



# Evolution of CAS human rights jurisprudence: observations from *Keramuddin Karim v. FIFA*

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## Abstract

This essay seeks to analyze certain elements in the 2020 Court of Arbitration for Sport award in *Keramuddin Karim v. Fédération Internationale de Football Associations* (CAS 2019/A/6388, award dated July 14, 2020) where the former President of the Afghan Football Federation was sanctioned for offences including sexual abuse of Afghan footballers. Against the backdrop of increasing visibility of and focus on safeguarding of sporting bodies in the recent past, this essay looks at three aspects: (1) the definition and constitution of the offence; (2) select evidentiary matters of standard of proof, anonymous witness statements and due process; and (3) sanctioning—contextualizing them against a non-criminal, arbitration forum’s human rights jurisprudence as it currently stands. Concluding observations made include a dearth of robust provisions in applicable regulations, but the possibility to read rights into them, and the necessity of nuanced, perhaps unconventional, approaches to evidentiary standards and sanctioning.

**Keywords** Keramuddin Karim · Court of Arbitration for Sport (CAS) · Sexual harassment and abuse in sport · Due process · Evidence · Sanctions

## 1 Introduction: context and the CAS award in *Keramuddin Karim v. FIFA*

### 1.1 Context

The Court of Arbitration for Sport (“CAS”), in essence an arbitral tribunal with jurisdiction arising out of contractual relations between actors in sport,<sup>1</sup> has seen an increasing proportion of its awards involving appeals from sport body decisions

in disciplinary matters.<sup>2</sup> This has involved arbitral panels in turn increasingly looking at evidence-based establishment of ‘offences’ defined in applicable governing body regulations, due process considerations, and determination of appropriate sanctions, *inter alia*. The varied framework applicable to each such matter creates complex jurisprudence—whether within doping, or manipulation of competitions, or, now, claims of abuse— independent even of basic questions such as whether these acts are criminalized and thus before which forum they must

<sup>1</sup> See Rule 27 of the CAS Procedural Rules which forms a part of the Code of Sports Related Arbitration (last amended in 2020, effective January 1, 2021, altogether, the “CAS Code”); see also Mavromati and Reeb (2015), p. 24 onward on the jurisdiction of CAS arising from an arbitration clause favouring CAS as forum; see also Baddeley (2020), p. 9.

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<sup>2</sup> CAS jurisdiction can involve cases with ‘ordinary’ or appellate procedure within the scope of Rule 27, ordinary procedure being ‘reserved’ for commercial disputes and appellate (82%) conceptualized for disputes including those arising from disciplinary matters (64%, including doping), though a strict distinction is not always possible to make—see Mavromati and Reeb (2015), p. 45, para 78, p. 401 and p. 419 (figures as of 2013/4). Special provisions applicable to appellate procedure are laid down under Rule 47 of the CAS Code, the path taken by most disciplinary disputes, as also specified within a federation’s internal regulations’ processes which sanction disciplinary offences.

proceed,<sup>3</sup> or the ‘unique’ treatment of sport disputes.<sup>4</sup> This is compounded by CAS panels having held themselves not bound by principles such as *stare decisis*, as an arbitral body, or those of criminal law, as a forum with no criminal court jurisdiction.<sup>5</sup>

This, for example, on one hand allows lower standards of proof, or evidence admissibility thresholds for conviction for offences where deemed popularly desirable, as seen in *Keramuddin Karim v. Fédération Internationale de Football Associations* (“FIFA”, the award hereafter “Keramuddin”).<sup>6</sup> Yet, on the other hand, and perhaps more problematically so, this allows for easier athlete convictions for certain offences.<sup>7</sup> Further, this allows for discretionary sanctioning or easier heavy sanctioning, also seen in *Keramuddin*.<sup>8</sup> Consequently, the right to legal certainty of what constitutes certain serious offences, quantum of sanction (sometimes alongside parallel criminal action), or required due process, either affecting a party’s/athlete’s rights, or involving offences which violate human rights, is compromised.<sup>9</sup>

## 1.2 Case-specifics and issue outline

*Keramuddin* is one of two CAS awards dealing with the subject of harassment and sexual abuse,<sup>10</sup> and is thus studied as the most recent CAS award wading into rights territory in the context of sexual harassment/abuse in what is otherwise a disciplinary appellate dispute from a federation adjudicatory decision.<sup>11</sup> The case is also relevant given the noted

<sup>3</sup> As discussed consequently in section 2.3 in this essay.

<sup>4</sup> See Baddeley (2020), p. 15 on the need to strengthen rights of weaker parties within CAS arbitration.

<sup>5</sup> See discussion in Lindholm (2019), p. 85 – 117 and the move towards setting precedent in Lindholm (2021).

<sup>6</sup> CAS 2019/A/6388, award dated July 14, 2020; also see case note in CAS Bulletin 2020/1, p. 78.

<sup>7</sup> Notably in awards on doping and manipulation, for example. See *Keramuddin*, para 161 and 162.

<sup>8</sup> See *Keramuddin*, para 220 to para 232.

<sup>9</sup> Sexual harassment/abuse in sport is considered a violation of the substantive human rights, including those of gender-based discrimination, right to dignity, a safe workplace and economic freedom, among others—see, for example, Baddeley (2020), p. 15, and consideration of rights issues arising from other awards summarized by the CAS in a document titled “Sport and Human Rights: Overview from a CAS Perspective”—CAS (2021).

<sup>10</sup> The second being *Cyril Sen v. International Table Tennis Federation*, CAS 2018/A/5641, award dated August 9, 2018 (“Cyril Sen”).

<sup>11</sup> Other recent non-disciplinary/appellate awards which have involved the CAS touching on aspects that affect rights issues include *Blake Leeper v. International Association of Athletics Federations* (“IAAF”, now World Athletics), CAS 2020/A/6807, award dated October 23, 2020 and *Caster Semenya and Athletics South Africa v. IAAF*, CAS 2018/O/5794 and CAS 2018/O/5798, award dated April 13, 2019 (“Semenya”)—it could be argued that the CAS in neither case addressed the human rights (e.g. discrimination) based argumentation put forth connected to their eligibility. There has been consideration of rights issues arising from other awards summarized by the CAS in a document titled “Sport and Human Rights: Overview from a CAS Perspective”—CAS (2021).

rise in the number of publicly alleged offences involving sexual harassment/abuse in sport, the surrounding activism and advocacy, and connected difficulties in grievance redressal in the recent past.<sup>12</sup>

Offences involving harassment/abuse touch upon rights of actors subject to sport governing body jurisdictions, violations of which then amount to the aforementioned disciplinary offences under federation statutes. In this instance, offences including lack of protection, respect or safeguard(ing) (violating Article 23, para 1); sexual harassment (violating Article 23, para 4); threats and promises of advantages (violating of Article 23, para 5); and abuse of position (violating Article 25) of the FIFA Code of Ethics (“FIFA CoE”)<sup>13</sup> were found to be committed by the President of the Afghanistan Football Federation. The CAS upheld the FIFA Ethics Committee’s lifetime ban from taking part in any national or international-level football-related activity and fine of CHF 1,000,000.<sup>14</sup> Since then, the FIFA Ethics Committee has handed down other life bans for sexual abuse of athletes.<sup>15</sup>

This essay analyses three elements addressed by the panel in *Keramuddin*: (1) constitution of offences, particularly of ‘sexual harassment’; (2) subjectivity in admissibility of types of evidence—in this case, for instance, anonymous witness statements; and (3) consistency in factors relevant to sanctioning, including their ‘gravity’, particularly relative to other disciplinary offences, in certain cases serving to increase, and in others, to decrease, the standard of proof prior to issuance of severe sanctions.

## 2 Analysis of select issues

### 2.1 Constitution of offences

In disciplinary matters before CAS, it is a sport federation’s internal regulations, whether or not specific to that offence,

<sup>12</sup> See Diaconu (2020), where the various investigations across the world which have come into public eye have been noted; see also ‘Resources’ listed within the IOC Consensus Statement on Sexual Harassment and Abuse in Sport (2007).

<sup>13</sup> The 2018 Edition of the FIFA CoE as applicable at the time. FIFA has an independent Disciplinary Code, the relevant edition of which would have applied for other offences at the time.

<sup>14</sup> Decision of the Adjudicatory Chamber of the FIFA Ethics Committee dated June 8, 2019—*Keramuddin*, para 1, p. 3 and para 231 and 233.

<sup>15</sup> For example, decisions of the Adjudicatory Chamber of the FIFA Ethics Committee related to the Haitian Football Federation (“HFF”)—see for example decision dated April 23, 2021 (“Joseph”), where Ms. Nella Joseph, a part of the staff for the Haitian women’s U20 side, a part of the HFF, was sanctioned with a ban for life from all types of football-related activities and a fine of CHF 20,000 for coercing players along with threats of retaliation into having sexual relationships with the President of the HFF.

which constitute applicable law.<sup>16</sup> Unlike FIFA's applicable regulations which incorporate certain specific offences (whether or not within a more ostensibly 'ominous' disciplinary code, as opposed to a more 'general' code of ethics<sup>17</sup>) and rights considerations/policies,<sup>18</sup> other sports' regulations or indeed domestic regulations might not be as robust. Even so, in *Keramuddin*, the panel noted in particular how the offence of 'sexual harassment' went from a defined to an undefined term in 2018.<sup>19</sup> Given this, it relied on the "common meaning in the English language" based on prior CAS awards which had used this tool of interpretation<sup>20</sup> as well as the general dictionary definition of the term.<sup>21</sup>

On the other connected offences under Article 23, the award does not discuss the elements that might constitute/components to be established to establish the occurrence of the defined offences or prior awards—the panel directly evaluates if facts established before the court through evidence fulfil what the offences are interpreted to mean.<sup>22</sup> This approach of directly considering evidence is also seen to some extent, in the one prior award in *Cyril Sen* (where the applicable provisions were even more general but mention specific acts)<sup>23</sup> as well as consequent FIFA Ethics

Committee decisions on the same provisions as in *Keramuddin*.<sup>24</sup> In *Cyril Sen*, the presence within regulations of certain nuance in the provision<sup>25</sup> was applied by the sole arbitrator to overturn the appealed decision based on witness testimony,<sup>26</sup> though again, the provisions in themselves were not analysed but applied semantically to facts adduced.<sup>27</sup>

In such instances, the CAS's full power to re-consider facts *de novo* in an appeal<sup>28</sup>, while useful in the context of independence and access to justice,<sup>29</sup> may also be argued to be very wide in the absence of nuance in regulations. This compromise on nuance in drafted regulations and within award analysis consequently compromises the principle of legal certainty, emphasized in prior awards in a disciplinary context,<sup>30</sup> and as part of Article 6(1) of the European Convention of Human Rights ("ECHR"), as applicable to such disputes.<sup>31</sup> This compromise on certainty is further significant given that as an arbitral tribunal, there is a lack of mandate to follow precedent or the concept of *stare decisis*, with many awards not published,<sup>32</sup> particularly when paired with tough sanctions. Even so, relevant in a rights context, CAS may also make recourse to Swiss law, in turn required to comply with the ECHR, to supplement loopholes in regulations applicable.<sup>33</sup>

Alongside, it might be important to note based on decisions such as those of the Swiss Federal Tribunal ("SFT") in the appeal from *Semenya*, that both the CAS and the SFT (and thereby Switzerland) have left substantive policy that

<sup>16</sup> Doping, and in case of majority of federations, corruption/competition manipulation tend to have their own independent set of regulations or dedicated provisions within the broader disciplinary provisions - see Kuwelker *et al.* (2022).

<sup>17</sup> This distinction can have implications on the types of dispute resolution processes, party rights and types of sanctions, particularly in sports where federation regulations for all offences are not robust. The fora which undertake investigations and pronounce decisions may vary as well - see Kuwelker *et al.* (2022). Sexual abuse being a 'newer' offence to become prominent is increasingly seeing independent provisions addressing this.

<sup>18</sup> FIFA issued a Human Rights Policy and established a Human Rights Advisory Board with a complaint mechanism in 2017.

<sup>19</sup> Under Article 23, para 4 of the FIFA CoE. The prior (2012 edition) definition read "unwelcome sexual advances that are not solicited or invited. The assessment is based on whether a reasonable person would regard the conduct as undesirable or offensive." Since, the FIFA CoE has been amended for Article 23, para 4 to read "Threats, the promise of advantages, coercion and all forms of sexual abuse, harassment and exploitation are particularly prohibited." though still without a definition, *per se*.

<sup>20</sup> The panel cited *Melanie Rinaldi v. Fédération Internationale de Natation*, CAS 2007/A/1377, award dated November 26, 2007, para 19 onward— *Keramuddin*, para 209.

<sup>21</sup> The panel considered the Merriam-Webster English dictionary definition: any "uninvited and unwelcome verbal or physical behavior of a sexual nature especially by a person in authority toward a subordinate (such as an employee or student)"—*Keramuddin*, para 209.

<sup>22</sup> *Keramuddin*—paras 206 to para 211.

<sup>23</sup> *Cyril Sen*, para 55 onward— where Clause 7.3.2.9 (Intimidating remarks and invitation or familiarity) of the ITTF Handbook was analysed to gauge whether there was "unwelcome, often persistent, attention" in the form of "invitations" as described in the clause.

<sup>24</sup> Albeit from the current of the FIFA CoE which describes in slightly more detail the offence—*supra* note 19; see decision of the Adjudicatory Chamber of the FIFA Ethics Committee delivered on March 16, 2021 concerning Ms. Yvette Felix, para 77 to para 91.

<sup>25</sup> An act of harassment under Clause 7.3 "takes many forms but can generally be defined as, persistent comment, conduct, or gesture directed toward an individual or group of individuals, which is insulting, humiliating, malicious, degrading, offensive or abusive" of which the offence under Clause 7.3.2.9 was being adjudicated in this instance.

<sup>26</sup> *Cyril Sen*, para 76 and para 84.

<sup>27</sup> *Cyril Sen*, para 78 to para 83.

<sup>28</sup> Under Rule 57 of the CAS Code, see Mavromati and Reeb (2015), p. 507–509.

<sup>29</sup> Mavromati and Pellaux (2013), p. 40.

<sup>30</sup> Albeit on other subject matter (retroactive application of limitation), the panel observing that an "open-ended approach to disciplinary cases poses a serious threat to the principle of legal certainty that constitutes a violation of Art. 6(1) ECHR" as held in *Tatyana Andrianova v. All Russia Athletic Federation*, CAS 2015/A/4304, award dated April 14, 2016, para 46 to para 50.

<sup>31</sup> See generally, Haas (2012); see discussion within sanctions below on European Court of Human Rights ("ECtHR") in *Platini*, and Article 7's application only in context of 'penalty', see *infra* note 94.

<sup>32</sup> See generally, Chapter 4 in Lindholm (2019).

<sup>33</sup> *Club Raja Casablanca v. FIFA*, CAS 2019/A/6345, award dated December 16, 2019, para. 35

arguably impacts human rights, to private (sporting) body determination,<sup>34</sup> despite noting that relations between two private entities (which could include an alleged perpetrator of a disciplinary offence such as abuse and a governing body) are somewhat analogous to an individual and the state.<sup>35</sup> Yet, the SFT has also held that underlying principles of the ECHR or the Swiss Constitution can be considered to construe (or augment) ‘public policy’, which allows for scope to read in rights, and develop robust jurisprudence.<sup>36</sup>

Sexual harassment and abuse touches on various rights, procedurally and substantively<sup>37</sup> within the ECHR—it has been argued before that these provisions will increasingly be relied on by parties before the CAS,<sup>38</sup> which would aid parties seeking redressal in the event of regulations being silent on key aspects of such offences including their definition.

## 2.2 Select evidentiary and procedural issues

The consideration of evidentiary issues in CAS jurisprudence and those that shall deal with such offences henceforth is important first, because within arbitration, and particularly sports arbitration, cases tend to turn on proven facts through admissible evidence.<sup>39</sup> Second, as noted in numerous CAS awards, despite the seriousness of offences, the investigative and prosecuting capabilities of federations remain limited particularly in case of offences which are in particular clandestine,<sup>40</sup> as well as, ostensibly when stigmatized or lack transparency when investigated due to conflict of interest, as abuse tends to be.<sup>41</sup>

### 2.2.1 Standard of proof

In *Keramuddin*, the FIFA Ethics Committee was given discretion under regulations to “decide on the basis of their comfortable satisfaction”,<sup>42</sup> which was, accordingly, the standard of proof adopted by CAS, with the burden, based on the regulations and prior awards, being on each party to prove facts and allegations on which they relied.<sup>43</sup> ‘Comfortable satisfaction’, held to be the standard in between the civil ‘balance of probability’ and the criminal ‘beyond reasonable doubt’, is the commonly adopted standard across disciplinary offences, unless stated otherwise,<sup>44</sup> and sometimes, as here, mentioned categorically within the federation’s applicable regulations.<sup>45</sup>

The application of the higher criminal law standard of ‘beyond reasonable doubt’ has been consistently held to be inappropriate for a sports arbitration forum like CAS, and even in disciplinary matters with potentially severe sanctions.<sup>46</sup> A combination of limited investigative ability, difficulty in adducing evidence, and seriousness of offence has justified adoption of an ‘in-between’, ‘lower’ standard,<sup>47</sup> but CAS panels have also independently found it difficult to follow.<sup>48</sup> This, on the one hand, reduces the threshold for conviction, as seen here,<sup>49</sup> popularly considered desirable in the context of abuse, but perhaps to a lesser extent where the balance of power is more skewed towards a federation,

<sup>34</sup> In *Semenya*, for example, the CAS found it unnecessary to delve into “detailed principles” of “international human rights law” of party domiciles or competitions’ host nations—para 544 or the “possible wider impact”—para 589; the SFT did not find that discrimination between private parties were part of values within public policy under Article 190(2)(e) of the Swiss Private International Law Act—*infra* note 35.

<sup>35</sup> 4A\_248/2019 and 4A\_398/2019, decision dated August 25, 2020, para 9.4; see also Holzer (2020) and Rigozzi (2020), p. 124.

<sup>36</sup> Rigozzi (2020), p. 127; see also Reitker (2020); to note is the argument in Kreche (2020), on allowing for a ‘margin of appreciation’, as has been done prior in the consideration of Article 8, and how that can be a double-edged sword.

<sup>37</sup> Articles 6 and 7 for procedure; and substantively Articles 8, on personal autonomy and identity, including physical, psychological, and moral integrity, and Article 14 on non-discrimination.

<sup>38</sup> See Rigozzi (2020), p. 128.

<sup>39</sup> Redfern and Hunter on International Arbitration (2009), p. 384; as also cited in Rigozzi (2014), p 1.

<sup>40</sup> See Diaconu *et al.* (2021) under ‘Select Evidentiary Issues’.

<sup>41</sup> Relatively few survivors seek recourse— see Dryden (2018).

<sup>42</sup> Article 48 of the FIFA CoE; *Keramuddin*, para 162.

<sup>43</sup> On the basis of Article 49 of the FIFA CoE which provides that the Ethics Committee had to prove any alleged breaches; the panel also relied on precedent in *Békéscsaba 1912 Futball v. George Koroudjiev*, award dated September 20, 2018, CAS 2017/A/5465, para 82; *Keramuddin*, para 161 and para 192.

<sup>44</sup> There remain a few other standards specified within regulations which include the ‘preponderance of probability’ part of section 3(g) (a) of the International Tennis Integrity Association’s Anti-Corruption Programme 2021 and ‘personal conviction’ under Article 97 of FIFA’s own of the FIFA Disciplinary Code 2019, to which parties consent contractually. This has been held commensurate to comfortable satisfaction - Rigozzi and Quinn (2014), p. 29

<sup>45</sup> Evidentiary rules are those adopted by each CAS panel unless specific rules are mentioned in regulations applicable; Chapter 12 of the PILA contains Article 182 that allows for a choice of procedure (by implication meaning CAS arbitrations are governed by the CAS Code, which if silent, would defer to applicable procedure) and Article 184 (evidentiary issues)—Rigozzi and Quinn (2014), pp. 2-4.

<sup>46</sup> See, for example *Mohammed Asif v. ICC*, CAS 2011/A/2362, award dates April 17, 2013, para 69, where parallel proceedings in the English High Court were ongoing and resulted in convictions, which were factored into sanctioning.

<sup>47</sup> Diaconu *et al.* (2021) under ‘Standard of Proof’ within ‘Select Evidentiary Issues’.

<sup>48</sup> *Oleg Oriekhov v. UEFA*, CAS 2010/A/2172, award dated January 18, 2011, para 53.

<sup>49</sup> *Keramuddin*, para 192.



as seen in doping or in manipulation offences in tennis.<sup>50</sup> At the same time, the presence of a standard higher than merely a ‘civil’ standard has also been considered a safeguard against violation of due process.<sup>51</sup> Finally, independent of this, a lower threshold of admissibility of evidence could impact the right not to self-incriminate, recognized by panels in the past,<sup>52</sup> particularly given parallel (and likely) criminal proceedings.

### 2.2.2 Type of evidence considered

In *Keramuddin*, large reliance was placed on anonymous witness statements,<sup>53</sup> which, the panel noted, relying on prior CAS jurisprudence, were not *per se* prohibited under Swiss or European law,<sup>54</sup> and had been ruled admissible by the European Court of Human Rights (“ECtHR”) and the SFT,<sup>55</sup> but considered here due to the number of witnesses, with protection of their identity coupled with FIFA’s limited interrogatory powers being weighed above the accused’s procedural right to interrogate witnesses.<sup>56</sup> This was supplemented by the panel’s making note of consistency across witness depositions<sup>57</sup> and with those before lower fora,<sup>58</sup> as well as lack of proven personal undisclosed reasons to make accusations, or of proven concoction of testimony.<sup>59</sup>

CAS panels have considerable discretion in admitting evidence and are not bound by Swiss civil or criminal rules

of evidence, even as ‘guidance’.<sup>60</sup> Yet, prior awards have both allowed<sup>61</sup> and disallowed<sup>62</sup> anonymous witness testimony. Where permitted, admission was made contingent on granting the other party the right to cross-examine witnesses based on Article 6 and Article 29.2 of the Swiss Constitution and the specific forum’s ability to confirm identification, among few other modalities.<sup>63</sup> Where not, such admissibility was considered infringement of the right to be heard and to a fair trial, as personal data was essential to test credibility—abstract danger to personal safety, among other things would not be sufficient for anonymity.<sup>64</sup>

In *Keramuddin*, the panel undertook extensive consideration of CAS, ECtHR and SFT precedent, noting, *inter alia*, that right of witnesses to life, liberty and security was to be balanced with that of those of defence, with conviction not based solely on such testimony, particularly where reliability of witnesses has not been tested.<sup>65</sup> Ultimately, fulfilment of each factor based on adduced fact was considered<sup>66</sup>—such determination also remains a subjective determination of the respective CAS panel.<sup>67</sup> The panel’s fairly detailed determination in *Keramuddin*, given also the survivor trauma for sexual harassment/abuse victims to be considered in addition to the usually considered factors, is difficult to fault and in line with certain prior panel decisions.<sup>68</sup>

<sup>50</sup> Numerous life bans have been issued consistently for manipulation offences and argued to be unnecessarily harsh, unsustainable and not serving the purpose of sanction in these cases—see Diaconu *et al.* (2021) under ‘Sanctions’.

<sup>51</sup> Rigozzi (2021) p. 27.

<sup>52</sup> See for instance *Jerome Valcke v. FIFA*, CAS 2017/A/5003, award dated July 27, 2018, at para 266.

<sup>53</sup> Witnesses testimonies are admissible evidence under Rule 51(1) and 55(1) of the CAS Code, which could be any person, including a party, their employees or other representatives—Rigozzi and Quinn (2014) p. 7.

<sup>54</sup> As there was impact on the right to be heard—*Keramuddin*, para 124.

<sup>55</sup> Citing precedent—*Keramuddin*, para 125.

<sup>56</sup> *Keramuddin*, para 195.

<sup>57</sup> *Keramuddin*, para 179.

<sup>58</sup> *Keramuddin*, para 189.

<sup>59</sup> *Keramuddin*, paras 184 and 185; The appellant (Mr. Karim) contended no corroborating evidence and not hearing his own witnesses post-hearing - the Panel held the former inadequate in light of strength of legitimacy of the testimonies and the latter impossible to speculate on, the appellant being responsible for and having failed to produce witnesses of his own within the rules, making the decision compliant with his procedural rights—*Keramuddin*, para 139 to para 148, and para 197; the panel relied on precedent from the SFT on timely and rule-compliant production of evidence to be important (4A\_440/2010 and 4A\_576/2012).

<sup>60</sup> *Amos Adamu v. FIFA*, CAS 2011/A/2426, award dated February 24, 2012, at para 68 and para 90.

<sup>61</sup> See *FK Pobeda, Aleksandar Zabrcanec and Nikolce Zdraveski v. UEFA*, CAS 2009/A/1920, award dated April 15, 2010 (“Pobeda”)—considered in *Keramuddin*, para 128.

<sup>62</sup> See *Union Cyclisme Internationale (“UCI”) v. Alberto Contador Velasco and RFEC*, CAS 2011/A/2384 and *WADA v. Alerto Contador Velasco and RFEC*, CAS 2011/A/2384, award dated February 6, 2012 (“Contador”)—considered in *Keramuddin*, para 129.

<sup>63</sup> *Pobeda* as cited in Rigozzi and Quinn (2014), p. 47.

<sup>64</sup> *Contador*, para 172 to para 180.

<sup>65</sup> *Keramuddin*, para 125 and para 126.

<sup>66</sup> See para 132 to para 138 in *Keramuddin*, being convincing motivation of need for anonymity, possibility for the panel to see the witnesses, concrete risk of retaliation, questioning of the witness by the court, including on reliability and ability to cross-examine—see also Rigozzi and Quinn (2014), p. 50.

<sup>67</sup> Independently, prior CAS awards have highlighted the right to defence including the right to be heard, *Real Federation Espanola de Ciclismo and A. Valverde et al. c. UCI*, TAS 2007/O/1381, award dated September 22, 2007, para 82 and para 83 and more generally the right to a fair procedure *FC Dynamo Kyiv v. Gerson Alencar de Lima Junior and SC Braga*, CAS 2013/A/3309, award dated January 22, 2015, para 87; see CAS (2020).

<sup>68</sup> Panels (see, for example, *IAAF v. All Russia Athletics Federation and Vladimir Kazarin*, CAS 2016/A/4480, award dated April 7, 2017, para 78) have justified the test to balance countering interests as in line with ECtHR decisions, particularly that in *K.S. and M.S. v. Germany*, App. No. 33969/11, judgement dated October 6, 2016.

### 2.2.3 General due process

While on the one hand, ECtHR after *Pechstein* requires procedural rights, including those to a fair trial, to be guaranteed even by private bodies,<sup>69</sup> in practice, the mandatory nature of CAS as a forum in disciplinary matters,<sup>70</sup> among other practical considerations could be argued to have hindered the ability to grant this. Examples include insufficient access to legal aid and access as a barrier to filing complaints, particularly on federations' exclusion of domestic law applicability/jurisdiction, within which human rights protections or jurisprudence might usually be found.<sup>71</sup> That said, within the sport dispute resolution process, particularly for disciplinary procedures, the difficulties in ensuring due process have been studied and critiqued prior,<sup>72</sup> and panels have hesitated to apply CAS's ability to hear cases *de novo* to cure deficiencies.<sup>73</sup>

Connected to this, the issues of standing or ability to participate in proceedings (and its being only guaranteed by limited bodies), has previously been raised,<sup>74</sup> with certain federations excluding, in entirety, the 'entitlement' to commence proceedings, including in practice.<sup>75</sup> Under the FIFA CoE, survivors are not considered or allowed to be parties, but are entitled to receive the decision.<sup>76</sup> Remedies, however, might lie within Swiss law, given that this is where federation bodies are usually headquartered<sup>77</sup>—the distinction between 'denouncer' and

'plaintiff' has previously been noted, the latter having standing based on direct interest worthy of protection.<sup>78</sup>

Additionally, federations' dragging their feet in investigation or prosecution could be argued in itself to be an appealable decision within Rule 47 of the CAS Code. This has certain parallel precedent in connection with football,<sup>79</sup> as well as within the broader arbitration world external to sport.<sup>80</sup> Failure to initiate disciplinary proceedings against a party, which is likely to affect the legal situation of others, has also been considered an appealable 'decision'.<sup>81</sup> Similarly a 'decision' is said to be made on admissibility if a party is invited to proceed before national courts instead of the sporting body<sup>82</sup>—a situation survivors of abuse might face. In the absence of this, the ability to appeal to CAS, irrespective of fulfillment of the grounds of 'denial of justice', still remains a possibility—this would include situations involving failure of a 'judicial' body to rule within a reasonable period of time, a decision being arbitrary and offending a sense of justice, or the applicable regulations being silent on the next steps examined under Swiss law.<sup>83</sup>

### 2.3 Award of sanctions

The panel in *Keramuddin*, at the outset, sought to visit proportionality of the sanctions awarded in the FIFA Ethics Committee's decision through the factors expressly listed to be taken into account while sanctioning, including nature of the offence, assistance and cooperation of the accused, motive, circumstances, degree of the accused's guilt (including seriousness of the violation), extent of acceptance of

<sup>69</sup> ECtHR, Case of *Mutu and Pechstein v. Switzerland* (Application no.s 40575/10 and 67474/10), judgement of October 2, 2018 ("Pechstein"), para 115; see also the emphasis on non-acceptance of restrictions on access to justice easily in awards such as *Mads Glasner v. Federation Internationale de Natation Associations*, CAS 2013/A/2374, award dated January 31, 2014, para 65.

<sup>70</sup> *Pechstein*, para 95 and para 96—consent needed to be free, whereas here parties were obliged to accept a monopolistic structure; also, see generally, Duval (2017), Voser and Gottlieb (2018).

<sup>71</sup> See generally, Diaconu (2021); see also, Report of the United Nations High Commissioner for Human Rights (2020), titled Intersection of race and gender discrimination in sport, para 40 and para 43.

<sup>72</sup> See generally Star and Kelly (2021).

<sup>73</sup> See for example, cases as far back as *USA Shooting & Q v. Union Internationale de Tir*, CAS 94/129, award dated May 23, 1995, para 59 and consequent panels which have cited the ECtHR on this point—for instance, see *Asif*, *supra* note 46, para 41 citing para 58 and para 59 of *A. Menarini Diagnostics S.r.l. v. Italy*, App. No. 43509/08 Second Section judgement dated September 27, 2011.

<sup>74</sup> Diaconu (2021); see for example Article 37 of the UEFA Disciplinary Regulations (2020) which allows for standing.

<sup>75</sup> Diaconu (2021), Article 21 of the UCI Code of Ethics 2019 has been cited as one such example.

<sup>76</sup> Article 41 para 3 of the FIFA CoE; other parallel support is provided including legal aid.

<sup>77</sup> See Duval (2015), p. 12.

<sup>78</sup> SFT 2A\_191/2003 of January 22, 2004; ATF 109 Ia 217, 4a p. 229; this threshold is ostensibly met for survivors of abuse, but similar rights are also present within Swiss criminal law—Diaconu (2021).

<sup>79</sup> *Galatasaray v. FIFA and Club Regatas Vasco da Gama and F.J.*, CAS 2004/A/659, award dated March 17, 2005, para 35 and para 36 where a decision conveyed to not open proceedings against a third party was in itself considered an appealable decision to CAS; also *CD Universidade Catolica v. FIFA*, CAS 2011/A/2343, award dated March 1, 2012, para 36. This has also been discussed in Bernasconi (2007).

<sup>80</sup> See Admissibility Objection within the Part IV of the Procedural Order No. 2 in PCA Case No. 2016-36 & 37 (Bangladesh Accords) of September 4, 2017 where admissibility was not denied on the contended grounds of lack of a prior decision.

<sup>81</sup> *World Anti-Doping Agency and Union Cyclisme Internationale v. A. Valverde and RFEC*, CAS 2007/A/1396, award of May 31, 2010, para 6.15.

<sup>82</sup> *Aris FC v. FIFA*, CAS 2007/A/1251, award dated July 27, 2007 ("Aris FC"), para 36f.

<sup>83</sup> This has been held in CAS awards such as *Aris FC* (*ibid*, paras 58 and 71); see also *Alexandra Shelton v. Polish Olympic Committee and Polish Fencing Federation*, CAS 2020/A/6693, award dated September 28, 2020, para. 113.

responsibility and mitigation of guilt by returning the advantages.<sup>84</sup> Any sanctions other than monetary ones are to be based on the most severe breach found established among those before the panel.<sup>85</sup> Considering the guilty finding on both counts ‘most serious’,<sup>86</sup> illegal and immoral and thus necessitating deterrent punishment, particularly given his ‘high position’ which warranted an increase of sentence,<sup>87</sup> the awarded life ban and fine were found to be proportionate.<sup>88</sup> The presence of such factors provides for a standardized set of considerations, but allows for discretion within those. As seen in the case of other offences such as manipulation, in the absence of further guidelines, this discretion applied by CAS panels may vary vastly in application across sports.<sup>89</sup>

Interestingly, independent of these, the panel drew a comparison to prior CAS awards confirming FIFA sanctions of life bans (in certain cases with the same CHF 1,000,000 fine) for officials involved in other offences (being match fixing, bribery and corruption), finding that *Keramuddin* involved offences of “*unprecedented gravity*” which violated “*basic human rights and damaged the mental and physical dignity and integrity*” of the survivors, ‘irreparably’ damaging their lives.<sup>90</sup> This consideration of proportionality is in line with prior CAS precedent on sanctions in general.<sup>91</sup>

While arguably warranted in this instance, and with a deterrent objective, the approach involving comparison to relative gravity and issuance of equally severe sanctions in other offences relative to this offence (and award) could be reconsidered - justification of harsh penalties in other offences when found ‘proportionate’ for such crimes could be difficult going forward. Additionally, ‘seriousness’ of an offence is often cited to heighten the standard of proof

or impose bans by CAS panels in awards involving offences like doping or manipulation,<sup>92</sup> which could therefore create complex questions on thresholds to justify level of and consistency across sanctioning. Certainty, meaning no punishment without law, a consequence of consistency or predictability across awards and as relevant also to determination of occurrence of an offence, has been ruled on in a sanctions context within sport by the CAS<sup>93</sup> and ECtHR,<sup>94</sup> where it was deemed necessary, despite an offence not being criminal in nature.<sup>95</sup> Finally, the CAS has also upheld the importance of predictability, and thereby legality of sanctions in specific, as well.<sup>96</sup>

### 3 Concluding observations

Based on the observations above, a few consistent themes emerge. The potential dearth of robust codification of offences and the variation across regulations is a potential primary barrier in addressing such abuse. Though certain bodies offer more safeguards in their regulations than others, none do so in a manner attributing the same gravity to the offence (dedicated nuanced definitions or procedure, or sanctions, *inter alia*) as certain other disciplinary offences, such as doping, have received, despite the arguably comparable, if not more egregious nature of the offence. This, arguably, inhibits analysis at the CAS level which could potentially result in compromise of due process for both survivors and the accused. Given the history of development of sporting regulation in a reactive manner, an example being the increase in focus on safeguarding seen now, this might perhaps be a matter of time.

For sexual harassment and abuse, unlike other sport-specific disciplinary offences, the likelihood of having applicable law per country and jurisdiction, or offences meeting a threshold to be independently proceeded against, is likely. Thus, considerations of appropriate forum and standing are likely to arise. Keeping in mind resistance to, but necessity of, application of higher (perhaps criminal law) standards

<sup>84</sup> *Keramuddin*, para 223, citing Article 9, para 1 of the FIFA CoE; see also, as recently applied in Joseph, in the FIFA Adjudicatory Chamber decision concerning Ms. Joseph and the HFF, *supra* note 15, para 69.

<sup>85</sup> *Keramuddin*, para 224, citing Article 11 of the FIFA CoE.

<sup>86</sup> *Keramuddin*, para 225.

<sup>87</sup> Under Article 25, para 2 FIFA CoE- *Keramuddin*, para 228.

<sup>88</sup> *Keramuddin*, paras 229 and 230.

<sup>89</sup> Manipulation provisions across most international sporting body federation regulations provide for aggravating and mitigating factors for sanctioning. Despite this, certain sports tend to provide far harsher sanctions for offences of similar gravity (to be noted are the prevalence of life-bans in tennis) as opposed to other sport (see, for example, sanctions described in Kuwelker *et al* (2022)).

<sup>90</sup> *Keramuddin*, para 231.

<sup>91</sup> For example, see *Ward v. FEI*, CAS 99/A/246, award dated May 11, 2000, para. 31 which states that it is a “...widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringement” and “seriousness of the penalty [...] depends on the degree of the fault committed by the person responsible”.

<sup>92</sup> See Diaconu *et al.* (2021) under ‘Sanctions’.

<sup>93</sup> See *George Yerolimpos v. World Karate Federation*, CAS 2014/A/3516, award dated October 6, 2014, para 104.

<sup>94</sup> Article 7 providing that no one can be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under applicable law at the time of commission—see ECtHR, *Platini v. Switzerland* (Application No. 526/18) judgement of February 11, 2020 (“Platini”) which considered the applicability of Article 7 to sanctions.

<sup>95</sup> As required for Article 7, Article 7(1) was autonomous in scope—*Platini* at para 44.

<sup>96</sup> *Vanessa Vanakorn v. FIS*, CAS 2014/A/3832 and 3833, award dated June 19, 2015, para. 86.

for evidence and procedure, among other practical issues such as investigative ability, there is need for further pushing alertness to criminal law-adjacent procedural guarantees to protect party rights, including at the federation level, as the CAS's ability to rehear a case entirely might disincentivize the guarantee of procedural propriety until then. Given the longer time taken to change statutes and the anticipated differences with domestic law, sexual abuse and harassment being mostly criminalized in domestic law and not unique to sport as an offence, the increasingly judicial arbitration nature of the CAS, as contended by a few noted above, could be used to provide clarity based on precedent on what would constitute such an offence within *lex sportiva*.

Even so, the decision in *Keramuddin*, though different in certain aspects from prior awards, incorporates nuance both into procedural and sanctioning considerations, particularly those affecting rights. However, from the standpoint of certainty in constitution of an offence, which goes to the heart of the human rights violation and effective remedies, there is more to be done. Finally, pending ECtHR decisions involving cases like *Semenya*, where potential substantive rights could be looked at, as compared to largely procedural analysis prior, it is contended that normatively, such analysis would occur at the CAS level itself, both as permitted jurisdictionally, and as often contended by and required in party interest. Until such time, reliance on external rights considerations in contentions and awards at CAS is likely to build further.

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