IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 53461/15 – *Kósa v. Hungary*

WRITTEN COMMENTS OF THE

OPEN SOCIETY JUSTICE INITIATIVE

Introduction

1. On 17 June 2016, the case of *Kósa v. Hungary* was communicated to the Respondent government of Hungary. *Inter alia*, the first question for the parties was:

> *Has the applicant exhausted domestic remedies, as required by Article 35 § 1 of the Convention, given that the situation giving rise to the application was examined by the domestic courts only in the framework of an* actio popularis *brought by the Chance for Children Foundation?*

2. The jurisprudence of the European Court of Human Rights is clear that *actio popularis* claims are incompatible *ratione personae* with the Convention.[1] It was for this reason that in 2014 the Court rejected as inadmissible a prior application by the Chance for Children Foundation (CFCF),[2] a non-membership organisation devoted to Roma education rights. The present case raises a different, but related issue: if a domestic collective redress claim for discrimination was made by an NGO under a statutorily valid claim mechanism that is, in substance, distinct from *actio popularis*, and the purpose of the NGO is to represent the interests of the victim class, should a victim who benefited from the collective claim be able to rely on this collective process to exhaust domestic remedies?

3. In such circumstances there is good reason for the Court to find that a victim of discrimination who was part of the class represented by the domestic collective redress process has exhausted domestic remedies, based on the following arguments:

- *A. Collective Redress.* The type of claim made by CFCF should not be characterized as an *actio popularis*, but a different form of limited collective redress.
- *B. Developments in European Anti-Discrimination Practice.* Collective redress claims by organizations which are required to demonstrate that their purpose is to represent the interests of the victim class, without the need for approval from individual victims, are becoming increasingly recognized mechanisms within European countries, particularly with respect to discrimination claims.
- *C. Effective Anti-Discrimination Laws.* These types of collective redress claims enable the practical and effective realization of Convention rights, particularly in relation to structural discrimination or discrimination against large groups.
- *D. Collective Redress beyond Membership Organisations.* Given that the Convention is a living instrument, when considering admissibility the Court should apply its jurisprudence – where members of organisations that undertake collective domestic claims on behalf of their members can rely on these for the purpose of exhaustion – to cases beyond membership organizations where:
  (1) A requirement for membership for claims of group discrimination would render the enjoyment of victims' rights theoretical and illusory;

[1] See *Burden v. UK*, Judgment of 29 April 2008, para. 33.
[2] *Esélyt A Hátrányos Helyzetű Gyerekeknek Alapítvány v. Hungary*, Decision of 25 March 2014.

(2) National legislation has authorized organizations, whose purpose is to protect equal treatment and promote anti-discrimination, to bring limited collective redress claims to protect the equal treatment of a distinct but indeterminate class of persons;

(3) Collective redress claims were made and the applicant was of the victim class intended to be beneficiaries of the claim; and

(4) The claim for collective redress has proceeded as far as legally possible within the Contracting Party.

A. Collective Redress

4. The type of claim made by CFCF should not be characterized as an *actio popularis*, but a different form of limited collective redress requiring a nexus of interest between the representative organization and victim class.

5. The Court has not provided an explicit definition of an *actio popularis* claim but has stated that "[t]he Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention."[3] Similarly, the Court states its rejection of *actio popularis* claims is to "avoid cases being brought before the Court by individuals complaining of the mere existence of a law applicable to any citizen of a country, or of a judicial decision to which they are not party".[4] This description comports with the classic understanding of *actio popularis* in Roman law, being an action that could be brought by an individual on behalf of the public interest.[5] Such type of claim mechanisms existed, for example, in Hungary (up until 2012), where any person could challenge the constitutionality of a law.[6]

6. Claims more limited in scope, particularly where there is an intimate connection between the substance of the claim, the organization making the claim, its purpose as an organization, and the class of victims, should not be classified as *actio popularis* claims. The Court has recognized as much in *L'Erabliere v. Belgium*, when finding the application of Article 6 to the claim by an organization, it stated that "in view of the circumstances of the present case, and in particular the nature of the impugned measure, the status of the applicant association and its founders and the fact that the aim it pursued was limited in space and in substance, that the general interest defended by the applicant association in its application for judicial review cannot be regarded as an *actio popularis*."[7]

7. In *L'Erabliere*, the measure in question was a plan to expand a landfill site, the association's aim was limited to protecting the environment in a specific geographical region, and all the founding members of the organisation resided in the area of concern. The type of claim made by CFCF in the domestic courts of Hungary is analogous: the impugned measure is limited to the opening of a particular school; CFCF is an organization limited in purpose, its aim being specifically and explicitly to address the education needs of Roma; and the claim is limited in space and substance to Roma in the catchment area of the school and to their right to education free from segregation.

B. Developments in European Anti-Discrimination Practice

8. Collective redress claims by organizations, which are required to demonstrate a purpose of representing the interests of the victim class, without the need for approval from

[3] *Burden v. UK*, Judgment of 29 April 2008, para. 33.
[4] *L'Erabliere A.S.B.L. v. Belgium*, Judgment of 24 February 2009, para. 29.
[5] Egon Schwelb, "The Actio Popularis and International Law" (1972) 2 *Israel Yearbook Human Rights* 46, 47.
[6] Act XX of 1949 (the Constitution), para. 32/A (4); Act XXXII of 1989 (Act on the Constitutional Court), para. 21.
[7] *L'Erabliere*, para. 29 (translated from French).

individual victims, are becoming increasingly common within European countries, particularly with respect to discrimination claims.

1. At the EU level

9. EU directives, regulations and recommendations have created sectoral mechanisms for consumer law, [8] commercial law, [9] environmental law, [10] and data protection[11] that require Member States to allow[12] select organizations (typically not-for-profits whose purpose is protection of the subject matter) to make collective claims in domestic courts (except environmental claims, which can only be brought against Community institutions), without authorization from individual claimants.

10. The 2013 European Commission Collective Redress Recommendation,[13] while not binding,[14] recommends to Member States a mechanism for collective complaints across all areas of EU law (although with particular emphasis on consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection). [15] The Recommendation suggests that certified or ad-hoc representative entities who are non-profit, and *whose objectives are related to the rights in question*, should have the power to take proceedings on behalf of and in the name of two or more natural or legal persons. Generally, under the Recommendation, the collective redress mechanism should be by an "opt-in" process, to allow litigants to decide whether they wish to become party to the claim. However, importantly, the Recommendation procedure allows for "opt-out" proceedings if justified by "the sound administration of justice". This type of opt-out process is akin to the Hungarian collective redress claim undertaken by CFCF, in that it allows for a claim by an organization not directly affected by a provision, but whose objectives are to represent the interests of its victims, to take action on behalf of a distinct but indeterminate class of beneficiaries.

2. European national practice – other than discrimination

11. Within national practice there is a growing trend to recognize sector-specific collective redress mechanisms brought by organizations whose purpose must be linked to the right in question. This is a representative, but not exhaustive, sample and summary:

- **France.** As of late-2014, France provides for collective redress in the areas of consumer and competition law.[16] Nationally representative consumer associations having received a governmental accreditation are entitled to bring an action on behalf of consumers.[17] This process has now been extended to health claims.[18]

[8] Directive 2009/22/EC on injunctions for the protection of consumers' interests [2009] OJ L110/30, Article 2.
[9] Directive 2011/7/EU on combating late payment in commercial transactions [2011] OJ L48/1, Article 7(5).
[10] Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13, Article 10(1).
[11] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (2016) OJ L119, Article 80, which will come into force 25 May 2018.
[12] Or will allow with respect to data protection.
[13] Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201.
[14] TFEU, Article 288.
[15] Commission Recommendation, Commentary, para.7.
[16] The mechanism was brought into effect by "*Loi Hamon*" No. 2014-344 of 17 March 2014 enacted by the decree No.2014-1081 of 24 September 2014, coming into force 1 October 2014. It applies to Article L. 423-1, Consumer Code.
[17] Consumer Code, Article L. 423-1.
[18] Public Health Code, Article L.5311-1.

- **The Netherlands.** The Netherlands provides for representative actions in all areas of civil law, but only for injunctive and declaratory relief.[19] The type of organizations permitted to take these actions are, *inter alia*, foundations or associations whose *corporate purposes, by their articles of association, are to protect specific interests*, and the action in question must be to protect those interests.[20] A system which allowed for compensatory relief came into effect in 2005.[21] The Dutch system is opt-out such that the class of beneficiaries is distinct but not determined.
- **Belgium.** From 2014[22], Belgian consumer law[23] permits representative organizations, which include *inter alia* recognized not-for-profit consumer organizations *whose purpose is related to the harm suffered* to take actions on behalf of all consumers.[24] Procedures may be opt-in (required where compensation for physical or moral harm) or opt-out, thereby allowing the organizations to take actions on behalf of a distinct but indeterminate class of beneficiaries.
- **Portugal.** From 1995, Portugal has a broad system of collective action available in all areas of law.[25] These may be commenced either by individuals without a direct interest in the claim, or *organizations who defend the interests claimed for*, regardless of whether they have a direct interest in the claim.[26] The system provides for an opt-out procedure.[27]
- **Germany.** German law provides a mechanism to allow injunctive relief for consumer rights[28] which can be brought by *inter alia* associations *representing interests of businesses*.[29]
- **Sweden.** Sweden allows representative claims in the areas of consumer and environmental law on behalf of claimants so long as the organization *protects the interests of consumers or employees,* [30] *or nature conservation or environmental interests*.[31] This can be taken on behalf of a group identified collectively, such that the group is distinct but indeterminate.
- **Spain.** Within consumer, product liability, and competition law, Spanish law allows legally constituted associations who have a *purpose for the defence of consumer and user interests* to make collective claims.[32] It can do so on behalf of a group which is indeterminate or difficult to determine.[33]

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[19] Dutch Civil Code, Articles 3:305a to 3:305d.
[20] Dutch Civil Code, Article 3:305a(1). Also included are public bodies (Art.3:305(b)); prescribed foreign organisations with respect to consumer rights (Art.3:305(c)); and specific protections relating to consumer rights (Art.3:305(d)).
[21] Act on the Collective Settlement of Mass Damage (Wet Collectieve Afwikkeling Massaschade) (WCAM), which has been implemented in Arts 7:907 to 7:910 of the Dutch Civil Code and Articles 1013 to 1018a of the Dutch Code of Civil Procedure.
[22] Loi portant insertion d'un titre 2 « De l'action en réparation collective » au livre XVII « Procédures juridictionnelles particulières » du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique, 28 March 2014.
[23] Specifically, competition law, market practices and consumer protection, payment and credit services, intellectual property, energy, telecom, transport, pharmaceuticals, food, or insurance.
[24] Belgian Code of Economic Law, Art. XVII.36 and Arts XVII.38 to 40.
[25] Although the Constitution particularly states that these are available for public health, consumer rights, the quality of life or the preservation of the environment and cultural heritage: Article 52(3).
[26] Law No. 83/95 of 31 August 1995, Art.1; Civil Procedure Code, Article 26- A.
[27] Law No. 83/95 of 31 August 1995, Articles 14 and 15.
[28] Act on Cease and Desist Actions (UKlaG).
[29] UKlaG, s. 4.
[30] Group Proceedings Act, s. 4.
[31] Group Proceedings Act, s. 2.
[32] Act 1/2000 of 7 January on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) (Civil Procedure Act). Article 11(2), requirements laid down in Title II of the Royal Legislative Decree

- **Bulgaria.** Although limited to tortious conduct (the victims must be "harmed by an infringement" or omission, and wrongfulness must be established) [34] standing is available for collective claims by organizations "*responsible for the protection of injured persons or for protection* against such infringements" on behalf of victims in situations where the "circle [of victims] cannot be defined precisely but is definable."[35]

3. Discrimination claims

12. The Court has, in previous case law, taken account of community law and practice where relevant.[36] The EU Race Equality Directive[37] requires Member States to establish judicial and/or administrative procedures to allow victims to seek remedies for violations of race discrimination.[38] Relevantly, the Directive requires Member States to ensure that "associations, organizations or other legal entities who have a *legitimate interest* in ensuring that the provisions of the Directive are complied with [that is, their object is to prevent racial discrimination and protect racial equality] may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive."[39] The purpose behind this provision is that "[p]ersons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection."[40]

13. Whilst the Directive ostensibly only recommends a claim mechanism on behalf of specific victims (that is, requiring approval), this does not mean that Member States are limited to this mechanism; Member States may introduce provisions more favourable than those found in the Directive.[41] The CJEU has affirmed that Article 7 does not preclude national legislation from empowering organizations to bring legal or administrative proceedings without acting in the name of a specific complainant or in the absence of an identifiable complainant.[42]

14. There are a number of European countries that go beyond the requirements of Article 6, and allow organizations, whose purpose is to represent the interests of the victim class, to take claims for violations of equal treatment without authorization or permission from specific victims. Others allow trade unions similar rights.[43]

- **Hungary.** Under the 2003 Act on Equal Treatment and the Promotion of Equal Opportunities[44] "social and interest representation organisations" may make claims for violations of equal treatment if the violation was "based on a characteristic that is an essential feature of the individual, and the violation of law affects a larger group of persons that cannot be determined accurately."[45] "Social and interest representation organisations" are *inter alia* "NGOs or foundations whose objectives

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1/2007 of 16 November on Consumers and Users (*Real Decreto Legislativo 1/2007, de 16 de Noviembre, Ley de Consumidores y Usuarios*); Consumers and Users Act, Article 37(c).
[33] Civil Procedure Act, Article 11(3).
[34] Civil Procedure Code, Article 379(1) – (3).
[35] Civil Procedure Code Article 379.
[36] See for example *D.H. and others v. Czech Republic*, Grand Chamber Judgment of 13 November 2007, at paras 81-90.
[37] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180.
[38] *Ibid*, Article 7(1).
[39] *Ibid*, Article 7(2), emphasis added.
[40] *Ibid*, Preamble, para.19.
[41] *Ibid*, Article 6.
[42] CJEU, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn VN*, [2008] ECR I-5187, Judgment of 10 July 2008, para. 27.
[43] For example,Cyprus, Hungary and Italy.
[44] Act CXXV of 2003.
[45] Act on Equal Treatment and the Promotion of Equal Opportunities, Article 20.

set out in the articles of association or *statutes include the promotion of equal social opportunities of disadvantaged groups or the protection of human or civil rights.*"[46]

- **Slovakia.** Slovakia's Anti-Discrimination Act allows legal entities *aimed at or dealing with protection against discrimination* to obtain declaratory and injunctive relief and rectification, as well as a determination that the principle of equal treatment has been breached, when a violation of the principle of equal treatment could infringe the rights of a greater or non-specified number of persons.[47]
- **Romania.** Under Romania's Law on Prevention and Sanction of all Forms of Discrimination, associations whose *objectives are protecting human rights or combating discrimination* may take actions in the courts or file a complaint with the National Council for Combating Discrimination for violations of discrimination when the target is a group or community.[48]
- **Bulgaria.** In Bulgaria, there are two methods of addressing discrimination under their anti-discrimination legislation: via the PADC (the independent equality body)[49] and through the courts.[50] In the courts, trade union organizations as well as non-profit legal persons *engaged in activities of benefit to the public*[51] can bring actions where "the rights of many people have been violated."[52] There is ambiguity whether this provision requires both a specific number of victims, and whether they must be identifiable – as little as ten have been deemed sufficient, but other cases have required enumeration and individuation of each victim.[53] The ultimate beneficiaries of this process – the victims themselves – may join the action as an assisting party.[54]
- **Italy.** Through legislative decrees of 2003, organisations, *on the basis of their statutory mission*, can act in cases of collective claims of discrimination where the victims cannot be identified in a direct and immediate way, or when the discrimination is against a whole category of persons.[55]
- **Belgium.** Generally, claims under Belgian anti-discrimination law require authorization from specific victims.[56] But where there is no identifiable victim an organization *whose purpose is* the protection of human rights or in *combating discrimination* can make claims in their own name.[57]
- **France.** Although not yet in law, France is considering extending its collective action procedure (see above) to enable associations who have the *objective of fighting discrimination* to make claims for discrimination with respect to those who

[46] *Ibid*, Article 3(e), emphasis added.
[47] Anti-Discrimination Act, amended by Act No 388/2011, 19 October 2011, s. 9a.
[48] Anti-Discrimination Law, Article 28(2).
[49] Protection Against Discrimination Act (PADA), Articles 47, 50, and 68(1).
[50] *Ibid*, Articles 71.
[51] PADA, Art.71(2).
[52] PADA, Art.71(3).
[53] European Commission, *Country report - Non-discrimination - Bulgaria* (2016), p.66, available at http://www.equalitylaw.eu/downloads/3711-2016-bg-country-report-nd.
[54] PADA, Article 72(3).
[55] Legislative Decree 215/2003, Article 5; Legislative Decree 216/2003, Article 5; Legislative Decree 67/2006, Article 4.
[56] See for example, the General Anti-discrimination Federal Act, Article 31; the Racial Equality Federal Act, Article 33.
[57] European Commission, *Country report - Non-discrimination – Belgium* (2016), p.112, available at http://www.equalitylaw.eu/downloads/3676-2016-be-country-report-nd; see Racial Equality Federal Act, Article 32(1) of the General Anti-discrimination Federal Act, Article 30.

suffer discrimination in similar or identical positions.[58] This Bill has been passed by the National Assembly,[59] but is yet to be adopted by the Senate.

15. The above demonstrates that, particularly within discrimination law, but also found in other areas of law – namely consumer and competition law - there is a trend within a growing number of European nations to recognize claims for collective redress that generally display the following features:

- Only a limited range of organizations are permitted to make claims – typically those whose purpose is linked to the issue in dispute;
- The claims do not typically require permission from victims and can be on behalf of broader groups, often when the group is distinct but indeterminate;
- They are typically limited to a particularly subject matter (e.g. violations of equal treatment or discrimination).

C. Effective Anti-Discrimination Laws

16. These types of collective redress claims enable the practical and effective realization of Convention rights, particularly in relation to systemic discrimination or discrimination against large groups.

17. Collective redress mechanisms, such as that utilized by CFCF in Hungarian domestic proceedings, serve the important function of providing a practical and effective means by which violations of discrimination against larger groups or communities can be addressed. To require individuals to seek individual remedies in situations of extensive group-directed discrimination is costly and ineffective. The severe impracticalities to organize individual victims to seek redress would render the realization of these rights as merely theoretical and illusory, something the Court has been long explicit to avoid. The practical justifications for recognizing these collective claims are forcefully made the European Union Agency for Fundamental Rights,

> "Firstly, [NGO] participation [in these mechanisms] may help to reduce the financial and personal burden on individual victims, giving them greater access to justice. Secondly, particularly where the permission of the victim is not required, the ability to enforce the directive is enhanced since, as noted below, members of ethnic minorities are often unaware of their rights or available procedures or unwilling to pursue claims. Thirdly, if claims can be brought even in the absence of an identifiable victim, it allows cases to be chosen on a strategic basis in order to address those practices that result in discrimination against large numbers of individuals."[60]

18. The nature of the discriminatory practices itself supplies further logic for the acceptance of these type of claims: as noted by the dissenting judges in the Hungarian Constitutional Court case that originally rejected CFCF's application on grounds of standing, the victims the subject of CFCF's claim were systemically marginalized such that it would have been difficult for them to personally take action against discriminatory practices. [61] That is, the very marginalization created by discriminatory practices makes it illusory for them to pursue individual remedies; an evil that the collective redress mechanism is designed to cure.

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[58] Proposition de loi instaurant une action de groupe en matière de lutte contre les discriminations, 10 June 2015, Article 1.
[59] See http://www.assemblee-nationale.fr/14/ta/ta0527.asp.
[60] The European Union Agency for Fundamental Rights, "The Racial Equality Directive: application and challenges" (2011), p.14.
[61] See European Equality Law Network, "Hungary - Constitutional Court denies legal standing of NGO's in *actio popularis* cases", available at http://www.equalitylaw.eu/document?task=document.viewdoc&id=1588.

19. Finally, there are substantive justifications for these types of claims: it is through such collective mechanisms that the systemic and widespread nature of the discrimination becomes clear: to require individual (even joined) claims only reveals the discriminatory practices in a piecemeal fashion. Individual claims only highlights the discriminatory practice as it affects the individual, which may obfuscate the true nature, intent and effects of a discriminatory practice which is against a larger group qua the group.

D. Living Instrument.

20. The Court should apply its jurisprudence – where members of organizations that undertook domestic claims could rely on these for the purpose of exhaustion – to cases beyond membership organizations to group discrimination claims by statutorily empowered organizations.

21. In *Aksu v Turkey,* when the Court reiterated the inadmissibility of *actio popularis* claims it stated that "[c]onsequently, the existence of a victim who was personally affected by an alleged violation of a Convention right is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid and inflexible way."[62]

22. An individual applicant who was of the intended victim class that formed the subject of a collective redress claim, should be considered a personally affected victim. This individual victim should not be expected, after the conclusion of a valid and effective group claim, to go through the entire domestic process; to require an individual applicant to agitate the claim before approaching the European Court would be an expensive and ineffecient process that collective redress claims were designed to avoid (for the reasons given above). It would deter victims who were intended beneficiaries of the domestic collective claim to seek redress before the European Court, rendering the enjoyment of Convention rights theoretical and illusory. To ensure Convention rights are practical and effective, an individual victim of the collective redress claim should be able to directly approach the European Court to claim violations of those Convention rights argued by the organization at the domestic level. This conforms with the principle of subsidiarity, as the substance of the claim has been dealt with by domestic jurisdictions in the group claim, and so respondent governments cannot complain that they have not had the opportunity to address the issues in the domestic courts.

23. The European Court has not, to our knowledge, dealt with precisely this issue, but there are a number of principles developed that should be extended to support the proposed position. These cases centre on membership organizations that took representative claims on behalf of their members at domestic levels, and thereafter individual members applied to the European Court. These individual members were found to have exhausted domestic remedies through these representative claims, even though they did not participate in domestic proceedings.

24. The leading case is *Gorraiz Lizarraga and others v Spain.*[63] The applicants were an organization and five individuals. The organization was set up to oppose the construction of a dam. The other applicants were members of the organization. The organization brought appeals against the approval of the dam in lower courts. The five individual applicants did not participate in any of the domestic proceedings – only the organization did. The justification of the individual's non-participation was, inter alia, that proceedings would have been lengthy and costly.

25. On the question of whether the individual applicants exhausted domestic remedies, after setting out the principles – that the Court will apply Article35(1) with some degree of flexibility and without formalism, and that it is essential to have regard to the

[62] *Aksu v. Turkey,* Judgment of 15 March 2012.
[63] *Gorraiz Lizarraga and others v. Spain,* Judgment of 27 April 2004.

circumstances of the particular case – the Court found exhaustion of domestic proceedings without their participation in domestic proceedings as:

a) The conduct of domestic proceedings was taken by an organization specifically set up to defend members' interests;

b) the organization is recognized to have standing under domestic legislation to conduct this type of litigation;

c) the applicant was a member of the organization; and

d) the substance of the litigation concerns members' interests (including the applicant) (at [38-[39]).

26. Other judgments reinforce the principle that claimants may count as victims without participating in domestic proceedings, where domestic proceedings were taken by an association whose purpose was to represent their interests as members, and the nature of the complaint would affect a group inclusive of the applicants. In *Union des cliniques privées de Grèce and others v. Greece*[64] the respondent government argued that only the first applicant – a union of private clinicians – was party to domestic court proceedings; other applicants, they argued, who were individual clinicians and legal representatives of the union, were making claims *actio popularis* and were not victims pursuant to Article 34. Whilst not directly on the exhaustion point, the Court found that even though the non-Union applicants did not participate in their own name in the lower proceedings, the Union was set up to represent clinical practitioners in Greece. The Court held that due to the nature of the complaint taken by the Union – that it would affect all clinicians in Greece, including the applicant clinicians – it could not be said that they were unaffected by the lower decisions, and hence they could be classified as direct victims.

27. In *Trigo Saraiva v. Portugal*,[65] the Union for Tax Workers took administrative proceedings on behalf of an individual applicant and three other employees regarding early retirement. In Strasbourg the applicant claimed a violation of Articles 6(1) and 13 due to the length of time of the domestic proceedings. The government claimed the case incompatible *ratione personae* as the applicant was not party to the domestic proceedings. The Court disagreed, finding that

> "the applicant was not a party to the proceedings in his own name, but through the intermediary of a Union which had been established for the purpose of defending its members' interests. The standing of associations to bring legal proceedings in defence of their member's interests is recognised by the legislation of Portugal and of most European countries. That is precisely the situation in the present case. For these reasons, the Court considers that the applicant has been directly affected by the length of the impugned proceedings, and that therefore he can claim to be a victim, within the meaning of article 34 of the alleged violation of the Convention".[66]

28. We submit that individual victims, who were the subject of collective redress claims for group discrimination, are in an analogous situation to the individuals cited above as:

- The organizations taking the claims are recognized under domestic law to be able to pursue these types of collective redress claims;
- Their standing to do so is recognized in a growing number of European countries;
- The purpose of the organizations must be to advance the interests of the beneficiary groups within a limited subject matter, namely discrimination and equal treatment;

[64] *Union des cliniques privées de Grèce and others v. Greece*, Judgment of 15 October 2009.
[65] *Trigo Saraiva v. Portugal*, Judgment of 28 January 2014.
[66] *Trigo Saraiva v. Portugal*, para. 16.

- The claim is to preserve the interests of a group to which the organization was set up to protect (i.e. victims of discrimination); and
- The applicant is directly affected by the measure in question.

29. The material difference between collective redress mechanisms and the cases cited above is that the victim of the collective mechanism is not a member of the organization making the claim. However, we submit that the Court should take a flexible and non-formalistic approach to extend the principle to the victims of group discrimination. Recognizing the long-standing principle that the Convention, as a living instrument, should take account of present day conditions,[67] the Court should acknowledge the growing and justified trend of collective redress mechanisms such as those deployed by CFCF. With respect to these mechanisms – particularly for cases of discrimination – it would be inappropriate to require a member relationship between the organization taking the claim and the victim beneficiary. To require all victims of discrimination to be members of the interest group taking a claim for their interests would defeat the whole *raison d'etre* of the collective redress claim mechanism, which is to provide a method of redress *for groups*, or where it would be impossible or impractical for the claimants to individually approve the claim. More substantively, to require membership ignores the effect of the discrimination itself, which if deep and systematic can prevent victims from effectively organizing into membership groups, or even knowing that they are victims in the first place. In place of membership, so long as the organization is limited to representing the interests of the victim class, and the victim group can be identified with sufficient distinctness (even though the group may be indeterminate by number), and any person who approaches the Court as an individual applicant, or joining an existing application, possesses an essential characteristics such that they form part of the victim group, then they are in a sufficiently analogous position as a "member" for the principles developed in the membership cases to apply.

Conclusion

30. Collective redress claims for issues of group discrimination are an effective and increasingly recognized mechanism within European countries. If a valid collective redress claim has proceeded as far as possible within the domestic jurisdiction, for the reasons advanced above, an individual victim applicant, who was intended to be a beneficiary of this collective claim, should not have their claim declared inadmissible for want of exhausting domestic remedies. The line of authority on membership organizations, when taking account of present conditions, supports such an approach. To deny this possibility effectively stultifies this practical and effective means of addressing discrimination, as organizations may choose not to utilize this mechanism if there is no realistic possibility to approach the European Court (either in their own name, or through a beneficiary). If that becomes the case, it will render theoretical and illusory the enjoyment of Convention rights, and may lead to impunity for violators of group discrimination, an outcome that surely must be avoided.

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20 October 2016

[67] *Tyrer v. UK*, Judgment of 25 April 1978, Series A no. 26.