

**RULING OF THE CMAS DISCIPLINARY COMMITTEE
IN THE CASE "OLEKSII ZAKHAROV VS. CMAS"**

Avv. Stefano Brustia (Chairman)
Avv. Alessandro Fusco
Avv. Lavinia Di Basilio

Introduction

1. This decision concerns a gesture made by an Ukrainian athlete, Mr. Oleskii Zakharov (hereinafter also referred to as the "Athlete"), who participated in the 20th CMAS Finswimming World Championship which took place in Belgrade in July 2018 (the "Competition"). On the 4th day of the Competition (i.e. on 19 July 2018) the Athlete was seen by the CMAS officials making the middle-finger gesture shortly after the end of the final heat 800 SF Men (the "Race").
2. The Technical Delegate of the Competition, Mr. Grigorii Shumkocov, promptly informed the CMAS of the alleged offensive gesture reporting also that the gesture was broadcasted live on television.
3. The CMAS President (the "President") was of the view that this alleged offence would be likely to affect adversely the reputation of the CMAS. Therefore, on 26 July 2018, the President



suspended on interim basis the Athlete for a period of two months.

The proceedings

4. The Notice of Charges was issued by the CMAS Prosecuting Body (the "Prosecuting Body") on 8 August 2018; on the same day, the President of the CMAS Disciplinary Committee (the "Disciplinary Committee") issued the Order of Procedure No. 1 inviting the Athlete to submit his Written Observations within twenty-one (21) days from the receipt of the Notice of Charges.
5. On 9 August 2018, the CMAS Secretariat notified the Athlete the Notice of Charges as well as the Order of Procedure No. 1.
6. The Athlete lodged its Written Observations on 31 August 2018.
7. Essentially, the Athlete does not deny that he made the middle-finger gesture. However, he claims that he did not intend to act in a disrespectful manner because he claims that he made this gesture by mistake in the attempt to repeat another gesture habitual to him, an elongated index gesture that he usually makes at the end of a race.
8. On the other hand, the Athlete also submits that he committed the alleged offense when he was in a state of confusion in which he could not fully control his actions and coordinated the movements of his hands.

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9. The Athlete also asserts that there is an alleged video recording that it would prove that the gesture was not intentional. However, this video has not been offered as evidence.
10. The Athlete's counsel participated at the hearing held on 18 September 2018 through video-conferencing. He reiterated the defenses carried out in the Written Submissions and answered the questions posed by the President of the Disciplinary Committee.

Conclusions

11. The Disciplinary Committee must consider whether the Athlete's gesture constitutes a violation of article 4, paragraph 2, letter d) of the CMAS Disciplinary Code (the "Code"), which provides as follows:

"Using offensive, insulting or abusive language and/or gestures: first violation Euro five thousand (5.000) fine, and suspension of no less than six (6) months. The second violation and afterwards shall be punished by a fine of Euro ten thousand (10.000), and a suspension of one year per each violation, and exclusion can be recommended".

12. The Disciplinary Committee is of the view that, to determine whether there has been a violation of the said provision, it is necessary to consider whether the gesture at issue was objectively offensive.



- 13.** The image below shows the gesture which was seen by the CMAS officials.



- 14.** The Disciplinary Committee finds that the gesture made by the Athlete is one that is objectively offensive. Indeed, it is undisputable that extending the middle finger is widely considered a symbol of disrespect.
- 15.** It is worth noting that the Athlete does not deny that he made this gesture, but he claims that he made it by mistake in the attempt to repeat another gesture habitual to him.
- 16.** This argument defies any logic.
- 17.** The picture above clearly shows the gesture made by the Athlete. Therefore, it is simply not credible by any standard that the Athlete made the gesture by mistake in the attempt to repeat an index finger gesture that he usually makes at the end of a competition.



- 18.** As set out above, the Athlete also submits that he made the gesture when he was in a state of shock, in which he could not fully control his actions and coordinated the movements of his hands.
- 19.** However, the Athlete has offered no evidence whatsoever in support of this defensive argument. In particular, the Athlete has not provided the alleged video recording that it would show that the gesture was unintentional.
- 20.** Accordingly, there is no evidence on record based on which it can be concluded that the gesture was made by the Athlete in a state of confusion.
- 21.** In the light of the foregoing considerations, there is nothing in the evidence available to the Disciplinary Committee to show that the Athlete's conduct was unintentional.
- 22.** Therefore, the Disciplinary Committee finds to its comfortable satisfaction that the Prosecuting Body has provided evidence proving that the Athlete made publicly a gesture which is widely considered to be offensive and obscene.
- 23.** The Disciplinary Committee believes that such conduct is clearly a disciplinary offence within the meaning of the applicable CMAS rules. Indeed, the Disciplinary Committee is of the view that if an athlete involved in competitions organized under the auspices of the CMAS makes a gesture that is widely considered to be



offensive that action is likely adversely to affect the reputation of the CMAS and underwater sports generally.

- 24.** Accordingly, the Disciplinary Committee considers it self-evident that such conduct falls within the scope of the prohibition set forth in article 4, paragraph 2, letter d) of the Code ("Using offensive, insulting or abusive language and/or gestures").
- 25.** In the light of the preceding considerations, the Disciplinary Committee reaches the conclusion that the Athlete's conduct constitutes a serious infringement.
- 26.** With regard to the type of the sanction to be imposed on the Athlete, the Disciplinary Committee notes that the said provision leaves no margin of discretion in determining the amount of the fine to be imposed.
- 27.** Therefore, having established that the Athlete violated article 4, paragraph 2, letter d) of the Code, the Disciplinary Committee believes that it is not entitled to reduce the amount of fine to be applied in the present case.
- 28.** In the light of all the above considerations and findings,
 - a)** Mr. Oleskii Zakharov is found guilty of infringement of article 4, paragraph 2, letter d) of the Code ("*Using offensive, insulting or abusive language and/or gestures*");
 - b)** Mr. Oleskii Zakharov is suspended from taking part in any activities organized under CMAS, Continental Confederations



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and National Federations and their various authorities and affiliated entities for six (6) months, starting from 26 July 2018;

- c) Mr. Oleskii Zakharov is ordered to pay a fine in the amount of Euro 5,000 (five thousand).

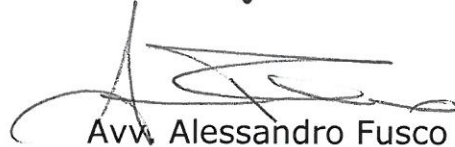
Right of Appeal

Mr. Oleskii Zakharov has a right of appeal against this decision to the CMAS Appeal Committee according to the procedure rules set out in Article 9 of the Code.

Rome, 11 October 2018



Avv. Stefano Brustia, Chairman



Avv. Alessandro Fusco



Avv. Lavinia Di Basilio