One-way ticket to Sudan: standard-setting, yet disconnection between reasoning and outcome in N.A. v. Switzerland?

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On 30 May 2017, the European Court of Human Rights decided two cases regarding the expulsion of rejected asylum seekers by Switzerland to Sudan. In *A.I. v. Switzerland*, the Court held unanimously that there would be a violation of Articles 2 and 3 ECHR in case of implementation of the deportation order, whereas in *N.A. v. Switzerland* the Court, also unanimously, did not find a conditional violation of these provisions.

The judgments (only in French) deserve a blogpost for at least two reasons. First, the Court explicitly sets out criteria in order to assess the risk of ill-treatment of political opponents when returned to Sudan. Second, the legal reasoning in *N.A. v. Switzerland* seems to hold potential for improvement. This post does not aim to question the outcome in *N.A.:* even though many aspects of *A.I.* and *N.A.* run parallel, there are important factual differences that may justify finding a violation in one case but not in the other. It does take issue with the way this outcome is arrived at in *N.A. v. Switzerland*.

Comparing the facts

Both applicants are Sudanese nationals, whose asylum applications were rejected by the Swiss authorities because of lack of credibility. The removal decisions issued against them were suspended on the basis of Rule 39 interim measures adopted by the ECtHR.

The two judgments mainly assess the applicants' political activities after their arrival in Switzerland (*sur place*). The part of A.I.'s application relating to his flight motives is considered manifestly unfounded (§ 37), while as regards N.A., the Court does not identify any element that would call into question the credibility assessment carried out by the domestic asylum authorities (§ 44).

In Switzerland, both applicants have been a member for several years of the opposition group Justice and Equality Movement (JEM). A.I. is also a member of the Centre for Peace and Development in Darfour (DFEZ). A.I. has been politically more engaged than N.A.: the former played a role in organizing weekly sessions of JEM, he participated regularly in events of JEM and DFEZ as well as in international conferences on the human rights situation in Sudan, he published two articles online criticizing the Sudanese regime, and had become the media responsible of the Swiss section of JEM. The latter participated in various meetings and public events organized by JEM as well as other organisations regarding the situation in Sudan. He also claimed to have regularly assisted the Swiss JEM leader in the preparation of a radio program, and that photographs of him with a JEM leader were circulating on the internet.

Comparing the assessments of the merits

In both cases, new information had come to light after the final decision was taken by the domestic authorities, so the Court undertook a full and *ex nunc* evaluation.

Regarding the general situation in Sudan, the Court notes in both cases that the human rights situation in Sudan is alarming, especially for political opponents. It confirms that the individuals at risk are not only high profile opponents, but '*every person opposing or being suspected of opposing the current regime*' (referring to *A.A. v. France*, § 56; *A.F. v. France*, § 49; *A.A. v. Switzerland*, § 40). Given the difficulties in assessing the genuineness of *sur place* activities, and in view of the importance attached to Article 3 ECHR, the Court assessed the applicants' claims on the grounds of the political activities effectively carried out (referring to *A.A. v. Switzerland*, § 41).

Considering that the surveillance by the Sudanese secret services of political opponents abroad cannot be considered as systematic (referring to *A.A. v. Switzerland*, § 40 and international reports), the Court identifies – for the first time explicitly – four factors to be taken into account when assessing the risk faced by political opponents of treatment contrary to Article 3 in case of deportation: (i) earlier interest of the Sudanese authorities in the individual concerned; (ii) membership of an opposition movement in Sudan and/or abroad, the nature of that movement, and the extent to which it is targeted by the government; (iii) the nature and degree of political engagement abroad (e.g. participation in meetings or public events, online activities); and (iv) personal or family ties with prominent opposition members in exile (*N.A.* § 46; *A.I.* § 53). The Court then applies these criteria to the cases at hand (N.A. §§ 47-50; A.I. §§ 54-57):

- As the interest by the Sudanese authorities is concerned, the Court does not find in either case an indication of any interest in the applicants by the Sudanese authorities during their residence in Sudan or abroad, prior to their arrival in Switzerland.
- Yet, the Court notes that JEM is one of the main rebellion movements in Sudan and that its increased legitimacy in the conflict has provoked a more stringent approach by the authorities towards its members. In both cases, the Court concludes that the applicants' membership of JEM since several years '*thus constitutes a risk factor for persecution*'. The Court draws the same conclusion as regards A.I.'s membership of DFEZ.
- The main differences between both cases – as regards both facts and legal reasoning – concern the nature and level of political activities abroad. The Court first remarks that, whereas the political engagement of A.I. had increased over time, this was not the case for N.A. In both cases, though, the Court is of the view that the political profile of the applicant '*cannot be considered as very exposed'*. Then the two judgements split ways as their argumentation is concerned.

In *A.I.*, the Court states that, notwithstanding the applicant's low public profile, '*the specific situation in Sudan should be taken into account'*. It then refers to the abovementioned case law, that not only high-profile opponents face risk of ill-treatment, but any person (supposedly) opposing the regime. Moreover, the Court holds, it has been acknowledged that the Sudanese government monitors activities of political opponents abroad.

In *N.A.*, by contrast, the Court justifies the qualification of the applicant's profile as 'not very exposed' by referring, among others, to the fact that he did not *represent* JEM when

participating in an international event on human rights in Sudan (distinguishing the case from *A.A. v. Switzerland* § 43). The Court therefore concludes that N.A.'s political activities in Switzerland, being limited to those of a 'mere participant' in events of the opposition, '*were not of the kind to attract the attention of the Sudanese intelligence services*'.

- Finally, the Court finds in both cases that the applicants cannot usefully invoke personal or family ties with prominent opposition members in exile.

The Court concludes in *A.I.* that it cannot exclude that the applicant, as an individual and because of his political activities, has attracted the attention of the Sudanese intelligence services. Substantial grounds have thus been shown for believing that A.I., if deported, faces a real risk of being arrested, interrogated and tortured upon arrival at Khartoum airport. Therefore, the Court finds that there would be a violation of Articles 2 and 3 in the case of expulsion (*A.I.* § 58).

In *N.A.*, the Court is of the view that the political activities of the applicant abroad, which are limited to merely participating in activities of opposition movements, are not likely to attract the Sudanese government's attention. The applicant thus does not face a risk of ill-treatment and torture if being returned to Sudan, on account of these activities *sur place* (*N.A.* § 51).

Comments

First, compared to the similar case of *A.A. v. Switzerland*, the Court takes a step further, and identifies in the abstract four factors to be taken into account when assessing the risk of deportation of political opponents. These criteria seem to hold potential for wider application, beyond the Sudanese context.

Second, the Court's legal reasoning in *N.A.* may be considered unfortunate. One observation relates to the internal construction of the argument, the other derives from comparing the merits sections of *N.A.* and *A.I.* Most paragraphs in the Court's assessments of the merits in the two cases are verbatim the same, or only differ as to minor/factual details. Both judgments were moreover issued on the same day. These circumstances support the position that, where the judgments *do* differ in their formulation, this is purposefully so.

In *N.A.*, the Court reaffirms that the human rights situation in Sudan is alarming, and that '*every person opposing or being suspected of opposing the current regime*' faces a risk of ill-treatment. The Court also confirms that N.A. has been a member of JEM for several years, and assesses this membership to be '*a risk factor for persecution'*. If any person merely being suspected of opposing the regime is already at risk, and if N.A.'s membership of JEM is not contested but explicitly considered to be a risk factor, how then can the Court feel so confident to conclude that N.A. does not face any risk of ill-treatment if deported?

This disconnection between reasoning and outcome becomes even more apparent when comparing the argumentation of the Court regarding the political engagement abroad in *A.I.* and *N.A.*. In the former case, the Court, after noting the applicant's 'not very exposed' public profile, states that '*the specific situation in Sudan should be taken into account*', in that any (suspected) opposition member runs a risk of ill-treatment, and that surveillance abroad is taking place. Why are these observations not included in *N.A.*? Does 'the specific situation in Sudan' not also apply to his case? Instead, the Court finds that his 'mere participation' in political activities of the opposition in exile will not have alarmed the Sudanese intelligence

services. It is therefore hard to see how the arguments put forward by the Court support the non-finding of a violation in *N.A.*, especially in light of the absolute nature of the prohibition of non-refoulement.