

Bundesgericht

Tribunal fédéral

Tribunale federale

Tribunal federal



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Press Release of the Swiss Federal Supreme Court

Judgment of 22 December 2020 ([4A_318/2020](#))

Reasoning of the judgment in the Sun Yang case

The Swiss Federal Supreme Court has published the reasoning of its decision concerning the Chinese swimmer Sun Yang. Due to the bias of one of the arbitrators the Court of Arbitration for Sport (CAS) in Lausanne will have to render a new award in a different composition of the panel.

In its decision of 28 February 2020 (CAS 2019/A/6148), the Court of Arbitration for Sport (CAS) imposed an eight-year ban on the Chinese swimmer Sun Yang for violating the doping rules of the International Swimming Federation ("FINA Doping Control Rules", 2017 edition). The athlete filed an appeal in civil matters (case 4A_192/2020, still pending) and later a request for revision (case [4A_318/2020](#)) with the Swiss Federal Supreme Court. For reasons of procedural economy, the Federal Supreme Court first dealt with the latter request and approved it in its decision of 22 December 2020 (see [press release of 24 December 2020](#)). The Federal Supreme Court set aside the CAS decision on the ground of bias of one of the arbitrators. As a result, the CAS will have to render a new award in a different composition of the panel in the Sun Yang case.

Following the disclosure of the operative part of the decision on 24 December 2020, the reasoning of the judgment is now available. In his request for revision, the athlete argued that, when an article appeared on the internet in mid-May 2020, he had become aware of circumstances that made the president of the panel appointed for his case

appear to be biased. The article covered tweets made by the arbitrator in 2018 and 2019 in connection with the protection of animals.

The Federal Supreme Court first examined whether the objections to the arbitrator's impartiality had been raised in time. Grounds for challenge must be raised immediately upon becoming known, otherwise they are forfeited. The party must exercise due care and make reasonable enquiries to discover such grounds. According to the Federal Supreme Court, the athlete in the present case sufficiently fulfilled his duty to investigate. Therefore he cannot be reproached for not having already discovered, during the arbitration proceedings, the grounds for challenge invoked in his request for revision.

The Federal Supreme Court then examined whether the arguments put forward by the athlete could justify the challenge of the arbitrator. In order to challenge an arbitrator, it is sufficient that the contested circumstances give rise to the appearance of partiality. The mere subjective impression of a party is, however, not decisive in this respect. Rather, the appearance of bias must be objectively justified. Doubts as to the impartiality of an arbitrator are only justified if, from an objective point of view, it cannot be ruled out that the arbitrator was influenced in his decision-making by extraneous factors.

In the case at hand, the arbitrator had taken up the cause of animal protection in the contested tweets. In principle, an arbitrator can also defend his convictions on social networks, but with the restraint required of judges. The choice of words and the repeated use of violent expressions is problematic in the specific case. In his tweets, the arbitrator castigates a Chinese practice of dog slaughter and denounces the consumption of this meat at a local festival in China. Some expressions refer to the skin colour of certain Chinese people he targets. In addition, the arbitrator also made the said remarks in tweets after his appointment as president of the panel of arbitrators deciding in the Sun Yang case. In view of all the relevant circumstances, the Federal Supreme Court therefore considered that the doubts as to the impartiality of the arbitrator were objectively justified.

The CAS will therefore have to render a new award in a different composition of the panel in the doping case against Sun Yang.

The appeal proceedings 4A_192/2020, which are still pending before the Federal Supreme Court, are to be considered without object following the annulment of the contested CAS decision of 28 February 2020. Currently, a deadline set for the parties to comment on the allocation of costs is still running.

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NB: The press release is intended as an information to the public and the media. The terminology used may differ from the wording of the judgment. For legal purposes, only the wording used in the written decision is binding.

The decision will be available on 15 January 2021 at 13:00 on www.bger.ch : *Rechtsprechung* > *Rechtsprechung (gratis)* / *Weitere Urteile ab 2000* > entering [4A_318/2020](http://www.bger.ch).

