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The European Court of Human Rights' new approach to climate change litigation

Executive summary

The ECHR judgment of 9 April 2024 in the *KlimaSeniorinnen* case has set the standard for climate change litigation, ruling that Switzerland violated the right to respect for private life and the right to access to courts by failing to adopt certain climate change mitigation measures.

The ECHR expressly stated that it is adopting a new approach, different from what it has decided in other environmental litigation, but warned that it must decide within the limits of its jurisdiction, and in no case could it replace the measures of the legislative or executive powers of the States parties.

This approach affects the analysis of standing, highlighting the essential role of associations and collective actions. The ECHR also established certain singularities in the analysis of the merits, both in terms of the right to a fair trial and the right to respect for private life.

In the *Duarte Agostinho* case, the applications were declared inadmissible. The ECHR maintained a strict analysis of the concept of jurisdiction, and did not extend the concept of extraterritorial application. The ECHR considered that in litigation in the context of climate change, a claim cannot be brought against a Member State with which the claimant has no connection.

These cases will influence future claims before the ECHR, but also before national courts and the CJEU, whose analysis of standing is very restrictive.

On 9 April 2024, the Grand Chamber of the European Court of Human Rights ("**ECHR**") handed down two decisions and a judgment concerning the failure of several Member States to adopt measures to combat climate change. This is the first time that the ECHR has examined the global problem of climate change, analysing the obligations of States, the limits of jurisdiction and the implications for the right to respect for private life and access to courts.

Two of the applications before the ECHR, *Carême v. France* and *Duarte Agostinho and Others v. Portugal and 32 other states ("**Duarte Agostinho and Others**")*, were inadmissible. In the first case, because the ECHR considered that the applicant did not have victim status under Article 34 of the European Convention on Human Rights (the "**Convention**"). In the second case, because, on the one hand, the ECHR considered that there were no grounds for extending its jurisdiction extraterritorially with respect to the other 32 respondent states - although it could do so with respect to Portugal - and, on the other hand, because the applicants had not exhausted domestic remedies in Portugal before turning to the ECHR.

The third case, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* ("***KlimaSeniorinnen***"), is the only one in which the merits of the case were analysed, and the standing of the applicant, a Swiss association called *KlimaSeniorinnen* which aims to protect older women from the effects of climate change, was upheld. The applicant alleged, among other things, a violation of the human right to respect for private and family life as a result of the Swiss Confederation's unambitious climate change legislation, as well as a restriction of the right to a fair trial, as the Swiss Federal Supreme Court had arbitrarily dismissed the domestic claim.The ECHR found there had been a violation of Article 6 of the Convention (right to a fair trial) and Article 8 of the Convention (right to respect for private and family life), and ordered Switzerland to pay €80,000.

The *KlimaSeniorinnen* judgment draws a new course for claimants and courts in future litigation on policies and issues related to global warming and climate change. In particular, the following considerations are worth noting:

i) The ECHR noted that this is a new approach, unlike what it has decided in other environmental cases, but warned that **it must decide within the limits of its jurisdiction**, and in no case can it replace the measures of the legislative or executive powers of States parties.

ii) The new approach is due, in particular, **to the nature of the problem of climate change**: there is no single cause of the damage, it does not relate to a single sector, the chain of effects is more complex and unpredictable, and it is a global problem which, according to the ECHR, must be analysed in a balanced way, taking into account all the interests at stake. Some of the issues addressed include the problems of causality, the moderation of the burden of proof and the standard of proof required in these cases, the assessment of evidence -and, in particular, evidence of a scientific nature-, and the scope of review by the courts of the public policies implemented by States in the area of climate change. It pointed out that the causal link between the damage and the State measure may be more indirect and complex, although it recalled that the ECHR cannot substitute itself for the national courts where there have been legal proceedings in which an analysis of the facts and evidence has been carried out. Finally, it also recalled the margin of appreciation enjoyed by the States, and that responsibility for climate change issues, although global, must be individualised for each Member State (paras. 423-457).

iii) **A new analysis of standing (*locus standi*) was carried out**, distinguishing between individuals and associations. In the case of individuals, it built on its case law but adaped it to the context of climate change and, while maintaining the *actio popularis* exclusion, was more open-ended in its analysis that the claimant must prove direct harm from the lack of adequate measures to combat climate change (paras. 484-488). The ECHR allowed an expansive interpretation of the scope of the extraordinary standing of associations when they meet certain requirements, among which the following stand out: (a) the association in question must be lawfully established in the relevant jurisdiction or have standing to act in that jurisdiction; (b) it must be able to demonstrate that it has as its statutory objective the defence of the human rights of its members or other affected individuals in its jurisdiction, including through the exercise of collective action for the protection of those rights from climate change threats; and (c) it must be able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of its members or other affected individuals in the jurisdiction subject to the threats or adverse effects of climate change (paras. 501, 502 and 523). Significantly, the ECHR added that it is not necessary for the members or individuals on behalf of whom the association acts to have victim status and that in the framework of the analysis of the above-mentioned requirements, the ECHR will assess whether the individual applicants had access to a court at the domestic level.

iv) **In relation to the violation of Article 8 of the Convention (right to respect for private and family life)**, States have a wide margin to establish mitigation measures, as long as they are aimed at combating climate change. However, in order to determine whether this right has been violated, it is necessary to examine whether the State has: (i) adopted general measures specifying a target timetable for achieving carbon neutrality in line with the overall climate change mitigation objective; (ii) set intermediate emission reduction targets (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national reduction targets within the relevant time frames undertaken in the national policies; (iii) provide evidence to that effect; and (iv) act in good time and update the targets in a timely manner, etc. (paras. 543 and 550).

v) **With regard to the violation of Article 6 of the Convention (right to a fair trial)**, the ECHR underlined the importance of associations for the defence of the environment and pointed out that collective actions are an essential tool in the context of the fight against climate change. In this case, it considered that it was essential to carry out an analysis from the point of view of the principle of proportionality, assessing the different elements of the case. In view of the urgency of taking measures, the fact that the applicants had

brought claims at various instances, the fact that the members of the association had been denied the right to an appeal, and the absence of other domestic remedies, the ECHR found that the right had been violated (paras. 635-639).

Finally, it is worth mentioning the ***Duarte Agostinho and Others*** decision, which, despite being a decision of inadmissibility, is relevant to the analysis of jurisdiction. The ECHR stated that Member States cannot be sued for violations in the context of the fight against climate change if there is no link with the defendant State. It therefore ruled out the possibility of claims against other EU Member States when the link exists only with one of them (in this case, Portugal). It held that climate change is a global phenomenon, but each State has its share of responsibility. It added that there is no case law permitting the extraterritorial application of the Convention when individuals are not subject to the jurisdiction of the State against which the action is brought, and that in the case in question there was no link with the defendant States, except with Portugal (paras. 192-200). Finally, it stressed that the Convention is not designed to provide general environmental protection, as there are other international instruments suitable for this purpose.

In conclusion, the ECHR's analysis may be useful to domestic courts and the CJEU in dealing with climate change litigation, which will undoubtedly become more relevant in the coming years. The success of these actions will depend in part on how the action is framed, and in part on the measures adopted in each State, with the ECHR having established clear lines for the judicial exercise of rights in the context of climate change.

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