

## **SPORT AND HUMAN RIGHTS**

### **Overview from A CAS perspective**

(as at 20 June 2022)

*I. Human rights in sport regulations*

*II. Selected CAS cases related to human rights issues*

*III. Sport and the European Convention on Human Rights (ECHR)*

*IV. SFT judgements dealing with the application of human rights in CAS matters*

*V. List of CAS arbitrators with specific expertise in human rights*

*VI. List of topics related to Human Rights in sport discussed at past CAS seminars*

## **I. HUMAN RIGHTS IN SPORT REGULATIONS**

### **IOC**

Olympic Charter (in force as from 8 August 2021)

*Fundamental principles of Olympism*

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

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

*Rule 2.18*

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

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

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

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

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

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

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

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

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

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

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

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

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

Sustainability measures have been added to the HCC.

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

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

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

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

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

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

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

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

(...)

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

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

(...)

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

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

### *Article 51 Governing law and arbitration*

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

### IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations, November 2021

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”<sup>2</sup>.

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<sup>2</sup> <https://olympics.com/ioc/news/ioc-releases-framework-on-fairness-inclusion-and-non-discrimination-on-the-basis-of-gender-identity-and-sex-variations>

The IOC framework is 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 will be responsible for defining how this framework will work 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.

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

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

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

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

*The Code*

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

*Introduction, p.17*

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

### *8.1 Fair Hearings*

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

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

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

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

*If no such body as described above is in place and available at the time of the appeal, the Athlete or other Person shall have a right to appeal to CAS.<sup>3</sup>*

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<sup>3</sup> Clarification of the standards of independence that apply to the adjudicatory bodies. Based on Art. 6 (1) of the European Convention on Human Rights ("ECHR"), different standards apply to the first and the second instances. According to this provision only one instance needs to comply with all procedural guarantees of Art. 6 (1) ECHR (including the principle of independence). This requirement is always met if a final appeal to the CAS is possible, since the CAS has been found [by the ECtHR in the Mutu Pechstein case (02.10.2018), no138 et seq.] to be a true and

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

## **FIFA**

Following pressure exercised by transnational mobilization of social movements and increasing public scrutiny, FIFA has taken measures regarding Human Rights in the last years. Critics have notably arisen in relation to violation of human rights linked to the Russia World Cup in 2018 and to the exploitation of migrant workers on World Cup construction sites linked to Qatar 2022.

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

### FIFA Statutes 2020

#### *Article 3: Human rights*

*FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.<sup>4</sup>*

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

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

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

### FIFA Human Right Policy, May 2017

#### *Article 1: Commitment*

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

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

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independent arbitral tribunal which, in addition, respects the athletes' right to a public hearing (cf. Art. R57 (2) [amended following the ECtHR judgement in Mutu Pechstein]). If the appellate body established by the rules of a NADO is competent to (finally) decide the case, Art. 13.2.2 WADC 2021 ensures that the same standards are met at the local appellate level. Otherwise, the athlete or other person has a right to appeal the first instance decision directly to the CAS. (Haas U., The Revision of the World Anti-Doping Code 2021, CAS Bulletin March 2020).

<sup>4</sup> Through the integration of human rights in Article 3 of the FIFA Statute, it is a possibility that they will play a greater role in disputes at the CAS, which if invoked by the parties would have to assess the compliance of a particular FIFA decision or regulation with internationally recognised human rights. Yet, the availability of such a procedural route to challenge the human rights compatibility of FIFA's decisions will be dependent on whether many of the primarily affected actors will have standing at the CAS.

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

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

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

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

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

*Guided by its human rights approach (see below), FIFA embeds its commitment throughout the organisation and engages in an ongoing due diligence process to identify, address, evaluate and communicate the risks of involvement with adverse human rights impacts. FIFA is committed to providing for or cooperating in remediation where it has caused or contributed to adverse human rights impacts and will seek to promote or cooperate in access to remediation where it is otherwise linked to adverse impacts through its relationships with third parties, including by exploring all options available to it.*

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

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

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

## **UEFA**

### 2024 EURO bidding requirements and staging agreement

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

##### *3 — Human rights*

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

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

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

Bidders' obligations with respect to HR<sup>5</sup>.

## **World Athletics**

*Constitution (effective 1 December 2021), Article 4.1 The purposes of World Athletics are to: j. preserve the right of every individual to participate in Athletics as a sport, without unlawful discrimination of any kind undertaken in the spirit of friendship, solidarity and fair play;*

## **Commonwealth Games federation**

Integration of the UNGP across the CWGF's operations.

The Commonwealth Consensus Statement on Promoting Human Rights in and through Sport, 5 October 2017. In 2020, Commonwealth member countries have unanimously adopted the Consensus Statement to promote human rights and tackle discrimination at all levels of sport - from community games to elite sporting events.

## Social Value Charter Birmingham Commonwealth 2022 Games

*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](http://www.birmingham2022.com)*

## **International Paralympic Committee**

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

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

## **Formula One Group**

Statement of Commitment to Respect for Human Rights, April 2015

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<sup>5</sup> In order to respect at best human rights, the Bidders should aim at:

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

Reporting indicators could for instance be:

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

Compliance indicators could be:

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

1. *The Formula 1 companies are committed to respecting internationally recognised human rights in its operations globally.*
2. *Whilst respecting human rights in all of our activities, we focus our efforts in relation to those areas which are within our own direct influence. We do so by taking proportionate steps to:*
  - (a) *understand and monitor through our due diligence processes the potential human rights impacts of our activities;*
  - (b) *identify and assess, by conducting due diligence where appropriate, any actual or potential adverse human rights impacts with which we may be involved either through our own activities or as a result of our business relationships, including but not limited to our suppliers and promoters;*
  - (c) *consider practical responses to any issues raised as a result of our due diligence, within the relevant context;*
  - (d) *engage in meaningful consultation with relevant stakeholders in relation to any issues raised as a result of our due diligence, where appropriate; and*
  - (e) *respect the human rights of our employees, in particular the prohibitions against forced and child labour, the freedom to associate and organise, the right to engage in collective bargaining, and the elimination of discrimination in employment and occupation.*
3. *Where domestic laws and regulations conflict with internationally recognised human rights, the Formula 1 companies will seek ways to honour them to the fullest extent which does not place them in violation of domestic law.*

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

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

### **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.

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

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

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

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

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

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

***1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced***



***publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.***

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

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

(a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

(b) *to have adequate time and facilities for the preparation of his defence;*

(c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

(d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

(e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

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

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

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

#### 1.1 Indirect application of Article 6(1) ECHR

*Principle*

CAS 2020/O/6689 WADA v. RUSADA para. 810

The ECHR does not apply directly to CAS or WADA, but regard should be had to the ECHR as certain fundamental tenets of it may be considered within the context of any review by the Swiss Federal Tribunal. See also CAS 2011/A/2384 & 2386 UCI v. Alberto Contador Velasco & RFEC; CAS 2011/A/2433 Amadou Diakite c. FIFA, paras 23, 24; CAS 2011/A/2426 Amos Adamu v. FIFA, paras 65 – 68; 2011/A/2425 Hongalu Fusimalohi v. FIFA paras 22 – 24.

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

CAS 2012/A/2747 WADA v. Judo Bond Nederland (JBN), para. 5; CAS 2011/A/2384 & 2386 UCI v. Alberto Contador Velasco & RFEC; CAS 2011/A/2433 Amadou Diakite c. FIFA para.17: Under Art. 6§1 of the European Convention on Human Rights (ECHR) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in determination of his civil rights and obligations. An exclusion of any external review (be it by a state court or an arbitral tribunal) of disciplinary decisions taken by the judicial organs of an association would be in contradiction with this fundamental right, since internal bodies of federations do not meet these requirements. According to the principle of good faith (“Vertrauensprinzip”) the rules and regulation of a federation should be interpreted in a way that are consistent with the mandatory provisions and principles. An (*ex ante*) exclusion of any external review of disciplinary measures in the rules and regulations of an association would be null and void from a Swiss law perspective.

*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 § 4), confirmed that anonymous witness statements do not breach the right to a fair trial when such statements support the other evidence provided to the court. The CAS has also recognized that, when evidence is offered by means of anonymous witness statements, the right to be heard which is guaranteed by Article 6 of the ECHR and Article 29(2) of the Swiss Constitution is affected, but that a panel may still admit anonymous witnesses without violating such right to be heard if the circumstances so warrant and provided that certain strict conditions are met (CAS 2009/A/1920 FK Pobeda et al. v. UEFA; CAS 2011/A/2384 & CAS 2011/A/2386 UCI v. Alberto Contador Velasco & RFEC paras. 21-23 & 26-32).

*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 Tatyana Andrianova v. ARAF, 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*

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 § 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 § 1 of the ECHR. Yet, Art. 6 §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 §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 §1 ECHR even if it is not public, CAS 2018/A/5746 Trabzonspor v. TFF, Fenerbahçe Futbol A.S., Fenerbahçe Spor Kulübü & FIFA, para. 101.

*Privilege against self-incrimination*

CAS 2017/A/5003 Jérôme Valcke v. FIFA para. 260ff.: The privilege against self-incrimination has been recognized as an implied right under Article 6 of the European Convention on Human

Rights. The privilege against self-incrimination is the result of a balance of interest and, thus, must be assessed in light of the respective procedural and factual framework.

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

CAS 2018/A/5769 Worawi Makudi v. FIFA paras 135 & 136: Article 6(1) of the European Convention on Human Rights (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 Mohammad Asif v. International Cricket Council (ICC), 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), the administrative decision of a competition authority is not in breach of Article 6 of the European Convention on Human Rights. See also CAS 2019/A/6388 Karim Keramuddin v. FIFA paras 155, 156; CAS 2007/A/1396 & 1402 WADA and UCI v. Alejandro Valverde & RFEC, para 43<sup>6,7</sup>;

*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 WADA v. RUSADA 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) of the European Convention on Human Rights (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. CAS’s exercise of its discretion and the fact that it does not disclose the reasoning behind that exercise of discretion does not infect each potential arbitrator in the list with actual or apprehended bias.

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

CAS 2020/O/6689 WADA v. RUSADA 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.

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<sup>6</sup> 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

<sup>7</sup> “In proceedings relating to arbitration, the state courts are under a duty to guarantee that the inalienable values of the ECHR that form part of public policy (“ordre public”) are observed. From this it follows that the arbitral tribunals like the CAS are at least indirectly bound by this system of values under ECHR” (HAAS, U., Role and Application of Art 6 of the European Convention on Human Rights (ECHR) in CAS procedures, CAS Seminar, Montreux, 2011).

*No specific prohibition on collective punishment in the ECHR*

CAS 2020/O/6689 WADA v. RUSADA 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.

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

*Inapplicability, even indirectly in disciplinary cases, of Articles (2) (presumption of innocence) and (3) d) ECHR (examination of witnesses for everyone charged with a criminal offence)*

CAS 2013/A/3139 Fenerbahçe SK v. UEFA, 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”*.

CAS 2011/A/2463 Aris FC v. Javier Edgardo Campora & Hellenic Football Federation (HFF), Paras 12 – 16: *“In application of Article R44.3 of the CAS Code, a CAS panel has the power to order the examination of witnesses if deemed necessary. In this respect, the mere fact for a panel to refuse, for valid reasons, to use its investigatory powers to hear a witness does not violate the principle of equality of arms provided for in the European Convention for Human Rights (ECHR). As a general rule, only shortcomings in legal representation which are imputable to the State authorities can give rise to a violation of Article 6(3)(c) ECHR”*.

*Article 6(3) ECHR only applies to criminal proceedings*

CAS 2010/A/2311 & 2312 Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. W, 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”*.

## 1.3 No direct application of Article 8 ECHR

*No direct application of international human rights treaties, in particular art.8 ECHR regarding the right to private life*

TAS 2011/A/2433 Amadou Diakite c. FIFA, para. 57 and TAS 2012/A/2862 FC Girondins de Bordeaux c. FIFA, para. 105: *“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 2862 FC Girondins de Bordeaux c. FIFA, para 107. See also CAS 2009/A/1957 Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN), 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. Substantive rights

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

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

CAS 2019/A/6345 Club Raja Casablanca v. FIFA, para. 35: *“To the extent that there are gaps in these statutes [FIFA Statutes], the Sole Arbitrator will have recourse to Swiss law (which, anyway reflects a standard of protection of human rights at least equivalent to that embedded in the European Convention on Human Rights) in order to fill the observed gaps”*. See also CAS 2016/O/4464 IAAF v. ARAF & Ekaterina Sharmina, para. 185; CAS 2016/O/4469 IAAF v. ARAF & Tatyana Chernova para. 170.

- Due process and personality rights

They 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. CAS 2017/A/4998 Julia Ivanova v. FIS, para. 154.

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

- Personality rights as such

CAS 2011/A/2433 Amadou Diakite c. FIFA 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 Amos Adamu v. FIFA, 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 freedom to exercise a sporting activity of one's choice

*“La liberté d'exercer une activité sportive de son choix, entre partenaires de même valeur et contre des adversaires équivalents, fait – selon la jurisprudence – partie des droits de la personnalité protégés par l'article 28 CC”*  
TAS 2012/A/2720 FC Italia Nyon & D. c. LA de l'ASF & ASF & FC Crans para. 10.23. See also CAS 2018/A/6029 Akhisar Belediye Gençlik ve Spor Kulübü Derneği v. Marvin Renato Emnes, para 106: *“For athletes, personality rights encompass in particular the development and fulfilment of personality through sporting activity, professional freedom and economic freedom”*.

- 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. 80.
- 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/7175 Al-Arabi Sporting Club v. Juan Ignacio Martínez, para. 84;
- The right to fulfilment through sporting activity  
*“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 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*" CAS 2006/A/1025 Mariano Puerta v. ITF, para. 85.

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

- Professional freedom and economic freedom  
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 (ATF 120 II 369; ATF 102 II 211; ATF 137 III 303; Judgment of the Swiss Federal Tribunal 4A\_558/2011, dated March 27, 2012) 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, CAS 2017/A/5092 Club Hajer FC Al-Hasa v. Arsid Kruja para. 128. See also ATF 120 II 369; ATF 102 II 211; ATF 137 III 303; 4A\_558/2011; CAS 2013/A/3091, 3092 & 3093 FC Nantes/I. Bangoura/Al Nasr SC/FIFA.
- Requirement to balance the athlete's personality rights against those of associational autonomy  
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/4998 CAS 2017/A/4998 Julia Ivanova v. FIS, para 162.  
Yet, the sanctions imposed on the Appellant do not violate the applicable international standards of human rights and, in particular, they do not affect "*in a drastic manner*" on the Appellant'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. CAS 2017/A/4947 para. 111.
- In terms of substantive public policy, strict application of the principle of proportionality of sanctions and personality rights:  
Only a manifest and serious violation, out of proportion to the conduct sanctioned or going beyond a "mere" disregard of Articles 27 and 28 of the Swiss Civil Code could lead to the annulment of a CAS award before the SFT. Thus, an award has been annulled for having confirmed a disciplinary sanction which infringed a player's economic freedom and which had the effect of handing him over to the "*arbitrariness of his former employer*", CAS 2010/A/2261 &

2263 Zaragoza & Matuzalem v. FIFA in which the CAS panel dismissed the player's submissions related to Articles 27 and 28 CC; the CAS decision was then annulled by the SFT for a violation of privacy contrary to public policy (Art. 190 (2) (e) PILA) SFT 4A\_558/2011.

- The respect of privacy [Article 8 ECHR]

*“De manière générale, il ne fait aucun doute que le respect de la vie privée fait partie des droits protégés par l'article 28 CC”*. CAS 2011/A/2433 Amadou Diakite, para. 56.<sup>8</sup>

In a Russian case, the athlete contended that the recordings were illegally obtained evidence in violation of her fundamental and procedural rights as well as the principle of good faith. The Athlete based her argument particularly on a violation of her privacy rights. However, the Panel held that *“Considering all the elements above, the Sole Arbitrator finds that the interest in discerning the truth must prevail over the interest of the Athlete that the covert recordings are not used against her in the present proceedings. The Sole Arbitrator is not prepared to accept that the principle of good faith has been violated in the proceedings at hand”*, CAS 2016/O/4481 IAAF v. ARAF & Mariya Savinova-Farnosova, para. 106.

- Prohibition of forced labour [Article 3 ECHR]

SFT 4A\_370/2007, consid. 5.3.2 and 4A\_178/2014, consid. 2.4.

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

- Principle of proportionality, in particular sanctions:

*“The Panel notes that it is a widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringement. The CAS has evidenced the existence and the importance of the principle of proportionality on several occasions. In the cases TAS 91/56 (S. v. FEI) and TAS 92/63 (G. v. FEI), the CAS stated that “the seriousness of the penalty [...] depends on the degree of the fault committed by the person responsible” (Digest of CAS Awards 1986-1998, Staempfli Editions, Berne 1998, 96 and 121)”*. CAS 66/A/246 Ward c. FEI para. 31. See also CAS 2011/O/2422 USOC v. IOC in the so-called “Osaka rule” case.

- Protection of legitimate expectations

*“[W]here the conduct of one party has led to legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party”* (AEK Athens and SK Slavia Prague v. Union of European Football Associations, CAS 98/200, para. 60). Indeed, the concept of legitimate expectations – in particular the concept of protecting *athletes'* legitimate expectations – has repeatedly been recognised by the CAS, for example, in USA Shooting & Q v. International Shooting Union, CAS 94/129, Watt v. Australian Cycling Federation, CAS 96/153 and Prusis v. International Olympic Committee, CAS 02/001, CAS 96/001, CAS 2002/O/401 IAAF c. USATF para. 68. See also CAS 2008/O/1455 Boxing Australia v/AIBA, para. 16.

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

CAS 2010/A/2058 British Equestrian Federation v. FEI, para. 18.

- Principle of legal certainty

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

- Principle of legality and predictability of sanctions

CAS 2014/A/3832 & 3833 Vanessa Vanakorn v. FIS, para. 86; CAS 2019/A/6278 para. 51

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

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

- Respect for the rights of the defence

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

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

CAS 2000/A/289 UCI c. C. & FFC, para. 7; CAS 2017/A/5086 Mong Joon Chung v. FIFA, para. 119; CAS 2019/A/6330 para. 96.

- Principle of prohibition of denial of justice

CAS 2017/A/5086 Mong Joon Chung v. FIFA, para. 129; CAS 2020/A/6693 Alexandra Shelton v. Polish Olympic Committee (POC) & Polish Fencing Federation (PFF), para. 113.

- Principle *non bis in idem*

CAS 2015/A/4319 Bulgarian Weightlifting Federation (BWF) v. IWF paras. 70-72; CAS 2007/A/1396 & 1402 WADA and UCI v. Alejandro Valverde & RFEC, para. 119; CAS 2013/A/3256 Fenerbahçe Spor Kulübü v. UEFA and CAS 2018/A/5800 Samir Arab v UEFA; CAS 2019/A/6483 Wydad Athletic Club v. CAF & Espérance Sportive de Tunis para. 120.

- Principle of strict interpretation in repressive matters

TAS 99/A/230 D. Bouras c. FIJ, para. 10; CAS 2017/A/5086 Mong Joon Chung v. FIFA, para. 129;

- Principle of justice and good faith

CAS 2014/A/3828 IHF v. FIH & Hockey India paras. 153 ff.

- Principle "*nulla poena sine culpa*"

CAS 2014/A/3516 George Yerolimpos v. World Karate Federation (WKF), para. 104; CAS 2017/A/5086 Mong Joon Chung v. FIFA, para. 129 para. 149.

- Principle of professional mobility and contractual freedom

CAS 2007/A/1363 TTF Liebherr Ochsenhausen v. ETTU, para. 18

- Principle of freedom of expression

CAS 2014/A/3516 George Yerolimpos v. WKF, para. 116; CAS 2020/A/6693 Alexandra Shelton v. POC, para. 137 (6);

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

CAS 2014/A/3639 Amar Muralidharan v. NADA para. 83; CAS 2015/A/3977 WADA v. Belarus Athletic Federation (BAF) & Vadim Devyatovskiy, para. 162.

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

- Prohibition of discrimination



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

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

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

- Discriminatory regulations on a *prima facie* basis warranted to ensure fairness of competitions  
CAS 2018/O/5794 Caster Semenya, The 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.<sup>9</sup>

- Prohibition of discriminatory conduct

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

- Prohibition of labour rights discrimination

CAS 2010/A/2204 Joint Stock Company Football Club Ural v. Russian Football Union (RFU) para. 50: labour right discrimination contrary to the applicable national law: "*Bearing in mind that part 2 Art.22 of the Labour Code of the Russian Federation stipulates, inter alia, the obligation for the employer to ensure equal payment to employees for their labor of equal value, all these arguments and evidence provided lead the Panel to believe that there was a discrimination of the labour rights of these Players relative to other players and officials of the Appellant*". CAS 2018/A/6045 Manuel Henrique Tavares Fernandes v. FC Lokomotiv Moscow, para. 99.

- Prohibition of racism

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

Article 58(1)(a) of the FIFA DC reads as follows: "*Anyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, colour, language, religion or origin shall be suspended for at least five matches. Furthermore, a stadium ban and a fine of at least CHF 20,000 shall be imposed. If the perpetrator is an official, the fine shall be at least CHF 30,000*". See also CAS 2015/A/4256 "racism" in the UEFA Disciplinary Regulations.

- Prohibition of sexual harassment

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

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<sup>9</sup> The appeal made by Caster Semenya and ASAF before the Swiss Federal Tribunal against the CAS decision has been dismissed. See *Infra*. An appeal against the SFT decision is pending before the ECtHR.

- Proportionality of sanctions

CAS 2020/O/6689 WADA v. RUSADA:

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

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

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

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

- Human rights

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

## 2.4 Direct application of certain principles of Community law

### - Applicability of EU law as foreign mandatory rules

CAS 2016/A/4492 Galatasaray v. UEFA, paras 42 – 45: Pursuant to Article 19 of the Swiss private international law statute (LDIP), 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 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 UMMC Ekaterinburg v. FIBA Europe e.V., para. 8: Application of non-discrimination EC law principles to Russian cases involving economic activities in the EU.

### - Guarantee of the free movement of workers

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

See also TAS 2016/A/4490 RFC Seraing c. FIFA regarding the taking into consideration of European Union law as applicable law and the legality of Articles 18a and 18b RSTP with regard to freedom of movement and competition law. The appeal against the CAS decision has been

dismissed by the Swiss Tribunal Federal (SFT 4A\_260/2017); See also CAS 2016/A/4492 mentioned above; CAS 2016/A/4903 Club Atlético Vélez Sarsfield v. The Football Association Ltd., Manchester City FC & FIFA, para. 93.

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

- Freedom of speech/ of expression

CAS 2011/A/2452 Paul King v. AIBA, para. 32: In any organisation, including a sports governing body, domestic or international, there is a danger that those in control may confuse their individual interests with those of the organisation as a whole and in consequence overact and misuse their powers vis à vis those who oppose them. The taking of legal advice, the institution of legal proceedings, and vigorous electioneering can only exceptionally be classified as conduct violating regulations reasonably drawn and reasonably to be applied. Political speech ranks foremost in the hierarchy of the rights, embraced by the right to freedom of expression protected by Article 10 of the European Convention on Human Rights.

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

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

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

CAS 2011/A/2353 Erik Tysse v. Norwegian Athletics Federation (NAF) & IAAF, Para. 39  
Even if it were applicable, there is no violation of the European Convention for Human Rights due to the fact that the No Fault and No Significant Fault provisions in both the WADA Code and the IAAF Rules protect athletes against any violation in this respect.

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

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

*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 Court of Arbitration for Sport (CAS). The applicants, 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 applicant 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.

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

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

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

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 to which the applicants had been parties were required to offer 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, discussed

before the CAS, required a hearing that was subject to public scrutiny. See also: Bakker v. Switzerland, decision (Committee) on the admissibility of 3 September 2019<sup>10</sup>.

- Ali Riza v. Switzerland, 13 July 2021

This case concerned a dispute between a professional footballer and his former Turkish League club, Trabzonspor. The applicant complained that he had been ordered by the Turkish Football Federation to pay damages for leaving the club without notice before the expiry of his contract. He applied to the CAS, based in Lausanne, which ruled that it had no jurisdiction to hear the case. That decision was upheld by the Swiss Federal tribunal. The applicant appealed before the ECtHR and submitted that he had been unable to bring his case before an impartial and independent tribunal and that his right of access to a court had been infringed as a result. 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 ECtHR held that there had been no violation of Article 6(1) (right to a fair trial) of the Convention as regards the right of access to a court. It found, in particular, that the CAS had given a convincing explanation, in a detailed and reasoned decision, as to why it was unable to deal with the dispute and, in particular, why the dispute had no international element. That being so, the applicant had applied to a court that did not have jurisdiction to examine his complaints. The judgment of the Federal tribunal likewise contained reasons, addressing all the grounds of appeal raised by the applicant. The decisions of both courts were neither arbitrary nor manifestly unreasonable. The ECtHR held, in view of the above considerations, the extremely tenuous link between the applicant's dispute and Switzerland, and the specific nature of proceedings before the CAS and the Federal tribunal. Moreover, the restriction of the right of access to a court had not been disproportionate to the aim pursued, namely the proper administration of justice and the effectiveness of domestic court decisions. 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-founded<sup>11</sup>.

- 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 Appellant (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 SFT, the restriction on the right of access to a court was neither arbitrary nor disproportionate to the aim pursued, namely the proper administration of justice. Consequently, this right was not infringed in its very substance, sufficient reasoning by the Federal Court, Application inadmissible<sup>12</sup>.

#### *Prohibition of inhuman or degrading treatment (Article 3 of the Convention)*

- Semenya v. Switzerland, Pending application – pending application

Application communicated to the Swiss Government on 3 May 2021. The applicant, an international athlete specialising in middle-distance races (800 to 3,000 metres), complains about regulations issued by the International Association of Athletics Federations (IAAF), requiring her

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<sup>10</sup> Factsheet – Sport and the ECHR, January 2022.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

to lower her natural testosterone levels through hormone treatment in order to be eligible to compete as a woman in international sporting events.

The Court gave notice of the application to the Swiss Government and put questions to the parties under Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private life), taken alone and in conjunction with Article 14 (prohibition of discrimination), as well as under Article 6 (right to a fair hearing) and Article 13 (right to an effective remedy) of the Convention<sup>13</sup>.

*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 control<sup>14</sup>.

- 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. He submitted in particular that the four-year suspension was incompatible with his freedom to exercise a professional activity.

The ECtHR 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. The Court also noted that the applicant had been afforded the domestic institutional and procedural safeguards allowing him to challenge FIFA's decision and submit his arguments in his defence<sup>15</sup>.

- 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), currently pending before the Court. The applicant association, the regulatory authority of athletics in South

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

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 (individual applications) of the ECHR. The applicant association, as a legal entity, was not a direct and personal victim of the alleged violations<sup>16</sup>.

- Semenya v. Switzerland

Pending application n° 10934/21 under “Prohibition of inhuman or degrading treatment”

*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 a minor 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 conduct<sup>17</sup>.

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

- Semenya v. Switzerland

Pending application n° 10934/21 under “Prohibition of inhuman or degrading treatment”.

*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)

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 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

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

present 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 testing<sup>18</sup>.

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

4A\_558/2011 Matuzalem, 27 March 2012

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

4A\_260/2017 Seraing, 20 February 2018

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

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

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

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<sup>18</sup> Ibid.



public policy in procedural terms. See also ATF 142 III 360 consid. 4.1.2; 4A\_268/2019 consid. 3.4.3.

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

The SFT dismissed the appeal made by Caster Semenya and the ASAF against the CAS decision upholding the CAS's ruling that had found that, while the Difference in Sexual Development (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". It 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 dignity<sup>19</sup>.

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

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

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

The athlete specialized in 400m and using prostheses to compete asked the IAAF to issue a decision confirming that his prostheses were legal. On 18 February 2020, the IAAF refused to grant the athlete's request on the grounds that he had failed to demonstrate that the use of his prostheses gave him no overall competitive advantage over "able-bodied" athletes. On 27 February 2020, the athlete appealed this decision to the Court of Arbitration for Sport (CAS). On 23 October 2020, the CAS partially upheld the appeal and *inter alia*, considered that (a) the relevant rule (Rule 6.3.4 of the World Athletics Technical Rules) was unlawful and invalid insofar as it placed the burden of proof upon an athlete desiring to use a mechanical aid to establish that the use of the mechanical aid will not provide the athlete with an overall competitive advantage over an athlete not using such an aid and (b) that WA had established on a balance of probabilities that the particular running specific prostheses used by the athlete gave him an overall competitive advantage over an athlete not using such a mechanical aid. Accordingly, the athlete should not use

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<sup>19</sup> An appeal is pending before the ECtHR against the SFT decision.

his particular running specific prostheses in the Olympic Games or World Athletics Series competitions. On 26 November 2020, the athlete lodged an appeal in civil matters with the SFT. The SFT found that the demonstration made in the appeal and the reply, in addition to being based on facts not established in the contested award, was thus of an appellate nature, so that the complaint under consideration did not appear to be admissible. In any event, the arguments put forward by the appellant were not convincing. The SFT dismissed the appellant's appeal against the CAS decision alleging an infringement of his right to be heard and, in the alternative, a violation of his right to a fair trial (art. 6(1) ECHR) and of substantive public policy within the meaning of Article 190 para. 2 let. e of the LDIP, and in the alternative, a violation of Article 14 ECHR (prohibition of discrimination), and finally an attack on his human dignity.

4A 406/2021 Sun Yang c. AMA & FINA, 14 février 2022, consid. 7

The appellant claimed notably that the award rendered by the CAS following the SFT's annulment 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 personal 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 was not automatically contrary to substantive public policy; it 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 is therefore legitimate to ask whether such conduct does 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, it should be accepted, as did the CAS Panel, that the alleged breaches of the regulatory requirements concerning accreditation and notification of the doping control by the sample-taking staff certainly 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 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).

## V. CAS ARBITRATORS WITH SPECIFIC EXPERTISE IN HUMAN RIGHTS (18)<sup>20</sup>

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

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

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

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

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

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

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

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

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

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

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

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

Carol Roberts: Human Rights expertise.

Donald Rukare: Advocate of the High Court of Uganda and a Legal Specialist with sound knowledge of International and Human Rights Law. Over 20 years' experience in the field of access to justice human rights. Country Director of Global Rights Uganda office. Manages the country office which implements programs in access to justice, human rights women's rights and

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<sup>20</sup> This list has been established on the basis of the information published on the CAS' website current list of arbitrators and is likely to be expanded after the regular updates of the arbitrators' bios.

ethnic/racial discrimination. Former head of office of the 32M Euros European Union Support to Human Rights and Good Governance Program in Uganda. Teaches the international law and human rights at Makerere University and regular guest faculty at the International Law Institute – Uganda and the Center for human rights at the University of Pretoria- South Africa.

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

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

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

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

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

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

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

Prof. Ulrich Haas, CAS Arbitrator

*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

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

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

Judge Wilhelmina Thomassen, ICAS Member

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

### **Harassment, Abuse and Discrimination in Sport**

Barbara Reeves, CAS Arbitrator

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

Hugh Fraser, CAS Arbitrator

### **Mediating Abuse/Harassment Complaints**

Carol Roberts, CAS Arbitrator

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(Estelle de La Rochefoucauld / Matthieu Reeb, 20 June 2022)