

# SPORT AND HUMAN RIGHTS

## Overview from A CAS perspective (as at 31 March 2021)

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## I. HUMAN RIGHTS IN SPORT REGULATIONS

### IOC

#### Olympic Charter

##### *Fundamental principles of Olympism*

*Principle 4. The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.*

*Principle 6. The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.*

##### *Rule 2.18*

*The IOC's role is to promote safe sport and the protection of athletes from all forms of harassment and abuse.*

Rule 2.18 was included in the Charter in 2019. Principle 6 of the Olympic Charter is now also reflected in Article 13.2(a) of the 2024 HCC core requirement.

#### Host City Contract (HCC) 2024 (*now: Olympic Host Contract (OHC)*)

In February 2017, following the adoption of the Olympic Agenda 2020 in December 2014, explicit obligations focusing on the protection of human rights were added to the Host City Contract (HCC) for the 2024 Games.<sup>1</sup>

The majority of Games-related human rights abuses may potentially fall into one of the following categories: (i) violation of labour rights; (ii) forced evictions; (iii) repression of civil rights, in particular the right to freedom of expression and the right to peaceful assembly.

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<sup>1</sup> HCC 2026 and HCC 2028 include similar human right obligations.

It is important to note that the UN Guiding Principles referred to in Article 13.2.b 2024 HCC is a non-binding legal framework intended to minimize adverse human rights impacts triggered by business activities.

The core human right provision i.e. article 13 HCC 2024 does not specify which human rights the Host City, the Host National Olympic Committee (NOC) and the Organizing Committees for the Olympic Games (OCOG) should respect and protect.

*Article 13. Respect of the Olympic Charter and promotion of Olympism*

*13.1. The Host City, the Host NOC and the OCOG undertake to abide by the provisions of the Olympic Charter and the IOC Code of Ethics and agree to conduct their activities related to the organisation of the Games in a manner which promotes and enhances the fundamental principles and values of Olympism, as well as the development of the Olympic Movement.*

*13.2. Pursuant to their obligations under §13.1, the Host City, the Host NOC and the OCOG shall, in their activities related to the organisation of the Games:*

- a. prohibit any form of discrimination with regard to a country or a person on grounds of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status;*
- b. protect and respect human rights and ensure any violation of human rights is remedied in a manner consistent with international agreements, laws and regulations applicable in the Host Country and in a manner consistent with all internationally-recognised human rights standards and principles, including the United Nations Guiding Principles on Business and Human Rights, applicable in the Host Country; and*
- c. refrain from any act involving fraud or corruption, in a manner consistent with any international agreements, laws and regulations applicable in the Host Country and all internationally recognised anti-corruption standards applicable in the Host Country, including by establishing and maintaining effective reporting and compliance.*

*13.3. The IOC, through its Coordination Commission referred to in §27, shall establish a reporting mechanism to address the obligations referred to in §13.1 and §13.2 in connection with the activities of the Host City, the Host NOC and the OCOG related to the organisation of the Games.*

Sustainability measures have been added to the HCC.

*Article 15. Sustainability and Olympic legacy (protection of labour rights to a certain extent)*

*15.1. The Host City, the Host NOC and the OCOG undertake to carry out all activities foreseen under the HCC in a manner which embraces sustainable development and contributes to the United Nations' Sustainable Development Goals.*

*15.2. Pursuant to their obligations under §15.1, the Host City, the Host NOC and the OCOG shall in particular:*

- a. define, implement and communicate a comprehensive and integrated sustainability programme as well as a legacy programme compliant with the provisions of the "HCC – Operational Requirements – Sustainability and Olympic Legacy"; and*
- b. take all necessary measures, where necessary in cooperation with Host Country Authorities and other third parties, to ensure that their activities in relation to the organisation of the Games comply with any international agreements, laws and regulations applicable in the Host Country, with regard to planning, construction, protection of the environment, health and safety, labour and working conditions and cultural heritage.*

In case of non-compliance with the HCC, Article 36 provides that the IOC may decide to retain all amounts held in the General Retention Fund or withhold any grant to be made to the OCOG pursuant to the HCC.

*Article 36 Measures in case of non-compliance with the HCC*

*36.2. In the event of any non-compliance by the Host City, the Host NOC and/or the OCOG with any of their obligations pursuant to the HCC, including any failure to comply with any deadline included in the Games Delivery Plan, the IOC shall be entitled to take any or several of the following measures:*

- a. retain all amounts held in the General Retention Fund;*
- b. withhold (in whole or in part) any payment due, or grant to be made, to the OCOG pursuant to the HCC, including without limitation in relation to §8 and §9;*
- c. keep any and all amounts retained or withheld, including interest, as liquidated damages;*
- d. set-off any and all of its obligations pursuant to the HCC against any claim against the Host City, the Host NOC and/or the OCOG for any damages resulting from any non-compliance by any such party(ies), or any sums held in the General Retention Fund or otherwise withheld pursuant to §36.2; and*
- e. after giving a reasonable notice, perform any obligation that the Host City, the Host NOC and/or the OCOG may have failed to perform in accordance with the HCC, at the cost of the Host City, the Host NOC or the OCOG, jointly and severally. 3*

(...)

Article 38.2 allows the IOC to terminate the HCC and withdraw the Games from the HC in case of violation.

*Article 38.2. The IOC shall be entitled to terminate the HCC and to withdraw the Games from the Host City, the Host NOC and the OCOG if:*

(...)

- d. there is a violation of or failure to perform by the Host City, the Host NOC and/or the OCOG any material obligation pursuant to the HCC or under any applicable law.*

The CAS is competent to hear any dispute in connection with the HCC.

*Article 51 Governing law and arbitration*

*Article 51.2. Any dispute concerning the validity, interpretation or performance of the HCC shall be determined conclusively by arbitration, to the exclusion of the state courts of Switzerland, of the Host Country or of any other country; it shall be decided by the Court of Arbitration for Sport in accordance with the Code of Sports-Related Arbitration of such Court. The arbitration shall take place in Lausanne, in the Canton of Vaud, Switzerland. If, for any reason, the Court of Arbitration for Sport denies its competence, the dispute shall then be determined conclusively by the state courts in Lausanne, Switzerland.*

**World Anti-doping Code (WADC) 2021**

The compliance with the principles of human rights are enshrined in the WADC including the principle of fair hearings.

*Purpose, scope and organization of the world anti-doping program and the code, p.9*

*Rule of law — to ensure that all relevant stakeholders have agreed to submit to the Code and the International Standards, and that all measures taken in application of their anti-doping programs respect the Code, the International Standards, and the principles of proportionality and human rights.*

*The Code*

*(...) The Code has been drafted giving consideration to the principles of proportionality and human rights, p. 10.*

*Introduction, p.17*

*(...) They [the sports-specific rules] are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights.*

### *8.1 Fair Hearings*

*For any Person who is asserted to have committed an anti-doping rule violation, the Anti-Doping Organization with responsibility for Results Management shall provide, at a minimum, a fair hearing within a reasonable time by a fair, impartial and Operationally Independent hearing panel in compliance with the WADA International Standard for Results Management. A timely reasoned decision specifically including an explanation of the reason(s) for any period of Ineligibility and Disqualification of results under Article 10.10 shall be Publicly Disclosed as provided in Article 14.3.*

### *13.2.2 Appeals Involving Other Athletes or Other Persons*

*In cases where Article 13.2.1 is not applicable [Appeals Involving International-Level Athletes or International Events where the decision may be appealed exclusively to CAS], the decision may be appealed to an appellate body in accordance with rules established by the National Anti-Doping Organization. The rules for such appeal shall respect the following principles:*

- a timely hearing;*
- a fair, impartial, and Operationally Independent and Institutionally Independent hearing panel;*
- the right to be represented by counsel at the Person's own expense; and*
- a timely, written, reasoned decision.*

*If no such body as described above is in place and available at the time of the appeal, the Athlete or other Person shall have a right to appeal to CAS.<sup>2</sup>*

*22.6 Each government should respect arbitration as the preferred means of resolving doping-related disputes, subject to human and fundamental rights and applicable national law*

## **FIFA**

Following pressure exercised by transnational mobilization of social movements and increasing public scrutiny, FIFA has taken measures regarding Human Rights in the last years. Critics have notably arisen in relation to violation of human rights linked to the Russia World Cup in 2018 and to the exploitation of migrant workers on World Cup construction sites in Qatar.

A distinction can be made between human rights impacts related to (i) FIFA's events i.e. World Cup-related human risks range from labour and housing rights issues to restriction of freedom of speech, freedom of movement, and public security concerns and (ii) human rights impacts related

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<sup>2</sup> Clarification of the standards of independence that apply to the adjudicatory bodies. Based on Art. 6 (1) of the European Convention on Human Rights ("ECHR"), different standards apply to the first and the second instances. According to this provision only one instance needs to comply with all procedural guarantees of Art. 6 (1) ECHR (including the principle of independence). This requirement is always met if a final appeal to the CAS is possible, since the CAS has been found [by the ECtHR in the Mutu Pechstein case (02.10.2018), no138 et seq.] to be a true and independent arbitral tribunal which, in addition, respects the athletes' right to a public hearing (cf. Art. R57 (2) [amended following the ECtHR judgement in Mutu Pechstein]). If the appellate body established by the rules of a NADO is competent to (finally) decide the case, Art. 13.2.2 WADC 2021 ensures that the same standards are met at the local appellate level. Otherwise, the athlete or other person has a right to appeal the first instance decision directly to the CAS. (Haas U., The Revision of the World Anti-Doping Code 2021, CAS Bulletin March 2020).

to FIFA's daily activities i.e. issue of trafficking of child footballers and abuse/harassment of female players.

### FIFA Statutes 2016

#### *Article 3: Human rights*

*FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.<sup>3</sup>*

#### *Article 4: Non-discrimination, equality and neutrality*

*1. Discrimination of any kind against a country, private person or group of people on account of race, skin colour, ethnic, national or social origin, gender, disability, language, religion, political opinion or any other opinion, wealth, birth or any other status, sexual orientation or any other reason is strictly prohibited and punishable by suspension or expulsion.*

*2. FIFA remains neutral in matters of politics and religion. Exceptions may be made with regard to matters affected by FIFA's statutory objectives.*

### FIFA Human Right Policy, May 2017

#### *Article 1: Commitment*

*FIFA is committed to respecting human rights in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs).*

#### *Article 2: Determination of the HR recognised*

*FIFA's commitment embraces all internationally recognised human rights, including those contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. Where FIFA may have adverse impacts on the human rights of people belonging to specific groups or populations that require special attention, it will also consider other international standards and principles that elaborate on the rights of such individuals, including in particular those standards concerning indigenous peoples, women, national, ethnic, religious and linguistic minorities, children, disabled people, migrant workers and their families and human rights defenders. Moreover, where FIFA's operations extend to situations of armed conflict, it will also respect the standards of international humanitarian law.*

#### *Article 5: FIFA's salient human rights risks*

*Given the nature of its operations, FIFA's involvement with adverse human rights impacts is most likely to occur through its relationships with other entities. FIFA's salient human rights risks include, for example: labour rights, land acquisition and housing rights, discrimination, security and players' rights.*

#### *Article 6: Engagement in an ongoing due diligence process*

*Guided by its human rights approach (see below), FIFA embeds its commitment throughout the organisation and engages in an ongoing due diligence process to identify, address, evaluate and communicate the risks of involvement*

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<sup>3</sup> Through the integration of human rights in Article 3 of the FIFA Statute, it is a possibility that they will play a greater role in disputes at the CAS, which if invoked by the parties would have to assess the compliance of a particular FIFA decision or regulation with internationally recognised human rights. Yet, the availability of such a procedural route to challenge the human rights compatibility of FIFA's decisions will be dependent on whether many of the primarily affected actors will have standing at the CAS.

FIFA could also allow affected third-parties to challenge its decisions on human rights grounds at the Court of Arbitration for Sport., Antoine Duval, FIFA and Human Rights: Introduction to the symposium 4 July 2019.

*with adverse human rights impacts. FIFA is committed to providing for or cooperating in remediation where it has caused or contributed to adverse human rights impacts and will seek to promote or cooperate in access to remediation where it is otherwise linked to adverse impacts through its relationships with third parties, including by exploring all options available to it.*

FIFA Human Rights Advisory Board created in March 2017: publishes reports evaluating FIFA's human rights progress and making recommendations on how FIFA should address human rights issues linked to its activities.

Complaint mechanism for human rights defenders introduced in May 2018, just before the start of the World Cup in Russia.

2024 and 2026 FIFA World Cup bidding and hosting requirements: sustainability and legacy considerations are regarded as important elements of the bid evaluation.

## UEFA

### 2024 EURO bidding requirements and staging agreement

#### *Sector 03 — Political, Social and Environmental Aspects*

#### *3 — Human rights*

*The Bidders have the obligation to respect, protect and fulfil human rights and fundamental freedoms, with a duty to respect human, labour and child rights during the Bidding Procedure and, if appointed, until the end of the dismantling of UEFA EURO 2024.*

*'Human rights' refers to the set of rights and freedom to which all human beings are considered to be entitled to, whatever their nationality, place of residence, sex, sexual orientation, national or ethnic origin, colour, religion, language, age, or any other status. These rights are all interrelated, interdependent and indivisible.*

Reference to the United Nations' Guiding Principles on Business and Human Rights.

Bidders' obligations with respect to HR<sup>4</sup>.

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<sup>4</sup> In order to respect at best human rights, the Bidders should aim at:

- culturally embedding human rights; 20/04/2017 Sector 03 — Political, Social and Environmental Aspects | Page 5 UEFA EURO 2024 Tournament Requirements
- proactively addressing human rights risks;
- engaging with relevant stakeholders and implementing means of reporting and accountability.

Reporting indicators could for instance be:

- Measures to prevent child labour in supply chains involved in UEFA EURO 2024 delivery or to prevent labour rights violations, in particular when building or renovating the Stadiums.
- Evidence of meaningful consultation of stakeholders and vulnerable groups affected by UEFA EURO 2024.
- A complaint mechanism and effective remedies for human rights infringements (including labour standards and corruption due diligence) in direct relation with the organisation of UEFA EURO 2024.

Compliance indicators could be:

- ethic code comprising basic values;
- comprehensive risk assessment with regard to corruption, fraud and any other criminal acts and unethical behaviour;
- compliance management system according to the risk assessment and in line with international standards, including:
  - code of conduct;
  - guidelines on gifts, invitations, conflict of interest;
  - secure reporting system (including mechanism to protect and secure the anonymity of whistleblowers and complainants who do not want to be publicly identified).

## **World Athletics**

*Constitution, Article 4.1 The purposes of World Athletics are to: j. preserve the right of every individual to participate in Athletics as a sport, without unlawful discrimination of any kind undertaken in the spirit of friendship, solidarity and fair play;*

## **Commonwealth Games federation**

Integration of the UNGP across the CWGF's operations.

The Commonwealth Consensus Statement on Promoting Human Rights in and through Sport, 5 October 2017

## Human Right Policy Gold Cost 2018 Commonwealth Games Corporation

### *3.1 Policy statement*

*The purpose of this policy is to demonstrate GOLDOC's commitment to human rights, transparency and accountability and to guide and direct actions and decisions taken by GOLDOC in relation to its human rights impacts in the planning and delivery of GC2018.*

### *3.2 Guiding principles*

*GOLDOC will adopt the guiding principles set out in the UNGP as an appropriate reference standard to ensure a holistic approach to the management of human rights across GC2018 planning and delivery.*

### *3.3 Scope*

*This policy applies to the delivery of GC2018 by GOLDOC, including its workforce, contractors and volunteers, from planning and implementation to review and post-Games activities. GOLDOC also strongly encourages all other stakeholders associated with GC2018.*

## **International Paralympic Committee**

IPC joined the Advisory Council of Center for Sport and Human Rights, 2018

Co-operation Agreement signed with the United Nations Commissioner for Human Rights to further the rights of persons with disabilities, 3 December 2020

## **Formula One Group**

Statement of Commitment to Respect for Human Rights, April 2015

- 1. The Formula 1 companies are committed to respecting internationally recognised human rights in its operations globally.*
- 2. Whilst respecting human rights in all of our activities, we focus our efforts in relation to those areas which are within our own direct influence. We do so by taking proportionate steps to:*
  - (a) understand and monitor through our due diligence processes the potential human rights impacts of our activities;*
  - (b) identify and assess, by conducting due diligence where appropriate, any actual or potential adverse human rights impacts with which we may be involved either through our own activities or as a result of our business relationships, including but not limited to our suppliers and promoters;*

- (c) consider practical responses to any issues raised as a result of our due diligence, within the relevant context;
  - (d) engage in meaningful consultation with relevant stakeholders in relation to any issues raised as a result of our due diligence, where appropriate; and
  - (e) respect the human rights of our employees, in particular the prohibitions against forced and child labour, the freedom to associate and organise, the right to engage in collective bargaining, and the elimination of discrimination in employment and occupation.
3. Where domestic laws and regulations conflict with internationally recognised human rights, the Formula 1 companies will seek ways to honour them to the fullest extent which does not place them in violation of domestic law.

### **United Nations Guiding Principles on Business and Human Rights**

Applicable to Sporting Governing Bodies (SGBs) and all sporting organizations within the world of professional sport, including leagues, clubs, national associations, academies, dispute resolution services, regulatory and enforcement agencies. UNGPs include the human rights of the players within their purview.

### **The Universal Declarations of Players Rights (UDPR), 14 December 2017**

**The World Player Rights Policy (WPRP)** published by the World Players Association (WPA), July 2017, policy document that anticipated and complements the UDPR.

**Institute for Human Rights and Business**, 11 White Papers published on Mega-Sporting Events Platform and Human Rights on 31 January 2017 presenting an analysis of the current state of the art on various aspects of human rights in sport.

## **II. SELECTED CAS CASES RELATED TO HUMAN RIGHTS ISSUES**

### **1. Procedural rights and European Convention on Human Rights (ECHR)**

*Article 6 §1 ECHR Right to a fair trial*

**1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.**

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

*Article 8 Right to respect for private and family life*



**1. Everyone has the right to respect for his private and family life, his home and his correspondence.**

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### 1.1 Indirect application of Article 6 § 1 ECHR

*CAS 2012/A/2747 WADA v. Judo Bond Nederland (JBN)*, para. 5.17: Application of Article 6 § 1 ECHR, right to a fair trial

Under Art. 6§1 of the European Convention on Human Rights (ECHR) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in determination of his civil rights and obligations. An exclusion of any external review (be it by a state court or an arbitral tribunal) of disciplinary decisions taken by the judicial organs of an association would be in contradiction with this fundamental right, since internal bodies of federations do not meet these requirements. According to the principle of good faith (“Vertrauensprinzip”) the rules and regulation of a federation should be interpreted in a way that are consistent with the mandatory provisions and principles. An (*ex ante*) exclusion of any external review of disciplinary measures in the rules and regulations of an association would be null and void from a Swiss law perspective.

*CAS 2017/A/5003 Jérôme Valcke v. FIFA* para. 260ff.: privilege against self-incrimination

The privilege against self-incrimination has been recognized as an implied right under Article 6 of the European Convention on Human Rights. The privilege against self-incrimination is the result of a balance of interest and, thus, must be assessed in light of the respective procedural and factual framework.

*CAS 2011/A/2384 & 2386 Union Cycliste Internationale (UCI) v. Alberto Contador & Real Federación Española de Ciclismo (RFEC)*, para. 72 and *CAS 2011/A/2433 Amadou Diakite v. FIFA*, para. 58: indirect application of Art. 6(1) ECHR, fair proceeding excludes the retroactive application of a longer statute of limitation.

CAS Panels have repeatedly found that arbitral tribunals are indirectly bound by the ECHR: “Applying retroactively a longer statute of limitation to a case that was already time-barred at the time of the entry into force of the new provision is incompatible with a “fair proceeding”. All the interests protected by a statute of limitation, in particular the legitimate procedural interests of the “debtor”/ “defendant” would be violated if an association could retroactively allow for the persecution of a disciplinary offense already time-barred. Such open-ended approach to disciplinary cases poses a serious threat to the principle of legal certainty that constitutes a violation of Art. 6(1) ECHR”.

*CAS 2011/A/2362 Mohammad Asif v. International Cricket Council (ICC)*, Para. 41: CAS compliant with art. 6 ECHR due to its full power to review the facts and the law

Article R57 of the CAS Code confers upon CAS panels full power to review the facts and the law. Furthermore, according to the jurisprudence of the European Court on Human Rights, where a party has access to a court with full judicial review jurisdiction (including on the merits), the administrative decision of a competition authority is not in breach of Article 6 of the European Convention on Human Rights. See also *CAS 2019/A/6388 Karim Keramuddin v. FIFA* paras 155, 156.

*CAS 2007/A/1396 & 1402 World Anti-Doping Agency (WADA) and UCI v. Alejandro Valverde & Real Federación Española de Ciclismo (RFEC), para 43<sup>5-6</sup>; See also TAS 2017/A/4999, para. 52<sup>7</sup>.*

*CAS 2019/A/6388 Karim Keramuddin v. FIFA paras. 124 – 137*: as a matter of principle, the hearing of “anonymous” witnesses is not *per se* prohibited as running against the fundamental right to a fair trial, as recognized by the ECHR (Article 6) (and the Swiss Constitution (art. 29(2))).

The European Court of Human Rights (the “ECtHR”), in fact, allowed the use of “protected” or “anonymous” witnesses even in criminal cases (covered also by the far-reaching guarantees set by Article 6(3) of the ECHR), if procedural safeguards are adopted. In the same way, the Swiss Federal Tribunal (SFT), in a decision dated 2 November 2006 (6S.59/2006, ATF 133 I 33, at § 4), confirmed that anonymous witness statements do not breach the right to a fair trial when such statements support the other evidence provided to the court. The CAS has also recognized that, when evidence is offered by means of anonymous witness statements, the right to be heard which is guaranteed by Article 6 of the ECHR and Article 29(2) of the Swiss Constitution is affected, but that a panel may still admit anonymous witnesses without violating such right to be heard if the circumstances so warrant and provided that certain strict conditions are met (CAS 2009/A/1920; CAS 2011/A/2384 & CAS 2011/A/2386).

## 1.2 No application of Article 6 para.2 & 3 ECHR

*CAS 2013/A/3139 Fenerbahçe SK v. UEFA, para. 90*: Inapplicability, even indirectly in disciplinary cases, of Articles 6 § 2 (presumption of innocence) and § 3 d) ECHR (examination of witnesses for everyone charged with a criminal offence), because, according to CAS arbitrators, sports sanctions do not come under criminal law within the meaning of the Convention: *“Insofar as the Club relies on Article 6(2) of the ECHR in order to argue that UEFA violated the nulla poena sine lege principle, this argument must fail as Article 6(2) is only applicable to criminal proceedings and the present proceedings are not of a criminal nature”*. See also TAS 2017/A/4999 para. 97<sup>8</sup>.

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<sup>5</sup> This CAS jurisprudence [de novo jurisprudence] is actually in line with European Court of Human Rights decisions, which in par. 41 of the Wickramsinghe Case concluded that “even where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6 (1) [ECHR] in some respect, no violation of the Convention will be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1)” (emphasis added).

See also CAS 2009/A/1957 Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN), paras 14, 18 – 25

<sup>6</sup> “In proceedings relating to arbitration, the state courts are under a duty to guarantee that the inalienable values of the ECHR that form part of public policy (‘ordre public’) are observed. From this it follows that the arbitral tribunals like the CAS are at least indirectly bound by this system of values under ECHR” (HAAS, U., Role and Application of Art 6 of the European Convention on Human Rights (ECHR) in CAS procedures, CAS Seminar, Montreux, 2011).

<sup>7</sup> “La Formation arbitrale constate que la procédure devant la Commission d’éthique et, partant, la décision en résultant sont de nature disciplinaire. La Commission d’éthique est un organe interne à l’IAAF qui n’a pas vocation à être une instance indépendante, et non un tribunal au sens de la CEDH. Conformément à la jurisprudence de la CEDH, la Commission d’éthique doit veiller le mieux possible à mener un procès équitable mais n’est pas tenue de garantir le respect des droits de la défense tels que consacrés par l’article 6§1 de la Convention Européenne des Droits de l’Homme s’il existe un recours contre ses décisions devant un tribunal indépendant et impartial doté d’un pouvoir de pleine juridiction. Le recours en appel auprès du TAS tel que consacré à l’article F35 susmentionné du Code d’éthique présente l’ensemble de ces caractéristiques. Du fait du plein pouvoir d’examen du TAS, ce recours gérit en outre tout éventuel manquement ou vice de procédure qui aurait entaché la procédure de première instance”.

<sup>8</sup> “La Formation rappelle que les procédures disciplinaires revêtent un caractère civil et que les principes de la procédure pénale n’étaient, de ce fait, pas applicables devant la Commission disciplinaire de l’IAAF. Selon la jurisprudence de la CEDH, seule une procédure pénale ou une procédure disciplinaire requalifiée par la CEDH comme étant de nature pénale ou entraînant des conséquences d’ordre pénal entre dans le champ de l’article 6 de la Convention Européenne des Droits de l’Homme.”

CAS 2010/A/2311 & 2312 *Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. W.*, para. 33: Article 6 § 3 ECHR only applies to criminal proceedings.

*Art. 6.3 ECHR applies to criminal proceedings only. According to Swiss Law, sport-related disciplinary proceedings conducted by a sport federation against an athlete are qualified as civil law disputes and not as criminal law proceedings. This finding is also in line with constant CAS jurisprudence.*

CAS 2011/A/2463 *Aris FC v. Javier Edgardo Campora & Hellenic Football Federation (HFF)*, Paras 12 – 16: Inapplicability of Article 6§3(c) ECHR to CAS Proceedings

*“In application of Article R44.3 of the CAS Code, a CAS panel has the power to order the examination of witnesses if deemed necessary. In this respect, the mere fact for a panel to refuse, for valid reasons, to use its investigatory powers to hear a witness does not violate the principle of equality of arms provided for in the European Convention for Human Rights (ECHR). As a general rule, only shortcomings in legal representation which are imputable to the State authorities can give rise to a violation of Article 6(3)(c) ECHR”.*

### 1.3 No direct application of Article 8 ECHR

TAS 2011/A/2433 *Amadou Diakite c. FIFA*, para. 57 and TAS 2012/A/2862 *FC Girondins de Bordeaux c. FIFA*, para. 105: No direct application of international human rights treaties, in particular art.8 ECHR regarding the right to private life.

*“Par principe, les droits fondamentaux et les garanties de procédure accordés par les traités internationaux de protection des droits de l’homme ne sont pas censés s’appliquer directement dans les rapports privés entre particuliers”.*

For example, refusal of the applicability of Article 1 of the Additional Protocol to the ECHR on respect for property or Article 8 ECHR on the right to privacy, see 2862 para 107.

See also CAS 2009/A/1957 *Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN)*, paras 14, 18 – 25)

## 2. Substantive rights

### 2.1 Indirect application of certain fundamental rights of a state nature under the concept of public policy

- Recourse to Swiss law to fill the gaps of the applicable regulation regarding protection of human right

CAS 2019/A/6345 *Club Raja Casablanca v. FIFA*, para. 35 *“To the extent that there are gaps in these statutes [FIFA Statutes], the Sole Arbitrator will have recourse to Swiss law (which, anyway reflects a standard of protection of human rights at least equivalent to that embedded in the European Convention on Human Rights) in order to fill the observed gaps”.*

- Application of Articles 27 and 28 of the Swiss Civil Code relating to the protection of personality, including

- Personality rights as such

CAS 2011/A/2433 para. 85 *“la FIFA ne peut pas se borner à respecter sa seule réglementation. En effet, s’il est vrai que le législateur suisse a souhaité laisser une large autonomie aux associations quant à leur fonctionnement et à leur organisation, aucune disposition réglementaire ne doit porter atteinte aux droits de la personnalité de ses membres”*

- The freedom to exercise a sporting activity of one’s choice

*“La liberté d’exercer une activité sportive de son choix, entre partenaires de même valeur et contre des adversaires équivalents, fait – selon la jurisprudence – partie des droits de la personnalité protégés par l’article 28 CC”*  
TAS 2012/A/2720 *FC Italia Nyon & D. c. LA de l’ASF & ASF & FC Crans* para. 10.23.

- The right to fulfilment through sporting activity

*“En ce qui concerne le sport amateur, la doctrine relève que le droit à l'épanouissement par l'activité sportive, que ce soit professionnellement ou non, fait partie des droits de la personnalité du sportif. Ce droit comprend notamment le droit de participer à des compétitions réunissant des sportifs du même niveau que lui”* TAS 2012/A/2720 FC Italia Nyon & D. c. LA de l'ASF & ASF & FC Crans para. 10.24.

- The respect of privacy [Article 8 ECHR]  
*“De manière générale, il ne fait aucun doute que le respect de la vie privée fait partie des droits protégés par l'article 28 CC”*. CAS 2011/A/2433 Amadou Diakite, para. 56.<sup>9</sup>  
In a Russian case, the athlete contended that the recordings were illegally obtained evidence in violation of her fundamental and procedural rights as well as the principle of good faith. The Athlete based her argument particularly on a violation of her privacy rights. *However, the Panel held that “Considering all the elements above, the Sole Arbitrator finds that the interest in discerning the truth must prevail over the interest of the Athlete that the covert recordings are not used against her in the present proceedings. The Sole Arbitrator is not prepared to accept that the principle of good faith has been violated in the proceedings at hand”*, CAS 2016/O/4481, para. 106.
- Professional freedom and economic freedom  
ATF 120 II 369; ATF 102 II 211; ATF 137 III 303; Judgment of the Swiss Federal Tribunal (SFT) 4A\_558/2011, dated March 27, 2012.  
CAS 2013/A/3091, 3092 & 3093 FC Nantes/I. Bangoura/Al Nasr SC/FIFA.
- In terms of substantive public policy, strict application of the principle of proportionality of sanctions and personality rights:  
Only a manifest and serious violation, out of proportion to the conduct sanctioned or going beyond a “mere” disregard of Articles 27 and 28 of the Swiss Civil Code could lead to the annulment of a CAS award before the SFT. Thus, an award has been annulled for having confirmed a disciplinary sanction which infringed a player's economic freedom and which had the effect of handing him over to the “*arbitrariness of his former employer*”, CAS 2010/A/2261 & 2263 Zaragoza & Matuzalem v. FIFA in which the CAS panel dismissed the player's submissions related to Articles 27 and 28 CC, the CAS decision was then annulled by the SFT for a violation of privacy contrary to public policy (Art. 190 (2) (e) PILA) SFT 4A\_558/2011.
- Prohibition of forced labour:  
SFT 4A\_370/2007, consid. 5.3.2 and 4A\_178/2014, consid. 2.4. [Article 3 ECHR]

## 2.2 Recourse to the general principles of law constituting the *lex sportiva*

### - Principle of proportionality, in particular sanctions:

*“The Panel notes that it is a widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringement. The CAS has evidenced the existence and the importance of the principle of proportionality on several occasions. In the cases TAS 91/56 (S. v. FEI) and TAS 92/63 (G. v. FEI), the CAS stated that “the seriousness of the penalty [...] depends on the degree of the fault committed by the person responsible” (Digest of CAS Awards 1986-1998, Staempfli Editions, Berne 1998, 96 and 121)”*. CAS 66/A/246 Ward c. FEI para. 31

See also CAS 2011/O/2422 USOC v. IOC in the so-called “Osaka rule” case.

### - Protection of legitimate expectations

*“[W]here the conduct of one party has led to legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party”* (AEK Athens and SK Slavia Prague v. Union of European Football Associations, CAS 98/200, para. 60). Indeed, the concept

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<sup>9</sup> However, there is no direct application of art.8 ECHR regarding the right to private life, See Supra TAS 2011/A/2433 Amadou Diakite c. FIFA, para. 57 and TAS 2012/A/2862 FC Girondins de Bordeaux c. FIFA, para. 105. Moreover, the invasion of privacy has been considered as legitimate in the context of the anti-doping fight, see TAS and CtEDH 18 janv. 2018, *FNASS et a. c. France*, n° 481581/11.

of legitimate expectations – in particular the concept of protecting *athletes'* legitimate expectations – has repeatedly been recognised by the CAS, for example, in the *USA Shooting* (USA Shooting & Q v. International Shooting Union, CAS 94/129), *Watt* (Watt v. Australian Cycling Federation, CAS 96/153) and *Prusis* (Prusis v. International Olympic Committee, CAS 02/001) decisions cited by USATF. In the case of *US Swimming v. FINA* (CAS 96/001). CAS 2002/O/401 IAAF c. USATF para. 68.

- Prohibition to contradict oneself to the detriment of others (*venire contra factum proprium*)  
CAS 2010/A/2058 British Equestrian Federation v. FEI, para. 18

-Principle of legal certainty  
TAS 2004/A/791 Le Havre AC c. FIFA, Newcastle United & Charles N'Zogbia para. 50.

- Principle of legality and predictability of sanctions  
CAS 2014/A/3832 & 3833 Vanessa Vanakorn v. FIS, para. 86.

- Principle of prohibition of arbitrary or unreasonable rules and measures  
CAS 98/200 AEK Athènes & SK Slavia Prague c. UEFA, para 156.

- Respect for the rights of the defence  
CAS 2000/A/290 A. Xavier et al. c. UEFA, para. 10, in particular the right to be heard, TAS 2007/O/1381 A. Valverde et al. c. UCI, paras. 82, 83 and more generally the right to a fair procedure CAS 2013/A/3309 FC Dynamo Kyiv v. Gerson Alencar de Lima junior & SC Braga, para. 87

- Principle of non-retroactivity in repressive matter  
CAS 2000/A/289 UCI c. C. & FFC, para. 7, subject to *lex mitior*

- Principle of prohibition of denial of justice  
CAS 2017/A/5086 Mong Joon Chung v. Fédération Internationale de Football Association (FIFA); CAS 2020/A/6693 Alexandra Shelton v. Polish Olympic Committee (POC) & Polish Fencing Federation (PFF), award of 28 September 2020, para. 113.

- Principle *non bis in idem*  
CAS 2015/A/4319 paras. 70-72; CAS 2007/A/1396 & 1402, para. 119

- Principle of strict interpretation in repressive matters  
TAS 99/A/230 D. Bouras c. FIJ, para. 10

- Principle of justice and good faith  
CAS 2014/A/3828 IHF v. FIH & Hockey India paras. 153 ff.

- Principle "*nulla poena sine culpa*"  
CAS 2014/A/3516 George Yerolimpos v. World Karate Federation (WKF), para. 104

- Principle of professional mobility and contractual freedom  
CAS 2007/A/1363 TTF Liebherr Ochsenhausen v. ETTU, para. 18

- Principle of freedom of expression

CAS 2014/A/3516 George Yerolimpos v. WKF, para. 116; CAS 2020/A/6693 Alexandra Shelton v. Polish Olympic Committee (POC) & Polish Fencing Federation (PFF), award of 28 September 2020, para. 137 (6)

- Fundamental right of an athlete to be notified of and be given the opportunity to attend the opening of his B sample in a doping context

CAS 2014/A/3639 Amar Muralidharan v. NADA para. 83

### 2.3 Application of certain principles on the basis of the applicable regulations

- Prohibition of discrimination

- Discriminatory regulations on a *prima facie* basis not warranted

2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) & IAA, para. 448: Discrimination of the Hyperandrogenism Regulations on a *prima facie* basis based on IOC Charter, the IAAF Constitution and the laws of Monaco.

The Hyperandrogenism Regulations only apply to female athletes. It is not in dispute that it is *prima facie* discriminatory to require female athletes to undergo testing for levels of endogenous testosterone when male athletes do not. In addition, it is not in dispute that the Hyperandrogenism Regulations place restrictions on the eligibility of certain female athletes to compete on the basis of a natural physical characteristic (namely the amount of testosterone that their bodies produce naturally) and are therefore *prima facie* discriminatory on that basis too. Regulations suspended.

- Discriminatory regulations on a *prima facie* basis warranted to ensure fairness of competitions

CAS 2018/O/5794 Caster Semenya, The DSD (Difference in Sexual Developments) regulations are discriminatory but on the current state of the evidence, such discrimination is necessary, reasonable and proportionate to ensure the fairness of competitions, the integrity of women's athletics and the maintenance of the "protected class" of female athletes in certain events.<sup>10</sup>

- Prohibition of discriminatory conduct

CAS 2017/A/5306 Guangzhou Evergrande Taobao FC v. Asian Football Confederation (AFC) para. 146: Discriminatory conduct under the AFC Code.

- Prohibition of labour rights discrimination

CAS 2010/A/2204 Joint Stock Company Football Club Ural v. Russian Football Union (RFU) para. 50: labour right discrimination contrary to the applicable national law: "*Bearing in mind that part 2 Art.22 of the Labour Code of the Russian Federation stipulates, inter alia, the obligation for the employer to ensure equal payment to employees for their labor of equal value, all these arguments and evidence provided lead the Panel to believe that there was a discrimination of the labour rights of these Players relative to other players and officials of the Appellant*".

- Prohibition of racism

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<sup>10</sup> The appeal made by Caster Semenya and ASAF before the Swiss Federal Tribunal against the CAS decision has been dismissed. See *Infra*. An appeal against the SFT decision is pending before the ECtHR.

- CAS 2014/A/3562 Josip Simunic v. FIFA: Disciplinary sanctions for behaviour offending the dignity of a group of persons after the conclusion of the match (racism) – words having a discriminatory connotation.

Article 58(1)(a) of the FIFA DC reads as follows: “*Anyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, colour, language, religion or origin shall be suspended for at least five matches. Furthermore, a stadium ban and a fine of at least CHF 20,000 shall be imposed. If the perpetrator is an official, the fine shall be at least CHF 30,000*”.

- Prohibition of sexual harassment

- CAS 2019/A/6388 Karim Keramuddin v. Fédération Internationale de Football Association (FIFA): life ban for the appellant who committed offences that violated basic human rights and damaged the mental and physical dignity and integrity of young female players, i.e. Lack of protection, respect or safeguard (violation of articles 23 para. 1 FCE; Sexual harassment (violation of articles 23 para. 4 FCE); Threats and promises of advantages (violation of articles 23 para. 5 FCE); Abuse of position (violation of article 25 FCE, para 231).

- Proportionality of sanctions

- CAS 2020/O/6689 WADA v. RUSADA: (...) pursuant to Article 4.4.2 of the [International Standard for Code Compliance with Signatories] ISCCS, the Panel is to interpret and apply the ISCCS in light of the fact that it has been drafted giving due consideration to the principles of respect of human rights, proportionality and other applicable legal principles (para. 545)

*The Panel bears firmly in mind at all times the paramount need to consider notions of proportionality in the imposition of Signatory Consequences (para. 719).*

*In applying principles of proportionality, the Panel does not consider it is necessary to extend the application of any of the Proposed Signatory Consequences to the Youth Olympic Games (para 732).*

*(...) the Panel considers it would be disproportionate to impose severe restrictions on the next generation of Russian athletes. In particular, as the doping schemes addressed in the McLaren Reports occurred between 2012 and 2016, (...) it very unlikely that any athletes who will be participating in the Youth Olympic Games were involved in those schemes (para 733).*

*The Panel considers that these young athletes ought to be encouraged to participate in international sporting events as a generation of athletes that respect clean sport. (...) it is necessary to protect the new generation of Russian athletes to achieve the goal of clean Russian sport. (para 734).*

- Human rights

- CAS 2020/O/6689 WADA v. RUSADA: (...) pursuant to Article 4.4.2 of the [International Standard for Code Compliance with Signatories] ISCCS, the Panel is to interpret and apply the ISCCS in light of the fact that it has been drafted giving due consideration to the principles of respect of human rights, proportionality and other applicable legal principles (para. 545).

*[T]he requirement to compete as neutral athletes, in the manner determined by the Panel (which permits use of national colours and the name Russia on a limited basis), does not violate the human dignity or any other right of Russian athletes. The neutrality requirements set by the Panel do not exceed the high threshold required to constitute such an infringement (para. 810).*

*With respect to the question of collective punishment, this is primarily a principle of international humanitarian law or criminal law, and there is no specific prohibition on collective punishment in the ECHR (para 811).*

## 2.4 Direct application of certain principles of Community law

- Prohibition of discrimination

CAS 2009/A/1788 UMMC Ekaterinburg v. FIBA Europe e.V., para. 8: Application of non-discrimination EC law principles to Russian cases involving economic activities in the EU.

- Guarantee of the free movement of workers

CAS 2012/A/2852 SCS Fotbal Club CFR 1907 Cluj SA & Manuel Ferreira de Sousa Ricardo & Mario Jorge Quintas Felgueiras v. FRF, para. 77 *“The ECJ made it clear that the practice of sport could be treated as an economic activity like any other and that organised sporting activities were subject to the same guarantees under Community law as were other economic activities. In that connection, the ECJ established that professional football players are workers who have a personal right not to be subject to discriminatory or restrictive rules which prevents them from leaving their country to pursue gainful employment in other Member States. Although sporting federations still hold regulatory authority to determine regulations’ substantive principles concerning player movement rights, they too are subject to and must respect Community law and principles”*.

See also TAS 2016/A/4490 RFC Seraing c. FIFA regarding the taking into consideration of European Union law as applicable law and the legality of Articles 18a and 18b RSTP with regard to freedom of movement and competition law. The appeal against the CAS decision has been dismissed by the Swiss Tribunal Federal (SFT 4A\_260/2017).

- Interpretation of a federation’s rules and regulations in light of principles of “human rights”

CAS 2015/A/4304 Tatyana Andrianova v. ARAF, para. 45, *“a federation cannot opt out from an interpretation of its rules and regulations in light of principles of “human rights” just by omitting any references in its rules and regulations to human rights”*.

- Freedom of speech

CAS 2020/A/6693 Alexandra Shelton v. Polish Olympic Committee (POC) & Polish Fencing Federation (PFF), award of 28 September 2020, para. 137 (6): *“the POC [Polish NOC] would necessarily have to had regard to the Appellant’s free speech rights, guaranteed by, inter alia, Article 9 of the European Convention on Human Rights. The importance of imperative of protecting free speech was emphasized by the CAS panel in CAS/2014/A/3516 as follows: “116. The Panel wishes to emphasise the importance of protecting - of course subject always to the limits imposed by law - freedom of speech and the right to criticize in good faith those in positions of authority even if there may be errors of fact in the criticism; the jurisprudence of the European Court of Human Rights is indicative, and, in jurisdictions to which it applies, compulsive”*.

However, all the fundamental rights found in international treaties cannot be invoked through general principles of law: refusal by arbitrators to apply the principles *in dubio pro reo* and the presumption of innocence. Furthermore, there is no clear consecration of the right to respect for private life, which is likely to be threatened by the anti-doping fight.

2-5 Anti-doping rules not contrary to human rights legislation

CAS 2011/A/2353 Erik Tysse v. Norwegian Athletics Federation (NAF) & IAAF, Para. 39

Even if it were applicable, there is no violation of the European Convention for Human Rights due to the fact that the No Fault and No Significant Fault provisions in both the WADA Code and the IAAF Rules protect athletes against any violation in this respect.

CAS 2010/A/2307 World Anti-Doping Agency (WADA) v. Jobson Leandro Pereira de Oliveira, Confederação Brasileira de Futebol (CBF) & Superior Tribunal de Justiça Desportiva (STJD), paras. 99 – 105: The Compatibility of a Two-Year Suspension with International Law and Human Rights Requirements (...) both CAS jurisprudence and various legal opinions confirm that the WADC mechanisms are not contrary to human rights legislation.



### III. SPORT AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

- Mutu & Pechstein v. Switzerland, 2 October 2018: right to a fair trial, Article 6 § 1 ECHR: Direct applicability of the guarantees of Article 6 § 1 ECHR to CAS arbitrations

Article 6 § 1 of the Convention is applicable *rationae materiae* to disputes of a civil nature. For Mutu, which is contesting the CAS award condemning it to pay damages to Chelsea, the rights in question are of a proprietary nature and result from a contractual relationship. For Pechstein, who is contesting the CAS award confirming a suspension, this is a disciplinary proceeding in which the right to practice a profession is of a civil nature (paras. 56 – 59).

Article 6 § 1 of the Convention is applicable *rationae personae*. The CAS is not a state court but an entity emanating from the ICAS, i.e. a private law foundation. The complaints raised before the ECHR concern in particular the regularity of the composition of the arbitral tribunal and the procedures followed before this body. However, in a limited number of circumstances, in particular with regard to the regularity of the composition of the arbitral panel, Swiss law provides for the jurisdiction of the Federal Court to hear the validity of CAS awards (Articles 190 and 191 of the LDIP). In the present cases, the SFT rejected the appeals of the claimants, thus giving *res judicata* force to the arbitral awards in question in the Swiss legal order. The disputed acts or omissions are therefore likely to engage the responsibility of the respondent State under the Convention (see, *mutatis mutandis*, *Nada c. Suisse* [GC], n° 10593/08, § 120-122, CEDH 2012). It also follows that the ECtHR has jurisdiction *ratione personae* to hear the grievances of the claimants regarding the acts and omissions of the CAS validated by the Federal Supreme Court. (paras. 62 – 67)

*Since CAS arbitrations are subject to review by the Federal Court, the refusal of the Federal Court to review their validity under Article 6 § 1 is likely to result in the liability of Switzerland, as a party to the Convention. The Court thus invalidates the thesis of the inapplicability in principle of the ECHR because of the private nature of the arbitration. The opening of a possible appeal against a CAS award before the Federal Supreme Court, a state court, thus establishes the jurisdiction *ratione personae* of the European Court and the applicability of Article 6 § 1 ECHR i.e. right to a fair trial including the right to a public hearing (Translated from French), See L'applicabilité de la Convention européenne des droits de l'homme aux arbitrages du TAS (Réflexions sur le sens et la portée de l'arrêt de la Cour Européenne des Droits de l'Homme du 2 octobre 2018 *Mutu et Pechstein*, Prof. Gérald Simon, Bull TAS Mars 2020).*

- FNASS et al. c. France, n° 481581/11 et 77769/13 18 janv. 2018 (not a CAS case)  
No violation of the principle of respect for private and family life in relation to Article 8 ECHR due to the whereabouts obligation for target group athletes. The Court had examined the merits of this obligation, as enshrined in the French Sport Code pursuant to the World Anti-Doping Code, considering that the infringement of these rights pursued legitimate aims.

- Platini v. Switzerland, 11 February 2020: right to a fair trial, Article 6 § 1 ECHR and right to respect for private and family life and home (Article 8 of the Convention): No violation of those principles

The Court noted that the applicant had been afforded the domestic institutional and procedural safeguards allowing him to challenge FIFA's decision and submit his arguments in his defence.

- Erwin Bakker v. Switzerland, 26 September 2019, Article 6 § 1 of the ECHR  
Given the specificity of the proceedings before the CAS and the SFT, the restriction on the right of access to a court was neither arbitrary nor disproportionate to the aim pursued, namely the

proper administration of justice. Consequently, this right was not infringed in its very substance, sufficient reasoning by the Federal Court, Application inadmissible.

#### **IV. SFT JUDGEMENTS DEALING WITH THE APPLICATION OF HUMAN RIGHTS BY THE CAS**

4A\_558/2011 Matuzalem, 27 March 2012

The threat of an unlimited occupational ban based on Art. 64 (4) of the FIFA Disciplinary Code constitutes an obvious and grave encroachment in the Appellant's privacy rights and disregards the fundamental limits of legal commitments as embodied in Art. 27 (2) Swiss Code of Obligations (SCO). Should payment fail to take place, the award under appeal would lead not only to the Appellant being subjected to his previous employer's arbitrariness but also to an encroachment in his economic freedom of such gravity that the foundations of his economic existence are jeopardized without any possible justification by some prevailing interest of the world football federation or its members. In view of the penalty it entails, the CAS arbitral award of June 29, 2011 contains an obvious and grave violation of privacy and is contrary to public policy (Art. 190 (2) (e) PILA) (at 4.3.5).

4A\_260/2017 Seraing, 20 February 2018

Within the scope of substantive public policy, the appellant attacked the CAS award for violation of Art. 27 (2) Swiss Civil Code that prohibits excessive commitments (at 5.4.1). The SFT reiterated that there needs to be a severe and obvious violation of Art. 27 (2) CC to fall within the scope of substantive public policy, a condition that was not fulfilled in this case: By prohibiting Third Parties' Ownerships (TPOs), FIFA is restricting the economic freedom of the clubs for certain types of investment but does not suppress it. Clubs remain free to pursue investments, as long as they do not secure them by assigning the economic rights of the players to third party investor (at 5.2).

4A\_486/2019 Trabzonspor c. TFF, Fenerbahce et FIFA, 17 August 2020, consid. 4.

The SFT has confirmed that violations of Article 6§1 of the ECHR cannot be considered by the SFT, unless they match with other grounds for appeal listed in the Swiss Act on International Law (PILA) (art. 190 §2). The argument was raised in relation to the refusal of CAS to hold a public hearing. A party to the arbitration agreement cannot complain directly to the Federal Supreme Court in a civil action against an award that the arbitrators have violated the ECHR, even though the principles deriving from the ECHR can be used, where appropriate, to give concrete form to the guarantees invoked on the basis of Art. 190 para. 2 PILA. Since a breach of treaty law does not *per se* coincide with a breach of public policy within the meaning of Article 190(2)(e) PILA, it is for the appellants to show how the alleged breach of Article 6 § 1 ECHR constitutes a breach of public policy in procedural terms. See also ATF 142 III 360 consid. 4.1.2; 4A\_268/2019 consid. 3.4.3.

4A\_248\_2019 & 4A 398\_2019 Caster Semenya & ASAF v. IAAF, 25 August 2020

The SFT dismissed the appeal made by Caster Semenya and the ASAF against the CAS decision. It considered that fairness in sport is a legitimate concern and forms a central principle of sporting competition. The SFT stressed that it is also an aspect important to the ECtHR. The decision is also compatible with public order regarding the athlete personality and human dignity<sup>11</sup>.

4A 318/2020 Sun Yang v. AMA & FINA, 22 December 2020, consid. 7.9

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<sup>11</sup> An appeal is pending before the ECtHR against the SFT decision.

The SFT admitted Sun Yang's application for review of the CAS award of 28 February 2020. The appellant's submission that he discovered, in May 2020, the existence of circumstances likely to cast serious doubt on the impartiality of the president of the panel, the subsequent challenge of the president of the panel on the basis of Art. 121 (a) of the SFT Act and the annulment of the CAS award have been admitted. The SFT that the decisive factor is whether a party's apprehensions about a lack of impartiality on the part of an arbitrator can be regarded as objectively justifiable. An arbitrator must be and must also appear to be independent and impartial. While agreeing that an arbitrator is, in principle, free to defend his convictions on social media, in this case, the cause for animal rights, an arbitrator must still express any opinions with a certain restraint and irrespective of whether he is acting in his capacity as an arbitrator. It is certain terms used in the tweets published by the arbitrator that are problematic. In particular, the use of the terms "yellow face" are racist qualifiers and are inadmissible. In view of the fact that the arbitrator made such remarks, not only on two occasions, but also after his appointment as president of a Panel, it must be admitted that the appellant's apprehensions, a Chinese citizen, as to the possible bias of the arbitrator may be regarded as objectively justified. The circumstances considered from the standpoint of a reasonable third party with knowledge of them are such as to raise doubts about the impartiality of the arbitrator and create the appearance of prevention.

## **V. CAS ARBITRATORS WITH SPECIFIC EXPERTISE IN HUMAN RIGHTS (17)<sup>12</sup>**

Rashid Al Anezi: member of the Committee for Human Rights 2008-2012; Head of the committee for Human Rights in the ministry of education 2006 - 2008

Michael Beloff: Human Rights expertise; nine HR cases before the ECtHR; Publications include *The Human Rights Act (1999)*; *Freedom of Information and Expression*; *Protecting Human Rights - the European Perspective*.

Annabelle Bennett: NSW Anti-Discrimination Board; Part-time commissioner of the HR & Equal opportunities commission, President of the Panel in CAS 2018/O/5794 Mokgadi Caster Semenya v. IAAF and CAS 2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) & IAAF.

James Bridgeman: Human Rights expertise; member of the Mental Health Tribunals Panel of Chairpersons, continuously since it was established following the enactment of the Mental Health Act 2001. Advocacy support for international human rights projects.

Andra Carska-Sheppard: Member of the working group that assisted the IOC to charter a new course in prevention of harassment and abuse in sports. Co-authored the IOC's Consensus Statement on Prevention of Harassment and Abuse in Sports, published by the British Journal of Sports Medicine (YEAR); Active in the context of implementation of the IOC Tool on Prevention of Harassment and Abuse in Sports and gender equality in international sports.

Jean-Paul Costa: President of the Institut International des Droits de l'Homme, Strasbourg. Judge (1998-2006), then President (2007-2011) of the European Court of Human Rights, Strasbourg.

Ghada M. Darwish: Former Head of Investigations and Legal Advice Division at the national Human Rights Commission of Qatar.

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<sup>12</sup> This list has been established on the basis of the information published on the CAS' website current list of arbitrators and is likely to be expanded after the regular updates of the arbitrators' bios.

Hugh Fraser: Former member of the Canadian Human Rights Tribunal; Arbitrator in CAS 2018/O/5794 Mokgadi Caster Semenya v. IAAF.

Christian Jura: Member of European Commission against Racism and Intolerance (ECRI) at the Council of Europe since 2018; National Council for Combating Discrimination: Human Rights, Combating Discrimination, Multiculturalism (mandate renewed in 2015).

Judith Levine: Human Rights expertise; Publications related to business and HR.

Koffi Sylvain Mensah Atttoh: Chef Division Législation au Ministère des Droits de l'Homme.

Carol Roberts: Human Rights expertise.

Donald Rukare: Advocate of the High Court of Uganda and a Legal Specialist with sound knowledge of International and Human Rights Law. Over 20 years' experience in the field of access to justice human rights. Country Director of Global Rights Uganda office. Manages the country office which implements programs in access to justice, human rights women's rights and ethnic/racial discrimination. Former head of office of the 32M Euros European Union Support to Human Rights and Good Governance Program in Uganda. Teaches the international law and human rights at Makerere University and regular guest faculty at the International Law Institute – Uganda and the Center for human rights at the University of Pretoria- South Africa.

Philippe Sands: Several cases before the European Court of Human Rights.

Sylvia Schenk: member of FIFA's Human Rights Advisory Board.

Jacopo Tognon: University of Padova Padova, IT, Sport and human rights in European Union Law (2008-2013);

Nicolas Ulmer: International Human Rights missions or trial observations for Amnesty International in Equatorial Guinea (1998), Ghana (1991), Romania (1990), Mauritania (1987), and Turkey (1986 and 1984).

## **VI. LIST OF TOPICS RELATED TO HUMAN RIGHTS IN SPORT DISCUSSED AT PAST CAS SEMINARS**

*1. CAS Seminar (for CAS arbitrators), 16-17 November 2011, Montreux*

### **Role and Application of Article 6 ECHR in CAS procedures**

Prof. Ulrich Haas, CAS Arbitrator

*2. CAS Seminar (for CAS arbitrators), 8-9 October 2015, Evian*

### **Arbitration and the ECHR concerning disciplinary cases**

Judge Wilhelmina Thomassen, ICAS Member

*3. International Sport Arbitration, 7th Conference CAS & SAV/FSA, Lausanne, 21-22 September 2018*

### **Gender discrimination**

Judge Annabelle Bennett, CAS Arbitrator

*4. CAS Seminar (for arbitrators), 24-25 October 2019, Budapest*

**Dutee Chand, Caster Semenya and beyond**

Judge Annabelle Bennett, CAS Arbitrator

**European Convention on Human Rights and arbitration**

Prof. Gérald Simon, CAS Arbitrator

*5. CAS/SDRCC Seminar, Fostering integrity in Sport with Dispute Resolution, 30 January 2020, Montreal*

**Harassment, Abuse and Discrimination in Sport**

Barbara Reeves, CAS Arbitrator

**Policing the Gender Divide: Where do we go from here**

Hugh Fraser, CAS Arbitrator

**Mediating Abuse/Harassment Complaints**

Carol Roberts, CAS Arbitrator

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(Estelle de la Rochefoucauld / Matthieu Reeb, 31 mars 2021)