**Arbitration CAS 2015/A/4181 Water Polo Australia (WPA) & Joseph Henry Kayes v. Fédération Internationale de Natation (FINA), award of 5 April 2016**

Panel: Mr Ivaylo Dermendjiev (Bulgaria), Sole Arbitrator

*Water polo*
*Change of sport nationality*
*Animus decidendi (appealable decision before CAS)*
*Time limit to file an appeal*
*Party affected by change of sport nationality*
*Standing to sue*

1. **The term "decision" within the meaning of Article R47 of the Code is interpreted broadly by CAS panels. According to relevant CAS case law, the form and/or denomination of the challenged act are not decisive. What matters is whether the latter contains a ruling affecting the parties' legal positions. In sum, (i) the qualification of an act as a decision is a matter of substance, not form; (ii) a decision must be intended to affect the legal rights of a person, usually, if not always, the addressee; (iii) a decision is to be distinguished from the mere provision of information.**

2. **The time limit for filing an appeal is a mandatory and not an indicative one. The consequence of not filing an appeal within the time limit is that the right to appeal is precluded thereafter, *i.e.* any appeal filed thereafter shall be inadmissible. The time limit for an appeal starts to run on the day following the communication of the decision which is subject to appeal. Furthermore, it is generally acknowledged that the time limit starts running when the appellant had the opportunity to obtain knowledge of the content of a decision irrespective of whether he has actually obtained knowledge of the content.**

3. **Under FINA rules and regulations the substantive right of choosing sport nationality and/or changing of the affiliation from one national governing body to another belongs to the competitor and not to the respective governing body. This is because choosing of sport nationality or the change of affiliation would affect the legal situation of the competitor, *i.e.* the competitor's personal rights are affected by the approval or the disapproval of the change of sport nationality or affiliation.**

4. **While the new federation of the competitor may be interested in the outcome of a request to change sport nationality, the rights of the new federation are not directly affected by the respective decision. Consequently, the new federation does not have standing to sue (*légitimation active*) with respect to the respective decision and therefore does not qualify as appellant having the right to challenge that decision.**

## I. PARTIES

1. Water Polo Australia Limited (the "WPA" or the "First Appellant") is affiliated to Swimming Australia Limited ("Swimming Australia") and recognized by Swimming Australia, the Fédération Internationale de Natation ("FINA" or the "Respondent"), and the Australian Olympic Committee as the Australian national governing body for the sport of water polo. The WPA is formally attached to FINA through Swimming Australia.

2. Joseph Henry Kayes (the "Second Appellant") is an elite water polo player, born in New Zealand on 3 January 1991, and a resident of Australia since 2009.

3. The WPA and Mr. Kayes will be collectively referred to as the "Appellants".

4. FINA is the international governing body for aquatic sports, including water polo.

## II. FACTUAL BACKGROUND

### A. Background Facts

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

6. The Second Appellant played a single match of water polo for New Zealand representative junior team in 2009.

7. The Second Appellant moved to Australia in 2009 and since then until August 2014 competed for Australian clubs.

8. On 22 October 2013, the Second Appellant obtained an Australian Distinguished Talent visa.

9. During the period 25 June 2014 to 5 September 2014, Mr. Darren Kane (acting for WPA) and Ms. Irene Romero Alemany of FINA Legal Department exchanged several emails in connection to the interpretation of the residency and jurisdiction test under FINA General Rule 2.6. The discussion ended with the email dated 5 September 2014 whereby Ms. Irene Romero Alemany noted that *"a competitor can be affiliated to 2 different National Federations through the Club, but CAN NOT represent more than one country in International, Continental and National competitions"*.

10. From September 2014 until the middle of May 2015, the Second Appellant played for a Hungarian club in Hungary.

11. On 15 June 2015, Mr. Kayes acquired Australian citizenship.

12. On 17 June 2015, Mr. Kane, in the capacity of external lawyer of the WPA, sent Ms. Irene Romero Alemany of the FINA Legal Department an e-mail with attachments designated as an application by the WPA and the athlete Joseph Kayes for the athlete to change his national affiliation from New Zealand to Australia.

13. In reply, by an e-mail of the same day, Ms. Alemany noted that FINA needed to receive an official request by the AUS NF (Australian New Federation) and certain proofs evidencing the fulfilment of the residency and jurisdiction requirements under FINA legal framework and referred for further information to the internet address specified in the letter.

14. On 19 June 2015, the President of the WPA signed an Application for a change of Sport Nationality - NF Official Request with respect to the athlete Joseph Kayes. The application with the annexes thereto was sent to FINA on 22 June 2015 by email from Mr. Kane to the attention of Ms. Alemany.

15. Between 22 June 2015 and 26 June 2015, the First Appellant submitted to FINA further documents and letters in support of the application for change of sport nationality.

16. On 10 July 2015, the FINA Executive Director notified the President of the WPA that the application for change of the sport nationality of Mr. Kayes had been unsuccessful because *"the water polo player does not fulfil the jurisdiction condition, as per FINA Rule GR 2.6.2, indent 3, proof of jurisdiction: "Official result lists from national championships, national, regional or international club competitions in which the applicant has participated for his/her "new" club during the GR 2.6 requested time"*. The FINA Executive Director further pointed to the WPA's President the opportunity for submitting the issue for consideration by the FINA Bureau by 17 July 2015.

17. On 13 July 2015, the WPA requested that the matter be referred to the FINA Bureau for consideration.

18. On 21 July 2015, the FINA Executive Director informed the President and the CEO of the WPA that at the occasion of a meeting held on 21 July 2015 the FINA Bureau had considered the appeal of the WPA related to the change of sport nationality of Mr. Kayes and had decided not to approve the change of sport nationality *"as the player does fulfil[1] the jurisdiction condition according to FINA Rule GR 2.6.2 for the last 12 months in a continuous and uninterrupted period"*.

19. The decision of the FINA Bureau dated 21 July 2015 was received by the First Appellant on 22 July 2015 via email and was forwarded on the same day to Mr. Kane for information.

20. On 17 August 2015, the President of the WPA wrote to the FINA Executive Director requesting that FINA determine that Mr. Kayes would be eligible under the FINA Rules to change his sport nationality from New Zealand to Australia on and from 1 April 2016 so to allow him to play for Australia in FINA World League in 2016. The request was made on the premise that Mr. Kayes recommenced under the jurisdiction of WPA on 19 May 2015 and therefore he would not become eligible to represent Australia until 19 May 2016. In the same

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1 It seems to be a manifest typographical error - should be read *"does not fulfil"*.

letter, the President of the WPA further denied that FINA General Rule 2.6.2 stated that an athlete must have remained under the jurisdiction of the country being transferred to for *"the last 12 months in a continuous and uninterrupted period"*. The President of the WPA also stated that in making the decision to play in Hungary, Mr. Kayes and the WPA had relied on the advice contained in the e-mail of 5 September 2014 by the FINA Legal Department.

21. On 18 August 2015, the FINA Executive Director replied to the President of the WPA in the following lines:

> *As per FINA Rule GR 2.6 "Any competitor or competition official changing his affiliation from one national governing body to another must have resided in the territory of and been under the jurisdiction of the latter for at least twelve months prior to his first representation for the country".*
>
> *Proofs of residence and jurisdiction are provided in FINA Rule GR 2.6.1 and GR 2.6.2.*
>
> *We kindly ask you to submit the required documents at the time that the athlete duly fulfils the conditions for changing the sport nationality.*
>
> *Unfortunately there is no mechanism in FINA Rules which permits to reduce the 12 months period.*

## III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 21 August 2015, the Appellants filed a statement of appeal with the Court of Arbitration for Sport (the "CAS") against the Respondent with respect to the decisions issued by the FINA Bureau on 21 July 2015 (the "First Decision") and in an email from the FINA Executive Director dated 18 August 2015 (the "Second Decision"), together referred to as the "Appealed Decisions". Pursuant to Article S20 of the Code of Sports-related Arbitration (the "Code"), the matter was assigned to the Appeals Arbitration Division of the CAS and was dealt with in accordance with Article R47 *et seq.* of the Code. In their statement of appeal, the Appellants submitted that a Sole Arbitrator be appointed, and suggested Mr. David Ipp, QC as arbitrator. Moreover, the Appellants requested that this matter be heard on an expedited basis.

23. The statement of appeal was initially filed on 21 August 2015 with the Court of Arbitration for Sport Oceania Registry. Due to the international nature of the appeal the procedure was thereafter forwarded to the CAS headquarters in Lausanne, Switzerland, and was further administered by that office.

24. On 28 August 2015, the Appellants designated their statement of appeal as their appeal brief in accordance with Article R51 of the Code and indicated that in their opinion the nature of the appeal did not give rise to witnesses being called as the issues for determination involved questions regarding the interpretation of FINA Constitution and FINA General Rules with respect to the validity of the Appealed Decisions. Nonetheless, the Appellants reserved the right to file witness statements depending on the position taken by the Respondent.

25. On 2 September 2015, the Respondent informed the CAS Court Office that it objected to the Appellants' request to expedite this procedure, but agreed to the appointment of a Sole

Arbitrator. In doing so, the Respondent noted that it did not agree to the appointment of Mr. Ipp as proposed by the Appellants.

26. On 3 September 2015, the CAS Court Office informed the parties that given the Respondent's objection, no expedited procedure would be implemented. Moreover, given the Respondent's objection to Mr. Ipp, a decision on the appointment of the Sole Arbitrator would be decided upon by the President of the Appeals Arbitration Division in accordance with Article R54 of the Code.

27. On 22 September 2015, the Respondent filed its answer in accordance with Article R55 of the Code. Included therein was an objection to the admissibility of this appeal. The Respondent requested that for reasons of procedural economy the CAS take a preliminary decision on the admissibility of the appeal and stated that no hearing was needed in this regard.

28. On 24 September 2015, the CAS Court Office acknowledged receipt of the Respondent's answer and more specifically, its objection to the admissibility of this appeal. The Appellants were then invited to file a response to the Respondent's objection and to state whether they agree that a preliminary decision in this regard be rendered by the Sole Arbitrator, once appointed.

29. On 28 September 2015, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed that Mr. Ivaylo Dermendjiev, attorney-at-law in Sofia, Bulgaria, was appointed Sole Arbitrator in this procedure.

30. On 5 October 2015, the Appellants filed their response to the Respondent's objection to the admissibility of this appeal (with exhibits attached) and concluded that the appeal filed by the Appellants was admissible and, in the alternative, that at least the appeal by the Second Appellant was admissible, if the appeal by the First Appellant was found to be inadmissible. The Appellants agreed that a preliminary decision on the admissibility of the appeal be rendered by the Sole Arbitrator based on the written submissions filed.

31. On 7 October 2015, the Respondent filed certain comments with respect to the Appellants' submission on the issue of admissibility, in particular with regard to the notification of the First Decision.

32. On 9 October 2015, the Appellants objected to the Respondent's letter dated 7 October 2015 as being filed without solicitation. To the extent such letter was admitted to the file, the Appellants requested that their comments contained in the letter dated 9 October 2015 also be included in response.

33. On 12 October 2015, the CAS Court Office again invited the parties to state whether they preferred that a preliminary decision on the admissibility issue be taken solely on the parties' written submissions, or alternatively whether they wished a preliminary hearing be held in this regard. By letters dated 12 October 2015 and 13 October 2015, the Appellants and the Respondent, respectively, expressed the view that a hearing was not needed and that the admissibility issue should be resolved solely on the parties' written submissions.

34. On 15 October 2015, the CAS Court Office, on behalf of the Sole Arbitrator, advised the parties that the Sole Arbitrator deemed himself sufficiently well informed to render a preliminary decision on the admissibility issue without the need for a hearing. However, before doing so the parties were requested to provide some documents in accordance with Article R44.3 of the Code. In particular, the Appellants were invited to provide a power of attorney, or letter of engagement, between the Appellants (individually or collectively) and Mr. Kane with respect to his role as counsel in connection with Mr. Kayes' selection/eligibility issue. The Respondent was invited to provide the FINA Bureau's complete file with respect to the same issue including any correspondence to and from the parties.

35. On 20 and 23 October 2015, the Appellants and Respondent, respectively, responded to the Sole Arbitrator's 15 October 2015 inquiry. Mr. Kane explained that his law firm was retained generally by WPA on a commercial basis and was acting for WPA in the CAS proceedings within this general retainer. It was further explained that the law firm had also been retained by Mr. Kayes in relation to the CAS proceedings without necessity under the laws of Australia for clients to engage the services of legal representatives through grant of power of attorney. Accordingly, the Respondent submitted the FINA Bureau's complete file and provided some comments regarding the context into which the documents were drafted and about the chronology of events.

36. On 6 November 2015, the CAS Court Office, on behalf of the Sole Arbitrator, issued further questions to the Appellants, and following an objection by the Appellants filed on 27 October 2015, rejected a portion of the Respondent's 23 October 2015 submission as falling outside the scope of the Sole Arbitrator's 15 October 2015 inquiry.

37. On 13 November 2015, the Appellants responded to the Sole Arbitrator's 6 November 2015 inquiry again reiterating that it was neither a mandatory requirement under the laws of Australia to engage the services of a legal practitioner through the grant of power of attorney nor that the retainer should have been in written form. In addition, Mr. Kane advised that his law firm had been retained to represent Mr. Kayes since before the initial application for change of sport nationality was submitted to the Respondent on or before 17 June 2015.

38. On 23 November 2015, the Sole Arbitrator, with the consent of the parties, issued a preliminary decision on the Respondent's request to dismiss this appeal as inadmissible based on the parties' written submissions alone. In this respect, the Respondent's request to dismiss this appeal as to the allegations brought by the First Appellant was partially granted on the basis that the First Appellant's appeal was not timely filed in accordance with Article R49 of the Code. Therefore, the First Appellant's appeal was dismissed. The parties were advised that the reasoning of the Sole Arbitrator's decision on the admissibility of the First Appellant's appeal would be set forth in a final award or decision on this appeal.

39. In the same decision, the Sole Arbitrator reserved decision on the Respondent's objection to the admissibility of the Second Appellant's appeal and further invited Mr. Kayes to provide a signed statement specifying the date on which he received the Appealed Decisions, how the latter were received and by whom, attaching a proof of receipt where available.

40. On 26 November 2015, Mr. Kayes filed a statement in response to the Sole Arbitrator's 23 November 2015 inquiry stating that the Second Appellant did not before 21 August 2015 receive a copy of the Appealed Decisions.

41. On 3 December 2015, the CAS Court Office, on behalf of the Sole Arbitrator advised the parties that after considering Mr. Kayes' 26 November 2015 submission, a decision on the Respondent's request to dismiss the appeal as to Mr. Kayes was reserved and that further questioning of Mr. Kayes on the issue might be addressed at a hearing, if necessary.

42. By communications dated 4 December 2015 and 10 December 2015, the Respondent and the Appellant, respectively, reconfirmed their preference that a hearing need not be held in the matter.

43. On 10 December 2015, the CAS Court Office, on behalf of the Sole Arbitrator, clarified Mr. Kane's inquiry that the claim brought by the First Appellant was indeed dismissed as untimely and that, therefore, the First Appellant was no longer a party to these proceedings.

44. On 14 December 2015, the CAS Court Office, on behalf of the Sole Arbitrator, informed the parties that the Sole Arbitrator deemed a hearing necessary in this procedure so as to resolve both his reservations on the admissibility of Mr. Kayes' appeal, as well as the merits of this case, in accordance with Article R57 of the Code.

45. On 19 and 20 January 2016, the Respondent and Mr. Kayes signed and returned the order of procedure in this appeal. Neither party called any witnesses.

46. On 20 January 2016, Mr. Kayes filed a new personal statement. Later that same day, FINA objected to the admission of such statement as untimely in view of Article R56 of the Code.

47. On 21 January 2016, a telephone hearing was held originating from the CAS Court Office. The Sole Arbitrator was assisted by Mr. Brent J. Nowicki, CAS Legal Counsel, and joined by the following:

For Mr. Kayes:

- Mr. Darren Kane (legal representative)
- Mr. Robert Weber (legal representative)
- Mr. Joseph Henry Kayes (Appellant)
- Mr. Chris Harrison (CEO of WPA, observer)

For FINA:

- Mr. Jean-Pierre Morand (legal representative)
- Ms. Irene Romero (FINA Legal Department)

48. At the inception of the hearing, the parties confirmed that they had no objection to the appointment of the Sole Arbitrator.

49. As an initial matter, the Sole Arbitrator addressed the admissibility of Mr. Kayes' statement dated 20 January 2016. In doing so, Mr. Kayes was invited to state, in particular, the exceptional circumstances upon which he should be allowed to file such a statement. FINA was then invited to respond. After hearing the parties, it was confirmed by the Sole Arbitrator that the request to file such statement on the eve of the hearing was denied as no exceptional circumstances were presented by Mr. Kayes as the statements and evidence contained therein was readily available to Mr. Kayes long before the date of the statement, and that to admit his new statement at such a late stage would be prejudicial to FINA. Such decision is in line with Article R56 of the Code. Notwithstanding the Sole Arbitrator's decision, it was noted that Mr. Kayes was present at the hearing and therefore, if necessary, he would be able to discuss the issues contained within his new statement as part of his oral evidence.

50. In accordance with the proposed agenda of the hearing, the parties made brief opening remarks. At the outset, the Appellant's representatives announced that the appeal against the Second Decision was not maintained anymore and should be considered withdrawn to which the Respondent did not object. Therefore, the appeal against the Second Decision was not an issue for determination in the case anymore.

51. Following the opening remarks, the hearing was bifurcated into two parts and the parties were first heard on the issue of the admissibility of the Second Appellant's appeal in terms of its timing, *i.e.* whether it was timely submitted pursuant to the applicable procedural rules. Second, the discussion went on to clarify the parties' positions with respect to the interpretation of the relevant legal provisions of the Respondent's legal documents (FINA's Constitution and General Rules) concerning the eligibility for change of sport nationality and the prerequisites for obtaining change of sport nationality and in particular the requirement for jurisdiction.

52. Mr. Kayes was given the opportunity to present personally his case and to expand on his statements submitted in the file. Mr. Kayes provided details for the periods and the clubs he played for since 2014 and stated that for competing in Hungary he had relied on previous representations by FINA.

53. Specific questions were put to Mr. Kayes concerning details of when and how he retained the services of a legal firm with respect to the procedure for change of sport nationality; what was the scope of the said services; if, when and how he was notified of the Appealed Decision(s) and/or made aware of their content.

54. In response to such questions Mr. Kayes explained that he did not personally retain the services of Mr. Kane's legal firm but to his knowledge the WPA had retained Mr. Kane to act on his behalf with respect to the procedure for change of sport nationality somewhere in June 2015. In so doing, the WPA would act on Mr. Kayes' behalf. The Appellant further testified that he neither saw the applications nor did he instruct Mr. Kane to file the applications as he had left the handling of the matter to the WPA.

55. At the conclusion of the hearing, the parties confirmed that their right to be heard had been fully respected.

## IV. SUBMISSIONS OF THE PARTIES

56. The Appellants' submissions, in essence, may be summarized as follows:

- The First Decision is void on the basis that the Respondent's FINA Bureau used a different interpretation of the FINA General Rules regarding jurisdiction, compared to the definition actually contained in the FINA General Rules, thus applying a more onerous test than the definition and test actually set out in the FINA General Rules. In particular, the Appellants dispute the FINA Bureau's determination that the Second Appellant is not under the jurisdiction of the First Appellant *"… for the last 12 months in a continuous and uninterrupted period"* in circumstances where FINA General Rule 2.6.2 contains no such requirement as to continuous and uninterrupted periods.

- The First Decision is further void on the basis that FINA (through the FINA Legal Department) represented to the Appellants in an e-mail correspondence of 5 September 2014 that the Second Appellant could leave Australia and yet remain under the jurisdiction of the First Appellant, where the Appellants thereafter relied on the Respondent's representation that the Second Appellant would not cease to be under the jurisdiction of the WPA if playing water polo in Hungary in late 2014 and early 2015.

- The Second Decision is void on the basis that once the Respondent (through the FINA Bureau) made the First Decision, the FINA Executive Director ceased to have any power under the Respondent's Constitution to make the Second Decision, the effect of which is to impose additional requirements on the application for the change of the Second Appellant's sport nationality that go beyond the reasons given for making the First Decision.

- The internal remedies to appeal the First Decision within the rules of the Respondent have been exhausted in relation to the First Decision. As to the Second Decision, the Appellants seek an order from the CAS that they need not exhaust the internal dispute resolution mechanism and that those internal appeal requirements be dispensed with for practical reasons.

57. In the statement of appeal acting as appeal brief, the Appellants requested the following relief:

1. *A declaration that the First Decision is void.*

2. *A declaration that the Second Applicant has been under the jurisdiction of the First Applicant at all times since 2009.*

3. *Further to Order 2, a declaration that the Second Applicant has satisfied the requirements of FINA General Rule 2.6.2 in relation to him being under the jurisdiction of the First Applicant.*

4. *An order that FINA approve the application of the Second Applicant to change his sport nationality from New Zealand to Australia.*

5. *An order that the Second Applicant's change of sport nationality from New Zealand to Australia be effective instantly.*

6. *A declaration that the Second Decision is void on the basis that the FINA Executive Director does not have the power to make the Second Decision following the FINA Bureau making the First Decision.*

7. *Such further or other remedies as the CAS deems necessary.*

58. The Respondent's submissions, in essence, may be summarized as follows:

- The alleged second "decision" is not a decision at all. It contains only a general information and a reminder that an application has to be filed in due time. In addition it is not issued by or on behalf of the body which is competent to issue decisions in regard of sport nationality, *i.e.* the FINA Bureau. Besides, the question addressed in the communication of the FINA Executive Director is not the same as the object of the rejected application. For that reason, the appeals against the Second Decision are inadmissible.

- The appealed decision was notified to the party which had submitted the application (the WPA) on 21 July 2015. The appeals have been filed long after the expiration of the 21-day deadline. The WPA as such has no standing with respect to an application for change of sport nationality, unless made on behalf of the competitor. The appeal filed on 21 August 2015 is clearly late and inadmissible.

- In respect of the merits of the appeal, the decision complies with the applicable rules (GR 2.6, GR 2.6.1 and GR 2.6.2). In the appealed decision, the FINA Bureau correctly rejected the application as it did not *"fulfill the jurisdiction condition according to FINA Rule GR 2.6.2"*. At the time of the application, the applicant was not in a position to provide *"official results lists … during the GR 2.6 requested time"* as the competitor had effectively not played for an Australian club since his departure for Hungary in early September 2014. The FINA GR 2.6 expressly provides that the competitor must be under the jurisdiction of the new country for at least 12 months prior to his first representation of his/her new country.

- As to FINA's representations in the e-mail dated 5 September 2014, the Appellants cannot rely on the principle of legitimate expectation. A party is protected only to the extent that its expectations are legitimate. The applicable rules are clear and could not be misunderstood. The FINA Legal Department's reply correctly indicates that a competitor can be affiliated to two different National Federations through the Club, but cannot represent more than one country in international competitions. This reflects the situation in which a competitor is simultaneously affiliated to the National Federation of his/her sport nationality and through the club in which he actually plays, to the National Federation of such club. The Second Appellant has been affiliated to the New Zealand National Association, as the federation of his sport nationality. In addition, he had a

second affiliation to the WPA through the Australian club he was playing for which then changed to the Hungarian Federation when he went to play for a Hungarian club in September 2014.

59. In its answer, FINA requested the following relief:

*1. The Appellants' appeals are inadmissible;*

*Subsidiarily:*

*2. The Appellants' appeals are dismissed;*

*In any event:*

*3. The Appellants shall bear the entirety of the arbitration costs for these appeal proceedings; and*

*4. The Respondent shall be awarded a contribution to its legal fees and other costs in connection with these proceedings.*

## V. JURISDICTION

60. Article R47 of the Code provides as follows:

*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

61. FINA Constitution C 12.11.4 provides that:

*An appeal against a decision by the Bureau, the FINA Doping Panel, the Disciplinary Panel or the Ethics Panel shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, within the same term as in C 12.11.3. The only appeal from a decision of the Doping Panel, the Disciplinary Panel or the Ethics Panel shall be to the CAS. The CAS shall also have exclusive jurisdiction over interlocutory orders and no other court or tribunal shall have authority to issue interlocutory orders relating to matters before the CAS. Decisions by the CAS shall be final and binding, subject only to the provisions of the Swiss Private International Law Act, section 190.*

62. FINA Constitution C 26 "ARBITRATION" reads as follows:

*Disputes between FINA and any of its Members or members of Members, individual members of Members or between Members of FINA that are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the Court of Arbitration for Sports (CAS), Lausanne. Any decision made by the Arbitration Court shall be final and binding on the parties concerned.*

63. The jurisdiction of the CAS is not disputed by FINA in its answer. By making numerous references to provisions of the Code and to CAS case law, the Respondent unambiguously accepted the jurisdiction of the CAS. Moreover, such was confirmed by the Respondent when it signed the order of procedure.

64. In the present case, it is not disputed that the challenged decision is final and that there is no internal remedy to put it into question, *i.e.* any available stages of appeal within FINA have been exhausted.

65. Accordingly, the Sole Arbitrator is satisfied that the CAS has jurisdiction to hear this dispute.

## VI. APPLICABLE LAW

66. Article R58 of the Code provides as follows:

> *The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

67. The FINA legal documents are silent as to which is the law applicable to disputes referred to the CAS. Despite this, the applicable law is not in dispute in this matter. The Appellants do not provide an express opinion regarding the applicable law. The Respondent states that the dispute must be decided in accordance with FINA regulations and subsidiarily, by Swiss law.

68. Accordingly, pursuant to Article R58 of the Code, the Sole Arbitrator shall primarily apply the various regulations of FINA and Swiss law, in subsidiary.

69. The conflicting interpretation by the parties of FINA General Rules is at the centre of the dispute. The relevant provisions provide as follows:

> *GR 2.5 When a competitor or competition official represents his/her country in a competition, he/she shall be a citizen, whether by birth or naturalisation, of the nation he/she represents, provided that a naturalised citizen shall have lived in that country for at least one year prior to that competition. Competitors, who have more than one nationality according to the laws of the respective nations must choose one "Sport Nationality" and be affiliated to one Member only.*
>
> *GR 2.6 Any competitor or competition official changing his affiliation from one national governing body to another must have resided in the territory of and been under the jurisdiction of the latter for at least twelve months prior to his first representation for the country.*
>
> *GR 2.6.1 Proof of Residence*
>
> *1) Residence means the place/country where the competitor or competition official "lives and sleeps" and where he/she can be found in the majority of days of the year.*

*2) The proof of residence must include documentation establishing the applicant resides in the country. In this regard the official school or university confirmation or employment contract or any other relevant documentation may constitute evidence.*

*3) Certified registration of an address in the «new» country for at least twelve (12) months prior to first representation of the competitor or competition official for the «new» country must be sent to FINA.*

*GR 2.6.2 Proof of Jurisdiction*

*1) Certified membership in a club of the new country*

*2) Confirmation from the FINA Member of that country*

*3) Official result lists from national championships, national, regional or international club competitions in which the applicant has participated for his/her "new" club during the GR 2.6 requested time*

*4) Applicants cannot represent any of the countries during the "transfer period".*

*GR 2.7 Any application for change of affiliation must be approved by FINA.*

## VII. ADMISSIBILITY

70. According to the parties' written submissions and to the declarations made by them at the hearing, the Sole Arbitrator, before entering into other issues of the dispute, shall first decide on the admissibility of the present appeal before CAS.

71. The appeal against the Second Decision was withdrawn at the hearing. Therefore, it remains for the Sole Arbitrator to analyse the admissibility of the appeal against the First Decision only.

72. In analysing the issue of admissibility, it is necessary first to consider what is a "decision" for the purposes of Article R47 of the Code.

73. In defining the concept of decision within the meaning of Article R47 of the Code, CAS panels have interpreted the term "decision" within the meaning of Article R47 of the Code broadly. According to relevant CAS case law, the form and/or denomination of the challenged act are not determinative (CAS 2007/A/1251, Award of 27 July 2007, paras. 3-6). What matters is whether the latter contains a ruling affecting the parties' legal positions (CAS 2008/A/1633, Award of 16 December 2008, para. 10, and the references cited therein; cf. also CAS 2007/A/1355, Award of 25 April 2008, paras. 5-16). For instance, a simple letter sent by an employee of a sports-governing body qualifies as a decision within the meaning of Article R47 of the Code if it is aimed at *"resolving a legal situation in an obligatory and constraining manner"* (CAS 2005/A/899, Award of 15 July 2005, para. 59). Since CAS appeals are *de novo* hearings (cf. Article R57 of the Code) the reasons for the challenged decision are not relevant for the purposes of the appeal.

74. The characteristic features of a "decision" within the meaning of Article R47 of the Code are defined in the relevant CAS jurisprudence (with which the Sole Arbitrator respectfully concurs) as further set out in the following excerpts:

- *"the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal"* (CAS 2005/A/899, para. 63; CAS 2004/A/748, para. 90; CAS 2008/A/1633, para. 31);

- *"In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties"* (CAS 2005/A/899, para. 61; CAS 2004/A/748, para. 89; CAS 2008/A/1633, para. 31);

- *"A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects"* (2004/A/659, para. 36; CAS 2004/A/748, para. 89; CAS 2008/A/1633, para. 31);

- *"an appealable decision of a sport association or federation is normally a communication of the association directed to a party and based on an 'animus decidendi', i.e. an intention of a body of the association to decide on a matter […]. A simple information, which does not contain any 'ruling', cannot be considered a decision"* (BERNASCONI M., "When is a 'decision' an appealable decision?" in: RIGOZZI/BERNASCONI (eds), The Proceedings before the CAS, Bern 2007, p. 273; CAS 2008/A/1633, para. 32).

75. In sum, *(i)* the qualification of an act as a decision is a matter of substance not form; *(ii)* a decision must be intended to affect and affect the legal rights of a person, usually, if not always, the addressee; *(iii)* a decision is to be distinguished from the mere provision of information.

76. In the Sole Arbitrator's view, by reference to the test elaborated in the CAS decisions cited above and his own analysis of them, the appealed First Decision was indeed a "decision" within the meaning of Article R47 of the Code taken by the FINA Bureau on 21 July 2015 and communicated to the WPA by the email sent by Ms. Alemany on 21 July 2015.

77. Once it has been established that the First Decision is capable of being subject to appeal, the next immediate step to be taken by the Sole Arbitrator in determining if the present appeal is admissible or not is to establish if the appeal was timely filed with reference to the relevant CAS and FINA provisions related to the applicable 21-day time limit for filing the appeals with the CAS in accordance with Article R49 of the Code, which provides as follows:

> *In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.*

78. The relevant provisions of the FINA Constitution (valid as of 23 July 2015) provide as follows:

> *C 12.11.3 Except in accordance with FINA Rule C 12.11.4, an appeal shall be submitted by the appealing party to the FINA Executive Director within twenty-one (21) days from the date of receipt of the decision.*
>
> *C 12.11.4 An appeal against a decision by the Bureau, the FINA Doping Panel, the Disciplinary Panel or the Ethics Panel shall be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, within the same term as in C 12.11.3. […].*

79. The previous FINA Constitution (valid until 23 July 2015) does not contain a specific time limit for filing of appeals against decisions of FINA bodies. By reference to Article R49 of the Code, the time limit for appeals filed under the previous Constitution would be again 21 days from receipt of the decision appealed.

80. Consequently, there is no difference between the Code and FINA Constitution in any of its versions and the time limit for appeal shall be 21 days from receipt of the appealed decision.

81. On a general note, the time limit for filing an appeal is clearly a mandatory and not indicative one. The consequence of not filing an appeal within the time limit is that the right to appeal is precluded thereafter. The automatic consequence for the statement of appeal not being filed within the 21-day period specified by Article R49 of the Code is that the appeal shall be inadmissible. In other words, the consequence is an automatic, self-executing one.

82. As another CAS Panel has put it (and the Sole Arbitrator respectfully agrees): *"[t]ime limits are commonplace in all kinds of fora. They contribute to legal certainty. They enable decision-makers to know precisely when they can be confident that their decisions will not be challenged. They ensure that any Tribunal seized of a dispute over a decision can resolve it when the issues and evidence are still fresh and do not have to adjudicate upon stale claims. Such is the perceptible and valuable purpose of Article R49 of the CAS Code"* (CAS 2010/A/2315, para. 7.11).

83. It is well established under Swiss procedural law that the time limit for an appeal starts to run on the day following the communication. The same principle is incorporated in Article R32 of the Code. In this respect, the Sole Arbitrator must be satisfied that the appealed decision was properly notified so as to trigger the running of the time limit.

84. The First Decision was communicated to WPA by email and received on 22 July 2015 at 00:38:14 hours (AEST). FINA Constitution does not expressly provide that notification of decisions may be made by email as a means of communication. By analogy to Article 34.1 of the Swiss Federal Act on Administrative Procedure, with the consent of the party, the notification of a ruling may be given by electronic means as an exception to the principle that the notification shall be in writing. The Sole Arbitrator accepts that this mode of notification is permissible with regard to parties who accepted this form of communication. The Sole Arbitrator observes that the parties to the present dispute used exclusively the email as the only means of communication in all the correspondence exchanged between them (and this is normal in view of the long distance separating them).

85. Assuming that the onus is on the sender of any electronic communication to prove receipt, the Sole Arbitrator accepts that the Respondent is discharged of the burden of proving receipt by the fact that Mr. Chris Harrison (CEO of WPA) who received the email with the attached First Decision on 22 July 2015 forwarded it by the email on the same 22 July 2015 at 4:30 am to Mr. Darren Kane (the external lawyer of WPA). To forward an email means that it was received prior to that. In addition, the First Appellant never disputed the fact that the decision was received by e-mail on 22 July 2015. On the contrary, at para. 15.17 of the statement of appeal the receipt of the First Decision on 22 July 2015 by the WPA is explicitly admitted. It is therefore irrelevant if and when the decision was received by the legal representative of the First Appellant.

86. Therefore, the First Decision was properly notified to and received by WPA on 22 July 2015 and therefore, the Appellants' time limit started to run on 23 July 2015. Furthermore, the Sole Arbitrator accepts that sufficient reasons for not approving the change of sport nationality of the Second Appellant were provided for in the First Decision. On that account too, the 21 days for Article R49 of the Code purposes ran from the day following the receipt of the decision. Accordingly, in the circumstances of the present case, the time limit for filing the statement of appeal would have expired on 12 August 2015. The appeal was filed on 21 August 2015 with the CAS Oceania Registry, *i.e.* nine days following the expiry of the time limit and was thus late.

87. Separately, it is convenient at this juncture to discuss the issue of standing as the statement of appeal was purportedly filed jointly by the two Appellants through Mr. Kane acting for both of them.

88. The FINA Constitution C 12.11.4 does not provide that only particular parties have the right to appeal to the CAS. As a result, the Sole Arbitrator must ascertain whether the Appellants (or which one of them) are/is entitled to appeal under C 12.11.4 by reference to the respective regulations.

89. According to FINA General Rule 2.5, *"competitors, who have more than one nationality according to the laws of the respective nations must choose one "Sport Nationality" and be affiliated to one Member only"*. Further, the requirement for a certain period of residence and submission to the jurisdiction of the new governing body under FINA General Rule 2.6 must be complied with by *"any competitor … changing his affiliation from one national governing body to another …"*. Next, FINA General Rule 2.6.2, para. 4 provides that *"applicants cannot represent any of the countries during the "transfer period"*.

90. It entails from the above-quoted provisions that the substantive right of choosing sport nationality and/or changing of the affiliation from one national governing body to another belongs to the competitor and not to the respective governing body. It could not be otherwise bearing in mind the personal character of that right.

91. Even though the WPA *de facto* is interested in the outcome of this appeal, it was not a real party to the underlying FINA proceedings leading to the FINA Bureau Decision presently challenged. The WPA's rights were not the object of the dispute before the FINA Bureau. The proceedings before FINA intended to deal with and to protect primarily an essential interest of the Second Appellant, *i.e.* the change of his sport nationality. In other words, the core of the First Decision

and of the appeal brought in the CAS proceedings against it, concerns only the existence of the prerequisites for change of sport nationality of the athlete himself and the power of FINA to approve it.

92. Choosing of one sport nationality or the change of affiliation would affect the legal situation of the competitor. Accordingly, the competitor is actually the addressee of the decision taken by FINA Bureau. The competitor would be affected by the approval or the disapproval of the change of sport nationality or affiliation by FINA. The new federation (the WPA in the case) is not directly affected with the consequence that it has no right of appeal.

93. As a result, the WPA cannot be considered as the "active subject" of the claim brought before the CAS by way of appeal against the First Decision, as the WPA's rights are not concerned by the First Decision. It is hence clear that the WPA does not have any standing to sue (*légitimation active*) and cannot, as such, be identified as an appellant in the present arbitration. As a matter of fact, the Appellants admit in their submission on the admissibility of the appeal dated 5 October 2015 (at para. 28) that *"[t]he right to make the application for sport nationality - and hence the right to appeal to the CAS against the decision of the Respondent in relation to that application for change of sport nationality - is the Second Appellant's right on a strict reading of the Respondent's FINA General Rules"* (emphasis as in the original text). On that basis alone, the appeal filed by the First Appellant (the WPA) is not admissible.

94. On reading of FINA General Rule 2.6.2 (4) it is clear that the competitor is understood as the "applicant" for change of sport nationality before FINA. However, according to the FINA Rules for change of sport nationality (available at *http://www.fina.org/content/fina-rules-change-sport-nationality*), the official request for a sport nationality transfer of the athlete shall be made by the new National Federation. The template of the official request requires that the application is filed by the new federation and signed by its president. The template further contains the remark that *"[t]his is an official statement of the National Federation"*. On the other side, the Affidavit of Residence which constitutes an attachment to the application for a change of sport nationality is addressed to FINA Executive and shall be signed by the athlete.

95. It is not quite clear for the Sole Arbitrator why, according to FINA regulations, the official request is not signed (also) by the competitor given the approval by FINA would affect his/her rights as explained above. One reason could be that FINA has had in mind to discharge the competitor of the burden to collect numerous documents to be annexed to the application. Or that FINA was mindful that the exercising of the competitor's right to the change of sport nationality should be subject to the new federation's prior consent. Be it as it may, it is the Sole Arbitrator's view that the application for change of sport nationality would be formally signed by the president of the new federation only on behalf and for the competitor.

96. The Sole Arbitrator must now examine if the First Decision should be deemed to have been properly notified to the Second Appellant as a genuine party to the proceedings. It is quite clear that a decision may be sent either to the party directly, and/or to a representative of the party holding a power of attorney and/or to a third party. It is also quite clear that, if the decision is only sent to a third party, it is not properly notified to the party involved in the proceedings. A

decision within the meaning of FINA Constitution C 12.11.4 can be sent to a representative of the party, thus being properly notified to the party itself.

97. As developed in detail above, although the application for change of sport nationality is technically filed by the new federation, it is the competitor that is affected by the approval sought with the application. Therefore, in the course of the communication with FINA, the WPA was acting as a representative of the athlete. Indeed, in the present case there is no authorization by the athlete in the form of a written power of attorney given to the WPA. Nevertheless, by signing the Affidavit of Residence and providing other documents, to be annexed to the official request, particularly for the purpose of change of sport nationality, the athlete unambiguously entrusted the handling of the matter to the WPA. At the hearing this was confirmed by Mr. Kayes stating that he had left the issue of changing the sport nationality to the WPA acting on his behalf. Further, Mr. Kayes confirmed his knowledge of the fact that WPA would retain the services of Mr. Kane to commence the procedure for change of sport nationality before FINA. In the circumstances it must be assumed that in the present case there was such representation of the Second Appellant by the WPA and Mr. Kane.

98. The procedure for change of sport nationality of the athlete before FINA was initiated by filing of the application signed by the President of the WPA. Thereafter, the correspondence in the matter was exchanged between the WPA and FINA without the participation of the Second Appellant. Among others, the appeal of 13 July 2015 against the FINA Executive Director's decision not to approve the change of sport nationality, communicated by his letter dated 10 July 2015, was filed by the WPA. It is thus natural that the decision dated 21 July 2015 by the FINA Bureau *"considering the appeal of AUS Water Polo Federation related to the change of sport nationality of Mr. Joseph Henry Kayes"* (the First Decision) was communicated to the party appealing the first instance decision which was also the signatory of the original official request for change of sport nationality. Therefore, notification of the First Decision to the Second Appellant in addition to the notification to WPA was not necessary.

99. But even if the WPA was not acting strictly as representative or agent of the Second Appellant but as kind of intermediary, receipt of the appealed decision by the WPA would have been sufficient to serve as notification for the Second Appellant. It was the duty of the WPA to forward immediately the appealed decision to the athlete. Otherwise, it would leave to the discretion of the WPA to choose if and when to pass on the decision, if it was not minded itself to appeal, and so manipulate the date upon which the time limit for the athlete to appeal would begin. In this way, the WPA could artificially extend the said time limit indefinitely which cannot be held against the Respondent. In fact, the WPA in good faith immediately forwarded the appealed decision to the attorney of the Second Appellant (*i.e.* Mr. Kane).

100. Even if, *in arguendo*, the Second Appellant must have been independently notified, which the Respondent failed to do in the Appellants' submission, the appeal filed on behalf of the Second Appellant is still inadmissible as untimely filed. If the Sole Arbitrator would not be fully satisfied that the First Decision was properly notified to the Second Appellant by the Respondent, the Sole Arbitrator should have then explored if the decision was ever received by the Second Appellant and when.

101. FINA Constitution C 12.11.3 attaches importance to the *"receipt of the decision"* not to the notification of the decision by the decision-making body. Although in most of the cases the decision would be received from such a decision-making body, the receipt of the decision could be validly obtained from other sources, too. In the words of the Panel in CAS 2007/A/1413, para. 52, *"[m]ore precisely, the time limit starts to run when the appellant has become aware of the decision. It is not necessary that the decision be formally notified to him by the decision-making body; it is sufficient if the appellant knows of the decision (see, e.g., HEINI/SCHERRER, Basler Kommentar, Zivilgesetzbuch I, p. 498 s)"*.

102. If, as in the present case, the decision was received by a third party (the WPA) which then passed it on to a representative of the party (Mr. Kane), a fiction is created that the decision was received by the party itself.

103. In the present case, due to a combination of factors, the decision was received by Mr. Kane on 22 July 2015. Despite the lack of a written power of attorney (the reasons for which were explained by Mr. Kane in his letter dated 13 November 2015 with reference to Australian law), it is not in dispute that Mr. Kane was acting as attorney to the Second Appellant since mid-June 2015 when the initial application for change of sport nationality was initiated. This fact was further confirmed at the hearing. It would be contradictory, if not abusive, to claim that the appealed decision should have been received personally by the athlete when he had retained an attorney to represent him.

104. Mr. Kane does not dispute that the First Decision was forwarded to him by the First Appellant and received by e-mail on 22 July 2015. Rather, Mr. Kane maintains that, due to limited access to internet when on holidays in the French Alps for the purpose of following the Tour de France, he only had knowledge of the decision in the beginning of August 2015 when he was back to the office (Mr. Kane's letter dated 9 October 2015, paras. 6-7).

105. With respect to the relevant time of receipt, reference is made to CAS 2006/A/1153, para. 40:

> *"As a basic rule, a decision or other legally relevant statement is considered as being notified to the relevant person whenever that person has the opportunity to obtain knowledge of its content irrespective of whether that person has actually obtained knowledge. Thus, the relevant point in time is when a person receives the decision and not when it obtains actual knowledge of its content (CAS 2004/A/574)"*.

106. Further, the Panel in CAS 2007/A/1413, para. 53 with legal authorities quoted therein, noted that *"[a]ccording to certain commentators, based on good faith principles, the time for filing of the appeal should already start to run if the appellant had the possibility to know, and should have known, about the decision"*.

107. In light of the CAS jurisprudence, the relevant point in time is when the decision is received by the person and not when he actually becomes aware of its content. Moreover, in considering such point in time, of paramount consideration is whether the person should have reasonably known about the decision.

108. It is not quite clear from the wording of Mr. Kane's communication of 9 October 2015 whether he had limited access to internet on the particular day the email was sent or during his entire

stay, whether still there were periods during the holidays and places where internet was available, etc. (it is noted that the last round of the 2015 Tour de France was on 26 July 2015, the tour finishing in Paris).

109. At all times, Mr. Kane used the email as means of communication when dealing with the matter related to the change of sport nationality of Mr. Kayes. Further, it should have been expected that soon after the WPA's appeal of 13 July 2015 FINA Bureau would pronounce its final decision for the result of which Mr. Kane would receive a notification either by FINA or the WPA. In light of the CAS case law, the Sole Arbitrator accepts that, despite the fact that he may have acquired actual knowledge of the decision later, the Second Appellant's attorney is assumed to have received the First Decision on 22 July 2015 or shortly thereafter on the premise that he must have secured a way to have access to his email at least occasionally during his holidays.

110. For the reasons above, the Sole Arbitrator concludes that the time limit for appeal by the Second Appellant started to run on 23 July 2015 and expired on 12 August 2015 and the appeal filed on 21 August 2015 was thus late.

111. The outcome of the appeal would not be different if, for the sake of argument, the First Appellant and the Second Appellant were taken to be independent parties to the proceedings and the Second Appellant (or his attorney) did not receive the appealed decision or received it on a different date.

112. The Second Appellant was not a party to the internal appeal procedure within FINA. The appeal against the FINA Executive Director decision brought before FINA Bureau was filed by the WPA only. The exhaustion of internal remedies prior to the appeal before the CAS is an admissibility requirement which is not met by the Second Appellant and his appeal must be rejected on that account only (Article R47 of the Code).

113. For the reasons set out above the Sole Arbitrator must decline to enter upon a consideration of the merits but must reject the appeal as inadmissible.

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal filed on 21 August 2015 by Water Polo Australia and Joseph Henry Kayes against the decision issued by the FINA Bureau on 21 July 2015 is rejected as inadmissible.

(…)

4. All other motions or prayers for relief are dismissed.