



Doping control: whereabouts requirement does not breach Convention

In today's **Chamber judgment**¹ in the case of **Fédération Nationale des Syndicats Sportifs (FNASS) and Others v. France** (application no. 48151/11 and 77769/13) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerns the requirement for a targeted group of sports professionals to notify their whereabouts for the purposes of unannounced anti-doping tests.

Taking account of the impact of the whereabouts requirement on the applicants' private life, the Court nevertheless took the view that the public interest grounds which made it necessary were of particular importance and justified the restrictions imposed on their Article 8 rights. It found that the reduction or removal of the relevant obligations would lead to an increase in the dangers of doping for the health of sports professionals and of all those who practise sports, and would be at odds with the European and international consensus on the need for unannounced testing as part of doping control.

Principal facts

In application no. 48151/11, the applicants are the Fédération Nationale des associations et des syndicats Sportifs (FNASS), the Syndicat National des Joueurs de Rugby (Provale), the Union Nationale des Footballeurs Professionnels (UNFP), the Association des Joueurs Professionnels de Handball (AJPH), and the Syndicat National des Basketteurs (SNB). The ninety-nine other applicants are professional handball, football, rugby and basketball players.

On 14 April 2010 the Government issued Order No. 2010-379 on the health of athletes, bringing the Sports Code into line with the principles of the World Anti-Doping Code.

On 1 June 2010 some of the applicants applied to the *Conseil d'État* for the annulment of the provisions of the Order concerning the requirement for sports professionals falling within a "target group" designated by the French Anti-Doping Agency (AFLD) to notify information on their whereabouts, so that unannounced anti-doping tests could be carried out. They complained of a "particularly intrusive" control system that allowed checks to be carried out independently of sports events and training periods. They alleged in particular that this constituted interference with their freedom of movement and with their right to a normal family life and a breach of their privacy. They also complained of an infringement of the principle of equality, arguing that the obligation to notify their whereabouts for anti-doping tests was confined to sports professionals belonging to the "target group". The *Conseil d'État* rejected their application.

The applicant in application no. 77769/13 is Jeannie Longo, a French cyclist who was born in 1958. By a decision of the AFLD testing director of 14 March 2008, Ms Longo was designated as belonging to the "target group". At that time, the duration of registration in this group was unlimited. Her

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

registration in that group was renewed several times by decisions of the AFLD and she challenged those of 27 September 2012 and 28 March 2013 before the *Conseil d'État*. During the proceedings, she asked the *Conseil d'État* to refer a priority question to the Constitutional Council as to whether the whereabouts requirement was compatible with the Constitution, but the *Conseil d'État* decided not to refer that question. It stated that the provisions at issue did not affect the individual freedom that the Constitution placed under the protection of the ordinary courts, but that they fell within the jurisdiction of the administrative courts. The *Conseil d'État* dismissed Ms Longo's applications. It found that, as regards the interference with the right to respect for the private and family life of the athletes concerned, the provisions relating to the whereabouts requirement only entailed interference that was necessary and proportionate to the aims pursued by anti-doping programmes, namely to protect the health of such athletes and to safeguard the fairness and ethics of sports competitions.

By a decision of 9 April 2015 the AFLD deleted Ms Longo's name from the list of sports professionals in the "target group".

Complaints, procedure and composition of the Court

Relying on Article 8, the applicants alleged that the mechanism requiring them to file complete quarterly information on their whereabouts and, for each day, to indicate a sixty-minute time-slot during which they would be available for testing, amounted to unjustified interference with their right to respect for their private and family life and their home. Ms Longo alleged that her inclusion in the target group since 2008 constituted a serious and repeated breach of her privacy. Relying on Article 2 of Protocol No. 4, the applicants submitted that the whereabouts requirement was incompatible with their freedom of movement.

The two applications were lodged with the European Court of Human Rights on 23 July 2011 and 6 December 2013 respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika Nußberger (Germany), *President*,
Erik Møse (Norway),
André Potocki (France),
Yonko Grozev (Bulgaria),
Síofra O'Leary (Ireland),
Gabriele Kucsko-Stadlmayer (Austria),
Lətif Hüseynov (Azerbaijan),

and also Milan Blaško, *Deputy Section Registrar*.

Decision of the Court

Article 8

The Court observed that the individual applicants in the target group were obliged to provide a public authority with precise and detailed information on their place of residence and daily movements seven days a week. It noted that they sometimes had no choice but to stay at home for this daily time slot. This requirement of transparency and availability, which reduced the immediate personal autonomy of those concerned, was sufficient for the Court to find that the whereabouts requirement interfered with the applicants' privacy.

The applicants did not dispute the fact that this interference was provided for by the Order of 14 April 2010, but took the view that the decisions of the AFLD were not "laws" because they emanated

from an institution that did not have the authority to issue accessible and precise rules. The Court observed, however, that the AFLD was an independent public authority responsible, in particular, for the planning and execution of anti-doping programmes and, on that basis, for the designation of the sports professionals in the target group. The AFLD had laid down the obligations to be fulfilled by the professionals concerned in decision no. 54, which was published in the *Journal officiel* and was therefore accessible. In addition, having regard to the precise and detailed indications of this text, the Court was of the view that professionals, accompanied by their trainers, could regulate their conduct accordingly and benefit from adequate protection against arbitrariness. The Court concluded that the interference was “in accordance with the law”.

With respect to the legitimate aim or aims of the interference, the Court observed that the “protection of health” was enshrined in the relevant international and national instruments which presented the prevention of doping as a health concern. As a result, the whereabouts requirement was intended to address health issues, and not only the health of professionals, but also that of amateurs and in particular youth. With regard to the other basis of anti-doping programmes, the fairness of sports competitions, the Court preferred to consider that it was more closely related to the “protection of the rights and freedoms of others”. Indeed, the use of prohibited substances unfairly eliminated competitors of the same level who did not have recourse to them, dangerously encouraging amateurs and especially young people to follow suit, and thus deprived the spectators of the fair competition which they legitimately expected.

Regarding the necessity of such interference in a democratic society, the Court found that it first had to look at the dangers of doping and ascertain whether there was common ground at European and international levels.

On the first point, the Court observed that there was a broad consensus among medical, governmental and international authorities in favour of denouncing and combating the dangers caused by doping for the health of athletes. It referred in this connection to international instruments which all legitimised anti-doping programmes for the sake of health protection and relied in particular on the detailed reports of the Academy of Medicine and the French Senate. In addition, it noted that doping control concerned all those who practised sports, especially youth. The Court considered it important to attach weight to the repercussions of professional doping on young people, who identified with high-level sports professionals, seeing them as models whose examples were to be followed.

On the second point, the Court observed that the gradual construction of anti-doping programmes had resulted in an international legal framework, of which the World Anti-Doping Code was the main instrument. Furthermore, it noted that co-operation between the Council of Europe and the World Anti-Doping Agency continued to move towards greater harmonisation of anti-doping rules within and outside the European Union. In these circumstances, the Court was of the view that there were common European and international views on the need for unannounced testing. In accordance with the principle of subsidiarity, it was primarily for the Contracting States to decide on the measures necessary to resolve in their legal order the concrete problems raised by doping control. Regarding the whereabouts requirement imposed on sports professionals and unannounced testing, the Court emphasised the very clear choice made by France to bring its domestic law into conformity with the principles of the World Anti-Doping Code. It also pointed out that the States Parties to the Unesco Convention had undertaken to adopt appropriate measures to comply with the principles set out in that Code.

As to the need for a balancing of interests, the Court did not underestimate the impact of the whereabouts requirements on the individual applicants’ private lives. It thus accepted their claim that they were subjected to obligations which were not imposed on the majority of the active population. That being so, it pointed out, first, that the whereabouts mechanism had the merit of establishing a legal framework for anti-doping which was not to be underestimated from the

perspective of guaranteeing the rights of the sports professionals concerned. It took the view, secondly, that while the whereabouts requirement was only one aspect of doping control, those concerned had to accept their fair share of the constraints inherent in measures that were necessary in order to combat a scourge which was particularly prevalent in high-level competitions. It further found that, in view of the fact that the possible fixing of one's whereabouts at home would be at the request of the person concerned and within a fixed time slot, the anti-doping tests in question were different from those under the supervision of the judiciary which were intended for the establishment of offences or for the possibility of carrying out seizures. It lastly observed that the applicants had not shown that testing confined to training venues and respecting private time would suffice to fulfil the aims set by the national authorities in view of the evolution of doping methods and the brief time-frame within which prohibited substances could be detected.

The Court thus held that the respondent State had struck a fair balance between the various interests at stake and that there had been no violation of Article 8 of the Convention.

Article 2 of Protocol No. 4

The Court noted that the applicants were obliged to notify the AFLD of a daily time slot of 60 minutes in a precise location where they would be available for an unannounced test. The location was freely chosen by them and the obligation was more of an interference with their privacy than a surveillance measure. The Court took note of the domestic courts' decisions not to characterise the whereabouts requirement as a restriction on freedom of movement and to distinguish between the ordinary and administrative courts in terms of the jurisdiction for such testing. The Court thus took the view that the measures at issue could not be equated with the electronic tagging that was used as an alternative to imprisonment or to accompany a form of house arrest. Lastly, the Court found that the applicants had not been prevented from leaving their country of residence but had merely been obliged to indicate their whereabouts in the destination country for the purposes of testing.

The Court held that Article 2 of Protocol No. 4 was therefore inapplicable.

The judgment is available only in French.

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Press contacts

echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Denis Lambert (tel: + 33 3 90 21 41 09)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Inci Ertekin (tel: + 33 3 90 21 55 30)

Patrick Lannin (tel: + 33 3 90 21 44 18)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.