

SPORT AND HUMAN RIGHTS

Overview from a CAS perspective

(as at 28 November 2023)

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I. HUMAN RIGHTS IN SPORT REGULATIONS

Sports organisations are generally private-law entities with the consequence that human rights laws are not directly applicable to them. Yet the direct application of human rights to sports organisations may result from self-commitments by sports organisations through regulations adopted on the basis of the autonomy of sports associations.

In 2017, driven by the transnational mobilisation of social movements and growing public attention, the Fédération Internationale de Football Association (FIFA) became the first sports federation and Sports Governing Body (SGB) to approve a human rights policy at international level. Then the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA) and some other international and national sport federations, have elaborated strategies, documents, or position statements to embed human rights. In this respect, we will see that SGBs are notably taking responsibility with regard human rights in connection with Major-Sporting Events (MSE). Furthermore, although the United Nation Guiding Principles on Business and Human Rights (UNGPs) unanimously approved by the United Nation Human Rights Council in 2011 are “soft law” *i.e.* they are not legally binding, they are widely recognized by SGBs and many sport actors with the consequence of their application as an authoritative framework intended to minimize adverse human rights impacts triggered by business activities.¹ Likewise, since 2020, there

¹ The UNGPs were incorporated in the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines) that are referred to in disputes between SGBs.

In December 2017, the Universal Declarations of Players Rights (UDPR) initiated by World Players Association, developed the UNGPs and underlined the accountability of Governments and sports bodies regarding human rights impacts on athletes (World Players Association (2017) Universal Declaration of Players Rights).

The Sport and Rights Alliance (SRA), whose role is to coordinate civil society groups and trade unions in promoting the rights of people affected by sport, has engaged directly with global sport bodies “to ensure their decision-making and operations respect international standards for human rights, [...] in accordance with the [UNGPs]” (ITUC (2021) Sport and rights. <http://www.ituc-csi.org/sport-and-rights>).

The 2017 Kazan Action Plan adopted by the Sixth International Conference of Ministers and Senior Officials Responsible for Physical Education and Sports declared “the fundamental human rights of everyone affected by or involved in the delivery of physical education, physical activity and sport must be protected, respected and fulfilled in accordance with the [UNGPs] (UNESCO 82017) Kazan action plan. <https://en.unesco.org/mineps6/kazan-action-plan>).

In March 2019 the UN Human Rights Council, “call[ed] upon States to ensure that sporting associations and bodies implement policies and practices in accordance with international human rights norms and standard” (UN Human Rights Council Resolution 40/5).

is a willingness at the European level for sports organisations to respect human rights and fundamental freedoms.²

FIFA

A distinction can be made between human rights impacts related to (i) FIFA's MSE i.e. World Cup-related human risks i.e. labour and housing rights issues to restriction of freedom of speech, freedom of movement, and public security concerns and (ii) human rights impacts related to FIFA's daily activities i.e. issue of trafficking of child footballers and abuse/harassment of female players.

In March 2017, the [FIFA Human Rights Advisory Board](#) was created. Its role is to publish reports evaluating FIFA's human rights progress and make recommendations on how FIFA should address human rights issues linked to its activities.

In May 2017, the [FIFA Human Right Policy](#) was published. According to article 1, FIFA commits to respect human rights in accordance with the UNGPs; according to article 2, FIFA determines the human rights recognized; article 5 specifies FIFA's salient human rights risks; under article 6 FIFA commits in an ongoing due diligence process.³

In 2017, FIFA joined the Steering Committee of the Mega-Sporting Events Platform for Human Rights (MSE Platform) which is a coalition of international and intergovernmental organisations, governments, sports governing bodies, athletes, unions, sponsors, broadcasters, and civil society groups. Its mission is to ensure all actors involved in hosting an event fully adopt and implement their respective human rights duties and responsibilities throughout the MSE duration. The Mega-Sporting Events Platform for Human Rights, which published 11 White Papers on 31 January 2017 presenting an analysis of the current state of the art on various aspects of human rights in sport has evolved into its own independent entity, established in 2018, now known as the [Centre for Sport and Human Rights](#).

In May 2018, just before the start of the World Cup in Russia, FIFA introduced a [Complaint mechanism for human rights defenders and journalists](#).

In 2019, the bidding process for hosting the 2023 FIFA Women's World Cup became compulsorily subject to Human Rights Strategies. Moreover, as from the bid to host the 2026 FIFA Men's World Cup, any host country must conduct a human rights risk assessment and outline a mitigation plan as part of their proposal.

In practical terms, in response to criticism 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 linked to Qatar 2022, the Supreme Committee (SC) for Delivery and Legacy of the 2022 FIFA World Cup in Qatar has publicly accepted its responsibilities under the UNGPs

² In December 2020, the Council of Europe Committee of Ministers called on "sport organisations to introduce respect of human rights and fundamental freedoms as an objective in their statutory aims, internal regulations and codes of conduct, policies, plans, projects and other strategic documents and to further strengthen their capacity to prevent and respond to human rights violations" (Council of Europe 2020 15th Council of Europe Conference of Ministers. <https://rm.coe.int/0900001680a03374>).

The Revised European Sports Charter provides at Article 6 that all "Stakeholders shall respect and protect internationally recognized human rights and fundamental freedoms and they should observe the general framework established for their implementation in business and other activities" (Council of Europe, Revised European Social Charter, 2021, Article 6).

³ <https://digitalhub.fifa.com/m/1a876c66a3f0498d/original/kr05dqyhwr1uhqy2lh6r-pdf.pdf>

and used the framework of the UNGPs in developing its approach to worker welfare, stakeholder engagement and sustainability. The SC also developed a partnership with Qatar’s national human rights institution to promote a “positive human rights legacy” from the event.⁴

Under the terms of the FIFA Statutes (May 2022), FIFA commits to respect all internationally recognised human rights and to strive to promote the protection of these rights (article 3), prohibits any form of discrimination and promotes equality and neutrality” (article 4).⁵

Under the FIFA Disciplinary Code and FIFA Code of Ethics edition 2023 aimed to enhance football integrity, (i) Sexual abuse, harassment and exploitation are not subject to limitation period; (ii) Victims to become parties to relevant proceedings and enjoy all procedural rights; (iii) Investigations into match-fixing via independent integrity expert are strengthened.

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

IOC

In 2019, the IOC mandated independent experts to elaborate Recommendations for an IOC Human Rights Strategy, engaged a Head of Human Rights and initiated a procedure for the establishment of a Human Rights unit.⁶ The IOC also aligned its gender equality strategy with human rights standards.⁷

In September 2022, the IOC published its Strategic Framework on Human Rights, which addresses many of the independent experts’ Recommendations.⁸ Likewise, the IOC is to support International Federations and National Olympic Committees in order to progress in the respect of human rights⁹. In this respect, specific guidance is offered to sports organizations by the IOC Consensus Statement on harassment and abuse in sport¹⁰, and a Tool Kit¹¹. Inspired by the Tool Kit, some sports organizations have set up and implement their own regulations¹².

Olympic Charter (in force as from 8 August 2021)

⁴ Qatar 2022 (2021) SC and Q22 sign MoU with NHRC to further enhance the positive human rights legacy of the FIFA World Cup 2022. <https://www.bbc.com/news/uk-politics-29762156>

⁵ https://digitalhub.fifa.com/m/3815fa68bd9f4ad8/original/FIFA_Statutes_2022-EN.pdf

⁶ Al Hussein Z. and Davis R. (2020) Recommendations for an IOC Human Rights Strategy. https://stillmeda.olympic.org/media/Document%20Library/OlympicOrg/News/2020/12/Independent_Expert_Report_IOC_HumanRights.pdf. To date, the Human Rights unit was created.

⁷ IOC (2021) IOC releases framework on fairness, inclusion and non-discrimination on the basis of gender identity and sex variations. International Olympic Committee. <https://Olympics.com/ioc/news/ioc-releases-framework-on-fairness-inclusion-and-non-discrimination-on-the-basis-of-gender-identity-and-sex-variations>

⁸ IOC (2022) IOC approves strategic framework on human rights. International Olympic Committee.

<https://olympics.com/ioc/news/ioc-approves-strategic-framework-on-human-rights#:~:text=The%20IOC%20also%20established%20a,Sex%20Variations%20in%20November%202021>

⁹ IOC (2020) IOC moves forward with its human right approach-Olympic News. International Olympic Committee. <https://olympics.com/ioc/news//ioc-moves-forward-with-its-human-rights-approach>

¹⁰ Mountjoy et al., ‘The International Olympic Committee (IOC) Consensus Statement: Harassment and abuse (non-accidental violence) in sport’, Br J Sports Med (2016) 1, 3.

¹¹ Duncan/Kirsty. IOC Toolkit for IFs and NOCs. Safeguarding athletes from harassment and abuse in sport. 03 November 2017.

¹² Soublière/Hessert, Safeguarding and beyond – The role of sports regulations, human rights and the balance between the rights of interested parties in sports investigations and the disciplinary proceedings that arise from them, CAS Bulletin 2023/2.

The Olympic Charter enshrines the respect for universal fundamental ethical principles, the preservation of human dignity, the practice of sport as a human right, the promotion of sustainable development in sport, the protection of athletes from all forms of harassment and abuse¹³ and condemns all forms of discrimination.¹⁴

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.¹⁵ In this regard, the liability to comply with human rights, and to provide remedy for any violations will apply to host cities, host National Olympic Committee (NOCs) and organizing committees of the 2024, 2026 and 2028 Olympic Games, by means of incorporation into the IOC's Host City Contract of the 2017 obligations.¹⁶

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.

The core human right provision is article 13 HCC 2024 “*Respect of the Olympic Charter and promotion of Olympism*”.¹⁷ Sustainability measures have also been added to the HCC (Article 15 Sustainability and Olympic legacy (protection of labour rights to a certain extent HCC 2024)).¹⁸ With respect to remedies, in case of non-compliance with the HCC, Article 36 HCC 2024 (“Measures in case of non-compliance with the HCC”) 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 38.2 also allows the IOC to terminate the HCC and withdraw the Games from the

¹³ Rule 2.18 related to the protection of athletes from all forms of harassment and abuse was included in the Charter in 2019.

¹⁴ See Olympic Charter, Fundamental principles of Olympism (Principles 1, 2, 4 & 6) & Rule 2 OC (Rule 2.6, 2.8, 2.14, 2.18). Principle 6 condemning any form of discrimination is also reflected in Article 13.2(a) of the 2024 HCC core requirement.

¹⁵ HCC 2026 and HCC 2028 include similar human right obligations.

¹⁶ Rook, Prado, Heerdt, Responsible sport: no going back, *The International Sports Law Journal*, 02.11.2022, <https://doi.org/10.1007/s40318-022-00231-4>

¹⁷ *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 para.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 para.27, shall establish a reporting mechanism to address the obligations referred to in para.13.1 and para.13.2 in connection with the activities of the Host City, the Host NOC and the OCOG related to the organisation of the Games.

¹⁸ library.olympics.com/Default/doc/SYRACUSE/171363/host-city-contract-principles-games-of-the-xxxiii-olympiad-in-2024-international-olympic-committee?_lg=en-GB

HC in case of violation. Pursuant to Article 51.2 of the HCC 2024, the CAS is competent to hear any dispute in connection with the HCC.

As part of the Olympic Agenda 2020 reforms, human rights standards were reinforced in the “Operational Requirements” of the Host City Contract for the Olympic Games 2024.

IOC Code of Ethics 2023 edition

Human rights are enshrined in Article 1 which recalls that the respect for the universal fundamental ethical principles is the foundation of Olympism. These include notably:

1.4 Respect for international conventions on protecting human rights insofar as they apply to the Olympic Games’ activities and which ensure in particular:

- respect for human dignity;
- rejection of discrimination of any kind on whatever grounds, be it race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status;
- rejection of all forms of harassment and abuse, be it physical, professional or sexual, and any physical or mental injuries;

Olympic Agenda 2020 + 5

One of the aspects of Recommendation 13 of Olympic Agenda 2020 + 5 entitled “Continue to lead by example in corporate citizenship” refers to the protection and respect of human rights. Recommendation 13 notably (i) foresees a sustainability strategy¹⁹, (ii) assists the Olympic Movement in developing sustainable sports worldwide²⁰, (iii) fosters gender equality and inclusion²¹, (iv) strengthen the IOC human rights approach²².

IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations, November 2021, complemented with a Frequently Asked Questions’ Guide

¹⁹ • Reduce IOC CO2 emissions in line with the Paris Agreement by 30% by 2024 and become a “climate positive” organisation through the creation of the “Olympic Forest” and other mitigation measures

• Ensure that the IOC Sustainable Sourcing Guidelines are fully implemented across the supply chain while promoting respectful, sober, circular and regenerative models

• Develop a comprehensive education programme, across all levels of responsibility, to increase staff competency in implementing the IOC Sustainability Strategy within their areas of responsibility

²⁰ • Support IFs and NOCs in their transition towards carbon neutrality through the Sport for Climate Action Framework and other means

• Assist the IFs and NOCs in developing their own sustainability strategies including sourcing and resource management

• Work with and support role models and influencers to raise awareness, educate and give visibility to sustainability

• Facilitate best practice sharing in sustainable innovation in sport infrastructure

²¹ • The IOC to lead by example by continuing to increase gender balance at IOC Governance level and adopting a Diversity and Inclusion action plan for its administration

• The IOC to call on IFs, NOCs and OCOGs to implement the IOC Gender Equality and Inclusion objectives for 2021-2024 around five focus areas (Participation, Leadership, Safe Sport, Portrayal, Resource Allocation)

²² Adopt an overarching IOC human rights strategic framework with specific action plans for each of the IOC’s three different spheres of responsibility (the IOC as an organisation, the IOC as owner of the Olympic Games and the IOC as leader of the Olympic Movement)

• Link the overarching IOC human rights strategic framework to various existing or forthcoming IOC strategies

• Amend the Olympic Charter and the “Basic Universal Principles of Good Governance” of the Olympic and Sports Movement to better articulate human rights responsibilities

• Enable the newly created IOC Human Rights unit to develop the IOC’s internal capacity with regard to human rights

On 16 November 2021, following a two-year consultation process with more than 250 athletes and concerned stakeholders, the IOC released a Framework “to promote a safe and welcoming environment for everyone involved in elite-level competition, consistent with the principles enshrined in the Olympic Charter. The Framework also acknowledges the central role that eligibility criteria play in ensuring fairness, particularly in high-level organised sport in the women’s category”²³. The IOC framework was issued as part of the IOC’s commitment to respecting human rights (as expressed in Olympic Agenda 2020+5), and as part of the action taken to foster gender equality and inclusion. From March 2022 onwards, IFs are responsible for defining how this framework works in practice applied to specific sports, disciplines and events. One of the key recommendations of the IOC framework is that diverse gender identities and variations in sex characteristics should not be assumed as an unquestionable sign of disproportionate advantage nor imply unavoidable risk to other athletes. Rather, any eligibility rules should be based on ethical, credible, and peer-reviewed research.

Future Host Questionnaire, Olympic Games January 2021

Preferred Hosts are required to submit responses to the Future Host Questionnaire and, among other things, describe how they will seek to identify and address adverse human rights impacts in line with the UNGPs, throughout the duration of the Games.

IOC Advisory Committee on Human Rights

The Advisory Committee’s mission is to provide strategic guidance to the IOC and advise on the implementation of the IOC Strategic Framework on Human Rights of 4 May 2022.

Approved by the IOC Executive Board in September 2022, the IOC Strategic Framework on Human Rights covers and provides specific action plans for each of the IOC’s three spheres of activity:

- the IOC as an organisation;
- the IOC as owner of the Olympic Games; and
- the IOC as leader of the Olympic Movement.

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.²⁴

UEFA

In 2017, UEFA has joined the Mega-Sporting Events Platform for Human Rights (MSE Platform) referred above.

The UEFA makes an explicit reference to the UNGPs in connection with their bidding requirements and staging agreement for all their major events,²⁵ and specify the bidders’ obligations with respect to human rights²⁶.

²³ <https://olympics.com/ioc/news/ioc-releases-framework-on-fairness-inclusion-and-non-discrimination-on-the-basis-of-gender-identity-and-sex-variations>

²⁴ https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf, see Purpose, scope and organization of the world anti-doping program and the Code, p.9 & 10, Introduction p.17; Article 8.1 Fair hearing, Article 13.2.2 Appeals Involving Other Athletes or Other Persons, Article 22.6.

²⁵ Rook, Prado, Heerdt, Responsible sport: no going back, The International Sports Law Journal, 02.11.2022, <https://doi.org/10.1007/s40318-022-00231-4>

²⁶ 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

In 2021, UEFA enacted a Human Right Commitment 2021. At UEFA, all work on human rights is led by the UEFA Football and Social Responsibility division, which identified 11 policies of strategic importance. Seven of these are linked to human rights: Anti-racism, Refugee support, Child and youth protection, Equality and inclusion, Football for all abilities, Health and well-being, Solidarity and rights, Refugee support, solidarity and rights. The other four relate to the environment *i.e.* circular economy, climate and advocacy, event sustainability, infrastructure sustainability. This human rights commitment is the basis on which UEFA strives to ensure safe and fair access to the game, as well as secure and inclusive working environments throughout football.²⁷

A UEFA Environmental Commitment is in development, for approval by the Executive Committee.²⁸

UEFA developed the UEFA Football Sustainability Strategy 2021-2030 including UEFA Circular economy Guidelines and UEFA Sustainable Infrastructure Guidelines. As a result, UEFA commits to manage all UEFA activities and events based on the core value of respect and the principles of sustainability, leading by example and ensuring a positive legacy for the future. UEFA mission is to inspire, activate and accelerate collective action to respect human rights and the environment within the context of European football.²⁹The UEFA also establishes a Respect Report providing an annual comprehensive insight in this respect.³⁰

The 2024 EURO bidding requirements and staging agreement provides:

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.

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- 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).

²⁷ https://editorial.uefa.com/resources/0270-13f89d361aaa-640357446989-1000/uefa_human_rights_commitment_2021.pdf

²⁸ https://editorial.uefa.com/resources/0270-13f89f5c7a60-81543be64ba7-1000/uefa_environmental_commitment_2021.pdf

²⁹ https://editorial.uefa.com/resources/0270-13f888ffa3e5-931c597968cb-1000/uefa_football_sustainability_strategy.pdf

³⁰ <https://www.uefa.com/insideuefa/news/027c-16de84801d66-a6c470c856c3-1000--uefa-releases-2021-22-respect-report/>

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.

World Athletics (WA)

World Athletics enacted several documents aimed at the respect of human rights:

WA's Constitution (effective 1 December 2021), according to Article 4.1 “[T]he 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”.

Sustainability Strategy 2020-2030, 7 April 2020 and Sustainability Policy ³¹, published a Sustainability Report 2020-2021 and established a WA Human Rights Working Group Report 2021.

World Athletics Safeguarding Rules (2023) and Appendix of the World Athletics Safeguarding Policies

World Aquatics (WAQ)

WAQ Rules on the Protection from Harassment and Abuse (2023)

Fédération Internationale de Gymnastique (FIG)

FIG Statutes Art. 2.2 Non-discrimination and human rights (2023 Edition)
FIG Code of Ethics (2022 Edition)

International Biathlon Union (IBU)

Code of Conduct (2021 version)

Union Cycliste Internationale (UCI)

UCI Code of Ethics and Appendix 1 to the UCI Code of Ethics (2021 version)
UCI Code of Conduct (2021 version)

International Shooting Sport Federation (ISSF)

ISSF Code of Ethics and General Rules of Conduct
ISSF Policy and Procedures Safeguarding Against Harassment and Abuse

Commonwealth Games federation

The UNGPs have been integrated across the CWGF's operations.

In 2014, the Glasgow 2014 Commonwealth Games adopted a specific “Approach to Human Rights”, linking human rights principles to the Games' business relationships comprising with regard sourcing and labour rights. Moreover, Glasgow 2014 declared to have “an obligation-both

³¹ <https://worldathletics.org/athletics-better-world/sustainability/world-athletics-sustainability-policy>

*moral and legal, and with the [UNGPs] in mind-to respect, support and promote these rights through the course of its normal business”.*³²

In 2017, the CGF published a Human Rights Policy Statement – updated in June 2022 - whereby it committed to respect all international standards in all its activities.³³

In 2018, the Gold Coast Commonwealth Games adopted a Human Rights Policy stating that its primary objective was *“to apply the framework of the UNGP to the management of human rights”*.³⁴

In 2020, the Commonwealth member countries have unanimously adopted the Commonwealth Consensus Statement to promote human rights and tackle discrimination at all levels of sport - from community games to elite sporting events.

The Social Value Charter Birmingham Commonwealth 2022 Games provided that *“The core values and principles of the Commonwealth Nations are set out in the Commonwealth Charter. Many of these are especially pertinent to Birmingham 2022 and have influenced our strategic focus for Birmingham 2022 including human rights, sustainable development and protecting the environment. We have a suite of policies which cover these areas of focus and which can be found at www.birmingham2022.com”*.

International Paralympic Committee

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

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

Formula One Group

On April 2015, a Statement of Commitment to Respect for Human Rights was adopted, stating that F1 will notably conduct human rights due diligence across its operations and engage in meaningful consultation with relevant stakeholders.³⁵

The F1 Code of Conduct 2022 has a Chapter entitled “Social and Environmental Responsibility” that includes the following sub-chapters: Human Rights and Modern Slavery; Sustainability; Diversity and Inclusion; Harassment and Bullying; Health and Safety.³⁶

German Football Federation (DBF)

³² Glasgow 2014 (2013) Approach to human rights.<http://www.glasgow2014.com/sites/default/files/2017-11/Human%20Rights%20Policy%20GC2018.pdf>

³³ Commonwealth Games Federation (2017) Commonwealth Games Federation Human Rights Policy Statement. <https://thecgf.com/sites/default/files/2018-03/CGF-Human-Rights-Policy-Statement-17-10-05.pdf>

³⁴ Gold Coast 2018 (2021) Gold Coast2018 XXI commonwealth games. <https://gc2018.com/sites/default/files/2017-11/Human%20Rights%20Policy%20GC2018.pdf>

³⁵ Formula 1 (2015) Statement of Commitment to Respect for Human Rights. <http://www.formula1.com/en/toolbar/statement-of-commitment-to-respecr-for-human-rights.html>

³⁶ Code of Conduct 2022 https://www.formula1.com/content/dam/fom-website/manual/Misc/f1_code_of_conduct/FOM_22_Code_of_Conduct_Final.pdf

The DBF was the first national football federation to adopt and publish a human right policy.³⁷ It acknowledges a duty of care and refers to human rights tools, comprising the UNGPs. Furthermore, the DBF's human right policy is lined up with Ruggie's recommendations on how FIFA's efforts in this regard are to be achieved by national federations.³⁸

Swiss Olympic

Swiss Olympic Statutes on Ethics in Swiss Sport (2022 Edition)

United Nations' Sport for Climate Action

Nearly 300 sport federations and members of the wider sport ecosystem have signed up to the UN's Sport for Climate Action initiative and have committed to reducing their climate impact, as well as advocating for responsible responses. Athlete activists are also highlighting the need for leadership on climate issues. Sport leaders have an opportunity to take targeted steps to scale up their own human rights due diligence in ways that account for actual and potential adverse impacts on people connected to climate change.³⁹

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 19 December 2016.⁴⁰

Universal Declarations of Players Rights (UDPR), 14 December 2017⁴¹

World Player Rights Policy (WPRP) published by the World Players Association (WPA) on July 2017: policy document anticipating and complementing the UDPR.

II. SELECTED CAS CASES RELATED TO HUMAN RIGHTS ISSUES

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

Article 6 para.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:

³⁷ Deutscher Fussball-Bund (2021) DBF adopts human rights policy and position on Qatar.

<http://www.dbf.de/news/detail/dbf-adopts-human-rights-policy-and-position-on-qatar-226819/>

³⁸ Ruggie J (2016) For the Game. For the World. FIFA and Human Rights. Harvard Kennedy School Mossavar-Rahmani Center for Business and Government.

³⁹ <https://unfccc.int/climate-action/sectoral-engagement/sports-for-climate-action>

⁴⁰ <https://www.unwomen.org/en/digital-library/publications/2016/12/cedaw-for-youth#:~:text=The%20Convention%20on%20the%20Elimination,women's%20and%20girls%20equal%20rights.>

⁴¹ <https://www.fifpro.org/media/md2efzpd/universal-declaration-of-player-rights-english-version.pdf>

- (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.*

1.1 Indirect application of Article 6(1) ECHR

Principle

CAS 2020/O/6689 para. 810

The ECHR does not apply directly to CAS or WADA, but regard should be given to the ECHR as certain fundamental tenets of it may be considered within the context of any review by the Swiss Federal Tribunal.

CAS 2011/A/2384 & 2386 para. 22:

The Panel is of the view that even though it is not bound directly by the provisions of the ECHR (cf. Art 1 ECHR), it should nevertheless account for their content within the framework of procedural public policy. See also CAS 2011/A/2433 paras 23, 24; CAS 2011/A/2426 paras 65 – 68; 2011/A/2425 paras 22 – 24.

Right to a fair trial enshrined in Article 6(1) ECHR

CAS 2011/A/2384 & 2386 para. 22; CAS 2011/A/2433 para.24

Under Art. 6 para.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.

It should be noted that, according to the ECtHR, the fundamental procedural rights guaranteed by Article 6(1) of the ECHR are fully applicable in proceedings before the CAS in the event of mandatory or equivocal arbitration (see *infra* Mutu & Pechstein v. Switzerland, 2 October 2018). In any event, in practice, directly or indirectly, the procedural guarantees of article 6 (1) ECHR are applicable before the CAS because: (i) the right to a fair trial is part of Swiss public policy, and failure to respect it may result in a CAS award being set aside before the Federal Tribunal; (ii) the CAS Code requires arbitrators to be independent and impartial and provides for reasonable procedural deadlines and the right to a public hearing.

The hearing of “anonymous” witnesses is not per se prohibited as running against the fundamental right to a fair trial

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 para. 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 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 (also CAS 2009/A/1920 para. 13; CAS 2011/A/2384 & 2386 paras. 21-23 & 26-32; CAS 2018/A/5734 para 159; CAS 2019/A/6669 paras. 150 - 156; CAS 2021/A/7661 paras. 152 ff.).

The principle of fairness of the procedure enshrined in Article 6(1) ECHR prevents the applicability of longer statute of limitation

CAS 2015/A/4304 paras. 46 – 50: the CAS recognized that fair proceeding excludes the retroactive application of a longer statute of limitation. It does not necessarily follow from the qualification of the statute of limitation as a “procedural rule” that there are no limits to a retroactive application of such rule. Instead, it follows from Art. 6(1) ECHR that the procedure must be “fair”. 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.

Right to a public hearing enshrined in Article 6(1) ECHR

CAS 2020/A/7110 para. 134: According to Article R57 of the CAS Code, a physical person who is party to the proceedings can request a public hearing if the matter is of a disciplinary nature. Article 6 para. 1 of the ECHR specifies in the relevant part that “[I]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing [...]”. In all events, if the matter dealt with by the CAS is not of a disciplinary nature, this type of legal question does not require a public hearing under Article 6 para. 1 of the ECHR.

CAS 2018/A/5746 para. 101: Yet, Art. 6 para.1 of the ECHR allows derogations from the principle of the right to a public hearing, in case, *inter alia*, the guarantee of public order so requires, for example if by sending emails to the tribunal, the fans of the football clubs parties to the proceedings are affecting the serenity of the procedure and it can be expected that they will be demonstrating at the hearing. Moreover, procedures which regard exclusively points of law or highly technical questions can satisfy the requirements of Art. 6 para.1 ECHR even in the absence of a public hearing. A hearing where only complex procedural matters such as the jurisdiction of CAS, the admissibility of the appeal and the standing to sue of the appellant are discussed therefore meets the requirements of Art. 6 para.1 ECHR even if it is not public.

Privilege against self-incrimination

CAS 2017/A/5003 para. 260ff.: The privilege against self-incrimination has been recognized as an implied right under Article 6 of the ECHR. 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.

Application of Article 6(1) ECHR to the failure to collaborate

CAS 2018/A/5769 paras 135 & 136: Article 6(1) ECHR which includes the privilege against self-incrimination is not applicable to a sanction for failure to collaborate if the person is not sanctioned for having failed to provide a decision to an investigatory body, but merely for having failed to timely provide such document.

CAS compliant with art. 6 (1) ECHR due to its full power to review

CAS 2011/A/2362 para. 41: CAS is 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 ECtHR, where a party has access to a court with full judicial review jurisdiction (including on the merits like CAS by virtue of Article R57 of the CAS Code), 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 paras 155 & 156; CAS 2007/A/1396 & 1402 para 43⁴²⁻⁴³; CAS 2020/A/7255 para. 156 and CAS 2020/A/7378 para. 161.

Appointment of the President of the Panel from a list of arbitrators specifically designated by CAS not contrary to Article 6(1) ECHR

CAS 2020/O/6689 para. 517: Article 10.4.1 of the International Standard for Code Compliance by Signatories (ISCCS) provides that for CAS cases arising under Article 23.5 of the 2018 World Anti-Doping Code (WADC) which provides for monitoring and enforcing compliance with the WADC, the President of the Panel is nominated by the two party-nominated arbitrators from the list of arbitrators specifically designated by CAS for such cases. The fact that the CAS is not publishing or disclosing the basis upon which such list of arbitrators is compiled does not cause the “mechanism” of this list to run afoul of the safeguards in Article 6(1) ECHR and Article 30(1) of the Swiss Constitution. Article 10.4.1 of the ISCCS vests the CAS with the discretion to compile the list of arbitrators and there is no obligation on the CAS to disclose the basis upon which this list is compiled.

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

Inapplicability, even indirectly in disciplinary cases, of Articles (2) (presumption of innocence)

CAS 2013/A/3139 para. 90: 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”.*

Article 6(3) ECHR only applies to criminal proceedings

CAS 2010/A/2311 & 2312 para. 33: *“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”.*

⁴² This CAS jurisprudence [de novo jurisprudence] is actually in line with European Court of Human Rights decisions, which in para. 41 of the Wickramasinghe 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

⁴³ “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).

CAS 2020/A/7129 & 7130 at para. 233 recalls the inapplicability of the criminal limb of Article 6 of the ECHR to disciplinary proceedings.

2. Substantive rights

2.1 No direct application of international human rights treaties

Traditionally, there is no direct application of the substantive rights granted by international human rights treaties to international arbitration.

No direct application of art. 8 ECHR regarding the right to private life

TAS 2011/A/2433 para. 57 and TAS 2012/A/2862 para. 105 & 107: “*Par principe, les droits fondamentaux et les garanties de procédure accordées 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 CAS 2009/A/1957 paras 14, 18 – 25; (ATF 127 III 429; see Gabrielle Kaufmann- Kohler, Giorgio Malinverni, Legal opinion on the conformity of certain provisions of the draft World Anti-Doping Code with commonly accepted principles of international law, 2003, N°62 et seq., p. 22).

2.2 Application of substantive rights under Article R58 CAS Code

Article R58 CAS Code defines the law applicable to the merits. It provides as follow:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

2.2.1 Firstly, under article R58 of the CAS Code, CAS panels shall rule in accordance with the applicable regulations

As seen above, in some cases, the application of human rights to sports organisations results from self-commitments by sports organisations through regulations adopted on the basis of the autonomy of sports associations.

- Prohibition of discrimination

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

2014/A/3759 para. 448: In principle discrimination is prohibited by the IAAF Constitution, the IOC Charter, and the laws of Monaco.

CAS determination: The IAAF 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. Therefore, the regulations were suspended.

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

CAS 2018/O/5794: The IAAF Difference in Sexual Developments (DSD) 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.⁴⁴

- Prohibition of discriminatory conduct

CAS 2017/A/5306 para. 146: Discriminatory conduct under the AFC Code.

- Prohibition of racism

CAS 2014/A/3562: Disciplinary sanctions were imposed 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"*. See also CAS 2015/A/4256 "racism" in the UEFA Disciplinary Regulations.

- Prohibition of sexual harassment

CAS 2019/A/6388: a life ban was imposed on the appellant who committed offences that violated basic human rights protected by the FIFA Code of Ethics (FCE) 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).

CAS 2020/A/7371: The evidence against the former President of the Haitian Football Federation, regarding the allegations of sexual abuse were considered inconsistent, unclear and contradictory and, as a result, were not sufficient to establish a violation of Articles 23 (protection of physical and mental integrity) and Art. 25 (abuse of position) of the FIFA Code of Ethics.

2.2.2 Secondly, under article R58 of the CAS Code, CAS panels shall decide the dispute according subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled

Pursuant to Article R58 CAS Code, Swiss law or another national law applicable in the alternative by the CAS may limit the autonomy of sports organisations and guarantee respect for constitutional rights in private law relationships.

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

CAS 2019/A/6345 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"*. See also CAS 2016/O/4464 para. 185; CAS 2016/O/4469 para. 170.

CAS 2017/A/4998 para. 154: Due process and personality rights inhere in Swiss law, either directly through codified law, or derived indirectly from principles of good faith and the prohibition on abuse of rights (Swiss Civil Code, Art. 2). These provide a minimum standard of process with which the IF's regulations must comply.

⁴⁴ 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.

- Under Articles 27 and 28 of the Swiss Civil Code relating to the protection of personality, the CAS enshrines respect for the rights of the individual.

- Personality rights as such

CAS 2011/A/2433 para. 8: *“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”*.

CAS 2011/A/2426 para. 96: *“The guarantee of article 28 CC extends to all of the essential values of an individual that are inherent to him by his mere existence and may be subject to attack (ATF 134 III 193, at consid. 4.5, p. 200). According to article 28 para. 2 CC, an attack on personality is unlawful, unless it is justified by (i) the victim’s consent, (ii) an overriding private or public interest, or (iii) the law”*.

- Right to privacy

CAS 2011/A/2426 para. 97: *“The Panel harbours no doubt that, in general terms, the right to privacy lies within the personality rights protected by article 28 CC”*.

- The respect of privacy [Article 8 ECHR]

CAS 2011/A/2433 para. 56.⁴⁵: *“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 2016/O/4481 para. 106: However, in certain cases, the respect of privacy may be balanced *“[C]onsidering 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”*.

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

TAS 2012/A/2720 para. 10.23: *“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”*. See also CAS 2018/A/6029 para 106: *“For athletes, personality rights encompass in particular the development and fulfilment of personality through sporting activity, professional freedom and economic freedom”*.

CAS 2013/A/3091 para. 223 ff., CAS 2018/A/6029 para. 106, 107; CAS 2020/A/7175 para. 80; CAS 2021/A/7856 para. 170: Preventing a professional player from rendering his services according to the terms of the employment contract may result in an infringement of his personality rights.

CAS 2020/A/7175 para. 84: Preventing a professional player from rendering his services according to the terms of the employment contract may justify the termination of contract with just cause.

CAS 2020/A/6954; CAS 2020/A/6770; CAS 2020/A/6950: Likewise, the lack of registration of a player with the national federation and the subsequent prevention from being qualified to play matches, warrants the termination of contract with just cause.

- The right to fulfilment through sporting activity

CAS 2006/A/1025 para. 85: *“In the event of an infringement of the right of an individual’s economic liberty or his right to personal fulfilment through sporting activities, the conditions set at Article 28 al. 2 of the*

⁴⁵ 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.

Swiss Civil Code are applicable. Such infringement must be based either on the person's consent, by a private or public interest or the law"

TAS 2012/A/2720 para. 10.24, CAS 2017/A/5092 para. 126: *"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"*.

- Professional freedom and economic freedom

CAS 2013/A/3091, 3092 & 3093; CAS 2017/A/5092 para. 128: According to Articles 28 *et seq.* of the Swiss Civil Code, any infringement of personality rights caused by another is presumed to be illegal and subject to penalties unless there is a justified reason that overturns this presumption. It is generally accepted in jurisprudence that personality rights apply to the world of sport. For athletes, personality rights encompass in particular the development and fulfilment of personality through sporting activity, professional freedom and economic freedom. An athlete who is not actively participating in competitions depreciates on the market and reduces his future career opportunities. Athletes have therefore a right to actively practice their profession. To the extent that Articles 28 *et seq.* of the Swiss Civil Code protect parties from negative actions and require offending parties to refrain therefrom, but do not grant rights to positive actions, such right to actively practice one's profession is resolved notably by labour law. See also

- Requirement to balance the athlete's personality rights against those of associational autonomy

CAS 2017/A/4998 para 162: An athlete who joins an association and thereby submits to that association's rules as a condition of participation may be deemed to have consented to those rules. Therefore, though a suspension infringes an athlete's personality rights, it is permissible if it is proportionate, *i.e.*, not "excessive". A determination of excessiveness depends on a balance of interests including *inter alia* the federation's appreciable interest in guaranteeing for all athletes a "*fundamental right to participate in doping-free sport*". Moreover, the fight against doping weighs even more heavily where the challenged measure is provisional and the infringement temporary.

CAS 2017/A/4947 para. 111: The sanctions imposed on the athlete do not violate the applicable international standards of human rights and, in particular, they do not affect "*in a drastic manner*" on the athlete's fundamental right to freely exercise a profession - economic freedom. A 2-year ban from any football-related activity does not violate the concerned individual's right to exercise a profession or enjoy its economic freedom. On the contrary, the respective sanction simply limits its capability of performing any football activity, during a temporary and limited period of 2 years. The concerned individual will keep enjoying its economic freedom and would be allowed to exercise any profession or economic activity, provided that it is not related with football.

- Prohibition of labour rights discrimination

CAS 2010/A/2204 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 labour 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"*. See also CAS 2018/A/6045 para. 99.

- Applicability of EU law as foreign mandatory rules

- CAS 2016/A/4492 paras 42 – 45: Pursuant to Article 19 of the Swiss private international law statute (PILA), an arbitral tribunal sitting in Switzerland, such as the CAS, must take into consideration foreign mandatory rules where three conditions are met: (i) such rules belong to a special category of norms which need to be applied irrespective of the law applicable to the merits of the case; (ii) there is a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force; (iii) in view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interest and crucial values and their application must lead to a decision which is appropriate. EU competition law and EU provisions on fundamental freedoms guaranteed by Treaty on the Functioning of the European Union (TFEU) meet these three conditions and constitute foreign mandatory rules. Therefore, compliance with these provisions must be taken into account by a CAS panel.
- Prohibition of discrimination
CAS 2009/A/1788 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 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 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); See also CAS 2016/A/4903 para. 93.

2.2.3 Thirdly, CAS panels shall decide the dispute according to the rules of law the panels deem appropriate. In the latter case, the panels shall give reasons for its decision: in this context. Under the *lex sportiva* concept, CAS panels apply fundamental rights.

Sports law has developed and consolidated a set of unwritten legal principles with which national and international sports federations must comply, regardless of whether such principles are contained in their own statutes and regulations or in any applicable national law.

- Principle of proportionality, in particular sanctions:

CAS 66/A/246 para. 31: *“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)”. See also CAS 2011/O/2422 in the so-called “Osaka rule” case.*

CAS 2020/A/7369 paras 123 & 129, the CAS Panel reminded that when determining whether a sanction is proportionate, various benchmarks seem appropriate: the gravity of the illegal act, the power to dissuade the offender from repeating the same illegality in the future, and the importance

of the rule of law that is protected. Further, all disciplinary systems require to contain a mechanism for increasing the sanctions so as to bring about compliance in case of a failure to comply with the sanctions imposed.

CAS 2020/O/6689 para. 719 ff.; CAS 2020/A/6920 para. 82; CAS 2020/A/7596 paras 251 ff.

- Protection of legitimate expectations

CAS 98/200 para. 60: “[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”. Indeed, the concept of legitimate expectations – in particular the concept of protecting athletes’ legitimate expectations – has repeatedly been recognised by the CAS, for example, in CAS 94/129, CAS 96/153, CAS 02/001, CAS 96/001, CAS 2002/O/401 para. 68, CAS 2008/O/1455 para. 16, 2018/A/5824 para. 143.

- Prohibition to contradict oneself to the detriment of others (*venire contra factum proprium*)

CAS 2008/O/1455, para. 16, CAS 2010/A/2058 para. 18; CAS 2020/A/7517 para. 128.

- Principle of legal certainty

TAS 2004/A/791 para. 50; CAS 2019/A/6278 para. 85 ff.

- Principle of legality and predictability of sanctions

CAS 2014/A/3832 & 3833 para. 86; CAS 2019/A/6278 para. 51; CAS 2019/A/6278 para. 85 ff: In order for the principles of predictability and legality to be respected, it is not necessary for the sanctioned stakeholder to know in advance the exact sanction that will be imposed. Such fundamental principles are satisfied whenever the disciplinary rules have been properly adopted, describe the infringement and provide, directly or by reference, for the relevant sanction. The fact that the competent body applying the disciplinary regulations has the discretion to adjust the sanction mentioned in the rules deemed applicable to the individual behavior of a player breaching such rules is not inconsistent with those principles. A decision cannot be required to contain an elaborate list of all deliberations made by the legal body when deciding on sanctions as long as the sanctions fall within an appropriate and predictable framework and it is possible to establish with sufficient certainty the considerations and deliberations providing the basis for the decision and the sanctions imposed.

- Principle of prohibition of arbitrary or unreasonable rules and measures

CAS 98/200 para 156

- Respect for the rights of the defence

CAS 2000/A/290 para. 10, in particular the right to be heard; TAS 2007/O/1381 paras. 82, 83 more generally the right to a fair procedure. See also CAS 2013/A/3309 para. 87;

CAS 2020/A/6920 para. 59: A party against which a disciplinary measure is issued must have the possibility (orally or in writing) to defend itself against the charges forming the matter in dispute in the disciplinary proceedings. Such right includes the opportunity to file submissions and to present evidence in order to challenge the allegations brought forward against it. Furthermore, the right to be heard is also breached with respect to the provision stating that the decision contains the legal reasons for the decision, when such legal reasoning does not explain what provisions were applied to which of the addressees of the decision, and why. The legal reasoning must be such that the addressee understands why the judicial body has decided the way it has and not in a different manner.

- Principle of non-retroactivity subject to *lex mitior*

CAS 2000/A/289 para. 7; CAS 2017/A/5086 para. 119; CAS 2019/A/6330 para. 96; CAS 2020/A/7397 para. 77 g).

- Principle of prohibition of denial of justice

CAS 2017/A/5086 para. 129; CAS 2020/A/6693 para. 113.

- Principle *non bis in idem*

CAS 2015/A/4319 paras. 70-72; CAS 2007/A/1396 & 1402 para. 119; CAS 2013/A/3256 and CAS 2018/A/5800; CAS 2019/A/6483 para. 120; CAS 2020/A/7369 para. 133 ff.

- Principle of strict interpretation in repressive matters

TAS 99/A/230 para. 10; CAS 2017/A/5086 para. 129; CAS 2020/A/7417 para. 94;

- Principle of justice and good faith

CAS 2014/A/3828 paras. 153 ff.

- Principle *nulla poena sine lege*

CAS 2019/A/6278 para. 47: There is general consensus that certain contents of the principle of *nulla poena sine lege* are also applicable to disciplinary provisions and proceedings in the context of sports organisations. The CAS, in particular, has adopted certain contents of this principle with regard to disciplinary proceedings and regulations of sports organisations by establishing a so-called “predictability test”. Disciplinary provisions and proceedings of an association or federation must be considered to be in line with the principle of *nulla poena sine lege* if: (i) the relevant regulations and provisions emanate from duly authorised bodies; (ii) the relevant regulations and provisions have been adopted in constitutionally proper ways; (iii) the relevant regulations and provisions are not the product of an obscure process of accretion; (iv) the relevant regulations and provisions are not mutually qualifying or contradictory; (v) the relevant regulations and provisions are not able to be understood only on the basis of the *de facto* practice over the course of many years of a small group of insiders; and (vi) there is a clear connection between the incriminated behavior and the sanction imposed. See also CAS 2019/A/6504 Cruzeiro Esporte Club v. FIFA, para. 85;

- Principle “*nulla poena sine culpa*”

CAS 2014/A/3516 para. 104; CAS 2017/A/5086 para. 129 para. 149;

- 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 2010/A/2161 para. 9.8; CAS 2014/A/3639 para. 83; CAS 2015/A/3977 para. 162; CAS 2016/A/4828 para.122 ff.

- Principle of professional mobility and contractual freedom

CAS 2007/A/1363 para. 18; CAS 2015/A/4042 para. 68; CAS 2020/A/7417 para. 78 ff.;

- Principle of freedom of expression / speech

CAS 2011/A/2452 para. 32; CAS 2014/A/3516 para. 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.

CAS 2020/A/6693 para. 137 (6): the POC [Polish NOC] would necessarily had to have 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

CAS 2018/A/6007 para. 96: Independently of whether or not the ECHR is directly applicable to international sports federations, its jurisprudence on the freedom of speech does not apply to a situation where it is not an “anonymous” individual forming part of a larger demonstration actually burning a t-shirt himself, but somebody requesting “everybody” to burn their shirts of a well-known individual, using mass media and his high political position to convey his message.

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

CAS 2015/A/4304 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”.

However, all the fundamental rights found in international treaties cannot be invoked through general principles of law. Thus, CAS panels do not apply the principles *in dubio pro reo* and the presumption of innocence. Furthermore, the right to respect for private life is likely to be threatened by the anti-doping fight. See CAS 2011/A/2353 para. 39: even if it were applicable, there is no violation of the ECHR 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; and CAS 2010/A/2307 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.

- Requirement to compete as neutral athlete not contrary to human rights

CAS 2020/O/6689 para. 810: The 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.

- No specific prohibition on collective punishment in the ECHR

CAS 2020/O/6689 para. 811: 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. The Panel does not accept that *Sõro v. Estonia*, no. 22588/08, ECtHR 2015 (which was relied upon by RUSADA) is authority that prohibition of collective punishment exists through other rights in the ECHR, such as the right to private and family life in Article 8.

2.3 Limited application of certain fundamental rights of a state nature under the concept of public policy

There is a limited application of fundamental rights of a state nature due to a restrictive conception of the notion of public policy within the meaning of Article 190 al. 2 let e PILA.

- In terms of substantive public policy, strict application of the principle of proportionality of sanctions and personality rights

CAS 2010/A/2261 & 2263: 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;

CAS 2010/A/2263 “Matuzalem”: the CAS 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*” (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).

III. SELECTED SFT JUDGEMENTS DEALING WITH THE APPLICATION OF HUMAN RIGHTS BY THE CAS

Right to economic freedom

4A_558/2011 “Matuzalem”, 27 March 2012, consid. 4.3.5

This case involved an employment contract dispute between a Brazilian football player, Matuzalem, and a Ukrainian club. As a result of the applicant football player’s termination of the employment contract, FIFA ordered the payment of compensation, which CAS affirmed and increased the value of compensation, adding interest. FIFA then commenced disciplinary proceedings against the player because the football club still had not been paid and found the football player and the player’s new club guilty of breaching their obligations towards the Ukrainian football club. Among other consequences, FIFA banned the player from any activity in connection with football pursuant to Article 64(4) of the FIFA Disciplinary Code. The CAS confirmed such decision.

The SFT overruled the CAS award. The SFT found that the worldwide and unlimited ban imposed on the player by FIFA constituted an obvious and grave encroachment in the player’s economic freedom, disregarded the fundamental limits of legal commitments as embodied in Art. 27 (2) Swiss Code of Obligations (SCO) and constituted a violation of substantive public policy under Article 190(2) of PILA.

Right to due process

4A_246/2014, 15 July 2015, consid. 7

This case arose out of employment contract disputes between a football club and several football players, due to a contractual provision tying full monthly salary payments to the condition that players play 70% of the total number of minutes of matches played by the club during the month in question. After administrative proceedings in the relevant State the players’ right to terminate their contracts was upheld and the club’s appeal to CAS was rejected. The club appealed to the Swiss Federal Tribunal (SFT), arguing that it was deprived of its right to due process because the CAS arbitrator did not have full power of review.

The SFT rejected the appeal on this ground, finding that once an arbitral tribunal as a dispute resolution mechanism has been validly chosen, a party may not validly submit that the arbitrators violated Article 6.1 of the European Convention on Human Rights (ECHR) as a separate ground for challenge, but Article 6.1 can be considered as part of the assessment of whether conduct has violated public policy under Article 190(2)(e) PILA.

4A_260/2017 Seraing, 20 February 2018, consid. 5.4

This case arose out of disciplinary sanction imposed by FIFA on a football club for violation of Third-Party Ownerships (TPOs) provisions included in FIFA’s regulations. The appellant, a Belgian football club, appealed a CAS decision partially upholding the sanction, alleging a violation of its right to be heard, an improper constitution of the arbitral tribunal, and a violation of substantive public policy under Article 190(2) of PILA. 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.

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. The SFT also reiterated the independence and impartiality of CAS as an arbitral tribunal, and further rejected the applicant's claim that its right to be heard had been infringed.

4A_486/2019 Trabzonspor c. TFF, Fenerbahce et FIFA, 17 August 2020, consid. 4.

This case arose out of a dispute between two Turkish football clubs, with one accusing the other's managers of match-fixing. Applicant, football club "V," appealed the CAS tribunal's finding of lack of standing, alleging, *inter alia*, a violation of its right to due process under Article 6.1 of the ECHR, as the CAS tribunal refused V's request to hold the preliminary hearing in public, and to have the transcripts published.

The SFT rejected the appeal, finding 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 Federal Private International Law Act (PILA) (art. 190(2)). 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_318/2020 Sun Yang v. AMA & FINA, 22 December 2020, consid. 7.9

The appellant, a Chinese elite swimmer, requested a revision of a previous CAS award which imposed an 8-year ban upon him for violating the International Swimming Federations' doping rules, alleging that the discovery of problematic social media tweets by the CAS Panel's president called the decision into question due to bias.

The SFT found that the problematic language used in the tweets in question, such as references to the skin color of certain Chinese individuals he referenced, combined with the fact that the tweets were made after his appointment as Panel president, justified the doubts as to the Panel president's impartiality and independence. The SFT admitted 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. The SFT found that the decisive factor was whether a party's apprehensions about a lack of impartiality on the part of an arbitrator could be regarded as objectively justifiable. An arbitrator must be and must also appear to be independent and impartial.

4A_644/2020, 23 August 2021, consid. 5

The appellant, a Russian Olympic biathlete, appealed a CAS decision finding that she committed an anti-doping rule violation in contravention of the World Anti-Doping Code, alleging, *inter alia*, that she had not freely consented to limitations on her right to a public hearing set by the panel due to COVID, and that the panel had not addressed her request to broadcast the hearing on the CAS website.

The Tribunal rejected her claim, ruling that Article 6.1 of the ECHR is not a separate ground for a challenge and the applicant failed to make a demonstration that the alleged violation of Article 6.1 was incompatible with public policy within the meaning of Article 190(2)(e) PILA.

Right to freedom from discrimination and right to bodily integrity

4A_248_2019 & 4A 398_2019 Caster Semenya & ASAF v. IAAF, 25 August 2020, consid. 9

Caster Semenya, an Olympic middle-distance runner, appealed a decision by CAS rejecting her challenge of IAAF Difference of Sex Development (DSD) Regulations, which mandate that women with certain natural levels of testosterone need to artificially lower these levels in order to compete in certain women's international athletic events. Semenya alleged these Regulations were discriminatory against women with certain physiological traits, and also alleged that the regulations interfered with her right to bodily integrity under the ECHR. The CAS tribunal found that, while the DSD regulations were discriminatory, "*such discrimination was a necessary, reasonable and proportionate means of achieving the legitimate objective of ensuring fair competition in female athletics in certain events and protecting the 'protected class' of female athletes in those events*".

The SFT considered that fairness in sport was a legitimate concern and formed a central principle of sporting competition. The SFT stressed that it was also an aspect important to the ECtHR. The decision was also compatible with public order regarding the athlete personality and human dignity⁴⁶.

4A 618/2020 A. c. World Athletics, 2 juin 2021, consid. 4 & 5

The athlete, a Paralympic sprinter, whose prosthetics allowed him to run at a taller height than he would naturally run, appealed a CAS decision upholding the World Athletics' decision to ban him from racing and competing against other able-bodied athletes, alleging discrimination under Article 14 of the ECHR. The athlete argued the rule was discriminatory on the basis of race or ethnic origin, because the rule was established on the basis of data relating exclusively to Spanish, Australian, and Asian individuals, when athletes of African or Afro-American origin have proportionally longer legs than individuals of other races of ethnic origins.

The SFT found the athlete's appeal on this basis inadmissible, as he failed to present scientific evidence to support his argument in the earlier CAS proceeding. The SFT also found that, in any case, the CAS tribunal had not applied the rule the athlete claimed was discriminatory to him in the earlier proceeding, but rather considered that the athlete enjoyed an overall competitive advantage as a result of the use of his prostheses.

Personality rights

4A_406/2021 Sun Yang c. AMA & FINA, 14 février 2022, consid. 7

The appellant, an elite Chinese swimmer, claimed notably that the award rendered by the CAS following the SFT's annulment (see 4A_318/2020 above) was contrary to substantive public policy within the meaning of Article 190 para. 2 let. e of the LDIP. The appellant, invoking in particular various conventional and constitutional guarantees, claimed to be the victim of an infringement of his personality rights, since the contested award enshrined a violation of several fundamental rights.

The SFT stressed that the procedural guarantees applicable to criminal proceedings were not transposable to arbitration. The SFT also held that depending on the circumstances, an infringement of the athlete's personality rights might be contrary to substantive public policy (BGE 138 III 322, paras. 4.3.1 and 4.3.2). According to the case law, however, a violation of Art. 27 para. 2 CC is not automatically contrary to substantive public policy. To infringe substantive public policy, a violation of Art. 27 para. 2 CC should be a serious and clear-cut case of violation of a fundamental right. The appellant signed the doping control form and consented to the blood test carried out by the sample-taking staff. It was therefore legitimate to ask whether such conduct did not preclude, from the point of view of good faith, the consideration of the appellant's criticisms concerning the regularity of the notification of the test, which were made only after the blood samples had been taken. In any event, the alleged breaches of the regulatory requirements concerning accreditation and notification of the doping control by the sample-taking staff certainly

⁴⁶ An appeal is pending before the ECtHR against the SFT decision.

did not entitle the appellant to take the law into his own hands by tearing up the doping control form and taking an active part in destroying a glass container containing his blood samples. In view of the foregoing, the result reached by the CAS Panel did not appear to be in any way contrary to substantive public policy.

4A_542/2021 A. c. Fédération Internationale de Football Association (FIFA), 28 April 2022, consid 6

Invoking, *inter alia*, Art. 27 para. 2 CC, the appellant, a football player, argued that the contested CAS award was contrary to substantive public policy (Art. 190 para. 2 let. e LDIP), since the disproportionate sanction imposed on him would infringe his personal rights.

By complaining after the event, before the SFT, about the excessive severity of the sanction and by arguing that the CAS Panel did not give sufficient reasons on this issue, the appellant, who not only did not formulate the slightest criticism in this respect before the CAS but expressly acknowledged that the sanction was not disproportionate, was adopting contradictory behaviour, incompatible with the rules of good faith (*venire contra factum proprium*), which did not deserve any protection. In any event, the SFT reminded that it only intervenes in decisions rendered by virtue of a discretionary power if they lead to a manifestly unjust result or shocking inequity (4A_600/2016, consid. 3.7.2).

Right to freedom from slavery and forced labor

4A_370/2007, 21 February 2008, consid. 5.3.1 and 5.3.2

This case arose out of a contractual dispute following a young French footballer's failure to sign with a French football club a certain period of time after the execution of a training agreement between the two parties, and the French footballer's subsequent signing with an English football club. The French footballer appealed a CAS decision rendered in favor of the French club, alleging that the award violated the prohibition in Article 4.2 of the ECHR against forced labor, as it would force the 16-year-old player to pay exorbitant sanctions for refusing to respect a career plan imposed on him by a football club. The CAS tribunal found it did not have the competence to assess the validity of the French training system for young footballers.

The SFT found the applicant's appeal inadmissible, as it could not fault the CAS tribunal for having found that this claim was outside of its purview. See also 4A_178/2014, consid. 2.4.

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

Right to a fair trial (Article 6 of the Convention)

- Mutu & Pechstein v. Switzerland, 2 October 2018: Direct applicability of the guarantees of Article 6(1) ECHR to CAS arbitrations

This case concerned the lawfulness of proceedings brought by professional athletes before the CAS. The appellants, a professional footballer and a professional speed skater, submitted in particular that the CAS could not be regarded as an independent and impartial tribunal. The second appellant also complained that she had not had a public hearing before the International Skating Union disciplinary board, the CAS or the Swiss Federal Supreme Court, despite her explicit requests to that end; her right to a fair hearing under Article 6.1 had not been upheld on the ground that Swiss law did not provide for any re-examination of the facts after the CAS award, and that the SFT only had a very limited power of review.

In essence, the Court held that there had been no violation of Article 6(1) (right to a fair trial) of the Convention with regard to the alleged lack of independence of the Court of Arbitration for Sport (CAS). It found that the CAS arbitration proceedings offered all the safeguards of a fair

hearing, and that the second applicant's allegations concerning a structural absence of independence and impartiality in the CAS, like the first applicant's criticisms concerning the impartiality of certain arbitrators, had to be rejected. In contrast, the Court held that there had been a violation of Article 6(1) of the Convention in the case of the second applicant, with regard to the lack of a public hearing before the CAS, finding that the questions concerning the merits of the sanction imposed on her for doping required a hearing that was subject to public scrutiny. See also: *Bakker v. Switzerland*, decision (Committee) of 3 September 2019.

- *Platini v. Switzerland*, 11 February 2020

Disciplinary proceedings had been brought against the applicant, a former professional football player, president of UEFA and vice president of FIFA, in respect of a salary "supplement" of 2 million Swiss francs (CHF), received in 2011 in the context of a verbal contract between him and FIFA's former President. He was suspended from any football related professional activity for four years and fined CHF 60,000.

The ECtHR declared the application inadmissible. 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 defence⁴⁷.

- *Ali Riza v. Switzerland*, 13 July 2021

This case concerned a dispute between a professional Turkish/British football player and his former Turkish League club, Trabzonspor. The player alleged a violation under Article 6.1 of his right to have access to an independent and impartial tribunal after CAS and the Swiss Federal Supreme Court dismissed his appeal of a Turkish Football Federation (TFF) Dispute Resolution Committee decision as inadmissible for lack of jurisdiction. He also complained that he had not been given a hearing and that the principle of equality of arms had not been observed before the Federal tribunal. The TFF decision had found that the applicant wrongfully terminated his contract with his former football club and imposed on him a fine and four-month ban from signing for another club.

The ECtHR found no violation of Article 6.1, finding that CAS had given a convincing explanation and a reasoned decision for dismissing the appeal, and considering the applicant's "extremely tenuous" link with the dispute and Switzerland, the restriction of the right to access to a court had not been disproportionate to the aim pursued, namely, the proper administration of justice. The Court further declared inadmissible the complaints concerning the failure to hold a hearing and the alleged non-compliance with the principle of equality of arms, holding that those complaints were manifestly ill-founded⁴⁸.

- *Erwin Bakker v. Switzerland*, 26 September 2019

On 5 September 2005, the anti-doping committee of the Royal Netherlands Cycling Union imposed a two-year suspension from competition on the applicant, the cyclist Erwin Bakker, as well as a fine for doping. The Appellant appealed to the CAS. In its award of 5 May 2006, the CAS rejected the applicant's application and banned him for life from participating in a sporting competition on the grounds that he had already been suspended for doping on 2 February 2006. As the appeal to the Federal tribunal was declared inadmissible, Bakker appealed to the ECtHR. Invoking Article 6(1) of the Convention. The applicant put forward four complaints alleging a violation of his right to a fair trial.

The ECtHR held that given the specificity of the proceedings before the CAS and the SFTI, 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

⁴⁷ Factsheet – Sport and the ECHR, January 2022

⁴⁸ *Ibid.*

its very substance. The Court found the reasoning by the Federal Court sufficient and the application inadmissible⁴⁹.

Right to respect for private and family life and home (Article 8 of the Convention)

- Fédération Nationale des Syndicats Sportifs (FNASS) et al. c. France, n° 481581/11 et 77769/13 18 janv. 2018 (not a CAS case)

This case concerned the requirement for a targeted group of sports professionals to notify their whereabouts for the purposes of unannounced anti-doping tests. The applicants alleged in particular that the mechanism requiring them to file complete quarterly information on their whereabouts and, for each day, to indicate a sixty-minute time-slot during which they would be available for testing, amounted to unjustified interference with their right to respect for their private and family life and their home.

The ECtHR held that there had been no violation of Article 8 (right to respect for private and family life and home) of the Convention in respect of the complaint of 17 of the individual applicants, finding that the French State had struck a fair balance between the various interests at stake. In particular, taking account of the impact of the whereabouts requirement on the applicants' private life, the ECtHR nevertheless took the view that the public interest grounds which made it necessary were of particular importance and justified the restrictions imposed on their Article 8 rights. The Court also found that the reduction or removal of the relevant obligations would lead to an increase in the dangers of doping for the health of sports professionals and of all those who practise sports, and would be at odds with the European and international consensus on the need for unannounced testing as part of doping control⁵⁰.

- Platini v. Switzerland 11 February 2020

See facts above under *Right to a fair trial (Article 6 of the Convention)*

The applicant submitted in particular that the four-year suspension was incompatible with his freedom to exercise a professional activity. The Court declared the application inadmissible. It found in particular that, having regard to the seriousness of the misconduct, the senior position held by the applicant in football's governing bodies and the need to restore the reputation of the sport and of FIFA, the sanction did not appear excessive or arbitrary. The domestic bodies had taken account of all the interests at stake in confirming the measure taken by FIFA, subsequently reduced by the Court of Arbitration for Sport.

- Athletics South Africa v. Switzerland, 5 October 2021 (decision on the admissibility)

This application was closely linked to the case of Semenya v. Switzerland (no. 10934/21). The applicant association, the regulatory authority of athletics in South Africa, argued in particular that the new Regulations issued by the International Association of Athletics Federations (IAAF), governing the eligibility requirements for classification as a female for athletes with differences of sex development (the so-called DSD Regulations), imposed an unjustified and disproportionate interference with the core of the right to the physical, moral and psychological integrity of the athlete. The applicant association also argued that M.C. Semenya suffered from an unjustified restriction on exercising her profession due to the DSD Regulations that precluded her from competing at an international level.

The Court declared the application inadmissible as being incompatible *ratione personae* with the provisions of the Convention. It observed in particular that, although the applicant association was recognised by the Swiss Federal Tribunal as having standing to challenge the DSD Regulations, this was not sufficient to be considered as victim for the purposes of Article 34

⁴⁹ Ibid.

⁵⁰ Ibid.

(individual applications) of the ECHR. The applicant association, as a legal entity, was not a direct and personal victim of the alleged violations⁵¹.

- Semenya v. Switzerland, 11 July 2023

The case concerned an international-level athlete, specialising in middle-distance races (800 to 3,000 metres), who complained about certain regulations of World Athletics requiring her to take hormone treatment to decrease her natural testosterone level in order to be able to take part in international competitions in the female category. Having refused to undergo the treatment, she was no longer able to take part in international competitions. Her legal actions challenging the regulations in question before the CAS and the Federal Court were rejected. The Chamber of the ECtHR decided by a majority of 4 to 3 that the appeal to the Federal Court had not been properly examined.

In summary, after declaring that it had jurisdiction despite the lack of territorial connection of WA and the athlete with Europe, the Chamber concluded that there had been a violation of Article 14 on the prohibition of discrimination in conjunction with Article 8 of the ECHR on the right to respect for private life, as well as a violation of Article 13 on the right to an effective remedy. According to the Chamber, the State has a positive obligation to provide institutional and procedural guarantees enabling the potential victim to effectively challenge the contested measure. This concept of positive obligation is applicable to the specific features of sports law. The Chamber imposed an obligation on Switzerland to re-examine the CAS decision in the light of the substantive norm of the prohibition of discrimination (Art. 14 ECHR).

This examination goes beyond the spirit of article 190 of the LDIP, which subjects arbitration awards to a limited examination of their compatibility with public policy. In the Chamber's view, this strict scrutiny is justified by the forced nature of the arbitration and the seriousness of the alleged discrimination.⁵²

The Swiss government lodged an appeal with the Grand Chamber of the ECtHR against the Chamber's judgment. The Grand Chamber agreed to hear the case. The appeal will be heard by 17 judges. There will therefore be a new judgement in a few months or a year.

Freedom of expression (Article 10 of the Convention)

- Simunic v. Croatia, 22 January 2019 (not a CAS case)

The applicant, a football player, was convicted of an offence of addressing messages to spectators of a football match, the content of which expressed or enticed hatred on the basis of race, nationality and faith. He submitted in particular that his right to freedom of expression had been violated.

The ECtHR declared the applicant's complaint under Article 10 (freedom of expression) of the Convention inadmissible as being manifestly ill-founded, finding that the interference with his right to freedom of expression had been supported by relevant and sufficient reasons and that the Croatian authorities, having had regard to the relatively modest nature of the fine imposed on the applicant and the context in which he had shouted the impugned phrase, had struck a fair balance between his interest in free speech, on the one hand, and society's interests in promoting tolerance and mutual respect at sports events as well as combating discrimination through sport on the other hand, thus acting within their margin of appreciation. The Court noted in particular that the applicant, being a famous football player and a role-model for many football fans, should have been aware of the possible negative impact of provocative chanting on spectators' behaviour, and should have abstained from such conduct⁵³.

⁵¹ Ibid.

⁵² [https://hudoc.echr.coe.int/eng-press#{%22itemid%22:\[%22003-7701636-10631196%22\]}](https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7701636-10631196%22]})

⁵³ Ibid.

Right to an effective remedy (Article 13 of the Convention)

- Semenya v. Switzerland, 11 July 2023

See facts above under *Right to respect for private and family life and home (Article 8 of the Convention)*

The ECtHR held, by a majority (4 votes to 3), that there had been:

- a violation of Article 13 (right to an effective remedy) in relation to Article 14 taken together with Article 8 of the Convention.

The Swiss government lodged an appeal with the Grand Chamber of the ECtHR against the Chamber's judgment. The Grand Chamber agreed to hear the case. The appeal will be heard by 17 judges. There will therefore be a new judgement in a few months or year(s).

Prohibition of discrimination (Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention)

- Semenya v. Switzerland, 11 July 2023

See facts above under *Right to respect for private and family life and home (Article 8 of the Convention)*

The ECtHR held, by a majority (4 votes to 3), that there had been:

- a violation of Article 13 (right to an effective remedy) in relation to Article 14 taken together with Article 8 of the Convention.

The Swiss government lodged an appeal with the Grand Chamber of the ECtHR against the Chamber's judgment. The Grand Chamber agreed to hear the case. The appeal will be heard by 17 judges. There will therefore be a new judgement in a few months or year(s).

Freedom of movement (Article 2 of Protocol No. 4)

Fédération Nationale des Syndicats Sportifs (FNASS) et al. c. France, n° 481581/11 et 77769/13
18 janv. 2018 (not a CAS case)

See facts above under *Right to respect for private and family life and home (Article 8 of the Convention)*.

The applicants submitted in particular that the whereabouts requirement was incompatible with their freedom of movement.

The Court held that Article 2 (freedom of movement) of Protocol No. 4 was inapplicable in the case and declared the complaint inadmissible as being incompatible *ratione materiae*. It noted in particular that the applicants were obliged to notify the French Anti-Doping Agency of a daily time slot of sixty minutes in a precise location where they would be available for an unannounced test. The location was freely chosen by them and the obligation was more of an interference with their privacy than a surveillance measure. The Court took note of the domestic courts' decisions not to characterise the whereabouts requirement as a restriction on freedom of movement and to distinguish between the ordinary and administrative courts in terms of the jurisdiction for such testing. The Court thus took the view that the measures at issue could not be equated with the electronic tagging that was used as an alternative to imprisonment or to accompany a form of house arrest. Lastly, the Court found that the applicants had not been prevented from leaving their country of residence but had merely been obliged to indicate their whereabouts in the destination country for the purposes of testing⁵⁴.

V. CAS ARBITRATORS WITH SPECIFIC EXPERTISE IN HUMAN RIGHTS (12)⁵⁵

Rashid Al-Anezi (Koweit): member of the Permanent Committee for Humanitarian Law 2007-2013 (Ministry of justice); Head of the committee for Human Rights in the ministry of education 2006 - 2008

⁵⁴ Ibid.

⁵⁵ 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.

Annabelle Bennett (Australia): 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 (Ireland): 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.

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

Frank Latty (France): Professor of public international law; Publications related to HR.

Judith Levine (Australia/Ireland): Human Rights expertise; Publications related to business and HR.

Koffi Sylvain Mensah Attoh (Togo): Chef Division Législation au Ministère des Droits de l'Homme.

Carol Roberts (USA): Human Rights expertise.

Donald Rukare (Uganda): 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 (UK/France): Several cases before the European Court of Human Rights.

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

Nicolas Ulmer (Switzerland/USA): 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

6. *CAS Seminar (for arbitrators), 30 November-1 December 2023, Geneva*

The application of Fundamental rights at CAS: selected case law

Estelle de La Rochefoucauld, CAS counsel

Best practices for the protection of witnesses and other vulnerable persons in arbitration procedures

Alma MOZETIC, Associate, Debevoise & Plimpton

(Estelle de La Rochefoucauld / Matthieu Reeb, November 2023)