Arbitration CAS 2016/A/4924 & 4943 Paolo Barelli v. Fédération Internationale de Natation (FINA), award of 28 June 2017

Panel: Mr Romano Subiotto QC (United Kingdom), President; Judge James Robert Reid QC (United Kingdom); Mr Jan Räker (Germany)

Aquatics
Breach of the provision of the FINA Code of ethics relating to neutrality and integrity
Conditions of standing to appeal of a third party
Lack of personal, direct and actual interest
Inapplicability of Art. 75 of the Swiss Civil Code due the lack of personal, direct and actual interest

1. **Third parties generally have standing before the CAS in two cases. First, when a regulation explicitly confers it. Secondly, when an association's measure affects not only the rights of the addressee, but also and directly those of a third party, that third party is considered *"directly affected"* and thus enjoys standing to sue. There is a category of third party applicants who, in principle, do not have standing, namely those deemed *"indirectly affected"* by a measure. As regards the differentiation of directly affected parties from indirectly affected parties, CAS jurisprudence displays a *"common thread"*. Where the third party is affected because he is a competitor of the addressee of the measure/decision taken by the association, - unless otherwise provided by the association's rules and regulations - the third party does not have a right of appeal. Effects that ensue only from competition are only indirect consequences of the association's decision/measure. If, however, the association disposes in its measure/decision not only of the rights of the addressee, but also of those of the third party, the latter is directly affected with the consequence that the third party then also has a right of appeal.**

2. **Since FINA's rules do not provide for a direct right of appeal of an official, in line with the CAS case law, in order to have legal standing, the appellant/official would need to have a direct, personal and actual interest. In this respect, the appellant cannot claim that he still has an actual interest to obtain a decision imposing a disciplinary sanction regarding the alleged intervention of another official in an election process in which the appellant was seeking re-election if the concerned election has been conducted and the appellant elected. It follows that the appellant's interest is no longer actual.**

3. **In line with the current interpretation of Art. 75 of the Swiss Civil Code, only members of an association who are directly affected by a decision of the association have standing to appeal the decision in question. As the appellant is not a Member of FINA but a member of a Member of FINA and since the FINA Constitution does not automatically render the appellant a directly affected party, the latter still has to establish that he was directly affected by the appealed decision. However, the fact not**

to be an addressee of the appealed decision in the first instance and to lack a direct, personal and actual interest in the outcome of the cases precludes the application of Art. 75 of the Swiss Civil Code.

I. THE PARTIES

1. Paolo Barelli (the "Appellant") is the President of the Ligue Européenne de Natation ("LEN"), the Honorary Secretary of the Fédération Internationale de Natation ("FINA"), a member of the FINA Bureau and the FINA Executive.

2. FINA is the international federation recognized by the International Olympic Committee for administering international competition in water sports. FINA controls the development of the following aquatic events: swimming, diving, high diving, water polo, synchronized swimming and open water swimming.

3. According to Rule C17.8 of the FINA Constitution, the FINA Executive *"is responsible for making decisions on matters referred to it in the FINA Rules and Regulations or matters referred to it by the Bureau or for other cases, which need decisions between the meetings of the Bureau"*.

4. The FINA Ethics Panel is provided for by Rule C24.1 to C24.9 of the FINA Constitution. In particular, Rule C24.7 provides: *"The FINA Ethics Panel shall have the power to hear and decide any violation of the Code of Ethics, including to impose sanction(s) as set out in C.24.9"*.

II. PROCEDURAL BACKGROUND

5. On December 27, 2016, the Appellant filed a statement of appeal in case CAS 2016/A/4924 and on January 12, 2017, the Appellant filed a statement of appeal in case CAS 2017/A/4943.

6. The Appellant filed the appeal brief in case CAS 2016/A/4924 on January 6, 2017.

7. On January 23, 2017, the Respondent submitted an application seeking to obtain decisions on bifurcation of the proceedings and on resolution of the disputes based on preliminary issues linked with jurisdiction and standing. The Respondent also applied for a stay of its deadline to answer in case CAS 2016/A/4924.

8. On January 26, 2017, the Appellant applied for a 7-day extension to respond to the Respondent's request. This extension was granted until February 2, 2017.

9. On January 26, 2017, the Respondent clarified its position that at the level of the issues of jurisdiction and standing, consolidation of the proceedings would be preferable. However, the Respondent agreed that both matters could be treated separately as regards their merits; but proposed to align the proceedings in terms of deadlines and procedural conduct.

10. On February 1, 2017, the Appellant requested that the question of jurisdiction be resolved by the CAS Panel ("the Panel") upon its constitution. However, in contrast to the Appellant's position on the issue of jurisdiction, the Appellant objected to the Respondent's application for bifurcation on the issue of standing. The Appellant also argued that the issue of standing to sue is a matter related to the merits of the case in issue, not its admissibility. Finally, the Appellant did not agree to the Respondent's request to file a single and common response to the Appellant's appeal briefs.

11. On February 2, 2017, the Panel confirmed that it had decided a bifurcation in respect of the issue of jurisdiction only.

12. On February 2, 2017, the Appellant challenged the appointment of Mr. Ken Lalo as President of the Panel. On February 3, 2017, Mr. Ken Lalo recused himself from the cases in question.

13. On February 6, 2017, the Respondent filed a further submission concerning jurisdiction and standing and stated that they would rely on the content of their submission of January 23, 2017.

14. On February 14, 2017, Mr. Romano Subiotto QC was appointed as the President of the Panel.

15. On February 16, 2017, the Appellant filed his submission on jurisdiction concerning both cases (CAS 2016/A/4924 and CAS 2017/A/4943).

16. On March 8, 2017, the Panel decided to retain jurisdiction in CAS 2016/A/4924 and CAS 2017/A/4943. The Panel also issued the following procedural directions to the Parties:

    a. *"The Appellant shall file, within 10 days from the receipt of the present letter, his appeal brief in the matter CAS 2017/A/4943.*

    b. *The Respondent shall then be granted a deadline of 20 days from the receipt of the above appeal brief to file its answers in the matters CAS 2016/A/4924 and CAS 2017/A/4943".*

17. On March 8, 2017, the Appellant asked for an extension until March 27, 2017, to file his appeal brief in the matter CAS 2017/A/4943.

18. On March 10, 2017, the Respondent opposed to the Appellant's request for an extension until March 27, 2017 to file his appeal brief in the matter CAS 2017/A/4943.

19. On March 15, 2017, the Panel granted the Appellant's request for an extension until March 27, 2017 to file his appeal brief in CAS 2017/A/4943.

20. On March 27, 2017, the Appellant filed an appeal brief in case CAS 2017/A/4943.

21. On April 19, 2017, the Respondent filed his answer to the appeal briefs in cases CAS 2016/A/4924 and CAS 2017/A/4943.

22. On May 3, 2017, the Appellant confirmed that he would like the CAS to hold an oral hearing to determine the CAS 2016/A/4924 appeal. In addition, the Appellant reiterated that in the appeal brief in CAS 2016/A/4924, he made three procedural applications. The Appellant asked the CAS for a ruling on these three procedural applications.

23. On May 7, 2017, the Respondent filed observations in relation to the issues raised in the Appellant's communication of May 3, 2017.

24. On May 8, 2017, the CAS decided to bifurcate the proceedings and to render a partial award on the issue of the Appellant's standing to sue.

25. On May 8, 2017, the CAS also communicated that the time limit to communicate the arbitral award to the Parties, pursuant to Art. R59 of the Code, had been extended until August 11, 2017 by an order of the President of the CAS Appeals Arbitration Division.

26. On May 29, 2017, the CAS fixed June 14, 2017 as the hearing date.

27. On June 14, 2017, the hearing on the issue of standing was held.

III. APPEALED DECISIONS

A. CAS 2016/A/4924

28. The appealed decision is a decision of the FINA Ethics Panel issued on December 5, 2016 ("Appealed Decision in CAS 2016/A/4924"). The Appealed Decision in CAS 2016/A/4924 was issued further to a referral of the FINA Executive to FINA Ethics Panel asking the FINA Ethics Panel to consider whether circumstances reported by the Appellant in regard of Mr. Husain Al Musallam ("Mr. Al Musallam"), FINA First Vice-President, would constitute circumstances relevant under the FINA Code of Ethics.

29. In particular, on June 17, 2016, the Appellant sent a letter to Mr. Julio Maglione, FINA's President and Mr. Cornel Marculescu, FINA's Executive Director, alleging that Mr. Musallam, President of Asia FINA and first Vice President of FINA and Director of the Asian Olympic Committees, approached a number of Presidents of National Federations during the LEN Elective Congress on May 8, 2016, and encouraged them to vote for the Appellant's opponent in the election, Mr. Erik van Heijningen.

30. On July 15, 2016, the Appellant sent a chasing letter requesting an update. On July 22, 2016, the Appellant received an email from Mr. Maglione, in which Mr. Maglione informed the Appellant that the matters he had raised in his letter dated June 17, 2016 were to be discussed at the then forthcoming FINA Executive meeting in Rio.

31. On November 29, 2016, the Appellant sent a complaint against Mr. Al Musallam in the form of an email to the chair of the FINA Ethics Panel with detailed submissions and supporting documents.

a. In his complaint, the Appellant asserted that *"Mr. Husain Al Musallam is in breach of Section 13 of the Code, in that his position as Director General of the OCA places him in a clear potential conflict of interest with his position as first Vice President of FINA"*.

b. The second aspect of the Appellant's complaint concerned steps that Mr. Al Musallam allegedly took, prior to LEN election in May 2016. The Appellant claimed that the steps Mr. Al Musallam took to support the candidacy of Mr. Erik van Heijningen, were a breach of the FINA Code of Ethics, in particular a breach of the principles of neutrality and integrity.

32. On December 4, 2016, the FINA Ethics Panel received a matter which had been transferred to it pursuant to Clause 24.5 of the FINA Constitution concerning the First FINA Vice President, Mr. Al Musallam.

33. Also on December 4, 2016, a meeting of the FINA Ethics Panel took place in Windsor, Ontario. The FINA Ethics Panel *"reviewed the material provided, and also had the opportunity to hear from Mr. Al Musallam in person and put questions to him arising out of the material it had considered"*.

34. On December 5, 2016, the FINA Ethics Panel rendered its decision. The decision was provided to the Appellant under cover of an email of December 7, 2016.

35. The FINA Ethics Panel concluded that no structural or actual conflict of interest existed by virtue of Mr. Al Musallam's holding of the various positions within FINA, while at the same time being the Director General of the OCA. The FINA Ethics Panel noted that circumstances might arise where a conflict could exist, however, there was no suggestion or evidence at the time that it did. Having questioned Mr. Al Musallam, the Panel confirmed that they did not have any reason for concern that Mr. Al Musallam would not, in the event of a conflict or a potential conflict of interest, deal with the matter appropriately.

36. In the FINA Ethics Panel's view, the evidence disclosed nothing other than an expression of Mr. Al Musallam's views, *i.e.* that Mr. Heijningen would in his opinion have been the preferred candidate in the LEN presidential election. The Panel did not agree that in expressing such a view, particularly when the Appellant was aware of Mr. Al Musallam's views, Mr. Al Musallam acted in breach of the provisions of the FINA Code of Ethics relating to neutrality and integrity.

37. Consequently, the Panel did not uphold the Appellant's complaints either as to the alleged conflict of interest or the alleged breaches of the FINA Code of Ethics.

B. CAS 2017/A/4943

38. The appealed decision in this case is the decision of the FINA Executive not to refer a complaint by the Appellant concerning violations of the FINA Code of Ethics by Mr. Dale Neuberger ("Mr. Neuberger"), a FINA Vice-President, member of the FINA Bureau and of the FINA Executive ("Appealed Decision in CAS 2017/A/4943").

39. In particular, by letter dated June 17, 2016, the Appellant wrote a letter to the President of FINA in which he complained about TSE Consulting's direct interference with the LEN presidential election and Mr. Neuberger's involvement in that company.

40. Subsequent to this letter, and nothing having been heard from the FINA President, the Appellant sent a chasing letter on July 15, 2016, requesting an update.

41. On July 22, 2016, the Appellant received an email from the FINA President in which he informed the Appellant that the matters he had raised in his letter dated June 17, 2016, were to be discussed at the then forthcoming FINA Executive meeting in Rio.

42. On November 29, 2016, the Appellant made a written complaint to the FINA Ethics Panel which alleged that Mr. Neuberger had violated the FINA Code of Ethics. The substance of the complaint was two-fold:

    a. By reason of Mr. Neuberger's status as a partner/director of TSE Consulting, as well as his status as a senior official within FINA, he is in violation of the FINA Code of Ethics principles against conflicts of interest; and

    b. TSE Consulting orchestrated the campaign of the Appellant's competitor in the LEN presidential election. Accordingly, because of his role as a partner/director of TSE Consulting, Mr. Neuberger was involved with a company, firm or association whose activity was inconsistent with one of FINA's objectives and interests, namely the principle of neutrality, as TSE Consulting was plainly engaged in political activity and, consequently, he was in violation of the FINA Code of Ethics.

43. On December 4, 2016, a meeting of the FINA Ethics Panel took place in Windsor, Ontario. The minutes recorded receipt of the Appellant's two complaints and stated: *"the Panel determined that the appropriate course was to refer the matters to the FINA Executive for review and consideration, and transfer to the Panel should the Executive decide, pursuant to cl 24.5 of the FINA constitution"*. The Appellant received a copy of the minutes on December 13, 2016.

44. On December 21, 2016, the Appellant wrote to the FINA Executive Director and asked for an update on the status of his reference.

45. On December 26, 2016, by an email dated 22:48 CET, the Appellant was informed by the FINA Executive Director that *"Following our communications below the general opinion is not to forward the matter to the FINA Ethics Panel"*. This decision, *i.e.* the decision not to forward the matter to the FINA Ethics Panel, is the subject of the Appellant's appeal in case CAS 2017/A/4943.

46. In the appeal brief in case CAS 2017/A/4943, the Appellant seeks an order that the decision of the FINA Executive made on December 26, 2017, in which the FINA Executive determined not to refer a complaint by the Appellant to the FINA Ethics Panel concerning violations of the FINA Code of Ethics by Mr. Neuberger, be set aside.

47. The Appellant seeks an order that the decision of the FINA Executive having been set aside, the CAS, applying the applicable rules, remit the matter to the FINA Ethics Panel for consideration and determination.

IV. CAS JURISDICTION

48. Pursuant to an application made on behalf of FINA, dated January 23, 2017, the CAS informed the Parties by letter of March 8, 2017, that the Panel determined that it would retain jurisdiction in this matter.

49. Rule C.12.11 of the FINA Constitution concerning appeals provides a right of appeal to the CAS for sanctioned parties:

"C.12.11.1 A Member, member of a Member or individual sanctioned by the Executive may appeal to the FINA Bureau.

C.12.11.2 A Member, member of a Member or individual sanctioned by the Doping Panel, the Disciplinary Panel or the Ethics Panel may appeal the decision directly to CAS".

50. However, Rule C26 provides for the possibility of referring disputes between FINA and any of its Members or members of Members, individual members of Members or between Members of FINA to the CAS: *"Disputes between FINA and any of its Members or members of Members, individual members of Members or between Members of FINA that are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the Court of Arbitration for Sports (CAS), Lausanne. Any decision made by the Arbitration Court shall be final and binding on the parties concerned".* The Panel decided to retain jurisdiction on the basis of Rule C26 of the FINA Constitution.

V. APPLICABLE LAW

51. Art. R58 of the CAS Code provides: *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

52. The Appellant submits that the matter falls to be determined according to the FINA Constitution and the FINA Code of Ethics. The FINA rules do not contain a choice of applicable law. Accordingly it is the Appellant's contention that the applicable law is that of the FINA rules, with Swiss law applying complementarily.

53. The Respondent does not make any submissions concerning the applicable law.

54. The Panel holds that the applicable law in this case shall be the FINA rules and regulations, in particular the FINA Constitution and the FINA Code of Ethics. Additional, Swiss law may apply.

VI. SUBMISSIONS OF THE PARTIES ON STANDING

A. Appellant's Written Submissions on Standing

55. In the appeal brief in case CAS 2016/A/4924, the Appellant does not adduce any arguments as to why he has standing to appeal to the CAS.

56. In the appeal brief in case CAS 2017/A/4943 the Appellant adduces the following arguments as to why he has standing to appeal to the CAS:

a. First, the Appellant notes that under Swiss law the challenge to a decision taken by an organ of an association is regulated by Art. 75 of the Swiss Civil Code: *"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof"*. The personal requirements to challenge a decision of a Swiss association are: (i) to be a member of such association at the time the decision is issued, (ii) to have voted against such a decision.

   i. According to the Appellant, all requirements of Swiss law are fulfilled: (i) the Appellant is a member of a Member of FINA and entitled to challenge the decision pursuant to Rule C26 of the FINA Constitution; (ii) the Appellant has never accepted the decision not to refer his complaint against Mr. Neuberger to the FINA Ethics Panel; (iii) the decision of the FINA Executive dated December 26, 2016, is final and cannot be disputed internally, and (iv) the decision offends the requirements and proper construction of the FINA Constitution and the FINA Code of Ethics.

   ii. According to the Appellant, as a matter of Swiss law, in principle, any FINA member falling within Rule C26 of the FINA Constitution is directly affected by decisions made in breach of the FINA Constitution.

b. Further, the Appellant submits that he is directly interested in the challenge to the decision of the FINA Executive not to refer the matter to the FINA Ethics Panel in so far as TSE Consulting was directly involved in orchestrating the campaign of the Appellant's rival. That the Appellant won that election does not remove or alter that fundamental fact.

c. The Appellant submits that he has a real and genuine dispute with FINA, which by the action of the FINA Executive, has manifestly wrongly prevented the Appellant's complaint from being considered by the FINA Ethics Panel:

i. The Appellant refers to CAS 2008/A/1674 and the fact that the Panel must determine whether the Appellant has shown sufficient interest in the matter: *"sufficient interest is broad, flexible concept free from undesirable rigidity and includes whether the Appellant can demonstrate a sporting and financial interest"*[1]. According to the Appellant, the Appellant's ability to have his complaint heard in accordance with the contract between himself and FINA is a tangible and real dispute conferring him with *"sufficient interest"*.

ii. The Appellant refers to the dicta in CAS 2002/O/373: *"In Swiss civil procedural law, the basic principle is that a claimant has standing to sue and the claim is admissible providing the person is invoking a substantive right of his own, i.e. a right deriving from contract, tort, or some other source"*[2]. The Appellant claims that he has a right to have his complaint considered by the FINA Ethics Panel.

d. According to the Appellant, he passes the *"aggrievement requirement"* in CAS 2009/A/1880 & 1881: *"only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against that decision"*[3]. The relief sought by the Appellant relates to an actual dispute relating to the manner in which FINA has wrongly failed to deal with the complaint. The Appellant has not brought this appeal for an advisory view but to get his complaint heard.

e. Further, the Appellant submits that even if he is considered as a non-addressee, in the context of the points made in CAS 2015/A/4289, relied upon by FINA, the Appellant has a concrete, legitimate and personal interest which affects and relates to him directly and with more intensity than others.

f. Finally, as regards the alleged lack of *"passive standing"*, the interest of Mr. Neuberger is not affected. If the Appellant is granted the relief he seeks, the matter will be referred to the FINA Ethics Panel who will consider the Appellant's complaint in accordance with the rules of natural justice and Mr. Neuberger will have the right to defend himself.

B. Appellant's Arguments on Standing at the Hearing

a) Standing to be sued

57. At the hearing, the Appellant insisted that FINA is the correct and only Respondent required for this appeal. The Appellant relied on the case of *Football Association of Serbia v. UEFA*, drawing an analogy between the two cases, in that the Respondent was not Kosovo, but UEFA. In said case, Serbia did have standing to sue, and UEFA was the only possible Respondent. The Appellant argued that the same applies in the case at hand.

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1 CAS 2008/A/1674, ¶11.
2 CAS 2002/O/373, ¶20.
3 CAS 2009/A/1880 & 1881, ¶29.

58. The Appellant reiterated that he does not seek any redress from or change in circumstance directly affecting Mr. Al Musallam or Mr. Neuberger, but only that FINA's decisions be altered. Therefore, FINA is the correct Respondent and there was no need whatsoever to include any other parties to the claim.

59. Further, the Appellant referred to the case of CAS 2013/A/3437[4], specifically referring to the fact that WADA was the only possible Respondent, due to the fact that it was WADA's decision that was being appealed. This, of course, may have in turn affected the Athlete; however the Athlete's actions were not being challenged – only the decision of WADA. The CAS ruled in this instance that WADA did have standing to be sued. The Appellant argued that the same should follow with FINA, for it is their decisions that are in question; not the actions of Mr. Al Musallam or Mr. Neuberger.

b) Standing to sue

60. At the hearing, the Appellant argued that he has a legal relationship with FINA in that he is a *"member of a Member"*. The Appellant emphasized that the purpose of the FINA Code of Ethics is not only to protect FINA, but also the victim of any violation of said Code. Denying the Appellant his rights in the first instance would be counter to the purpose of the FINA Code of Ethics.

61. Furthermore, the Appellant referred to Art. 75 of the Swiss Civil Code, claiming that decisions can be rendered null and void due to a serious breach. Anyone with an interest can challenge a decision which is null and void. Since the decisions of the FINA Executive and the FINA Ethics Panel are null and void, the Appellant has standing.

62. The Appellant claimed that there was a serious breach, in that one of the six possible members of the FINA Ethics Panel was a friend of Mr. Al Musallam, and the procedure was not at all transparent, and too quick to have been conducted properly. Therefore, the decision by the FINA Ethics Panel regarding Mr. Al Musallam is null and void, and may be appealed.

63. With regards to the decision by the FINA Executive concerning Mr. Neuberger, the Appellant cited the FINA Constitution, specifically Art. 12 (3), Art. 12 (5), and Art. 12 (6). In this, the Appellant stated that the FINA Ethics Panel is the competent body to deal with the matter, and the FINA Executive has no power to decide whether to refer the case, but was obliged instead to transfer automatically the case, without any discretion on its part. Therefore, the decision not to refer the complaint to the FINA Ethics Panel constituted a serious breach, is null and void, and may be appealed by the Appellant.

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4 CAS 2013/A/3437, ¶¶280-285.

C. Respondent's Written Submissions on Standing

a) Respondent's arguments on standing in the submission of January 23, 2017

64. The Respondent submits that *"the Appellant obviously has no standing to appeal"*. The Respondent reiterates that to have standing, a party appealing a decision must have a legitimate interest in doing so. The decision it is seeking through its appeal must have an actual impact on its direct and personal interests. The interests at stake in connection with the outcome of the appeal must be concrete and personal interests of the Appellant, not just general interests such as ensuring the application of principle of good governance.

65. The Respondent submits that the fact that Mr. Al Musallam and or Mr. Neuberger would or would not be subject to the sanctions issued in application of the FINA Code of Ethics does not affect any personal interests of the Appellant.

66. The Respondent further claims that the Appellant reported circumstances which were linked to his own election. The election is now long past and the Appellant won it easily. Thus, the Appellant no longer has an actual interest to pursue the appeals.

67. The only personal interest, which the Appellant could be drawing from succeeding in his appeals would be to see Mr. Al Musallam and or Mr. Neuberger subject to sanctions. This would not affect his personal interests and is not a legitimate interest worthy of protection.

68. As regards the lack of passive standing, the Respondent claims that the results, which the Appellant is seeking, would directly affect the personal direct interests of Mr. Al Musallam and or Mr. Neuberger. No decisions affecting directly the rights of these two persons, who are not parties to these proceedings, may be validly issued in the same proceedings.

69. Further, the Respondent submits that whenever fundamental interests of a third party are directly concerned, this third party must be included in the respective proceedings. The appeals are effectively misdirected and cannot result in the granting of the Appellant's requests for relief as those would affect the position of persons which the award cannot bind. Therefore, according to the Respondent, the two appeals must be rejected for lack of passive standing as appeals not directed against the parties affected by the decision.

b) Respondent's arguments on standing in the response to the appeal brief in CAS 2016/A/4924 and CAS 2017/A/4943

70. According to the Respondent, the issue of standing arises in two different aspects: (i) the active standing to sue, and (ii) the passive standing to be sued.

71. The active standing is the entitlement of an Appellant to appeal against a decision issued in proceedings in which he was not a party. This depends on whether the Appellant has a legitimate and actual personal interest to obtain the relief he is seeking. The passive standing concerns the issue whether the appeal is directed against the correct Respondent given the requests for relief the Appellant seeks.

ba) Lack of "active" standing

72. First, the Respondent submits that the FINA Code of Ethics does not purport to protect individual rights and does not establish any basis for individual entitlements nor claims of individual parties.

a. The structure of the proceedings in front of the FINA Ethics Panel is "vertical", *i.e.* they are proceedings between the institution, acting through designated decision-making body (in this case the FINA Ethics Panel) and the individual, who potentially breached the FINA Code of Ethics.

b. In proceedings of this type, unless provided specifically by the rules of the organization, there is no procedural position for individual parties other than the parties directly subject to the decision at stake in the proceedings.

73. Further, the Respondent submits that the person reporting the facts does not have any personal right or claim to obtain that his or her denunciation effectively leads to proceedings, nor the right to challenge a decision which he or she might not consider satisfactory.

a. The interests adjudicated in these proceedings are not the denunciator's interests but general interests linked with the institutional enforcement of the FINA Code of Ethics.

b. The "denunciator" reporting facts does not acquire a procedural position allowing him or her to act as a "prosecutor". He only has the obligation to contribute to the clarification of the facts, if requested.

c. The fact that the Appellant brought forward facts, which allegedly constituted violations of the FINA Code of Ethics, did not give him the right to participate in the proceedings.

74. The Respondent submits that according to the precedents of the CAS, a decision can only be appealed by a party who has a direct, concrete and actual interest in the relief sought.

- CAS 2016/A/4924

i. The establishment of a violation by a third party and the issuance of sanctions against Mr. Al Musallam do not have any relation with nor impact on any of the Appellant's interests.

ii. What the Appellant is truly seeking in these proceedings is to weaken or to eliminate the person whom he considers as a rival.

iii. As regards the fact that Mr. Al Musallam is the OCA General Director, the Appellant complained of a situation which existed before Mr. Al Musallam's first election to the FINA Bureau in 1996 and which never raised any issue up to now. Therefore, there is no relation between the alleged violation and any personal, actual or even potential interests of the Appellant.

iv. As regards the Appellant's allegation that Mr. Al Musallam intervened in the election process of LEN, in which the Appellant was seeking re-election as LEN

President, the Appellant cannot claim that he still has an actual interest to obtain a decision in this respect. Even before the initial decision of the FINA Ethics Panel and before the filing of the appeal, the issue had lost any relevance, as the election had been conducted and the Appellant elected. To be *"worthy of protection"*, the interest must not only be concrete and personal, it must be actual.

- CAS 2017/A/4943

  i. The matters of whether or not the circumstances reported by the Appellant are submitted to the FINA Ethics Panel for it to consider if they constitute violations committed by Mr. Neuberger, and if so, which sanctions would have to be issued against Mr. Neuberger, do not have any impact on the personal or actual interests of the Appellant.

  ii. The fact that the circumstances reported by the Appellant include a reference to the alleged links of Mr. Neuberger with TSE SA and to the fact that this company was appointed to support an opponent of the Appellant in an electoral process (now long concluded and successfully won by the Appellant) does not allow the Appellant to claim that he would have such an interest.

  iii. Irrespective of the fact that the claim that TSE SA's activities in the electoral process would allegedly represent a violation of the FINA Code of Ethics by Mr. Neuberger personally is frivolous and without merits. A decision on this issue would no longer have any impact on any conceivable personal or actual interests of the Appellant.

  iv. The outcome of these proceedings could therefore neither directly nor indirectly have any impact on the Appellant's actual and personal interests. Therefore, the Appellant has no interest worthy of protection.

75. In conclusion, proceedings in front of the FINA Ethics Panel are proceedings of an institutional nature. The parties to these proceedings are (i) FINA and (ii) the person whose potential breach of the provisions of the FINA Code of Ethics is subject to evaluation. The Appellant does not have any personal interest worthy of protection to obtain the relief he is seeking. Given the lack of standing, the appeal must be dismissed.

bb) Lack of "passive" standing

76. As regards the argument of lack of passive standing, the Respondent submits that the appeals have not been directed against the party, who should have been involved in the proceedings, given the requests for relief sought by the Appellant in the two cases.

77. In particular, the Respondent submits that the Appellant is attempting to force the review of decisions without relevance for his own interests in absence of the party who would be directly affected by the relief he is seeking.

  a. The Appealed Decision in CAS 2016/A/4924 and the requests for relief concern and potentially affect the direct, personal and actual interests of Mr. Al Musallam, who was the main party in the proceedings which led to the Appealed Decision in CAS

2016/A/4924, and who would be truly directly concerned if the requests for relief sought by the Appellant were granted by the Panel. In addition, *"it would be an "absolute" violation of the right to be heard: a decision concerning Mr. Al Musallam's direct interests and only these interests would be discussed and issued in proceedings in which Mr. Al Musallam is not even named as a party*!*"* Therefore, issues affecting Mr. Al Musallam cannot be addressed in his absence.

b. The Appealed Decision in CAS 2017/A/4943 and the requests for relief concern and potentially affect the direct, personal and actual interests of Mr. Neuberger, who is the party who would be truly directly concerned if the requests for relief sought by the Appellant were granted by the Panel. In addition, *"it would be an "absolute" violation of the right to be heard: a decision concerning Mr. Dale Neuberger's direct interests and only these interests would be discussed and issued in proceedings in which Mr. Dale Neuberger is not even named as a party!"*. Therefore, issues affecting Mr. Neuberger cannot be addressed in his absence.

78. Since the appeals have been misdirected they must be dismissed, as issues and requests for relief concerning a party not present in the proceedings cannot be properly addressed by the Panel.

D. Respondent's Arguments on Standing at the Hearing

a) Standing to sue

79. The Respondent reiterated the importance of the distinction between parties that do and do not have a right to be part of proceedings. FINA Code of Ethics provisions, Art. VI specifically, are clear on the implication of third parties, with the Appellant being such party. In line with Art. VI, third parties have the obligation to contribute and refer but do not have the right to appeal a decision.

80. Since FINA' rules do not provide for a direct right of appeal of the Appellant, in order to sue, he would need to have a direct, personal and actual interest. The Appellant's claim that he was acting *"for the future of the organization"* does not fulfill the criterion of direct and personal interest. As regards the Appellant's *"actual"* interest, there is no evidence of any ongoing interference whatsoever. Even if there was an interest during the campaign, if that interest ceases to be actual, which by now it certainly would have, then standing to sue is lost.

81. The Respondent disregarded the reference to *CAS 2016/A/4602*, arguing that it is inherently different in that Serbia, by nature of its membership with UEFA, had a right to challenge that decision. In the Appellant's case, CAS is not dealing with someone who has a direct procedural right to appeal.

82. In addition, the Respondent dismissed the Appellant's reference to the Swiss Supreme Court case which states that a member has a broad right to appeal. The Appellant is not a Member, but a member of a Member, and an officer. He is not an actual Member, and as an officer, he has no right to challenge a decision merely because it is not favourable to him.

83. In any event, even if the Appellant had standing under Swiss law, the Respondent submitted that the FINA Ethics Panel functioned perfectly well, with transparent procedure, and no factor rendered either of the decisions null and void.

b) Standing to be sued

84. Given that the ultimate aim of these appeals is to impose sanctions on Mr. Al Musallam and Mr. Neuberger, the Appellant should have included them in the proceedings. One cannot affect the position of a third party without involving them in the relevant proceedings. Doing otherwise would create a situation where the decision in question would become *res iudicata* as against Mr. Al Musallam and Mr. Neuberger.

VII. MERITS

A. CAS jurisprudence on standing to appeal

85. Third parties generally have standing before the CAS in two cases. First, when a regulation explicitly confers it. Secondly, when an association's measure affects not only the rights of the addressee, but also and directly those of a third party, that third party is considered *"directly affected"* and thus enjoys standing to sue[5]. This is consistent with the general definition of standing that parties, who are sufficiently affected by a decision, and who have a tangible interest of a financial or sporting nature at stake may bring a claim, even if they are not addressees of the measure being challenged.

86. There is a category of third party applicants who, in principle, do not have standing, namely those deemed *"indirectly affected"* by a measure. As regards the differentiation of directly affected parties from indirectly affected parties, CAS jurisprudence displays a *"common thread"*, which has been succinctly put as follows:

> *"Where the third party is affected because he is a competitor of the addressee of the measure/ decision taken by the association, - unless otherwise provided by the association's rules and regulations - the third party does not have a right of appeal. Effects that ensue only from competition are only indirect consequences of the association's decision/ measure. If, however, the association disposes in its measure/ decision not only of the rights of the addressee, but also of those of the third party, the latter is directly affected with the consequence that the third party then also has a right of appeal"*[6].

87. In a nutshell, the correct approach when dealing with standing is to deem mere competitors indirectly affected – and thus exclude them from standing – when the measure does not have

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5 CAS 2008/A/1583 & 1584 at ¶32. See also DE LA ROCHEFOUCAULD E., *"Standing to sue, a procedural issue before the CAS"*, CAS Bulletin 1/11 at ¶17. For instance, art. 62(2) of the UEFA Statutes provides that *parties "directly affected by a decision may appeal to the CAS"*. The Panel has rightly observed that *"[t]he wording of the UEFA Statutes does not exclude the possibility that a third party may also be a party […]; the provision refers to the actual state of being affected, not to whether someone is formally the addressee of the measure"* (see CAS 2008/A/1583 & 1584 at ¶24).

6 CAS CAS 2008/A/1583 & 1584, ¶9.6.1. *See also* DE LA ROCHEFOUCAULD E., *"Standing to sue, a procedural issue before the CAS"*, CAS Bulletin 1/11, p. 17.

tangible and immediate direct consequences for them beyond its generic influence on the competitive relationship as such. A few previous CAS decisions shed some light on how the notion *"directly affected"* is interpreted.

88. First, in CAS 2002/O/373, the CAS granted an athlete placed third the right to appeal against a decision by the IOC not to award her the gold medal after the first and second placed athletes were involved in a doping scandal. It was held that a disciplinary decision in respect of an athlete placed first had inevitably affected the rights of an athlete placed second. By contrast, athletes who lack any chance of obtaining a medal have no right to appeal[7].

89. Second, in the CAS 2008/A/1583 & 1584 cases, the CAS found that a decision by UEFA's disciplinary body granting FC Porto (the winner of the 2007/2008 Portuguese football league) admission into the UEFA Champions League pending an investigation into alleged bribery of referees, had the effect of excluding Benfica Lisbon (third in the 2007/2008 Portuguese football league) from direct admission to, and Vitória Guimarães (4th in the 2007/2008 Portuguese football league) from a qualification place in, the Champions League. The Panel held that both clubs were *"directly affected; for if UEFA grants a club a starting place in a championship which has a closed field of starters, it has at the same time made a negative decision about including other candidates for said starting place"*[8].

90. Third, in CAS 2015/A/4151, the Panel examined whether Panathinaikos, being the runner-up, could prove under the relevant provisions that it would automatically replace Olympiakos in the UEFA Champions League:

> *"In order to convince the Panel of its standing to sue in this matter, Panathinaikos has some further hurdles to overcome. Would it now automatically replace Olympiakos in the 2015/16 UEFA Champions League, pursuant to Article 4.08 of the UCLR? If not, can it prove that the Emergency Panel would consider it as the replacement?"*[9].

91. The Panel in CAS 2015/A/4151 found that Panathinaikos lacked standing and ruled that:

> *"standing to sue should be restricted to a club that could show to the Panel that it would directly replace an excluded club and not by the means of possibly being entered into a draw along with a number of other clubs or by a possible one-off decision that the Emergency Panel could take"*[10].

92. Fourth, in CAS 2015/A/3874, the Panel denied legal standing for the request to impose higher sanctions on the Football Association of Serbia. The Panel found that the Football Association of Albania was not directly affected as the *"victim"* of the racist and discriminatory chants. According to CAS 2008/A/1583 & 1584, this could only be envisaged if the UEFA rules provided a specific right for a victim to appeal, which they do not. Art. 62 para. 2 of the UEFA Statutes links the *"directly affected"* requirement to the disciplinary decision and not to

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7 CAS 2002/O/373, ¶62 *et seq.*
8 CAS 2008/A/1583 & 1584, ¶32.
9 CAS 2015/A/4151, ¶135.
10 CAS 2015/A/4151, ¶146.

the conduct giving rise to the disciplinary proceedings (*"directly affected by a decision"*, emphasis added)[11].

93. The panel in that case also held: *"the mere fact that an individual is a victim does not as such establish a standing to appeal a sanction imposed on the offender. Such an interpretation would have far-reaching consequences and could lead to the possibility of appeals from a potentially very large group of persons. Under such an interpretation, for instance, any player who is injured by a dangerous tackle or is bitten by another player would be able to appeal if he were unhappy with the sanction imposed on the offender"*[12].

94. Finally, the Panel in CAS 2015/A/4343 held that as a runner-up, Trabzonspor could be affected by sanctions imposed on Fenerbahçe, such as withdrawal of the title. However, this outcome was far from certain. There is no legal provision providing that, in the event the title is withdrawn from Fenerbahçe, it would revert to Trabzonspor. The applicable TFF Regulations do not provide for an automatic award of the title to the runner-up. Therefore, *"in the absence of a clear benefit, Trabzonspor's standing is questionable"*[13].

B. The case at hand

a) FINA's provisions do not provide for third-party standing

95. Rule C26 provides for the possibility of referring disputes between FINA and any of its Members or members of Members, individual members of Members or between Members of FINA to the CAS: *"Disputes between FINA and any of its Members or members of Members, individual members of Members or between Members of FINA that are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the Court of Arbitration for Sports (CAS), Lausanne. Any decision made by the Arbitration Court shall be final and binding on the parties concerned"*. Rule C26 gives the CAS jurisdiction, however, the issue whether the Appellant is a directly affected party with a legal standing to appeal is a separate question.

96. The FINA Constitution does not include any special provisions on the issue of standing to appeal to the CAS. FINA Code of Ethics provisions, Art. VI specifically, provide for a duty to *"immediately report any potential violation of this Code to the Ethics Panel"*. In addition, *"at the request of the Ethics Panel, persons bound by this Code are obliged to contribute to clarifying the facts of the matter or clarifying possible violations"*. However, the FINA Code of Ethics does not include any express provisions on which the Appellant could rely to establish that he is a directly affected party entitled to appeal a decision.

97. Since FINA's rules do not provide for a direct right of appeal of the Appellant, in line with the CAS case law, in order to have legal standing, the Appellant would need to have a direct, personal and actual interest.

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11 CAS 2015/A/3874, ¶182.
12 CAS 2015/A/3874, ¶182.
13 CAS 2015/A/4343, ¶¶123-124.

b) No direct, personal and actual interest

ba) CAS 2016/A/4924

98. In his appeal brief in CAS 2016/A/4924, the Appellant did not adduce any arguments as to why he would have a direct, personal and actual interest in the case. At the hearing, the Appellant argued that he decided to make the complaint because he had the future of FINA as an organization in mind. He also argued that he wanted to make sure that a similar situation does not happen in connection with elections on other continents. Even though this is a noble cause, this does not give rise to a direct and personal interest.

99. As regards the Appellant's allegation that Mr. Al Musallam intervened in the election process of LEN, in which the Appellant was seeking re-election as LEN President, the Appellant cannot claim that he still has an actual interest to obtain a decision in this respect. The concerned election had been conducted and the Appellant elected. It follows that the Appellant's interest is no longer actual. The Appellant's direct legal interest would further have had to be related to the imposition of a disciplinary sanction on Mr. Al Musallam, not to the alleged intervention of Mr. Al Musallam of which he was a 'victim'. The Appellant however failed to show that this is the case.

100. Further, as regards the fact that Mr. Al Musallam is the OCA General Director, the Appellant complained of a situation which had been pre-existing Mr. Al Musallam's first election to the FINA Bureau in 1996. The Panel concurs with the Respondent's submission that there is no relation between the alleged violation and any personal, actual or even potential interests of the Appellant.

101. It follows that the Appellant is an indirectly affected party and does not have a personal, direct and actual interest in the outcome of the case.

bb) CAS 2017/A/4943

102. In his appeal brief in CAS 2017/A/4943, the Appellant submits that he is directly interested in the challenge to the decision of the FINA Executive not to refer the matter to the FINA Ethics Panel in so far as TSE Consulting was directly involved in orchestrating the campaign of the Appellant's rival. He has a real and genuine dispute with FINA, which by the action of the FINA Executive, has manifestly wrongly prevented the Appellant's complaint from being considered by the FINA Ethics Panel.

103. At the hearing, as in CAS 2016/A/4924, the Appellant argued that he decided to make the complaint because he had the future of FINA as an organization in mind. He also argued that he wanted to make sure that a similar situation does not happen in connection with elections on other continents. As concluded by the Panel in CAS 2016/A/4924, even though this is a noble cause, this does not give rise to a direct and personal interest.

104. However, even if the FINA Ethics Panel were to decide on the allegations brought against Mr. Neuberger, these would not be of any direct, concrete or actual interest for the Appellant.

The concerned election had been conducted and the Appellant elected. The Appellant's interest is no longer actual. A personal legal interest in the imposition of a disciplinary sanction was not established either.

105. It follows that the Appellant is an indirectly affected party and does not have a personal, direct and actual interest in the outcome of the case.

c) Art. 75 of the Swiss civil code does not apply

106. The Appellant argues that under Swiss law, the challenge to a decision taken by an organ of an association is regulated by Art. 75 of the Swiss Civil Code: *"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof".*

107. The Appellant also submits that the Appellant is a member of a Member of FINA and entitled to challenge the decision pursuant to Rule C26 of the FINA Constitution. According to the Appellant, as a matter of Swiss law, in principle, any FINA member falling within Rule C26 of the FINA Constitution is directly affected by decisions made in breach of the FINA Constitution (and, as relevant, the FINA Code of Ethics).

108. However, in line with the current interpretation of Art. 75 of the Swiss Civil Code, entitled to challenge *"is here only the directly affected Member (differently from the entitlement in connection with challenge of decisions of the General Meeting) as the other members are not at all addressees of the decisions of such organs"*[14]. Therefore, only members of an association who are directly affected by a decision of the association have standing to appeal the decision in question.

109. Here, the Appellant is not a Member of FINA but a member of a Member of FINA. In addition, Rule C26 of the FINA Constitution does not automatically render the Appellant a directly affected party. The Appellant still has to establish that he was directly affected by the Appealed Decision in CAS 2016/A/4924 and the Appealed Decision in CAS 2017/A/4943.

110. However, the Appellant was not an addressee of the Appealed Decision in CAS 2016/A/4924 and the Appealed Decision in CAS 2017/A/4943 in the first instance. Moreover, as demonstrated above, the Appellant does not have a direct, personal and actual interest in the outcome of the cases. Therefore, Art. 75 of the Swiss Civil Code is not applicable.

111. Even if Art. 75 of the Swiss Civil Code were applicable, the Appellant would need to demonstrate in detail why he considers the Appealed Decision in CAS 2016/A/4924 and the Appealed Decision in CAS 2017/A/4943 to be null and void.

112. As regards the Appellant's submissions concerning the alleged bias of the FINA Ethics Panel in the matter of Mr. Al Musallam and the procedure followed, the Appellant would need to

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14 *Berner Kommentar : Kommentar zum schweizerischen Zivilrecht*, Art. 75 of the Swiss Civil Code.

adduce concrete evidence as to why the Appealed Decision in CAS 2016/A/4924 is null and void. Mere assertions of bias are not enough to prove that a decision is null and void.

113. The Appellant also argued that the Appealed Decision in CAS 2017/A/4943 is null and void because the FINA Executive has an obligation to direct all complaints received to the FINA Ethics Panel. However, Rule C24.5 of the FINA Constitution states that *"The matters are transferred to the Ethics Panel by the FINA Executive"*. The system of a referral from the FINA Executive to the FINA Ethics Panel has been devised so as to give the FINA Executive discretion to decide which complaints merit to be transferred to the FINA Ethics Panel. Complaints do not need to be automatically transferred by the FINA Executive to the FINA Ethics Panel.

114. Therefore, even if Art. 75 of the Swiss Civil Code were applicable, the decision of the FINA Executive not to transfer the Appellant's complaint concerning Mr. Neuberger would not be null and void.

115. Since the Appellant does not have a direct, personal and actual interest in the outcome of the case and Art. 75 of the Swiss Civil Code is inapplicable because the Appellant is not a *"directly affected Member"*, the CAS dismisses the appeals CAS 2016/A/4924 and CAS 2017/A/4943 for the lack of the Appellant's standing to sue.

116. In these circumstances, the Panel does not need to express any view as to the Respondent's submission that the appeals were defective because of the absence of necessary parties.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeals in cases CAS 2016/A/4924 and CAS 2017/A/4943 in the matter of *Paolo Barelli v. FINA* are dismissed.

2. (…).

3. (…).

4. All other motions or prayers for relief are dismissed.