Roll Number: 3072
Judgement no. 16/2005
January 19, 2005

Judgement

At issue: an action to annul article 40.6, line 2, of the Flemish Act of 27 March, 1991 regarding sport with respect to health imperatives, as it was inserted by the Act of 19 March 2004, pleaded by J.V.

The Court of Arbitration,

Composed of the presidents A. Arts and M. Melchior, and the judges P. Martens, M. Bossuyt, A. Alen, J.-P. Moerman and J. Spreutels, aided by clerk P.-Y Dutilleux, and presided over by the president A. Arts.

After having deliberated, delivered the following judgment:

I. Subject of the appeal and proceedings.

By request addressed to the court by letter sent on 4 August 2004 and received by the clerk on 5 August 2004, J.V., residing at (…), introduced an action to annul article 40.6, line 2, of the Flemish Act of 27 March 1991 regarding sport with respect to health imperatives as it was inserted by the Act of 19 March 2004 (published in the *Moniteur belge* [Belgian Monitor], 10 May 2004, second edition).

By a separate request, he also introduced a demand to suspend the application of the aforementioned provision. By decision No. 162/2004 of 20 October 2004 (published in the *Moniteur belge*, 25 October 2004), the Court suspended the words “on the website which the Government created for that use” appearing in that provision.

The Flemish government presented a brief, the applicant presented a brief in response, and the Flemish government presented a brief in reply.

The public audience of 11 January 2005:

-Me B. Staelens, lawyer at the Bar of Bruges, appeared for the Flemish Government.

-the reporting judges, M. Bossuyt and J. Spreutels have reported

-the lawyer aforesaid was heard

-the case was taken under advisement.

The provisions of the special law on the Court of Arbitration of 6 January 1989, relating to the procedure and to the use of languages was applied.

II. Law

-A-

A.1.1 According to the impugned provision, major disciplinary suspensions of athletes are published for the duration of the suspension on the website which the government created for this purpose and by the official communication channels created by the sports federations. This publication contains the first and last name, and the date of birth of the

athlete, the beginning and the end of the period of suspension and the sport in which the infraction occurred.

A.1.2. The applicant was suspended for life from any participation in cycling races as an amateur cyclist, by the disciplinary commission of the Belgian Cycling League [Ligue vélocipédiquebelge] for having used a banned anabolic agent. He claims an interest in the suspension and annulation of the impugned provision, considering that his name was published on the official website of the Flemish authorities, which he considers offensive.

A.2.1. The first plea alleges a violation of article 22 of the Constitution, by virtue of which each person has a right to the respect of their privacyand family life, except in the cases and conditions established by law.

In order for an invasion of privacy to be lawful, the legislature must demonstrate that the provision is necessary to attain a legitimate objective.

A.2.2. The impugned provision was introduced in order to optimally inform sports associations of disciplinary measures that have been imposed, so that they can ensure effective enforcement of these measures. The applicant emphasizes that letters and lists of disciplinary sanctions are sent to the sports federations. Publication on a website that is accessible to everyone is, according to him, superfluous and manifestly disproportionate to the objective in view of which the measure was established, and amounts to instituting a “public pillory.” In support of his point of view, the applicant makes reference to the

opinion of the Commission for Protection of Privacy, which held that publication on a public website is excessive, as well as the opinion of the legislative section of the State Council.

A.3.1. The Flemish Government first notes that the action is not directed against the entirety of article 40.6 of the impugned act, but only against the fact that it intends an announcement on a website published to that end by the Government.

A.3.2. The impugned act seeks to combat in an adequate manner the practice of doping in sport and responds to urgent social necessities. It is absolutely necessary to that end to publish the names of athletes sanctioned for doping

The act aims to render it impossible for suspended athletes to participate in any sporting event or organized training. Limiting the publication of sanctions to professional sports associations would not go far enough to reach this legitimate goal.

The Flemish Government equally emphasizes that article 43 of the act provides penal sanctions against those who are found guilty of not respecting the ban against athletes participating in any sporting event for a set duration. This implies that any organizer of a sporting event must be up to date with the sanctions inflicted, and to that end publication on a website is a necessary means.

A.3.3. During the evaluation of the necessity and the proportionality of the provision, it is necessary to draw attention to the social necessity of combatting doping. Those who rose to notoriety and who comport themselves in a fraudulent manner must bear the consequences that access to sports forums will be publicly refused to them.

A.4. A second motion alleges the violation of articles 10 and 11 of the Constitution. The individuals upon whom a disciplinary suspension is inflicted as a part of their participation in the sport, following an infraction of article 30, 1°, 2°, 4° and 5° are identified, according to article 40.6 of the Act of 27 March, 1991, on a website accessible to the public, while persons against whom a disciplinary suspension measure is imposed following a different offense do not suffer such a public humiliation. There is no objective evidence that justifies the discrimination between athletes suspended from athletic completions due to an infraction of article 30, 1°, 2°, 4° and 5° of the impugned act, and the athletes suspended for another reason.

In order to attain the intended objective of the legislature, a limited publication, accessible only to sports organizers, would be perfectly adequate. In this case, the legislature went unnecessarily far, to the point where there was no proportionality between the means used and the objective.

A.5.1. According to the Flemish Government, the applicant is particularly vague when referring to the categories of person who are treated in an inequitable manner. It assumes

that the applicant considers the amount of publicity is contrary to articles 10 and 11 of the constitution regardless of which cause of suspension is referred to on the website.

A.5.2. The publication of sanctions on the website referred to in the contested provision concerns all the suspensions that have an impact on any sporting event or organized training. An athlete who incurs a suspension for reasons not mentioned in article 30 of the impugned act is not affected by the publicity requirement. There is in effect no necessity in this sense, since the purpose of publicity is not a sanction. So one cannot see how the principle of equality would be violated.

-B-

B.1. The applicant demands the annulation of article 40.6, line 2, of the act of 27 March 1991 regarding sport with respect to health imperatives, inserted by article 31 of the act of 19 March 2004 modifying the act of 27 March 1991 relative to the practice of sport with respect to health imperatives, which provides that:

“Disciplinary suspensions of major sports are published for the duration of the suspension on the website which the Government created to that end and by the official channels of communication created by the sports federations. This publication contains the first and last name and the date of birth of the athlete, the beginning and the end of the period of suspension and the sport in which the infraction occurred.”

B.2.1. The first plea is made on the violation of article 22 of the Constitution, which states:

“Each person has the right to the respect of their privacy and family life, except in cases and conditions established by law.

The law, the act or the regulation as referred to in article 134 guarantees the protection of this right.”

B.2.2. Expanding on the plea, the applicant argues that the protection of privacy is equally assured by article 8 of the European Convention on Human Rights and by article 17 of the International Covenant on Civil and Political Rights.

By virtue of article 1.1 and 1.2 of the special law of 6 January 1989 on the Court of Arbitration, modified by the special law of 9 March 2003, the Court has competence to review legislative norms, in the context of an action for annulment, with regard to the articles of title II “Belgians and their rights” and of articles 170, 172, and 191 of the Constitution.

B.2.3. However, where a treaty provision binding Belgium is similar in scope to one or more of the above constitutional provisions, the guarantees enshrined in this treaty provision constitute an inseparable whole with the guarantees of the constitutional provisions. Otherwise, the violation of a fundamental right constitutes *ipso facto* a violation of the principle of equality and of non-discrimination.

B.2.4. It follows that, when a breach of a provision of Title II and Articles 170, 172 or 191 of the Constitution is alleged, the Court shall consider provisions of international law that guarantee analogous rights and liberties in its review.

It also follows that the preparatory work of article 22 of the Constitution that the Constituent sought the best alignment "with Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), to avoid disputes on the contents of the article of the Constitution and Article 8 of the [Convention]" (*Doc. Parl.*, Chambre, 1993-1994, n° 997/5, p. 2).

B.3.1 Article 8 of the European Convention on Human Rights provides that:

“1. Every person has a right to the respect of their privacy and family life, of their home and correspondence.

2. There can be no interference by a public authority with the exercise of this right except where this interference is provided for by law and is a measure which, in a democratic society, is necessary for national security, public safety or the economic well-being of the country, the defense of order and the prevention of crime, for the protection of health or morals, or the protection of rights and freedoms of others.”

B.3.2. Article 17 of the International Covenant on Civil and Political Rights states:

"1. No one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honor and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

B.4.1. By virtue of the impugned provision, disciplinary suspensions in major sports are published for the duration of the suspension on the web site that the Flemish Government created for this purpose and by the official channels of communication created by the sports federations. This publication contains the first and last name and the date of birth of the athlete, the beginning and the end of the period of suspension and the sport in which the infraction occurred.

Even though the applicant demands the annulment of article 40.6 line 2 of the Act as a whole, it appears from the plea that his complaints are not directed against the publication of the suspension through the channels established by sports federations, but only against the publication on the Government website. The Court will therefore limit its examination to this part of the contested provision.

B.4.2. It appears from the preparatory work of the Act that the Parliament's explicit intention was to make the information public on an open website, and therefore accessible to everyone, which proves to be the case in practice (*Doc*., Parlement flamand, 2003-2004, No. 1854-1, p. 19). To justify this choice, the legislature states:

“The general publication of any disciplinary suspensions on an open website was retained, even if the Commission has found it excessive, given that interviews with sports federations have found that communication through the website has strong support and allows sports federations to enforce bans imposed quickly and effectively in all sports, considering the level of organization of sports associations and federations, and in unions.”(Ibid., P. 19)

B.5.1. Publishing personal information in so general a manner constitutes an interference with the right to respect of privacy guaranteed by article 22 of the Constitution and by the above-mentioned conventional provisions.

For such interference to be permissible, it must be necessary to achieve a specific legitimate purpose, which implies in particular that there must be a reasonable proportionality between the consequences of the measure for the person concerned and the interests of the community.

B.5.2. In addition, the legislature must respect article 22, line 1, of the Constitution, by virtue of which only the federal legislature can determine in which case and conditions the right to privacy and family life can be limited.

An invasion of privacy as part of a particular area of regulation certainly falls within the jurisdiction of the relevant legislature, but the Flemish Parliament legislature must respect

federal general regulation, which regulates a minimum standard in all matters. Given that the provision concerns the publication of personal information, it implies that the legislature is restrained by the law of 8 December 1992 regarding the protection of privacy with regards to the treatment of information of a personal character.

B.6.1. A restrained form of electronic publication for the needs of functionaries responsible for surveillance and the officials of sports associations could be judged necessary to assure that sanctions imposed on athletes are respected, and serves a legitimate goal. The diffusion of personal information provided for by the Act, on a website that is non-secure, and thus accessible to anybody, however, goes beyond what the objective requires. Such publication not only has the effect that everyone can read this information, even if it is of no use, but it also makes it possible for the data to be used for other purposes, with the result that the information can still be released after the expiry of sanctions and end of the online publication.

B.6.2. As it turns out, firstly, that the publication is not necessary to attain the legitimate objective of the legislature, since the objective could equally be realized in a manner less damaging to the interests and, secondly, that the effects of the measure are disproportionate with regards to that objective, the impugned provision is contrary to article 22 of the Constitution and to the analogous provisions of Conventions.

B.6.3. Since the first plea is well founded, the Court has no need to examine the second plea, because it cannot lead to a more extensive annulment.

For these reasons,

The Court

Removes from article 40.6, line 2, of the Flemish Act of 27 March 1991 regarding sport with respect to health imperatives, the words “on the website which the government created for this purpose and”.

Thus pronounced in the Dutch, French, and German languages, according to article 65 of the special law of 6 January 1989 on the Court of Arbitration, at the public hearing of 19 January 2005.

The Clerk, The President,

P.-Y Dutilleux A. Arts