



RUIZ-HUERTA & CRESPO
ABOGADOS

THE COURT OF ARBITRATION FOR SPORT

KALUSHA BWALYA

APPELLANT

v.

FOOTBALL ASSOCIATION OF ZAMBIA

RESPONDENT

STATEMENT OF APPEAL

REQUEST FOR PROVISIONAL MEASURES

APPEAL BRIEF

Appeals Division
Mr. Matthieu Reeb
General Secretary to the CAS
Château de Béthusy - Avenue de Beaumont 2
CH-1012 Lausanne (Switzerland)
procedures@tas-cas.org



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A. INTRODUCTION

1. The Appellant is a former Zambian former international footballer where he is Zambia's eighth-most capped player and third on the list of all-time top goal scorers where he appeared in 87 international matches scoring 39 goals from 1983 to 2004.
2. During the Appellant's active career in club football he played in Zambia, Belgium, Holland, Mexico and the United Arab Emirates.
3. The Appellant was named African Footballer of the Year in 1988 by the magazine *France Football* and was nominated for the 1996 FIFA World Player of the Year.
4. The Appellant also competed at the 1988 Olympic Games, making his mark scoring a hat-trick in a 4–0 victory against Italy.
5. The FAZ will hold elections for the position of president the 28 March 2020.
6. The Appellant submitted his nomination to stand in that election.
7. The FAZ Electoral Committee incorrectly declared the Appellant ineligible to stand for that election on the basis of an “integrity check”.
8. The FAZ Statutes and regulations are clear in that the criteria in relation to integrity checks must be explicitly delineated in the FAZ Statutes.
9. The FAZ Statutes stipulate that the integrity criteria is that a potential candidate must not have been found guilty of a criminal offense.
10. There is no mention of FIFA Ethics cases.
11. The integrity criteria relied on by the FAZ Electoral Committee to declare the Appellant ineligible does not appear in the FAZ Statutes.



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12. In imposing additional integrity criteria on potential candidates, the FAZ Electoral Committee was acting outside the scope of its powers afforded to it by its own statutes and regulations.
13. The Appellant was never convicted of a criminal offense.
14. Therefore, the Appellant ought to have been declared eligible to stand in the upcoming presidential elections.
15. The Electoral Committee acted *ultra vires* the powers afforded to it by relying on this additional criterion in determining the Appellant ineligible.
16. The Appellant's legal argument shall be articulated in the following manner:
 - a. an examination of the FAZ Statutes and Electoral Code demonstrates that eligibility criteria is the domain of the FAZ Statutes and not by the Electoral Committee;
 - b. principles of interpretation of sport governing body statutes dictate that this plain meaning ought to be applied;
 - c. the Decision under appeal violates the principle of *nulla poena sine lege*;
 - d. the Decision under appeal violates the doctrine of the hierarchy and norms of laws;
 - e. the Decision under appeals violates the fundamental principle that sport federations must follow their own rules; and
 - f. to apply the FIFA Code of Ethics and other eligibility criteria other than those in the FAZ Statutes violates the doctrine of *lex specialis derogat generali*.
17. In the alternative, the Appellant submits that in any event, he satisfies the criteria imposed by the decision under appeal by the FAZ as he is



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not impeded from correctly exercising his function as president and ought to be declared eligible to stand in these elections.

- 18.** This is an appeal filed seeking to:
 - a. vacate the decision finding the Appellant ineligible for the presidential election; and
 - b. declare that the Appellant is eligible to run for the president of the FAZ in 2020.

- 19.** The elections are set to be held the 28 March 2020.

- 20.** Given the short time frame, the Appellant, in addition to the relief on the merits of the appeal, requests that:
 - a. the matter be held on an expedited basis where an award on the merits of the appeal will be issue before the FAZ presidential elections; and
 - b. that the CAS issue an interim award for provisional measures prohibiting the FAZ from conducting the presidential elections before a final award has been issued on the merits of this appeal.

- 21.** Therefore, please find the Appellant's consolidated statement of appeal, request for provisional measures and appeal brief herein.

- 22.** Due to the time constraints it is respectfully requested that this appeal be initiated without delay.



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B. STATEMENT OF APPEAL

23. The following is drafted and provided in accordance with the requirements of R48 of the Code of Sports-related Arbitration (the “CAS Code”).

a) The Parties and Address for Communications

24. The Appellant is a Zambian national.

25. Further to R30 of the CAS Code, the Appellant is represented by his lawyers as follows:

Mr. Paolo Torchetti
Ruiz-Huerta & Crespo Sports Lawyers
Avenida Reino de Valencia, 19-4^a, 46005, Valencia, Spain
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Mr. Gilbert Phiri
PNP Advocates
28 Mpulungu Road, Olympia Park, P. O Box 50034 Lusaka, Zambia
pnpadvocates1@gmail.com

Mr. Lewis Mosho
Lewis Nathan Advocates
758 Independence Avenue, Woodlands, Lusaka, Zambia
info@lewisnathan.com

26. Attached as **Annex 1** is the power of attorney.

27. The Respondent, the Football Association of Zambia (“FAZ”), coordinates’ are as follows:

General Secretary: Mr. Adrian Kashala
FAZ Football House
Alick Nkhata Road, Long Acres – Lusaka, Zambia
Phone : +260-211/250 940 Fax : +260-211/250 946
Public email address per www.FIFA.com: adrian.kashala@faz.co.zm



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b) Right to Appeal and Time Limit

28. The decision (**Annex 2**: the “Decision”) under appeal is that of the FAZ Electoral Appeals Committee (“FAZ EAC”).
29. Article 9(6) of the FAZ Electoral Code (**Annex 3**) determines that “(t)he decisions of the Electoral Appeal Committee shall be final and binding.”
30. Article 65(1) of the FAZ Statutes (**Annex 4**) specifies that the Court of Arbitration for Sport retains jurisdiction to hear appeals of decisions of the FAZ:

“In accordance with the relevant provisions of the FIFA Statutes, any appeal against a final and binding decision passed by FIFA, CAF, or FAZ shall be heard by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, unless another Arbitration Tribunal has jurisdiction in accordance with Article 63. CAS shall not, however, hear appeals on violations of the Laws of the Game, and suspensions of up to four matches or up to three months (with the exception of doping decisions).”
31. As the Decision of the FAZ EAC is final and binding and Article 63 (FAZ Arbitration) does not apply the CAS retains jurisdiction to hear this dispute.
32. With respect to the time requirements to file the statement of appeal and appeal brief we note that neither the FAZ Statutes nor the FAZ Electoral Code specify a required timeline.
33. In this respect we note the first sentence of article 65(1) of the FAZ Statutes that states that appeals to the CAS are to be “(i)n accordance with the relevant provisions of the FIFA Statutes”.
34. Therefore, the time requirements contained in the FIFA Statutes are those that apply to the filing of this appeal.



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35. Article 58(1) of the FIFA Statutes requires that such appeals are filed with the CAS within 21 days:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question.”
36. The Decision was delivered to the Appellant the 21 February 2020.
37. The time deadline to file the statement of appeal is the 13 March 2020.
38. Further to R51 of the CAS Code the deadline to file the appeal brief is the 23 March 2020.
39. The Appellant files this consolidated statement of appeal and appeal brief within these deadlines.
40. We note that the Appellant has standing to bring this appeal.
41. A fundamental principle of law is that the appealing party must have a manifest interest in the dispute.
42. A party has standing to appeal if it has an interest worthy of protection, where it can be demonstrated that the party has a sufficient legal interest in the matter being appealed.
43. In this case the Appellant is directly affected as he is being prohibited from standing in the upcoming elections.
44. Moreover, he was the party to the proceeding of the appealed Decision.
45. The Appellant submits that the arbitration ought to be initiated further to R52 of the CAS Code.



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c) Request for Expedited Procedure and Further Conduct

- 46.** The FAZ EAC has disqualified the Appellant from standing as a candidate in its upcoming presidential elections.
- 47.** The presidential elections will be held the 28 March 2020 (**Annex 5**: 2020 FAZ Electoral Road Map and FAZ Facebook page announcement).
- 48.** The Appellant makes a request that this matter be held on an expedited basis further to R44.4 of the CAS Code:
- “With the consent of the parties, the Division President or the Panel may proceed in an expedited manner and may issue appropriate directions therefor.”
- 49.** The Appellant proposes that FAZ consent to an order where:
- a. the answer to the statement of appeal, provisional measures and appeal brief be filed with the CAS within 10 days of the receipt of this submission;
 - b. there shall be no second round of submissions;
 - c. the case shall be decided by a sole arbitrator appointed by the CAS administration;
 - d. an oral hearing may be heard, on an emergency and expedited basis, at the CAS in Lausanne as soon as possible; and
 - e. the CAS shall issue an award, with grounds, as soon as possible keeping in mind that the FAZ presidential elections will be held, at the latest, the 28 March 2020.
- 50.** The Appellant submits that if FAZ refuses to consent to an expedited procedure that the CAS issue an award in accordance with the Appellant’s request herein.



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51. We note R37(5) of the CAS Code concerning provisional measures:

“When deciding whether to award preliminary relief, the President of the Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the Applicant outweigh those of the Respondent(s).”

52. The purpose of the request for an expedited procedure is to ensure that the Appellant receives an award before the FAZ presidential elections are held.

53. The reason underlying this request is that if the CAS declares that the Appellant is eligible to stand in the election, however after the elections are held, he will have suffered irreparable harm.

54. Therefore, the Appellant also makes a request for provisional measures suspending the holding of the FAZ presidential elections pending a final award from the CAS with grounds.

55. These two requests are related in the sense that if an award cannot be issued before the elections then it is necessary to issue an award to provisionally suspend the FAZ presidential elections.

56. The request for provisional measures will be further elaborated on under a separate heading, below.

d) Composition of the Panel

57. The Appellant requests that the case shall be decided by a sole arbitrator appointed by the CAS administration.

58. The reason for this request is in order to ensure that the matter can be heard on an expedited basis.

e) Applicable Law

59. We note the contents of R58 of the CAS Code:



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

- 60.** Article 1(1) of the FAZ Electoral Code sets out its scope of application (**Annex 3**):

“1 This Electoral Code is applicable to the elections of FAZ bodies as defined in the Statutes of the FAZ.”

- 61.** As this is the appeal of the FAZ EAC the applicable regulations are the FAZ Electoral Code and the FAZ Statutes.

- 62.** Neither the FAZ Statutes nor the FAZ Electoral Code specify whether a particular national law is subsidiarily applicable.

- 63.** The FAZ Statutes, at many points, including at article 2(e) state that “(w)here there are no provisions under the FAZ Statutes, FIFA Statutes shall override FAZ Statutes”.

- 64.** Article 57(1) of the FIFA Statutes fills this gap and specifies that Swiss law applies in such cases:

“The 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.”

- 65.** The result is that the Swiss Federal Tribunal (“SFT”) retains procedural and potentially substantive jurisdiction where any result is subject to articles 190 and 191 of the Swiss Federal Code on Private International Law (“PILA”), including but not limited to whether the award is incompatible with Swiss public policy (*ordre public*).



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66. Therefore, the applicable laws to this case are the FAZ Statutes, the FAZ Electoral Code, and subsidiarily, Swiss law.

f) **Language of the Proceedings**

67. The Appellant elects English as the language of the proceedings further to R29 of the CAS Code.

g) **Payment of the Court Office Fee and Costs**

68. The payment of the Court office fee of 1,000 Swiss francs has already been completed by the Appellant in accordance with R64.1 of the CAS Code (**Annex 6**: proof of payment of the Court office fee).
69. The Appellant submits that although this is an electoral issue, it is an appeal against a decision issued by an international federation in a disciplinary matter as it prohibits the Appellant from partaking in football related activities.
70. The Appellant submits that R65(2) shall apply where the proceedings shall be free and the fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

C. STATEMENT OF FACTS

71. As mentioned in the introduction above the Appellant is one of Zambia's most decorated football players in its history.
72. Since the Appellant's playing career ended, he has held a variety of position in football:
- a. FAZ men's national team head coach (2003 to 2006);
 - b. FAZ Vice-President (2004 to 2008);
 - c. FAZ President (2008 to 2016);



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- d. standing committee member at FIFA and the Confederation of African Football (CAF); and
 - e. CAF Executive Committee Member (2011 to 2018).
- 73.** The Appellant has decided to stand for election for the FAZ presidency for the next four-year term of 2020 to 2024.
- 74.** The Appellant provided the following documents to the FAZ in order to stand for the election within the time-deadlines required:
- a. 2020 FAZ Elections Candidate Nomination Form (**Annex 7**); and
 - b. 2020 FAZ Elections Questionnaire for Integrity Checks (**Annex 8**).
- 75.** The FAZ Electoral Committee, via a letter dated 15 February 2020, communicated to the Appellant that he was ineligible to stand in the presidential election (**Annex 9**: FAZ letter to Appellant 15 February 2020).
- 76.** The FAZ wrote that the reason for the Appellant’s ineligibility is that he failed the integrity check where the letter specifically mentioned “part 1 3, (b) of the Questionnaire for integrity checks”.
- 77.** The letter of the 15 February 2020 (**Annex 9**) contained a typographical error where it should have read “part 1 4, (b) of the Questionnaire for integrity checks”.
- 78.** Part 1 4, (b) of the Questionnaire for integrity checks reads, *verbatim*, as follows:
- “4 The candidate or holder shall be deemed not to have passed the integrity check, if he:
- (...)



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b) has been found guilty and/or sentenced by the FIFA Ethics Committee or any other sporting body with a sanction that would seriously put into question the discharge of the office concerned.”

- 79.** The Appellant filed an appeal of the FAZ Electoral Committee’s decision to the FAZ EAC (Electoral Appeal Committee).
- 80.** The FAZ EAC denied the Appellant’s appeal on precisely the same basis as the FAZ Electoral Committee, that the Appellant violated Part 1 4, (b) of the Questionnaire for integrity checks (**Annex 2:** the Decision under appeal dated 21 February 2020).
- 81.** As it will be explained in the legal submissions portion of the appeal brief, the Appellant should have been declared eligible to stand in the upcoming presidential elections because:
- a. the criteria in relation to integrity checks must be explicitly delineated in the FAZ Statutes;
 - b. the FAZ Statutes stipulate that the integrity criteria is that a potential candidate must not have been found guilty of a criminal offense;
 - c. the integrity criteria relied on by the FAZ Electoral Committee to declare the Appellant ineligible only appears in the Questionnaire for integrity checks, which is an annex to the Electoral Code, and not in the FAZ Statutes;
 - d. in imposing additional integrity criteria on potential candidates, the FAZ Electoral Committee was acting outside the scope of its powers afforded to it by its own statutes and regulations;
 - e. the Appellant was never convicted of a criminal offense; and
 - f. therefore, he ought to have been declared eligible to stand in the upcoming presidential elections.



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- 82.** The Adjudicatory Chamber of the FIFA Ethics Committee (the “FIFA EC AC”) found that the Appellant infringed articles 16 and 20 of the FIFA Code of Ethics (**Annex 10**: the Decision of the FIFA EC AC dated 12 April 2018).
- 83.** In its decision the FIFA EC AC (**Annex 10**):
- a. prohibited the Appellant from partaking in football-related activities for two years; and
 - b. imposed a fine on the Appellant in the amount of 100,000 CHF.
- 84.** The Appellant appealed that decision to the FIFA Appeals Committee.
- 85.** The FIFA Appeals Committee reduced the sanction and fine imposed by the FIFAEC AC where (**Annex 11**: Terms of the Decision of the FIFA Appeals Committee 18 October 2018):
- a. the prohibition from taking part in football related activities was reduced to the time served, which was approximately nine months (the decision was communicated in January 2019 see **Annex 12**);
 - b. the fine was reduced to 10,000 CHF.
- 86.** The Appellant did not appeal that decision to the CAS.
- 87.** The decision of the FIFA Appeals Committee does not contravene the criteria for integrity checks according to the FAZ Statutes.
- 88.** Upon the receipt of this decision of the FIFA Appeals Committee the CAF reinstated the Appellant in his position as a member of the CAF Executive Committee (**Annex 12**: letter from CAF to Appellant 7 February 2019).



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D. REQUEST FOR PROVISIONAL MEASURES

- 89.** R37 of the CAS Code enables the President of the Appeals division to issue an award for provisional measures granting interim relief.
- 90.** The ability to do so is recognized in article 183(1) of the Federal Statute on Private International Law (PILA):
- “Unless the parties have agreed otherwise, the arbitral tribunal may enter provisional or protective measures at the request of one party.”
- 91.** The Appellant satisfies the initial threshold requirements imposed by R37, where:
- a. all internal legal remedies have been exhausted within FAZ;
 - b. the initial filing fee of CHF 1,000 has been paid (see **Annex 6**);
and
 - c. the CAS has jurisdiction to hear this dispute.
- 92.** The Appellant makes the request for the CAS to issue a provisional award prohibiting the Respondent from holding its presidential elections before the rendering of the final award in this case.
- 93.** According to R37 of the CAS Code the following factors must be considered in deciding to issue interim relief (**Annex 13**: CAS 2011/A/2479 Sinkewitz v. UCI at para. 4):
- a. whether the relief is necessary to protect the applicant from irreparable harm;
 - b. the likelihood of success on the merits of the claim; and
 - c. whether the interests of the Appellant outweigh those of the Respondent.



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94. The Appellant submits that the granting of such a provisional award is appropriate in these circumstances.

95. It is trite law to say that the three prongs of the test must be demonstrated cumulatively.

96. Each factor is considered below.

a) **Irreparable Harm**

97. Irreparable harm is defined as any damage that cannot be fully compensated if the applicant succeeds on the merits.

98. To satisfy the irreparable harm test “(t)he Appellant must demonstrate that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage.” (**Annex 13**: CAS 2011/A/2479 Sinkewitz v. UCI at para. 4a).

99. This view is has been confirmed by the SFT (**Annex 14**: CAS 2011/A/2615 Thibaut Fauconnet v. International Skating Union (ISU) & CAS 2011/A/2618 International Skating Union (ISU) v. Thibaut Fauconnet):

“Considering that according to the jurisprudence of the Swiss Federal Tribunal, there is irreparable harm when a final decision, even favourable to the applicant, would not completely remedy such harm (see ATF 126 I 207). The Swiss doctrine considers that “the conservatory measure shall avoid a damage which shall be difficult to remedy if it was not ordered immediately” (see HOHL F., Procédure civile, T. II, Berne 2002, p. 234).”

100. The determination of irreparable harm is a fact specific test that is analyzed within the context of the circumstances of each specific case.

101. As mentioned above the elections will be held 28 March 2020 (**Annex 5**).



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102. In this case the Appellant has already been harmed where he has been incorrectly declared ineligible to stand for the election for the FAZ presidency which is to be held in March of 2020.
103. The harm will be irreparable if the elections will have taken place while the Appellant was incorrectly prohibited from running.
104. The evidence supports this submission is that the Decision under appeal was communicated to the Appellant the 21 February 2020, and the elections will take place, at the latest, the 28 March 2020 (Annex 5).
105. This is precisely the type of irreparable harm “that would be impossible, or very difficult, to remedy or cancel at a later stage” specifically because it would have been too late to rectify the situation (Annex 13: CAS 2011/A/2479 Sinkewitz v. UCI at para. 4a).
106. This is the precise “legal” or “pecuniary” interest that is harmed irreparably.
107. In these circumstances the Appellant submits “that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage” when he is declared eligible after the elections are held (Annex 13: CAS 2011/A/2479 Sinkewitz v. UCI at para. 4a).
108. The CAS has stated that where one “has already served almost his entire original suspension” that it must be considered in as a factor to be recognized in assessing irreparable harm (Annex 15: CAS 2015/A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO) paragraph 6.9).
109. This situation facing the Appellant is analogous in that if an election is held at the end of March 2020 and he is declared eligible, *ex post facto*, that harm is irreparable as it can never be rectified
110. The Appellant submits that he has satisfied the “irreparable harm” prong of the three-part test.



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b) Likelihood of Success

- 111.** As a preliminary matter, as not to be repetitive, the Appellant refers to and relies on the arguments articulated within the merits of this appeal below.
- 112.** In order to demonstrate the likelihood of success “(t)he Appellant must make at least a plausible case that the facts relied upon by him and the rights which he seeks to enforce exist and that the material criteria for a cause of action are fulfilled.” (**Annex 13**: CAS 2011/A/2479 Sinkewitz v. UCI at paragraph 4b; see also **Annex 15** CAS 2015/A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO) at paragraph 6.12; **Annex 16**: CAS 2012/A/2981 CD Nacional v. FK Sutjeska at paragraph 6.4).
- 113.** Under this prong of the test it is not necessary to demonstrate “(w)hether these arguments will prevail to the extent requested by the Appellant” where that “can only be fully addressed in the final award and need not be addressed at this preliminary stage of the proceedings” (**Annex 15**: CAS 2015/A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO) at paragraph 6.12).
- 114.** What is necessary is to demonstrate that it is established on a *prima facie* basis (**Annex 14**: CAS 2011/A/2615 Thibaut Fauconnet v. International Skating Union (ISU) & CAS 2011/A/2618 International Skating Union (ISU) v. Thibaut Fauconnet at paragraph 11).
- 115.** Here the Appellant submits that he has made plausible factual and legal arguments as to his chance of success where the FAZ Electoral Committee has refused his eligibility on criteria that is not enumerated in the FAZ Statutes.
- 116.** The use of unenumerated criteria for admissibility renders the statutes and regulations of the FAZ completely unintelligible to the point that the FAZ Electoral Committee is wielding arbitrary power.
- 117.** It is plausible where the doctrine of *nulla poena sine legge praevia* is a fundamental legal principle that forms the basis of justice and



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fairness in all legal traditions where the FAZ Electoral Committee applied arbitrary criteria not grounded in the FAZ Statutes as required by its own regulations.

118. Again, to avoid repetition, we refer to the legal submissions on the merits of the appeal, in making this request for relief.
119. What is important to note is that article 7 of the FAZ Electoral Code is clear in that eligibility criteria must be enumerated in the FAZ Statutes.
120. The FAZ Statutes do not list the criteria used to render the Appellant ineligible.
121. It is a matter of simple legislative interpretation, and for these reasons in conjunction with the arguments made within legal submissions made within the merits of the appeal, the Appellant submits that he has satisfied this prong of the three-step test.

c) Balance of Interests

122. In applying the balance of interests test “(i)t is then necessary to compare the disadvantage to the Appellant of immediate execution of the decision with the disadvantages for the Respondent in being deprived such execution.” (**Annex 13**: CAS 2011/A/2479 Sinkewitz v. UCI at para. 4c).
123. The Appellant acknowledges that FAZ has a legitimate interest in ensuring the smooth running of elections held on a timely basis.
124. In addition, the Appellant acknowledges that the FAZ has a legitimate interest in ensuring that the persons that stand for election for executive positions retain the highest of integrity and professionalism.
125. What is also required of football federations is that they observe their own rules and not act arbitrarily.



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- 126.** In this case, the Appellant is not requesting that the elections be suspended indefinitely.
- 127.** The Appellant is asking that a final award in this appeal be issued before the elections take place.
- 128.** Within the context of the balance of interests test the CAS has held that a sanction will not lose its deterrent effect if a provisional measure to suspend a sanction is granted pending the decision on the merits of the matter, and the person is ultimately found to have transgressed a regulation and is subsequently sanctioned (**Annex 17**: CAS 2006/A/1141 M.P. v. FIFA & PFC Krilja Sovetov, at paras. 19 and 20):
- “Eventually, with regard to the balance of interests between the parties, the sanction imposed by FIFA is an important issue for the Panel to be appointed. The Deputy President of the Appeals Arbitration Division notes that the deterrent effect of the sanction will not be undermined if its imposition is merely postponed and not cancelled. The risks incurred by the Appellant in the event of immediate execution of the Decision seem thus to outweigh the disadvantages for the Respondents in being deprived from such execution.”
- 129.** This reasoning is analogous to the circumstances of this case.
- 130.** FAZ has nothing to lose if the provisional measure pending the final award is granted, as the elections can go ahead immediately after a final award.
- 131.** We also note that the Appellant is requesting that an expedited procedure be initiated.
- 132.** Therefore, in the balance of interests, both the FAZ’s and the Appellant’s interests will be promoted, as it will ensure the proper application of its rules, and a free and fair election consistent with its regulations.



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133. In addition, should the provisional stay be refused, the elections held, and the CAS subsequently issues an award proclaiming that the Appellant is eligible to stand in the election, the balance of interest tips in favour of the Appellant.

134. This has been previously recognized in CAS jurisprudence within the context of an athletics competition (**Annex 15**: CAS 2015/A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO) at paragraph 6.14):

“Were the Panel to ultimately find during the course of the full appeal that the suspension pronounced in the Appealed Decision should be upheld and accordingly that the appeal is dismissed, then the remaining four (or so months) of the sanction can be served out by the Athlete with little harm to the Respondent. By contrast, were the requested stay to be denied, but the Panel were to eventually determine that the anti-doping rule violation shall be nullified, then the Appellant will have lost the chance of competing in several major events forever. Therefore, the President of the Appeals Arbitration Division determines that the balance of interests tips decisively in favour of the Appellant.”

135. It is also noted that the CAS has found that the inability to compete, which is analogous to working in football in this case, has been found to tip the scales in favour of the Appellant, in some extreme cases (**Annex 14**: CAS 2011/A/2615 Thibaut Fauconnet v. International Skating Union (ISU) & CAS 2011/A/2618 International Skating Union (ISU) v. Thibaut Fauconnet at paragraph 12):

“Considering that Mr Fauconnet’s risk of damage to which he may be exposed, i.e. not being able to participate in the next two World Cups of the 2011-2012 season outweighs the interests of ISU.”

136. In this case the Appellant’s inability to work and represent his home federation is a serious matter.

137. Accordingly, it is requested that the request for provisional measures be granted and that the FAZ presidential elections be suspended.



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E. RIGHT TO BE HEARD

- 138.** Before delving into the substantive issues of the appeal we note that the right to be heard applies to private arbitration procedures before the CAS.
- 139.** The SFT has determined that a parties' right to be heard within the context of an arbitration is no different than those rights that are constitutionally protected within the context of the PILA (**Annex 18**: SFT 4A_274/20121 Judgment of September 19, 2012):

“The right to be heard, as guaranteed by Art. 182 (3) and 190 (2) (d) PILA is not different in principle from that which is available in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus it was held in the field of arbitration that each party had the right to express its views on the facts essential for the decision, to present its legal arguments, to propose evidence on pertinent facts and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

As to the right to adduce evidence, it must have been exercised timely and according to the applicable procedural rules (ATF 119 II 386 at 1b p. 389). The arbitral tribunal may refuse to adduce evidence without breaching the right to be heard if the evidence is unfit to base a decision on, if the fact to be proved is already established, if it is without pertinence or if the tribunal, by assessing the evidence in advance, reaches the conclusion that it is already convinced and that the evidence proposed would not change its conviction (judgment 4A_440/20106 of January 7, 2011 at 4.1).. The Federal Tribunal may not review an advanced assessment of the evidence, except from the very narrow point of view of public policy. The right to be heard does not create an entitlement to adducing evidence unfit to prove the alleged fact (judgment 4A_600/20107 of March 17, 2011 at 4.1).

The party claiming that its right to be heard was violated or raising another procedural error must invoke it immediately in the arbitral proceedings under penalty of forfeiture. Indeed it is contrary to good faith to invoke a procedural error only in the framework of an appeal against the arbitral tribunal when the error could have been signaled



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during the proceedings (judgment 4A_150/20128 of July 12, 2012 at 4.1).”

140. This issue is relevant to both the request for provisional measures and the substantive issues under appeal.
141. The Appellant was determined to be ineligible to stand in the FAZ’s upcoming presidential elections based on criteria that cannot be considered under the FAZ Statutes.
142. The decision of the FAZ Electoral Committee was taken summarily without the opportunity to present a case.
143. The Appellant submitted his candidacy and then simply received the letter of 15 February 2020 determining him ineligible (**Annex 9**).
144. There was no invitation to clarify or communicate with the Electoral Committee.
145. On appeal the Electoral Appeals Committee did not address the concerns of the Appellant.
146. The Decision simply stated, repeatedly, that the additional criteria that it relied upon to hold that the Appellant was ineligible was in the Questionnaire for Integrity Checks.
147. This is not an authoritative source of law enabling additional criteria.
148. If the FAZ elections go ahead prior to an award being issued in this case, the Appellant will consider that his right to be heard has been compromised.
149. In this sense, this filing of the statement of appeal, provisional measures, and appeal brief is considered notification to the FAZ, in accordance with the Appellant’s legal position taken before the FAZ Electoral Committee.



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F. OVERVIEW OF LEGAL SUBMISSIONS

150. The Appellant makes two substantive legal arguments with respect to the merits of this case.
151. Firstly, the Appellant submits that the declaration that he is ineligible to stand for president in the upcoming FAZ elections on the basis of a FIFA Ethics case must be set aside because this criterion is not provided for in the FAZ Statutes.
152. The FAZ Electoral committee cannot rule on eligibility of potential candidate.
153. In the alternative, the Appellant submits that he ought to be declared eligible in any event because the FIFA Ethics case does not put into question the discharge of the presidential office.

G. FAZ RELIED ON UNAUTHORIZED CRITERIA

154. As mentioned above, the Appellant was declared ineligible to stand for the FAZ presidential elections to be held 28 March 2020.
155. The criteria, as applied by the FAZ Electoral Committee and affirmed by the Electoral Appeals Committee, is additional criteria that is not authorized by the FAZ Statutes.
156. The Electoral Committee acted *ultra vires* the powers afforded to it by relying on this additional criterion in determining the Appellant ineligible.
157. The Appellant's argument shall be articulated in the following order:
 - a. an examination of the FAZ Statutes and Electoral Code;
 - b. review of principles of interpretation of sport governing body statutes;



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- c. the Decision under appeal violates the principle of *nulla poena sine lege*;
 - d. the Decision under appeal violates the doctrine of the hierarchy and norms of laws;
 - e. the Decision under appeals violates the fundamental principle that sport federations must follow their own rules; and
 - f. to apply the FIFA Code of Ethics and other eligibility criteria other than those in the FAZ Statutes violates the doctrine of *lex specialis derogat generali*.
- 158.** Parenthetically, we note that the initial decision of the FAZ Electoral Committee and the Decision of the FAZ Electoral Appeal Committee specifically referred to this additional criterion as its exclusive reason to deem the Appellant ineligible.
- 159.** The Respondent cannot argue that the basis of ineligibility is another reason.
- 160.** In this sense, we note that the Decision under appeal ought to be vacated as the FAZ relied on unauthorized criteria.

a) FAZ STATUTES AND THE FAZ ELECTORAL CODE

- 161.** The starting point in determining what criteria for eligibility can be used is article 7 of the FAZ Electoral Code (**Annex 3**):

“Article 7 Eligibility criteria

1- The eligibility criteria for the positions to be filed within the relevant bodies of FAZ are defined in the relevant provisions of the Statutes of FAZ.

2- The Electoral Committee shall not impose any eligibility criteria that are not provided for in the Statutes of FAZ or any other formal requirements that are not provided for in this Electoral Code or in the



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Statutes of the FAZ. The Electoral Committee shall only request the documents that help establish whether the relevant eligibility criteria have been fulfilled.

3- The Electoral Committee Shall publish the full list of eligibility criteria (with reference to the relevant provisions of the Statutes of FAZ, as well as the documents to be provided for each of the positions within the deadlines stipulated in the Statutes of FAZ.

- 162.** The Electoral Committee also publishes the “2020 FAZ Elections Qualifications for Nomination as Candidates” (**Annex 19**).
- 163.** The 2020 FAZ Elections Qualifications for Nomination as Candidates do not establish a FIFA Ethics case as a disqualifying criterion.
- 164.** The FAZ Statutes do not establish a FIFA Ethics case as a disqualifying criterion (**Annex 4**).
- 165.** The correct eligibility criteria in accordance with the FAZ Statutes and the Electoral Code is found in the 2020 FAZ Elections Qualifications for Nomination as Candidates (**Annex 19**).
- 166.** These include both the technical requirements such as age and competency, as well as the fundamental integrity aspects to be approved in the FAZ Statutes – criminal convictions.
- 167.** The Appellant submits that this is the applicable regulations, not the Questionnaire, that ought to be used in vetting candidates.
- 168.** The eligibility criterion established in the FAZ Statutes that relate to prior behaviour are:
 - a. “All the members of the Executive Committee must not have served a term of imprisonment of at least 3 years in the 10 years immediately preceding the elections and must also fulfil the prerequisites stipulated in Article 20(8) of the Statutes” (**Annex 4**: article 33(6); and



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- b. “The bodies of FAZ shall be either elected or appointed by the FAZ Executive without any external influence and in accordance with the procedures described in these Statutes. The members of these bodies shall not have previously been found guilty of any criminal offence incompatible with their position” (**Annex 4**: article 20(8)).

169. The CAF Electoral Code itself does not establish a FIFA Ethics case as a disqualifying criterion (**Annex 3**).

170. This criterion only appears in the questionnaire which is inconsistent with the FAZ Regulations.

b) PRINCIPLES OF INTERPRETATION OF STATUTES

171. The main thrust of this case is that it deals with the application and interpretation of a federation’s statutes.

172. The CAS has explained such interpretative principles as follows (**Annex 20**: CAS 2017/A/5356 South African Football Association v. FIFA, Fédération Burkinabé de Football, Fédération Sénégalaise de Football & Federação Caboverdiana de Futebol at paragraphs 83 to 86):

“There is no unified view on how articles of associations should be interpreted in Switzerland (FLEISCHER H.; die Auslegung von Gesellschaftsstatuten: Rechtsstand in der Schweiz und rechtsvergleichende Perspektiven; GesKR 4/2013, p. 8; ZEN-RUFFINEN P., Droit du Sport, Schulthess 2002, p. 63). The issue is whether the articles of associations should be interpreted by using the principles applied to the interpretation of contract or to the interpretation of laws. As the articles of association form the contractual basis of an association - a private law institution - it can be argued that they have much in common with contracts and should therefore be interpreted through the contractual principles of the subjective intent of the parties and good faith (FORSTMOSER/MEIER-HAYOZ/NOBEL, §7 N 4; Zeller, §11 N 129-133; VALLONI/PACHMANN, p. 25). However, articles of



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association also set forth constitutive principles which may have effects to others apart from the original members of the association, and should therefore be subject to the more objective approach followed with respect to statutory laws (FORSTMOSER/MEIER-HAYOZ/NOBEL, §7 N 3; CAS 2013/A/3365; CAS 2013/A/3366 para. 140 ss).

According to the Swiss Federal Tribunal (SFT), the statutes of a private legal entity are normally interpreted according to the principle of good faith, which is also applicable to contracts (Decision of the SFT 4A_392/2008, 22 December 2008, at 4.2.1 and references). However, the method of interpretation may vary depending on the nature and dimension of the legal person involved. As regards the statutes of larger entities, it may be more appropriate to have recourse to the method of interpretation applicable to the law, whereas in the presence of smaller associations, the statutes may more legitimately be interpreted by reference to good faith (Decision of the SFT 4A_600/2016, 28 Jun 2017, consid. 3.3.4.1 and references).

Under Swiss law, the methods of interpretation of the law are the following:

- the literal interpretation (“interprétation littérale”);
- the systematic interpretation (“interprétation systématique”);
- the principle of purposive interpretation (“interprétation téléologique”).

According to the SFT, the starting point for interpreting is indeed its wording (literal interpretation). There is no reason to depart from the plain text, unless there are objective reasons to think that it does not reflect the core meaning of the provision under review. This may result from the drafting history of the provision, from its purpose, or from the systematic interpretation of the law. Where the text is not entirely clear and there are several possible interpretations, the true scope of the provision will need to be narrowed by taking into account all the pertinent factors, such as its relationship with other legal provisions and its context (systematic interpretation), the goal



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pursued, especially the protected interest (teleological interpretation), as well as the intent of the legislator as it is reflected, among others, from the drafting history of the piece of legislation in question (historical interpretation) (ATF 132 III 226 at 3.3.5 and references; ATF 131 II 361 at 4.2).”

173. In this case the Appellant submits that the wording of the FAZ Statutes and Electoral Code is clear and that a purposive style of interpretation is not necessary.

174. Article 7 of the Electoral Code is clear in that eligibility criteria must be defined in the FAZ Statutes:

“Article 7 Eligibility criteria

1- The eligibility criteria for the positions to be filed within the relevant bodies of FAZ are defined in the relevant provisions of the Statutes of FAZ.

2- The Electoral Committee shall not impose any eligibility criteria that are not provided for in the Statutes of FAZ or any other formal requirements that are not provided for in this Electoral Code or in the Statutes of the FAZ. The Electoral Committee shall only request the documents that help establish whether the relevant eligibility criteria have been fulfilled.

3- The Electoral Committee Shall publish the full list of eligibility criteria (with reference to the relevant provisions of the Statutes of FAZ, as well as the documents to be provided for each of the positions within the deadlines stipulated in the Statutes of FAZ.”

175. At three separate instances the FAZ Statutes are referenced as the source of the eligibility criteria.

176. The Appellant submits that this is clear that there is no room for a purposive interpretation.



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177. Moreover, article 7(2) specifically states that “(t)he Electoral Committee shall only request the documents that help establish whether the relevant eligibility criteria have been fulfilled.”
178. The FAZ Electoral Code only confers administrative responsibility on the FAZ Electoral Committee.
179. This supports the view that the decision-making power in establishing the eligibility criteria lies with the rules and regulations established in the FAZ Statutes.
180. Article 5 further reinforces this view where the primacy of the FAZ Statutes are established and the administrative role of the Electoral Committee is defined:

“Article 5 General Duties of the Electoral Committee

The Electoral Committee shall be responsible for all tasks relating to the organisation, running, supervision of the elections to take place during the Council. In particular, the Electoral Committee shall be responsible for:

- a) strictly enforcing the Statutes and regulations of FAZ as well as this Electoral Code;
- b) ensuring that the electoral rules and guidelines of the bodies of FAZ are in line with the provisions of the Electoral Code and the Statutes of FAZ as well as the Statutes, regulations, directives and decisions of FIFA;
- c) strictly enforcing the statutory deadlines for elections;
- d) providing information to the Members as well as to relevant government authorities (where necessary), the media and the public;
- e) where necessary, managing relations with relevant government authorities;



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- f) the candidature procedure (launch, distribution of information, evaluation, publication of official list, etc.);
 - g) drawing up the list of voters (delegates), assisted by the general secretariat, in accordance with the statutory provisions of FAZ;
 - h) verifying the identity of the voters (delegates) under the supervision of the public notary appointed for this purpose;
 - i) the electoral voting procedure;
 - j) any and all tasks to ensure the smooth running of the electoral process.”
- 181.** This administrative role is also highlighted in the following articles of the FAZ Statutes where the Electoral Committee is the body in charge of organizing and supervising the election process (**Annex 4**):
- a. article 20(7); and
 - b. article 55.
- 182.** At no point is the Electoral Committee given the authority to establish eligibility criteria that relates to the criteria at issue before the Panel.
- 183.** The 2020 FAZ Elections Qualifications for Nomination as Candidates (**Annex 19**) respects these regulations as they do not impose the FIFA Ethics criteria.
- 184.** This responsibility is afforded exclusively to the FAZ Statutes.
- 185.** It is of paramount importance to note article 7(2) of the Electoral Code that distinguishes between formal and non-formal requirements of eligibility:



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“2- The Electoral Committee shall not impose any eligibility criteria that are not provided for in the Statutes of FAZ or any other formal requirements that are not provided for in this Electoral Code or in the Statutes of the FAZ. The Electoral Committee shall only request the documents that help establish whether the relevant eligibility criteria have been fulfilled.”

- 186.** This regulation specifically prohibits such fundamental rule changes by the Electoral Committee, which, by virtue of the various articles mentioned above, plays an administrative role.
- 187.** For greater certainty, article 30 of the FAZ Statutes relating to Amendment to the Statutes, the Standing Orders of the Council and the Electoral recognizes this difference.
- 188.** There are two distinct procedures for amending the Statutes and amended the Orders in Council and the Electoral Code.
- 189.** Amendments to the FAZ Statutes require a supra-majority of three-quarters of the members to ratify such a change (article 30(2) to 30(4)).
- 190.** Amendments the Electoral Code only require a simple majority of 50% (article 30(5) and 30(6)).
- 191.** The FAZ Statutes themselves recognize that the eligibility criteria relating to the issue in this case are of such a fundamental nature that a simple majority does not suffice to make such a fundamental change.
- 192.** Such a change requires a change to the FAZ Statutes first before making such a fundamental change to the Electoral Code.
- 193.** The precise opposite happened in this case.
- 194.** The Electoral Code was most recently amended to include the Annex and Questionnaire on 1 February 2020.



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- 195.** This amendment, not to the FAZ Statutes, but to the subservient regulations of the Electoral Code, was done by extraordinary and emergency meeting called by the FAZ.
- 196.** It was unable to make this fundamental change to the Statutes so instead the FAZ Electoral Committee attempted to alter the Questionnaire.
- 197.** The Electoral Committee, in establishing this criterion in the Questionnaire without the fundamental change of the Statutes, acted *ultra vires* its power as it did not have legislative authority to do so.
- 198.** Therefore, it applied regulations that simply could not exist under the Statutes.
- c) NULLA POENA SINE LEGE**
- 199.** The Decision taken by the Electoral Committee violates the principle of *nulla poena sine lege*.
- 200.** This means that sport federations must abide by the “predictability test”.
- 201.** It is trite law to say that regulations and sanctions imposed under those regulations by sport bodies must be predictable, clear and intelligible.
- 202.** Sport bodies cannot impose sanctions and results without their proper legal or legislative basis.
- 203.** To do so would be arbitrary and contrary to fundamental principles.
- 204.** The Appellant refers to the submissions above that demonstrate that the FAZ Statutes do not authorize the eligibility criterion as imposed in this case.
- 205.** The CAS in 2011/A/2670 Masar Omeragik v. FFM held that (**Annex 21**: at paragraph 8.13) held that sanctions can only be applied in cases where there is a proper regulatory basis:



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“CAS awards have consistently held that sports organizations cannot impose sanctions without a proper legal or regulatory basis for them and that such sanctions must also be predictable (“predictability test”).”

- 206.** In addition, the CAS stated that there must be a clear connection between the behaviour and the sanction (**Annex 21**: CAS 2011/A/2670 Masar Omeragik v. FFM at paragraph 8.13):

“This principle is further confirmed by CAS 2007/A/1363, which holds that the principle of legality and predictability of sanctions requires a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision.”

- 207.** Moreover, in cases where the regulations are not clear they are to be interpreted against the governing body (**Annex 21**: CAS 2011/A/2670 Masar Omeragik v. FFM at paragraph 8.13):

“Finally, CAS case law (for example CAS 2007/A/1437 para. 8.1.8) has held that inconsistencies in the rules of a federation will be construed against the federation (contra proferentem principle).”

- 208.** This principle of “predictability” and “legality” has consistently been applied within the context of applying sanctions by international sport bodies resident as explained in CAS 2008/A/1545 Andrea Anderson et al. v. IOC, (**Annex 22**: award of 16 July 2010 paragraphs 30 to 34):

“30. In the Panel’s opinion, this provision of the Olympic Charter is to be properly read in accordance with the “principle of legality” (“principe de légalité” in French), requiring that the offences and the sanctions be clearly and previously defined by the law and precluding the “adjustment” of existing rules to apply them to situations or behaviours that the legislator did not clearly intend to penalize. CAS arbitrators have drawn inspiration from this general principle of law in reference to sports disciplinary issues, and have formulated and applied what has been termed as “predictability test”. Indeed, CAS awards have consistently held that sports organizations cannot impose



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sanctions without a proper legal or regulatory basis and that such sanctions must be predictable. In other words, offences and sanctions must be provided by clear rules enacted beforehand.

31. In the seminal award of 23 May 1995, CAS 94/129, the panel declared the following:

“The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable” (para. 34, emphasis added).

32. In another well-known award issued on 12 February 1998 by the CAS ad hoc Division at the Nagano Olympic Games (CAS OG 98/002), the panel stated as follows:

“The Panel recognizes that from an ethical and medical perspective, cannabis consumption is a matter of serious social concern. CAS is not, however, a criminal court and can neither promulgate nor apply penal laws. We must decide within the context of the law of sports, and cannot invent prohibitions or sanctions where none appear. [...] It is clear that the sanctions against R. lack requisite legal foundation” (para. 26, emphasis added).

33. In CAS 2001/A/330, award of 23 November 2001, the panel explicitly stated that the sanctions imposed by sports federations were valid if they could withstand the “predictability test”:

“In the present case, the Panel is in no doubt that the sanction imposed was based upon valid provisions of the FISA Rules which were then in force. Those provisions were well-known and predictable to all rowers [...]. In the circumstances, therefore, the Panel has no hesitation in finding that the sanction contained in FISA’s Rules satisfied what might be called the „predictability test“” (para. 17, emphasis added).

34. In CAS 2007/A/1363, award of 5 October 2007, in line with many CAS awards, the sole arbitrator protected “the principle of legality and predictability of sanctions which requires a clear connection between



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the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision” (para. 16, emphasis added).”

- 209.** The Panel in CAS 2014/A/3765 Club X. v. D. & FIFA applied this principle to FIFA statutes specifically where ambiguities ought to be interpreted against federations (**Annex 23**):

“As held by CAS case law in CAS 2008/A/1545 and CAS 2011/A/2670, the “principle of legality” (“principe de légalité”) requires that the offences and sanctions must be clearly and previously defined by law and must preclude the “adjustment” of existing rules to enable an application of them to situations or conduct that the legislator did not clearly intend to penalize. CAS awards have consistently held that sports organizations cannot impose sanctions without a proper legal or regulatory basis for them and that such sanctions must also be predictable (“predictability test”). This principle is further confirmed by CAS 2007/A/1363, which holds that the principle of legality and predictability of sanctions requires a clear connection between the incriminated behaviour and the sanction and calls for a narrow interpretation of the respective provision. Furthermore, an association may be estopped from invoking a certain rule or exercising such rule in a certain fashion if precedent representations induce a subordinate or member to believe something resulting in that person’s reasonable and detrimental reliance on such belief (“estoppel by representation”) (CAS OG 08/02). Finally, CAS case law (for example CAS 2007/A/1437 para. 8.1.8) has held that inconsistencies in the rules of a federation will be construed against the federation (contra proferentem principle).”

- 210.** This principle was most recently adopted and re-affirmed by the CAS in CAS 2017/A/5498 Vitaly Mutko v. IOC (**Annex 24**: at paragraph 60):

“The Panel notes that, according to well-established CAS jurisprudence:

“the ‘principle of legality’ (‘principe de légalité’ in French), requir[es] that the offences and the sanctions be clearly and previously defined



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by the law and preclud[es] the ‘adjustment’ of existing rules to apply them to situations or behaviours that the legislator did not clearly intend to penalize. CAS arbitrators have drawn inspiration from this general principle of law in reference to sports disciplinary issues, and have formulated and applied what has been termed as ‘predictability test’. Indeed, CAS awards have consistently held that sports organizations cannot impose sanctions without a proper legal or regulatory basis and that such sanctions must be predictable. In other words, offences and sanctions must be provided by clear rules enacted beforehand” (see CAS 2008/A/1545 at para. 30; see also CAS 2014/A/3765, CAS 2011/A/2670, CAS 2017/A/5086, among several other CAS awards).”

- 211.** Moreover, the application of an eligibility rule without legal basis is unintelligible and a violation of Swiss law under the heading of public order.
- 212.** The CAS is an arbitral tribunal that is established under Chapter 12 of the Swiss Federal Code on Private International Law (“PILA”) at article 176(1):

“The provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland.”
- 213.** The result is that the Swiss Federal Tribunal retains procedural and potentially substantive jurisdiction on an appeal.
- 214.** In this sense we note article 190(2) of the PILA:
- 215.** “It can be challenged only:
 - a. if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;
 - b. if the arbitral tribunal erroneously held that it had or did not have jurisdiction;



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- c. if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
- d. if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;
- e. if the award is incompatible with Swiss public policy (*ordre public*).”

216. The Appellant here specifically refers to article 190(2)(e) which refers to the necessity for an award to be compatible with Swiss public policy (*ordre public*).

217. In this case the Appellant submits that principles of *nulla poena sine lege* applies because the decision to declare him ineligible without legislative basis is not express in sufficient clarity and specificity.

d) DOCTRINE OF HIERACHY AND NORMS OF LAW

218. In addition to the obligation that sport associations observe their own statutes, the statutes that create the sport association are treated as supreme *vis a vis* all other subordinate rules and regulations.

219. In this case, as explained above, article 7 of the Electoral Code is clear in that the FAZ Statutes are supreme in establishing eligibility criteria.

220. The FAZ, on the 1 February 2020, changed the Electoral Code, which only needed 50% support.

221. To impose such a fundamental eligibility requirement required a change in the FAZ Statutes in requiring 75% support, as clearly stated in article 30 of the FAZ Statutes.

222. The FAZ, in attempting to change the Questionnaire via an annex to the Electoral Code, did a complete “end-around” not only with respect to its Statutes, but with the fundamental principle of the doctrine of the hierarchy of a federation’s rules or norms.



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- 223.** This view is analogous to the hierarchy of national laws in domestic situations, where a country's constitution sets the parameters and subordinate laws and action must be enacted in accordance with the principles and limits set in the constitution.
- 224.** As applied to sport federations the statutes set the parameters for subsidiary actions and regulations.
- 225.** This view has been endorsed by the CAS Panel in 2008/A/1705 Grasshopper v. Alianza Lima (**Annex 25**):

“In principle, sports federations can freely establish their own provisions (cf. ZEN-RUFFINEN, Droit du Sport, 2002, marg. no. 161). However, there are limits to this autonomy. In particular the relevant organs when creating new rules and regulations are bound by the limits imposed on them by higher ranking norms, in particular the association's statutes. This follows from the principle of legality (“Le principe de la légalité implique l'exigence de la conformité aux statuts des textes réglementaires inférieurs et des décisions des organes sociaux”, cf. BADDELEY M., L'association sportive face au droit, Les limites de son autonomie, 1994, p. 208). According to this principle regulations of a lower level may complement and concretize higher ranking provision, but not amend nor contradict or change them. This principle is also well established in CAS jurisprudence (cf. CAS 2006/A/1181, no. 8.2.2; CAS 2006/A/1125, no. 6.18; 2004/A/794, no. 10.4.15).”

- 226.** This doctrine of hierarchy of norms has also been relied upon by a CAS Panel within the context of whether a FIFA circular must be consistent with the FIFA RSTP (**Annex 26**: CAS 2015/A/4153 Al-Gharafa SC v. Nicolas Fedor & FIFA at paragraphs to 149 to 156):

“The Panel notes that the issue of whether Article 12bis came into force on 1 March 2015 or 1 April 2015 could have an impact not just on this particular case, but also on any other Article 12bis cases which were initiated at FIFA between 1 March and 1 April 2015.



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Both the Player and FIFA point to Circular 1468 stating that Article 12bis was clearly intended to come into force on 1 March 2015 and all the stakeholders in the football community were made aware of this in advance of this date. Moreover, FIFA points out that they specifically referred to Article 12bis in their correspondence with the Club and the Club replied to FIFA citing the reference “OP” in their letters. At no point did the Club object to the applicability of Article 12bis before the Appealed Decision. Thus, irrespective of what it states in the RSTP 2015, it should be considered that Article 12bis applies to the matter at hand and generally as from 1 March 2015. FIFA also submitted that there were, in reality, many versions of the RSTP in 2015, as various rules and regulations changed at different times, but only one (the final) version was put into print and published on the FIFA website, due to commercial expedience, and it contained all the changes made from the RSTP 2014 version by these various new versions and it then became the formal, final RSTP 2015.

Conversely, the Club relies on the specific wording contained in Article 29 of the RSTP 2015 which states that the entire RSTP was to come into force on 1 April 2015. Further, the Club argues that FIFA could have either issued a 1 March 2015 version of the RSTP or it could have specifically stated in the RSTP 2015 exactly what date the various changes came into effect, including the fact that Article 12bis came into force on 1 March 2015, but it did neither.

In summary, the Panel sides with the Club’s arguments in this regard. There is an undoubted confusion which has been created by the discrepancy between Circular 1468 and Article 29 of the RSTP 2015 and this confusion was created by FIFA. The Panel acknowledges FIFA’s arguments that the entire football community was made aware that Article 12bis was intended to come into effect on 1 March 2015. However, the reality is that the first (and only) publically available legislation containing Article 12bis (i.e. the final, printed version of the RSTP, being RSTP 2015) expressly stated that the entire RSTP was to come into force on 1 April 2015, which included Article 12bis. It would not have been too onerous to produce more than one version of the RSTP as each change was made, or simply to have confirmed with the RSTP 2015 exactly when each change was to take effect from.



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Moreover, as stated by the panel in CAS 2004/A/594, (emphasis added): ... FIFA has issued numerous Circular Letters. Although these Circular Letters are not regulations in a strict legal sense, they reflect the understanding of FIFA and the general practice of the federations and associations belonging thereto. Thus, these Circular Letters are relevant for the interpretation of the FIFA Regulations.

Thus, the Panel concludes that in accordance with clear and consistent CAS jurisprudence in this regard (CAS 2008/A/1705, CAS 2006/A/1181, CAS 2006/A/1125, CAS 2004/A/794 and CAS 2004/A/594 to name a few), FIFA Circulars cannot be allowed to take precedence over the clear and specific wording of FIFA's regulations, including the RSTP, as the RSTP contains provisions of a higher ranking in the hierarchy of FIFA regulations than the contents of a circular. The wording in Circular 1468 cannot amend, override, change or contradict the provisions in the RSTP 2015 as it appears to do so in this situation. Given the contradiction between the RSTP 2015 and Circular 1468, the former should prevail. For the abundance of clarity, the Panel also agrees with the Club's argument that pursuant to the principle of *contra proferentem*, the unclear wording should be interpreted against the author of the wording (i.e. FIFA).

If FIFA wanted Article 12bis to apply from 1 March 2015 (and the Panel acknowledges that they clearly intended to do so) but only wanted to issue one 'new' version of the RSTP on 1 April 2015 for procedural efficiency, it could have – as the Club stated – simply specified in the RSTP 2015 that while the rest of the RSTP came into force on 1 April 2015, Article 12bis in particular came into force on 1 March 2015. However, FIFA failed to do so and the Club should not have to suffer the adverse consequences of FIFA's oversight.

In summary, the Panel concludes that Article 12bis came into force on 1 April 2015. Accordingly, the sanction of a 'warning' imposed on the Club in the Appealed Decision pursuant to Article 12bis (4) FIFA RSTP 2015 is to be set aside.”

- 227.** In this sense the Appellant submits that the actions of the FAZ must be consistent with the legislative authority outlined in its Statutes.



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228. The Appellant submits that they were not and the Decision to have him declared ineligible must be quashed.
229. Again, we refer to the arguments above that explain that the FAZ Statutes are not only generally supreme but are particularly supreme with respect to article 7 of the Electoral Code.
230. The eligibility criteria are the exclusive domain of the FAZ Statutes, not to be subject to an end around in including a new questionnaire a mere 10 days before the commencement of the process.
231. In this sense, the Appellant ought to be declared eligible to stand.
- e) **FEDERATIONS MUST OBSERVE THEIR OWN STATUTES**
232. Sport organizations must observe their own regulations and cannot take actions that are outside the purview of their own regulations.
233. The Appellant submits that the FAZ did not.
234. As mentioned above Swiss law in addition to the FAZ Statutes is applicable as the FAZ Statutes do not denote a national law and the FAZ Statutes rely on FIFA Statutes where there is a gap.
235. The Swiss Civil Code (SCC) is quite permissive in the sense that associations can enact their own regulations and the default regulations in the Swiss Civil Code only apply if the association does not enact its own statutes (SCC article 63(1)):
- “Where the articles of association do not provide rules for the association’s organisation or its relationship with its members, the following provisions apply.”
236. This view has been confirmed by a CAS Panel (**Annex 27**: CAS 2014/A/3828 IHF v. FIH & Hockey India):



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“In this respect, the Panel underlined that under Swiss law which is applicable to the FIH in its capacity as Swiss association, the right of a Swiss association to regulate and determine its own affairs is considered essential for the association. One of the expressions of private autonomy of associations is the competence to issue rules relating to their own governance, their membership and -where a sports association is concerned- their own competitions.”

- 237. What associations, Swiss and international, must observe, however, are their own regulations.
- 238. The Appellant submits that this is a basic legal principle that is consistently applied in the context of sport federations particularly in the context of associations.
- 239. We shall not repeat the portions of the FAZ Statutes with respect to eligibility criteria.
- 240. The Appellant submits that the FAZ has also violated this fundamental principle and the Appellant ought to be allowed.

f) **LEX SPECIALIS DEROGAT GENERALI**

- 241. The Appellant relies on the doctrine of *lex specialis derogat generali* in his argument where the competency of the FAZ Statutes in selecting fundamental eligibility criteria has been effectively eroded.
- 242. The generally accepted interpretive principle “*lex specialis derogat generali*” is consistently applied by CAS Panels.
- 243. It requires that a rule specifically targeting a particular issue prevails over a rule generally encompassing wider principles.
- 244. This rule is generally referred to as “the specific over the general” (**Annex 28**: CAS 2004/A/748 ROC & Viatcheslav Ekimov v. IOC, USOC & Tyler Hamilton at paragraph 31):



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“The Panel points out that, in fact, in case of different rules applicable to the same matter, the interpretive principle “lex specialis derogat generali” requires that a rule specially targeting a specific case prevails over a rule generally encompassing all cases (the rationale being that the lex specialis is presumed to have been drafted having in mind particular purposes and taking into account particular circumstances. The Panel takes comfort from the fact that CAS Panels have already applied this interpretive principle on several occasions (for example, see the award CAS 2005/A/878, at paragraph 53).”

- 245.** This doctrine has been applied by a CAS Panel more recently (**Annex 29**: CAS 2013/A/3274 Mads Glasner v. FINA at paragraph 78):

“The Sole Arbitrator concurs with the starting point of the Respondent, i.e. that if different (conflicting) rules are applicable to the same matter, the conflict of rules is to be solved by applying the principle lex specialis derogat generali. According thereto the (more) specific rule prevails over the more general rule, since the lex specialis is presumed to have been drafted having in mind particular purposes and taking into account particular circumstances.”

- 246.** This doctrine relates to both the procedural and substantive arguments.
- 247.** In relation to the procedural aspect, the FAZ Electoral Code is clear in article 7 that fundamental eligibility criteria must be enumerated in the FAZ Statutes.
- 248.** The FAZ Statutes only speak to criminal convictions, not FIFA Ethics cases.
- 249.** For the FAZ Electoral Committee to be authorized to do so, an amendment to the FAZ Statutes in articles 33 (Executive Committee) and article 38 (President) with a three-quarters majority be necessary.
- 250.** These are specific regulations that create procedural requirements.
- 251.** These specific electoral regulations must be respected.



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252. The FAZ Electoral Committee's alleged authority to make such a change without an amendment to the Statutes cannot stand in face of these specific procedural requirements.
253. With respect to the substantive erosion of powers we note that this is an appeal of an eligibility decision made by the FAZ Electoral Committee.
254. This is not an appeal of a the FAZ Ethics Committee.
255. Paragraph 1 of the Decision under appeal states that "(t)his is an appeal of the Ethics Committee and the Electoral Committee of the Football Association of Zambia (hereinafter referred to as 'FAZ')" (Annex 2).
256. Although this is what the Decision states, the 15 February 2020 notification of the decision to deem the Appellant ineligible is communicated by the Electoral Committee.
257. We note that the Electoral Committee has the exclusive jurisdiction in the administration of election under the FAZ Statutes and the FAZ Electoral Code specifically in articles 1 to 5 of the Electoral Code.
258. We also note that the FAZ Ethics Committee, further to article 11 of the Electoral Code, carries out the "integrity check" process.
259. In any event, the correct appeal route was to the Electoral Elections Committee, exhausting all internal measure.
260. It is of paramount importance to note that this is not an ethics case, despite paragraph 1 of the Decision and article 11 of the Electoral Code.
261. This is an appeal of an electoral process relating to eligibility criteria.
262. In the same vein, this is not an appeal of a FIFA Ethics Committee decision.



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- 263.** This is because this is strictly an eligibility issue.
- 264.** The *lex specialis derogat generali* doctrine determines that because there are specific regulations concerning eligibility, the procedures are separate.
- 265.** It is important to note article 2(e) of the FAZ Statutes:
- “Where there are no provisions under the FAZ Statutes, FIFA Statutes shall override FAZ Statutes.”
- 266.** In this case, the eligibility criteria and elections procedures, there are concrete rules and regulations in the FAZ Statutes.
- 267.** These are the rules and regulations that are previously explained above including article 7 of the Electoral Code and the portions of the FAZ Statutes that determine eligibility in articles 33(6) and 20(8).
- 268.** The application of article 2(e) of the FAZ Statutes fills a sphere of regulation with respect to eligibility where the FIFA rules on eligibility are not applicable.
- 269.** Therefore, the CAS jurisprudence regarding eligibility in FIFA elections is not analogous nor applicable.
- 270.** We note that at paragraph 7 of the Decision under appeal relies on the Informative Note on the Eligibility Checks (Internal Working Document No. 3).
- 271.** That document is a FIFA working document that is used in the development of eligibility checks (attached as **Annex 30**).
- 272.** The FAZ Elections Appeal Committee made a fundamental legal error where this document cannot be relied on for two reasons.
- 273.** Firstly, the FAZ Statutes have their own eligibility rules, and FIFA “informative notes” are not applicable by virtue of application of article 2(e) of the FAZ Statutes:



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“Where there are no provisions under the FAZ Statutes, FIFA Statutes shall override FAZ Statutes.”

274. Simply put, there are provisions under the FAZ Statutes, therefore FIFA rules in this sphere do not apply.
275. Secondly, the note at page one specifically states that “(i)t is recommended that eligibility checks are also carried out by confederations.”
276. The FAZ has accepted this recommendation and has enacted its own rules.
277. Those are the rules that must be respected.
278. For these reasons, the *lex specialis derogat generali* doctrine supports the Appellant’s position.

H. ALTERNATIVE ARGUMENT

279. In the alternative, if it is accepted that the FAZ Electoral Committee applied the correct criteria for eligibility, the Appellant submits that he has satisfied this criteria and ought to be declared to be eligible.
280. The criteria applied by the Electoral Committee and confirmed by the Electoral Appeals Committee is that a candidate is ineligible if he “has been found guilty and/or sentenced by the FIFA Ethics Committee or any other sporting body with a sanction that would seriously put into question the discharge of the office concerned.”
281. The Appellant submits that this decision of the FIFA Appeals Committee does not “seriously put into question the discharge of the office concerned.”
282. Firstly, the sanction on appeal was all but eliminated as the prohibition from football-related activities was reduced from two years to time



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served, which was approximately 5 months at the hearing date and 10 months when the award was communicated.

- 283.** Secondly, the fine was reduced from 100,000 CHF to 10,00 CHF.
- 284.** This is a clear indication that the case was very weak and that this cannot be considered to seriously put in question the discharge of his duties.
- 285.** We note that the Appellant is the one of the most decorated football persons in the history of Zambia.
- 286.** He has dedicated his life to Zambian football.
- 287.** There are no other issues or infractions in his career.
- 288.** We note that the FAZ has not even given the Appellant the opportunity to explain or specify.
- 289.** Moreover, neither the FAZ Electoral Committee nor the FAZ Electoral Appeals Committee have addressed whether this would seriously put in question the discharge of his duties.
- 290.** The FAZ treated this eligibility criteria as automatic and did not issue a reasoned decision.
- 291.** We note that according to the rules of the onus and burden of proof it is up to the party claiming a proposition to bear the onus of proof.
- 292.** The FAZ has not elicited any proof against the Appellant's character in this regard and has treated this issue as an absolute liability offense.
- 293.** The criteria, as applied by the FAZ, is effectively life ban from taking place in football-related activities.



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- 294.** The Appellant submits that such an interpretation of the eligibility criteria is in contravention of the FIFA Appeals Committee award as the Appellant was only sanctioned for time served.
- 295.** We note that the standard of proof required is that of “comfortable satisfaction”.
- 296.** The FAZ has not demonstrated that the Appellant cannot discharge these functions as president.
- 297.** We note that the Appellant requests an oral hearing specifically so he can explain himself to the CAS in order to demonstrate his sincerity and dedication to Zambian football.
- 298.** This is particularly important to the Appellant in particular respect to his right to be heard.
- 299.** For these reasons the Appellant submits that the Appeal ought to be allowed and he should be declared to be eligible to stand for the upcoming presidential elections.



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I. EVIDENCE AND ANNEXES

The following evidence and annexes are attached to this claim:

- 1) Power of Attorney authorizing counsel.
- 2) The Decision of the FAZ Electoral Appeals Committee 21 February 2020.
- 3) FAZ Electoral Code.
- 4) The FAZ Statutes.
- 5) FAZ Electoral Road Map and announcement FAZ Facebook page.
- 6) Proof of advance of filing fee of 1,000 CHF.
- 7) 2020 FAZ Elections Candidate Nomination Form for the Appellant.
- 8) 2020 FAZ Elections Questionnaire for Integrity Checks for the Appellant.
- 9) FAZ Electoral Committee decision 15 February 2020.
- 10) The decision of the Adjudicatory Chamber of the FIFA Ethics Committee.
- 11) The terms of the decision of the FIFA Appeals Committee.
- 12) CAF Reinstatement letter to Appellant 7 February 2019.
- 13) CAS 2011/A/2479 Sinkewitz v. UCI.
- 14) CAS 2011/A/2615 Thibaut Fauconnet v. International Skating Union (ISU) & CAS 2011/A/2618 International Skating Union (ISU) v. Thibaut Fauconnet.
- 15) CAS 2015/A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO).
- 16) CAS 2012/A/2981 CD Nacional v. FK Sutjeska.
- 17) CAS 2006/A/1141 M.P. v. FIFA & PFC Krilja Sovetov.
- 18) SFT 4A_274/20121 Judgment of September 19, 2012.
- 19) 2020 FAZ Elections Qualifications for nomination as candidates.
- 20) CAS 2017/A/5356 South African Football Association v. Fédération Internationale de Football Association (FIFA), Fédération Burkinabé de Football, Fédération Sénégalaise de Football & Federação Caboverdiana de Futebol.
- 21) CAS 2011/A/2670 Masar Omeragik v. Macedonian Football Federation.
- 22) CAS 2008/A/1545 Andrea Anderson et al. v. IOC.
- 23) CAS 2014/A/3765 Club X. v. D. & Fédération Internationale de Football Association (FIFA).
- 24) CAS 2017/A/5498 Vitaly Mutko v. IOC.



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- 25)** 2008/A/1705 Grasshopper v. Alianza Lima.
- 26)** CAS 2015/A/4153 Al-Gharafa SC v. Nicolas Fedor & FIFA.
- 27)** CAS 2014/A/3828 IHF v. FIH & Hockey India.
- 28)** CAS 2004/A/748 ROC & Viatcheslav Ekimov v. IOC, USOC & Tyler Hamilton.
- 29)** CAS 2013/A/3274 Mads Glasner v. FINA.
- 30)** Informative Note on the Eligibility Checks (Internal Working Document No. 3).



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J. REQUEST FOR RELIEF

The Appellant herein respectfully requests the Panel:

1. To accept this appeal against the Decision rendered by the FAZ Electoral Appeals Committee.
2. To adopt a preliminary award:
 - a. subjecting this matter to the expedited procedure to have a final award prior to the elections; and
 - b. granting the provisional measures to suspend the elections until a final award is issued.
3. To adopt an award:
 - a. annulling the Decision of the FAZ Electoral Appeals Committee; and
 - b. declaring that the Appellant is eligible to stand for the elections for the FAZ presidency to be held in 2020.
4. In the alternative, to declaring that the Appellant is eligible to stand for the elections for the FAZ presidency to be held in 2020 in accordance with the eligibility criteria imposed by the Decision of the FAZ Electoral Appeals Committee.
5. In any event the Appellant requests that the Panel issue an award where:
 - a. the Respondent pays the entire cost of the CAS proceedings; and
 - b. the Respondent pays the legal fees and costs in the amount of 30,000 CHF.



RUIZ-HUERTA & CRESPO
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Valencia, Spain 2 March 2020 for Mr. Kalusha Bwalya

Paolo TORCHETTI
Ruiz-Huerta & Crespo
Sports Lawyers

Attached: 30 Annexes