its members being transformed into individual commitments of the Member States and the European Union set at a uniform level of 55 %. The collective nature of that commitment would thus be negated. Its purpose is that the EU Member States can agree at EU level how to implement this commitment jointly. That is to say, to determine what the legislation will be in some sectors that will oblige all Member States to reduce emissions collectively, and how the commitment to reduce emissions in other sectors will be shared among Member States. Thus, according to the SAC, part of the EU's collective obligation to reduce emissions by 55% is the possibility of a partial distribution of obligations among the individual Member States, even though they remain jointly responsible with the European Union as a whole for compliance.

The SAC refused it is the role of the judiciary to estimate the positive obligation of the state in climate protection that corresponds to the impact of the climate change to the rights of the plaintiffs if there is no precise obligation enacted in legislation: *'It would be contrary to the restraint of the judiciary if the administrative courts were to enter now into the political and legislative processes still underway at EU level with categorical conclusions on what the individualised commitment of the Czech Republic should look like'* (para. 2).

As a consequence, the Czech Republic is subject to significantly less ambitious emission reduction obligations, which reflect the collective commitment adopted by the European Union already in 2015 and which have already been reflected in the now valid and effective secondary EU law. The SAC suggested that in the further proceedings before the first instance court, the plaintiffs should specify in which specific areas the defendants' alleged passivity breached their obligations, which specifically interfere with the individual rights.

As regards the other cassation objections, the SAC agreed it was appropriate to dismiss the climate action against the government. The government acted only in its role as a coordinator of the activities of the various ministries, not as an administrative body directly interfering with the rights of the individual applicants. The SAC also agreed that the climate action was not well-founded in so far as it criticised the insufficiency of the adaptation measures designed to prepare the Czech Republic for the consequences of global warming.

3. NOTABLE PARTS OF THE JUDGEMENT

On the *locus standi* of an environmental NGO in climate matters (paras. 94-95):

> [94] It is necessary to reject at this point the claim of the Ministry of the Environment that the plaintiff a) as an environmental association could not have active standing. In its more recent case-law, the Constitutional Court has expressly overcome its previous position on the active legitimacy of associations to represent interests in the protection of the right to a favourable environment, as expressed in its Resolution of 6 January 1998, No I. ÚS 282/97. The Constitutional Court has clearly expressed the overcoming of the previous case law and the extension of the active legitimation of associations to protect the right to a favourable environment in para. 26 of its ruling of 30 May 2014, No I. ÚS 59/14: *"Natural persons, if they join a civil association (association) whose purpose according to its statutes is the protection of nature and the countryside, may also exercise their right to a favourable environment, enshrined in Article 35 of the Charter, through this association."* The Constitutional Court subsequently took even more favourable approach to this issue in para. 43 of its ruling of 13 October 2015, No. IV ÚS 3572/14. It rejected the civilistic approach according to which the purpose of environmental associations is merely to act on behalf of associated individuals who may be individually affected in their right to a favourable environment, stating: *"The rights of the community may be affected more widely: the defects of a measure of general nature are capable of affecting the legitimate interests of citizens living in the territory concerned in a negative sense, may significantly impede the implementation of the concept of the measure of general nature intended and thus jeopardise its social function. In this case, it is desirable that not only the individuals themselves but also the legal entities into which they associate should have access to judicial protection."* As the SAC stated in its judgment of 4 May 2011, No. 7 As 2/2011-52, associations

also play a specific role in defending the public interests concerned in the protection of nature and landscape in competition with other public interests and private interests.

[95] With this evolution of case-law, the Constitutional Court also reflected the newly adopted international obligations of the Czech Republic in the field of environmental protection, in particular Article 9 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, promulgated under No. 124/2004 Coll., which in Article 2(5) constructs for "non-governmental organisations promoting environmental protection" an irrebuttable presumption of interest in environmental decision-making by public authorities (see, for example, judgments of the Court of Justice of the EU, hereinafter referred to as the "CJEU", of 8 November 2016, C-243/15, *Lesoochranárske zoskupenie VLK*, or of 8 November 2022, C-873/19, *Deutsche Umwelthilfe*, etc.).

On the nature of obligations under international climate law (paras. 105-112):

[105] The Municipal Court based its conclusion that the Czech Republic has a legal obligation to reduce greenhouse gas emissions by 55% by 2030 compared to 1990 on the Paris Agreement of 12 December 2015 (No 64/2017 Coll.), one of the sources of **international climate law**. The framework of international climate law was established by the United Nations Framework Convention on Climate Change (UNFCCC) of 9 May 1992 (No 80/2005 Coll.). Due to its economic situation, the then Czechoslovak Republic (and subsequently the successor Czech Republic) was included in Annex I of the UNFCCC, which lists countries with a general non-quantified obligation to reduce emissions (it was therefore not included in its Annex II, among the most developed countries, which are also obliged to provide assistance to developing countries in their efforts to reduce emissions). The UNFCCC therefore imposes on the Czech Republic both the general obligations applicable to all Parties under Article 4(1) (e.g. to develop, regularly update, publish and make available to the Conference of the Parties national inventories of anthropogenic emissions from sources and reductions through sinks of all greenhouse gases); and the obligations applicable to Parties listed in Annex I under Article 4(1). 4(2), namely, under subparagraph (a) thereof, to adopt a national approach and appropriate mitigation measures to limit their anthropogenic greenhouse gas emissions and to protect and enhance their sinks and reservoirs of greenhouse gases.

[106] However, this is only a general commitment, which does not indicate by how much the Czech Republic should reduce its GHG emissions. This deficiency was to be remedied by the so-called Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, in force for the Czech Republic since 16 February 2005 (No 81/2005 Coll.). Article 3 of the Protocol introduced collective binding targets for the developed countries listed in Annex I, including the Czech Republic, for the reduction of emissions of six types of greenhouse gases (carbon dioxide, methane, nitrous oxide, partially and fully fluorinated hydrocarbons, sulphur hexafluoride); the Doha Amendment of 8 December 2012 added nitrogen hexafluoride to the list of greenhouse gases. However, in addition to this collective target, the Kyoto Protocol also contains quantified emission reduction commitments for individual Parties. In the case of the Czech Republic, according to Annex B, this commitment translates to an individual reduction commitment of 8% in relation to the first control period 2008-2012 and a reduction of 20% in relation to the second control period 2013-2020 (which was, of course, already a collective EU commitment). In other words, the Kyoto Protocol does not imply a commitment to reduce GHG emissions by 55% by 2030 compared to 1990, as it explicitly implies significantly lower commitments for the Czech Republic.

[107] The low number of ratifications led to the abandonment of the model of the Kyoto Protocol, an international treaty that itself contained individual quantified commitments of the Parties, and its replacement by the model of the Paris Agreement, also adopted on the basis of the UNFCCC, as its supplement. It entered into force on 4 November 2016, having been ratified under its Article 21(1) by at least 55 States producing at least 55% of global greenhouse gas emissions. It has been binding on the Czech Republic since 4 November 2017. The Paris Agreement contains some binding provisions (e.g. to prepare, communicate and maintain nationally determined contributions under Article 4(2), to provide information necessary for the clarity, transparency and understanding of the contribution under Article 4(8), to communicate every five years the amount of its nationally determined contribution under Article 4(9), or to provide periodically the required information under Article 13(7)), but in addition to these, it also contains non-legally binding provisions regulating the basic objectives of the Paris Agreement, and is hybrid in nature in this respect.

[108] It is precisely those fundamental objectives to which the somewhat generalising conclusion in paragraph 46 of the SAC judgment No. 1 As 49/2018-62 refers, the impact of which the Municipal Court correctly tried to limit in para. 230 of its judgment. There, the Supreme Administrative Court stated: *"The Paris Agreement does not in itself impose specific obligations on the Contracting States, but only an objective which the States have undertaken to achieve. In order to achieve it, the Contracting States then agreed to take certain measures."* On the contrary, as will be seen from the analysis below, the Paris Agreement also imposes specific obligations on the Contracting States. However, from the Czech perspective, the implementation of the basic objectives aimed at mitigating climate change is carried out indirectly through the EU.

[109] Article 2(1)(a) of the Paris Agreement sets the basic collective objective of *'keeping the increase in global average temperature well below 2 °C above pre-industrial levels and striving to keep the temperature increase below 1.5 °C above pre-industrial levels, and recognising that this would significantly reduce the risks and impacts of climate change'*. Nationally Determined Contributions (NDCs) by Parties under Article 3 are intended to lead to the achievement of this collective objective. These are to be communicated by each Party every five years under Article 4, and subsequently undergo a 'global assessment', the first of which is due to take place in 2023, to serve as a tool to incentivise individual Parties to set the highest possible NDCs. In addition, the Paris Agreement also makes reference to adaptation measures in Article 7, which were also the subject of the climate action now under consideration and will be discussed in Part IV(j). Thus, the standard procedure under the Paris Agreement would be for a State to declare its individual NDC within the meaning of Article 3, and this unilateral declaration, combined with the wording of Article 4(2) of the Paris Agreement, will create an international law obligation for that State to maintain the nationally determined contribution it seeks to achieve.

[110] However, EU Member States, including the Czech Republic, have made use of the options provided for in Article 4(16) to (18) of the Paris Agreement:

"16. Parties, including regional economic integration organizations and their member States, that have agreed to act jointly pursuant to paragraph 2 of this Article shall notify the Secretariat, at the same time as their nationally determined contribution, of the terms of such agreement, including the level of emissions allocated to each Party in the relevant time period. The Secretariat shall subsequently notify the Parties and Signatories to the Convention of the terms of such an agreement.

(17) Each Party to such an agreement shall be responsible for its level of emissions as set out in the agreement referred to in paragraph 16 of this Article, in accordance with paragraphs 13 and 14 of this Article and Articles 13 and 15.

(18) Where Parties, acting jointly, do so within and with a regional economic integration organization, and where such organization is itself a Party to this Agreement, ***then each Member State of such regional economic integration organization shall be responsible, individually and jointly with that organization, for its level of emissions set out in the agreement notified under paragraph 16 of this Article****, in accordance with paragraphs 13 and 14 of this Article and Articles 13 and 15."* (emphasis added by the SAC)

[111] It follows that the Czech Republic, although it remains a Party to the Paris Agreement, does not prepare and communicate its individual NDC, but acts collectively within the EU. It first reported during the Latvian Presidency to the UNFCCC Secretariat in the Submission of Latvia and the European Commission on behalf of the EU and its Member States dated 6. 3. 2015 that the EU Intended Nationally Determined Contribution (EU Intended Nationally Determined Contribution, hereafter "EU INDC") was to be a reduction of at least 40% in GHG emissions by 2030 compared to 1990, which was subsequently reflected in secondary EU legislation from that period.

[112] Subsequently, during the German Presidency, the EU reported to the UNFCCC Secretariat in a Submission by Germany and the European Commission on behalf of the EU and its Member States of 17 December 2020 that, as a result of the EU's ratification of the Paris Agreement in October 2016, the 2015 EU INDC had become the EU Nationally Determined Contribution (EU NDC) and that the new EU NDC was 55%.The key Article 27 of this submission reads as follows in the Czech translation (emphasis added by the NSS): *"EU a její členské státy si přejí oznámit následující NDC. EU a její členské státy,* ***jednající společně****, se zavazují dosáhnout do roku 2030 čistého domácího snížení emisí skleníkových plynů o alespoň 55 % ve srovnání s rokem 1990."* (*"The EU and its Member States wish to communicate the following NDC. The EU and its Member States,* ***acting jointly****, are committed to a binding target of a net domestic reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990."*)

On the EU NDC (paras. 117-125):

[117] The way in which emission reductions are allocated to individual Member States under current EU law implementing the earlier 2015 EU NDC commitment is described by the EU in the 2020 EU NDC in the manner described above, i.e, that in some sectors, the currently applicable level of reduction by individual Member States, based on the earlier 2015 EU NDC, is indicated, i.e. a reduction of 40% (by contrast, the allocation that would fulfil the new, more ambitious EU-wide reduction commitment of 55% has not yet been determined). In other sectors that cannot be simply allocated among Member States in this way, a reduction pathway that impacts collectively on all Member States is indicated (typically the emission neutrality commitment in the LULUCF sector covered by Regulation 2018/841). In this approach it is necessary to see the very meaning of the option foreseen in Article 4(16)-(18) of the Paris Agreement, which is 'tailor-made' for the EU, as the only 'regional economic integration organisation' to have made use of this option (Brosset, E., Maljean-Dubois, S. The Paris Agreement, EU Climate Law and the Energy Union. Research Handbook on EU Environmental Law, 2020, p. 5).

[118] The assessment of the broader question of whether the 2020 EU NDC itself is sufficient to meet the global objectives of the Paris Agreement and whether the manner of its notification fulfils all the requirements of Article 4(16)-(18) of the Paris Agreement is not primarily for the Czech administrative courts, but for the Conference of the Parties, which, pursuant to Article 14(2), will conduct its first global assessment in 2023.

[119] Similarly, the way in which the obligations arising from the EU NDCs are translated into EU secondary law and how their share is distributed among the Member States can be debated. However, it should be noted here that the relevant legislative and negotiation processes within the EU structures are still ongoing. Regulation 2021/1119 itself provides in its Article 6(1) and (2) that the Commission shall carry out a first assessment of the collective progress made by all Member States in meeting the climate neutrality and adaptation target, as well as a first assessment of the coherence of EU measures with the climate neutrality target and with ensuring progress on adaptation, by 30 September 2023 (and every five years thereafter). At the same frequency, the Commission shall also carry out an assessment of national measures pursuant to Article 7. In this situation, it is not for the SAC to enter into these political and legislative processes still ongoing at EU level with categorical conclusions on what an individualised commitment of the Czech Republic derived from the EU NDC should look like. This is a typical situation in which premature interference by the judiciary could lead to depriving the legislative or executive bodies of the EU and the Czech Republic of the necessary room for assessment and negotiation (see, by analogy, e.g. paragraphs 50 and 53 of the judgment of the Grand Chamber of the European Court of Justice of 1 March 2005, C-377/02, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau*), both within the EU and in relation to the Conference of the Parties.

[120] It is therefore necessary to reject the approach of the Municipal Court, which implies that, instead of the collective EU NDC commitment, there would be only 28 individual commitments of the Member States and the EU itself, set at a uniform rate of 55%. On the contrary, the essence of the collective undertaking resulting from the association of *'regional economic integration organisations and their Member States which have agreed to* ***act jointly****'* in Article 4(16) of the Paris Agreement lies in the possibility of internal differentiation of the obligations arising from that collective undertaking between the individual Member States, even though they remain jointly responsible for its fulfilment with the EU as a whole. As already mentioned, the specific allocation and implementation of the EU 2020 NDCs at EU level is currently still subject to legislative and political negotiations.

[121] Even the above-quoted EU NDC announced in 2020 is a good example of the fact that setting a collective GHG reduction target of 55% by 2030 compared to 1990 does not mean that each individual Member State has an individual commitment of that amount. Then, in fact, the EU collective process would have no real meaning and would just be a kind of renegotiation of individual NDCs between EU Member States so that each one's commitment is the same and then jointly announced. That the Municipal Court misunderstood the nature of the commitment in precisely this way is suggested by its statement in para. 259 that *'EU Member States have a single EU NDC which aims to reduce greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels'*. However, in the SAC's view, this is instead a 'common' target, implemented jointly by the EU as a whole and by all EU Member States, not a 'uniform' target, i.e. applicable only at the same level for each individual Member State.

[122] Indeed, the very division into the three sectors in the EU NDC shows that in sectors (i) and (iii) the Member States' commitments are common and undivided, as they are reflected in the collective emissions trading scheme and in the common EU regulation in the form of Regulation 2018/841, while in sector (ii) the common target has been allocated to individual Member States in a very differentiated manner, taking into account a number of factors, in particular gross domestic product per capita. The result enshrined in the current legislation, building on the previous less ambitious EU NDC target of 2015 (i.e. a reduction of at least 40% in GHG emissions by 2030 compared to 1990), the reduction in individual Member States ranges from 40% (Luxembourg and Sweden), 39% (Denmark and Finland), 38% (Germany), 37%

(France), 36% (Netherlands and Austria) to a 2% reduction (Romania) or zero reduction (Bulgaria) by 2030 compared to 2005. In the case of the Czech Republic, this is a 14% reduction (see Article 4(1) and Annex I of Regulation 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual reductions in greenhouse gas emissions by Member States from 2021 to 2030 contributing to climate action to meet their commitments under the Paris Agreement and amending Regulation 525/2013, which defines specific individual greenhouse gas reduction commitments by Member States).

[123] As the Municipal Court stated in paragraph 273 of its judgment on the forthcoming amendment of the EU regulations to meet the more ambitious EU NDC of 2020, i.e. a 55% reduction in emissions, *"according to the forthcoming amendment, the Czech Republic is to reduce its greenhouse gas emissions by 26% by 2030 compared to 2005 levels."* This corresponds to the proposal, which is the subject of a preliminary agreement between the European Commission and the European Parliament and the Council of 8 November 2022 (Commission press release of 9 November 2022, available on the Commission's website: https://ec.europa.eu/commission/presscorner/detail/cs/IP_22_6724), which plans to commit the Czech Republic to a 26% reduction in GHG emissions compared to 2005. It is therefore certainly not a mechanically identical reduction applicable to each individual Member State, corresponding to a 55% reduction.

[124] It follows that the 55% reduction in greenhouse gas emissions is a commitment for the EU as a whole, not broken down between individual Member States. The allocation between Member States under the current EU regime has only been made in the 'residual' sector (ii). This corresponds to the fact that there are a number of areas regulated by EU law that cannot simply be 'budgeted' between Member States, as emissions from certain activities are not strictly bound to the territory of a single Member State (a typical example is the currently discussed introduction of a so-called carbon offsetting mechanism or 'carbon tariff', which would apply to imports of carbon-intensive products into the EU, so that it would apply primarily at the EU's external border, see on this para. 18 of the preamble to Regulation 2021/1119).

[125] The fact that the collective objective in the form of the EU NDC is only partially distributed among the Member States certainly does not mean that the Czech Republic would cease to be a Party to the Paris Convention or that it would lose those obligations of the Parties which are not covered by the EU collective obligation within the meaning of Article 4(16) to (18). Moreover, the Czech Republic is also responsible for this collective obligation under international law, individually and jointly with the EU as a whole, as is clear from the phrase "the EU and its Member States", which is also used consistently in the above-quoted submissions made on behalf of the EU (and its Member States). However, it does not follow from anything that this collective obligation is automatically allocated to the equally high obligations of each individual Member State, as the Municipal Court found.

In paragraph 137, the SAC emphasised that global warming is a serious threat, but it also had to take into account the limits of judicial decision-making:

[137] The Supreme Administrative Court does not underestimate the seriousness of the threats which the Czech Republic and the world are facing and will face as a result of global warming. On the contrary, the fact of man-made global warming and the seriousness of its consequences is a subject of global consensus even according to the international documents just cited (...). It is therefore legitimate to require the defendant ministries to respond adequately to the current situation and the imminent danger within the scope of their competence. However, it is not for the administrative courts themselves to set the standards by which to assess the unlawfulness of the alleged interference. At the same time, however, they must be prepared to provide

effective protection to individuals affected by the consequences of the lack of action by the Czech State authorities in the area of combating climate change and its consequences; this need may increase over time as the consequences of climate change increase.

On the application of the ECHtR case-law:

[150] At the level of the Czech Republic's **international human rights obligations**, there is no specific right to a favourable environment, much less the right to climate stability (or to a certain level of greenhouse gas emissions or freedom from the negative effects of climate change), Although the possibility of enshrining such a right has recently been discussed in the literature, and the five global committees on the protection of various aspects of human rights (CEDAW, CESC, CMW, CRC, CRPD) have already expressed their views in their joint Statement on human rights and climate change (HRI/2019/1, dated 16 September 2019) on the various human rights implications of climate change. In particular, it stated here that climate change poses a fundamental threat to the enjoyment of the right to life, to adequate food, adequate housing, health and water, and cultural rights.

[151] The Supreme Administrative Court is aware of the trend referred to as the "greening of human rights" (also "human rights greening"), i.e., the importation of the protection of certain aspects of a favourable environment from those rights that are protected in international human rights catalogues, in other words, the attempt to find tools for addressing climate change as a new problem in existing legal instruments. This trend is particularly evident in the case law of the European Court of Human Rights (ECtHR) interpreting Article 2 (right to life) and Article 8 (right to respect for family and private life) of the ECHR. On the other hand, however, even this trend is not unrestricted, since the pursuit of an expansive interpretation of these rights, however much it is made possible by the perception of the ECHR as a 'living instrument' (see, for example, paragraph 31 of the ECtHR judgment in *Tyrer v. the United Kingdom* of 25 April 1978, Application No. 5856/72), runs up against the textual limitations of the ECHR itself, its focus on individual human rights, and thus not on addressing the collective global problem of climate change. Such an endeavour also raises questions of the legitimacy of the ECtHR's interference in national policies in the area of balancing the costs and benefits of measures to combat global warming, the admissibility of *actiones populares* before the ECtHR, the limits of the national separation of powers and the doctrine of the 'political question' (on which see paragraph 29 of the Constitutional Court's ruling of 20 November 2007, No. Pl. ÚS 50/06) and other doctrines (see for example Mayer, B.: *Climate Change Mitigation as an Obligation under Human Rights Treaties?*, American Journal of International Law, 2021, No. 3, pp. 409-451).

[152] Even the ECtHR has not yet taken this trend of "greening of human rights" so far as to find a violation of Article 2 or Article 8 of the ECHR on the basis of the inadequacy of mitigation or adaptation measures by a party to the ECHR. The Supreme Administrative Court is aware that several complaints based on this allegation have been brought before the ECtHR in the recent past and that some have even been referred to the Grand Chamber of the ECtHR. These are, in particular, the complaints in *Duarte Agostinho and Others v. Portugal and Others*, Application No. 39371/20 (referred to the Grand Chamber on 29 June 2022); *Carême v. France*, Application No. 7189/21 (referred to the Grand Chamber on 31 May 2022); and *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Application No. 53600/20 (referred to the Grand Chamber on 26 April 2022). It is the latter Swiss case that comes close to the situation now before the SAC, since - unlike the other cases cited - it was a collective climate action heard in the administrative justice system, but dismissed by the Swiss Federal Supreme Court as *actio popularis*, referring the applicants (Swiss senior citizens pointing in particular to the impact of heat waves on

the health of the elderly) to political, not judicial, decision-making. In addition, the ECtHR is also hearing the case of *Greenpeace Nordic and Others v. Norway*, complaint No 34068/21.

[153] The ECtHR can therefore be expected to comment in the future on the ways in which a lack of activity by the legislative, executive or judicial branch may violate Articles 2 and 8 or also Articles 6 and 13 ECHR, or even Article 3 ECHR, on the basis of so-called climate anxiety (also referred to as eco-anxiety, climate grief, climate depression or environmental melancholy). However, it is not for the SCC to prejudge such decisions, not even in terms of whether there is a violation of the ECHR articles just mentioned, let alone in terms of how the ECtHR balances the contribution of mitigation (by nature globally manifested and dependent on global collective action) or adaptation (local) instruments in the field of climate change mitigation to the protection of these rights and, conversely, the severity of the restriction of human rights resulting from these measures in a particular national legal order. The Supreme Administrative Court therefore bases its current judgment solely on the ECtHR's silence on the issue now under consideration. Given that it is not possible to estimate how long it will take the Grand Chamber of the ECtHR to rule on the above proceedings, the President of the Chamber did not consider it appropriate in the present case, even from the point of view of procedural economy, to make use of the option of an optional stay of proceedings pursuant to Article 48(3)(d) of the Code of Civil Procedure and to wait for the Grand Chamber of the ECtHR to give its legal opinion.

[154] In the opinion of the SAC, on the basis of the ECtHR case-law to date, it can only be stated that States have certain positive obligations arising in the field of environmental protection, in particular from Articles 2 and 8 ECHR (see in particular the judgment of the ECtHR in Cordella and Others v *Italy* of 24 January 2019, Complaints Nos 54414/13 and 54264/15). At the same time, however, it should be recalled from the ECtHR case-law to date that, as shown in particular by the judgment in *Budayeva and Others v. Russia* of 20 March 2008, Application no. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, concerning threats to life resulting from the passivity of the Russian authorities in response to the threat to a particular town from mudslides, the ECtHR leaves a wide margin of appreciation in the area of positive obligations to protect life (and privacy) in the face of natural disasters, what instruments the state will use to protect the rights guaranteed by the ECHR, i.e. whether these instruments are more likely to be mitigative (preventing the occurrence of a natural disaster) or adaptive (creating tools to cope with the consequences of a natural disaster once it occurs).