

Rechtsanwaltskanzlei | Krömer

Rechtsanwalt Dr. Peter Krömer | Rechtsanwältin Mag.^a Michaela Krömer, LL.M. (Harvard)

The Registrar
European Court of Human Rights Council of Europe
F-67075 Strasbourg Cedex France
EINSCHREIBEN

St.Pölten/ 25.03.2021

New application: [REDACTED] v Austria and request for expedite proceedings under Rule 41 (expedite proceedings)

Please find enclosed our clients' application form, supporting documents and appendix. The application concerns a person whose right to private and family life is already directly and severely impacted by the climate-crisis induced increase in average temperature as well heatwaves, due also to the failure of the Austrian government to set effective climate measures in order to reduce greenhouse gas emissions. The application is brought after having exhausted all national remedies available, with the final decision from the Austrian Supreme Court communicated to the parties on 12 October 2020.

Under Rule 41 of the Rules of Court, we request that the Court expedite this application as its contents reflect Categories I, II, and III of the Court's Priority Policy. We ask that the Court to prioritize this application in recognition of its extreme urgency and the profound threats to the physical and psychological integrity of the Applicant. The Climate crisis is currently the most pressing emergency faced by humanity. It also poses particularly serious and urgent risks to the Applicant, who as a patient suffering from multiple sclerosis and the Uhthoff's syndrome is signifi-

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cantly affected by the increase in average temperatures as well as heatwaves. At temperatures of about 25°C plus, Applicant is no longer able to walk without the support of a wheelchair. These impacts are continuously exacerbated to the effect that Applicant loses complete control over muscular movement at temperatures of about 30°C and beyond.

We further request that the Court expedite this application as it raises an important question of general interest that could have major implications for domestic legal systems and the European system. Despite the Court's extensive jurisprudence addressing violations of the Convention stemming from adverse environmental factors, the Court has yet to address the specific and unprecedented human rights violations originating from climate impacts. As cases addressing climate impacts and concomitant violations of rights increase, domestic European courts could greatly benefit from this Court deciding such a case.

For the application for priority under Rule 41, paras 9-13, 30 of the application are the most pertinent

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Michaela Krömer', written in a cursive style.

Mag Michaela Krömer, LL.M

Subject matter of the application

All the information concerning the facts, complaints and compliance with the requirements of exhaustion of domestic remedies and the six-month time-limit laid down in Article 35 § 1 of the Convention must be set out in this part of the application form (sections E, F and G). It is not acceptable to leave these sections blank or simply to refer to attached sheets. See Rule 47 § 2 and the Practice Direction on the Institution of proceedings as well as the "Notes for filling in the application form".

E. Statement of the facts

58.
 APPLICANT IS DIRECTLY AFFECTED BY CLIMATE-CRISIS INDUCED INCREASE IN AVERAGE TEMPERATURE AND HEATWAVES
 Since 2003, Applicant suffers from multiple sclerosis ("MS"), an autoimmune neurodegenerative disease of the central nervous system ("CNS"). He has a certificate of disability, attesting a degree of disability of 60 %. (Doc 1) Each MS patient experiences a unique set of symptoms. Yet, 60 to 80% of patients, including Applicant, suffer from temperature sensitivity, meaning that their specific symptoms of disease worsen with increase of external temperatures. This effect, known as UHTHOFF'S SYNDROME, can only be remedied by decrease of overall (body) temperature. No medical treatment exists. (Doc 2; p 6, 11-15) As described in his medical report and personal statement, Applicant's symptoms of disease consist in signs of paralysis. At a temperature starting at about 25°C - due to the Uhthoff's syndrome - the impairment of his muscular movement severely worsens, meaning that he starts to get dependent on his wheelchair. Especially, when leaving the house. This impact increases to the extent that at temperatures of about 30°C and plus, he is fully dependent on an electric wheelchair and hence 100 % external support, as the muscular strength in his arms is too weak for pushing the wheels of his mechanical wheelchair, let alone do anything else. On hot days, he hence experiences a different level of disability than usual. Up until 25°C he can walk independently or with the help of two crutches (depending on general health condition, length of distance). The increase in average mean temperature caused by the climate crisis cages him to his home for increasingly longer period of time, forcing him to live an isolated family and private life. Besides, the strenuous effects of this isolation, Applicant is severely burdened by the humiliation and increase in anxiety he suffers due to the complete loss of control over his muscular strength at 30°C plus. (Doc 1, 3; AS paras. 1-2)

THE AVERAGE TEMPERATURE IN AUSTRIA (AND APPLICANT'S HOME REGION) HAS INCREASED BY ABOUT 2°C DUE TO THE CLIMATE CRISIS

Austrian average temperature has been rising faster than the global average, namely by almost 2°C since 1880 and by about 1°C since XXXX, the year Applicant was born. The faster rate of warming also applies to Applicant's home region where the average temperature has risen by about 2.4°C above preindustrial level. (Doc 4, p 252, Doc 5, p 1142; AS paras. 3-4) This temperature rise has led to an almost twofold increase of the number of days with temperature reaching and exceeding 25°C, and a more than sixfold increase of days with temperatures of 30°C or higher, also in Applicant's home region. (AS para. 5) The temperature rise has also led to an increase in heatwaves. The summers 2003, 2015, 2017, 2018, 2019 have been the hottest on record in Austria increasing the suffering for Applicant during these periods. (Doc 5, p 1142; AS paras. 1-2, 8) According to the Austrian Panel on Climate Change ("APCC"), the International Panel on Climate Change ("IPCC"), and the Lancet Report, this strongly impacts people with chronic diseases such as Applicant increasing the risk of premature mortality and overall impairment for Applicant. (Doc 7, p 1893-1894, DOC 9; AS paras. 9, 31) Pursuant to this robust data of Applicant's home region, a decadal-mean, referred to as "Threshold Exceedance Days per Year" for 25°C ("TEDY25C) and a devised Uhthoff Impairment Amplification Factor ("UIAF") can be derived as shown by the submitted expert report. This maps out the average impact for Applicant due to Uhthoff's syndrome and with increasing temperatures. It concludes that Applicant's overall temperature induced impairment due to warm and hot days has – on average - more than tripled. (Doc 8; AS para. 7-8)

THESE DIRECT IMPACTS ON APPLICANT WILL INCREASE IF GREENHOUSE GAS EMISSIONS ARE NOT RAPIDLY REDUCED

If no effective climate protection measures are set, temperatures in Austria will rise by about 2°C in the period 2021-2050 and by about 4°C until in the period 2071-2100 compared to the period of 1971-2000, which amounts to 3°C between 2021-2050 and about 5°C for 2071-2100 compared to preindustrial levels. Under these circumstances, the IPCC predicts a global mean temperature increase between 2.6°C and 4.8°C (with a mean of 3.7°C) with high confidence, resulting also in frequent and extreme weather events, particularly for Applicant's home region and Respondent. (Doc 5, p 1143, Doc 7, p 1843; AS paras. 10-13)

This translates to a further increase of warm and hot days, which will increase drastically if business as usual remains and no climate measures are set. The temperature rise will also result in an increase of warm spells and rise in very extreme heatwaves, especially for Central Europe, also for Applicant's home region. (Doc 7, p 1893-1894, 1843; AS paras. 10-13) Although the number of days impacting Applicant will increase even at a global average of 1.5°C increase (compared to the current global 1°C) holding the global temperature increase to 1.5°C would drastically reduce the frequency and intensity of hot extremes as well as the length of warm spells. (Doc 7, p 1843; AS para. 13) compared to an increase of 2°C or more.

Statement of the facts (continued)

59.
RESPONDENT HAS FAILED TO COMPLY WITH INTERNATIONAL CLIMATE LAW TARGETS IN LINE WITH BEST AVAILABLE SCIENCE

Already in 1994, Respondent ratified the United Nations Framework Convention on Climate Change ("UNFCCC") and consented to stabilizing greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Respondent reaffirmed its obligation to reduce Greenhouse Gas Emissions ("GHG") in 2016, by ratifying the Paris Agreement. Respondent thereby also acknowledged its individual duties under human rights, in particular the right to health and rights of vulnerable persons with disabilities based on best available science (Paris Agreement, Preamble and Articles 4, 7, 14). By joining both, the UNFCCC and the Paris Agreement, Respondent consented to the guiding principles of equity, common but differentiated responsibilities and respective capabilities ("CBDR-RC"), and its duty as a developed state to "take the lead" in reducing emissions. (AS paras. 14-15). When adopting the Paris Agreement, the Parties invited the IPCC to provide a special scientific report regarding the impacts of global warming of 1.5°C ("SR 1.5°C"). The Parties, including Respondent, thereby affirmed the IPCC as the scientific authority concerning on global climate science. Respondent also acknowledged the impacts on human rights of current degree of warming and the importance of limiting any future warming to 1.5°C. In order to significantly reduce climate impacts, including adverse health effects in general and the health of people with chronic diseases, such as Applicant, in particular. (AS paras. 15-16) There is global consensus in politics and science that a 1.5°C limit is the scientific benchmark to calibrate national mitigation efforts. (AS para. 16) The efforts by the European Union in its New Green Deal Plans also contain a 1.5°C target, as a temperature increase by 2°C would have devastating consequences. (Proposal for a Regulation Of The European Parliament And Of The Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999, 2020)

In 2019, Respondent's legislator, Austria's National Council, declared a national Climate Emergency based on the scientific findings of the IPCC, the APCC and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services ("IPBES"). In its statement of 25.9.2019, Respondent confirmed its commitment to the 1.5°C target to solve this emergency and declared the mitigation of the present climate crisis based on this target its utmost priority. (Doc 13; AS para. 17) Yet, no revised climate targets have consequently been set by Respondent. The Austrian Climate Protection Act ("Klimaschutzgesetz", "KSG") contains no specific measures, no complaint procedure (if targets are not met or are too low or not embedded), and from 2017 to 2020 no updated European climate targets. At present, no GHG reduction target has even embedded in the KSG for the years 2021 and beyond. (AS paras. 25-27)

Also in the past, Respondent has consistently failed to set any effective climate measures. Despite recurring warnings by the scientific community, Respondent was not able to fulfill its obligations under the Kyoto Protocol and under the Effort Sharing Decision ("ESD") by effective GHG reduction. In the last years, GHG in Austria rose even above already low national reduction targets. The GHG level today is practically the same as in 1990. Emissions also didn't go down at all between the years 2010 and 2019. (Doc 5, p 1168, Doc 14, p 3295; AS paras. 18-20)

According to the APCC, it is de facto impossible for Respondent to meet the 1.5°C target by way of Respondent's current climate measures. Respondent's current national contributions under the Paris Agreement do not suffice to meet the 1.5°C. (Doc 5, p 1135, Doc 15, p 3318; AS paras. 21-22) Pursuant to the IPCC, states have to achieve global CO2 neutrality by about 2050 with halving emissions by 2030 if they want a 66% chance of limiting the temperature rise to 1.5°C. (Doc 7, p 1665). For Respondent this amounts to a CO2 budget of 700 Mt CO2 equ., meaning that Respondent has to reduce emissions by 55% until 2030 and achieve CO2 neutrality – emission reduction by 90 to 95% - by 2040 (Doc 15, p 3318; AS para. 29). If insufficient climate policy such as Respondent's (among the wealthiest countries worldwide) were pursued by all countries, the ultimate objective of the UNFCCC, namely „stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system“ could never be reached. Respondent as wealthy industrialized state had per capita CO2 emission of 8.25 tCO2/cap/yr in 2019, which was above the EU average of 6.47 CO2/cap/yr (AS para. 18)

RESPONDENT EVEN ACTIVELY TAKES MEASURES THAT EXACERBATE THE CLIMATE CRISIS

The European Commission criticized Respondent's national energy and climate plan ("NECP) pursuant to the EU Regulation 2018/1999 on Governance of the Energy Union and Climate Action for the lack of ambition regarding effective measures as well as for submitting a comprehensive list of subsidies and incentives counterproductive to climate and energy targets. (Doc 16, p 3331f, p 3349ff; AS para. 24)

To this day, no comprehensive list has been submitted by Respondent. Already in 2016, the Austrian Institute for Economic Research ("WIFO") published a comprehensive list of Respondent's climate counterproductive measures. (Doc 17) Not a single one of these subsidies, incentives and counter-productive measures has been removed by Respondent until today. At present, Respondent subsidizes climate counterproductive actions in realm of energy and transport in the amount 15 billion EUR/ year on average, of which 4,4 million are directly related to its annual budget. (Doc 19; AS para. 23)

Statement of the facts (continued)

60.

STAYING WITHIN THE TEMPERATURE LIMIT OF 1,5°C WOULD SIGNIFICANTLY IMPROVE APPLICANT'S OVERALL WELL-BEING
 In its SR 1.5°C the IPCC found that limiting temperature increase to 1.5°C instead of 2°C would reduce heat-related impacts with high confidence. A maximum of 1.5°C warming would also diminish the further increase days beyond 25°C with high confidence. (Doc 7, p 1843-1844; AS para. 30) It is scientifically undisputed that measures have to be set now in order to be effective and reach this target. Postponement could lead to exceeding critical thresholds, known as "tipping points", which would constitute significant negative and even irreversible changes in the climate, and ultimately greater harm for Applicant. Some of which might have already been reached. This risk consistently increases with an overall temperature rise between 1 and 2 °C (Doc 7, p 1915; AS para. 30).

Applicant is 40 years old and has an average life expectancy of 68,35 years, yet already suffers from the present increase in average temperatures. (Doc 1, 3; AS paras. 1-2, 9) Most likely he will have to suffer for an increasingly longer period of time for many more years, with his well-being worsening as number of days reaching and exceeding 25°C, as well as 30°C will rise in light of inadequate climate policies, such as Respondent's. In some cases, the Uthoff's syndrome (not the MS) has even led to a premature death. This is in line with the IPCC's finding that people with chronic diseases face a higher risk of premature mortality due to the climate crisis. (Doc 2, 9; AS paras. 9, 13, 31)

APPLICANT IS FACED WITH A SYSTEMIC DEFICIT IN RESPONDENT'S LEGAL SYSTEM TO RAISE HIS CLAIM REGARDING HIS CLIMATE INDUCED SUFFERING

Applicant cannot challenge Respondent's ineffective climate policies, as the inaction of the legislator and administrative omissions regarding climate measures cannot be challenged under Austrian domestic law. (see Section F) In lack of a remedy mechanism under the relevant administrative law, the Austrian Climate Protection Act ("KSG"), Applicant is faced with a systemic deficit regarding his human rights protection. No general duty of protection can be adhered to or general administrative omission can be referred to by Applicant to assert his rights. Applicant tried - at the very least - to request the invalidation of counter-productive measures under Art 2 and 8 and the principle of equality before the law (Art 2 StGG and Art 7 B-VG), alleging that climate damaging norms such as a VAT exemption on private, cross-border flights constitute an active infringement of Respondent's duty to protect Applicant under Art 2 and 8. The aviation sector is VAT-privileged over the railways despite the fact a flight emits around 31 times more CO2 than a train-ride. Emissions in the realm of transportation rose in 2019 compared to 2018 (Doc 14, p 3297). The Constitutional Court denied standing on very formalistic grounds, despite having been made aware of Applicant's lack to file any other remedy. (see section F Art 13, Doc 20, 21, AS paras. 57-59)

THE APPLICANT'S VICTIM STATUS IN THE FACE OF CLIMATE-CRISIS INDUCED INCREASE IN WARM TO HOT DAYS

Applicant is a DIRECT VICTIM pursuant Art 34 ECHR in respect to Art 8 ECHR, as he has suffered and continues to suffer from the rise in average temperature and heat afflictions caused by the climate crisis severely and to a greater extent than the average population. The effects of the rise in warm and hot days (and length of time during these days) caused by the climate crisis have serious, specific and imminent effects on his physical and moral integrity. Specific and serious, as his symptoms of disease worsen already today as a direct consequence to the rise in temperatures including heat waves leading to immense suffering. (Section E, Doc 1, 2, 3; AS paras. 1-8). The effect is imminent as average temperatures will continue to rise (resulting in a greater number of warm and hot days) and hence his suffering will worsen in the future, if no effective protection measures are set now. (AS paras. 9-13, 30-31) His application doesn't concern the general degradation of the environment, but the specific effects he has to suffer from due to the Uthoff's Syndrome. (Doc 1, 3; AS para. 32)

URGENCY OF THE CASE

Applicant's case is urgent according to best available science. Only very limited time is left to vindicate Applicant's rights Art 8 ECHR. Each additionally emitted ton of CO2 increases the risk of crossing critical thresholds which could lead to irreversible changes in the system, rendering mitigation of the climate crisis almost impossible. In a climate emergency, Applicant's well-being and personal dignity will be impacted to an even greater extent than what is currently the case, as each additional day of 25°C and beyond immensely impacts his physical ability to move around freely and to lead a self-determined and non-isolated private life in dignity. Hence, Applicant requests to grant this case priority status under Rule 41.

Documents are ordered in the number of appearance, first in the application form itself and then in the additional submission ("AS") which lays out all the arguments of the application form in a more detail. Abbreviations are introduced by order of appearance in the text.

F. Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments

61. Article invoked	Explanation
Art 8 ECHR	Respondent is continuously violating Applicant's right under Article 8 ECHR by failing to
(subsidiary Art 2 ECHR)	comply with its positive obligation to take "reasonable and appropriate measures" to
	effectively protect the health and wellbeing of Applicant. (Hatton v. the United Kingdom
	(GC), no. 36022/97, § 98) The ECtHR has found Art 8 to apply to environmental hazards
	(Cordella v Italy, nos. 54414/13 54264/15, § 161; Budayeva and others v. Russia, §133,
	López Ostra v. Spain, no. 30765/08, § 51) constituting a duty to prevent harm in
	connection with an environmental hazard where it "attains a level of severity resulting
	in significant impairment of Applicant's ability to enjoy his home, private and family
	life" (Dubetska v. Ukraine, § 105; Giacomelli v. Italy, no. 59909/00, §76; AS paras. 33-34),
	even if the state of health is not seriously endangered (López Ostra v. Spain, § 51; Tătar
	v. Romania §107) or deteriorated (Branduse v. Romania, no. 6586/03, § 67). The climate
	crisis induced rise of the mean temperature in Austria and in Applicant's home region,
	results in more days and longer hours beyond 25°C and plus 30°C on average. (Doc 1, 3,
	8, 26; AS paras. 4-5) Due to this, Applicant's symptoms of disease severely worsen.
	(Section E; Doc 1, 3; AS paras. 1-2) The effects of the climate crisis constitute a real and
	serious risk to Applicant's physical, psychological and moral integrity (López Ostra v.
	Spain, § 51; Guerra and others v. Italy, no. 116/1996/735/932, § 60), personal dignity
	(Beizaras and Levickas v. Lithuania, no. 41288/15, § 117) and the overall quality of his
	private and family life and well-being (Di Sarno and others v. Italy, no. 30765/08, § 108;
	Fadeyeva v. Russia, no. 55723/00, §§ 68-69; Çiçek and Others v. Turkey, no. 44837/07,
	§22; Tătar v. Romania, § 85), as he is locked up in his house at days reaching and
	exceeding 25°C and humiliated due to the complete loss of control over his muscular
	strength at 30°C and plus (Nicolae Virgiliu Tănase v. Romania, §§ 118, 121; Bouyid v.
	Belgium [GC], no.23380/09, § 87). Respondent knows of the real and serious risks of the
	climate crisis (López Ostra v. Spain, § 52,53; Fadeyeva v. Russia, no. 55723/00, §90; AS
	paras. 35, 38). Respondent is a member State of the IPCC, so it has reviewed and
	endorsed the findings contained in the IPCC's SR 1,5°C as best available science (AS
	para. 38). It is aware that staying within the 1.5°C limit would mitigate the effects of the
	climate crisis and avoid the risk of reaching irreversible tipping points. (AS para. 30)
	Hence, Respondent is required by Art 8 "to do everything within in their power"(López
	Ostra v. Spain, §51) to provide "effective protection" (Budayeva and others v. Russia, §
	129, Öneriyildiz v. Turkey, §§ 89-90;) and to approach "the problem with due diligence"
	(Fadeyeva v. Russia, §128). In this regard, the "onus" is upon Respondent (Fadeyeva v.
	Russia, § 128-133) to provide "sufficient explanation" (Dubetska v. Ukraine, no.
	30499/03, § 105) including "using detailed and rigorous data" (Fadeyeva v. Russia, §
	125) that its measures are necessary and appropriate, to the risk of harm constituting
	an "effective protection" of the Applicant (Budayeva and others v. Russia, no. 15339/02,
	§ 129, Öneriyildiz v. Turkey, §§ 89-90; Dubetska v. Ukraine, § 155, Fadeyeva v. Russia, §
	133) The state's obligation to adopt appropriate measures to protect can arise even if it
	has no direct and/or exclusive responsibility. (Nicolae Virgiliu Tănase v. Romania, no.
	41720/13, § 135). The required due diligence must be informed by national and
	international law and consensus (Demir and Baykara v. Turkey, §§ 67-86; Case of Oluić
	v. Croatia, no. 61260/08, § 60; AS para. 40), as the European Convention as "a living
	instrument (..) must be interpreted in the light of present-day conditions" (Tyrer v.
	United Kingdom, no. 5856/72, § 31). The UNFCC, the Paris Agreement and the IPCC as
	best available science have almost universal ratification. This framework is evidence of
	the global consensus on, and States' commitments to, preventing dangerous climate
	crisis by reaching the 1,5°C target. (AS paras. 16, 41) It also evidences consensus
	regarding the principles of equity, hence common but differentiated responsibilities and
	respective capacities ("CBDR-RC"). Established international law such as the
	precautionary and the prevention principle, also enshrined in Art 191 of the Treaty on
	the Functioning of the European Union (TFEU), must further inform the scope of
	Respondent's obligation under Art 8 (Tatar v. Romania, § 120, where the Court
	specifically considered the precautionary principle under Art 8). Whilst "the choice of
	means is in principle a matter that falls within the Contracting State's margin of

Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments (continued)

62. Article invoked	<p>Explanation appreciation" (Fadeyeva v. Russia, § 96) a "manifest error of appreciation" (Buckley v. United Kingdom, §§ 76–77;) constitutes an infringement of Art 8 ECHR. Such error has been made by Respondent. Respondent has acknowledged the threats of the climate crisis, its obligation to mitigate based on the IPCC's findings (Doc 7) an even declared the state of climate emergency. (AS para. 17) Yet, Respondent has not established an adequate legislative and administrative framework to meet the 1.5°C target. There has been no reduction of national GHG in the period 2010-2019. (AS para. 20). Respondent also consistently failed to meet its national targets by way of effective GHG reduction. Stricter EU climate targets were not enacted under the Austrian Protection Act ("KSG") and no national climate targets for 2021 and beyond are even enshrined under the KSG. Respondent acknowledged the need to revise its National Energy and Climate Plan ("NECP"), which was criticized by the European Commission for lack of ambition, yet hasn't done so. (AS paras. 17, 25) Despite numerous warnings by national scientists, Respondent is not on track to reach the 1.5°C target (AS paras. 14-19, 31) although this would improve Applicant's overall well-being and would also avoid the risk of reaching irreversible tipping points which would severely worsen his situation. (AS para. 45) Applicant cannot mitigate the effects of the crisis for himself. (AS para. 50) Regarding the mitigation of the crisis, there is no conflict of interests between the general interest of the community and Applicant's protection of rights (Soering v. UK, no. 14038/88, § 89). Respondent's protection is essential for society as a whole and of primary importance (Öneryıldız v. Turkey, § 89). The effects of the climate crisis pose a foreseeable risk to the life of society at large (AS para. 49), including Applicant's life in particular (L.C.B. v. the United Kingdom, no. 14/1997/798/1001, § 36, 38; Öneryıldız v. Turkey, § 90; AS para. 9), requiring Respondent to act preventively.</p>
Art 8 in conjunction with Art 13 ECHR	<p>Applicant has no effective national remedy available within its own legal system (Kudlha v. Poland, no. 30210/96, § 152) regarding his arguable claim (Boyle and Rice v. the United Kingdom, no. 19/1986/117/165-166, § 52; Hatton and Others v. the UK, § 137) before a competent national authority (Boyle and Rice v. the United Kingdom, no. 16580/90, § 52). Applicant rights are arguable infringed by Respondent's failure to protect the private life and well-being of Applicant regarding the effects of the climate crisis (see above re Art 8 ECHR). Yet, administrative omission regarding climate measures and the legislator's inaction cannot be challenged. The relevant specific act, the Austrian Climate Protection Act, doesn't provide for any complaint mechanism if CO2 reduction targets have not been reached, are too low and not in compliance with the 1,5°C target. Let alone, if no climate measures or targets have been set. (AS para. 51) If remedies are not provided for in the respective applicable administrative act(in this case the KSG), a systemic protection deficit exists as administrative omissions cannot be challenged per se. Neither constitutional law nor administrative law provide for a general duty of care which can be adhered to or grant the right to request any declaratory action (AS para. 52). Art 139 and 140 of the Austrian Constitution ("B-VG") only grant Applicant the right to challenge single norms and regulations that directly impact him and are legally addressed to him. The Austrian public ombudsman board ("Volksanwaltschaft") has no power to hand down legally binding decisions (Zazanis v. Greece, no. 68138/01, § 47). There is no administrative body, let alone court, which has competence to decide on Applicant's arguable infringement of rights in the face climate related issues.</p>
Art 6 ECHR	<p>Applicant is personally exposed to an environmental danger that is serious, specific and imminent. (Athanasoglou and Others v. Switzerland [GC], no. 27644/95, §§ 46,55) Yet, the overly formalistic approach taken by the constitutional court denied Applicant even the chance to have his case partially addressed on the merits by a court. The Court didn't assess the critical questions of this of this genuine and serious dispute (Mennitto v. Italy, no. 33804/96, § 23) on the merits due to an applied excessive formalism regarding the criteria of Art 140 B-VG (Hasan Tunç and Others v. Turkey, no. 19074/05, §§ 32-33), thereby also infringing Applicant's rights under Art 6.</p>

ADDITIONAL SUBMISSION

I. SECTION E (This sections supplements Section E of the Application Form)

1. Applicant is directly affected by the climate crisis induced temperature increase

1. Applicant suffers from multiple sclerosis (“MS”), an autoimmune neurodegenerative disease of the central nervous system, including a temperature sensitivity of his muscular system known as the “*Uhthoff's Syndrome*”. Like 60 to 80 % of MS patients suffering from the *Uhthoff's syndrome*, Applicant’s symptoms of disease worsen with the increase of external temperatures. The heat-induced exacerbations in MS are driven by a transient slowing or blocking of neural conduction within CNS nerve fibers, due to the temperature-induced changes in the excitability of demyelinated axons. Given this temperature driven impact, no medical treatment, medical relief or cure exists.¹
2. As shown by the medical report of the department of Neurology of the University of Vienna, specialized in MS, as well as by Applicant’s personal statement, Applicant’s well-being is already impacted at temperatures starting and exceeding 25°C.² At 25°C and above, the impairment of his muscular movement severely worsens so that he starts to get dependent on his (mechanical) wheelchair, especially when leaving the house. This effects his family and private life, as he is continuously locked up in his house if he wants to maintain some level of independence. Up until about 25°C he can walk independently or with the help of two crutches (depending on his general health condition, length of distance). Should he sit outside in the garden outside for too long at warmer temperatures, he sometimes is not able to return to his house alone in order to go to the toilet. This is particularly humiliating as sudden urges to urinate occur quite frequently for MS patients.³ The negative impact of external temperature rise continuously increases to the effect that Applicant is fully dependent on an electrical wheelchair at 30°C and beyond. Due to heat-induced lack of muscular power in his arm, he is no longer able to even push his wheelchair all by himself at temperatures reaching or exceeding 30°C. Let alone, use his

¹ *Christogianni/Bibb/Davis/Jay/Barnett/Evangelou/Filingeri*, Temperature sensitivity in multiple sclerosis: An overview of its impact on sensory and cognitive symptoms, DOI:10.1080/23328940.2018.1475831 2018, 208, 213-217. Submitted as DOC 02, p 6,11-15.

² Medical Report by the Department of Neurology, University of Vienna. Submitted as DOC 01.

³ *Multiple sclerosis international foundation*, MS in focus: Bladder and bowel, 2014, 6. Available online: <https://nmsscdn.azureedge.net/NationalMSSociety/media/MSNationalFiles/Documents/MS-in-focus-24-Bladder-and-bowel-issues-English.pdf> (Last opened: 02.04.2021) Baumhackl Berger, Enzinger (Hg.), ÖMSB Österreichische Multiple Sklerose Bibliothek, 2020, 73. Available online: https://www.oemsg.at/wp-content/uploads/2020/05/O%CC%88MSB-2020.MS_kern_170x220-NA4-05-14-ePDF.pdf (Last opened: 02.04.2021).

arms in other ways. He thus is then dependent on 100% external physical support.⁴ Applicant is severely burdened by this degrading impact⁵ and increase in anxiety he suffers due to the complete loss of control over his muscular strength at 30°C plus.⁶

2. The condition of Applicant has deteriorated in the course of his lifetime due to increase in average temperatures

3. The Austrian average temperature has been rising faster than the global average. Austria's mean temperature has risen by almost 2°C since 1880, compared to a global temperature rise of 0,87°C.⁷ This stronger increase also applies to the time period since [REDACTED], the year Applicant was born, as Austrian temperatures rose by about 1°C compared to a global average temperature rise of about 0,5°C compared to pre-industrial levels.⁸
4. Applicant is living in the city of [REDACTED], in the region "[REDACTED]", in the state of [REDACTED] [REDACTED].⁹ As can be seen from oldest temperature measurements for this region, at [REDACTED] [REDACTED] from 1883, the mean temperature rise in this region was even greater than for the whole of Austria. In the three decades, from 1883 to 1902, the mean annual temperature was at 5.6°C. In the last decade from 2011 to 2020, it was at 8.0°C, which equals a temperature rise of 2.4°C pre-industrial levels.¹⁰



⁴ Leutmetzer, Befund [REDACTED], AKH Wien Universitätsklinikum für Neurologie. Submitted as DOC 01. Applicant, Personal Statement, 2021. Submitted as DOC 03.

⁵ *Bouyid v. Belgium* [GC] (App. No. 23380/09), Judgement of 28 September 2015, § 87 (“*Bouyid*”), re Art 3 ECHR.

⁶ *Christogianni et al.*, cited above Fn 1, 219. Submitted as DOC 02, p 17.

⁷ *Austrian Panel on Climate Change (APCC)*, Österreichischer Sachstandsbericht Klimawandel 2014 (AAR14), 229. Submitted as DOC 04, p 252. *Zechmeister et al.*, Klimaschutzbericht 2020, 22. Submitted as DOC 05, p 1142. See also: IPCC, Global Warming of 1.5°C, 177. Submitted as DOC 07, p 1830.

⁸ *Austrian Panel on Climate Change (APCC)*, cited above Fn 7, 229. Submitted as DOC 04, p 252. *Zechmeister et al.*, Klimaschutzbericht 2020, 22. Submitted as DOC 05, p 1142. *Austrian Panel on Climate Change (APCC)*, Austrian Special Report 2018 (ASR18), 135. Submitted as DOC 06. p 1441.

⁹ [REDACTED].

¹⁰ HISTALP Homogenized Datasets by ZAMG. Available online: <http://www.zamg.ac.at/histalp/dataset/station/csv.php>. (Last opened 04.04.2021). See also: ZAMG, HISTALP (local data for Applicant). Submitted as DOC 25. *Chimani et al.*, ÖKS15 – Klimaszenarien für Österreich. Daten, Methoden und Klimanalyse, 2016, 25f. Submitted as DOC 26, p 3683f.

5. During the years between 1961 and 1991 the average mean of days reaching and exceeding 25°C in Applicant's home region was 27,67. During the years of 1991 to 2020 the average mean of days of 25°C and plus was 43,17 and in the most recent decade – the years 2011 to 2020 – the mean was about 55, so has almost doubled compared to the years between 1961 and 1991. The number of days of 30°C and beyond, has increased by a mean of 2,3 between the years 1961 and 1991. In the years of 1991 to 2020 the mean increase amounted to 8,93 and in the last decade, 2011 to 2020, it was 14,1. Based on this data, the temperature rise in Austria has led to an almost twofold increase of the number of days with temperature reaching and exceeding 25°C, and a more than sixfold increase of days with temperatures of 30°C or higher.¹¹
6. According to robust data derived from Applicant's home region, a decadal-mean 'Threshold Exceedance Days per Year' for 25°C plus ("TEDY25C") can be established. If this is compared against a specially devised amplification factor which displays the average Uththoff impact in reference to days exceeding 25°C (TEDY25C), the so-called "Uththoff Impairment Amplification Factor" ("UIAF") is derived.¹² This displays more accurately the overall impact of Applicant on days reaching and exceeding 25°C, also accounting for the fact that on days of 30°C plus, also hours of 25°C plus increase. The impact over time, displayed in the decadal development of UIAF for Applicant during 1961-2020:¹³

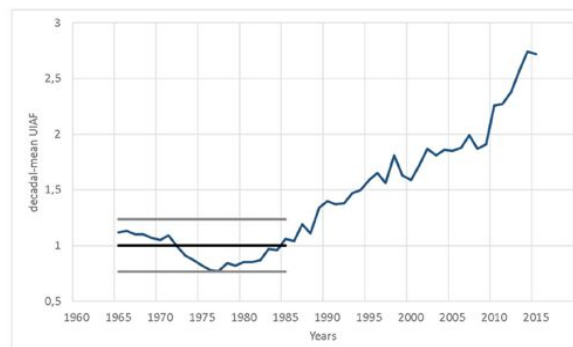


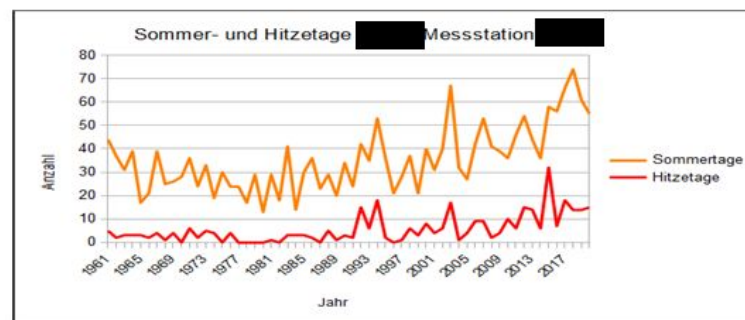
Abbildung 2: Historische Entwicklung der Dekadenmittel von TEDY25C (oben) und UIAF (unten) im

¹¹ HOMSTART dataset, Available online: <https://www.zamg.ac.at/cms/de/forschung/klima/datensaetze/homstart> (Last opened 06.04.2021) The following data set shows the daily maximum temperature in [REDACTED] from 1.1.1948-31.12.2009, some variations in the linked data set can be attributed to changes in measuring equipment or procedure. Officially to be cited as *Nemec/Gruber/Chimani/Auer*, Trends in extreme temperature indices in Austria based on a new homogenised dataset of daily minimum and maximum temperature series, 2012, International Journal of Climatology, doi:10.1002/joc.3532. Zentralanstalt für Meteorologie und Geodynamik, Jahrbuch, 2020. Available online: <https://www.zamg.ac.at/cms/de/klima/klimauebersichten/jahrbuch> (Last opened: 02.04.2021). *Timeanddate*, Wetter-Rückblick [REDACTED], [REDACTED], Österreich, 2021. Available online: [https://www.timeanddate.de/wetter/oesterreich/\[REDACTED\]/nueckblick](https://www.timeanddate.de/wetter/oesterreich/[REDACTED]/nueckblick) (Last opened: 02.04.2021).

¹² These scientific standards have been developed for the purpose of this litigation.

¹³ ZAMG/Kalcher, Expert Report, 2021, 6. Submitted as DOC 08, p 2277.

7. Based on TEDY25C and the UIAF it concludes that Applicant's overall temperature induced impairment due to warm and hot days has – on average - more than tripled due to primarily anthropogenic climate crisis over the recent decades and the inaction thereto.¹⁴
8. The increase in average temperatures as also lead to the increase on extreme weather events, both in length and frequency, such as heatwaves.¹⁵ During such years the number of days that exceed 25°C and 30°C lie far above the average. Austria experienced extreme heatwaves in 2003, 2015, 2017, 2018 and 2019.¹⁶ The year 2003 saw 67 days above 25°C and 17 days above 30°C. The year 2017 saw 66 days above 25°C and 18 days above 30°C. In 2018 and 2019 the days above 25°C were 74 and 61 respectively and 14 days above 30°C in each year.¹⁷ During such periods, Applicant's suffering increases in terms of length of impact and intensity. Increase of warm and hot days in Applicants' home:¹⁸



2.1. These direct impacts will increase if GHG emissions are not rapidly reduced

9. Applicant was born on [REDACTED]¹⁹ and has a life expectancy of [REDACTED] years on average.²⁰ Given his lifetime and the scientific prognosis of future climate developments -if climate policies (including Respondent's) remain unchanged- the negative impact of the human made climate crisis on his psychological and physical well-being and integrity will severely

¹⁴ ZAMG/Kalcher, Expert Report, 2021. Submitted as DOC 08.

¹⁵ IPCC, Global Warming of 1.5°C, 190- 191. Submitted as DOC 07, p 1843-1844.

¹⁶ Höfler et al, Klimarückblick [REDACTED] 2019, 2020, 5. Available online: https://ccca.ac.at/fileadmin/00_DokumenteHauptmenue/02_Klimawissen/Klimastatusbericht/web_Klimarueckblick_NOE_2019.pdf (Last opened: 13.02.2021). See also: Zechmeister et al, Klimaschutzbericht 2020, 22. Submitted as DOC 05, p 1142.

¹⁷ Nemeč/Gruber/Chimani/Auer, cited above Fn 11. Timeanddate, Wetter-Rückblick [REDACTED], cited above Fn 11.

¹⁷ Ibid.

¹⁸ Timeanddate, Wetter-Rückblick [REDACTED], cited above Fn 11. Nemeč/Gruber/Chimani/Auer, cited above Fn 11.

¹⁹ Applicant's handicapped ID. Submitted as DOC 01.

²⁰ Statistik Austria, Lebenserwartung bei der Geburt 1970 bis 2019 nach Bundesländern und Geschlecht. Submitted as DOC 27.

increase during his lifetime. In some cases, the Uhthoff's syndrome (not the MS) has led to an even higher mortality.²¹ This is in line with IPCC SR1.5°C which highlights that people with chronic diseases, like Applicant, incur the highest risk regarding temperature-related morbidity and mortality.²²

10. The scenario that no effective climate protection measures are set, is scientifically described as an RCP 8.5 scenario and referred to as “business as usual”.²³ Under these circumstances, the IPCC predicts a global mean temperature increase between 2.6°C and 4.8°C (with a mean of 3.7°C) with high confidence.²⁴ According to the IPCC for “business as usual” “it is virtually certain that there will be more frequent hot and fewer cold temperature extremes over most land areas on daily and seasonal timescales, as global mean surface temperature increases. It is very likely that heat waves will occur with a higher frequency and longer duration.”²⁵
11. Respondent's national agency, the Umweltbundesamt, reports that in a “business as usual” scenario, the temperatures in the home region of Applicant will rise by about 2°C in the period 2021-2050 and about 4°C in the period 2071-2100, compared to the average temperature in the period 1971-2000. This rise is equal to an average temperature increase of 3°C in the period 2021-2050 and 5°C in the period 2071-2100 compared to pre-industrial levels.²⁶ This translates into a projected average increase of plus of 11 days of 25°C and plus, and an average increase of 4,3 days with 30°C and plus, for the period 2021-2050 compared to 1971-2001. For the period from 2071-2100 the increase will be more drastic: In a “business as usual” scenario days of 25°C plus will increase by 35 and days of 30°C plus by 17,4 or even 23 days for [REDACTED].²⁷ In summers containing heatwaves Austria (Respondent) could thus experience over 100 days above 25°C.
12. According to the IPCC, Respondent (Austria) lies in one of the regions that will experience the strongest increase in hot extremes.²⁸ In the same vein, the European Environmental Agency has noted that very extreme heatwaves are projected to occur as often as every two years for Southern and Central Europe in the second half of the

²¹ *Christogianni/Bibb/Davis/Jay/Barnett/Evangelou/Filingeri*, cited above Fn 1. Submitted as DOC 02, p 14.

²² IPCC, Global Warming of 1.5°C, 240-241. Submitted as DOC 07, p 1893-1894.

²³ *Zechmeister et al*, Klimaschutzbericht 2020, 22. Submitted as DOC 05, p 1142.

²⁴ IPCC, Climate change 2014. Synthesis report. Geneva: Intergovernmental Panel on Climate Change, 2014, 10. Available online: https://ar5-syr.ipcc.ch/ipcc/resources/pdf/IPCC_SynthesisReport.pdf (Last opened 28.02.2021).

²⁵ *Ibid*.

²⁶ *Zechmeister et al*, Klimaschutzbericht 2020, 23. Submitted as DOC 05, p 1143. ZAMG, HISTALP. Cited above Fn 10. Submitted as DOC 25. See also: *Chimani et al*, ÖKS15 – cited above Fn 10, 25. Submitted as DOC 26, p 3683.

²⁷ *Chimani et al*, ÖKS15 – cited above Fn 10, 44, Abb.4.3. Submitted as DOC 26, p 3702. *Chimani et al*, ÖKS15 – Klimaszenarien für das Bundesland [REDACTED] bis 2100, 2016. Submitted as DOC 28, p 4018, 4022.

²⁸ IPCC, Global Warming of 1.5°C, 190. Submitted as DOC 07, p 1843.

century, if emissions continue unabated.²⁹

13. The extreme summers (para. 8) will thus have become the ‘new normal’ in the second half of the century, disabling Applicant’s for even longer periods of time. According to the IPCC, people with chronic diseases are most vulnerable regarding the impact of heatwaves.³⁰ Although the number of days impacting Applicant will increase even at a global average of 1.5°C increase (compared to the current global 1°C), holding the global temperature increase to 1.5°C would drastically reduce the frequency and intensity of hot extremes as well as the length of warm spells, compared to holding the temperature increase to below 2°C.³¹ Pursuant to the IPCC, states have to achieve global CO2 neutrality by about 2050 with halving emissions by 2030 if they want a 66% chance of limiting the temperature rise to 1.5°C, noting that this still entails a 33% likelihood of not missing this target.³²

3. Respondent’s climate policies are not in line with international law and the best available science

14. As party to the UNFCCC, Respondent committed to “*prevent dangerous anthropogenic interference with the climate system*” in “*limiting its anthropogenic emissions of greenhouse gases*” already in 1994.³³ By joining both, the UNFCCC and the Paris Agreement, Respondent consented to the guiding principles of equity, common but differentiated responsibilities and respective capabilities (“CBDR-RC”), and its duty as a developed state to “*take the lead*” in reducing emissions.³⁴
15. Respondent ratified the Paris Agreement in acknowledgement of its responsibilities under human rights, in particular the right to health and rights of vulnerable persons with disabilities such as Applicant.³⁵
16. In adopting the Paris Agreement, the parties invited the IPCC to provide a special scientific report on the impacts of global warming of 1.5°C (“1.5°C SR”), which it did in

²⁹ *European Environment Agency*, The European environment - state and outlook 2020: knowledge for transition to a sustainable Europe, European Environment, 2019, 171, Map 7.1. Available online: <https://www.eea.europa.eu/publications/soer-2020> (Last opened: 04.04.2021).

³⁰ *Füssel/Jol/Marx/Hildén*, Climate change, impacts and vulnerability in Europe 2016 — European Environment Agency, European Environment Agency, 2017, 76-77, 77. Available online: <https://www.eea.europa.eu/publications/climate-change-impacts-and-vulnerability-2016> (Last opened: 04.04.2021).

³¹ *IPCC*, Global Warming of 1.5°C, 240-241. Submitted as DOC 07, p 1893-1894.

³² *IPCC*, Global Warming of 1.5°C, 191. Submitted as DOC 07, p 1843.

³³ *IPCC*.

³⁴ UNFCCC, Art 2, 3.1.

³⁵ UNFCCC, Art 3, 4.2(a), *Paris Agreement* Art 2 and 4.

³⁶ *Preamble of the Paris Agreement*.

2018.³⁶ The 1.5°C SR shows that limiting the temperature increase to 1.5°C would substantially reduce the risks and impacts of the climate crisis, including health effects and heat-related mortality.³⁷ The parties, including Respondent, have accepted the IPCC as best available science regarding the goals of the Paris Agreement³⁸. Hence, 1.5°C is the scientifically and politically established global benchmark for all countries to calibrate their mitigation efforts.³⁹

17. In 2019, Respondent's legislator, Austria's National Council, declared the state of national climate emergency based on the scientific findings of the IPCC, the Austrian Panel on Climate Change ("APCC"), and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services ("IPBES"). In this statement of 25.9.2019, Respondent confirmed its commitment to the 1.5°C target and declared the mitigation of the climate crisis its utmost priority.⁴⁰ Respondent acknowledged that its current National Energy and Climate Plan ("NECP") needs to be revised in order to meet the 1.5 °C target⁴¹, yet hasn't done so until today.⁴²

3.1. Respondent's climate policy thus far has disproportionately contributed to the exacerbation of Applicant's condition

18. Despite its commitment and numerous warnings by scientists⁴³, Respondent has failed and continues to fail to take appropriate measures to reduce its GHG emissions ("GHG"). Respondent is an old, industrialized nation that committed to taking the lead, yet had a per capita CO₂ emission for fossil fuels of 8.25 tCO₂/cap/yr in 2019, which is above the EU-average of 6.47 tCO₂/cap/yr.⁴⁴

³⁶ *Conference of the Parties to the UNFCCC*, Adoption of the Paris Agreement. Decision 1/CP.21, § 21. Available online: <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=2>. (Last opened: 04.04.2021).

³⁷ *IPCC*, Global Warming of 1.5°C, 9, 11, 39, 180. Submitted as **DOC 07, p 1662, 1664, 1692, 1833**.

³⁸ *Paris Agreement*, Art 4, 7, 14.

³⁹ *Rajamani/ Guerin in Klein et al* (eds.), *The Paris Agreement on Climate Change*, 76. *Rafferty et al*, *Less than 2 °C warming by 2100 unlikely*, 2017, 637–641. Available online: <https://doi.org/10.1038/nclimate3352>. Last opened: 04.04.2021.

⁴⁰ Entschließung des Nationalrates vom 25. September 2019 betreffend Erklärung des Climate Emergency, 140/E XXVI. GP, Submitted as **DOC 13**.

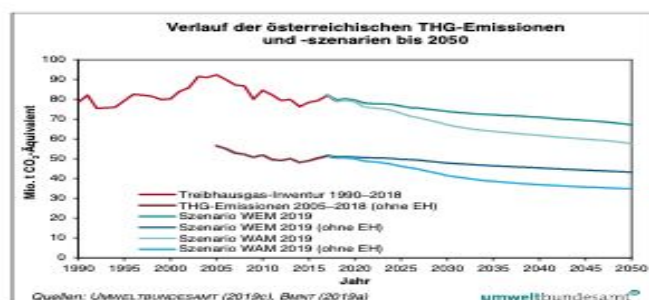
⁴¹ Regierungsprogramm der österreichischen Bundesregierung 2020. Available online: <https://www.bundeskanzleramt.gv.at/dam/jcr:7b9e6755-2115-440c-b2ec-cbf64a931aa8/RegProgramm-lang.pdf>. (Last opened 04.04.2021). Entschließung des Nationalrates, 19 November 2019, 1/E XXVII.GP, Submitted as **DOC 13**.

⁴² *Ibid.* p. 73.

⁴³ *Kirchbengast*, Stellungnahme NEKP – auf Basis NKK-Sitzungsstatement 26.11.2018, Submitted as **DOC 30**.

⁴⁴ *EDGAR (Emissions Database for Global Atmospheric Research)*, Fossil CO₂ emissions of all world countries, 2020 report. Available Online: <https://edgar.jrc.ec.europa.eu/overview.php?v=booklet2020&dst=CO2pc>. (Last opened: 04.04.2021).

19. Respondent has not reduced GHG below the level of 1990 until to day.⁴⁵ Development of GHG in Austria:⁴⁶



20. Respondent's emissions also didn't go down at all between the years 2010 and 2019.⁴⁷ Emissions in 2019 were rising in comparison to 2018.⁴⁸
21. Respondent's national contributions under the Paris Agreement determined in the European Effort Sharing Decision ("ESD") and Effort Sharing Regulation ("ESR") do not suffice to meet the 1.5°C. It is de facto impossible for Respondent to even meet the 2030 (lower) targets of the ESR, let alone the required target of 1.5°C by way of Respondent's current climate measures.⁴⁹
22. Respondent has a track record of failing to meet reduction targets by way of effective GHG reduction, such as the targets under the Kyoto Protocol⁵⁰ and the ESD.⁵¹
23. To this day, Respondent directly and indirectly subsidizes climate damaging and environmentally counterproductive actions in realm of energy and transport in the amount 15 billion EUR/ year on average, of which 4,4 million are directly related to its annual budget.⁵² Whilst not all of these counterproductive measures can be eliminated by Respondent alone, Respondent until today has not removed even a single one of these harmful direct and indirect subsidies and taxes.⁵³ It should be noted that Respondent has

⁴⁵ Zechmeister et al, Klimaschutzbericht 2020, 48, Appendix 4, 184. Submitted as DOC 05, p 1168.

⁴⁶ Zechmeister et al, Klimaschutzbericht 2020, 48. Submitted as DOC 05, p 1168.

⁴⁷ Kirchbergast et al, Referenzplan als Grundlage für einen wissenschaftlich fundierten und mit den Pariser Klimazielen in Einklang stehenden Nationalen Energie- und Klimaplan für Österreich (Ref-NEKP) —Executive Summary, 2019, 11, Abb. 1 Submitted as DOC 15, p 3318 Figure.1.

⁴⁸ Zechmeister et al, Nahzeitprognose der österreichischen Treibhausgas-emissionen für 2019 (NOWCAST 2019), 2020, 10f. Submitted as DOC 14, p 3295f

⁴⁹ Zechmeister et al, Klimaschutzbericht 2020, 15f. Submitted as DOC 05, p 1135. Kirchbergast et al, cited above Fn 47, 11 including Figure 1. Submitted as DOC 15, p 3318 including Figure 1.

⁵⁰ Zechmeister et al, Klimaschutzbericht 2020, Annex 4 on 184. Submitted as DOC 05, Annex 4 on p 1304.

⁵¹ Ibid.

⁵² Steiner et al, Klimapolitik in Österreich: Innovationschance Coronakrise und die Kosten des Nicht-Handels (2020), 37ff. Submitted as DOC 19, p 3422ff.

⁵³ Bundesministerium für Nachhaltigkeit und Entwicklung, Antrag des WWF auf Herausgabe von Umweltinformationen betreffend die Listen umweltschädlicher Subventionen -Themenbereich Klimaschutz, BMNT-UW.4.1.9/0120-RD 1/2019 samt Beilagen. Submitted as DOC 18.

been notified of these facts by scientist already in 2016⁵⁴ and is fully aware of its actions.⁵⁵

3.2. Respondent is not acting with due diligence in taking appropriate measures to limit the further deterioration of Applicant's condition

24. The European Commission criticized Respondent's NECP pursuant to the EU Regulation 2018/1999 on Governance of the Energy Union and Climate Action for its lack of ambition.⁵⁶ Respondent reported only 15 planned or implemented GHG reduction measures by 2020. Of all the, then 28, member states, Respondent had thus the worst record, ranking even behind less wealthy nations such as Greece and Cyprus. Only four of the measures listed by Respondent included an assessment of the reduction potential.⁵⁷ The reference NECP drafted by scientists on how to achieve 1.5°C has hardly found any consideration for the NECP submitted by Respondent.⁵⁸
25. The Austrian Climate Protection Act ("*Klimaschutzgesetz*", "KSG") which purpose is to lay out Respondent's overall climate strategy contains no specific measures, no remedy mechanism and even no national climate targets beyond 2020. Failure to reach climate targets, as well as lack of ambition and effectiveness regarding these targets cannot be challenged. There is no mechanism by which an agreement between federal states and the state can be enforced, despite this being essential for implementing effective climate measures in a federal state with divided competences such as Respondent. Adapted (stricter) reduction targets set by EU Commission Decision (EU) 2017/1471 for the period 2017-2020 have also never been transferred into the KSG.⁵⁹
26. Given Respondent's failure to comply with its own 2017 annual emission target, Respondent would have been obliged to decide on immediate reduction measures within six months according to the KSG⁶⁰. However, an application by environmental NGOs based on the Aarhus Convention to introduce additional reduction measures filed in

⁵⁴ *Kletzian-Slamanič/Köpl*, Umweltschädliche Subventionen in den Bereichen Energie und Verkehr, 2016. **Submitted as DOC 17.**

⁵⁵ *Bundesministerium für Nachhaltigkeit und Entwicklung*, cited above Fn 51. **Submitted as DOC 18.**

⁵⁶ *European Commission*, Staff Working Document, Assessment of the final national energy and climate plan, 2020, 3, 4, 21ff **Submitted as DOC 16 p 3331, 3332, 3349ff.**

⁵⁷ *European Environmental Agency*, Overview of climate change policies and measures in Europe. Available online: https://tableau.discomap.eea.europa.eu/t/Aironline/views/EEA_PAM_Viewer2019_final_draft/Overview?:showAppBanner=false&:display_count=n&:showVizHome=n&:origin=viz_share_link&:isGuestRedirectFromVizportal=y&:embed=y. Last opened: 04.04.2021.

⁵⁸ *Kirchengast et al*, cited above Fn 47. **Submitted as DOC 15.** Österreichs integrierter nationaler Energie- und Klimaplan, Available online: https://www.bmk.gv.at/themen/klima_umwelt/klimaschutz/nat_klimapolitik/energie_klimaplan.html (Last opened: 05.04.2021).

⁵⁹ *Bundesgesetz zur Einhaltung von Höchstmengen von Treibhausgasemissionen und zur Erarbeitung von wirksamen Maßnahmen zum Klimaschutz* (Klimaschutzgesetz – „KSG“), BGBl. I Nr. 106/2011.

⁶⁰ Art 3 para 2 KSG.

October 2019 has been disregarded until today.⁶¹ Although the KSG stipulates the adoption of periodic climate action programmes, no such programme has been drafted in time in order to reach full effectiveness.⁶²

27. The structural deficits of the KSG, including the lack of enforcement mechanisms and effective remedies have been widely criticized by legal experts.⁶³ The protection of the climate also hardly finds any mention, let alone regulation, in any other environmental law or investment law. Given all this, it concludes that Respondent is not acting with due diligence.

3.3. Respondent's policies are not best upon best available science

28. In September 2019, Austrian scientists drafted a reference NECP outlining to Respondent how to set measures with due diligence and according to scientific facts. Only very few of the suggested measures have been included by Respondent in its revision of the NECP and nowhere near the necessary volume. None of the recommended measures has been implemented into national law so far.

29. According to Austrian scientists, Respondent needs a severe cut in emissions, if it wants to reach the 1.5°C target. Its available CO₂ budget as of this year (2021) amounts 700 Mt CO₂ equ. and a maximum of 550 MtCO₂eq until 2030. This means that Respondent has to reduce emissions by 55% until 2030 and by 90 to 95% until 2040.⁶⁴ Currently no reduction target is even embedded for the years 2021 and beyond. Reduction plan for Austria drafted by Austrian scientists:⁶⁵

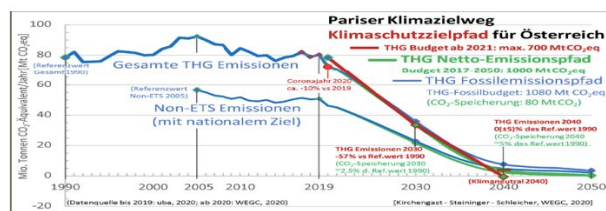


Abbildung 1. Pariser Klimazielweg für Österreich—ein beispielhafter Reduktionszielplan (Netto-Emissionspfad grün, zugehöriger Fossil-Emissionspfad aus Fossilenergie&Industrie⁶ blau) und ein damit konsistenter einfacher Klimaschutzzielplan 2020-2040 (rot) für Österreichs Weg zur Klimaneutralität 2040 im Einklang mit den EU-Zielen und dem globalen 1,5-Grad-Ziel. Die Reduktionsschätzung für das Coronajahr 2020 ist -10(±3) % und daher bei -10% gegenüber 2019 markiert.

⁶¹ *Ökobüro/Greenpeace Austria*, Antrag zu Klimaschutz-Sofortmaßnahmen 2019. Submitted as DOC 29.

⁶² The programme for 2019/2020 was not released until mid-2020 in April, thus denying it a full effectiveness. Available online: https://www.bmk.gv.at/dam/jcr:4851eabd-a9c7-46e2-b855-928fb75fb5b9/KSG_Massnahmentabelle2019_2020.pdf (Last opened 04.04.2021).

⁶³ *Schulev-Steindl/Hofer/Franke*, Evaluierung des Klimaschutzgesetzes. Gutachten im Auftrag des BMK, 2020, 27. Available online: https://www.bmk.gv.at/themen/klima_umwelt/klimaschutz/nat_klimapolitik/klimaschutzgesetz.html (Last opened 04.04.2021).

⁶⁴ *Kirchengast/Steininger*, Ein Update zum Ref-NEKP der Wissenschaft, Treibhausgasbudget für Österreich auf dem Weg zur Klimaneutralität 2040, 2020, 2-3. Submitted as DOC 22, p 3629-3630.

⁶⁵ *Kirchengast et al*, cited above Fn 47, 11, Abb. 1 Submitted as DOC 15, Figure.1 on p 3318.

3.4. Staying within the temperature limit of 1.5°C would significantly improve Applicant's overall well-being

30. In its SR 1.5°C the IPCC found that limiting temperature increase to 1.5°C instead of 2°C would reduce heat-related impacts with high confidence.⁶⁶ This is in line with data for Respondent and Applicant's home region. (paras. 13) As temperatures increase, the climate crisis may also experience tipping points, resulting in large, abrupt and irreversible changes to which parts of society and nature will not be able to adapt. The IPCC assesses that some of these tipping points might have already been triggered at the current level of warming and that the risks of these tipping points occurring greatly increases between 1°C and 2°C of warming.⁶⁷ (see also paras. 12-13)
31. According to the APCC and the Lancet report, exposure to higher temperatures has a strong negative impact on people with pre-existing illnesses and disabilities.⁶⁸ Strong evidence suggest a link between extreme weather events and mental health issues.⁶⁹

4. The Applicant's has victim status in the face of the climate crisis

32. The term "victim" is an autonomous concept⁷⁰ and requires for a violation to be conceivable⁷¹, irrespective of national definitions⁷². Applicant is a victim under Art 34 as he has and continues to suffer from the heat-related afflictions⁷³ to a greater extent than the general population and beyond the minimum threshold of Art 8 ECHR. The impacts of the climate crisis induced increase in temperature, including extreme weather events, have already severe degrading physical and psychological impact on his health and physical, psychological and moral integrity and will have in the future. (paras. 1-2) Particularly, as he is affected by both, temperatures of 25°C and plus, as well as (extremely) hot days of 30°C and beyond. The effects will increase if no effective measures are set by Respondent now. (paras 9-13). His application doesn't concern the general degradation of the environment nor issues of general climate concern, but the concrete, personal impacts he has to suffer from as a result of the present climate crisis.

⁶⁶ IPCC, Global Warming of 1.5°C, 190-191. **Submitted as DOC 07, p 1843-1844.**

⁶⁷ IPCC, AR 5 Climate Change 2014: Impacts, Adaptation and Vulnerability, 12, 61, 109. Available online: https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf (Last opened 04.04.2021).

⁶⁸ *Austrian Panel on Climate Change (APCC)*, Austrian Special Report 2018 (ASR18), 15ff, 233. **Submitted as DOC 06, p 1321ff, 1539.**

Watts et al, The 2020 report of The Lancet Countdown on health and climate change: responding to converging crises, 2020, 6-7. **Submitted as DOC 9, p 2291-2292.**

⁶⁹ *Watts/Amann/Arnell et al*, cited above Fn 68, 9. **Submitted as DOC 9, p 2294.**

⁷⁰ *Aksu v. Turkey* (GC) (App. Nos. 4149/04 41029/04), Judgment of 15 March 2012, § 52.

⁷¹ *Brumărescu v. Romani* (App. No. 28342/95), Judgment of 23 January 2001, § 50.

⁷² *Gorraiz Lizarraga and Others v. Spain* (App. No. 62543/00), Judgment of 27 April 2004, § 35.

⁷³ *Roman Zakharov v. Russia*, 4 December 2015, no .47143/06, § 164.

II. SECTION F (This section supplements Section F of the Application Form)

5. Respondent is continuously violating Applicant's rights under Article 8 ECHR

33. Article 8 ECHR protects the right to respect for private and family life and home. The State has a positive obligation “to take reasonable and appropriate measures to secure” the rights protected therein,⁷⁴ and to approach “the problem with due diligence”.⁷⁵ This includes a duty to “introduce regulations adapted to the specific features of the activity, in particular the level of risk that might result”.⁷⁶ The impacts on the rights in Article 8 must meet a “minimum level of severity”.⁷⁷ The effects of “severe environmental pollution”,⁷⁸ and “noise, emissions, smells, or other forms of interference”⁷⁹ may meet the minimum level of severity to engage Article 8 ECHR if they affect individuals’ well-being, their health or their ability to enjoy their homes.⁸⁰
34. The ECtHR has found violations of States’ positive obligations under Article 8 ECHR regarding inadequate management of risks of harm associated with environment pollution arising from the operation of steel plants,⁸¹ gold mines,⁸² waste treatment plants,⁸³ a coal mine,⁸⁴ a power station,⁸⁵ waste management,⁸⁶ and the management of feral animals,⁸⁷ among others. There is no principled reason to distinguish between this case law and the environmental harms for Applicant consequent upon increasing GHG.
35. On the basis of the ECtHR’s environmental jurisprudence, the following multi-part test determines whether Respondent has complied with its positive obligations under Article 8 ECHR in the context of the climate crisis: (i) there is “real and serious” risk of harm posed by dangerous climate crisis, as evidenced by current and projected impacts of the climate crisis (**threshold test**)⁸⁸; (ii) Respondent knows or ought to have known of this risk of

⁷⁴ *Hatton v. the United Kingdom* [GC] (App No. 36022/97), Judgment of 2 October 2000, § 98 (“*Hatton*”).

⁷⁵ *Fadeyeva v. Russia* (App No. 55723/00), Judgment of 9 June 2005, § 128 (“*Fadeyeva*”).

⁷⁶ *Cordella v. Italy* (App. Nos. 54414/13 54264/15), Judgment of 24 January 2019, § 161 (“*Cordella*”).

⁷⁷ See *Fadeyeva* §§ 70, 88.

⁷⁸ *López Ostra v. Spain* (App No 16798/90), Judgment of 9 December 1994, § 51 (“*López*”).

⁷⁹ *Giacomelli v. Italy* (App. No. 59909/00), Judgment of 2 November 2006, § 76 (“*Giacomelli*”).

⁸⁰ See *López*, § 51; *Hatton*, § 96.

⁸¹ See *Fadeyeva*; *Cordella*.

⁸² *Taşkın v. Turkey* (App. No. 46117/99), Judgment of 10 November 2004; (“*Taşkın*”). *Tătar v. Romania* (App. No. 67021/01), Judgment of 27 January 2009 (“*Tătar*”).

⁸³ See *López*; *Giacomelli*.

⁸⁴ *Dubetska v. Ukraine* (App. No. 30499/03), Judgment of 10 February 2011 (“*Dubetska*”).

⁸⁵ *Jugheli v. Georgia* (App. No. 38342/05), Judgment of 13 July 2017 (“*Jugheli*”).

⁸⁶ *Di Sarno v. Italy* (App. No. 30765/08), Judgment of 10 January 2012.

⁸⁷ *Georgel and Georgeta Stoicescu v. Romania* (App. No. 9718/03), Judgment of 26 July 2011.

⁸⁸ See *Tătar*, § 107; *Brincat v. Italy* (App. No. 13867/88), Judgement of 26 November 1992, § 82 (“*Brincat*”). *Jugheli*, § 67; *Cordella*, § 169.

harm (**knowledge requirement**);⁸⁹ and (iii) has failed to act with due diligence⁹⁰ in the adoption of “necessary”⁹¹ and “appropriate”⁹² measures, reasonably available to it, to prevent or minimize the risk of harm (**due diligence requirement**). Thereby, Respondent bears the onus to substantiate that it has met the due diligence requirement.⁹³ Respondent must provide “*sufficient explanation*”⁹⁴ including “*using detailed and rigorous data*”⁹⁵ that its measures are necessary and appropriate i.e. that it has provided an “*effective solution*” to the risk of harm and “*effective protection*” of Applicant.⁹⁶ Respondent obligation to set appropriate measures can arise even if it has no direct or exclusive responsibility.⁹⁷

36. This test has to be applied to the specific facts in the case in light of the ECtHR’s interpretive principles, with the aim of ensuring that the Convention operates as a “*living instrument*”⁹⁸ in order to render the protection of Convention rights “*practical and effective*”⁹⁹.

37. Each step of the test is satisfied in this case. The climate crisis poses a “*real and serious*” risk of harm to Applicant’s as evidenced by current and projected impacts of the climate crisis.¹⁰⁰ The effects of the climate crisis result in intense physical or mental suffering for Applicant (DOC 1, 3; paras. 1-2, 8), including humiliation due to the complete loss of control over his muscular strength at 30°C plus (DOC 1, 3; para. 2)¹⁰¹. As a person with a disability, Applicant belongs to a group singled out as being among the most affected.¹⁰² The present impact will substantially increase if no effective measures are set. (paras. 1, 9-13)

38. As party to the UNFCCC, Respondent knows and acknowledges the risks of the climate

⁸⁹ See *Lopez*, §§9, 11, 52-53; *Öneryıldız v. Turkey*, (App. No. 48939/99), Judgment of 30 November 2004 § 101; (“*Öneryıldız*”), *Fadeyeva*, § 90; *Budayeva and others v. Russia* (App. Nos. 15339/02 2116/02 20058/02 11673/02 15343/02), Judgment of 20 March 2008, §§ 147-148 (“*Budayeva*”). *Kolyadenko and Others v. Russia* (App. Nos. 17423/05 20534/05 20678/05 23263/05 24283/05 35673/05), Judgment of 28 February 2012, §§ 165, 176 (“*Kolyadenko*”). *Brincat*, § 106; *Jugbeli*, § 77.

⁹⁰ See *Fadeyeva*, § 128; *Cordella*, § 161; *Budayeva*, §152; *Jugbeli*, § 76; *Kolyadenko*, § 216.

⁹¹ See *Öneryıldız* § 101; *Cordella*, § 173.

⁹² See *Taşkın*, § 113; *Budayeva*, § 128; *Kolyadenko*, § 212.

⁹³ *Fadeyeva*, § 128-133; *Cordella*, § 161; *Jugbeli*, § 76; *Dubetska*, § 155. This conclusion was also reached by the *Dutch Supreme Court*, *Urgenda v. The Netherlands*, ECLI:NL:HR:2019:2007, 20 Dec. 2019, paras 5.3.3 (“*Urgenda*”).

⁹⁴ See *Dubetska*, § 155.

⁹⁵ See *Fadeyeva*, § 128; *Jugbeli*, § 76.

⁹⁶ See *Öneryıldız* § 89; *Budayeva*, § 132; *Fadeyeva*, § 133; *Dubetska*, § 155; *Brincat*, § 110.

⁹⁷ *Nicolae Virgiliu Tănase v. Romania* [GC] (App No. 41720/13), Judgment of 25 June 2019, §§ 118, 121. (“*Nicolae*”).

⁹⁸ *Tyrer v. United Kingdom* (App. No. 5856/72), Judgment of 25 April 1978, § 31 (“*Tyrer*”).

⁹⁹ *Tyrer*, § 75.

¹⁰⁰ See *Tatar*, § 107; *Brincat*, § 82; *Jugbeli*, § 67; *Cordella*, § 169. Applicant, cited above Fn 2. **Submitted as DOC 01.**

¹⁰¹ See also *Nicolae*, §§ 118, 121. *Boyiid*, § 87.

¹⁰² *Jodoin/Ananthamoorthy/Lofts*, *Ecology Law Quarterly*, A Disability Rights Approach to Climate Governance, 2020, 90. Available online:

https://www.ecologylawquarterly.org/wp-content/uploads/2020/11/2_47.1_Jodoin_Final_Internet.pdf (Last opened 04.04.2021).

crisis already in 1994.¹⁰³ Respondent has further ratified the Paris Agreement in 2016, thereby explicitly recognizing the risks associated with increasing global average temperature.¹⁰⁴ As a member state of the IPCC, Respondent has reviewed and endorsed the findings contained in the IPCC's reports, including the Special Report on 1.5°C of warming.¹⁰⁵ Respondent's National Council has even declared the state of climate emergency based on the best available science in line with the 1.5 °C target. (para. 17)

39. To determine whether the State's measures with respect to the reduction of GHG to prevent the dangerous climate crisis are “*necessary*” and “*appropriate*”, and meet the requirements of due diligence, the ECtHR is required to have regard to “*the seriousness of the threat at issue*”¹⁰⁶, scientific insights and standards,¹⁰⁷ and whether the State's measures “*take sufficient account of the state of scientific knowledge about the subject matter at the relevant time*”.¹⁰⁸
40. The following legal sources must also inform Respondent's “*due diligence*” obligation under Article 8 ECHR as they indicate “*evolving norms of national and international law*”¹⁰⁹ and “*consensus*”:¹¹⁰
41. (i) **The UNFCCC and the Paris Agreement** which both have almost universal ratification,¹¹¹ evidencing the global consensus on, and states' commitments to, preventing the risk of harm posed by the dangerous climate crisis.¹¹² Both provide for the principles CBDR-RC and the duty for developed countries to “*take the lead*” (see also para 14), which apply to Respondent as an old and industrialized nation. The commitment under this framework of international climate law is based upon the precautionary principle¹¹³, also detailed in Art 191 of the Treaty on the Functioning of the European Union (TFEU),

¹⁰³ Austria's Sixth National Communication in Compliance with the Obligations under the United Nations Framework Convention on Climate Change, according to Decisions 9/CP.16 and 4/CP.5 of the Conference of the Parties, and in Compliance with the Obligations under the Kyoto Protocol, according to Decisions 7/CMP.8 and 15/CMP.1 of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol. Available online: https://unfccc.int/files/national_reports/annex_i_natcom/submitted_natcom/application/pdf/aut_nc6.pdf (Last opened 04.04.2021).

¹⁰⁴ BGBl III, 2016/197.

¹⁰⁵ List of IPCC Member Countries. Available online: https://www.ipcc.ch/site/assets/uploads/2019/02/ipcc_members.pdf (Last opened 04.04.2021).

¹⁰⁶ See *Brincat*, § 116; *Öneryıldız*, § 90.

¹⁰⁷ For the relevance of scientific developments and standards in ECtHR case law see *Rees v UK* (App. No. 9532/81), Judgment of 17 October 1986, §47; *Cossey v UK* (App. No. 10843/84), Judgment of 27 September 1990, §40; *Fretté v France* (App. No. 36515/97), Judgment of 26 February 2002, § 42; *S.H. & Others v Austria* (App. No. 57813/00), Judgment of 3 November 2011, § §97, 103, 117, 118; *Dubská and Krejzová v. The Czech Republic* (App. Nos. 28859/11 28473/12), Judgment of 15 November 2016, § 100; *Oluić v. Croatia* (App. No. 61260/08), Judgment of 20 May 2010, §§ 29- 31. *Tatar* [Part IIB(h)], §§ 109, 120.

¹⁰⁸ *Brincat*, §112.

¹⁰⁹ See *Demir and Baykara v. Turkey* (App. No. 34503/97), Judgment of 12 November 2008, § 68. (“*Demir*”)

¹¹⁰ See *Demir*, § 85. *Neulinger and Shuruk v. Switzerland* (App. No. 41615/07), Judgment of 6 July 2010, §131.

¹¹¹ As of October 2020, 196 States have ratified the UNFCCC, and 189 States have ratified the Paris Agreement.

¹¹² UNFCCC, Art 2.

¹¹³ UNFCCC, Art 3(3).

guiding the scope of measures to be taken pursuant to Art 8 ECHR.¹¹⁴

42. **(ii) Other norms of international law:** The ECtHR has determined that the precautionary principle of international environmental law and the ‘no harm’ principle of customary international law may inform the scope of the State’s positive obligations under the ECHR.¹¹⁵ The precautionary principle already applies in lack of a hundred percent certainty regarding the effect of the respective preventive measures. A high scientific plausibility of the efficacy of measures is sufficient.¹¹⁶ These principles are particularly relevant to the State’s positive obligations in the present case, as the climate crisis is a transboundary environmental problem that poses a threat of “serious” and “irreversible” harm. Art 47 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts further states that “*where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act*”.¹¹⁷
43. Respondent has also ratified the United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”) thereby acknowledging a broad range of human rights held by persons with disabilities such as Applicant. This includes protection in the event of natural disaster(s).¹¹⁸ The IPCC has concluded that disabled people are especially vulnerable to the detrimental effects of the climate crisis.¹¹⁹ In line with this, the Conference of the Parties to the UNFCCC (which Respondent has ratified) has identified persons with disabilities, such as Applicant, as one of the groups most likely to be disproportionately affected by the effects of climate crisis.¹²⁰
44. **(iii) Judicial decisions and legal developments** on states’ human rights obligations to mitigate the climate crisis, within and outside the Council of Europe. UN Human Rights Treaty Bodies have indicated that, in light of the serious risk of harm posed by the climate crisis, and in order to comply with their human rights obligations, States must adopt policies “*which reflect the highest possible ambition*” and “*act on the basis of the best scientific evidence*”

¹¹⁴ See *Tătar*, Fn. 66, §120.

¹¹⁵ On the precautionary principle, see *Tatar* [Part IIB(h)], §§ 109, 120; and on the no harm principle, see *Taskin*, §111.

¹¹⁶ See *Urgenda* Fn 90, para 63.

¹¹⁷ *United Nations, Responsibility of States for Internationally Wrongful Acts*, 2001. Available online: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (Last opened 04.04.2021).

¹¹⁸ Art 11 UNCRPD.

¹¹⁹ *IPCC, AR 5 Climate Change 2014: Impacts, Adaptation and Vulnerability*, 12, 61, 109. Available online: https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf (Last opened 04.04.2021).

¹²⁰ See, e.g., UNFCCC COP, *supra* note 2; H.R.C. Res. 41/21, *supra* note 7; *Relationship Between Climate Change and Human Rights*, *supra* note 3, at 22–23.

- available*'.¹²¹ Multiple court rulings, ordering more effective climate measures pursuant to human rights obligations, have also drawn on a range of principles from international climate change and environmental law in determining the State's duty to mitigate GHG.¹²²
45. According to strong scientific evidence, urgent action to tackle the climate crisis is imperative and the additional risks of exceeding critical climate thresholds, so-called "*tipping points*"¹²³ has to be avoided.¹²⁴ (para. 32) This risk consistently increases with an overall temperature rise between 1 and 2 °C.¹²⁵ In *Taşkın and Others v. Turkey*, the ECtHR dismissed the government's defense that risks would only emerge in 20 to 50 years.¹²⁶ In the present case, the real risk of the climate crisis has already materialized for Applicant (paras. 1-2) and best available science shows that the risk will be even more serious and real if business as usual continues. (paras. 10,11)
46. Respondent's margin of appreciation is limited to determining how to fulfill its duties within this framework and not to refrain from taking any measures.¹²⁷ Whilst "*the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation*",¹²⁸ a "*manifest error of appreciation*"¹²⁹ by the state constitutes an infringement of Art 8 ECHR. Such error has been made by Respondent. Whilst Respondent has acknowledged the threats of the climate crisis fully endorsing the IPCC's findings, Respondent has consistently failed its climate targets by way of effective reduction measures (para. 22) and is not on track to reach the 1.5°C target. (para. 21) In fact, Respondent has not reduced GHG at all during the period of 2010 and 2019.¹³⁰ National GHG are still at the level of 1990 and not below. (paras. 19-20)
47. Respondent has not established an adequate legislative and administrative mitigation framework. Currently, no national climate targets are even enshrined under the Austrian Climate Protection Act ("KSG"). Let alone, a mechanism that requires the federal state and the state to reach an agreement regarding measures, as is essential for a federal state with divided competences set any effective mitigation measures. Respondent subsidizes

¹²¹ UNTBs *Joint Statement on Climate Change* (16 September 2019). Available online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E> (Last opened 04.04.2021).

¹²² *Dutch Supreme Court, Urgenda v. The Netherlands*, ECLI:NL:HR:2019:2007, 20 Dec. 2019, para. 5.7.7. *Tribunal Administratif de Paris, Notre Affaire a Tous et al. v France*, 44-008, 60-01-02-02 R, § 16.

¹²³ IPCC, *Global Warming of 1.5°C*, 262. **Submitted as DOC 07, p 1915.**

¹²⁴ *Ibid.*

¹²⁵ IPCC, *Global Warming of 1.5°C*, 262. **Submitted as DOC 07, p 1915.**

¹²⁶ See *Taşkın*, §§107, 113.

¹²⁷ See *Fadeyeva*, §124.

¹²⁸ See *Fadeyeva*, § 96.

¹²⁹ *Buckley v. United Kingdom* (App. No. 20348/92), Judgment of 29 September 1996, §§ 76–77. *Fadeyeva*, § 105.

¹³⁰ *Zechmeister et al, Klimaschutzbericht 2020*, 48, 184 (Appendix 4). **Submitted as DOC 05, p. 1168, 1304 (App.4)**

climate damaging and environmentally counterproductive actions in realm of energy and transport in the amount 15 billion EUR/ year on average. (para. 23) Respondent has committed to doing its fair share¹³¹, yet has not acted upon that commitment. This is contrary to the principles of CBDR-RC, equity and Respondent's leading role as a developed country in the UNFCCC.

48. Respondent has failed to substantiate as to why, despite these failures, it has set the necessary and appropriate measures to mitigate the climate crisis in line with the scientifically required target of 1.5°C. To the contrary, Respondent's national council has even declared the state of climate emergency in 2019, yet not acted upon that. (para. 17)
49. There are no competing interests for the community at large, as the effects of the climate crisis pose a foreseeable long-term risk to the life of society at large, including Applicants'. (para. 9) ¹³² Respondent's protection of Applicant is essential for society as a whole and also of primary importance.¹³³
50. Applicant cannot adapt to the effects of the climate crisis as he cannot relocate. As a result of the MS (including the Uhthoff's Syndrome), he is unable to pursue regular work. Given this, he has no option to migrate to another country, as he can't apply for any work, nor does he have a reason to seek asylum under the current asylum regime. National immigration policies are typically linked to economic needs.¹³⁴ Besides, his family, and in particular his wife, are based in Austria and have no intention of moving, let alone a realistic economic opportunity to find adequate employment outside their home country. A separation from his family, would infringe Applicant's rights under Art 8 ECHR, as he wants to stay close to his wife and closest family. Last, it should be noted that the average rise in temperature is a global phenomenon and even Nordic countries, such as Sweden and Norway, have experienced an increase in summer days of 25°C and more.¹³⁵

¹³¹ *Paris Agreement*, Art. 4(3) and 4(4).

¹³² *L.C.B. v. the United Kingdom* (App. No. 14/1997/798/1001), 9 Juni 1998, § 36.

¹³³ See *Oneriyildiz*, § 89.

¹³⁴ See *Jodoin/Ananthamoorthy/Lofts*, cited above Fn 99, 2020, 73 -115, 90.

¹³⁵ *Wilcke et al*, The extremely warm summer 2018 in Sweden - set in a historical context, 2020, 20. Available online: <https://esd.copernicus.org/preprints/esd-2020-25/esd-2020-25.pdf> (Last opened 04.04.2021). *Amorim et al*, High resolution simulation of Stockholm's air temperature and its interactions with urban development, 2020, 2. Available online:

<https://reader.elsevier.com/reader/sd/pii/S2212095519301725?token=238F773982FC5304D47DF32AB6B2CBE633AEEABF5DDC03CA492FC466BEF6229881E1A55E1D43F03EBBC5F1CE88F66F93&originRegion=eu-west-1&originCreation=20210405154542> (Last opened 04.04.2021).

6. Despite his arguable claim under Art 8 ECHR, Applicant has no effective remedy available to him under Art 13 ECHR

51. A domestic regime must afford an effective remedy to concerned individuals in case of an arguable claim to a violation of a Convention right.¹³⁶ Art 13 ECHR requires access to a competent national authority who can deal with the substance of the complaint.¹³⁷ Applicant, victim under Art 8 ECHR, however, can't challenge Respondent's ineffective and insufficient climate measures. Administrative omissions can only be challenged if access to justice is specifically provided for under respective national acts. Otherwise, a systemic deficit exists. The inaction of the legislator cannot be challenged under Austrian law.¹³⁸ Applicant has no right to request declaratory action with regards to the legislator's inaction or administrative omission, neither with a court nor an administrative body. No general duty of protection can be adhered to by Applicant under Austrian law, requiring a court or competent authority to investigate Applicant's claim under Art 8 ECHR.
52. No right to remedy or opportunity to challenge administrative omissions or even lack of ambition exists under the Climate Protection Act ("*Klimaschutzgesetz*", "KSG"), the only applicable administrative act in the case at hand. The KSG is not addressed to individuals such as Applicant. NGO's attempt to challenge administrative omissions regarding climate measures despite these structural deficits, based on the Aarhus Convention, has not even been dealt with.¹³⁹
53. Art 139 and 140 B-VG which govern the access of private individuals to the Constitutional Court only allows for the invalidation of single norms (or parts thereof) by a person who is addressed and legally impacted by this very norm. The KSG is not addressed to individual persons hence Applicant cannot request to invalidate it under Art 140 B-VG. Let alone, a successful invalidation wouldn't provide a practical and effective remedy to his claim, as it would result in there being no climate law at all.
54. There is no civil case for Applicant to raise. No claim can be raised according to the Public Liability Act ("*Amtshaftungsgesetz*", "AHG"), as no national law is infringed by the executive power/administrative authorities. In lack of an applicable criminal statute and a clear perpetrator, no criminal law case could have been initiated by Applicant.

¹³⁶ *Boyle and Rice v. the United Kingdom* (App. No. 9659/82; 9658/82) Judgment of 27 April 1988, § 52 ("*Boyle*"); *Hatton*, § 137.

¹³⁷ *Boyle*, § 52.

¹³⁸ *Ennöckl*, Climate Change Litigation in Germany and Austria – Recent Developments, Current Developments in Carbon & Climate Law, 2020. **Submitted as DOC 24.** *Schulev-Stieindl/Kerschner*, Klimaklage: VfGH weist Individualantrag gegen steuerliche Begünstigung der Luftfahrt zurück, RdU 2020, 251-256. **Submitted as DOC 23.** *Berka*, Verfassungsrecht, 2018, 374; *Oblinger/Eberhard*, Verfassungsrecht, 2019, 493.

¹³⁹ *Ökobüro/Greenpeace Austria*, Antrag zu Klimaschutz-Sofortmaßnahmen 2019. **Submitted as DOC 29.**

55. Lastly, the Austrian public ombudsman board, "*Volksanwaltschaft*" has no power to hand down legally binding decisions¹⁴⁰ nor to offer any kind of redress. Its powers are restricted to recommendations, public statements, reports and the like.¹⁴¹
56. Given the above, Applicant is faced with a structural deficit in the law regarding his climate crisis case. There is no practical and effective remedy available to him which would provide him with the opportunity to effectively redress for breaches under the Art 8 ECHR.¹⁴²

6.1. Applicant exhausted all possible remedies despite their lack of full effectiveness

57. Despite the lack of full effectiveness required under Art 8 ECHR, Applicant requested the invalidation of Art 6 para. 1 lit 3 d Austrian VAT law ("*Umsatzsteuergesetz*", "*UStG*") with the Constitutional Court pursuant to Art 2 and 8 ECHR (and Art 2 and 7 Charter of Fundamental Rights, "*CFR*"), as well as the principle of equality before the law. In this regard, he also argued that the preferential treatment of the most climate damaging means of transportation, namely the plane, constitutes an infringement of the State's duty to protect under Art 2 and 8 ECHR. The issue of Art 13 ECHR was also raised with the Court.¹⁴³
58. His legally independent petition pursuant to Art 140 B-VG¹⁴⁴ was filed in an attempt to at least set an end to a climate damaging state measure and thereby have his rights partly addressed. This norm was listed as one of Respondent's climate counterproductive measures.¹⁴⁵ (para 23) Respondent defended these tax exemptions to be factually justified.¹⁴⁶ Art 6 para 1 lit 3 d UStG was the only climate damaging State action (norm) that Applicant could arguably request to repeal pursuant to the stringent criteria of Art 140 B-VG and the court's jurisprudence thereto. The Constitutional Court dismissed Applicants' standing stating that he couldn't request to invalidate a VAT tax privilege for a means of transportation that he -for ecological reasons- is not using. Besides, the Court stated that VAT tax doesn't automatically have a knock-on effect on consumers and hence it cannot be concluded that VAT tax is effectively addressed to consumers. Only in very few cases has the Court deviated from its very stringent interpretation of Art 140 B-VG.

¹⁴⁰ *Zaxanis v. Greece* (App. No. 68138/01), Judgment of 18 November 2004, §47.

¹⁴¹ *Ombudsman Act 1982*, Art 1 para 2.

¹⁴² *Case of Z and others v. the United Kingdom* (App. No. 29392/95), Judgment of 10 May 2001, §§ 108 -111.

¹⁴³ *Individualantrag* gem 140 B-VG, 20.2.2020, 135. Submitted as **DOC 20**, p 3578.

¹⁴⁴ Filed in conjunction with 8.062 other petitioners.

¹⁴⁵ *Kletzian-Slamanig/Köppel*, cited above Fn 52, 612 Submitted as **DOC 17**, p 3361.

¹⁴⁶ *Bundesministerium für Finanzen*, Rs V-332/2020 (in Zusammenhang mit Rs G-144 und 145/2020)

Aktenübermittlung und Äußerung betreffend LuftfahrtbegünstigungsV, 2020,4. Submitted as **DOC 31**, p 4453.

Despite explicit reference, these exceptions have not even been considered in the case at hand.¹⁴⁷

59. The excessively rigid approach by the Court¹⁴⁸ deprived Applicant of any opportunity to have his arguable claim under Art 8¹⁴⁹ at least partly examined on its merits. Given the negative and direct impact of the effects of the climate crisis on Applicant's well-being, his claim is by all means arguable under Art 13 ECHR.¹⁵⁰ Even if successful, the invalidation of single climate damaging norms is not an effective remedy to set an end to the ongoing infringement of Art 8 regarding Applicant.

7. Respondent has infringed Applicant's rights under Art 6 ECHR

60. Whilst the Court's case law makes it clear that challenges by individuals to decisions of major environmental impact do not necessarily engage an individual's "civil rights and obligations" under Article 6 ECHR. Article 6 is nevertheless applicable in case of personal exposure to a danger that is serious, specific and imminent.¹⁵¹ The effects of the climate crisis on Applicant meet these criteria, as his severe suffering is directly related to a climate-crisis induced rise in average temperatures including increase in heatwaves. The effects are serious, as they amount to a complete loss of control over muscular movements at temperatures reaching and exceeding 30°C. (paras 1-8) His suffering will predictably and foreseeably worsen, if no effective climate measures are set by Respondent now (paras 9-13), also to avoid the risk of reaching tipping points which could lead to irreversible effects (para 30), also for Applicant. Hence, in this case Article 6 ECHR is applicable and has been infringed as Applicant's has been denied any opportunity to have his case – at least partly – examined on its merits.¹⁵²

¹⁴⁷ *Austrian Supreme Court*, VfGH 12.03.1992, G220/91; G222/91, 58 Submitted as DOC 21, p 3501.

¹⁴⁸ *Camenzind v. Switzerland* (App. No. 136/1996/755/954), Judgment of 16 December 1997, § 54.

¹⁴⁹ *Boyle*, § 52; *Hatton*, § 137.

¹⁵⁰ *Valsamis v. Greece* (App. No. 21787/93), Judgment of 18 December 1996, § 47.

¹⁵¹ *Balmer-Schafroth and Others v Switzerland*, (App.No. 67\1996\686\876), Judgment of 26 August 1997, § 40; *Atbanassoglou and Others v Switzerland* [GC], (App. No. 27644/95), Judgment of 6 April 2000, §§ 46-55; *Ivan Atanasov v Bulgaria*, (App. No. 12853/03), Judgment 2 December 2010, § 92.

¹⁵² *Austrian Supreme Court*, VfGH 12.03.1992, G220/91; G222/91. Submitted as DOC 21.