



HAL
open science

The Future of European Climate Change Litigation

Torre-Schaub Marta

► **To cite this version:**

Torre-Schaub Marta. The Future of European Climate Change Litigation: The Carême case before the European Court of human Rights. 2022. hal-03910073

HAL Id: hal-03910073

<https://hal.science/hal-03910073>

Submitted on 8 Dec 2023

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

The Future of European Climate Change Litigation The Carême case before the European Court of human Rights

Marta Torre-Schaub

Senior Professor Researcher at the Centre National de la Recherche Scientifique (CNRS), France
Director of ClimaLex. Institut de sciences juridique et philosophique de la Sorbonne, Université Paris 1
Panthéon-Sorbonne

On 7 June 2022 the European Court of Human Rights (ECtHR) [relinquished jurisdiction](#) to the Grand Chamber to hear the application lodged on 28 January 2021 on behalf of Damien Carême, former mayor of the Commune of Grande Synthe in France on the basis of Articles 2 and 8 of the European Convention of Human Rights (ECHR).

This application involves the 10th climate case for which the ECtHR has been called upon in recent months. The Carême case is interesting in several respects. While it shares some characteristics with other climate change affaires, it differs in some key respects, making it a unique case of its kind at the moment. Like other climate applications before the ECtHR (Swiss and Danish cases), the Carême application is a continuation of a climate case presented before national courts – in this case, the French Administrative High Court Conseil d'Etat CE. However, it has an original feature, since it is presented personally by Mr Carême, given that his individual application had been rejected by the French CE in the Grande Synthe case for lack of interest in acting. The CE had accepted the arguments based on the interest to act of the municipality of Grande Synthe, the municipalities of Grenoble and Paris, as well as various NGOs, but had rejected the individual conclusions of Mr. Carême. The CE also did not accept the applicant's conclusions concerning [conventional articles](#) 2 and 8.

In order to better understand what the new appeal consists of, it is appropriate to first present the application and then analyse the Grande Synthe case before the French CE. This will outline the possible responses of the ECtHR. It is also interesting to place the case in the context of other climate cases before the Strasbourg Court to better analyse the similarities and differences. This will lead to better understand the possible solutions of the Carême case.

The Carême application before the ECtHR

The applicant submits that the failure of the authorities to take all appropriate measures to enable France to comply with the maximum levels of greenhouse gas emissions constitutes a violation of the obligation to guarantee the right to life, enshrined in Article 2 of the ECHR, to ensure the protection of the environment and to guarantee the "right to a normal private and family life", enshrined in Article 8 of the Convention. In particular, the applicant argues that Article 2 places an obligation on States to take the necessary measures to protect the lives of persons under their jurisdiction with regard to environmental hazards which may affect life. He argues, firstly, that by rejecting his application on the grounds that he had no interest in bringing proceedings, the Council of State had disregarded his "right to a normal private and family life". Secondly, that he is directly affected by the inadequacy of the government's action to combat climate change since it increases the risk for his home to be affected in future years to come, -as early as 2030-. This risk does not allowing him to plan his life there serenely. Finally, he added that the extent of the risks that would affect his home would

depend in particular on the results obtained by the French government in the fight against climate change.

The context : the Grande Synthe case before the French High Court –Conseil d’Etat-

On [19 November 2019](#) confirmed on [July 1st 2021](#), the French CE issued a [landmark decision](#), clarifying a number of points relating to France's climate commitments and their consequences for the State. The case was referred to the CE in February 2019 by the municipality of Grande Synthe, its Mayor Damien Carême, joined by the cities of Paris and Grenoble in their request, and then by the four NGOs that make up the "[affaire du siècle](#)" group (« the case of the Century »). The municipality argued that it is exposed in the medium term to increased and high risks of meteorological and geological phenomena induced by global warming. Because of its immediate proximity to the coast and the physical characteristics of its territory, it is exposed to increased and high risks of flooding, to an amplification of episodes of strong drought but also to significant damage to built-up areas given the geological characteristics of the soil. Although these concrete consequences of climate change are only likely to have their full effect on the territory of the municipality by 2030 or 2040, their inevitability, in the absence of effective measures taken quickly to prevent their causes and in view of the time frame for action by public policies in this area, justifies the need to act. According to the data published by the National Observatory on the effects of global warming, the Dunkerque area has been identified as having a very high level of exposure to climate risks. Consequently, the municipality of Grande-Synthe, having regard to its level of exposure to the risks and to their direct and certain impact on its situation and the interests for which it is responsible, has an interest which gives it standing.

The requests contained in the applications were aimed, on the one hand, at taking all useful measures to curb the curve of greenhouse gas emissions produced on national territory so as to respect, at the very least, the commitments made by France at the international and national levels. Secondly, it was requested that immediate measures be implemented to adapt to climate change in France. Finally, the request was for all legislative and regulatory initiatives to be taken in order to "make climate priority mandatory" and to prohibit any measure likely to increase greenhouse gas emissions.

It follows from the stipulations and provisions that the measures the European Union and France, signatories to the UNFCCC and the [Paris Agreement](#), have undertaken to combat the harmful effects of climate change consists on reducing, in successive stages the level of these emissions. Although these stipulations require complementary acts in order to produce effects with regard to individuals and are, consequently, devoid of direct effect, they must nevertheless be taken into consideration in the interpretation of the provisions of national law, which, referring to the objectives that they set, have the purpose of implementing them.

The French CE in its two decisions found that it was clear from the documents in the file that, at the end of the 2015-2018 period, France had substantially exceeded the initial carbon budget it had set for itself, achieving an average reduction in its emissions of 1% per year, whereas the required reduction should be around 2.2% per year. The years 2015, 2016 and 2017 saw an increase in greenhouse gas emissions and 2018 led to a 4.5% increase, which exceeded the reduction targets for that year. In this respect, the independent High Climate Council has [highlighted](#) the inadequacy of the policies to achieve the targets in its annual reports for 2019 and 2020. But the CE rejected two of the conclusions of the application: the one concerning the "climate priority", for lack of precision on the concept itself, and the application of Mr. Carême on a personal basis. In particular, the CE rejected the applicant's

claim that the geographical location of his home, which could be subject to a risk of marine submersion in the future, makes him vulnerable.

Consequently to the rejection of his request before the French CE for lack of legitimate interest, Damien Carême, former mayor of the Commune of Grande Synthe, on the basis of Articles 2 and 8 of the European Convention of Human Rights (ECHR) filed an application before the ECtHR. The Carême's application is the 10th climate case before the Strasbourg Court. In order to better understand the possible solutions of the Carême case it is interesting to place the case in the context of the ECtHR interpretation of articles 2 and 8 in other case law raising environmental issues. Also, the exam of other climate applications before the Strasbourg Court will enlighten us about the possible ECtHR responses to the Carême case.

The Carême case in the light of ECtHR Environmental case law

The ECtHR has built consistent jurisprudence on environmental issues on the basis of the interpretation of articles 2 and 8 of the European Convention (ECHR). In the absence of a specific «human right to a healthy environment», the Court has developed a very interesting doctrine around those articles, which can be applied too to the Carême case.

a) The interpretation of article 2 in light of industrial activities and foreseeable disasters

The 2004 case of [Oneryildiz v. Turkey](#) allowed the ECtHR to define the positive obligation for States to take the necessary measures to protect the lives of persons under their jurisdiction, as set out in Article 2(1) of the Convention, in the context of any activity, public or otherwise, which may affect the right to life. With regard to environmental issues, Article 2 can, for instance, be applied to activities of an industrial nature which are inherently dangerous or the state's duties when it comes to foreseeable natural disasters. In the present case, two possibilities are offered to the applicant to enrich his argument before the Court.

With regard to the first, that concerning industrial activities, the link with climate change would come through the GHG emissions emitted by France, the surplus of which was censured by the CE itself in its Grande Synthe decision of 2019 and 2021, criticising the lack of control by the administration regarding the national emissions trajectory for certain periods (2015-2018). This was echoed by the Paris Administrative Court in both decisions in the context of the case of the century, « affaire du siècle », considering that the surplus of GHG emissions for the period 2015-2018 had [produced an ecological damage](#) to the atmosphere.

With regard to the second possibility, that of foreseeable natural risks, there is no doubt that the risk of marine submersion that the municipality of Grande Synthe is facing endangers the lives of its inhabitants - including Mr Carême. It is a risk that can be foreseen, given the numerous expert opinions provided in the context of the Grande Synthe case before the CE and the « Case of the Century » before the Paris Court, which concerns the entire Atlantic coast of France. Other judgments have also ruled on the issue of the lack of predictability of administrative authorities with regard to natural disasters related to floods and other extreme events suffered in France in the past, which [can be linked to both](#) climate change and a lack of preventive action by the administration.

However, there are several limitations in the context of the danger mentioned by Mr Carême: on the one hand, the question of the imminence of the danger and, on the other, whether it is sufficiently serious and real. Although the fact that there is a risk of submersion throughout the built-up area where the municipality of Grande Synthe and the applicant's home are

located is not debatable, the EC had nevertheless rejected this argument for lack of interest in taking action, considering that it was not certain that Mr Carême would continue to live in the same place until 2040, the estimated date on which submersion could occur. It is in particular on this point that the application before the ECtHR could be based to demonstrate that the risk is indeed present, serious and real, and that the requirement of its imminent nature should not prevent the Court from assessing the violation of the obligation of the State consisting in putting in place a legislative and regulatory framework aimed at effective prevention and deterring the right to life from being jeopardised. This overriding obligation, which had to be translated into preventive measures on the part of the administration - for example, the establishment of a prevention plan and a plan for adapting to climate change - must be at the heart of the applicant's argument, if the Court is to find a violation of Article 2.

With regard to the first postulate, that relating to industrial activities, the Court is accustomed to examining Article 2 in the light also of Article 8, concerning the right to privacy and a home (see the cases [Budayeva & others v. Russia](#)). According to these case law developments, the Court has developed a line of interpretation of Articles 2 and 8 considering that the preventive measures that must be put in place by States concerning the authorisation, establishment, operation, safety and control of the activity in order to ensure the effective protection of citizens whose lives may be exposed to the dangers inherent in the field in question. The right to information as well as the respect of adequate procedures make it possible to detect the failures and deficiencies of the State. It would thus be useful to be able to link this line of jurisprudence of the Court to the decisions of the TA of Paris in the framework of the "affaire du siècle" affirming the fault of the French State for not having acted sufficiently to mitigate and reduce GHG emissions from various sectors of activity - including the fossil industry, transport and other activities.

However, it is known that the Court also applies the method of the margin of appreciation left to the States concerning concrete and particular measures. In the case of climate change and France's public policies, the issue is delicate since, on the one hand, two courts have already considered that they were insufficiently ambitious. But on the other hand, and taking into account the Covid crisis which had succeeded in lowering France's emission levels and the current armed conflict in Ukraine, causing an unprecedented energy crisis in the heart of Europe, the State will probably be able, like the other EU States, to readjust its emission trajectories in order to provide for the energy needs of the population for the coming winter months. It would thus be possible for the Court to allow the French State to consider that it has taken effective measures, left to its own discretion, in order to be able to adapt to the consequences of the war in the heart of Europe. This could be the first obstacle to a full interpretation by the Court of the second part of Article 2.

Returning to the hypothesis that the risk of marine submersion suffered by the inhabitants of the municipality and Mr Carême, the applicant, should be regarded as a natural disaster for the purposes of the violation of Article 2, the Court will no doubt look at the various preventive options available to the public authorities: has the risk been sufficiently mitigated? The Court's interpretation of the violation of positive obligations in this case consists in examining the State's capacity to deal with this type of violent and extreme natural phenomenon. The condition of the foreseeability of the risk would be fulfilled in this case since this was admitted for the municipality itself in the EC decision of 2019 and reaffirmed by the decision of 1 July 2021. The preventive measures, as in other cases before the Court, would consist in particular in the adoption of land-use policies and the control of urban

planning in the areas concerned, which does not seem to be the case given the absence of a sufficiently protective and realistic adaptation plan.

b) The interpretation fo article 8 in light of risk, harm and vulnerability

Concerning article 8, since the 1994 [Lopez Ostra case](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22002-10606%22%5D%7D) <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22002-10606%22%5D%7D> }, the ECtHR has interpreted the right to respect for private and family life and a home as a human right to live in a quality environment, a condition for survival, but also for dignity. It is through the right that the Court recognises that this right implies the absence of environmental nuisances that exceed an acceptable level. In most cases, interference with the home has an impact on private life. The same approach was taken in the 2005 [Fadeyeva judgment](#) in which the ECtHR, faced with ambient air pollution in the vicinity of a steel factory that had at least indirectly caused the deterioration of the applicant's state of health, also considered that the pollution had had adverse consequences on her quality of life at home.

The second criterion to be taken into account in assessing compliance with Article 8 of the ECHR concerns the type of harm that may be penalised under that Article. The Court is often confronted with a wide variety of situations involving harm to health or well-being alone, actual harm or the risk of harm, significant harm or harm that does not reach a minimum threshold of seriousness. But the ECtHR always requires that there is a sufficiently direct link between the victim-applicant and the damage suffered. Also, in some cases, the infringement of environmental rights is unquestionably proven, while in other cases, there is a risk, as in the Carême application. However, the Court does not always accept the infringement under Article 8. Thus, when the risk to health is discussed, the Court does not rely on the risk as such to establish the applicability of Article 8, since the mere existence of a risk has repercussions both on mental health (anguish, anxiety, distress) and on well-being. The Court has ruled a few times and unequivocally on the existence of risk and insists on the need for the "victim-applicant" faced with a "risk" to have a [sufficient probability of occurrence](#) of the risk. . Only in very exceptional circumstances may the risk of a future violation nevertheless confer on an individual applicant the status of 'victim', provided that he or she produces reasonable and convincing evidence of the likelihood of a violation occurring in his or her personal regard ; mere suspicion or conjecture is insufficient in this respect.

Also for the Court, Article 8 cannot be violated if the nuisance is not serious enough to be taken into account. While the criterion is clearly established, nothing is specified as to its scope. For the Court, the estimation of this threshold is relative and depends on the circumstances of the case, such as the intensity and duration of the nuisance, the physical and psychological impacts on an individual's health and quality of life, but also the characteristics of the existing environment; measuring this harm can be [difficult and sometimes subjective](#) since this harm also [depends on](#) "whether the harm caused was comparable to that associated with the environmental risks inherent in living in any modern city" . The Court accepts, on this point, that such reasonable and convincing indications may result from an environmental impact assessment procedure which would establish a sufficiently close link between the hazardous effects of an activity and private and family life.

Lastly, with regard to the obligations of States, in addition to procedural obligations (right to information, consultation, participation), in substantive matters, the Court usually considers that it is up to the public authorities directly or indirectly responsible for the interference to

strike a "fair balance" between the objectives pursued by the interference and the protection of the rights of individuals, while having a wide margin of appreciation

The Carême case in the context of other climate cases before the ECtHR

Of the [ten applications](#) currently before the ECtHR, four have so far been communicated to the parties. This section analyses two of them while highlighting the different issues that the Court may be confronted with. Some may be points of convergence with the Carême case as [we pointed out in our 2022 study](#).

The [application of the Swiss senior citizens](#) (Klimaseniorinnen) concerns Switzerland's climate obligations. The applicants point to the fact that they suffer from health problems that are aggravated during periods of heat waves and that impact on their health and living conditions. The application brought by the Swiss senior citizens consists of an application that has already exhausted domestic remedies. This point is common to the Carême application. The Swiss application alleges violations of Articles 2, 6, 8 and 13 of the Convention (respectively right to life, right to private and family life and respect for the home, right of access to justice and right to an effective remedy). This case also raises issues of time and generational justice. It is a generational issue for victims already suffering from the negative consequences of climate change, aggravated by their vulnerability - their old age. Indeed, the senior claimants highlight their current health problems by insisting both on their particular vulnerabilities and on the Swiss state's omissions from its positive obligations.

It is the issue of vulnerability that is common to the Carême application. In the Swiss case, the [third party intervention](#) provides rich and interesting arguments on the increased vulnerability of the applicants. This participation also emphasises the links between the vulnerability of the elderly applicants and the need for the Swiss State to develop measures to avoid a violation of articles 2 and 8 of the Convention. On this point too, there may be [common ground](#) with the Carême application.

Furthermore, and with regard to admissibility, it is crucial to emphasise the need for the Strasbourg Court not to avoid entering into the examination of this application. There are intertwined issues in this case relating to both the notion of "real and immediate risk" and that of the definition of "victim directly bearing" the alleged omissions. These points are also a fundamental common element with the Carême application. It is the question of flexibility in the understanding of "victim status" that will be crucial to the admissibility of this application. On this point, the Carême application also presents interesting elements, since Mr Carême considers himself to be a victim of future risks linked to the negative consequences of climate change. This will require the Court to consider the interpretation of risk.

Even more substantively, the Court will also have to analyse whether the omissions alleged by the Swiss applicants are inactions falling within the category of breach of positive obligations. Again, the similarity with the Carême application is interesting. The Court will have to assess, as it is already used to, the measures already taken by the state against those that would protect the applicants from a violation of Articles 2 and 8.

The question of the standards of comparison that the Court could use to determine whether or not the Swiss State has failed to fulfil its obligations is important too in this case and the Carême application. The obligations determined by international law, in particular the Paris Agreement, could allow the Strasbourg Court to analyse the extent to which the measures taken are those actually required by the international obligations to which the State has

subscribed. On this point too, the Carême application can be compared, as the French Council of State itself had already agreed to "take into account" France's international climate commitments, including the Paris Agreement.

The [Norwegian application](#) (Greenpeace Nordic) follows the case that has already been tried twice before norwegian national courts. This brings it closer to both the Swiss application and the Carême case. Like both of them, it raises the question of a violation of Articles 2 and 8 of the ECHR due to the failure of the Norwegian administration to prohibit oil exploitation in the Barents Sea. The issues that could raise possible problems requiring adjustments by the Court in terms of admissibility are those relating to « victim » status, including in relation to the sequence of time to which the applicants refer: not only the present time, but, as in the Duarte case, the question of the future threat to young people. On this point the Carême application will find the same difficulties.

On the merits, according to the Court's [Practical Guide to Admissibility](#) , where the Convention right invoked is not absolute and is subject to explicit or implicit limitations, the Court is often called upon to analyse the proportionality of the interference complained of. When the Court is called upon to examine the interference of public authorities with the exercise of one of the above-mentioned rights, it always carries out a three-stage analysis:

- Is the interference provided for by a sufficiently accessible and foreseeable "law"?
- If so, does the interference pursue at least one of the exhaustively listed 'legitimate aims' (the repertoire of which varies slightly depending on the article)?
- If so, is the interference 'necessary in a democratic society' to achieve the legitimate aim it pursues? This amounts to asking whether there is a relationship of proportionality between that aim and the restrictions in question. If the answer to each of these three questions is negative, the interference is considered not to be in conformity with the Convention.

In considering the last of these three questions, the Court must take into account the margin of appreciation available to the State, the extent of which varies according to the circumstances, the nature of the right protected and the nature of the interference. Thus, in the context of the Norwegian climate application, the Court will have to consider whether the Norwegian national climate law provides sufficient protection for the younger generations so as not to "subject them to undue restrictions in the future with regard to their welfare". On the second question, however, the Court may be faced with a dilemma, as the [Norwegian Climate Change Act](#) , which allows for the exploitation of oil in the Barents Sea, does pursue a legitimate aim, which is Norwegian economic development. The proportionality test will have to be carried out here - should the Court agree to do so - between this "legitimate aim" and another equally legitimate interest which is that of "sustainability", namely "ensuring a sustainable future for the younger generation". In the end, it is a question of "protecting the future life and living environment, in the broad sense" of the young applicants. This will undoubtedly be one of the possible points of inflection for the Court, which could enable it to rule in favour of the applicants.

The question of « legitimate aim » is a common point bringing the two cases together: in the Carême case, the « legitimate aim » could be interpreted by the Strasbourg Court as the need to preserve the stability and sustainability of the applicant's, Mr Carême's, living conditions and well-being in the enjoyment of his home.

Conclusion

The Strasbourg Court will have to enter the debate opened up by these various climate cases. The Carême application opens up other questions while extending those raised by the other climate applications here analysed. It will be difficult for the Strasbourg judges to avoid answering them, because even if it remains a classic examination of applications: admissibility, procedural rules and substantive rules, the question that arises in all these cases is ultimately that of the compatibility of the actions or omissions of the various States with the protection of our future lives and the development of our living environment. The Court will have to be open to a shift towards a more ecological interpretation of the Convention. It will have to assume its role as the European leader in the protection of human rights. This will inevitably lead it to demonstrate its capacity to protect these rights in a world on the verge of exhaustion. This is not only a challenge for the Court, but above all an opening up for all Human Rights Law. These climate cases should therefore not be seen as just another environmental case, or as anecdotal developments at the Court, but as the Court's ability and talent to rise to the historic task required.

Suggested citation :

Torre-Schaub Marta, « : The future of European Climate Change Litigation. The Carême case before the European Court of human Rights », 2022/08/05 verfassungsblog.de