



INSIGHT

# REGULATION OF SPORT ACTIVITIES AND RIGHT TO RESPECT TO PRIVATE LIFE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

FRANCESCO BESTAGNO\*

**ABSTRACT:** In *Fédération Nationale des Syndicats Sportifs (FNASS) and others v. France* (judgment of 18 January 2018, no. 48151/11 and 77769/13), the European Court of Human Rights assessed the compatibility between the right to private and family life and a French Order regulating unannounced anti-doping controls for sport professionals. According to the European Court of Human Rights, the impact of the disputed regulation on sport professionals' right to private life is not disproportionate with respect to the legitimate necessity to protect public health and assure fairness and equality of opportunities among sport competitors. This decision confirms a specific approach characterising the, albeit limited, case-law elaborated by the European Court of Human Rights on the interplay between sport activities, on one hand, and the right to respect for private and family life, on the other. The European Court of Human Rights tends to highlight the leisure nature of sport activities more than the interests on the part of sport professionals. In relation to professional sport activities, the balancing test seems to place emphasis on public interest linked with the regulation of sport competitions more than on the right to privacy of sport professionals. Instead, when sport activities come into play in relation to their leisure nature, the European Court of Human Rights deeply stresses their importance as a means allowing persons to develop social relations and express personal identity.

**KEYWORDS:** sport activities – European Convention on Human Rights and Fundamental Freedoms – right to respect for private life – anti-doping controls – sport professional activities – sport professionals' right.

## I. INTRODUCTION

On 18 January 2018, the European Court of Human Rights unanimously delivered a decision on *Fédération Nationale des Syndicats Sportifs (FNASS) and others v. France*.<sup>1</sup> The

\* Full Professor of EU Law, Faculty of Law, Catholic University of the Sacred Heart, Milan (Italy), francesco.bestagno@unicatt.it.

<sup>1</sup> European Court of Human Rights, judgment of 18 January 2018, no. 48151/11 and 77769/13, *Fédération Nationale des Syndicats Sportifs (FNASS) and others v. France*.

case originated from two different applications: one submitted by five national sport federations and numerous sport professionals, the other by a famous cycling champion, Jeannie Longo, and her husband. This case provided the European Court of Human Rights with the opportunity to examine the interplay between the right to respect for private and family life (Art. 8 European Convention on Human Rights and Fundamental Freedoms) and a national legislation concerning anti-doping controls to be undertaken by sport professionals.

Among the rights enshrined in the European Convention on Human Rights and Fundamental Freedoms, the right to private life appears to be the most relevant as far as sport activities are concerned. On the one hand, measures aiming at preventing and combatting crimes in sports – and in particular anti-doping controls – can seriously impact on this right, as acknowledged by the European Court of Human Rights in the judgment in comment. On the other hand, sport activities allow individuals to express their own personality and provide them with important occasions to build and develop social relationships.

Surprisingly, the interplay between sport activities and Art. 8 European Convention on Human Rights and Fundamental Freedoms has assumed quite limited relevance in the European Court's case-law, as opposed to applications concerning infringements of Art. 3 European Convention on Human Rights and Fundamental Freedoms for deprivation of sport activities (see, *infra*, section IV). Nevertheless, on rare occasions, the Strasbourg judges elaborated some meaningful principles which could be relevant in future applications alleging a violation of Art. 8 European Convention on Human Rights and Fundamental Freedoms in relation to sport activities.

In this regard, it is worth remembering that the relevance of this case-law goes beyond the European Convention on Human Rights and Fundamental Freedoms system. It must be taken into account by EU Institutions (and EU Member States when implementing EU Law), especially with regard to the supporting competence in sport matters introduced by the Lisbon Treaty (Art. 165 TFEU). Indeed, the CJEU jurisprudence represents a fundamental benchmark to interpret the provisions of the Charter of fundamental rights of the European Union (the Charter) which “correspond” to rights secured by the European Convention on Human Rights and Fundamental Freedoms. This is the case for Art. 7 of the Charter,<sup>2</sup> corresponding to Art. 8 European Convention on Human Rights and Fundamental Freedoms that was the object of the judgment at hand.<sup>3</sup>

<sup>2</sup> Art. 7 of the Charter (corresponding to the text of Art. 8, para. 1, European Convention on Human Rights and Fundamental Freedoms): “Respect for private and family life. Everyone has the right to respect for his or her private and family life, home and communications”.

<sup>3</sup> Cf. the Explanations relating to the Charter of Fundamental Rights of the European Union, no. 2007/C 303/02, 14 December 2017, elaborated by the Praesidium of the European Convention, in particular p. 33. On the relevance of the Explanations, cf. Art. 52, para. 7, of the Charter. As regards the decisions in which the European Court of Justice has interpreted the Art. 7 of the Charter by making reference to the case-law of the European Court of Human Rights on Art. 8 European Convention on Human Rights

After analysing the judgment in the *FNASS and others v. France* case, this *Insight* will examine the case-law elaborated by the European Court of Human Rights on the interplay between legislation concerning sport activities and the right to private life as set out in the European Convention on Human Rights and Fundamental Freedoms.<sup>4</sup> As this analysis will highlight, this case-law – albeit limited – is characterised by a dual-track approach. On the one hand, in relation to *professional* sport activities, the balancing test seems to place emphasis on public interest linked with the regulation of sport competitions more than on the right to privacy of sport professionals. On the other hand, when sport activities come into play in relation to their *leisure nature*, the Court deeply stresses their importance as a means allowing persons to develop social relations and express personal identity.

## II. THE *FNASS AND OTHERS V. FRANCE* CASE

In 2010, the French Government enacted an Order with the aim of adapting the French Sport Code to the principles of the World Anti-Doping Code, adopted in 2007 during the Third World Conference on Doping in Sport. According to the Order, sport professionals belonging to a “target group”, periodically defined by the French Anti-Doping Agency (AFLD), must notify complete information on their whereabouts and designate a sixty-minute timeframe per day in which they need to assure their availability in a specified location to make unannounced anti-doping tests possible. As stipulated by an AFLD’s deliberation, the requested information must be provided no later than the 15<sup>th</sup> of the month before each quarter and promptly updated in the event of changes. The non-communication of requested information, the notification of incomplete or not up-to-date information, and the athlete’s absence during the indicated sixty-minute timeframe constitute a breach of obligations. In case of three violations during a consecutive 18-month period, the Anti-Doping Agency communicates the violation to the competent Federation, which can apply a sanction.

According to the applicants, the whereabouts requirement represented an interference with their right to respect for private and family life as the requested information covered not only sport events and training activities, but also aspects going beyond

and Fundamental Freedoms, cf. among others Court of Justice, judgment of 9 November 2010, joined cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Eifert*, para. 52; judgment of 8 April 2014, joined cases C-293/12 e C-594/12, *Digital Rights Ireland Ltd*, paras 35, 47 and 54.

<sup>4</sup> As for the right to respect for private and family life in the European Convention on Human Rights, cf. W.A. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford: Oxford University Press, 2015, p. 358 *et seq.* For a more comprehensive analysis on the interplay between sport activities and human rights, cf. among others R. GIULIANOTTI, D. McARDLE (eds), *Civil Liberties and Human Rights*, New York: Taylor & Francis Ltd, 2006; P. DONNELLY, *Sport and human rights*, in *Sport in Society. Cultures, Commerce, Media, Politics*, 2008, pp. 381-394; E. GREPPI, *Lo sport e i diritti umani*, in E. GREPPI, M. VELLANO (eds), *Diritto internazionale dello sport*, Torino: Giappichelli, 2010, pp. 145-168.

their professional life. Ms. Longo alleged also a violation of Art. 8 European Convention on Human Rights and Fundamental Freedoms because the AFLD's decision to designate her as belonging to the "target group" was renewed several times. Furthermore, the applicants submitted that information on their whereabouts entailed a breach of their freedom of movement (Art. 2 of Protocol no. 4 to the European Convention on Human Rights and Fundamental Freedoms).

With regard to admissibility, the European Court of Human Rights found the inadmissibility *ratione personae* of the application submitted by the FNASS and other national syndicates ascertaining their lack of victim status. In the European Court of Human Rights' view, the athletes' syndicates couldn't be considered as direct and personal victims of alleged violations due to the lack of "sufficiently direct link between the applicant and the harm". As for sport professionals individually submitted applications, the European Court of Human Rights found admissible only those made by professionals who, at the time of application, were qualified by the AFLD as belonging to the target group. As for the application of Ms. Longo and her husband, the part of the application submitted by the husband was already declared inadmissible during the admissibility stage.

Concerning the substantive issue, the European Court of Human Rights recognized that the contested obligation indeed implied an interference with the applicants' right to respect for private life. Indeed, the requested information covered a wide range of aspects, including both public and private places attended by professionals belonging to the target group, regardless of the professional or personal activity exercised. Moreover, given that the requested information had to cover the next quarter and, as a result, applicants had to plan their private lives well in advance, the European Court of Human Rights ruled that the whereabouts requirement reduced the personal autonomy of the athletes concerned and had an impact on the quality of their private life. Furthermore, as the anti-doping controls could have been carried out at the athletes' domicile or in places comparable to domicile according to Art. 8 European Convention on Human Rights and Fundamental Freedoms (i.e. hotel rooms), the contested measure prevented a peaceful enjoyment of sport professionals' domicile. The European Court of Human Rights therefore recognised that the whereabouts requirement represented an interference in the applicants' right to respect for private life.

The most sensitive part of the judgment concerns the assessment of the legitimacy of the interference, in the light of the criteria defined by Art. 8, para. 2, European Convention on Human Rights and Fundamental Freedoms, according to which a restriction of the right for private life is legitimate insofar as it is defined by the law and "necessary in a democratic society" to pursue a legitimate aim.

As to the legitimate aim of the interference, the French Government invoked the protection of public health and public moral. The European Court of Human Rights agreed with the Government's argument that international instruments considered doping prevention as a health issue. According to the European Court of Human Rights, the wherea-

bouts requirement is intended to protect the sport professionals' health, but also the health of amateurs, in particular of young people. As to public moral, namely the protection of the fairness of sport competitions, the European Court of Human Rights linked it to the protection of other people's rights. Indeed, the use of doping substances creates a disadvantage for competitors not using them, inciting amateurs and especially young people to do the same, thereby depriving the public of a fair competition.

With respect to the necessity of the interference, the European Court of Human Rights stressed the existence, at European and international level, of a broad consensus about the necessity of carrying out unannounced anti-doping tests in order to combat dangerous effects that doping might have for sport professionals and, more generally, for the entire world of sport amateurs, in particular young people.

According to the European Court of Human Rights, the restriction imposed to the applicants' right to private life by the whereabouts mechanism was proportionate to the aim pursued. The European Court of Human Rights recognised that the restrictions deriving from the whereabouts requirement could be an impediment to the peaceful enjoyment of applicants' domicile; yet, the European Court of Human Rights highlighted that the anti-doping tests at the professionals' domicile called for their specific acceptance, were limited to a defined time slot and, above all, were necessary to assure their effectiveness. Therefore, rejecting the applicants' thesis, the Court argued that sport professionals have in principle to accept certain constraints which result from measures necessary to combat a serious problem affecting high-level competitions. Against this background, the European Court of Human Rights took the view that the disputed measure did not entail a violation of Art. 8 European Convention on Human Rights and Fundamental Freedoms.

As for the alleged violation of the freedom of movement, the Court rejected the applicants' thesis according to which the whereabouts requirement would be comparable to surveillance measures adopted by the judicial power. Sport professionals could have freely chosen both the location and the timeframe in which they were obliged to remain. In the light of this, the European Court of Human Rights held the application inadmissible *ratione materiae*.

### III. THE EUROPEAN COURT'S CASE-LAW ON SPORT ACTIVITIES

As recalled above, the European Court of Human Rights has assessed the regulation of sport activities in light of Art. 8 European Convention on Human Rights and Fundamental Freedoms in a very small number of cases.

Instead, a greater significance has been acquired by Art. 3 European Convention on Human Rights and Fundamental Freedoms (prohibition of torture and inhuman or degrading treatment or punishment), in relation to several applications complaining about restrictions placed to leisure activities, and partially to sport. The denial to practise sport activities (or its limitations) has been assessed by the Strasbourg Court, for instance, in

relation to applications submitted by people in custody, therefore in connection with other depriving elements. There is a high number of decisions making reference to inmates' sport activities. However – and quite comprehensibly – in those cases the denial to practise sport activities does not play a central role compared to other elements (i.e. detention conditions, sanitary facilities, degree of contacts with families).<sup>5</sup> Moreover, it is evident that in this case-law the relevance of sport activities lies more in its leisure nature than in the agonistic one. At the same time, it cannot be excluded that, in future cases, athletes in detention will complain about not being able to carry out agonistic (and professional) sport activities.

Going back to the cases in which the Court has dealt with the interplays between sport activities and Art. 8 European Convention on Human Rights and Fundamental Freedoms, as in *FNASS* judgement, the following paragraphs will focus on two different situations: the cases in which the European Court of Human Rights has assessed the prospective negative impact that sport regulation can have on the chance to express one's personal identity through sport professional activities (sub-section III.1) and through non-agonistic activities (sub-section III.2).

### III.1. REGULATION OF SPORT EVENTS AND SPORT PROFESSIONALS' RIGHT TO RESPECT FOR PRIVATE LIFE

An interesting case was decided in 1998 by the European Commission of Human Rights in one of its latest decisions before being absorbed by the Court: the *Azzopardi v. Malta* case.<sup>6</sup> A Maltese professional rower lodged an application with the Commission to complain about a national rule stating that each rower could attend no more than three races per day. Setting a maximum limit on the number of races available for each rower, the new rule intended to promote a broader and more competitive participation to races.

The applicant alleged a violation of Art. 8 European Convention on Human Rights and Fundamental Freedoms because, for many years, he had regularly attended four or five competitions during each race organised twice a year by the Government of Malta. In his application, he explained that he had consecrated his whole life to rowing and his participation to rowing events represented a fundamental element of his life, a feature of his identity and an occasion to develop his social relationships.

<sup>5</sup> European Court of Human Rights: judgment of 8 July 2014, no. 15018/11 and 61199/12, *Harakchiev and Tolomov v. Bulgaria*, para. 165 *et seq.*; judgment of 18 March 2014, no. 24069/03, 197/04, 6201/06 and 10464/07, *Öcalan v. Turkey (No 2)*, para. 113; judgment of 1 October 2013, no. 56054/12, *Khider v. France*, para. 42; judgment of 2 September 2010, no. 36295/02, *Iorgov v. Bulgaria*, para. 65; judgment of 22 October 2009, no. 17599/05, *Norbert Sikorski v. Poland*, para. 138.

<sup>6</sup> European Commission of Human Rights, decision of 15 January 1998, no. 35722/97, *Azzopardi v. Malta*.

After acknowledging that the new rules adopted by the Maltese Government “may well have had an impact on the applicant’s hopes and ambitions”, the European Commission of Human Rights found the application to be manifestly ill-founded.

The relevance of this decision lies in the argument developed by the European Commission of Human Rights. In its view, any rule about sport events – the definition of which is clearly not up to athletes – determines *per se* whether and to what extent individuals may practise sport activities. However, it does not entail in itself a violation of athletes’ human rights. The decisive factor is the extent to which the restrictive measure interferes with the individual’s right.

The rationale at the basis of the decision is fully acceptable: the right to respect for private and family life does not *per se* imply the right to take part in sport activities without any regulation and meeting individuals’ wishes.

However, the decision did not rule out any possibility to challenge national laws regulating sport competitions. A violation of Art. 8 European Convention on Human Rights and Fundamental Freedoms can arise, for instance, from a law affecting one or several athletes in a disproportionate manner, i.e. in case of discrimination. A violation can also derive from a law which is arbitrary, lacks reasonable arguments or implies a disproportionate restriction in relation to the objective pursued. In these cases, the Court (and, on occasion, national judges) will have to make an assessment – according to the criteria defined by Art. 8, para. 2, European Convention on Human Rights and Fundamental Freedoms and respecting the national margin of appreciation – as to whether the aim of the law is proportionate in relation to its impact on the individuals concerned.

### III.2. SPORT ACTIVITIES AS A MEANS TO EXPRESS ONE’S OWN PERSONAL IDENTITY

As regards the European Court of Human Rights balancing test, a relevant element lies in the fact that a sport activity can represent an identity feature of an ethnic community or minority. In this regard, it is worth taking into consideration the possibility to submit a violation European Convention on Human Rights and Fundamental Freedoms stemming from an act banning an entire community (e.g. a group of migrants) from performing a sport activity that is relevant in terms of community members’ identity. It could be assumed that the potential conflict with the European Convention on Human Rights and Fundamental Freedoms would be assessed by the Court in the light of the permanent or temporal nature of the ban, the scope of the act, and its concrete effect on persons practising the activity and others involved. A meaningful decision in this respect was adopted by the European Court of Human Rights in *Friend and Countryside Alliance v. the United Kingdom*.<sup>7</sup> The case concerned an array of applications submitted by some private individuals and one association claiming a violation of Arts 8 and 11 Eu-

<sup>7</sup> European Court of Human Rights, judgment of 24 November 2009, no. 16072/06 and 27809/08, *Friend and Countryside Alliance v. the United Kingdom*.

European Convention on Human Rights and Fundamental Freedoms and Art. 1 of its Protocol 1, arising from two Acts introduced in the United Kingdom to ban the hunting practice. Despite this judgment does not concern, strictly speaking, a sport activity, certain aspects of the line of reasoning followed by the Court can be really meaningful with regard to the interplay among sport and human rights.

The European Court of Human Rights found that the bans in question did not interfere with an essential aspect of the applicants' personal identity or with the development of their social relationships. While hunting provides hunters with opportunities for establishing interpersonal relations, for carrying out outdoor activities and being entertained, the European Court of Human Rights states that it cannot be qualified as an identity feature of a (supposed) hunters' community. The European Court of Human Rights "does not consider that hunting amounts to a particular lifestyle which is so inextricably linked to the identity of those who practise it that to impose a ban on hunting would be to jeopardise the very essence of their identity".<sup>8</sup>

This argument is particularly interesting as it is focused on the significant role played by a sport/leisure activity (hunting) in relation to the identity of a person or a community. This reasoning can be extended to every sport or leisure activity and a future application of this reasoning cannot be excluded in relation to national acts limiting or banning a sport practice. The statement of the European Court of Human Rights in the *Friend and Countryside Alliance* decision could be developed, *a contrario*, to argue that a specific sport or leisure activity defines the identity of a specific social group, so as to challenge a national measure capable of interfering with private life. Following the European Court of Human Rights argument in *Friend and Countryside Alliance*, the applicants would have to prove that the activity at stake does not only amount to a pastime they share with other people, but that it is a traditional practice of the community they belong to, or, in other terms, an essential element of their identity.

#### IV. CONCLUDING REMARKS: THE RELEVANCE OF THE LEISURE NATURE OF SPORT ACTIVITIES IN THE EUROPEAN COURT'S APPROACH

Looking at the limited case-law of the European Court of Human Rights concerning the regulation of sport activities and the right to respect for private life, the European Court of Human Rights tendency to recognise the leisure nature of sport activities rather than the interests of sport professionals is remarkable. Indeed, in relation to professional sport activities, the balancing test seems to pay a greater deal of attention to the public interest in the regulation of sport competitions (*Azzopardi* case) or in the regulation of athletes' be-

<sup>8</sup> *Ibid.*, para. 44. Cf. also para. 43: "the Court finds hunting to be too far removed from the personal autonomy of the applicants, and *the interpersonal relations they rely on to be too broad and indeterminate in scope*, for the hunting bans to amount to an interference with their rights under Article 8" (emphasis added).

haviours (such as doping) which could compromise health and ethical values. To this regard, an illustrative example is provided by the judgment in *FNASS and others v. France*.

On the contrary, when sport comes into play in the light of its leisure nature, and not as a professional activity, the European Court of Human Rights seems to adopt a very different approach, centred on the relevance of the leisure nature of sport. In this respect, the *Friend and Countryside Alliance* decision seems to leave room for the recognition of sport activities as an element of personal (or group) identity. In addition, it is worth highlighting the great deal of attention paid to sport in assessing the detention conditions according to standards defined by Art. 3 European Convention on Human Rights and Fundamental Freedoms. This “leisure-sensitive” approach in relation to sport activities is not a prerogative of the European Court, but it corresponds to the practice of other human-rights monitoring bodies. For instance, the European Committee of Social Rights (the monitoring body of the European Social Charter), on several occasions concerning the social rights of persons with disabilities (Art. 15 European Social Charter), emphasised the leisure nature of sport activities and highlighted the States’ obligations to guarantee that persons with disabilities have an equal access to sport.<sup>9</sup> The leisure side of sport activities has also been stressed by the Committee in relation to national programmes aiming at promoting the integration of migrants by encouraging their participation in sport activities.<sup>10</sup> Another meaningful example is the wide practice of the United Nations Committee of the Rights of the Child, with specific regard to the General Comment n. 17 “on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts”. Indeed, the General Comment includes among recreational activities also sports, i.e. those activities voluntarily chosen by children, due

<sup>9</sup> Cf. among others, European Committee of Social Rights, conclusions no. 2012/def/MNE of 7 December 2012 on Montenegro: “The Committee recalls under Article 15§3 that the right of persons with disabilities to social integration implies that barriers to communication and mobility be removed in order to enable access to cultural activities and leisure (social and sporting activities)”; cf. also European Committee of Social Rights: conclusions no. 2012/def/AND of 7 December 2012 on Andorra; conclusions no. c-2008-1fr of 7 December 2008 on Andorra; conclusions no. 2012/def/ITA/ of 7 December 2012 on Italy; conclusions no. 2012/def/LTU/ of 7 December 2012 on Lithuania; conclusions no. c-2008-2fr of 7 December 2008 on Italy; conclusions no. 2012/def/NLD/ of 7 December 2012 on the Netherlands; conclusions no. 2012/def/PRT/ of 7 December 2012 on Portugal; conclusions no. 2012/def/TUR/ of 7 December 2012 on Turkey; conclusions no. 2012/def/UKR/ of 7 December 2012 on Ukraine; conclusions no. c-2003-fr1 of 30 June 2003 on France.

<sup>10</sup> Cf. in particular European Committee of Social Rights, conclusions no. 2011/def/DEU/ of 9 December 2011 on Germany: “A National Integration Plan was presented by the Federal Chancellor at the second Integration Summit in July 2007. The plan proposes 400 optional measures to be taken by various authorities in a very broad range of fields. Among these are measures to improve immigrant children’s school results and make it easier for young immigrants to gain access to the labour market, programmes to promote integration through sport [... T] the Committee concludes that the situation in Germany is in conformity with Article 19§1 of the 1961 Charter”.

to the “immediate satisfaction” they can find practising them, or because they “perceive that some personal or social value will be gained by accomplishing them”.<sup>11</sup>

It is against this wide international context that we can frame the European Court of Human Rights approach to the issue of the regulation of sport activities. As we have seen, also the Strasbourg judges tend to stress the relevance of sport activities as a means to develop one’s social relationships and to express one’s personality and identity as an individual or as a member of a group or community.

<sup>11</sup> Committee on the Rights of the Child (CRC), General Comment no. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (Art. 31 of the Convention of the Rights of the Child) of 17 April 2013, UN Doc. CRC/C/GC/17.