



Arbitration CAS 2007/A/1291 Mikhaylo Zubkov v. Fédération Internationale de Natation (FINA), award of 21 December 2007

Panel: Mr Kaj Hobér (Sweden), President; Mr David Harold Bloom (Australia); Mr John Faylor (Germany)

Aquatics (swimming)

Act of misbehaviour by a coach

Need for actual disrepute

Conduct bringing the sport into disrepute

Proportionality of the disciplinary sanction

- 1. When Section C12.1.3 of the FINA Constitution speaks of sanctions “for bringing the sport into disrepute”, actual disrepute is required for the provision to be applicable. Therefore, potential disrepute is not covered.**
- 2. The conduct in question must result in the sport of swimming being brought into disrepute, as opposed to, for example, individuals involved in the sport of swimming. In other words: public opinion of the sport of swimming must be diminished as a result of the conduct in question.**
- 3. A sanction of expulsion for life from any future activities under the jurisdiction of FINA and Member Federations for an aggressive and violent conduct constituting an act of misbehaviour within the meaning of Art. 2(b) of the FINA Code of Conduct but not bringing the sport of swimming into disrepute is not proportionate to the offence in question.**

The Appellant, Mikhaylo Zubkov, born on 24 August 1968, is a licensed swimming coach of the Ukrainian Swimming Federation. From 1984 until 1992, he was a member of the National Swimming Team of the USSR. As a member of the USSR Olympic Team in 1988, he participated in the Seoul Olympic Games and placed fourth in the 200 metre medley. In 1995, he graduated from the Kharkiv, Ukraine, Institute of Physical Culture.

Since September 2003, the Appellant has been working as a swimming coach assistant of the regional swimming team in the Kharkiv region. In early 2006, he became the personal coach to two athletes, one of whom was his daughter, Kateryna, 18 years of age and herself a member of the 2004 Ukrainian Olympic Team in Athens. She has won numerous medals in European swimming competition.

The Respondent, Fédération Internationale de Natation (FINA), is the international federation governing the sports of aquatics worldwide and is recognized as such by the International Olympic Committee.

Pursuant to Article C 5 of its Constitution, FINA's objectives are

“(...) to promote and encourage the development of Swimming in all possible manifestations throughout the world, to provide drug free sport, to promote and encourage the development of international relations, to adopt necessary uniform rules and regulations to hold competitions in Swimming, Open Water Swimming, Diving, Water Polo, Synchronised Swimming, and Masters, to organize World Championships and other FINA competitions, to increase the number of facilities for Swimming throughout the world, and to carry out such other activities as may be desirable to promote its sport”.

On 27 March 2007, the Appellant's daughter participated in training exercises prior to the start of competition at the 12th FINA World Championships at the Rod Laver Pool held in Melbourne Australia. As swimming coach for his daughter, the Appellant also attended these events. After the training, the Appellant met his daughter in the calling area of the arena. This is the area in which the swimmers wait to be called to assume their starting positions.

In the calling area which, except for a walkway in front of the area, was largely vacated at this time, the Appellant and his daughter became engaged in a hefty altercation allegedly involving the daughter's choice of boyfriends. As emotions flared and voices rose, physical pushing and shoving took place between father and daughter. Unbeknownst to the Appellant and his daughter, the dispute was captured on a remote video camera mounted several meters away.

On the same evening, the video clip of the incident appeared on the evening television news in Melbourne. On the following day, 28 March 2007, the Melbourne police served an interim intervention order on the Appellant which prevented him from coming within 100 meters of his daughter.

On the following morning, 29 March 2007, an article appeared in the Melbourne Herald Sun entitled “Don't Blame Dad; Swim brawl Daughter and Father tell: “We fought over boyfriend”. The article described the altercation as an “exchange of blows” between father and daughter.

Following the newspaper article, the video clip of the incident in the calling area was passed to the international media and shown in numerous national news and magazine programs around the world.

Two hearings took place before the FINA Disciplinary Committee on 28 March 2007 and 30 March 2007. In its decision dated 11 April 2007, the three member Disciplinary Panel held that the Appellant had breached Article 2(b) of the FINA Code of Conduct and further that he had brought the sport of swimming into disrepute pursuant to Rule C 12.1.3 of the FINA Constitution.

The Preamble to the Code of Conduct provides inter alia:

“The purpose of this Code is to (...) sanction incidents which damage the image of the FINA activities or bring them into disrepute and this Code establishes basic regulations for fair play and moral behaviour and general discipline in all the FINA activities and covers offences committed by (...) officials (...)”.

Article 2(b) of the FINA Code of Conduct states as follows:

“The following incidents or offences shall be subject to the application of this Code:

- (a) (...)*
- (b) acts of misbehaviour including, but not limited to abusive, violent conduct in a disturbing, ugly or provocative manner, unjustified interference including disobedience with obstruction of the orderly conduct of any sporting event within or outside of the venue(s), malicious alternation, damage or destruction of property or infliction of physical or mental harm on others”.*

Articles 3 and 4 of the Code of Conduct provide:

“Article 3, SANCTIONS

Any member of FINA, or club or team or individual person covered in this Code may be sanctioned by the FINA Bureau or when the Bureau is not assembled by the FINA Executive in accordance with FINA rule C 12 “Sanctions”. Sanction for partiality can only be imposed on officials in any position in FINA. Sanctions may also be imposed by the Management Committee duly appointed by the FINA Executive subject to the right of appeal to the FINA Bureau in accordance with FINA Rule C 12.9.2.

Article 4, CONSIDERATION

In the imposition of any sanction, the nature of the offence, the circumstances under which it occurred, the gravity of the offence, the character of the action and other consideration that is in harmony with the objectives of FINA must be taken into account”.

FINA Rule 12.1.3 deals with “Sanctions” and provides as follows:

“Any Member, Member of a Member or individual member of a Member may be sanctioned,

C 12.1.1 if duties and financial obligations to FINA are not fulfilled, or

C 12.1.2 in case of violation of the Constitution, Rules, and/or decisions of the Congresses, or

C 12.1.3 for bringing the sport into disrepute”.

The possible sanctions available to the Disciplinary Panel under Rule C 12.2 of the FINA Constitution are any of a warning, fine, suspension or expulsion. The Disciplinary Panel, although accepting that the Appellant had shown “contrition and remorse”, nevertheless considered that his behaviour was “so offensive that a significant penalty [was] required”.

After considering character references submitted on behalf of the Appellant and the forgiving testimony of his daughter, the Disciplinary Panel decided to expel the Appellant with immediate effect from any future “activities under the jurisdiction of FINA and Member Federations” and to recommend to FINA that the Appellant be barred from applying for readmission to FINA “not before six years”.

In accordance with FINA Rule C 12.9.3, the Appellant filed an Appeal Statement against the decision of the FINA Disciplinary Panel on 17 May 2007. In his Appeal Statement, the Appellant moves that the decision of 11 April 2007

- (i) be set aside and that the complaint (containing the two charges) brought by the Respondent be dismissed.
- (ii) the sanction imposed upon the Appellant by the Disciplinary Panel (the expulsion for 6 years) be quashed or alternatively reduced;
- (iii) the Respondent pay the Appellant's costs of the appeal and the hearing at first instance;
- (iv) such further or other order which the CAS considers necessary.

The Respondent moves that the CAS Panel decide as follows:

- (i) to dismiss the Appeal;
- (ii) to order the Appellant to pay to the Respondent an appropriate contribution for the costs incurred by the Respondent;
- (iii) to reject any contrary or other claims of the Appellant.

On 7 October 2007, a hearing took place in Lausanne. During the hearing, the Panel and those present viewed the video clip which was recorded in the calling area of the Ron Laver Pool on 27 March 2007.

LAW

Jurisdiction

1. The decision of the FINA Disciplinary Panel was rendered on 11 April 2007. In its decision the Panel noted that the Appellant had the right to appeal the decision to the Court of Arbitration for Sport pursuant to Rule C12.9.3 of the FINA Constitution.
2. The aforementioned provision stipulates that the CAS has exclusive jurisdiction to hear appeals against decision by the Disciplinary Panel.
3. Rule 12.9.2 of the FINA Constitution prescribes that an appeal must be filed within 21 days from the date of receipt of the decision.
4. The decision of the Disciplinary Panel was provided to the Appellant on or about, but not earlier than 26 April 2007. The Appeal was filed on 17 May 2007 and there is no issue that the appeal was filed within time. Consequently, we have jurisdiction to hear the Appeal.

Applicable law

5. It follows from Rule R58 of the CAS Rules, that, unless the parties have agreed on the rules of law to be applied, the CAS Panel in question shall apply the law of the country where the federation, association or organisation in question is domiciled. The Panel may, in the alternative, apply rules of law which it deems appropriate, in which case the Panel must give reasons for its decision.
6. The parties to the present dispute have not agreed on the rules of law to be applied. Since FINA is domiciled in Lausanne, Switzerland, we will apply Swiss law, to the extent necessary.

Reasons

7. The Parties agree that the conduct of Appellant to be assessed is the conduct as reflected on the video clip submitted as evidence in this arbitration. The Parties also agree that the conduct is to be judged against the background of the FINA Code of Conduct – forming part of what is called the By-Laws – and the FINA Constitution.
8. As explained above, the FINA Disciplinary Committee found that the Appellant had breached Article 2(b) of the Code of Conduct and also that he had brought the sport of swimming into disrepute for the purposes of Rule C 12.1.3 of the FINA Constitution. Based on these findings the Disciplinary Committee decided to expel the Appellant from any future activities under the jurisdiction of FINA and its Member Federations.
9. In trying this appeal we are guided by Rule R57 of the CAS Rule which reads:
“Scope of Panel’s Review, Hearing
The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments. He may also request communication of the file of the federation association or sports-related body, whose decision is the subject of the appeal: Articles R44.2 and R44.3 shall apply.
After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. At the hearing, the proceedings take place in camera, unless the parties agree otherwise.
If any of the parties is duly summoned yet fails to appear, the Panel may nevertheless proceed with the hearing”.
10. This provision empowers us to review all the facts and legal arguments de novo.
11. It follows from the foregoing that we must address three main issues, viz. (i) did Appellant’s conduct constitute a violation of Article 2(b) of the Code of Conduct; (ii) additionally or alternatively did it bring the sport of swimming into disrepute; and (iii) is the sanction issued by the Disciplinary Committee appropriate?

(i) *Did Appellant's conduct violate Article 2(b) of the Code of Conduct?*

12. We have reviewed the video clip several times and conclude that Appellant's conduct does violate Article 2(b) of the Code of Conduct in that it constitutes an act of "misbehaviour".
13. In reaching this conclusion we have taken into account the explanations by the Appellant that the incident was of a private nature which had nothing to do with the sport of swimming, that he and his daughter were unaware of the fact that they were being filmed and that the events occurred in the calling area of the arena.
14. On the other side, we have taken into consideration that Appellant's quarrel with his daughter took place during the Championships and at the arena of the Championships, during daylight, albeit not on a day of competition.
15. Appellant and his daughter have both stated that Appellant did not hit his daughter. After having reviewed the video clip several times, we have come to the conclusion that the video clip seems to confirm Appellant's statement.
16. We hasten to add, however, that we nevertheless find Appellant's conduct aggressive and violent to such a degree that it constitutes an act of misbehaviour within the meaning of Article 2(b) of the FINA Code of Conduct. Appellant's conduct is unbecoming an accredited team official during world championships.

(ii) *Did Appellant's conduct bring the sport of swimming into disrepute?*

17. In the FINA Constitution Section C12 deals with sanctions. Section 12.1, read together with Section C.12.1.3, means that sanctions may be issued against someone who has brought "*the sport into disrepute*".
18. Appellant has argued that the referenced provisions deal with actually bringing the sport into disrepute and that actual disrepute is required for Section 12.1.3 to be applicable. We agree with the Appellant.
19. The language of the relevant provision does not refer to "potential" disrepute, nor to conduct "having the potential" of bringing the sport into disrepute. When determining the proper meaning of Section 12.1.3 the starting point must be the ordinary meaning of the words used. If the meaning of the words used is clear, it is not permissible, in our view, to read other meanings, or qualified meanings, into such words. This is particularly so in our view when one has regard to the possible sanctions and to the actual sanction imposed by the Disciplinary Committee here. Therefore, when Section 12.1.3 speaks of "disrepute", it does not cover potential disrepute.

20. Section 12.1.3 speaks about “*bringing the sport into disrepute*”. The conduct in question must thus result in the sport of swimming – as opposed to, for example, individuals involved in the sport of swimming – being brought into disrepute. In other words: public opinion of the sport of swimming must be diminished as a result of the conduct in question.
 21. Proceeding on the basis of the foregoing analysis, we have concluded that there is no evidence to establish actual disrepute of the sport of swimming.
- (iii) *Is the sanction issued by the Disciplinary Committee appropriate?*
22. We have found that Appellant’s conduct constitutes a violation of Article 2(b) of the Code of Conduct, but that it has not been established that within Section 12.1.3 of the FINA Constitution the sport of swimming has been brought into disrepute.
 23. Article 3 of the Code of Conduct addresses sanctions and refers to FINA Rule 12 “Sanctions”, i.e. to those listed in Section C12 of the FINA Constitution. We accept the submission of the Respondent that the sanctions listed in C12.2 are thus available with respect to violations of the Code of Conduct such as the one we have found was committed by the Appellant even though, as we have also found, that conduct did not fall within the terms of C12.1.3.
 24. The sanction imposed by the Disciplinary Committee was expulsion from any future “*activities under the jurisdiction of FINA and Member Federations*”. While it added a “recommendation” to FINA that the Appellant be barred from applying for re-admission to FINA for a six year period, the recommendation was exactly that – it had no force or effect. The expulsion of the Appellant was therefore expulsion for life.
 25. We find this to be a harsh and severe sanction in the circumstances of this case. It is not in proportion to the Appellant’s conduct found by the Disciplinary Committee to constitute violations of the FINA Constitution and the FINA Rules. The sanction imposed by the Disciplinary Committee is even more disproportionate given our determination that it was not established that the Appellant’s conduct brought the sport of swimming into disrepute.
 26. It goes without saying that every system of sanctions must build on and give effect to the principle that sanctions are to be proportionate to the offence in question.
 27. We have found that the Appellant has violated Article 2(b) of the Code of Conduct. Any sanction imposed on the Appellant must be proportionate to the conduct which makes out this offence.
 28. We are of the view that the appropriate sanction is that of suspension rather than expulsion. Given the special nature and unusual circumstances of the Appellant’s conduct, we find that a suspension for a period of 8 months from 27 April 2007 expiring 27 December 2007 constitutes an appropriate and proportionate sanction for his conduct.

The Court of Arbitration for Sport rules:

1. The Appeal filed by Mikhaylo Zubkov on 17 May 2007 against a decision of the FINA Disciplinary Panel is allowed in part.
2. The decision of the FINA Disciplinary Panel of 11 April 2007 is confirmed insofar as it found that Mikhaylo Zubkov's conduct constitutes a violation of Article 2(b) of the FINA Code of Conduct.
3. The remainder of the decision of the FINA Disciplinary Panel of 11 April 2007 is overruled.
4. Mikhaylo Zubkov shall be suspended from activities under the jurisdiction of FINA and Member Federations from the date of effect of the decision of the FINA Disciplinary Panel (27 April 2007) until the 27 December 2007.

(...)