HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Uncorrected oral evidence: The European Court of Human Rights and climate change: recent judgments and implications for the UK (HC 778)

Wednesday 22 May 2024

3.15 pm

Watch the meeting

Members present: Joanna Cherry (Chair); Lord Dholakia; Miss Sarah Dines; Dr Caroline Johnson; Baroness Lawrence of Clarendon; Baroness Meyer; Lord Murray of Blidworth.

Questions 1 - 3

Witnesses

I: Lord Sumption (Jonathan Sumption KC), Former Judge, Supreme Court; Jessica Simor KC, Barrister, Matrix Chambers; Nikki Reisch, Climate and Energy Director, Center for International Environmental Law.

Examination of witnesses

Lord Sumption, Jessica Simor and Nikki Reisch.

Q1 **Chair:** Good afternoon and welcome to today's meeting of the Joint Committee on Human Rights. We are a cross-party committee and a Joint Committee, which means that we have members from both the House of Commons and the House of Lords. Today, we will focus on a series of recent European Court of Human Rights judgments on climate change and their implications for the United Kingdom.

I am delighted to be joined by three witnesses, to tell us about the judgments. In no particular order, we have Nikki Reisch, director of the Climate and Energy Program at the Center for International Environmental Law, and Jessica Simor KC, who is a barrister at Matrix Chambers. Both Nikki and Jessica are joining us virtually. Last, but most certainly not least, we are delighted to have Lord Sumption, former justice at the United Kingdom Supreme Court, who is joining us here in the committee room.

Perhaps I will start with you, Jessica, as I believe you were counsel for one of the three parties, which you can tell us about in a moment. By way of overview, could you give us a summary of the facts of the three cases, including KlimaSeniorinnen, and what the court decided? I will go around each witness, because I know that there might be different takes on this.

Jessica Simor: I will do my best, in a very summary way. There were three cases. The first was the case of Agostinho, brought by six young people from Portugal. They brought their case against 33 states, including Portugal, arguing that the failure of those states to take adequate measures was putting their health and lives at risk under Articles 2, 3 and 8, and including the property right under the convention, Article 1 of protocol 1. The Grand Chamber rejected their claims on admissibility grounds. First, it held that making a complaint against any state other than Portugal, where they lived, was outside of its jurisdiction, therefore there was a lack of jurisdiction in relation to at least 32 of the countries they were complaining against. Secondly, they had failed to exhaust any domestic remedies; that is, they had not taken any proceedings in Portugal. The court did not do any more than that and did not examine the merits of the case.

The second was a case called Carême, which was brought by the once mayor of a municipality called the Grande-Synthe, in France, about the municipality's failure to take adequate measures in relation to climate change. That case was also thrown out on admissibility grounds because the mayor no longer lived in that municipality and therefore could not claim to be a victim of any violation.

The case in which I acted was the KlimaSeniorinnen case, which was brought by 2,038 elderly Swiss women against Switzerland in relation to Switzerland's failure to take adequate measures to mitigate climate change in failing to adopt the necessary legislation and regulations to

reduce its emissions. Four individuals, and through an association, did take their case to the Swiss courts. The case was thrown out of the Swiss courts, but they had therefore exhausted their domestic remedies. The Strasbourg court found—and I expect that we will discuss in more detail why—that Switzerland had failed to take adequate measures to mitigate climate change, and had so violated the right to well-being and a healthy environment under Article 8, and the right to access to court under Article 6.

Chair: You have given us an overview of the cases. I will bring in Nikki and then Jonathan, to see whether they take issue with anything you have said at this stage. Obviously, we will delve deeper into the reasons for the decision in due course. Nikki, can I start with you?

Nikki Reisch: Thank you very much, Madam Chair and honourable members of the committee, for the opportunity to participate in this discussion.

I endorse the broad description of those cases and welcome further questions. I would just clarify—I suspect we might get into this in the conversation—that the finding and the holding of the court in the KlimaSeniorinnen case was a finding of the violation of the right under Article 8 to private and family life. That includes and extends to a right to the enjoyment of health and well-being free from environmental threats, although it is not explicitly, and the court did not use this language explicitly, a right to a healthy environment per se. I think that is an important point of discussion, but I would agree with the other facts as laid out.

This triptych of cases that came before the Grand Chamber illustrates not only the importance and propriety of the European Court addressing matters of climate change—because indeed climate change is a human rights crisis—but the rather measured approach taken by the court. It demonstrated that it was applying long-standing and existing principles of law to the mounting risk of climate change—this is a new context but these are long-standing legal principles—and was doing so in a way that clearly is not throwing the doors open to any and all cases but is considering, as was evident from the dismissal of two of those three cases, that there are significant and stringent standards to be met. I will pause there, because, to respond to your question, I endorse that summary of facts, broadly speaking.

Chair: Lord Sumption, is there anything you would like to add? I suspect that you might take issue with the description of it as being a measured approach.

Lord Sumption: I certainly would. I rather assume that later questions will bring out the points of principle, therefore I am at the moment dealing with only the actual facts.

I do not disagree with anything that either Jessica Simor or Nikki Reisch has said, except that I think that it is perfectly clear that the judgment

does in fact create or acknowledge—depending on your point of view—a right to a specific level of environmental protection in the interests of health. It does not seem to me to matter whether it used those words; that is the effect of the judgment.

I have circulated, through your clerk, a short summary of two and a half pages of the facts, which I hope is neutral. It gives references to the relevant paragraphs and will supply you, if you take it, with a brief summary of the essential features; it is a very long and complicated judgment. I have sent a copy to Jessica Simor. I was not able to send one to Nikki Reisch because I did not have an e-mail address for her, and I apologise for that.

Chair: We will make sure that that is dealt with, and that the note is circulated to the committee members. If either of our other witnesses want to supplement anything they say in writing, they should feel free to do that as well. Is there anything else you would like to say at this stage, Lord Sumption, or shall we go on to more focused questions?

Lord Sumption: Absolutely.

Q2 **Lord Murray of Blidworth:** My question focuses on the first point, to my mind, which is the question of the standing of the ladies in the Swiss case to bring the claim that they did. I wonder whether members of the panel might be able to tell the committee to what extent it is considered that the decision to provide standing in the way that the court did was consistent with earlier case law, or whether there was a departure from the previous position.

Lord Sumption: Would you like me to kick off on that one?

Chair: Please.

Lord Sumption: The criteria for standing are very broad. There are basically two distinct criteria: one is standing properly, so-called—namely, whether the applicants have a sufficient interest in the subject matter—and the other is the question of whether they are victims. In a case such as this, those two issues pretty well totally overlap.

The essential issue, which was probably best brought out in the dissenting opinion of Judge Eicke, was whether somebody could claim to be a victim, or to have a personal interest exceeding that of the population at large, if they were complaining about the failure to reach a target that would materialise only in 2050, a quarter of a century away. It was suggested unsuccessfully by the Governments that that meant that nobody could claim to be anything other than a self-appointed public guardian—a species of litigant that is not encouraged, even in Strasbourg.

That was rejected by the court on the grounds that the imminence of the threat, albeit not the imminence of the deadline, made them victims. I find that slightly surprising, but that is a one-off issue. I do not think that the criteria that the court applied in deciding standing or victimhood were

particularly revolutionary. The criteria, as I have said, are very broad, and the principle applied is not very different from that applying in a domestic judicial review in this country.

Lord Murray of Blidworth: Ms Reisch, I wonder whether you have a view on that.

Nikki Reisch: I would not call the approach a departure from the court's case law. The criteria applied were not revolutionary; the court took what I would characterise as a pragmatic approach to the perhaps unique challenges that the climate crisis and that context pose due to the diffuse and widespread nature of climate impacts, but also the very clear imperative not to wait until it is too late, in effect, for anyone to bring a claim because nothing could be done to prevent the real risk of harm.

In effect, in denying the individual victims in the case standing—under what I would argue is a relatively high threshold of proof for a real risk of direct impact, which has to be, as the court alluded to, sufficiently intense and severe, with attention to both the duration and the particular need for protection—the court arguably made standing more restrictive. It was closing the door rather than opening it. The court's approach to standing overall in the three cases reflects that, having denied victim standing status to Mr Carême in the other case as well.

The court, in effect, drew on existing case law dating back at least to 2004, recognising that, under Article 34 of the convention, there is a basis for a representative or a group of individuals to bring a claim on behalf of those individuals who face actual effects to and infringements on their rights or the real risk thereof. The court allowed associations effectively as representatives of individuals in climate cases—those natural persons whose rights can be shown to be affected or to be at serious risk of being affected—while making it effectively harder for individuals to claim to be victims. We will see whether that stringent standard can be met going forward.

This pragmatic approach, applying existing case law—for example, a principle that was applied previously in the Lizarraga and Others case, recognising the standing of associations—was both an extension of that case law and an appropriate response to the practical reality that climate cases involve legal and technical complexities and potential barriers to others, as well as the need to limit the potential volume of cases, given that they recognise everyone is in some way affected by climate change, while refusing to hold that because everyone is affected no one can seek justice or have standing, much as the court refused to accept that because so many states contribute to the harm of climate change none can be held accountable. I will stop there.

Lord Murray of Blidworth: To what extent do you think that the concerns expressed in the dissenting judgment of Judge Eicke on the question of standing are ones that we should not be concerned about?

Nikki Reisch: I tend to respectfully differ with Judge Eicke's assessment of the standing ruling, for the reasons I just laid out. There is grounding for, in Lord Sumption's words, the non-revolutionary application of the criteria applied for victim standing. The approach that is outlined is consistent with applying the basis for associational standing in the context of climate change. The effect of the approach of the court is ultimately more likely to be a check on potential floodgates, or on narrowing the number of potential claimants who could bring climate cases, and not throwing the doors wide open or in any way signifying a slippage of attention to the fundamental principles of a bar on actio popularis under the convention and the need for there to be a connection between the entity with standing and a real and direct effect, or risk of an effect, infringing rights.

Lord Murray of Blidworth: Ms Simor, do you think that standing is now too broadly drawn in the European Court?

Jessica Simor: I would rather agree with Nikki Reisch that the court seems to have taken an essentially pragmatic approach. It has dealt with the risk of floodgates, which arises from the fact that climate change potentially affects everybody, and has created a narrow rule of standing relating to associations representing those affected by climate change, which is effectively the application of the Lizarraga case of 2004. I understand its approach.

I do not agree with Judge Eicke. What he is saying at paragraph 45 is that it has allowed individuals and associations, and created a widening. My reading of the judgment is that it has effectively put quite a high threshold on the possibility for individuals to come before the court, for the very sensible reason that it does not want hundreds of millions of applications by individuals. It has then laid down a test for associations, at paragraph 502 of the judgment, which restricts when associations can bring cases and applications. As Nikki Reisch said, it has done that to require there to be a clear linkage between the representation and the individuals who are members of the relevant association.

Lord Murray of Blidworth: Lord Sumption, what view do you take on this question?

Lord Sumption: It seems to me that the most important fact is that the arguments about the lack of standing failed. When this had been decided in the Swiss courts, the Swiss courts applied a principle identical to that applied normally in Strasbourg: that, in principle, actio popularis—I will come to that—is not permissible. An actio popularis is an action by a self-appointed public guardian who cannot claim that he or she has any personal interest greater than that of the public at large. There is a very similar principle applied in English administrative law. All three Swiss courts decided that there was nothing to distinguish the complainants from the general Swiss public.

I do not think for this purpose it matters whether the claimants are applying as individuals or, more efficiently, as associations. The essential

question of principle is about victimhood. It seems to me that the effect of the decision is that nobody will be shut out. They may be well advised to start an association with exactly the same characteristics as this one. I will not talk about floodgates as I find that expression rather unhelpful, but there will be a lot of claims involving a lot of countries, as it is most unlikely that any other countries have exactly the criteria required in the substantive part of the decision.

Chair: Are you saying, Lord Sumption, that all that individuals need to do is get together and form an association to get over the hurdle, on the basis of this decision?

Lord Sumption: The hurdle is not very high, even for individuals. I disagree that it has significantly narrowed it. As you say, they can form an association, which is what is normally done when you have a very large number of claimants in a broadly similar position. The normal process is to form an association with some legal capacity and use that as the vehicle.

Chair: I suppose the million-dollar question is how far beyond litigation about climate change this principle extends. I will bring Sarah in on that.

Lord Sumption: That is far too fact-sensitive for a useful answer to be possible. There are features of the decision on standing that I find odd in the majority judgment. Personally, I have a good deal of sympathy for Judge Eicke's approach, but I do not think that this is a very important part of the judgment. The reality is that maybe "pragmatic" is the right word for this, although others might choose a different word: if the court wants to decide the issue and regards it as sufficiently important, it will do so.

Miss Sarah Dines: I will start with Lord Sumption, as you were just speaking. What are the implications for future climate change litigation under the ECHR as a result of this judgment?

Lord Sumption: It seems to me that what the court has decided is potentially applicable to anybody complaining against a Government who do not have the very detailed scheme of regulation that the ECHR has now required. The implications are absolutely fundamental.

In the United Kingdom, attempts to judicially review the Government for not having sufficiently ambitious targets or not applying them sufficiently zealously have generally failed when they are brought on the basis that these cases were brought. There was a case 18 months ago, Plan B Earth v Prime Minister, in which the application for leave was rejected on that ground both by Mr Justice Bourne and subsequently by the Court of Appeal. Essentially, it was rejected on the ground that nothing in the jurisprudence of the European Court of Human Rights suggested that there was a violation of human rights, even arguably. That is the view that I would have taken before this judgment came out, and clearly it will have to be revived. I would imagine that there will be a substantial number of judicial reviews in this country, and doubtless elsewhere.

Miss Sarah Dines: I have a supplementary on that. Is it against the constitution of the United Kingdom to have such a broad judgment? Does it effectively diminish the sovereignty of this House in law-making capacity and in being able to control the narrative? Practically and ideologically, does it diminish the power of this place in which we sit?

Lord Sumption: It clearly does. In that respect, it is not the first time. The European Court of Human Rights has reached conclusions in other fields that also have that effect. The answer to your question, I think, is this: ever since the late 1970s, the Strasbourg court has declared its mission to be to develop human rights in directions not necessarily warranted by the text that the various state parties have agreed. That is likely to be an essentially legislative function.

The Swiss climate case is a very striking example of this, but there have been other examples. I say that for three reasons. First, the legislative character of the judgment is absolutely plain from the detailed prospectus that it contains about what states have to do about climate change. None of this has any basis in the text of the convention. What is said is that the states have no, or virtually no, discretion as to the targets or the timing of their fulfilment, but only as to the methods of achieving those targets. The methods are, to some extent, within the discretion of the states, but even those have to be spelled out in advance in the enabling legislation, rather than varied from time to time as the situation develops. That is an essentially legislative act, so to that extent it is an intrusion into what is normally regarded as the function of national Parliaments.

The second point that comes along from that, as Judge Eicke put it in his dissent, is that the basis of the convention is democratic values, but the majority of the court has effectively decided that it was a violation for the Swiss electorate in their referendum of 2020 to reject the Act which was put before them under Swiss constitutional law. Fifty thousand or more citizens can petition for a referendum on any enactment of the Swiss Parliament. The 2020 Act would have dealt with most, if not all, of the complaints put forward by the Strasbourg court, but it was rejected in a referendum and replaced by a somewhat more moderate and flexible provision.

It seems to me that that has very considerable implications for the activities of Parliaments and electorates. What is said about this at paragraph 412 of the judgment is that: "democracy cannot be reduced to the will of the majority of the electorate and elected representatives, in disregard of the requirements of the rule of law". That, in a sentence, is the answer to your question. What the court meant by the rule of law is compliance with its own, to my mind, rather extreme interpretations of Article 8, which is about privacy and not about climate change. Effectively, it is saying that the Swiss must find a way of overriding the wishes of their people, if necessary, one must assume, by amending their constitution to prevent them from voting down measures inconsistent with the judgment.

Chair: That is a very long and full answer. I will have to bring in our

other witnesses to see whether they agree or disagree with that.

Jessica Simor: I suppose this is the crux of it. At a certain point I was going to address what Switzerland had conceded before the court. It is very hard to understand a judgment without understanding what the respondent was accepting to be the case.

I will just deal with Lord Sumption's two points. First of all, in relation to it being of a legislative character, it is true that the court lays down what is required of states. I do not have the specific paragraph in front of me now.

Nikki Reisch: Paragraph 550.

Jessica Simor: Is it 558?

Lord Sumption: It is 538 to 539.

Chair: Is this the five criteria?

Lord Sumption: This I think is what Nikki Reisch was coming to. She was looking for the paragraph.

Jessica Simor: Paragraph 550 is where Strasbourg sets out what is expected of the states. This needs to be seen in the background of the international obligations to which all of the Council of Europe member states have signed up to, 195 states in total: namely, the Paris Agreement. Switzerland conceded before the court that it had these obligations, and indeed that it wanted to meet them, and that in its nationally determined contribution that it had lodged before the UN that it intended to meet them. Switzerland was not saying before the court that it did not want to, or could not, or should not meet any of these obligations. That was not in dispute.

In relation to the UK, it is central to this case that the United Kingdom has the Climate Change Act 2008. The Climate Change Act does all the things that are set out in paragraph 550 of this judgment: budgets need to be produced on a five-yearly basis for emissions reductions; the Secretary of State needs to produce a Section 14 report setting out the plans and policies that will enable that budget to be met; there is transparency; and the plan or project that is reported can be judicially reviewed, and has been successfully judicially reviewed now on two occasions. We have budgets, plans and policies, access to court and transparency—in other words, compliance with Strasbourg.

There is some irony here because, in holding Switzerland to account, Strasbourg is assisting the United Kingdom. It is essentially saying, "You need to do what you have committed to do as a matter of international law". That is what the United Kingdom is doing. Because this is a global problem, if one country free-rides—as Switzerland was doing, if you look at the detailed facts—that means that the other countries are paying the price for that free-riding. Here we have a situation where the Strasbourg

court is, in the context of international law, saying that it is necessary for all states to do their part. That is within the background of human rights.

I have a final point on that. Switzerland conceded before the court that Article 8, and its obligations under Article 8, had to be read in the light of the international obligations that it had signed up to. I will just read you a couple of words from its observations. There are, "positive obligations and standards of conduct … which are likely to shed some light on the reasonable and appropriate measures" that Switzerland "must take to effectively protect the rights set out in Articles 2 and 8". That is saying that international law obligations will shed light on the obligations under Articles 2 and 8. It conceded that Article 8 was potentially engaged here.

Chair: Before I bring you in, Nikki, I know that Caroline has a supplementary. I will ask Caroline to ask it and we will see if we can cover it. We obviously have two quite contrasting views there from Jonathan and Jessica on the degree of judicial intrusion on the legislative function, if I may put it that simplistically. I want to bring Caroline in and then come to Nikki.

Dr Caroline Johnson: I should say before I start that I am not a lawyer and I talk in slightly plainer English perhaps than some of the terms used.

It seems to me—and please correct me if I have misunderstood it—that the court has decided that there is a duty to protect these Swiss individuals from the consequences of climate change, but it also seems to have decided how it should do so. It seems to me that the Swiss could have decided to do so through domestic regulation. They could have sought to do so by seeking to influence international partners who contribute a much greater share of the problem of climate change. They could have worked to protect the individuals from heatwaves, perhaps by installing air conditioning or similar to protect them from the effects of climate change which one might or might not consider inevitable. Of these, it would seem to me that domestic regulation, with Switzerland being relatively such a small country, is likely to have the least effect in protecting citizens from climate change overall. Is deciding not just that the Swiss have a duty to protect citizens from climate change but how the Swiss look at it essentially a political decision?

Nikki Reisch: I will try to address that, as well as a few of the other points.

I agree with Jessica that this goes to the heart of the matter and the perspective on the critical role that courts play, not just the European court but courts domestically and around the world, in upholding the rule of law. While there is a role for and a primary place for lawmakers and policymakers in deciding how measures are defined and how they proceed, that discretion and margin of appreciation are not unfettered. It is precisely the role of courts around the world to define the bounds within which that discretion and legislative prerogative are exercised.

I think that the court was doing that here, and in so doing was joining a very large and growing body of case law around the world. It was joining many courts—including courts across Europe at the domestic level, and arguably courts in the UK itself—that have exercised that same function, in setting out what the bounds are for ensuring that the exercise of democratic processes and lawmaking adheres to the balance of law.

It is worth noting that this discussion is happening on the heels of an opinion that was issued just yesterday by the International Tribunal for the Law of the Sea. That opinion, the first advisory opinion on climate change—there are two others to follow, from the Inter-American Court of Human Rights and the International Court of Justice—very clearly underscored not only that states have legal obligations under multiple sources to take urgent and effective action but that the way they do that has to be through measures that are in line with science and, crucially, capable of satisfying the objective of preventing further harm from climate change, as they have committed to do not only through parallel agreements but following and flowing from their obligations under the convention.

The European court has long-standing jurisprudence on Article 8, recognising that the duty to protect encompasses a duty to protect through not only setting up an appropriate legal and regulatory framework but implementing it effectively through measures that are capable of achieving the objectives, and that that regulatory framework and the duty to protect extend to environmental threats and harms. Numerous cases have recognised that. Those are environmental harms coming from—

Chair: Can I just interrupt you there? We will come on to Article 8 in a minute, but I think Caroline's question is an important one for us and for those watching this, who are not all lawyers, to try to understand. Caroline asked whether the reality of this judgment is that the European Court of Human Rights is telling states how they must tackle climate change—

Dr Caroline Johnson: It was not just that.

Chair: If I can just finish.

Dr Caroline Johnson: I am telling you what my question is.

Chair: I noted down, "Are they telling the Swiss how to do it?"

Dr Caroline Johnson: Is this telling the Swiss not just that they should protect people but how they should protect people? Even if they met their obligations, and even if they met them tomorrow—with no further greenhouse gas emissions and no carbon dioxide released, and they were completely net zero—it would not protect people from climate change. The court has decided how and has decided a cause and effect that probably is not accurate.

Chair: I am looking at one alternative commentator here, Professor

Stefan Thiel, assistant professor in public law at the University of Cambridge. His analysis of the case, pithily put, is that the inconvenient truth is that the states remain in the driving seat. Legislatures legislate and courts interpret. What some people are suggesting is that, in effect, this court has stepped outwith its interpretation role and is telling people how to legislate and what they must say in their legislation. I know that is a very real concern that people have about this case.

I want to understand whether you think that concern is well-founded. I suspect there may be a divergence of view on that. I rather got the impression that Lord Sumption thought that that concern was well-founded, from the three points that he put to us. Nikki, do you think it is well-founded?

I am conscious of the time, so perhaps you could keep your answer fairly short.

Nikki Reisch: In short, I do not think it is a well-founded view that the court has somehow gone beyond what it has done in countless cases in exercising its role in identifying and clarifying what the bounds of discretion are to ensure that there is adherence to the rule of law. Much as Jessica said, I think the effect of that in the climate context is actually to the benefit of the UK and other states because it ensures that there is minimum compliance and that every country is doing its part.

I would just stand to correct, or to take a slightly different perspective on, something that Lord Sumption said, drawing out and characterising the partially dissenting opinion as saying that the court overruled the democratic voter referendum taken in Switzerland. Clearly, the court did not rule that the exercise of a democratic referendum was at odds with the convention obligations, but that that decision—which, as I understand it, turned not on whether there should be climate action or policy but more on the nature of the measures that were in the proposal put forward—did not alleviate or relieve the state of its obligation to ensure that alternative measures were put forward that were capable of protecting the rights that it is duty-bound to protect through effective measures. I do not think that the court has done more. It very clearly identified the remaining margin of appreciation that states have to define just how they do it, and the criteria laid out flow very clearly from undisputed, unequivocal science.

Jessica Simor: May I just add a short point?

Chair: You may add a short point and then I will bring Caroline back in.

Jessica Simor: At paragraphs 416 to 421 of the judgment you will find where the court sets out the very special circumstances of climate change. This complaint to the court was a complaint that the failure of Switzerland to take adequate measures to reduce or mitigate emissions from Switzerland was the violation. That was the claim that the court was dealing with. It was not dealing with the question of a failure to put in air conditioning or whatever, although it is true that Switzerland in defence

said that it had done other adaptation measures. The court tackled the very difficult question—I accept that it is a very difficult question—in relation to causation that you have raised. It is a legitimate concern. The court made clear that in Strasbourg the test is not, as it is in English law, but for X, Y would not have happened. The test is whether the state has done everything that it could reasonably be expected to do to deal with the foreseeable harm.

There have been many cases which tackled this issue of causation, most importantly the case of Urgenda, in the Dutch Supreme Court, which preceded this case, and Neubauer in the German Constitutional Court. In both of those cases, as followed by the Strasbourg court, the court found that the obligation in Article 8 had to be read in the light of the state's commitments under the Paris Agreement. That required all states to act and all states to reduce emissions. The reason there was a global international agreement on climate change is that the only way to tackle climate change is for all states to act and to have the most ambitious targets possible. That is why they have had to deal with causation separately, because obviously nothing will happen—it will not work—if only the UK reduces its emissions. It is essential that all states do, especially rich states such as Switzerland.

Dr Caroline Johnson: I just wondered whether Lord Sumption had any comments on what we have just been talking about.

Lord Sumption: There is a fairly comprehensive scheme in the various climate change treaties for dealing with issues and disputes that are enforceable at the international level. What the European Court of Human Rights has done is to make it enforceable at the domestic level. That was not something that the Swiss Government conceded. They did not concede that there was an actionable human right. They did not concede that Article 8 could be read as a general protection for health rights.

The effect of the judgment is probably best seen not so much in paragraph 550 as in paragraphs 538 and 539. Paragraph 550 says that it is the obligation of states in international law to meet the Paris target, which is basically net zero by 2050. Paragraphs 538 and 539 set out in detail what must be done. What it says is that each state has to make suitable regulations governing "the licensing, setting-up, operation, security, and supervision" of activities that generate greenhouse gases, "and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of the citizens". What it says is that states have to legislate to produce a comprehensive and compulsory licensing scheme.

It does not say what that licensing scheme has to contain. It does not say that there must be air conditioning in every building more than a certain size, or that states must prevent petrol being sold in octane levels higher than a certain amount. It does not say anything like that; it leaves that much to the state. But there is no doubt that this is a legislative provision requiring a form of legislation, which the Climate Change Act 2008 does not provide.

In fact, Britain has the same characteristic that was criticised in the case of Switzerland under the Climate Change Act 2008. The target is set out and is legally mandatory—net zero by 2050—but the methods of achieving it are left to government regulation put before Parliament in the ordinary way. That was also the effect of the 2022 legislation in Switzerland, which was criticised by the Strasbourg court on the ground that it did not specify the measures but left them to be determined by the Executive, subject to confirmation by Parliament. That is precisely the same as the UK scheme.

The basic problem—correct me if I am wrong but this may be what lies behind your question—is that, as the court recognised, this is a polycentric problem that has been given a unicentric answer. This is a highly controversial political issue. There have been electoral backlashes in this country and in the Netherlands, France and other countries of Europe against measures to deal with climate change that do not accept the need for a transition from an age in which energy was regarded as plentiful and harmless. States, including the UK, have to carry their people with them. It has to be managed politically, and that may call for compromises. Top-down answers from external courts such as this one are a very unsatisfactory way of responding to that problem.

Chair: That is a very clear statement that this is what we might call an example of judicial overreach.

Lord Sumption: I would say so.

Chair: You are saying that the judiciary has reached into what is properly the role of the legislature.

As Jessica has had to leave us, I wonder whether our other witness, Nikki, agrees or disagrees with the idea that this is an example of judicial overreach, where the majority at Strasbourg have gone beyond their role and into the legislative role, which many people in this jurisdiction would see as being unconstitutional. What do you think?

Nikki Reisch: Not to repeat myself, but I do not agree with that characterisation. The court goes to lengths to recognise the scope for manoeuvre in a state to decide the particular measures—where and how those emissions reductions will be achieved are not dictated. What the court does do is take the unequivocal, and indeed undisputed, science that has been politically endorsed by the parties to the Intergovernmental Panel on Climate Change, which makes very clear the known causes of climate change and its not just foreseeable but increasingly manifest consequences, which are infringing on a range of rights and are having impacts that no one in this case contested.

I mention that because those facts themselves give rise to a duty under the convention. The court has simply said, as it has said in countless other cases in the face of an environmental threat, that there is a need for an effective and comprehensive legislative framework to address that

threat, and that the first step of the duty of the states is to enact legislation and measures that are capable of effectively averting the risk.

I think that is indeed what has been done here. It has drawn on that consensus science but has stopped short of saying how it should be done. It is my understanding that, as versus Switzerland, the UK climate policy is in a stronger position. Switzerland was faulted for not having identified a quantified and near-term limit on emissions within its jurisdiction and control, and then not adhering to past targets and setting measures to achieve that.

The issue in the UK—as was illustrated in a recent decision of the High Court in addressing the net-zero plan—is largely about the implementation of the measures identified. The UK's own courts have passed that in judicial review and have turned to a host of statutory provisions to assess the adequacy of those measures. These are not issues that are immune from judicial review in any circumstance. I think here the court has afforded the same margin of discretion that it afforded other environmental issues it has addressed in the past.

Chair: We have two very different views there.

One of the things you have both talked about is how this decision has been reached by the analysis the court made of obligations under Article 8. Perhaps we ask some questions about how that works.

Q3 **Lord Murray of Blidworth:** I will turn to Article 8. As we know, Lord Sumption, the bulk of the court's substantive reasoning concerned the application of Article 8. I think it is clear that this was an expansion from previous cases decided using Article 8. To what extent do you think that was so, and to what extent are the criticisms of Judge Eicke justified?

Lord Sumption: On this point, Judge Eicke said that this was beyond the limits of evolutionary interpretation. I think that was the phrase that he used and I agree with that. Previously, the European Court of Human Rights had held on a number of occasions that the convention was not concerned with environmental protection. That was a proposition first stated by the court in Kyrtatos v Greece in 2003, and reaffirmed in the case of Jugheli v Georgia in 2017. More generally, it has been held that the court is not a suitable forum for resolving complex scientific issues, a point that was made in the Heathrow case involving this country.

Since the late 1970s, the living instrument doctrine has led to a degree of evolution that is not consistent with the ordinary rule applied in interpreting treaties, which is that you look at the language against the background that is relevant at the time that it was made. This is a problem with many aspects of the convention. On any normal reading of Article 8, it is concerned with privacy. It has developed into a general protection of personal autonomy and the development of the individual, something that potentially covers every aspect of human well-being. Historically, a huge range of subjects has been brought within the broad

range of privacy. That is a problem because it makes the extent of Article 8 pretty well impossible to predict if you cannot rely on the text.

I respectfully suggest that this is not consistent with the rule of law because the first requirement of the rule of law is that the law has to be available in advance, in clear terms, not retrospective, so that people and public authorities can be guided by it. You cannot therefore have courts making it up as you go along by way of a succession of ex post facto commands. You cannot have constantly moving goalposts and call it law.

This is a point that has frequently been made by the Strasbourg court itself when criticising domestic legislation, but I respectfully suggest that the rule of law applies as much to international jurisprudence as it does to domestic ones. You cannot simply evolve Article 8 in a direction you think is highly desirable and then retrospectively say that Switzerland has been in breach of it for years.

Lord Murray of Blidworth: Ms Reisch, I imagine you have a different view.

Nikki Reisch: I do. I respectfully say that this is nothing ground-breaking here. The climate change context is new—it is unfolding, evolving and escalating—but the principles applied here have been applied in other cases. It is clear that the protection of the rights under the convention—including, but not limited to, Article 8 and the right to private and family life—has been shown to encompass the protection against environmental harm and the threat that that poses. I respectfully submit that the effectiveness principle that applies to convention rights, to ensure that they are real and effective and not illusory, requires the court to confront climate change.

To suggest that climate change—which poses perhaps the most significant, real, demonstrable and escalating threat to human rights, including the ability to enjoy private life, one's health and welfare, and to live free from environmental harm—is outside the reach of the court would render the rights protected in the convention illusory. I think that it was a natural extension, with of course adaptation to the facts at hand, that the court engaged in here. Again, I stress that the legal goalposts are not shifting.

Lord Murray of Blidworth: Do you agree with Lord Sumption's remark that the effect of the extension of Article 8 to cover these situations means that Article 8 now potentially extends to anything that intrudes upon a person's well-being or personal autonomy?

Nikki Reisch: I do not think that the principle is limitless.

Lord Murray of Blidworth: Where then are the boundaries?

Nikki Reisch: The boundaries are to be found in conduct that is attributable to the state, due to a failure to regulate that conduct, so conduct that is subject to state regulation. The boundaries are to be found in the principles laid out in the court. I would like to point that out

to members, and can do so. If I do not have all the paragraphs to hand right now, I certainly will be happy to follow up in writing.

I think those boundaries are to be found in the criteria laid out for what conduct is subject to the state, either attributable to the state as public conduct or private conduct, subject to its regulation, and that has a real and appreciable effect on rights, where you can show a direct effect and/or serious risk of that effect on health or on enjoyment of private and family life. It is of course true that there is a wide variety of factual circumstances and threats that can impose such an infringement on rights.

We cannot carve out from the purview of the scope of the convention or the purview of the court as a body of judicial review all those matters that concern science. I believe the court cites the fact that, in past cases, it has drawn on expert science to understand the parameters of the issues before it when they involve technical and scientific matters.

There are still requirements that are common both to Articles 2 and 8 that there has to be an actual interference, and it is serious and ascertainable. It has continued to point to evidence of that in this case, so that it is not merely speculation about conduct.

Chair: I will take you up on your offer to write to us afterwards with the paragraphs that set out the principles and boundaries of this decision.

I will ask Jonathan a quick question. You were very critical of the living instrument doctrine. Clearly, this is quite a leap forward for Article 8, though Nikki has her views as to why it has boundaries. There have been other leaps forward in the past, whereby the convention has been interpreted to include things that were not within the contemplation of the original drafters, such as the retention of biometric data. Equally, the original drafters probably thought it was all right for homosexuality to be illegal, but that changed over time.

Lord Sumption: Homosexuality would be within even the narrowest and most literal construction of Article 8.

Chair: I agree; I am just giving it as an example. There are all sorts of areas where arguably the court has expanded to take into account developing mores, and, as I think Nikki is saying, developing science. Can we identify what is so noteworthy about this particular application of the living instrument doctrine that takes it beyond other applications, where other things that were not within the original contemplation were dealt with by the court?

Lord Sumption: Shall I address that?

Chair: Do you know what I am getting at? I am perhaps not phrasing it well.

Lord Sumption: You are absolutely right to point out that the process of evolving Article 8 to encompass large numbers of things that are not

included within the language that the parties have agreed is a long-standing issue. It has certainly been the case since the late 1970s, and in a few cases even before that.

The Strasbourg Court is undoubtedly—I say that with no critical intent—a very ambitious court. What is special about this? First, what is special is the degree and the implications of its intrusion into an exceptionally complicated and delicate issue, which is as political as any issue that you could identify—political internationally and political nationally, if we are to carry our populations with us, in what I quite accept is a very important endeavour.

Secondly, I think it breaks new ground, in that it is dealing with an extremely complex and controversial issue. No sensible person now denies the reality of climate change, but there is a great deal of controversy about timing, measures and targets. All of those are matters of controversy. The Intergovernmental Panel on Climate Change is an important and authoritative source, but it is not definitive. There is room for disagreement on these matters, and that is fundamentally a question for national politicians.

Finally, it breaks new ground in the overt way in which in the actual language says that democracy does not matter in a case like that; it is not a matter of elected representatives or electorates, it is something that is governed by the rule of law—by judges and by courts—as opposed to Parliaments. I know of only one other case in which the Strasbourg court has been quite so in your face about its determination not to allow democratic input into an issue. That is the notorious issue—very much less important than climate change—of prisoners voting, around 16 or 18 years ago. I do not think you need to be reminded of that issue, but that was a case in which it was overtly said, "What does democracy have to do with it? This is a question of law".

In those three respects in particular, I would say this is an advance in the same direction as we have seen before, but a great leap forward.

Chair: I suppose one could equally have said that in the past. To take the example of gay rights again, if it had been up to the majority, or up to democracy, there would have been no equal rights for homosexual people.

Lord Sumption: Absolutely, yes.

Chair: But because of human rights, and because of an expansion of Article 8, the Strasbourg court set the ball rolling on equal rights for gay people. I am wondering what the difference is. Some of us might argue that part of being in a democracy is that you have democratic decision-making, but you also have human rights, and human rights are there to protect minorities. Sometimes the majority will not be interested in the protection of minorities, and that is why we have to have human rights. Clearly, we are dealing with something a bit different here—whatever you think about climate change, it is not about minority rights; it affects

everybody. What is the difference here? What is the bridge too far? What is the Rubicon that has been crossed?

Lord Sumption: I entirely accept that there are some principles of the convention—in fact, quite a number of principles of the convention—that override as a matter of intentional law, though not national law, the decisions of national Parliaments. In other words, either we are in breach of the convention or we change our law to accommodate it. You have mentioned a classic example of that, which is gay rights. The point about gay rights is that it does not require an extension of Article 8 to bring those within the article. On any view, the privacy of the home embraces the sexuality of individuals. Although I suspect that this was not something that occurred to the draftsman, the reality is that on the perfectly ordinary reading of this, in accordance with the Vienna convention about the interpretation of treaties, I think any reasonable court would say that the persecution of homosexuals was contrary to Article 8. I do not have a problem about that, but once you extend it into fields not covered by language then you are in difficulties on the rule of law.

Chair: I hear the distinction you are making there and it is hard for me to argue against it, but fortunately I am not in the witness box this afternoon.

I will ask Nikki for her comments on that, and particularly on the important statement you made, Lord Sumption, that the court has basically said that democracy does not matter in a case such as this, it is the rule of law. Nikki, what do you think about that characterisation? Do you think that is what the court said?

Nikki Reisch: Perhaps unsurprisingly, I disagree. I do not think that is what the court said. The court said that it is up to the state how it legislates and implements, but that there is a duty to address, in meaningful ways, the climate threat to human rights. It cannot simply point to the fact that there was a referendum, that was decided in a certain way, rejecting a particular formulation of measures that were put forward. That does not eliminate the duty to take effective action to protect rights.

I want to underscore one point. If I am hearing Lord Sumption right, the factors that it seems he is arguing set climate change outside of the bounds of Article 8 or other aspects of the convention are that it is politically sensitive, complex and controversial, and that there is not definitive science on either the timing, measures or targets necessary. I respectfully beg to differ on those points. While it may be politically sensitive, that certainly has not kept it outside of countless courts around the world, which have recognised the justiciability of the issue. Arguably, climate change coming to the European Court of Justice at this time was in some ways late. It is somewhat of a surprise that it is coming only now. It has been a huge and mounting threat and impact on human rights for quite some time, so I do not think is too early, by any means.

As we saw very clearly illustrated in the ITLOS proceedings—which issued an opinion yesterday—and in this case as well, the degree of consensus on the timing of the reductions needed urgently and now to prevent warming reaching or exceeding 1.5 degrees, and the nature of the measures necessary, is crystallised to such an extent that it is not about any kind of judicial legislating; it is just drawing out the duties that flow from that clear science. We know what is causing the climate crisis, and we know what its consequences are for human beings and the environment. Therefore, there is a clear legal obligation to take steps to address it, and those steps have to be scientifically capable of achieving the kinds of reductions on the near-term timescale required. I do not think that is controversial at this point; in fact, it has been quite accepted by most courts.

Chair: I am very conscious of the time. I think this is very important, though we are not going to cover everything and we will have to send you some follow-up questions.

Lord Sumption is very much focusing on this going beyond the privacy protections of Article 8, but does not Article 8 protect bodily autonomy, which brings within it health? Is this not within the health aspect? Is that not what the court focused on here? I am not sure I understand this properly, but it was my understanding that the group who were recognised as having standing raised issues about the impact on their health, as senior members of the community, of the failure to tackle climate change. My understanding is that Article 8, while importantly dealing with privacy, also deals with our right to family life and our bodily autonomy, and that includes health. Is that not how it comes in under Article 8?

Nikki Reisch: That is absolutely right. Thank you, Chair, for raising that. I wanted to come back to that point because in quite a number of cases in which the court has relied on Article 8 in the past it has been because of environmental threats to or effects on health. It has made it very clear that the adverse effect on human health, well-being and quality of life fall within Article 8, which covers that one cannot enjoy the right to private life if one does not have health or is imperilled by an environmental threat. I think that here, the abundant evidence, not just for these women, cited to you, including from the IPCC, shows those real and escalating health impacts.

Chair: I did say that I would let you both go by 4.30 pm.

Lord Sumption: The actual language of Article 8 is that everyone has the right to respect for his private and family life, his home and his correspondence. There is nothing in the actual language of Article 8 about health protection. It is all about privacy, in the strict sense of that word. It is an evolutionary answer and not a textual answer.

Chair: Has it not already been used to cover health? In a variety of other cases, has Article 8 not been interpreted as covering health?

Lord Sumption: Not environmental protection, no.

Chair: Not in the field of environmental protection, but in other fields.

Lord Sumption: In other fields, yes. One would need to go through the facts of those to make that a useful answer.

Chair: I will have to ask you both to follow up—I did say I would let you go at 4.30 pm. We have lots of other questions for you because it is such a fascinating area. There is clearly a very strong divergence of view between the two of you. I am left unconvinced as to which I think is correct, but it is very interesting. I know, Lord Sumption, you have already submitted a position paper to us.

Lord Sumption: That is just concerned with the facts.

Chair: I wonder if we might try your patience a bit further by following up with a few questions, which we will put together as a committee. I am very sorry that we started late. It was unavoidable, and you have both been very patient with us. If you do not mind, we will follow up with written questions because we want to make sure that we understand this. I know that colleagues have further questions, and I certainly do as well. Thank you both very much indeed.