# CLIMATE LITIGATION IN AUSTRIA

## Case Study

**Justice and Environment 2023**

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# Climate Case before the Austrian Constitutional Court (AT)

## SUMMARY

The individual applications, which were directed against provisions of the Value Added Tax Act (UStG) and the Mineral Oil Tax Act 1995 (MineralölsteuerG) as well as the Aviation Concessions Ordinance, were submitted to the Austrian Constitutional Court on 20 February 2020. In total 8.068 persons submitted the claim, five of whom are named in the application. In essence, the applicants claimed that the contested standards did not comply with the principle of equality and that the state did not fulfil its obligations to protect under Art 2 ECHR, Art 2 CFR and Art 8 ECHR, Art 7 CFR in view of the expected adverse effects of the climate crisis. However, the application failed to meet the admissibility requirements.

Due to the lack of immediacy of concern, the application was rejected as inadmissible, and the Constitutional Court did not deal with its substance. The application was submitted by attorney-at-law Michaela Krömer with the support of Justice and Environment member ÖKOBÜRO.

## ARGUMENTS OF THE APPLICANTS

8.063 of the applicants are persons who had agreed in advance via an online form to also submit an individual application with the same content to the Constitutional Court. This was communicated in the media as a "class action", but formally it was a bundling of individual applications to lend symbolic weight to the cause. The persons named in the application were a climate researcher, a student and activist of the Fridays for Future movement, the managing director of Greenpeace Austria and the moderator (and long-time "voice" of Austrian Railway Services) Chris Lohner, all of whom publicly promoted the climate lawsuit. The remaining applicant is not a public figure, but suffers from a form of multiple sclerosis that worsens with rising temperatures, and is now involved in a climate lawsuit before the ECtHR after the application was rejected by the Constitutional Court. The applicants requested the repeal of wordings of Value Added Tax Act (UStG) and the Mineral Oil Tax Act 1995 (MineralölsteuerG) as well as the Aviation Concessions Ordinance. Section 6(1)(d) Value Added Tax Act regulates the exemption from VAT of passenger transport services by ship and aircraft in cross-border transport. Section 4(1)(1) of the Mineral Oil Tax Act provides for an exemption from mineral oil tax for fuels supplied to air carriers for the provision of aviation services.

Regarding their right to equality under Article 20 CFR and the obligation of the legislator under Article 2 StGG, Article 7 B-VG (Federal Constitutional Act) to treat equal things equally and unequal things unequally, the applicants argued that due to the exemption from paraffin tax pursuant to section 4(1)(1) of the Mineral Oil Tax Act and the passing on of the value added tax for cross-border rail journeys to consumers, passengers would have to pay a higher net ticket price for a train journey than for an air journey. In this way, consumers who aim to follow the

national goal of environmental protection and choose a climate-friendly means of transport are financially disadvantaged.

The applicants also argued that the contested provisions were also counterproductive towards the State's duty to protect the applicants right to life and physical integrity according to article 2 ECHR, article 2 CFR. In view of the foreseeable or partially realised threat to the right to life of the applicants due to extreme weather events, natural disasters and deterioration of soil, water and air quality, the legislator was obliged to create a legal situation that would lead to a reduction of greenhouse gas emissions.

The applicants also argued that duties to protect regarding Art 8 ECHR and Art 7 CFR were violated. They argued that the legislature was obliged to create a legal situation that limited environmental damage that had a negative impact on health, physical integrity, or private and family life.

## THE COURT'S DECISION

The Constitutional Court first examined the admissibility requirements of the application. An individual application is admissible if a regulation or a law directly interferes with the legal sphere of the person, if the interference is clearly determined by the regulation or the law itself, i.e. directly, if it currently impairs the legally protected interests of the person and if there is no reasonable way around it, i.e. the applicant has no other reasonable way to defend him/herself against the alleged interference.

Regarding the immediacy of concern, the applicants had stated that passengers were directly affected insofar as the value added tax had to be paid by train travellers to companies in the context of the ticket purchase. According to the Constitutional Court, however, this was not sufficient to demonstrate a direct violation of the law. In the given context, the extent to which the tax liability could be passed on to passengers depended on many factors. The obligation to pay VAT in connection with cross-border passenger transport by rail is in any case incumbent on the owner of the tax warehouse. In addition, the Constitutional Court also examines possible violations of the rights of persons who are not addressed by the contested provison - especially if these are constitutionally guaranteed rights. In this case, however, such an examination was out of the question, as the applicants, according to their own statements, did not want to use the transport services of airlines. Accordingly, the applicants could in no way be the addressees of the challenged standards, which were only relevant for air transport and not also for rail transport.

Due to the lack of immediacy of concern, the application was rejected as inadmissible.

Contact

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