Fédération Internationale des Échecs World Chess Federation

FIDE ETHICS COMMISSION

Case N. 2/11

JUDGEMENT

rendered by the

FIDE ETHICS COMMISSION

sitting in the following composition

Chairman: Mr. Roberto Rivello
Members: Mr. Ion Serban Dobronauteanu
Ms. Margaret Murphy
Mr. Ian Wilkinson

in the case

"French Team", concerning a complaint submitted by the French Chess Federation against Mr. Sébastien FELLER, Mr. Arnaud HAUCHARD and Mr. Cyril MARZOLO, for an alleged violation of par. 2.2.5 of the FIDE Code of Ethics, in reference to facts allegedly committed during the 2010 Chess Olympiad in Khanty-Mansiysk, and a report submitted by the FIDE Executive Director.

PROCEEDINGS BEFORE THE ETHICS COMMISSION

On 7th of June 2011 the Executive Director of the French chess Federation (hereafter called the "FF") sent to FIDE President, to FIDE Executive Director and to FIDE Secretariat a communication concerning the players Sébastien FELLER, Arnaud HAUCHARD et Cyril

MARZOLO, informing FIDE that "The Bureau Fédéral of the French Chess Federation acted as the plaintiff on December 2010, 21st. The case was heard by our Disciplinary Committee on March 19th, and the players were found guilty. The players appealed on the decision, which suspended it until the Appeal's Committee held its hearings, on May, 19th. The final decision that has been taken is a 5-year ban for Sébastien FELLER and Cyril MARZOLO, and a 3-year ban for Arnaud HAUCHARD. On May, 24th, the players brought the case in front of the CNOSF (French Olympic Sports Committee). The CNOSF's advice to the players was to fully accept the sanctions (imposed) by FFE organs". On this basis -these are the words of the French chess Federation- "we are expecting FIDE to extend the sanctions worldwide".

This communication, forwarded to the FIDE Ethics Commission (hereafter called the "EC"), was already to be considered as a complaint-report against Mr. Sébastien FELLER, Mr. Arnaud HAUCHARD and Mr. Cyril MARZOLO. In any case the French Chess Federation immediately after have clarified their intention to submit a complaint-report.

On 17th of June 2011 the FIDE Executive Director informed the EC "that FIDE wishes the EC to consider the request of the French Chess Federation" "and any other questions it considers relevant". This communication has to be considered as a report concerning facts committed during the 2010 Chess Olympiad in Khanty-Mansiysk.

In accordance with EC Internal Rules, the case was inscribed on the Register of cases as N. 2/2011 – "French Team", and the EC considered the case as receivable, given first of all the submission of a report by a FIDE organ and also the existence of a legitimate relevant interest of the complainant concerning facts that could constitute a violation of par. 2.2.5 of the FIDE Code of Ethics.

In accordance with articles 4, 6 and 7 of the EC Internal Rules, on 1st July 2011 the Chairman of the EC communicated to Mr. Sébastien FELLER, Mr. Arnaud HAUCHARD, Mr. Cyril MARZOLO and to the FF, the existence of a pending case, informing them of their rights and of the EC proceeding rules, and fixed a term for the submission of memorials and documents.

Following these communications Mr. Sébastien FELLER, Mr. Arnaud HAUCHARD, Mr. Cyril MARZOLO and the French Chess Federation submitted to EC numerous documents (mainly copies of the acts of the proceedings in front of various sports, disciplinary, civil and criminal French Authorities, but also declarations/affidavits of witnesses, expert witnesses, copies of articles published in newspapers) and memorials, many of them in French language (especially Mr. HAUCHARD and Mr. MARZOLO memorials), preliminarily prospecting

various different objections, that can be summarized as follows (the most relevant paragraphs have been recopied textually - in French, when written in this language):

Mr. Arnaud HAUCHARD:

- Applicability of the "Droit Européen", given that both Greece (seat of the FIDE Secretariat) and Switzerland (official seat of FIDE) "signed" European Convention on Human Rights (ECHR).
- Assumed violation of art. 6.3 of the ECHR, given that Mr. HAUCHARD received communications from EC only in English and not in French, his native language, and that the EC working language is only English, without guaranteeing him "the free assistance of an interpreter" (regarding the same point also art. 14 and Prot. 12 of the ECHR have been mentioned).
- Assumed violation of art. 6 of the ECHR, given that Mt. HAUCHARD has not had full access to all the documents of the proceeding, in his language, and has not had a reasonable time to prepare his defence and to obtain a public hearing.
- Assumed incompetence of the EC, given an assumed exclusive competence of national chess federation, ex art. 1.2 and 2.1 of the FIDE Statute: "FIDE doit respecter une strice neutralité dans les affaires menées en interne (au niveau national) par une Fédération d'Echecs".
- Political reasons of the complaint submitted by the FF and by its former President, Mr. J.C. Moingt; contrasts between FF and FIDE.
- Assumed procedural violations committed by FF disciplinary organs, as stated also by French Judicial Authorities.

Mr. Cyril MARZOLO:

- submits all the same arguments of Mr. HAUCHARD, with identical motivations; in addition he
- denies receiving from the FIDE Secretariat any official communication concerning the current EC proceedings.

Mr. Sébastien FELLER:

- asks for a suspension of the proceedings in front of the EC "as far as no decision has been taken both by a trial and the decision of the French Prosecutor", given that he has denounced to the competent French Authorities various irregularities, procedural

violations and "lies" allegedly committed by the FF, and that in front of the Nancy's "Tribunal de Grande Instance" is pending also a criminal inquiry against former Vice President of the FF, Ms Joanna Pomian, in which, "when visited by a bailiff and a police officer, she first denied and finally recognized she was a forger and had falsified her accounting and administrative documents" (concerning Mr. MARZOLO)

French Chess Federation:

- (concerning the position of Mr. Cyril MARZOLO) "Mr Cyril Marzolo asked for an 'optional arbitration' which is possible under the auspices of the CNOSF. This arbitration was held on August 16th and was concluded by a common document signed by FFE, CNOSF and Cyril Marzolo. This document is strictly confidential and transferred to FIDE Ethics Commission, as it overrules the disciplinary sanctions taken on May 19th by FFE Appeal's Commission. The French Chess Federation asks FIDE Ethics Commission to reconsider its earlier charges against Cyril MARZOLO, taking into account a new sentence pronounced by the highest French Sports authority. Please note that this document is strictly confidential until the beginning of the penal enquiries". Given the evident relevance of this document, FF seems indirectly asking for a suspension of the proceedings "until the beginning of the penal enquiries" in front of French penal Judicial Authorities.

No one of the parties asked to appear in front of the EC in an oral hearing.

The case was discussed by the EC during its meeting in Milano, on 1st October 2011.

The EC delivered a decision on procedural and evidential matters, achieving unanimity. The Chairman of the EC was charged with the draft of the written motivation. None of the EC members asked to deliver a separate opinion.

PROCEDURAL MATTERS

All procedural objections submitted by the different parties have to be dismissed, adding some clarifications about some of them.

EC Competence

These proceedings concern facts allegedly committed by members of the French Team during the 2010 Chess Olympiad (the most important FIDE competition) in Khanty-Mansiysk (Russia): it seems difficult even to imagine that this could be only "an internal affair", a question of exclusive competence of the French chess federation, even more considering that it was the same FF that addressed a complaint to the EC.

Chapter 2.1 of the FIDE Statute refers to national federations competence over chess activities "in their own countries". This is a more than sufficient argument to dismiss the objection, but it is important to underline –even if here it is an *obiter dictum*- that artt. 1.2 and 2.1 of the FIDE Statute in no case can constitute a limit to the application of FIDE Code of Ethics and to the EC competence. This is relevant even regarding the relationship between EC competence and the competence of disciplinary or judiciary organs of national chess Federations.

FIDE "observes strict neutrality in the internal affairs of the national chess federations" (Art. 1.2 FIDE Statute), "which have principal authority over chess activities in their own countries" (Art. 2.1 FIDE Statute), it's true, but to become member of FIDE every national chess federation have to "acknowledge the FIDE Statutes" (Art. 2.1 FIDE Statute), and during all its activities every national chess federation "must acknowledge and observe the statutes, regulations, resolutions and decisions of FIDE" (Art. 2.4 FIDE Statute).

Therefore every organ of sporting justice of a national chess federation member of FIDE has the right and the duty to give application to the FIDE Statute and to the CoE.

FIDE and national chess federations are independent entities, with their own internal legal systems, otherwise FIDE "unites national chess federations throughout the world" and "is the recognized international federation in the domain of chess", "recognized by the International Olympic Committee as the supreme body responsible for the game of chess" (Art. 1.1 FIDE Statute).

Other international sports federations expressly regulate the relationships between national and international sporting justice, the FIDE Statute does not regulate the point. Without a specific regulation of the point, no limit to the respective competences can be presumed; if the same facts, discussed or under discussion in front of an organ of sporting justice of a national chess federation, are submitted to the EC, the EC may decide to wait for the national final decision, may ask the national federation to send copies of all the relevant acts, may even limit its decision to a confirm of the national decision or to an extension of the effects of the national decision, but can also decide without waiting for a national final decision and can even overrule a national decision, or, better, can assume a completely different decision on the same facts.

Swiss Law and art. 6.1 ECHR (European Convention on Human Rights)

On one point we can definitely agree with the defense of Mr. Hauchard and Mr. Marzolo.

FIDE, as many other international sports federations, is a Swiss association and must comply with Swiss law –the location in Athens of FIDE offices is not relevant here-.

Otherwise Swiss law grants to associations a wide discretion to regulate their own affairs (v. Art. 63 Swiss Civil Code). The freedom of associations to regulate their own affairs is limited only by mandatory law.

In Swiss law, it is generally accepted that an association may impose disciplinary sanctions upon its members if they violate the rules and regulations of the association. The jurisdiction to impose such sanctions is based upon the freedom of associations to regulate their own affairs. The association is granted a wide discretion to determine the violations which are subject to sanctions, the measure of the sanctions and all procedural rules.

In order to impose a sanction an association must satisfy the following conditions (cfr. Swiss Federal Supreme Court 90 II 347 E. 2):

- The violator must be subject to the rules and regulations of that association.

- There must be a sufficiently clear statutory basis for a penalty in the statutes or bylaws of the association.

- The sanction procedure must guarantee the right to be heard.

Nothing less, nothing more.

It's important to underline immediately that the FIDE Statute and the EC procedural rules satisfy all these conditions.

Of course ECHR is a mandatory source of law and it could be even possible to argue that Swiss Law concerning associations violate art. 6.1 ECHR, but this is not the case. Swiss Law and EC Procedural Rules do not deny the right of a public hearing, on the contrary art. 6 of EC Procedural rules states that "Each party has the right, within the limits provided by art. 8, to ask to appear in front of the EC in an oral hearing".

In the current proceedings no one asked to appear in front of the EC in an oral hearing, There is not at all any violation of art. 6.1 ECHR.

In addition we can anticipate that, evaluating evidential matters, the EC deems relevant an oral hearing and Mr. Hauchard, Mr. Marzolo and Mr. Feller are invited to be present and to personally present their defence, if necessary authorising tele or video-conference.

About other conditions for a "fair trial": preliminarily it is necessary to stress that these are proceedings of sports law –not a criminal case- and the conditions previewed as mandatory by the Swiss law seem perfectly sufficient to comply with the principle stated by art. 6.1 ECHR, but in any case we have to clarify that to Mr. Hauchard and to Mr. Marzolo was given a deadline of 20 days, starting from the receipt of the communication, to present to the EC memorials and documents in support of their position, a perfectly adequate deadline that cannot constitute a violation of the principle of "fair trail". Finally, all documents of the proceedings were and are at the disposal of the parties, in the FIDE Office, but any request to send, free of charges, copies of all the documents with a translation in French of the English ones, cannot be accepted, and this is not at all a violation of the principle of the fair trial.

Art. 6.3 ECHR

Art. 2 of the EC Procedural Rules states that "The working language of the EC is English".

In the opinion of Mr. Hauchard and Mr. Marzolo this constitute a violation of art. 6.3 ECHR and also of art. 14 and Prot. 12 of the ECHR.

It is not so. Art. 6.3 ECHR concerns only criminal cases ("Everyone charged with a criminal offence …"), it has not application in civil, administrative, disciplinary cases, and even less in sports proceedings.

Many years ago the point was clarified by the **European Commission of Human Rights, 9 December 1997, Kenneth Conrad Wickramsinghe against the United Kingdom, decision as to the admissibility of case n. No. 31503/96**, specifying that: "Article 6 para. 3 (Art. 6-3) of the Convention applies to criminal cases but not to civil cases", "professional disciplinary matters are essentially matters which concern the relationship between the individual and the professional association", they are not criminal cases.

Jurisprudence from the Court of Arbitration for Sporst ("CAS") has also acknowledged or recognized that many times (regarding much more crucial principles of criminal law, as "*in dubio pro reo*"): cfr. **Arbitration CAS 2001/A/317 A. / Fédération Internationale de Luttes Associées (FILA), award of 9 July 2001**, "The legal relations between an athlete and a federation are of a civil nature and do not leave room for the application of principles of criminal law. This is particularly true for the principles of *in dubio pro reo* and *nulla poena sine culpa* and the presumption of innocence as enshrined in Art. 6 ECHR" (see also Swiss Federal Tribunal, ASA Bull. 1993, p. 398, 409 et seq. [G. v/ FEI] and Swiss Federal Tribunal judgment of March 31, 1999 [5P. 83/1999], unreported, p. 12); **Advisory opinion CAS 2005/C/976 & 986 Fédération Internationale de Football Association (FIFA) & World Antidoping**

Agency (WADA), 21 April 2006, "Swiss law grants an association a wide discretion to determine the obligations of its members and other people subject to its rules, and to impose such sanctions it deems necessary to enforce the obligations. Disciplinary sanctions imposed by associations are subject to the civil law and must be clearly distinguished from criminal penalties. A sanction imposed by an association is not a criminal punishment".

The reference to art. 14 and Prot. 12 of the ECHR is even less pertinent: the use of a working language in an international organisation or association does not constitute a discrimination against anybody, it is sufficient to remember that the same Council of Europe establishes the use of some working language, the CAS too and so on.

Authorization of the use of French language

After having clarified that no human right has been violated, it is necessary to decide if the memorials and the documents submitted by Mr. Hauchard and Mr. Marzolo, written exclusively in French, are admissible or not.

Art. 2 of the EC Procedural Rules states that "The EC shall, at the request of any party, authorize a language other than English to be used by the parties involved. In that occurrence, the EC may order any or all of the parties to bear all or part of the translation and interpreting costs. The EC may order that all documents submitted in languages other than English shall be filed together with a certified translation in the language of the procedure".

The Hauchard and Marzolo objections can be interpreted also as a request to be authorized to use French language in their declarations and memorials.

The request is authorized and their memorials and documents will be considered for the decision.

Assumed procedural violations by FF organs and political motivations

These proceedings in front of the EC are not an appeal against a disciplinary decision of a national chess Federation, even if it is true that the EC can, in some cases, confirm or not such decisions. In any case the EC has complete power to review the facts and the law and to rule the case ex novo (for a similar conclusion concerning CAS see **Arbitration CAS 2007/A/1396 & 1402 World Anti-Doping Agency (WADA) and Union Cycliste Internationale (UCI) v. Alejandro Valverde & Real Federación Española de Ciclismo (RFEC), award of 31 May 2010**, and **CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v/ UEFA**, "the procedural deficiencies

which affected the procedures before (national) disciplinary bodies may be cured by virtue of the present arbitration proceedings").

Therefore the assumed violations of procedural rules by FF organs could be relevant for the merit, but they do not affect the validity of the complaint submitted by the FF. Same conclusions for the assumed political and personal motivations of the complaint. Finally, the political opposition of the FF against current FIDE Board is not relevant at all: FF was and is a FIDE member.

Communication to Mr. Marzolo

Mr. Marzolo claims that he never received EC communication concerning the pending case, however FIDE Secretariat sent a correspondence to Mr. Cyril Marzolo to the address 46, avenue to Brabois, Villers-les-Nancy, 54600, France, that was "Non Reclamé", "Avisé le 12/7/2011". This is exactly the same address that Mr. Marzolo confirms to be the correct one in his memorials. FIDE Secretariat sent also an email to his known email address. There were no other methods to communicate with him, given the nature of these proceedings, and his possible refusal to receive any FIDE communication cannot stop the proceeding.

In any case Mr. Marzolo has been *de facto* fully informed of the existence of these proceedings and submitted memorials and documents. The rights of the defence have not suffered any violation.

Requested suspension of the proceedings – *Lis pendens*

Mr. Feller requested the suspension of the proceedings, "as far as no decision has been taken both by a trial and the decision of the French Prosecutor".

FF asks to consider a relevant document as "strictly confidential until the beginning of the penal enquiries".

It is beyond any doubts that the acts of French criminal cases –and also of the civil cases- would be relevant for the current proceedings, and the EC invites all the parties to produce copies of them, if and when available, but this is not a sufficient reason for a suspension: the facts are partially the same but the subject matter of the other numerous criminal and civil proceedings is different.

Therefore there is no *lis pendens* within the meaning of Article 186 (1bis) of the Swiss Private International Law Act and, even in the case of the same proceedings pending before the

national State courts and the EC, the EC has to have "considerable reasons" in order to suspend its proceedings. Moreover a suspension does not follow from the Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial matters from 16 September 1988 or the Council Regulation (EC) No 44/2001 of 22 December 2000 on the Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, since both sets of rules do not deal with the competence and jurisdiction of arbitral and sports tribunals (cfr. also **Arbitration CAS 2008/A/1639 RCD Mallorca v. The Football Association (FA) & Newcastle United, award of 24 April 2009**).

EVIDENTIAL MATTERS

The EC evaluates not to have sufficient elements to decide the case, especially on the following points:

- FF submitted an affidavit of Dr. Kenneth W. Regan concerning his analysis -with Rybka 3 chess engine- of the performances of many players, including Mr. Feller, in every major event in chess history, and also the declarations of Mr. L. Fressinet regarding similarities of the moves in the games played by Mr. S. Feller during the 2010 Chess Olympiad and the moves proposed by the engine Firebird: EC deems it necessary to obtain additional expert opinions, an expertise on the objective value of the analyses already submitted and of this typology of analyses. This task can be conferred to the FIDE Technical Commission;
- EC deems as necessary an oral hearing, and requests Mr. Hauchard, Mr. Feller and Mr. Marzolo to attend it, authorising, if requested, a tele/web or video-conference;
- It could be necessary to hear as testimonies the match arbiters of the matches in which, during the 2010 Chess Olympiad, Mr. Feller played for the French team.

Given that, having received a report by a FIDE organ, the EC has no limits concerning acquisition of evidence.

ON THESE GROUNDS

the EC rules that:

- all submitted objections and preliminary requests have to be dismissed;
- the use of the French language by Mr. Hauchard and Mr. Marzano in memorials and declarations is authorized;

and:

- requests the FIDE Technical Commission and its members to produce expert opinion on the objective value of the analyses of Dr. K. W. Regan and Mr. L. Fressinet, and in general of this typology of analysis, authorizing the FIDE Technical Commission to appoint other experts to support them, if necessary;
- asks the FIDE Secretariat to contact the Chief Arbiter of the 2010 Chess Olympiad, to produce the list of match arbiters in the matches where Feller was a member of the French team;
- asks the FIDE Secretariat to inform Mr. Sébastien FELLER, Mr. Arnaud HAUCHARD and Mr. Cyril MARZOLO that an oral hearing will be scheduled and their presence is requested, at least by tele-web or video conference;
- authorizes all the parties to produce new documents, especially concerning the pending criminal and civil cases, until the date of the oral hearing; after the hearing a final deadline will be fixed in due course, for the submissions of memorials and conclusions.

Milano, 1st October 2011

The Chairman of the FIDE Ethics Commission
Roberto Rivello