

Around the World

Switzerland

ATHLETICS/DOPING VIOLATION /REFORMATIO IN PEIUS

Swiss Federal Supreme Court

Discussion of Decision No. 4A 624/2009 dated April 12, 2010

⚖️ Court of Arbitration for Sport; Disciplinary procedures; Drug abuse; Reformatio in peius; Sportspersons; Switzerland

Facts:

Süreyya Ayhan Kop, a Turkish track and field athlete (800 and 1500 metres, silver medalist at the world championships 2003), was suspended for two years in 2005 as she had committed various anti-doping rule violations. At the end of the suspension, she continued to compete and was tested positive again in 2007. An arbitral body competent pursuant to the rules of the Turkish Athletics Federation thereafter sanctioned her with a four-year suspension. The athlete appealed to the Court of Arbitration for Sport (“CAS”). In the appeal proceedings, the International Association of Athletics Federation (“IAAF”) requested in its answer brief that—if the CAS found itself to be competent which the IAAF contested—a life-long suspension be imposed on the athlete. The CAS thereafter indeed confirmed its competence and imposed a life-long ban on the athlete.

The athlete appealed this decision with the Swiss Federal Supreme Court (“FSC”), amongst other arguing that the general legal principle of prohibition of *reformatio in peius* was breached by this decision and that, hence, the *ordre public* was violated. She pointed out that the IAAF had not appealed the decision of the Turkish arbitral body to the CAS and claimed that, therefore, the CAS had gone beyond the limits which the procedural law allowed by imposing an even longer ban than the Turkish arbitral body.

Held:

The Swiss Federal Supreme Court did not follow the athlete’s arguments and referred to R55 of the CAS code. The CAS code of 2004 that was in force at the time stated in said clause that a defendant was allowed to file a counterclaim with its answer brief. The requests filed by the IAAF in its answering brief were considered to be such counterclaims, which were admissible. Therefore, the amendment of the appealed decision by the CAS to the disfavour of the athlete was within the limits of the parties’ requests, thus legal, even though this resulted in a *reformatio in peius* from a viewpoint of the athlete. Consequently, and not following other arguments of the athlete either, the FSC rejected the appeal.

Comment:

The outcome of this case might tempt sports associations to lie back and to wait for the possibility to file an answer brief to the CAS. However, this is not possible any more.

The CAS code was amended in 2010 (the amended parts included R55), amongst other cancelling respondent’s possibility to file a counterclaim with its answer brief. Even though this might seem like a minor change at first glance, its implications are not to be underestimated. Both sports associations and athletes can no longer make their decision whether to appeal a CAS decision or not dependent upon the decision of the opposing party. All parties will, under the rules now in force, have to appeal a decision to the CAS within the deadline provided for by the applicable procedural law without knowing if the other parties also plan to file an appeal. It remains to be seen if this

amendment will turn out to be positive or negative. The authors expect that it might slightly speed up the proceedings but will also cause more appeals to the CAS that will be filed “just in case” and therefore less acceptance of the decisions taken by bodies within the respective sports associations.

In view of this amendment of the applicable CAS code, the FSC case discussed above is—even though it is correct pursuant to the rules in force at the time—rather unfortunate in its timing and may be misleading to any party relying on it.

For completeness' sake, it is to be stressed that the amendment of R55 only concerns the deadline within which a party has to file an appeal. It does not, however, in general prevent a *reformatio in peius*, i.e. that a sanction may be extended by the CAS.

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