



Arbitration CAS 2015/A/4256 Feyenoord Rotterdam N.V. v. Union des Associations Européennes de Football (UEFA), award of 24 June 2016

Panel: Mr Alexander McLin (Switzerland), President; Mr Manfred Nan (The Netherlands); Mr Jeffrey Benz (USA)

Football

Sanctions against a club for racist behaviour of supporters

Definition of “racism” in the UEFA Disciplinary Regulations

Presumptive validity of the match report and shift of the burden of proof

Objective test to apply when assessing whether or not an act constitutes an insult to human dignity

Proportionality of the sanction

1. **Article 14.1 of the UEFA Disciplinary Regulations (DR) is intended to prevent insults to human dignity. Those that are unacceptably discriminatory, such as one based on skin colour and race, are grounds that are specified as such. It is aimed not only at the prevention of insults based on race, but also at other forms of similarly reprehensible discriminatory behaviour. In order to satisfy the elements of Article 14.1 DR, there must be (1) an insult to human dignity, and (2) such insult must be on the grounds of race or ethnic origin.**
2. **Article 38 DR creates a ‘regulatory assumption’, that the facts contained in official UEFA reports are correct. This presumption shifts the burden of proof to the party arguing of their inaccuracy. The rationale for the presumptive validity is sound, seeing as UEFA would not be in a position to prove violations of its applicable rules in the absence of such presumption, given its relative lack of ability to secure evidence in stadia over which it does not have outright control.**
3. **When considering the objective of the regulation and the campaign against racism generally, the test to apply must surely conclude that an act violates Article 14.1 DR if an objective onlooker, wherever he or she is situated, be it in the stadium either on the pitch or in the stands, or behind a screen in any location (worldwide or indeed in outer space), could reasonably conclude that the act constitutes an insult to human dignity as envisioned by Article 14.1 DR. To find otherwise would be permissive of acts that are racist or otherwise reprehensible to some individuals on the basis that they are not to others, and that the perception of the latter should somehow prevail over that of the former. This sort of relativism was surely not intended by the drafters of the DR, whose purpose was undoubtedly to elaborate uniform standards that could be universally applicable throughout association football in Europe.**
4. **Article 17.3 DR provides that the disciplinary sanctions enumerated in Article 14 DR are standard measures which can be reduced or increased by the competent**

disciplinary body only under exceptional circumstances. Although it is unclear what exactly constitutes exceptional circumstances, as the intent of the drafters in this respect is not known, the reasonable possibility that an act objectively qualifying as an insult to human dignity be perpetrated without any racist intentions (“unintentional racism”) can lead an adjudicating body to reduce the sanction in application of the principle of proportionality.

1. This is an appeal by Feyenoord Rotterdam N.V. (“Feyenoord” or the “Appellant”) against the decision of the Union des Associations Européennes de Football (“UEFA” or the “Respondent”) Appeals Body dated 17 September 2015, which rejected Feyenoord’s prior appeal against and upheld the decision by the UEFA Control, Ethics and Disciplinary Body of 21 May 2015. The latter decision had held Feyenoord responsible for racist behaviour by its supporters, and, finding this to be a second violation of Article 14 (1) of the UEFA Disciplinary Regulations (“DR”), ordered Feyenoord to play its next UEFA competition match as a host club behind closed doors and to pay a fine of EUR 50,000.

I. PARTIES

2. Feyenoord is a public limited company under Dutch law and a professional football club, member of the Royal Netherlands Football Association (“KNVB”), established at Van Zandvlietplein 3, 3077 AA, Rotterdam, the Netherlands.
3. UEFA is an association under Swiss law further to Article 60 *et seq.* of the Swiss Civil Code, and the European continental governing body for football, established at Route de Genève 46, CH-1260 Nyon 2, Switzerland.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the arbitral tribunal (the “Panel”) has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
5. During a UEFA Europa League football match played between Feyenoord and AS Roma teams at Feyenoord’s home stadium in Rotterdam on 26 February 2015, an inflatable banana of about 115 cm in length and 30 cm in diameter was thrown onto the pitch during the course of the match. It landed between the stands and the perimeter boards, in relative proximity to where match play had halted for a throw-in.

6. Play was temporarily suspended by the match referee after a determination that the inflatable banana had been thrown in the direction of AS Roma player Gervais Yao Kouassi (“Gervinho”), and that this constituted a racist act calling for a specific anti-racism procedure to be set in motion. The referee’s determination was based in part on the visual assessment of one of the Additional Assistant Referees, Mr. Nicolas Rainville (the “AAR2”).
7. The incident was widely reported in news media as an incident of racist nature, and it led to a UEFA disciplinary procedure that resulted in a decision by the UEFA Control, Ethics and Disciplinary Body (the “CEDB”), which in a decision dated 21 May 2015 held the Appellant responsible for a breach of Article 14 of the DR attributable to the racist behaviour of Feyenoord’s supporters. The CEDB imposed the following disciplinary measures on Feyenoord:
 - A fine of EUR 50,000; and
 - An order to play a match behind closed doors, such measure to be applied for the next UEFA club competition match that Feyenoord hosts.
8. This decision was the subject of an appeal by Feyenoord to the UEFA Appeals Body in July 2015. On 17 September 2015, the UEFA Appeals Body dismissed Feyenoord’s appeal and confirmed the CEDB’s decision. The UEFA Appeals Body decision, notified to Feyenoord on 16 October 2015, is the subject of the present appeal before CAS.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

9. In accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “Code”), the Appellant filed its statement of appeal on 26 October 2015. Therein Appellant appointed Mr. Manfred Nan, Attorney-at-law in Arnhem, the Netherlands, as arbitrator. It also requested a ten-day extension of the time limit to submit its appeal brief.
10. The CAS Court Office wrote to the parties on 29 October 2015 to inform them of the relevant filing deadlines, including requesting comment from Respondent regarding the extension sought by Appellant and the choice of English as the language of arbitration.
11. Respondent replied on 29 October 2015 that it consented to a ten-day extension for the filing of the appeal brief, and to English as the language of arbitration.
12. On 30 October 2015, Respondent nominated Mr Jeffrey G. Benz, attorney-at-law in London, United Kingdom and Los Angeles, USA, as arbitrator.
13. Further correspondence between the parties and the CAS Court Office took place through 16 November 2015, whereby the CAS Court Office noted that while it did not object to the appointment of Mr Benz, his legal residence being Los Angeles, USA might not be compliant with Article 63 para. 2 of the UEFA Statutes, which requires the appointment of arbitrators domiciled in Europe, and whereby Appellant sought an additional extension, until 20

November 2015, for the filing of its appeal brief. Appellant consented to the appointment of Mr Benz, and Respondent consented to the additional extension.

14. In accordance with Article R51 of the Code, the Appellant filed its appeal brief on 20 November 2015, which the CAS Court Office confirmed receipt of in its letter to the parties dated 23 November 2015, granting Respondent 20 days for the filing of its answer.
15. On 4 December 2015, the CAS Court Office informed the parties of the appointment of the Panel as follows: Mr Alexander McLin, attorney-at-law in Geneva, Switzerland (President), Mr Manfred Nan, attorney-at-law in Arnhem, the Netherlands, and Mr Jeffrey G. Benz, attorney-at-law in Los Angeles, USA, and London, UK (Arbitrators).
16. In accordance with Article R55 of the Code, the Respondent filed its answer on 14 December 2015.
17. On 15 December 2015, the CAS Court Office invited the parties to express their preference as to whether a hearing should be held in this matter. On 16 December 2015, Respondent replied that its preference would be for the matter to be decided on the basis of the parties' written submissions. On 22 December 2015, Appellant requested a hearing, expressed the desire to hear Mr Nicolas Rainville (AAR2), and the desire to hear the audio recordings of the closed circuit communication between officials during the match with respect to the "banana incident". It requested that the Panel order Respondent to produce both Mr Rainville and the audio recordings at the hearing, as well as the complete file of previous proceedings before UEFA.
18. On 7 January 2016, the CAS Court Office informed the Parties of the Panel's decision to grant Appellant's requests concerning the holding of a hearing, the production of the complete UEFA file and the audio recording of the referees' communication during the match. By the same letter, the Panel invited the Appellant to ensure the presence of Mr W. (the proffered "thrower" of the inflatable), and Respondent to ensure the presence of Mr Rainville at the hearing.
19. On 18 January 2016, Respondent furnished the complete file and a letter signed by Mr. Pierluigi Collina, UEFA's Chief Refereeing Officer, regarding the audio recordings of the referee communications during the match. Therein, Mr. Collina explains that there were:

"problems related to the recordings made by the referee team of Mr. Clément Turpin at the matches they officiated in during the season 2014/2015. Indeed his team did not successfully record any communication from these matches. Consequently, the attached audio recording only provides a persistent noise and no audible communication between the parties".

In his letter, dated 15 January 2016, Mr Collina goes on:

"I also would like to add that, in the context of internal conferences given by myself to the UEFA referees during the last and the current year explaining how communications between referees at football matches shall

be made, I used the example of Mr. Turpin's referee team to demonstrate how important it is to take care and understand the technology of the recording system in order to avoid situations like the one in hand.

The above information can be personally confirmed by myself as well as by the referee himself.

In this regard, I swear that what I am testifying here is truth”.

20. On 25 January 2016 and 1 February 2016 respectively, the Respondent and the Appellant returned duly signed copies of the Order of Procedure to the CAS Court Office.
21. A hearing was held on 17 February 2016 at the CAS Court Office in Lausanne. Appellant was represented by Mr Eric Gudde, Managing Director; Mr Maarten van Holstein, “fan coach”, and assisted by Mr Joris van Benthem, General Counsel. Respondent was represented by Dr Emilio García, Head of Disciplinary and Integrity; Mr Andrew Mercer, Legal Counsel; and Mr Carlos Schneider, Disciplinary Lawyer.
22. Two witnesses were heard at the hearing, Mr. W. (the proffered “thrower” of the inflatable), and Mr Nicolas Rainville, the Additional Assistant Referee (AAR2). Ms. Karin Ter Haar-van den Berg provided interpretation from and into Dutch for Mr. W.
23. At the hearing, further to Appellant’s request, the parties and the Panel agreed that in light of Mr. W.’s young age, this award would not identify him by name.
24. Each witness heard by the Panel was invited by its President to tell the truth subject to the sanctions of perjury. Both parties and the Panel had the opportunity to examine and cross-examine the witnesses. The parties then had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.
25. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure and that their right to be heard had been respected.
26. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

27. The Appellant’s submissions, in essence, may be summarized as follows:
 - The use of inflatable bananas by Feyenoord fans is part of a tradition that is not racist in nature, but rather seeks to “*create a positive and supporting atmosphere*” in the stands.
 - While Mr W. did throw the inflatable banana, and the latter did land on the pitch (not on the playing pitch but outside the field lines), Mr W. did so out of frustration when a throw-in was awarded to what he considered was the wrong side and in general frustration at how the match was going for Feyenoord until that moment. In doing so, he did not

throw the inflatable at a particular player. Indeed, the nature of the object is such that it would be difficult to direct at any particular target.

- Mr Turpin's conclusion concerning the racist nature of the act is subjective and is based on the third party assessment of the AAR2. Given the serious nature of the accusation and the implications for Feyenoord, Mr Turpin, as Referee, "*should have – at least – a high degree of confidence*".
- Given the importance of the fight against racism, which Appellant recognizes, there has been "overregulation" and "overinstruction" of the issue. This is due to the political nature of the problem, and resulted in an overreaction by the officials in this case, who saw a racist act where there was none to be seen.
- The context, which is highly relevant, is one in which a 17-year old "*coloured boy*" threw a "*harmless toy*" at a home match of Feyenoord, which had previously never experienced acts of a racist nature. This context was not taken into account by the UEFA Appeals Body.
- No evidence suggests that a Feyenoord fan committed a racist act. This conclusion is based on an interpretation after the fact, in turn based on an erroneous decision by the referee, itself based solely on the AAR2's observation. No broadcasted images convey that the inflatable banana was thrown in the direction of a specific player.
- The use of media reports by the Respondent to support the UEFA Appeals Body decision conflicts with the principles of a fair trial under Article 6 of the European Convention on Human Rights. The fact that these reports stated that a racist act had been committed is the result of an incorrect value judgment by a UEFA official, which in turn had immediate negative impact on Feyenoord and impaired its ability to defend itself.
- The UEFA Disciplinary Regulations are lacking in that they do not define racism. As such, they should be interpreted *contra proferentum*. If the so-called "reasonable onlooker" standard (see *infra*) is to be used to determine what constitutes a racist act, the reasonable onlooker should be taken to know that Mr W., the thrower, is himself black.
- Secondly, even if Feyenoord were found in breach of Article 14.1 in connection with Article 8 of the DR, the sanctions imposed are disproportionate given that the reputational and economic damage to the club is already significant. A number of mitigating factors should be considered. These include the following: (1) even if the act is considered racist, it is substantially less severe than others having occurred in Europe in recent years; (2) there is no racial intention as evidenced by the race of Mr W.; (3) other African players have not experienced acts of racism at Feyenoord; and (4) an inflatable banana cannot hurt anyone as it "*acts as a symbol to create atmosphere and laughter*". These should be considered as exceptional circumstances used to reduce Feyenoord's sanction under Article 17 para. 3 DR.

28. In its statement of appeal, Appellant requests the following relief:

“Primary:

To annul and set aside the whole decision of the UEFA Appeals Body as referred to above.

Secondary:

Only in the event that the honourable CAS judges that a sanction on Feyenoord could lawfully be imposed on the basis of the UEFA Statutes & Regulations and Swiss Law:

To issue a new decision imposing in good justice a lower and proportionate sanction on Feyenoord replacing the decision of the UEFA Appeals Body thus enabling Feyenoord at least to play the next home match in the UEFA competitions with supporters as usual.

More Secondary:

To annul the decision of the Appeals Body and refer the case back to the Appeals Body in a new composition of the panel in order for the new panel of the UEFA Appeals Body to finalise the investigations into the facts (such as the facts about the throw of the inflatable banana) and issue a new decision”.

In its appeal brief, Appellant requests the following relief:

“Primary:

Feyenoord requests to annul and / or set aside the whole decision of the UEFA Appeals Body against which Feyenoord appealed, as a result of which no sanction rests on, and / or applies, for Feyenoord.

Secondary:

Only in the event that the honourable CAS judges that a sanction on Feyenoord could lawfully be imposed:

Feyenoord requests to issue a new decision imposing in good justice a lower and proportionate sanction on Feyenoord replacing the decision of the UEFA Appeals Body thus enabling Feyenoord at least to play the next UEFA competition match in its own stadium with supporters”.

At the hearing, Appellant specified that it maintained the third alternative request for relief (*i.e.* the remanding of the case to the UEFA Appeals Body) despite its absence from the appeal brief, explaining that it had been left out of the appeal brief unintentionally.

29. The Respondent’s submissions, in essence, may be summarized as follows:

- The facts support the simple conclusion that a Feyenoord supporter threw an inflatable banana at a black player of AS Roma. This is substantiated by media reports that described the incident as racist before official UEFA reports were available, and were therefore the result of independent conclusions.
- Feyenoord had been sanctioned for discriminatory behaviour in the same UEFA season, and this therefore constitutes recidivism. As such, Feyenoord received the minimum applicable sanction under the DR.
- The UEFA DR and their application are grounded in the policy of UEFA’s fight against racism, the overarching importance of which must be considered in the application of sanctions thereunder.

- Considerations of absence of racist intent of the supporter are not relevant. Under Article 28 DR, the referee's report is presumed to be accurate. The questions to be answered are therefore (1) whether Appellant has been able to breach the accuracy of the referee's report with respect to the fact that an inflatable banana was thrown towards a black player, and (2) whether such an act is racist under Article 14 DR.
- The policy of regulatory presumption of the accuracy of official reports is necessary, as only the local club has access to the evidentiary means that could be used to prove or disprove rule violations after the fact. In addition, the AAR2 in this case was better placed to observe what occurred than other officials, and the resulting referee's report is therefore not circumstantial in nature, but results from precise observation.
- Given this regulatory presumption, Appellant has the burden of proving that the inflatable banana was not deliberately thrown at Gervinho, which it has not done.
- The evidence provided in the referee's report is far from circumstantial and rather the result of directly witnessing the act at issue.
- Appellant's explanation that the thrower of the inflatable banana is not believable given that Feyenoord was leading in the aggregate score after the initial match in Rome, and therefore it was more likely that the reason for the throwing of the inflatable was aggressiveness directed at Gervinho, especially given that the act directly followed an action on the pitch performed by Gervinho.
- The video clearly shows that the crowd was aggressive towards Gervinho immediately before the incident, including the throwing of a paper roll that nearly missed his head. This makes it unlikely that the act of throwing the inflatable banana was not somehow directed at Gervinho. Likewise, the fact that the inflatable is difficult to direct when thrown does not make it any less likely that, in this context, someone nevertheless deliberately tried to throw it at the player.
- The definition of racism in Article 14 DR is clear, and the throwing of the inflatable banana falls clearly within it in the present context. To distinguish between the relative racist connotations of inflatable and edible bananas changes nothing, as the symbolism amounts the same despicable comparison of black people with monkeys.
- The fact that the proffered thrower, Mr. W., is himself dark-skinned neither excludes the possibility of him being racist, nor makes the act any more acceptable under the applicable rules.
- Appellant has failed to categorically prove that Mr. W. is indeed the thrower of the inflatable, as it is impossible to determine from the video footage available.
- Objectively, a reasonable observer (as highlighted by the testimony of AAR2 and the referee's report), as well as the athlete himself and media reports that independently

concluded that the incident was of racist nature, would believe that the act is of a racist nature.

- The sanctions pronounced are proportional under the circumstances given the recidivist nature of the offense, and the powers of CAS to review these are limited according the relevant CAS case law.

30. Respondent makes the following requests for relief:

“UEFA respectfully requests the CAS to issue an award on the merits:

- *Rejecting the reliefs sought by Feyenoord.*
- *Confirming the decision under appeal.*
- *Bearing in mind that UEFA has more financial resources than Feyenoord and the defence of UEFA has been conducted by in-house lawyers, Respondent honestly considers that no contribution towards the legal fees and other expenses incurred by UEFA in connection with these proceedings must be paid by Appellant”.*

V. JURISDICTION

31. The Appellant relies on Articles 59 to 64 of the UEFA Statutes as conferring jurisdiction on the CAS.

32. Article R47 of the CAS Code provides that *“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body”.*

33. Article 62 para. 1 of the UEFA Statutes provides that *“[a]ny decision taken by a UEFA organ may be disputed exclusively before the CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration”.*

34. The jurisdiction of the CAS is not contested by the Respondent, and is confirmed by the parties’ respective signatures on the Order of Procedure.

35. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

36. Art. 62.2 of the UEFA Statutes (2014) states:

The time limit for appeal to the CAS shall be ten days from the receipt of the decision in question.

37. Art. 63.3 of the UEFA Statutes (2014) states:

An appeal before the CAS may only be brought after UEFA's internal procedures and remedies have been exhausted.

38. The UEFA Appeals Body decision is dated 17 September 2015. Appellant filed its Statement of Appeal on 26 October 2015. Appellant claims to have received the decision with grounds on 16 October 2015.

39. The Respondent expressly states that it does not object to the admissibility of the appeal, as it is directed against a final decision of UEFA.

40. The appeal is therefore admissible.

VII. APPLICABLE LAW

41. According to Article 63 para. 3 of the UEFA Statutes (2014 edition), “... *proceedings before the CAS shall take place in accordance with the Code of Sports-related Arbitration of the CAS*”.

42. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS, 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision*”.

43. According to Article 5 of the DR, “*the disciplinary bodies base their decisions on UEFA's Statutes, regulations, directives and decisions, as well as the Laws of the Game and Swiss law and any other law that the competent disciplinary body considers applicable*”.

44. Therefore, the applicable law under which the Panel will decide the present dispute is to be found in the UEFA regulations, including the DR and, subsidiarily, Swiss law.

VIII. MERITS

45. Much is made by both parties of the importance of context in this case. While undoubtedly the context in which the facts play out has a real bearing on the nature of the alleged offence and whether indeed it was committed, it must not be forgotten that the determinative framework is established by the rules: in this case, the UEFA DR.

A. The Definition of Racism and its Applicability

46. Article 3 of the DR reads as follows:

The following are subject to these regulations: a) all member associations and their officials (i.e. all persons assigned by a member association to exercise a function); b) all clubs and their officials (i.e. all persons assigned

by a club to exercise a function); c) all match officials; d) all players; e) all persons assigned by UEFA to exercise a function.

Article 8 of the DR reads as follows:

A member association or club that is bound by a rule of conduct laid down in UEFA's Statutes or regulations may be subject to disciplinary measures and directives if such a rule is violated as a result of the conduct of one of its members, players, officials or supporters and any other person exercising a function on behalf of the member association or club concerned, even if the member association or the club concerned can prove the absence of any fault or negligence.

Article 14.1 of the DR reads as follows:

Any person under the scope of Article 3 who insults the human dignity of a person or group of persons on whatever grounds, including skin colour, race, religion or ethnic origin, incurs a suspension lasting at least ten matches or a specified period of time, or any other appropriate sanction.

47. It is Appellant's position that racism is not defined in the DR, and it invites the panel rather to apply the definition stipulated in the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. In the alternative, it argues that UEFA should have provided examples in its regulations if it intended for them to extend to acts that did not have a racist intention, but could be considered as such by a reasonable onlooker.
48. With due respect to Appellant's argument, it is clear from the initial reading of Article 14.1 DR that the provision is intended to prevent insults to human dignity. Those that are unacceptably discriminatory, such as one based on skin colour and race, are grounds that are specified as such.
49. Respondent correctly points out that its regulations, applicable as association rules under private law, set a high standard as reflected in the DR. This simply provides a framework that is applicable within the context of European football and is therefore more specific in its scope (if not in its subject matter) and privately regulated. Appellant does not contend that Article 14.1 DR is somehow too vague to be applied – it chooses rather to profess that racism is simply not defined. This interpretation of the DR cannot realistically be entertained, when it is clear that it is aimed not only at the prevention of insults based on race, but also at other forms of similarly reprehensible discriminatory behaviour. CAS precedent reaches similar conclusions, going so far as to state that in order to satisfy the elements of Article 14.1 DR, there must be (1) an insult to human dignity, and (2) that such insult must be on the grounds of race or ethnic origin (CAS 2013/A/3324 and 3369, at para. 9.12).
50. The analysis in CAS 2013/A/3324 and 3369 raises the interesting question, pertinent in this case, of whether a racist act (as envisaged by Article 14.1 DR) can ever be unintentional in nature. This is addressed, to the extent necessary, in *C. infra* when considering the relevance of context and the applicable test for determining the existence of a racist act, and in *D. infra* with respect to proportionality.

B. The Presumptive Validity of the Referee's Report

51. Appellant argues that the information upon which the referee made his decision is somehow erroneous or unsound, “based on the circumstantial observation of the assistant referee” and in any event insufficient to reach the conclusion that a racist act had occurred. It alleges that the training of officials with respect to racism has gone so far as to create a climate in which racist acts are seen where there are none to be seen. Moreover, according to Appellant, an appropriate assessment of context (see C. *infra*) would lead to the conclusion that the act could not have been racist.

52. Respondent's position is that the referee's report must be deemed correct from a factual standpoint, based on the Article 38 DR which provides as follows:

“Facts contained in official UEFA reports are presumed to be accurate. Proof of their inaccuracy may, however, be provided”.

53. According to Respondent, Appellant therefore bears the burden of disproving the accuracy of the facts in the report, as stated previously by the CAS:

“Article 38 of the UEFA Disciplinary Regulations creates a ‘regulatory assumption’, that the statement contained in official UEFA reports are correct. This regulatory assumption shifts the burden of proof to the Appellant in this case. The function of the burden of proof is to allocate who bears the risk that the proof of a specific fact is not possible. The regulatory assumption that the report of the UEFA inspector is correct results in a shift of the burden of proof to the Appellant” (CAS 2015/A/3926, para. 78).

54. Further CAS precedent confirms that this presumption and its corresponding shift of the burden of proof apply to official UEFA match reports (CAS 2013/A/3139, para. 70).

55. The rationale for the presumptive validity is sound, seeing as UEFA would not be in a position to prove violations of its applicable rules in the absence of such presumption, given its relative lack of ability to secure evidence in stadia over which it does not have outright control (CAS 2015/A/3926 para. 79). The question therefore is whether the arguments brought forward by Appellant are sufficient to rebut the presumption of validity of the facts contained in the report.

56. The referee states in his report that at the 38th minute, after the ball had gone out of bounds, he was informed by the AAR2 that a

“huge plastic banana’ was thrown in the direction of [Gervinho]. I approached, and I actually saw this banana which had fallen again next to the corner post.

Considering that this element was a gesture clearly racist in the direction of a black player of color I made the decision to alert Venu Director and to set up the step no. 1 of the procedure ‘anti-racism’” (sic).

57. The UEFA Europa League (“UEL”) delegate states in his report that “[a]n inflatable banana was also thrown onto the pitch by the home supporters in the 38th minute”, and his additional report states at “38 mins” that

“[a]n inflatable banana (see pic 1) was thrown onto the pitch from sector Z4 – Olympiatribune (home supporters) which the referee believed to be a racist act against an AS Roma player who was at the time in that area of the pitch. The referee took this item to the Venue Director and requested that the step one announcement of the 3-step procedure be made over the public address system. This was made approximately 1 minute later”.

58. At the hearing, the Panel viewed the video evidence that, while not entirely conclusive, does not appear to contradict the content of the reports. Mr Rainville (AAR2) explained that in his estimation he was approximately 40 metres from where the inflatable had landed on the pitch. He explained that his attention was focused on this area by virtue of the paper roll which had been thrown in the direction of Gervinho, and that only this player was in his angle of vision at time. He saw the inflatable arriving in Gervinho’s direction, and immediately reported to the referee on the closed circuit radio system that a banana had been thrown at Gervinho. He said that the referee had originally thought it was a real banana until he saw it, and that it was the referee who made the connection that the inflatable banana had been thrown at a black player, which led to his decision to implement the anti-racism protocol. Mr Rainville also mentioned that the atmosphere was aggressive, and that he and the goalkeeper that was close to him had been the target of various projectiles throughout the match. Finally, he mentioned that while the audio communications equipment was tested the day prior to the match, the recording function was not, and it had therefore been a good idea to make a circular letter about this.
59. In the Panel’s assessment, the reasons for the presumptive validity of the referee’s report are sound, the rule is clear and the principle sufficiently established. While it is unfortunate that the audio evidence was deficient, neither this, nor the video evidence, nor the testimony at the hearing contradict the content of the report which is presumed as valid. Not only did Mr Rainville’s testimony confirm the report’s contents, but Mr W.’s admission that he threw the inflatable and that it landed on the pitch in the area corroborated by the video evidence and by Mr Rainville’s testimony confirms that the facts as described in the report deserve to be deemed as correct. The UEL delegate’s reports also appear to concord with the fact that the inflatable was thrown onto the pitch from the same area of the stands.
60. The reality is therefore that the AAR2 reported what he saw. The referee made the call in the context in which he found himself. These decisions are difficult and must be supported unless there is sufficient reliable evidence that contradicts the content of official reports. This does not appear to be the case here.

C. Context and the “Reasonable Onlooker”

61. While the parties agree that context is highly relevant to the outcome of whether what occurred constitutes a racist act, there appear to be differing interpretations of the actual context of the match. Likewise, while there appears to be some degree of agreement as to the applicability of the standard to determine whether an act or occurrence is racist in nature, unsurprisingly there are differing views as to what exactly it means to be a “reasonable onlooker” or “reasonable and objective observer”.

62. There is now a significant line of CAS cases which have established the test for a violation of Article 14.1 DR as an objective one:

“The Panel finds these cases relevant insofar as they establish a common thread to the effect that the assessment of whether an individual is supporter of a team is based on the perception of the ‘reasonable and objective observer’” (CAS 2015/A/3874, para. 193).

“In the Panel’s view the test of whether or not there has been an insult qualifying for sanctions under Article 14 UEFA DR, is the perception of the reasonable onlooker. It is in that sense objective and not subjective” (CAS 2013A/3324 and 3369, para. 9.13).

“The Panel adheres to the considerations of the panel in CAS 2007/A/1217 and thus finds that the main issue here is to assess whether the perpetrators that launched the fireworks from outside the stadium (influencing the smooth running of the match) are to be considered supporters of the Club in the eyes of a reasonable and objective observer” (CAS 2013/A/3139, para. 67).

63. As a result, all factors that might be relevant to a reasonable onlooker’s impression of whether or not an act was racist should be considered, and the impression of one player (even the player towards whom the act is ostensibly directed), while it may be relevant, is not solely determinative.
64. Appellant believes that there are a few factors that favour an interpretation of context more favourable to its stance. These are the following: (a) inflatable bananas are meant as props to create “positive atmosphere” and, as opposed to edible ones, have not been associated with racism and are therefore not racist in nature; (b) Mr W., the proffered thrower of the inflatable banana, of Antillean parentage, is dark-skinned himself and therefore cannot be deemed to intend to commit a racist act against a black player; (c) former black players at Feyenoord who were Ivory Coast nationals did not feel as if they were targets of racism by Feyenoord fans; (d) the nature of the inflatable is such that it could not be reliably thrown in the direction of a particular target; and (e) a reasonable onlooker should be deemed to be cognizant of these contextual elements.
65. Respondent believes that the relevant contextual factors are rather that (f) the match was taking place in an aggressive and violent verbal atmosphere; (g) the symbolism of the banana when thrown in the direction of a black player is highly racist; (h) it is unclear whether Mr W. is indeed responsible for throwing the inflatable, and in any event his skin colour is not therefore likely to be known to those who witness the incident; and (i) the perception of outside parties, including media, who independently concluded that the incident was racist is a reliable indicator. This is in addition to the contents of the official report, which are to be presumed accurate and reflect the views of the officials.
66. In the Panel’s view, when considering the objective of the regulation and the campaign against racism generally, the test to apply must surely conclude that an act violates Article 14.1 DR if an objective onlooker, wherever he or she is situated, be it in the stadium either on the pitch or in the stands, or behind a screen in any location (worldwide or indeed in outer space), could reasonably conclude that the act constitutes an insult to human dignity as envisioned by Article

14.1 DR. To find otherwise would be permissive of acts that are racist or otherwise reprehensible to some individuals on the basis that they are not to others, and that the perception of the latter should somehow prevail over that of the former. This sort of relativism was surely not intended by the drafters of the DR, whose purpose was undoubtedly to elaborate uniform standards that could be universally applicable throughout association football in Europe. This legislative intent was given credence at the hearing by the Respondent's representatives, who explained that the UEFA Executive Committee had determined the need for stricter provisions in the DR with respect to combatting racism when compared to the original proposal of the drafting committee, which had foreseen a more lenient framework. All of this highlights that in the fight against racism, there is little room for actions that, while they might be acceptable by some, are offensive to others.

67. Under this rationale, the fact that Mr Rainville saw it fit to report the matter to Mr Turpin, and the fact that Mr Turpin concluded, in the context in which he was doing his job – a vibrant football match – that the act was of racist nature, was sufficient for the act to constitute a violation of Article 14.1 DR. Another way to state this is that if the referee's report withstands the challenge to its presumptive validity (which we have concluded it does), it is more likely than not that the findings that it contains, when they are the product of the referee's (or indeed other officials') professional judgment, are of a reasonable nature. The fact that others may also have considered the act racist, including Gervinho himself, is an additional (but not essential) indication that it can reasonably be considered as such.
68. In reaching this conclusion, the Panel attributes no weight to media reports which, allegedly reflecting an independent conclusion of a racist act by third parties, could nevertheless simply be reflecting the referee's original conclusion given that play was interrupted due to the implementation of the anti-racism protocol. The simple interruption of the match would likely lead onlookers, whether reasonable or not, to search for a reason for the match's interruption, and the officials' interpretation of the incident as racist is a likely reason.
69. As to whether Mr W. indeed threw the inflatable banana on the pitch, the Panel finds that, in view of the Player's testimony that he threw the inflatable banana on the pitch and the similarities between the appearance of Mr W. and the person carrying the inflatable banana in the stadium during the pertinent match as displayed on photos submitted by Feyenoord, it is more likely than not that it was Mr W. who threw the inflatable banana on the pitch.
70. As to the other elements, the Panel is unconvinced by the comparison between edible and inflatable bananas as to their potential as vectors of racist expression, and refrains from considering the implications of engaging in such a distinction. Mr W.'s testimony, in which he claims to have thrown the inflatable out of frustration in no particular direction, is of limited relevance given the objective dimension of the relevant test. The fact, however, that he describes his state of mind as "belligerent" at the time, tends to contribute to the UEFA accounts (including the testimony of AAR2) that describe behaviour by Feyenoord fans as "aggressive". While it is unlikely that a reasonable onlooker might identify the race of the individual throwing the inflatable, it is however likely that the aggressive atmosphere (in which a paper roll was thrown onto the pitch and landed close to Gervinho moments before the inflatable landed close by, not to mention other projectiles) contributed to the impression that

the act had a racist intent. Whether or not former players of Feyenoord, irrespective of their race, considered the inflatables in and of themselves as innocuous, is beside the point. The issue is rather whether in the context of the match, the act was more likely than not to be objectively perceived as racist. The Panel finds this to be the case.

D. Proportionality

71. Appellant argues that the sanctions provided for in the UEFA decisions are disproportionate under the circumstances, for the following reasons: (a) the *“inflatable banana incident”* is less severe than other racist incidents in recent years in Eastern Europe, and those that involve monkey chants, swastikas and other such reprehensible symbols; (b) there is clearly no racist intention, meaning Feyenoord would be punished because of *“public image”* only; (c) former Feyenoord African players did not experience racism at the club; and (d) an inflatable banana cannot hurt anyone as it *“acts as a symbol to create atmosphere and laughter”*.

72. The Panel observes that Article 17.3 DR reads as follows:

“3. The disciplinary measures enumerated in Article 14 of these regulations are standard measures and can be reduced or increased by the competent disciplinary body only under exceptional circumstances”.

73. The Panel further observes that Article 20 DR reads as follows – as relevant:

“1. All disciplinary measures may be suspended, with the exception of:

- a) warnings;*
- b) reprimands;*
- c) bans on all football-related activities;*
- d) disciplinary measures related to match-fixing, bribery and corruption.*

2. The probationary period must be a minimum of one year and a maximum of five. This period may be extended in exceptional circumstances.

3. If a further offence is committed during the probationary period, the competent disciplinary body, as a rule, orders that the original disciplinary measure be enforced. This may be added to the disciplinary measure imposed for the new offence”.

74. The Panel finds that, of the grounds enumerated by Appellant with respect to proportionality, only (b) above is somewhat relevant. Arguments (a) and (c) suggest that because behaviour is worse elsewhere, unacceptable behaviour should be judged in relative terms. This Panel does not countenance such an outcome. As for (d), we refer to our earlier conclusions (*supra* at C.), and feel that if the Appellant continues to believe that no harm can come of the use of such symbols, it is sorely mistaken.

75. The Panel finds that in light of the conclusion we draw above, the sanctions pronounced by the UEFA Appeals Body are those that one would expect under a strict application of the DR. The question is therefore whether the UEFA Appeals Body should have applied Article 17.3 DR, which allows for a reduction (or increase) “*only under exceptional circumstances*”.
76. It is unclear what exactly constitutes exceptional circumstances, and it is difficult to enumerate what they might be. Respondent did not specify the intent of the drafters with respect to this specific clause. Moreover, in light of the Panel’s position on the objective test to be applied to determine what constitutes a violation of Article 14.1 DR, it is our position that exceptional circumstances that would allow for a reduction of the sanction do not exist in the present case, especially given the fact that this appears to be Feyenoord’s second rule violation in the same sport season.
77. The Panel finds, however, that it cannot completely disregard the testimony of Mr. W., and – faced with his Antillean parentage – the reasonable possibility that the inflatable banana was indeed only thrown out of frustration without any racist intentions. This makes the present case a singular instance of potentially unintentional racism. It is difficult to imagine another set of facts where this might be the case. Indeed, it would be highly suspicious if the same scenario were to play out again. If indeed the incident is unintentional, the sanction provided for by the UEFA Appeals Body appears harsh if applied without the possibility of demonstrating a true commitment and effective measures against the occurrence of future questionable conduct.
78. As a result, the Panel finds that it is appropriate to maintain the fine levied against Appellant, but to suspend the application of the part of the sanction ordering that the next such match be played behind closed doors, under Article 20 DR, in such a manner that it will become immediately applicable in the event of any further breach of Article 14.1 DR. Given the nature of the offense, a period of three years’ probation is appropriate in that it lifts the immediate burden associated with an otherwise burdensome sanction, while nevertheless highlighting the need to ensure effective measures towards fostering positive race relations, and ensuring an absence of associated DR violations, in the context of football matches.
79. Indeed, the Panel is of the view that in light of the history of problematic behaviour at the match between Feyenoord and Besiktas JK earlier in the same season, it is likely that Feyenoord supporters need to gain greater sensitivity in this area. It is the Panel’s hope that the prospect of such a certain sanction, in the event of a further violation, may prove a useful deterrent and incentive for Feyenoord to take whatever action may be necessary in order to make this message understood. While the Parties have not explicitly called for the application of Article 20 DR, the Panel considers that its application falls within the scope of Appellant’s requests for relief, and can reasonably have been expected. It is therefore in keeping with recent Swiss Federal Tribunal case law (SFT 4A_246/2014 and 4A_554/2014).
80. The Panel wishes to make clear that sport has no place in it for racist conduct and acts. Racism undermines the spirit of fair play and good sportsmanship that forms the fundamental basis for sport. It detracts from the fan experience, from the play of the game, and it creates a reprehensibly uncomfortable environment for the individuals who are the then-current target

of its ugly expression. Given the strict pronouncement of UEFA on the subject, clubs, and their supporters, have to be mindful of the effects of their acts and the need to be irreproachable on matters of racism or face the consequences. The relief crafted by the Panel here makes these principles clear and provides a further deterrent to Feyenoord and its fans to avoid future bad conduct while providing them a benefit if they meet the required standards of conduct.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 26 October 2015 by Feyenoord Rotterdam N.V. against the decision issued on 17 September 2015 by the UEFA Appeals Body is partially upheld.
2. The decision of the UEFA Appeals Body ordering Feyenoord Rotterdam N.V. to pay a fine of EUR 50,000 (fifty thousand Euro) is upheld.
3. The decision of the UEFA Appeals Body ordering Feyenoord Rotterdam N.V. to play its next UEFA competition match behind closed doors is suspended for a probationary period of three years from the date of notification of this award, only becoming immediately applicable in the event of a further violation of Article 14.1 of the UEFA Disciplinary Regulations during the probationary period, in addition to any other applicable penalty(ies).
4. The award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by Feyenoord Rotterdam N.V., which is retained by the CAS.
5. (...).
6. All other motions or prayers for relief are dismissed.