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Positive Obligations, Standing, and Victim Status in Klimaseniorinnen v Switzerland [2024] ECHR 304

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On 09 April 2024, the European Court of Human Rights ("ECtHR") handed down its long-awaited judgment in three seminal climate cases: *Carême v France* (ECHR no 7189/21), *Duarte Agostinho v Portugal and 32 others* (ECHR no 39371/20), and *Verein Klimaseniorinnen v Switzerland* [2024] ECHR 304, no 53600/20. See Jonathan Welch's previous blog post on Duarte Agostinho v Portugal.

Of the three ECtHR rulings, this blog will focus on the Court's ruling in *Klimaseniorinnen* which was the only successful application. The *Duarte Agostinho* case, brought by six youth applicants from Portugal alleging human rights violations caused by the impacts of the climate crisis, was dismissed because the applicants had failed to exhaust domestic remedies. *Carême* was brought by the former mayor of the city of Grande-Synthe in France who alleged that the French Government's insufficient action on the climate crisis violated his right to private and family life under Article 8 of the European Convention on Human Rights and the right to life under Article 2. The ECtHR declared *Carême* inadmissible because the applicant no longer lived in France and consequently, could not claim victim status under the Convention.

The *Klimaseniorinnen* ruling raises a wide range of issues in a 260-page judgment but for the purpose of this blog post, I will focus on what the Court said about victim status, standing and Article 8 positive obligations.

Klimaseniorinnen

Klimaseniorinnen was brought by four Swiss senior citizens and Verein KlimaSeniorinnen Schweiz, a non-profit association established to promote and implement effective climate protection on behalf of its members, the general public and future generations. The applicants relied on Articles 2, 6, 8 and 13 of the Convention to allege various omissions of the Swiss authorities on climate-change mitigation. In particular, a failure to adopt a sufficient reduction pathway for Switzerland's GHG emissions, thereby adversely affecting their lives, living conditions and health. As elderly women, the applicants submitted that they are particularly vulnerable to illness and death from the impacts of climate-crisis induced heatwaves.

Before examining the legal arguments, the Court deemed it necessary to highlight factual elements in relation to the climate crisis. In this regard, the Court relied on the significant body of scientific evidence

and knowledge on the climate crisis that has emerged since the enactment of the United Nations Framework Convention on Climate Change (UNFCCC) in the 1990s. The Court traced the evolution of international commitments and knowledge on the climate crisis from the 1990s through to the legally binding commitments introduced by the Paris Agreement in 2015, IPCC reports and the UN's recognition of a human right to a clean, healthy and sustainable environment (UN General Assembly Resolution 76/300). Having comprehensively summarised the scientific understanding of the climate crisis and related state commitments, the Court noted at [410] and [413] that *"climate change is one of the most pressing issues of our time" and "the current situation therefore involves compelling present-day conditions, confirmed by scientific knowledge, which the Court cannot ignore in its role as a judicial body tasked with the enforcement of human rights."*

Standing and victim status

The first main issue of controversy that fell to be determined was the question of standing and victim status. Article 34 of the Convention allows the Court to receive applications from *"any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention of the Protocols thereto."* The Court held that the individual applicants were not victims for the purpose of Article 34 because they failed to demonstrate the existence of a sufficient link between the harm they had allegedly suffered (or would suffer in the future) and climate change. As such, the individual applicants' complaints under Articles 2 and 8 of the Convention were dismissed. However, the Court held that the applicant association did have locus standi and proceeded to determine its Article 8 complaint.

On the question of standing and victim status, the Court had to strike a delicate balance between upholding the longstanding principle against admitting so called *actio popularis* type claims while recognising at [483] that in a climate change context, everyone may be affected or be at risk of being affected. For the first time, the Court accepted a claim brought by an environmental NGO. In doing so, it reiterated at [460-461] that the Convention does not provide for actio popularis but that victim status is not to be applied in a *"rigid, mechanical and inflexible way"*. Interestingly, the Court recognised at [499] that *"the special feature of climate change as a common concern of humankind and the necessity of promoting intergenerational burden-sharing in this context (…) speak in favour of recognising the standing of associations before the Court in climate-change cases."*

Positive obligations in the context of the climate crisis

Another controversial issue before the Court was the extent to which states have positive obligations under the Convention regarding climate change mitigation. As set out above, the Court deemed it appropriate to examine the applicant association's complaint from the angle of Article 8 alone.

The Association argued that Article 8 was engaged by Switzerland's failure to take the necessary steps to reduce emissions and combat the immediate risk posed to its vulnerable elderly female members by the climate crisis. The respondent government's response, as recorded at [346], was that climate change is a global problem and therefore, the applicants could not attribute causation specifically to Switzerland. Furthermore, the respondent government maintained at [351] that, given the technical and complex nature of climate change, states should be afforded a wide margin of appreciation. The living-instrument doctrine did not allow for the Convention to be interpreted in a way that undermined the principle of subsidiarity, at [355].

At [415-416] the Court acknowledged that this kind of claim signifies a new departure for the Court's environmental case law which thus far, has dealt with situations involving specific sources of environmental harm as opposed to the wider problem of climate change for which there is no single or

specific source of harm. Nevertheless, *"failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement"* at [455]. In an interesting development of the Court's environmental jurisprudence, the Court recognised the *"intergenerational burden"* of the climate crisis and the rights of future generations, at [420].

The Court held at [543] that given the nature and gravity of the threat of climate change, states have a *"reduced margin of appreciation"* in deciding whether to act. However, applying the well-established Convention principle of subsidiarity, the Court reiterated that states enjoy a wide margin appreciation in deciding the specific steps they will take to comply with their positive obligations.

The Court ultimately held that Switzerland had failed to comply with its positive obligations under Article 8 to put in place relevant legislative and administrative frameworks to quantify through a carbon budget or otherwise, national GHG emissions limitations.

Dissenting opinion

British ECtHR Judge, Judge Eicke, issued a dissenting opinion which demonstrates the extent to which the *Klimaseniorinnen* case raises crucial, existential questions about the role of the ECtHR, and courts in general, faced with the challenges of the climate crisis. As set out by Judge Eicke at para [2] of his dissent, *"I find myself in a position where my disagreement goes well beyond a mere difference in the assessment of the evidence or a minor difference as to the law. The disagreement is of a more fundamental nature and, at least in part, goes to the very heart of the role of the Court within the Convention system and, more generally, the role of a court in the context of the unique and unprecedented challenges posed to humanity (including in but also across our societies) by anthropogenic climate change."*

Judge Eicke's dissent is grounded in his view that the majority went *"well beyond"* the Court's *"normally careful, cautious and gradual approach to the evolutive interpretation of the Convention under what is frequently described as the "living instrument" doctrine."* He objected at [4] that the Court has *"unnecessarily expanded the concept of "victim" status/standing under Article 34 of the Convention and has created a new right (under Article 8 and, possibly, Article 2) to "effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change""* The crux of Judge Eicke's dissent is founded in his view that courts are not best placed to grapple with the complex scientific evidence underpinning the climate crisis. He further maintained that legal proceedings undermine the need for urgent action by distracting contracting parties and slowing down their ability to take necessary measures.

Analysis

The disagreement between Judge Eicke and his majority colleagues is a classic example of the longstanding debate between those who maintain that judges should take a literal, conservative approach to the law and those who believe they should approach their judicial roles in a more interpretive way that allows the law to evolve and respond to changing times and circumstances. It is an important debate and one that is especially ignited by the complexities of the climate crisis.

It is not the intention of this blog post to come down on either side of that debate. Instead, I will set out my thoughts on whether *Klimaseniorinnen* really does constitute a radical departure for the ECtHR or is better understood as a natural development of its jurisprudence.

It must be recalled at the outset that adaptation to changing times and circumstances is embedded within the Convention's *"living instrument"* doctrine. In other words, it is widely acknowledged that the

human rights challenges facing Council of Europe member states when the Convention was drafted in 1950 are not necessarily the same as those facing current-day members. Indeed, the climate crisis would understandably not have been to the forefront of the minds of those who drafted the Convention in 1950, if they considered it at all. Nor would human rights issues relating to technological advancements and other modern-day concerns that the ECtHR has nonetheless been able to grapple with and adapt to in line with the *"living instrument"* doctrine.

The Court's expansion of the law of standing for associations raising environmental complaints is a significant development. However, it is a coherent and pragmatic application of the *"living instrument"* doctrine given that it is impossible to pinpoint one specific source of harm in climate cases and the scope of those who may be affected potentially extends to a country's entire population – see at [414-421]. The Court therefore recognised the potential difficulties for individual applicants in bringing environmental/climate cases without the support of an association equipped with the finances and expertise to represent the collective interests of individual applicants. Any potential 'floodgates' arguments are countered by the fact that this expansion of the principle of standing is confined to environmental/climate cases.

Concerning the positive obligations on states to reduce GHG emissions, the Court was cautious and deferential in recognising at [412] that *"judicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government (…) The task of the judiciary is to ensure the necessary oversight of compliance with legal requirements."* In my view, this is a standard application of the principle of subsidiarity. The ECtHR held that Switzerland had violated Article 8 of the Convention by failing to adopt a sufficient reduction pathway for GHG emissions. In this regard, it must be recalled that states do not have a discretion in this area but instead, are legally bound by the Paris Agreement to prepare, communicate and maintain a nationally determined contribution ("**NDC**") and to pursue domestic measures to achieve them. However, in line with the principle of subsidiarity and states' margin of appreciation, the ECtHR did not mandate how Switzerland should set about reducing its GHG emissions.

Conclusions

The ECtHR ruling in *Klimaseniorinnen* is a pivotal moment in international climate litigation. It indicates that human rights law is developing to respond to the complexities of the climate crisis, including an evolving approach to questions of harm, causation, standing and victim status in this context – see Merrow Golden's discussion of the increasing interplay between the climate crisis and human rights law.

Another interesting aspect of the judgment is its references to *"intergenerational burden sharing"* and future generations; concepts that are familiar in other socio-legal contexts but have yet to find their way into mainstream European legal discourse. It will certainly be interesting to see how this precedent-setting judgment shapes the future exercise of the right to respect for private and family life under Article 8 as a basis for challenging government inaction on the climate crisis.

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