4A_624/2009[1]

Judgement of April 12, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: CARRUZZO.

X._____,
Appellant,
Represented by Mr Philippe KITSOS

v.

1. Y._____ Association,
2. Z._____ Federation,
Respondents,

Facts:

A.

A.a In 2004, X._____, born in 1978, an athlete at the international level, specialising in middle-distance races, was the subject of disciplinary proceedings for various offenses against the Anti-Doping Rules noticed during off races tests. In a decision of June 15, 2005, the Central Disciplinary Commission of the General Directorate of Youth and Sport of Z._____ (CDC) suspended X._____ for two years after reconsidering a

[1] Translator's note: Quote as X._____ *v.* Y._____ and Z._____, 4A_624/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

first decision challenged by Y._____ Association (hereafter Y._____) suspending the athlete for one year.

X._____ did not appeal the June 15, 2005 decision. Challenging the date of the beginning of her suspension, she intervened with Y._____ through counsel, threatening an appeal to the CAS in order to move that date forward. In a letter sent by her lawyer to the Y._____ representative on August 16, 2005, the athlete confirmed that she accepted that the suspension would start as from August 8, 2004. Whereupon Y._____, in a letter of September 19, 2005 informed Z._____ Federation of the agreement reached with the athlete in this respect.

Notwithstanding the foregoing, in a request of September 12, 2005, X._____ seized the Administrative Court of Z._____ of an appeal against the aforesaid decision of June 15, 2005, in particular because the CDC would have breached the law by reconsidering its first decision. In a judgement of April 4, 2007, the Administrative Court held that the case did not fall under administrative jurisdiction and rejected the appeal. On July 24, 2007 X._____ challenged that judgment in front of the Council of State, which has not yet decided the matter.

The athlete's suspension ended in the beginning of August 2006.

A.b On September 8, 2007, an off race test conducted on X._____, which was then in the United States of America to treat a wound, showed the presence of forbidden substances in the athlete's body. The disciplinary proceedings opened against the athlete in this respect on October 18, 2007 induced a number of decisions. The last one was issued on May 30, 2008 by the Arbitral Tribunal of the General Directorate of Youth and Sport, a national court of Z._____ specialised in sport disputes, which ordered a four years suspension.

B.
On June 20, 2008, X._____ sent to the CAS a statement of appeal seeking the annulment of the May 30, 2008 decision.

In her answer of August 28, 2008, Y._____ challenged the jurisdiction of the CAS to entertain the appeal. Should the CAS assume jurisdiction, it submitted that the athlete should be banned for life for a second serious offense against the anti-doping rules.

A hearing was held in Lausanne on April 2, 2009. Subsequently, the CAS invited the parties to submit additional exhibits relating to the disciplinary proceedings as to the first offense committed by the athlete and to the administrative proceedings pending in front of the Council of State. Once in possession of the exhibits requested, it gave the parties the possibility to state their views in this respect.

In an award of November 10, 2009[2] the CAS annulled the decision taken by the Arbitral Tribunal of Youth and Sport and ordered the athlete banned for life.

C.
On December 10, 2009, X._____ filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the CAS award.

The two Respondents and the CAS, which produced the file of the case, submit that the appeal should be rejected.

Reasons:

1.
According to Art. 54 (1) LTF[3] the Federal Tribunal issues its decision in an official language[4], as a rule in the language of the decision under appeal. When the decision is in another language (here English), the Federal Tribunal resorts to the official language chosen by the parties. In front of the CAS, they opted for English. The Civil law

[2] Translator's note: The award is published on the Court of Arbitration for Sports website www.tas-cas.org.
[3] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.
[4] Translator's note: The official languages of Switzerland are German, French and Italian.

appeal made by X._____ is in French. According to its practice the Federal Tribunal will resort to the language of the appeal and issue its decision in French.

2.

In the field of international arbitration a Civil law appeal is possible against the awards of arbitral tribunals under the requirements stated at Art. 190 to 192 PILA[5] (Art. 77 (1) LTF). Whether with regard to the object of the appeal, to the standing to appeal, or the time limit to appeal, the Appellant's submissions or the grievances invoked in the appeal brief, none of such admissibility requirements raises any problems in this case. There is therefore no reason not to entertain the appeal.

3.

In a first grievance, based on Art. 190 (2) (e) PILA, the Appellant claims that the CAS would have issued an award inconsistent with public policy.

3.1 The material review of an international arbitral award by the Federal Tribunal is limited to the issue of the compatibility of the award with public policy (ATF 121 III 331 at 3a).

An award is incompatible with public policy if it disregards the essential values broadly recognised which, according to the prevailing concepts in Switzerland, should be the basis of any legal order (ATF 132 III 389 at 2.2.3).

3.2

3.2.1 The Appellant argued that the CAS failed to recognise the prohibition of *reformatio in peius* which, in her view, is a general and universal legal principle resulting from public policy. To substantiate this grievance, she argues that the CAS could not aggravate the disciplinary sanction inflicted on her because Y._____ had not appealed the May 30, 2008 decision and the rules relating to appeal proceedings in front

[5] Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

of the CAS do not allow the Respondent to introduce a counterclaim after the filing of an appeal.

It is not necessary to decide the issue left open previously (decision 4A_17/2007 of June 8, 2007 at 4.2) as to whether or not the prohibition of *reformatio in peius* is a fundamental principle contained in the definition of public policy within the meaning of Art. 190 (2) (e) PILA. Indeed no matter what the Appellant says, the CAS did not disregard this principle at all in this case. Contrary to what the Appellant claims, the Sport Arbitration Code specifically provides at Art. R55 the possibility for the Respondent to submit to the CAS an answer containing in particular "any counterclaim"[6]. Y._____, Respondent in the appeal procedure, availed itself of that possibility by filing on August 28, 2009 an answer containing a counterclaim raised in the alternative, should the CAS accept jurisdiction, as it did, and seeking a suspension against the Appellant not for four years but for life. Moreover, the CAS expressly notes at § 103 i.f. of the award that the answer including the counterclaim was timely filed and that it is accordingly admissible.

It follows from the foregoing that no breach of the prohibition of *reformatio in peius* was committed to the Appellant's detriment.

3.2.2 Under the heading "violation of the principle of *lex mitior* and of non-retroactivity", the Appellant then argues that the CAS applied the Anti-Doping Rules in force in 2009 to determine the disciplinary sanction against her instead of relying on those in force in 2007, which were applicable to the two offenses committed in 2004 and 2007. The latter, contrary to the former, subjected the existence of a second offense which could justify suspension for life to a new offense of the same nature as the previous one being committed, a condition not met in this case. Hence, by ordering suspension for life on the basis of the Anti-Doping Rules in force in 2009 due to a second offence, the CAS would clearly have violated the principle of non-retroactivity of "penal law" according to the Appellant.

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[6] Translator's note: The Federal Tribunal refers here to the 2004 edition of the Code. That possibility in Art. R55 is no longer to be found in the 2010 edition. See www.tas-cas.org/statutes.

The grievance fails. The manner in which it is formulated incidentally suggests that the Appellant did not grasp the true meaning of the reasons of the CAS on that issue although they are clear. From the award it appears indeed that the arbitrators started by reviewing the legal situation on the basis of the Anti-Doping Rules in force in 2007. Interpreting these rules as meaning that the existence of a second offense could be admitted notwithstanding the different nature of the two offenses to be taken into consideration (§ 114), they applied them to the circumstances of the case at hand to deduct that they justified a life suspension against the Appellant (§ 115 to 121). Having done so, the arbitrators reviewed whether or not, on the basis of the principle of *lex mitior*, the athlete could benefit from a lighter penalty. Then they interpreted the pertinent provisions of the Anti-Doping Rules in force in 2009 and reached the conclusion that it was not so (§ 122 to 128). It is therefore clear from the summary of its reasons that the CAS inflicted upon the Appellant the disciplinary sanction contained in the Anti-Doping Rules in force in 2007, *i.e.* at the time when the second offense had been committed.

Moreover, it is not for the Federal Tribunal to review the manner in which the CAS interpreted the concept of second offense as derived from the Anti-Doping Rules in force in 2007. It is also to be recalled that in the field of international arbitration, this Court only reviews the grievances submitted and in relation to the manner in which they were reasoned (Art. 77 (3) LTF).

4.
In a second grievance, the Appellant claims that her right to be heard was violated.

4.1 The right to be heard as guaranteed by Art. 182 (2) and 190 (2) (d) PILA has in principle no different contents from that which is recognised in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus it was held in the field of arbitration that each party had the right to state its view on the facts essential for the decision, to present its legal argument, to propose evidence on pertinent facts and to attend the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

Case law also deducted from the right to be heard a minimum duty for the authority to review and to deal with pertinent issues. That duty, which was extended to international arbitration, is breached when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some allegations, arguments, evidence and offers of evidence submitted by one of the parties and important for the decision to be issued. It behoves the allegedly aggrieved party to establish, on the one hand, that the arbitral tribunal did not review certain elements of fact, evidence or law, which it had regularly put forward to substantiate its submissions and, on the other hand, that these elements were of such nature as to have an influence on the issue of the dispute. If the award totally overlooks some apparently important elements for the solution of the dispute, it will be for the arbitrators or the respondent to justify such omission in their brief in response. They may do so by demonstrating that, contrary to the appellant's claims, the elements disregarded were not pertinent to decide the case at hand or, if they were, that they were implicitly rebutted by the arbitral tribunal. It must be emphasised in this context that there is a violation of the right to be heard, even within the broader meaning given by Swiss constitutional law to this guarantee, only if the authority does not meet its minimum duty to examine the pertinent issues. Thus the arbitrators have no obligation to discuss all the arguments raised by the Parties, so that they could not be blamed for violating the right to be heard in contradictory proceedings if they did not refute, even implicitly, an argument obviously deprived of any relevance (ATF 133 III 235 at 5.2 and cases quoted).

4.2 In a concise argument presented in somewhat vague terms, the Appellant in substance blames the CAS for not taking into account the proceedings pending in front of the Council of State of Z._____. In her opinion, in view of these proceedings, it would not be possible to interpret the offence she committed in 2007 as a second offense justifying her life suspension.

One cannot but notice that the award under appeal alludes in several places to the administrative proceedings, which the Appellant conducted in parallel in Z._____ and which, apparently, are not yet closed (see § 13, 50, 52, 54 and 60). It is accordingly

inaccurate to argue that such a circumstance would have escaped the CAS. Doubtlessly it did not state *expressis verbis* for what reason it held that such a circumstance should not impact the decision it was about to take. It is however clear from § 116 of the award under appeal that the Arbitrators implicitly denied any importance to that circumstance because the athlete concerned had accepted the two years suspension issued against her by the CDC and renounced an appeal of the decision to the CAS against the acceptance by Y._____ of its request to change the starting point of the disciplinary sanction. In other words, the Arbitrators implicitly held that the Appellant's initiation of administrative proceedings after the athlete complied with the decision issued by the competent national sport jurisdiction constituted *venire contra factum proprium*, which did not merit protection, so that it was not necessary to wait for the decision in the proceedings pending in front of the Council of State to determine the scope of the disciplinary sanction to be inflicted upon the Appellant. Such is at least the way in which the Appellant, without great effort of imagination, could interpret the pertinent passage of the award under appeal.

Accordingly the grievance based on the violation of the right to be heard shall also be rejected.

5.

The Appellant, whose appeal is rejected, shall pay the judicial costs of the federal proceedings (Art. 66 (1) LTF). As to the two Respondents, since they appear without the assistance of counsel they are not entitled to costs.

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected.

2. The judicial costs, set at CHF 3'975.-, shall be borne by the Appellant.

3. This judgment shall be notified to the Parties and to the Court of Arbitration for Sports (CAS).

Lausanne, April 12, 2010

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
KLETT (Mrs)	CARRUZZO