Migrant Workers and the 2022 FIFA World Cup in Qatar

How Could the European Court of Human Right Come into Action in Securing Access to Justice?

Daniel Rietiker

25.11.2022 doi: 10.17176/20221126-001635-0

When we are enjoying the beautiful game these days, we should not forget that hundreds or even thousands of migrant workers, mostly from Bangladesh, India, Nepal, Pakistan, Philippines and Sri Lanka have allegedly lost their lives in Qatar when working on stadium and other infrastructure constructions in view of the 2022 FIFA World Cup (see, for instance, Amnesty International). The question raised in this post is whether the European Court of Human Rights (the "Court") is able to play a certain role in the protection of the rights of these migrant workers and their families.[1]

The World Cup in Qatar is a relevant example for a situation where several actors, FIFA, Switzerland, Qatar and others, have contributed to human rights violations without having acted as a collective entity (Raquel Regueiro Dubra). Who can be held responsible for such abuses under the European Convention on Human Rights ("ECHR")? Qatar is of course not a State Party to the ECHR. FIFA as the overarching, but private international football governing body in charge of the organization of the World Cup is not, as such, liable under the ECHR neither. It has, however, its headquarters in Switzerland. Is this enough to hold Switzerland, a party to the ECHR, liable for human rights violations in Strasbourg? The present contribution is, for practical reasons, limited to the right to access to court within the meaning of Article 6 § 1, one of the most basic human rights.

A Special Responsibility of Switzerland and Other Host States of Sport Governing Bodies?

It is suggested here that, Switzerland, the host state of many international sports federations, has a special role and responsibility. The same applies to other home states of sport governing bodies, such as Monaco where "World Athletics" has its headquarters. Can we expect from them to guarantee, as a minimum duty, appropriate and effective access to their tribunals?

Switzerland's laws do *a priori* not provide for a legal basis for criminal and/or civil liability of businesses (or their managers) for alleged human rights violations abroad. But there have been certain attempts to get justice before Swiss courts based on other grounds. An often cited but unsuccessful case is the claim of a Bangladeshi citizen (Nadim Shariful Alam) against FIFA Ruling of the Commercial Court of the Canton of Zurich, HG160261-0, 3 January 2017 (HG160261-0, 3 January 2017). Three other plaintiffs joined the proceedings, namely the Netherlands Trade Union Confederation, the Bangladeshi Free Trade Union Congress and the Bangladeshi Building and Wood Workers Federation (Raquel Regueiro Dubra, cited above). Alam's passport had been confiscated in 2014 by his employer, making it impossible for him to travel and made him completely dependent of his *Kafil*. Moreover, during his stay in Qatar, Alam allegedly was living in miserable conditions in a worker's camp with 2,250 other migrants (*ibidem*). The plaintiffs alleged that FIFA committed a wrongful act by selecting Qatar for the 2022 World Cup without ensuring the proper

[1] Further considerations on this and other topics can be found in the author's recently published book *Defending Athletes, Players, Clubs and Fans, Manual for human rights education and litigation in sport, in particular before the European Court of Human Rights*, Council of Europe Publishing, Strasbourg, 2022. The author expresses his own views in the present article.

protection of the right of migrant construction workers; that FIFA failed to fulfill its obligation to request Qatar to protect migrant workers and to demand legal reforms and, as a result, that FIFA violated Alam's rights and had to pay for the damage resulting from the unlawful actions (*ibidem*). In its judgement of 3 January 2017, the Commercial Court (*Handelsgericht)* of the Canton of Zürich dismissed the claim on the grounds that the case was not a commercial dispute falling within the jurisdiction of the tribunal and that the claim was not sufficiently specific and enforceable (*ibidem*).

Even if this case did not succeed, it is not excluded that Swiss tribunals, and ultimately the Court, will be confronted with more promising complaints of this kind.

Lessons Learnt from Naït-Liman v. Switzerland?

In spite of its factual and legal differences, the case of *Naït-Liman v. Switzerland*, decided on 15 March 2018 by the Grand Chamber of the Court (*Naït-Liman v. Switzerland*), is noteworthy. Relying on Article 6 § 1 of the Convention, the applicant, a Tunisian national, argued before the Court that the refusal by the Swiss courts to examine his civil claim for compensation in respect of the non-pecuniary damage caused by the alleged acts of torture had infringed his right of access to a court. He criticized, in particular, that the Swiss tribunals have declined jurisdiction for his civil action due to lack of a sufficient link to Switzerland. The Grand Chamber concluded that there had not been violation of the right to access to court even though it was undisputed that the prohibition of torture is a norm of *jus cogens* value under public international law and that the applicant could not sue the wrongdoers before Tunisian courts. This recent example shows that, from the Court's point of view, states still enjoy a considerable margin of appreciation to assess whether a given situation has or not a sufficient link to trigger its own jurisdiction and, ultimately, to decline jurisdiction if they consider that such a link is lacking.

The case is interesting for the present debate for at least two reasons. First of all, it shows that the Court has jurisdiction to examine whether the refusal of jurisdiction by the Swiss courts was compatible with the ECHR, namely the right to access to court, as one of the most basic rights, enshrined in its Article 6 § 1. Even though the Court finally endorsed the Swiss courts' finding that there had not been a sufficient link with Switzerland, the depth of the Court's legal analysis is remarkable and shows that it took its task very seriously. This is good news for organizations potentially trying to challenge the lack of remedies for victims of sport-related human rights violations.

Forum of Necessity as the Last Resort for Migrant Workers?

Secondly, the case is also interesting as it illustrates the potential relevance of Section 3 of the Swiss Federal Act on Private International Law (*Bundesgesetz über das Internationale Privatrecht, "IPRG"*) that was at the heart of Naït-Liman's civil action and that could be used for future sport-related litigation. Section 3 provides for a so-called "forum of necessity" and reads as follows:

> *"Section 3: Forum of necessityWhere this Act does not provide for any forum in Switzerland and proceedings abroad prove impossible or it cannot reasonably be required that they be brought, the Swiss judicial or administrative authorities of the locality with which the case has a sufficient connection shall have jurisdiction."*

It clearly transpires from the Federal Tribunal's judgment of 22 May 2007 that the gist of the *Naït-Liman* case was a lack of sufficient connection with Switzerland. The court stressed that the claimant complained of acts of torture that had allegedly been committed in Tunisia a couple of years before, by Tunisians resident in Tunisia, against a Tunisian residing in Italy (Federal Tribunal, in French, consideration 3.5). It held that all of the specific features of the case related back to Tunisia, except for the fact of residence in Italy at the relevant time – thus offering no connection with Switzerland, so that the question did not even arise whether or not the link with this country was sufficient (*ibidem*). In those circumstances, it was not possible to recognize the jurisdiction of the Swiss courts, short of

disregarding the clear text of Section 3 of the LDIP. As a result, Naït-Liman's appeal had to be dismissed Federal Tribunal, cited above, consideration 4). The question is now whether Section 3 of the LDIP could be applied to sport-related claims?

To apply this provision, three cumulative conditions have to be met: firstly, that the Swiss authorities do not have jurisdiction under another provision; secondly, that legal proceedings in another country are impossible or cannot reasonably be required; and, thirdly, that the case in question has a sufficient connection with Switzerland.

The first condition does not need to be addressed here in further details. The forum of necessity is of subsidiary nature and only applies if no other provision of Swiss law provides for the jurisdiction of Swiss courts. Whether such a provision exists can be left open in this brief discussion. The second condition is more relevant for the present discussion. FIFA and other sport governing bodies having their headquarters in Switzerland, Swiss courts are often cited as a last recourse in connection with litigations of human rights abuses committed outside Europe, for instance during the preparation of the Football World Cup in Qatar in 2022. It does not seem far-fetched or exaggerated to believe that it would be difficult for foreign migrant workers being employed in stadium constructions to seek and get protection by Qatari courts for their allegations of violations of human rights. It is not obvious neither that they could file such claims before the courts of yet another jurisdiction in that region. Migrant workers employed in Qatar arrive from countries with poor human rights records. In other words, even if their home states would accept jurisdiction based on nationality, it is unlikely that such proceedings turn out effective. In addition, a regional court for the protection of human rights, of the ECHR type, does not exist in that region. As a result, the second condition for the application of Section 3 of the LDIP would most likely be met in the described scenario.

The third and last condition to be examined is the question whether the potential claimants could rely on a sufficient connection with Switzerland. It transpires from the relatively little case-law from the Swiss courts concerning Section 3 that, in the case of legal entities, the headquarters in Switzerland of the claimant or the respondent have been recognized as sufficient connection (*Naït-Liman v. Switzerland*, cited above, §§ 40-44). This approach has been confirmed by Resolution No. 2/2012 of the "Committee on International Civil Litigation and the Interests of the Public" of the International Law Association (ILA), adopted at its Sofia Session in 2012, addressing problems of coordination between different jurisdictions in relation with claims against individuals, corporations and other non-state actors. This committee recognizes, in particular, the following connections as sufficient for the establishment of a forum of necessity: a) presence of the claimant, b) nationality of the claimant or the defendant, c) the presence of assets of the defendant, d) some activity of the defendant, or e) a civil claim based on an act giving rise to criminal proceedings in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings (Paragraph 2.3(3) of the Resolution, cited in *Naït-Liman v. Switzerland*).

Regarding FIFA, IOC and other sports governing bodies, at least the following could apply: a) in case the claimant is present in Switzerland, as well as c) and d). Regarding the criterion of nationality of the defendant (b), it can be recalled that in the landmark case of *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* decided by judgment on the merits in 1970, the International Court of Justice (ICJ) held, concerning the issue of what state could exercize diplomatic protection in favor of that company, that the decisive criteria to determine the nationality of a company are, first, under which legal order it is incorporated and, second, where it has its offices (headquarters) (*ICJ Reports 1970*, § 70). Even though the *Barcelona Traction* case dealt mainly with diplomatic protection, its reasoning on nationality is applicable, at least *mutatis mutandis*, to the issue of jurisdiction. As a result of the similarities between multinational business companies and certain sport governing bodies, such as FIFA, UEFA or IOC, the conclusions adopted by the ICJ are valid also for the latter ones. Many sport governing bodies being constituted as

associations under Swiss law and having their headquarters in Switzerland, a claim for human rights violations committed in Qatar could possibly be linked to Switzerland thanks to the nationality principle (see, in this regard, Raquel Regueiro Dubra, cited above).

Conclusions

The aim of the present contribution was to examine whether there are legal remedies available to migrant workers and their families complaining about human rights violations in Qatar in view of the 2022 FIFA World Cup. From the outset, it seemed difficult to hold Qatar responsible for such abuses, in particular due to the lack of effective protection by domestic courts and the absence of an effective human rights court in the region. Moreover, FIFA as a private legal entity is not bound by the ECHR. A third option is Switzerland, a party to the ECHR. Switzerland attracts international sports federations with ideal conditions. The question can be raised whether it should, in return, reply to human rights abuses co-committed or tolerated by organizations based on its territory, even if committed abroad. Can Swiss courts be expected, as a minimum duty, to provide effective access to justice to victims of the alleged human rights violations, for example by accepting a forum of necessity in their favor?

In addition, while much of the reasoning presented in this short analysis remains hypothetical at this stage and deserves further reflection, it would nevertheless be interesting to see how a potential refusal of a Swiss court to grant a forum of necessity in relation to migrant workers' claims of human rights violations committed in Qatar would be assessed by the Strasbourg Court.

ABOUT THE AUTHOR

Daniel Rietiker

Daniel Rietiker (PhD) is senior lawyer at the ECtHR and an adjunct Professor of international law and human rights law at Lausanne University and Suffolk University Law School (Boston, MA).

SUGGESTED CITATION

Rietiker, Daniel: Migrant Workers and the 2022 FIFA World Cup in Qatar: How Could the European Court of Human Right Come into Action in Securing Access to Justice?, Verfassungsblog, 25.11.2022, doi: 10.17176/20221126-001635-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20221126-001635-0.