

# **FAIR PLAY IN SPORT: RIGHTS AND RESPONSIBILITIES**

by Michael O'Boyle<sup>1</sup> and Mikhail Lobov<sup>2</sup>

Presentation at the 15<sup>th</sup> Council of Europe Conference of Ministers  
responsible for Sport

Tbilisi, 16 October 2018

Ministers,

Excellencies,

Ladies and gentlemen,

It is natural that the Council of Europe and, in particular, the European Court of Human Rights should interest themselves in issues from the sporting world for there is a natural connection between sport and human rights that may not be always obvious. Both contribute to building inclusive and democratic societies founded on respect for the rule of law and both are concerned with fundamental values.

In a real sense the foundational value of sport and human rights can be summed up in two words - fair play. Fair play on the sports field is of the essence and needs no definition. It is determined by the rules of the sport and respect between athletes. Fair play in human rights terms concerns respect for the integrity of human beings, for their life and liberty and for adjudicatory procedures that are governed by fairness.

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<sup>1</sup> Former Deputy Registrar of the European Court of Human Rights

<sup>2</sup> Head of the Human Rights Policy and Cooperation Department, Directorate General Human Rights and Rule of Law (DG-I), Council of Europe

Under the concept of fair play athletes are expected to conduct themselves responsibly and to conform, for example, to anti-doping requirements - making themselves available for testing and, therefore, tolerating some uncommon intrusions into their private life. But it also means, as an indispensable *quid pro quo*, that when they are suspected of a breach of rules, that the procedures against them will be fair and conducted before independent and impartial bodies.

This essential trade-off is well reflected in two judgments that were given by the ECtHR this year (2018). In the first case against France the athletes complained about the impact of the "whereabouts" requirements on their private life.<sup>3</sup> The Court's approach was to balance the competing interests involved.

The Court observed that there existed a broad consensus among medical, governmental and international authorities in favor of combating the dangers caused by doping to the health of athletes. This consensus had given rise to a legal framework of which the World Anti-Doping Code was the central instrument. For the Court, athletes had to accept their fair share of the constraints inherent in measures that were deemed necessary to combat the scourge of doping that was prevalent in sporting competitions.

France had made a clear choice to bring its domestic law into conformity with the World Anti-Doping Code. While acknowledging that the degree of daily interference with the athletes' private life gave rise to concern, the Court found after a careful balancing exercise that the measures taken under the French

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<sup>3</sup> *Fédération Nationale des Syndicats Sportifs (FNASS) and Others v. France*, nos. 48151/11 and 77769/13), 18 January 2018

law in that case were proportionate to the legitimate aim pursued. Indeed, to restrict testing to training venues only would not have been sufficient to achieve these aims in view of the insidious development of doping methods. The balance thus tilted in favor of the Government.

In the second case<sup>4</sup> two athletes had appealed unsuccessfully against sanctions imposed on them for doping infringements to the CAS. Both submitted that the CAS had not been an independent and impartial tribunal as required by the ECHR under various heads. The Court has for the first time found that Article 6 ECHR applies to proceedings before the CAS and that by agreeing to submit a dispute to the CAS the athlete could not be considered to have waived his right to an independent and impartial tribunal. In one of the cases it found a violation of Article 6 because the CAS hearing was not held in public.

Although the judgment is not yet final - requiring a certain amount of caution on our part - its significance lies in the finding that the CAS must conduct its proceedings with fairness for the purposes of Article 6 - as if it were a national tribunal - thereby making the Court's considerable corpus of principles on the notion of fair hearing applicable to this crucial area of sports adjudication. In short, the Court has accepted that recourse to arbitration to resolve disputes is, in itself, in keeping with Article 6 provided that the proceedings are fair within the meaning of the ECHR.

Both of these cases signal that the application of the Convention to sport provides an outer guarantee against arbitrariness: legal uncertainty, the taking of measures that are disproportionate, and denial of fair trial subject to public

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<sup>4</sup> *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, 2 October 2018

scrutiny are not acceptable in other spheres governed by the Convention. Nor can they be tolerated where the Convention applies to sports decisions. Likewise, restrictions imposed on athletes' rights and liberties, where they have not been the subject of a valid waiver, must pursue legitimate aims, be proportionate to these aims, and again, be subject to independent and impartial judicial scrutiny.

However, not all human rights issues in the field of sport concern athletes. There are other important cases pending before the Court raising important issues concerning the detention of suspected hooligans in advance of a football match where there are fears of clashes between rival gangs<sup>5</sup>. Is it legitimate to detain persons pre-emptively for 6 or seven hours in order to protect society against the risk of violence? If so what safeguards should we expect govern such procedures? Should they only be so detained on the authority of a judge or should they be brought before a judge during their detention? How is the right to liberty in such cases to be balanced against the state's interest in combatting football hooliganism?

In another pending case the issue concerns the banning of individuals who have previously been convicted by a court of "hooliganism" from attending matches for long periods<sup>6</sup>. Does this amount to an additional punishment in breach of the requirement of *non bis in idem* set out in Protocol No 7 to the Convention?

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<sup>5</sup> *S., V. and A. v. Denmark*, nos. 35553/12, 36678/12 and 36711/12, communicated to the Danish Government in January 2014, relinquished to the Grand Chamber in July 2017  
[https://hudoc.echr.coe.int/eng#{"fulltext":\["35553/12"\],"documentcollectionid":\["COMMUNICATEDCASES"\],"itemid":\["001-140688"\]}](https://hudoc.echr.coe.int/eng#{)

<sup>6</sup> *Seražin and others v. Croatia*, nos. 19120/15, 792/16, 5677/16, 21599/16, 27292/16 and 38450/16, applications communicated to the Croatian Government on 30 January 2017.  
[https://hudoc.echr.coe.int/eng#{"fulltext":\["19120/15"\],"documentcollectionid":\["COMMUNICATEDCASES"\],"itemid":\["001-171707"\]}](https://hudoc.echr.coe.int/eng#{)

Further human rights issues may arise on the global stage sporting events - especially mega events - for example, cases involving the imprisonment and harassment of journalists, abuses of workers' rights and even environmental destruction and the physical elimination of poor neighborhoods.<sup>7</sup>

The issues that we have been speaking about amply support the observation that in view of the importance of sport in the modern world, ensuring respect for human rights concerns a matter of public order ("*ordre public*") and that the provisions of the ECHR should apply to sporting activities and sporting adjudication just as they do to other fields of human and social activity. This does not involve the politicization of sport, as some would argue, but, rather, a recognition that the application of basic human rights principles that form the basis of the rule of law serve both the interests of society, the interests of fair play in sport and public confidence in sport.

The recognition by all 47 Governments of the Council of Europe of the increasing relevance of the ECHR and its case law for the governance of sport is a welcome development well reflected in the Draft Resolution on your desk. It also provides an important incentive for the Council of Europe to reflect on development of the regulatory framework that would better care for human rights in sport. The latest developments in the Court's case law this year provide timely evidence of the need for closer intergovernmental co-operation in this area. It is all the more timely because they concern the core issue under discussion, the access of athletes to justice - for we are convinced that independent and impartial justice and fair trial are the keys to combatting

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<sup>7</sup> See further information on sport-related cases brought before the European Court of Human Rights in the Fact Sheet "Sport and the ECHR". [https://www.echr.coe.int/Documents/FS\\_Sport\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Sport_ENG.pdf)

arbitrariness. Moreover, access to a fair hearing before an independent and impartial tribunal and the existence of an effective remedy are not only the Convention requirements in their own right; they are also essential to ensure legal protection of all other human rights in sport.

However, the ECHR is not the only relevant instrument in this area to be taken into consideration through relevant intergovernmental work and monitoring. The European Social Charter is also of great importance given sport's tremendous role as a vehicle for social inclusion and integration. This brings to mind the role of the Paralympique movement for the integration and re-integration of persons with disabilities. Our member States bear positive obligations under Article 15 of the European Social Charter in this respect.<sup>8</sup>

The effective embedding of human rights in sport, however, is not confined to adjudication and intergovernmental work. It must also be promoted through the traditional co-operation and monitoring activities of the Council of Europe, and not least through education and training. A new training course has been developed by the HELP Programme which covers virtually all Conventional material of the Council of Europe addressing access to justice, anti-doping, safety, match-fixing, discrimination and treatment of vulnerable groups. It is innovative and accessible on line to lawyers, athletes, coaches, sports managers and others. As you will see at our side-event presentation, the course may also be tailored by the HELP Programme to the specific needs of any particular country which would so wish.

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<sup>8</sup> Article 15 of the European Social Charter (revised) deals with the right of persons with disabilities to independence, social integration and participation in the life of the community: "(...) the Parties undertake (...) to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure."

Mr. Chairman, ladies and gentlemen,

In conclusion, we are convinced that the marriage of human rights and sport is long overdue and that the intergovernmental, judicial and monitoring activities of the Council of Europe to ensure adequate protection of human rights in sport is for the lasting benefit of both.

But we also realise that it needs essential nourishment through targeted education and training if this union is to flourish and gain public confidence. In this process the Council of Europe will be at your side and the side of sportsmen and sportswomen throughout Europe. And, of course, it goes without saying, on the side of fair play.

Thank you for your attention.