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A STRATEGIC CASE OF THE INVISIBLE KILLER: AIR POLLUTION

By: Alba Dushi - Group for Legal and Political Studies

Air pollution kills around [7 million](#) people yearly around the world. Although this invisible killer has been troubling governments ever since the Industrial Revolution, very little has been done against it. Air pollution was even classified as a human [carcinogen](#) in 2013, yet we still burn fossil fuels and everything else like there is no tomorrow. One main source is “[traffic-related air pollution](#)” or the so-called ‘TRAP’ with which people living near highways are too familiar with. It is widely known and accepted that air pollution kills people, but the question is, how many times has air pollution been officially recognized as a cause of death?

Surprisingly, [only once](#)! This is the case of [Ella Kissi-Debrah](#), a 9-year old girl with asthma who had the misfortune to live near a busy road in London. Ella passed away in 2013 and at the time air pollution was not found to be the cause of death. However, due to her mother’s insistence in seeking justice for Ella, on December 2020, the Coroner’s Court found that Ella’s causes of death were acute respiratory failure, severe asthma and air pollution exposure. Such decision is reportedly the first and only of its kind in the world, a decision where air pollution is officially recognized as the cause of death. Until now, coroners, courts and other administrative bodies have been hesitant to officially link the obvious cause to the inevitable effect, *i.e.* to link air pollution to individual deaths. Ella’s case is a positive step towards changing the practice of inaction, ignorance and lack of accountability of states, one which they have been accustomed to for far too long.

The right to a healthy environment, and subsequently the right to clean air, is not provided in the European Convention on Human Rights (ECHR). Nevertheless, according to the [jurisprudence of the European Court of Human Rights\(Court\)](#), an unhealthy environment can lead to the breach of other human rights recognized by the Convention. The Court often refers to the Convention as a ‘living instrument,’ the interpretation of which is not fixed but takes into account [changes in the society](#). Hence, an unhealthy or harmed environment can result in the state’s breach of the people’s right to life (art. 2 ECHR), right to respect for private and family life (art. 8 ECHR), right to receive and impart information and ideas (art. 10 ECHR), right to the peaceful enjoyment of one’s possessions (prot. 1, art. 1 ECHR), right to a fair trial and access to court (art. 6 ECHR) and right to an effective remedy (art. 13 ECHR). According to the [Manual on Human Rights and the Environment](#), human rights main instruments such as the Universal Declaration of Human Rights and the European Convention on Human Rights were drafted before environmental awareness was fully developed, thus neither of these instruments includes a right to a healthy environment. In the today’s world however –a world where the number of deadly heat waves, wildfires, droughts, floods, storms and other disasters is continuously on the rise – it is commonly agreed and can no longer be denied that respect for human rights and the protection of environment are interconnected.

There are a number of cases where the European Court of Human Rights found that fundamental rights were breached by states due to an unhealthy environment. However, there is no case in the Court’s jurisprudence where air pollution was found to be the cause of death and subsequently the basis for state responsibility, such as the Ella Kissi-Debrah case. For the purpose of this article, a few cases have been elaborated below in order to give a general picture how human rights and the environment are correlated and how that is continuously proved by the Court’s case law. It should be noted firstly that states have a [positive obligation](#) to take appropriate steps to protect the human rights of the people living in their territory, in addition to having a negative obligation to not violate these rights. In this respect, [Öneryıldız v. Turkey](#) is a case where an explosion on a municipal rubbish tip killed 39 people. Here, the Court found a

violation of the “right to life” (Art. 2 ECHR), noting that because the state authorities knew or ought to have known of the dangers, they had an obligation to (i) take preventive measures for the safety of the people, (ii) to inform the people for the dangers they were subjected to, and (iii) to issue legislation which duly regulates dangerous activities. On the other hand, in the [Hamer v. Belgium](#) case, a house built in a forest without a permit was demolished by the state. Here, the Court did not find that there was a violation of “the right to the peaceful enjoyment of one’s possessions” (prot. 1, art. 1 ECHR) and emphasized that *“while none of the Articles of the Convention is specifically designed to provide general protection of the environment as such... in today’s society the protection of the environment is an increasingly important consideration... The environment is a cause whose defense arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations.”*In this respect, according to the European Court of Human Rights case law, when states issue decisions affecting the environment so far as to interfere with citizens’ fundamental rights, these decisions must follow a legitimate aim, and *“a fair balance must be struck between the interest of the individual and that of the community as a whole.”*

In addition to the above, in [LópezOstra v. Spain](#) case, citizens had been suffering from fumes and noises coming from a waste treatment plant near their home. Here, the Court found a violation of the right to respect for private and family life (Art. 8 ECHR) and argued that although the fumes and noises did not seriously endanger the people’s lives, severe environmental pollution may still affect the people’s well-being and stop them from enjoying their homes, private and family life; which is what had happened in this case. In [Brândușe v. Romania](#) case, a prisoner suffered from bad odors coming from a rubbish tip near the prison and here the Court found a violation of Article 8 ECHR as well. Similarly, in [Fadeyeva v. Russia](#), a case where an applicant who lived near a steel plant had been exposed for a long time to toxic elements in the air that seriously exceeded safe levels, which as a result had deteriorated the applicant’s health; the Court had also found a violation of Article 8 ECHR. Also, in [Dubetska and Others v. Ukraine](#), a case where the applicants who lived near a coal plant had suffered from chronic health problems, the Court found a violation of Article 8 ECHR because the area where the applicants lived was unsafe and since the authorities had not found a solution for 12 years by neither containing the pollution nor by moving them into another place, this constituted a breach of the right to respect for private and family life. In [Tătar v. Romania](#), a case where applicants lived near a gold extraction mine that used a procedure involving sodium cyanide and which subsequently polluted several rivers, the Court found a violation of Article 8 ECHR, stating that states have a positive obligation to ensure the respect of the right for private and family life and home, as well as a healthy and protected environment. Also, in [Gomez v. Spain](#), a case where citizens were disturbed in their homes by continuous noise from bars, the Court found a violation of Article 8 ECHR and reasoned that although the state had adopted by laws regulating the matter, they had failed to properly implement them in practice.

On the other hand, in [Grimkovskaya v. Ukraine](#), the state administration had routed a motorway in a street which was previously residential, a street which had no proper surface to withstand heavy traffic, no pavement and no drainage, and had potholes usually filled with cheap material including waste from coal mines. Here, the applicant complained that the people living in her house suffered from constant noise, pollution and vibrations. In this case, although the court considered that the cumulative effect of the air and soil pollution, noise and vibration created by the motorway significantly deterred the applicant from enjoying her right to private and family life, the court did not find sufficient evidence to prove the direct link between the people’s health problems and the pollution, because they had suffered from many diseases

before the motorway was routed. In this case, had the facts been slightly different, namely had the applicants gotten sick after the motorway was routed close to their home, then the Court would have likely found there was a breach of a fundamental human right.

In light of the above, there is currently no case in the European Court of Human Rights jurisprudence where a breach of the “right to life” was found due to air pollution. Nevertheless, after analyzing the previous decisions of the Court in similar matters, it is not far-fetched to believe that it is only a matter of time before a case like this arises; a case where air pollution is found to be the cause of death and subsequently the basis for state responsibility. The fact that air pollution kills can no longer be denied by states that put economic profitability first, and these states must take positive actions to ensure the right to a clean environment, and to also be held accountable when failing to do so. Detrimental to achieving this goal is to firstly ascertain that the cause of death is air pollution, and this is why Ella’s case is so important, since it is the first official recognition of the invisible killer, and hopefully not the last. Although we haven’t seen many results of this case yet, it is not too optimistic to believe that it will make a change in tackling air pollution, not just in Europe but all around the world. We have a long way to go, but the first step has been taken and should be recognized. This decision paves the way for finally keeping states accountable for failing to ensure and respect the citizens’ fundamental right to clean air and healthy environment.

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