



Arbitration CAS 2011/A/2354 E. v. Fédération Internationale de Football Association (FIFA), award of 24 August 2011

Panel: Prof. Petros Mavroidis (Greece), President; Mr Christian Duve (Germany); Mr José Juan Pintó (Spain)

Football

International transfer of minor players

Calculation of the time-limit to file an appeal

Standing to appeal

Interpretation of the term ‘parents’ appearing in Article 19 para. 2(a) RSTP

Territorial scope of application of Art. 19 para. 2(b) RSTP

Restrictive interpretation of Art. 19 para. 2 RSTP

1. The FIFA Statutes are silent on the calculation of time limits. In turn, under Swiss law, deadlines fixed per days start to run from the day following the receipt of a decision, with the day of receipt not included. This method of calculating deadlines has been consistently applied by the CAS in its corresponding precedential case law.
2. Pursuant to Swiss law and CAS jurisprudence, provided he is a party to an arbitration clause, anyone who is affected by the decision and has a legitimate or sufficient interest in the case has standing to appeal (*locus standi*) and may file an appeal.
3. The FIFA Commentary to Article 19 para. 2(a) RSTP calls for an interpretation of the term ‘parents’, appearing in the body of this provision, *stricto sensu*. Although this term conceivably could cover situations beyond the natural parents, it definitely does not cover the situation where the minor player’s residence may be at his aunt’s house, as the latter is not a ‘parent’ to the minor player in the sense of Article 19 para. 2(a) RSTP.
5. Article 19 para 2(b) RSTP allows for exceptional transfers of under-aged players only if the transfer takes place within the territory of the EU (European Union), and that of the EEA (European Economic Area). Therefore, this provision literally cannot apply to a case regarding a player from Bosnia and Herzegovina, as the latter is neither a member of the EU, nor of the EEA. Moreover, it cannot apply by analogy in light of the Stabilization and Association Agreement signed between the EU and Bosnia and Herzegovina, as the Stabilization and Association Agreement contains only trade provisions and does not anywhere address free movement.
6. The rationale for Article 19 RSTP was to stop some forms of transfers akin to a “trade of minor players” and not to stop voluntary transactions. At the same time, there is a need to apply the protection of minors strictly. Opening up the door to exceptions beyond those carefully drafted and included in Article 19 RSTP would unavoidably lead

to cases of circumvention of the rationale for this provision.

E. (the “Appellant” or the “Player”) is a minor football player. He was born on 30 March 1994 in Bosnia and Herzegovina. The Player is currently training with the German football club OFC Kickers Offenbach, which is a member of the Deutscher Fussball Bund (DFB). DFB is affiliated with the Fédération Internationale de Football Association (FIFA; the “Respondent”).

FIFA is the world governing body of football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players worldwide. FIFA is an association under Swiss law and has its headquarters in Zurich (Switzerland).

Since 2009, the Player follows a professional training program with the company Quissenz GmbH, Frankfurt, Germany. This training program is supposed to prepare him as office clerk to apply for a job as “Airport Manager” with German language skills at the International Airport of Sarajevo. The educational and trainee program is scheduled over a three-year period of time. It has started on 1 October 2009 and will last until 30 September 2012. It is combined with language classes.

In 2010, the Appellant joined the football club OFC Kickers Offenbach as a football player.

On 5 August 2010, the DFB requested, on behalf of the OFC Kickers Offenbach, within the Transfer Matching System (TMS) an approval from the Players’ Status Committee of the FIFA to have the Appellant registered as amateur player. Such request was based on Article 19 para. 2 of the FIFA Regulations on the Status and Transfer of Players (RSTP; the “FIFA Regulations”), claiming an exception to the general ban on the transfer of minors on the following ground: *“the player’s moved to the country in which the new club is located for reasons not linked to football”*.

By decision of 10 August 2010, the Single Judge of the FIFA Players’ Status Committee dismissed DFB’s request for granting of the International Transfer Certificate (ITC) within the TMS.

By letter of the same day, DFB filed a new request with FIFA, this time not through the TMS and not claiming exceptions mentioned in Article 19 para. 2 of the FIFA Regulations, to grant a special authorization for the transfer of the Player to the football club Kickers Offenbach. Such request was argued as a case of hardship based on the specific circumstances of the present case, namely the move of the Player from Bosnia and Herzegovina to Germany without his parents, but with their expressed consent, for reasons not linked to football but to benefit from a humanitarian educational project.

Based on an official certificate delivered on 13 January 2010 by the City of Frankfurt, the Appellant’s address is the same as that of his aunt.

On 28 September 2010, the FIFA Players’ Status Sub-Committee decided to dismiss the DFB’s request (the “Decision”):

“Das Gesuch des Deutschen Fussball-Bundes (DFB) im Namen seines Mitgliedervereins, OFC Kickers Offenbach, um Zustimmung vor dem Gesuch um Zustellung des Internationalen Freigabebescheines für den minderjährigen Spieler, E. (Bosnien und Herzegowina), wird abgelehnt”.

On 14 January 2011, FIFA notified the Decision to the DFB.

It is undisputed that the merits of the Decision were notified to the Appellant and the football club OFC Kickers Offenbach by the DFB only on 11 February 2011.

On 16 February 2011, the Appellant filed a statement of appeal with the CAS to challenge the Decision. On 22 February 2011, he lodged his appeal brief. This document contains a statement of the facts and legal arguments accompanied by supporting documents.

The Appellant challenged the Decision submitting the following request for relief:

“Appellant is seeking an approval of FIFA prior to the international transfer to the German football club of Offenbacher Kickers e. V.

- i) either as a hardship case or*
- ii) based on Article 9, Subparagraph 2b) analog of FIFA’s transfer regulations”.*

By letter of 4 March 2011, FIFA requested the CAS to issue a preliminary decision on the admissibility of the appeal:

“Indeed, we are of the opinion that the appeal of E. was lodged late, i.e. outside the deadline of 21 days since the notification of the decision provided for in art. 63 par. 1 of the FIFA Statutes. Indeed, we would like to very briefly recall herewith – and which will be further developed in our submission – that the presently challenged decision was notified to the parties on 14 January 2011 whereas the statement of appeal was presented to the CAS by E. on 16 February 2011 only”.

On 9 March 2011, the Appellant replied to the Respondent's objection arguing:

“Both involved parties – the appealing player and his football club Offenbacher Kickers – received and noticed the grounds of the decision on February 11 2011.

The case had since August 10, 2010 the full attention of DFB, the football club Offenbacher Kickers and the player awaiting and asking for a decision and after October 6, 2010 awaiting and asking for the grounds of the decision on an almost fortnightly basis – diligently documented by the enclosed emails of semantic and verbal inquiries of DFB and Appellant’s representative as well as by emails of any mediated replies and promises of Respondent.

As a result of this full attention Appellant has not ignored or missed a deadline. He had never the opportunity to enjoy the purported deadline – being served considerably after the expired term following Respondent’s first transmission on January 14, 2011. With due respect we are not arguing the first transmission of Respondent which obviously has been properly notified. But it is also a fact that Appellant and his football team Offenbacher Kickers had been served on February 11, 2011 with no information what so ever on the grounds of the decision before this date.

5. *Within the rules of FIFA's Regulations of Status and Transfer of Players the national association – in this case DFB – is acting as a messenger on behalf of the Respondent to serve the involved parties of football club and player. Consequently, its organisational bearings shall not be assigned to the involved parties of football team and player.*

Consequently, the involved parties of football club and player cannot be held responsible for organisational bearings of the messenger”.

By letter of 14 March 2011, FIFA submitted its observations with respect to the issue of admissibility of Appellant's appeal as follows:

“apart from the Appellant's association of origin, the Football Federation of Bosnia and Herzegovina, the sole formal party participating in and sending and receiving communications in relation to the procedure leading to the challenged decision is our direct member, the national association Deutscher Fussball-Bund (DFB), in accordance with art. 19 para. 4 of the Regulations on the Status and Transfer of Players which requires that the association wishing to register the minor player shall submit the application for approval, (...). In this respect the Appellant's assertion that the national association concerned would be merely acting as a “messenger” in such procedure is manifestly wrong. Accordingly taking into account the outcome of the challenged decision, the DFB is the sole party that is formally aggrieved (...) by the relevant decision”.

According to FIFA, the challenged decision was notified to the DFB on 14 January 2011. That was not contested by the Appellant. Accordingly, it is the Respondent's view that the time limit to lodge an appeal expired on 4 February 2011 so that *“it appears that the Appellant's statement of appeal was not filed at CAS before 16 February 2011 and, therefore, manifestly late”*. Finally, FIFA alleges that the only point of time to be considered for the calculation of the deadline is 14 January 2011, date when the challenged decision was notified to the DFB, which is the only formal party to the procedure leading to such decision.

By letter of 22 March 2011, the CAS Court office informed the parties that the Deputy President of the CAS Appeals Arbitration Division has decided that *“the alleged late filing of the appeal, cannot be “a priori” considered manifestly late pursuant to article R49 of the Code of Sports-related Arbitration (Code)”*.

On 5 April 2011, FIFA submitted an answer, requesting the CAS:

1. *Not to admit the appeal against the decision passed by the Single Judge of the Players' Status Sub-Committee on 28 September 2010 and as a consequence, not to enter into the consideration of the substance of the appeal.*
2. *In the alternative, to reject as to its substance the appeal against the decision passed by the Single Judge of the Players' Status Sub-Committee on 28 September 2010.*
3. *To order the Appellant to cover all costs incurred with the present procedure as well as all legal expenses of the Respondent related thereto”.*

On 1 July 2011, pursuant to R44.3 of the CAS Code, the Panel ordered the Appellant to submit to the CAS Court office a copy of the employment contract he has with the company Quissenz GmbH, as well as a copy of any agreements he may have with Offenbach Kickers.

A hearing was held on 7 July 2011 at the CAS premises in Lausanne, Switzerland. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel.

No witness was called to testify. The parties had ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Panel. After the parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel heard carefully and took into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties even if they have not been summarized in the present award. Upon closure, the parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from Articles 62 ff. of the FIFA Statutes, Article 23 para. 3 of the FIFA's Transfer Regulations and Article R47 of the Code. It is further confirmed by the order of procedure duly signed by the parties.
2. It follows that the CAS has jurisdiction to decide on the present dispute.
3. Under Article R57 of the Code, the Panel has the full power to review the facts and the law.

Applicable Law

4. Article R58 of the Code provides the following:
"The Panel shall decide the dispute according to the applicable regulations and 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".
5. Pursuant Article 62 para. 2 of the FIFA Statutes, "[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".
6. Regarding the issue at stake, the Panel notes that the parties have not chosen any specific national law as the law applicable to the dispute. As a result, subject to the primacy of applicable FIFA's regulations, Swiss law shall apply complementarily.

Admissibility

7. Initially, FIFA questioned the timeliness of the appeal filed by the Appellant and requested a preliminary decision on admissibility. In their view, the statutory limitation of 21 days (between the date of notification of the decision and the lodging of the appeal) had been violated since the decision was notified to the DFB on 14 January 2011. However, the appeal to CAS would have been lodged by Appellant only on 16 February 2011. That would have been 12 days after the statutory deadline that would have expired on 4 February 2011.
8. On 22 March 2011, the CAS decided, on a *prima facie* basis, that the case is admissible as the alleged late filing was not “manifestly late” pursuant to Article R49. This Rule provides that the time limit for filing an appeal with CAS is 21 days, unless the regulations of the sports federation or association concerned provides another time limit.
9. Article 63 para. 1 of the FIFA Statutes provides that the time limit for filing an appeal with CAS is 21 days. However, the FIFA Statutes are silent on the calculation of the time limit. In turn, under Swiss law, deadlines fixed per days start to run from the day following the receipt of a decision, with the day of receipt not included. This method of calculating deadlines has been consistently applied by the CAS in its corresponding precedential case law (e.g. CAS 2006/A/1153, para. 41; CAS 2007/A/1364, para. 6.3; and CAS 2008/A/1583 & 1584, para. 7).
10. In the present case, whereas the Decision was notified to the DFB on 14 January 2011, it is undisputed that it was served on Appellant only on 11 February 2011. Appellant, therefore, had under Article 63 para. 1 of the FIFA Statutes until 4 March 2011 to file his Statement of Appeal, which he did on 16 February 2011.
11. Consequently, Appellant has lodged its appeal within the 21 day-deadline contained in Article R49 of the CAS Code and Article 63 para. 1 of the FIFA Statutes. Hence, the Panel confirms that CAS decision of 22 March 2011 and finds that the appeal against the Decision is admissible.

Merits

12. There is no issue regarding the standing to appeal (*locus standi*) of the Appellant: It was uncontested that E. had the legal right to appeal against the Decision at the request of the DFB. The Player was affected as the DFB had launched such request for an approval to issue an International Transfer Certificate for him.
13. Pursuant to Swiss law and CAS jurisprudence, provided he is a party to an arbitration clause, anyone who is affected by the decision and has a legitimate or sufficient interest in the case may file an appeal (cf. RIEMER, Anfechtungs- und Nichtigkeitsklage, Bern 1990, ZGB 75 no. 17; see also CAS 2007/A/1278 & 1279, para. 78; CAS 2007/A/1392, paras. 63 *et seq.*; CAS 2008/A/1583 & 1584, paras. 9.5.5.1 to 9.6.1; and CAS 2009/A/1880 & 1881, paras. 153 & 154). It is undisputed between the Parties that the Appellant is affected by the Decision and has

a sufficient interest in the case. Accordingly, the Panel finds that the Appellant had standing to appeal and was thus entitled to file the present appeal.

14. First, in his brief, the Appellant invokes Article 19 para. 2(b) of the FIFA Regulations *in extenso*, but also refers to Article 19 para.2 in general without much elaboration of this latter point. During the hearing, the Appellant invoked Article 19.2(a), and for this reason the CAS Panel decided to address his request under Article 19.2 *in toto*.
15. Second, the Appellant explicitly conceded, when responding to questions by the CAS Panel, that Article 19 para. 2 does not explicitly apply to his case. The Appellant called for an analogous application (*mutatis mutandis*) of this provision to the facts of the case, calling for an interpretation in line with the ‘spirit’ rather than the ‘letter’ of this provision.
16. The CAS Panel first recalls that, by virtue of Article 19 para. 1, all international transfers of under-aged football players are prohibited: players who have not completed their eighteenth year are considered under-aged. Article 19 para.2 provides for three exceptions. These prerequisites are not fulfilled for the following reasons:
17. Article 19 para. 2(a) deals with the following situation: the Player’s parents move to the country in which the new club is located for reasons not linked to football. The official commentary to Article 19 para. 2(a) calls for an interpretation of the term ‘parents’, appearing in the body of this provision, *stricto sensu*.
18. Although this term conceivably could cover situations beyond the natural parents, it definitely does not cover the situation before the CAS Panel in the instant case. The natural mother of the football player did not move at the time when the Player moved to Germany for reasons unrelated to football. The Appellant’s residence may be at his aunt’s house. However, she is not a parent to the Appellant. Her reasons for moving to Germany from Bosnia and Herzegovina were not clarified before the CAS Panel in more detail, but appearingly were unrelated to the Player. For these reasons, this provision cannot be invoked in the instant case as legal basis in order to authorize an international transfer for E.
19. Article 19 para. 2(b) calls for some additional reflection. It imposes three obligations of a substantive nature and one of procedural nature that the new club must fulfil: The club must provide the transferred player with football education, with vocational training; and it must also look after the player in the best possible way when it comes to accommodation and nutrition. It must finally notify the federation concerned and provide evidence regarding the manner in which it has gone about its substantive obligations. The CAS Panel has no reason to doubt that E. indeed benefits from the excellent hospitality offered by Kickers Offenbach F.C., his host football club, and his employer and would continue to do so in the near future. The CAS Panel also acknowledges that the Appellant may have received an excellent education during his stay in Germany and may continue to do so.
20. The question is, however, whether these circumstances would justify an interpretation of Article 19 para. 2(b) by analogy as this provision allows for exceptional transfers of under-aged players

only if the transfer takes place within the territory of the EU (European Union), and that of the EEA (European Economic Area). The player has completed his 16th year. On its face, this provision is limited to a well-defined geographic scope: As Bosnia and Herzegovina is neither a member of the EU, nor of the EEA, it was uncontested between the Parties that this provision literally would not apply to the facts of the present case.

21. In his briefs, the Appellant had, however, suggested that this provision might apply to the facts of this case by analogy in light of the Stabilization and Association Agreement signed between the EU and Bosnia and Herzegovina (Council Regulation 594/2008 of June 16, 2008).
22. The CAS Panel notes that, as a matter of principle, the rationale for Article 19 para. 2(b) is straightforward: There is free movement of services and services suppliers within the EU and the EEA (along with other freedoms of production factors). Article 19 para. 2(b) aims at acknowledging this reality and exceptionally allowing for international transfers of under-aged players.
23. The Stabilization and Association Agreement contains only trade provisions and does not anywhere address free movement. Therefore, even if by analogy one could extend the application of Article 19 para. 2(b), the argument of Appellant would not prevail. Moreover, the Appellant did not submit other evidence that might have required a different reading of this provision.
24. Article 19 para. 2(c) also does not apply to the facts of the case as it affects only players living close to the national border of a neighbouring association.
25. The Appellant also suggested that the instant was a ‘hardship’ case, the statutory silence in this respect notwithstanding.
26. The CAS Panel acknowledges that the rationale for Article 19 was to stop some forms of transfers akin to a “trade of minor players” and not to stop voluntary transactions. At the same time, the CAS Panel sees the need to apply the protection of minors strictly. Opening up the door to exceptions beyond those carefully drafted and included in the present text would unavoidably lead to cases of circumvention of the rationale for this provision.
27. The decision to reject the present appeal will not deprive him of the possibility to continue both his vocational as well as his football training, and will only defer the possibility to obtain an international transfer certificate by a few months. At the same time, the CAS Panel fails to see why, separately from Article 19 para. 2 of the FIFA Regulations, this could be a hardship case. The primary reason for the Appellant's move to Germany was education which he is continuing to receive. Although he is not allowed to play football in professional matches until he reaches his 18th year, he is allowed to play football and train with his team. While the Appellant is affected by Rules for the protection of minors, there is no evidence that would have justified to consider an exceptional hardship going beyond the general impact of the provisions on the protection of minors.

28. For all the reasons mentioned above, the CAS Panel rejected the appeal lodged by E.

The Court of Arbitration for Sport rules:

1. The appeal filed by E. against the decision issued on 28 September 2010 by the Single Judge of the FIFA Players' Status Sub-Committee is dismissed.
2. The decision adopted on 28 September 2010 by the Single Judge of the FIFA Players' Status Sub-Committee is confirmed.

(...)

5. All other prayers for relief are dismissed.