



Arbitration CAS 2006/A/1141 M.P. v. FIFA & PFC Krilja Sovetov, order of 31 August 2006

Football

Conditions to stay the execution of a decision

Likelihood of success

Irreparable harm

Balance of interest between the parties

1. When deciding whether to stay the execution of the decision appealed against, it is necessary to consider whether the measure is useful to protect the applicant from irreparable harm, the likelihood of success on the merits of the appeal and whether the interests of the Appellant outweigh those of the opposite party. It is necessary to compare the risks incurred by the Appellant in the event of immediate execution of the decision with the disadvantages for the Respondent in being deprived such execution – the so-called balance of convenience or interests. The 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 conditions for a legal action are fulfilled.
2. The Appellant's likelihood of success over the substance can be considered as *prima facie* reasonable if it cannot be definitely discounted.
3. For a player to be denied the opportunity to play during four months would cause him irreparable harm if the Panel to be appointed were eventually to find that the suspension should be set aside.
4. With regard to the balance of interests between the parties, it should be noted 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.

M.P. ("the Appellant" or "the Player") is a Brazilian professional football player.

The Fédération Internationale de Football Association (FIFA, "the first Respondent") is the international federation of football which is registered in Zurich, Switzerland.

FC Krilja Sovetov ("the second Respondent" or "the Russian Club") is a football club with has its seat in Samara, Russia. It is a member of the Russian Football Association, which in turn is a member of FIFA.

On 1 February 2004, the Player and the Russian Club signed an employment contract, valid from 1 February 2004 until 1 February 2007.

On 10 March 2004, the Player terminated unilaterally the employment contract alleging that the second Respondent had not fulfilled its financial obligations.

On 13 April 2005, the Player signed a new employment contract with the Brazilian Club, Cruzeiro Esporte Clube.

On 9 May 2005, the Brazilian Football Federation (Confederação Brasileira de Futebol, CBF) applied to FIFA to get the authorization to provisionally register the Player.

By decision of the FIFA Single Judge of the Players' Status Committee issued on 26 May 2005, the BBF was provisionally authorized to register the Player.

On 20 May 2005, the Russian Club filed a claim before the FIFA Dispute Resolution Chamber ("the FIFA DRC") claiming that the Appellant breached the contract without just cause, and that the Brazilian Club induced the Player to breach the contract.

On 23 March 2006, the FIFA DRC issued a decision ("the Decision"), whereby it partially admitted the claim of the second Respondent. Therefore, the Appellant was ordered to pay a certain amount of money to the Russian Club and was imposed a "*restriction of four months on his eligibility to play in official matches*".

On 3 August 2006, the Appellant filed with the Court of Arbitration for Sport (CAS) an appeal against the Decision. The Appellant applied that the Decision be set aside. Basically, he alleged that he unilaterally terminated the contract for a just cause, since the second Respondent did not fulfil its financial obligations. Furthermore, the Appellant asked for compensation to be paid by the Russian Club.

Together with the statement of appeal, the Appellant filed an application for a stay of a Decision. He contented that would suffer irreparable harm, since the suspension imposed on him will "*impede not only his family's and his parents' provision, but will also cause inevitable damage for his career*".

By letter of 7 August 2006, the CAS Court Office fixed a 10-day deadline to the Respondents to express their opinion regarding the request for stay submitted by the Appellant.

On 8 August 2006, Counsel for Appellant sent a letter to the CAS Court Office, whereby he stated that the Appellant withdrew his application for a stay of the monetary sanction of the Decision but maintained his request for application for a stay regarding the disciplinary sanction of the Decision.

By letter of 18 August 2006, FIFA sent its reply to the request for stay of execution of the Decision filed by the Appellant.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS derives from Art. R47 of the Code of Sports-related Arbitration (“the Code”) and from Art. 59 ff of the FIFA Statutes.
2. It follows that, in principle, CAS has jurisdiction to decide the present dispute, without prejudice of a varying decision which the Panel may issue upon its constitution.

Applicable Law

3. Art. R58 of the Code provides as follows:
“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
4. Art. 59 para. 2 of the FIFA Statutes provides as follows:
“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”.
5. The Appellant has not expressly chosen any specific rules of law to be applicable to this proceedings. He has recognised the application of the FIFA Regulations.
6. As the seat of the CAS is in Switzerland, this arbitration is subject to the rules of the Swiss private international law (“LDIP”). Article 187 para. 1 LDIP provides that the arbitral tribunal decides in accordance with the law chosen by the parties or, in the absence of any choice, in accordance with the rules with which the case has the closest connection.
7. In the event that no special request regarding the applicable law was made by the Appellant, the general rule of Art. R58 of the Code applies. It follows that the rules and regulations of FIFA shall apply primarily and Swiss law shall apply subsidiary.

Admissibility

8. The statement of appeal filed by the Appellant was lodged within the deadline provided by Art. 60 of the FIFA Statutes, namely 21 days from the notification of the Decision. Furthermore, it complies with the requirements of Art. R48 of the Code.
9. It follows that the appeal is admissible.

Application for a stay

10. The Appellant has applied to stay the Decision, in particular the disciplinary decision. Such application is to be dealt with as a request for provisional and conservators measures in accordance with Art. R37 of the Code.

11. The Decision states:

“(...) the DRC declared that the player had breached the employment contract without just cause undoubtedly during the so-called protected period as provided for in article 21 par. 1 of the Regulations. Therefore, according to the afore-mentioned provision, financial and sports sanctions shall be imposed on the player.

In this respect, the DRC referred to the basic sanction of four months on the player’s eligibility to participate in any official football matches in case of an unjustified breach of contract by a player. Moreover, the DRC referred to the possibility of taking into consideration exceptional circumstances based on which the sanction could be shortened or extended.

The DRC then stated that the player was fully responsible for the breach of contract, since he was absent from the club for a long lasting period of time without any permission from the side of the club. Besides that, the DRC stated that the same mitigating and aggravating circumstances which were taken into consideration when the amount of compensation for breach of contract was fixed had to be taken into consideration as well when the sports sanction is to be determined, but in this respect as well compensate each other, and therefore, have no effect on the duration of the player’s sports sanction”.

The DRC concluded that “a restriction of four months on his eligibility to play in official matches is imposed on the player M.P. This sanction shall take effect from the start of the first season of the player’s current club following the notification of the present decision”.

12. The Player argued that:

“According to the Appellant the stay of the Decision in this matter would not harm either Respondent. For the Appellant, on the other hand, the ineligibility for four months, period during which he will have difficulties to maintain his technical and physical shape, having in view he will have no financial conditions neither to attend centers for technical preparation and training, might have severe consequences to his future, which may be compromised in a definitive way”.

The Appellant furthermore argues that the damages for him is “already initially configured, since he had been hired by the Sporting – Sociedade Desportiva de Futebol, SAD, from Lisbon, Portugal, and due to the suspension imposed he was forced to accept a termination of the contract which, although consensual, was

obtained under the threat of taking place via that country's Justice". Therefore, "as that contract's rescission was imposed to him, due to his ineligibility, no other club will hire him because he is impeded to play".

13. In its reply FIFA requested to reject the application for stay submitted by the Appellant. It alleged firstly that *"at the present stage of the procedure at hand, the chances of success on the merits of the appeal are little"*. The reasons are the following:

"(...) with particular reference to the Appellant's position, it has to be emphasized that the latter, in his request for stay of execution to the CAS, has not presented any new and well-founded arguments corroborating his position that the employment contract in question was breached by Krilja, and not by the Appellant. He was thus not able to submit statements which would, prima facie, lead to the conclusion that the decision passed by the DRC needs being amended since inappropriate. Therefore, the decision taken by the DRC with regard to the Appellant, (...) is undoubtedly correct and appropriate". Furthermore, FIFA stated that *"(...) we acknowledged that the Appellant allegedly has at his disposal certain important documents which would clearly prove that he did not breach the contract with Krilja. However, these documents were, according to the Appellant's statement, not submitted to the DRC, although he could have done so. (...) we would like to emphasize that the procedure for stay before the CAS shall not serve to repair omissions or weak defence strategies of parties in a procedure before the DRC. Moreover, the procedure for stay of execution, like all procedures related to provisional measures, is a summary procedure only, and is not intended to clarify details with regard to the circumstances and the substance of a matter"*.

14. Furthermore, FIFA stated that the Appellant would not suffer any harm which would be irreparable in case the request for stay is dismissed, since the suspension would not affect the Appellant's financial position.

"(...) in case the CAS would decide to reject the request for stay of execution, but finally decide to annul the challenged decision, the Appellant still would have the possibility to claim for the reparation of financial damages he allegedly incurs due to the suspension, provided he would be able to duly substantiate them".

15. Finally, FIFA alleged that the interests of FIFA as the governing body of football, outweigh any interest that the Appellant may have with its application for stay. In this respect FIFA reminded the principle of the maintenance of contractual stability, which is part of an important part of the agreement signed between FIFA/UEFA and the European Commission. It represents the core of the FIFA Regulations.

"The sanction must serve as a reminder to the faulty party that its conduct will not be tolerated in the world of football as well as to ensure that other members of the football family will reconsider before damaging someone with such conduct".

Analysis

16. According to the CAS jurisprudence, as a general rule, when deciding whether to stay the execution of the decision appealed against, it is necessary to consider whether the measure is useful to protect the applicant from irreparable harm, the likelihood of success on the merits of the appeal and whether the interests of the Appellant outweigh those of the opposite party. It is necessary to compare the risks incurred by the Appellant in the event of immediate

execution of the decision with the disadvantages for the Respondent in being deprived such execution – the so-called balance of convenience or interests. The 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 conditions for a legal action are fulfilled (CAS 2004/A/578; CAS 2000/A/274, published in the Digest of CAS Awards II, p. 757; CAS 98/200, pp. 38-41; CAS 2003/A/523, para. 7.4; CAS 2004/A/691; CAS 2004/A/780; CAS 2005/A/916).

17. The disciplinary sanction was imposed pursuant to Art. 23(a) of the FIFA Regulations (edition 2001), which provides the following:

“If the breach occurs at the end of the first or the second year of contract, the sanction shall be a restriction of four months of his eligibility to participate in any official football matches from the beginning of the new season of the new club’s national championship”.

According to this article, exceptional circumstances on which the sanction could be shortened or extended may be taken into consideration by the deciding body.

18. In the case at hand, the Appellant’s likelihood of success over the substance is *prima facie* reasonable in the sense that it cannot be definitely discounted. The Appellant submitted in summary that he did not breach the contract concluded with PFC Krilja, as the club did not fulfil its financial obligations. Since the Russian Club did not submit any reply concerning the application for stay filed by the Appellant, the resolution of this issue will thus depend upon an assessment of all the evidence, which can only be undertaken at the end of the proceedings. However, it will be for the Appellant to bring concrete evidence in order to prove that he terminated the contract with just cause. At this stage, it is impossible to express any further view on the merits of this dispute.
19. As to the risks that the Appellant suffers an irreparable damage pursuant to the definition of the Swiss Federal Tribunal (ATF 126 I 207), for a player to be denied the opportunity to play during four months would cause him damage irreparable if the Panel to be appointed were eventually to find that the suspension should be set aside (Preliminary decision in CAS 2003/O/482; CAS 2004/A/780). At this stage, it appears thus that the execution of the particular disciplinary sanction contained in the Decision would result in an immediate harm to the Appellant, which would be difficult to compensate, assuming that the appeal would be eventually admitted.
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.
21. It follows from the above that the three cumulative conditions for the stay of a decision are met. As a consequence, the application for a stay of the disciplinary Decision is to be allowed.

The Deputy President of the CAS Appeals Arbitration Division of the Court of Arbitration for Sport, ruling in camera, pronounces:

1. The application by M.P. to stay the decision issued on 23 March 2006 by the FIFA Dispute Resolution Chamber is allowed.
2. (...).