Arbitration CAS 2010/A/2315 Netball New Zealand v. International Netball Federation Limited (IFNA), award of 27 May 2011

Panel: Judge Conny Jörneklint (Sweden), President; Mr Malcolm Holmes QC (Australia); The Hon. Michael Beloff QC (United Kingdom)

Netball
Eligibility of a player
Notion of decision
Time limit for appeal: absence of extension of a time limit by a request for reconsideration
Principles applicable to the exhaustion of the legal remedies and to limitation periods

1. **What constitutes a decision is a question of substance not form. A decision must be intended to affect the legal rights of a person, usually, if not always, the addressee. A decision is to be distinguished from the mere provision of information.**

2. **One cannot be permitted simply to resurrect an option (i.e. to appeal) open to it, but not pursued, at an earlier date since this would frustrate the policy of Article R49 of the CAS Code. The refusal to reconsider a decision duly taken cannot further affect the addressees of the decision legal rights. In this regard, a request for reconsideration does not amount to an appeal and cannot extend a time limit. Likewise, refusal to reconsider cannot restart the limitation clock running.**

3. **According to article R47 of the CAS Code, where the regulations of the decision maker specify a process of reconsideration by a first instance body or appeal to a second instance one, it is necessary for an aggrieved person to exhaust those domestic remedies; and it follows that time does not run against him until he has done so. Likewise if the body that takes the adverse decision at the same time encourages the object of it to seek to reopen it, time for the purposes of a limitation period pro tem stand still. Furthermore, if the aggrieved person advances a substantially different case or, even the same case in a substantially different way, one with fresh evidence or legal argument with which the body with power to decide deliberately and conscientiously re-engages, any further adverse decision then reached may itself be an appealable decision.**

Netball New Zealand (NNZ or the "Appellant") is the national body for the administration, development and promotion of netball. NNZ is a full member of IFNA.

International Netball Federation Limited (IFNA or the "Respondent") is the internationally recognised, governing body for netball, affiliated to the General Association of International Sports Federations, the International World Games Association and the Association of Recognised Sports Federations; it receives funding from the International Olympic Committee.

This dispute revolves around the eligibility of a female netball player, Cathrine Latu, to represent New Zealand internationally although she had previously played for Samoa. On 1 May 2008, an application was made by NNZ to IFNA for Cathrine Latu to be considered eligible to play netball at an international level for New Zealand.

On 15 March 2009, the application was considered by the IFNA Board. The relevant extract from the minutes records as follows:

> *"Netball New Zealand had submitted an application to the Board for player Cathrine Latu to be granted discretion under Regulation 11.5.6(c) to grant her eligibility to play for New Zealand. The Player had previously played for Samoa in WYNC 2005 and WNC 2007 but was actually a New Zealand citizen and had never lived in Samoa.*
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> …
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> *The principle factor in considering the application for discretion was that Cathrine had been an adult aged 19 or 20 when she played in the 2007 World Championships and she should have addressed the issue of which country she wished to play for then. She chose to play for Samoa and must have been aware of the consequences of her actions.*
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> …
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> *It was agreed that the CEO would look at the rules and processes in place for some other sports and then prepare a paper for the next Board Meeting.*
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> *CEO to write to Netball New Zealand to advise of Board decision".*

On 18 March 2009, IFNA sent a letter to NNZ advising of its decision in the following terms:

> *"At its meeting on Sunday 15th March the IFNA Board carefully considered the application submitted by NNZ requesting that discretion in accordance with 11.5.6(C) of the IFNA Regulations be exercised, so as to enable the above player to be eligible to represent New Zealand rather than Samoa. After a full discussion and deliberation on all the points raised in the NNZ application the Board decided that it could not exercise its discretion in favour of the application".*

On 31 September 2009, Cathrine Latu wrote a letter herself supporting NNZ's application and asked to be able to play for her country of birth (New Zealand).

On 2 October 2009, NNZ submitted a nine-page submission to IFNA regarding the eligibility status of Cathrine Latu.

On 13 October 2009, the application was considered at a Board meeting of IFNA. The minutes note that the *"Board deliberated on the nine page submission and the supporting letter submitted by the player"*. The

minutes conclude by noting *"[t]he Board accordingly declined Cathrine Latu's application"* and that the *"CEO* [was] *to write to NNZ to advise them of the Board Decision"*.

By letter dated 14 October 2009 IFNA informed NNZ that the IFNA Board at *"its meeting on Tuesday 13 October 2009"* had *"decided that it could not exercise its discretion in favour of Cathrine Latu"* to declare the athlete eligible under 11.5.6(c) of the IFNA Regulations; 11.5.6 provides that:

> *"A player who has played for a country in a World Netball Championships or World Youth Netball Championships shall not be eligible to participate in either the following World Netball Championships or World Youth Netball Championships for another country provided that the Board may waive application of this clause where:*
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> *(a) players, under the age of twenty-one (21) who have played for one country and will be playing for another country because of extenuating circumstances, or*
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> *(b) players are returning to their place of birth, or*
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> *(c) there are other exceptional circumstances".*

By letter dated 2 November 2009 in response to a request by NNZ for *"a written explanation of why the NNZ application was declined"*, IFNA advised NNZ that while the written submission supplied more detail of the personal circumstances of the player, the essential facts had not changed since the Board previously considered the application in March 2009. The Board concluded that it was not a case where a waiver of the requirement under Regulation 11.5.6 was warranted. In the alternative, it was not a case of the athlete returning to her place of birth as she had simply never left her place of birth.

On 18 May 2010, a 17-page memorandum written on behalf of NNZ ("the first memorandum") was forwarded to IFNA seeking to reverse its decision. The concluding paragraph of the first memorandum stated:

> *"55. It is my advice and proposal that the unsatisfactory outcome of this situation should be immediately addressed in the following manner:*
>
> *55.1 The 'decision' to rule Cathrine Latu ineligible be revoked.*
>
> *55.2 An urgent video-conference or audio teleconference be convened between NNZ and its adviser(s) and IFNA Board Chair to discuss this matter; and hopefully agree upon an outcome of the NNZ application for Board (and later, if need be, Congress) ratification. This is the proper and customary first step in dispute resolution processes, namely the parties talking to and with (and not past) each other to work out a fair and just solution.*
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> *55.3 In the absence of agreement under the process proposed in para.55.2, for NNZ and the IFNA Board Chair to agree on the next logical step in the dispute resolution procedure, namely to take the issue to mediation before an independent, international mediator of standing, expertise and experience. An agreement to mediate could be signed by the parties accordingly.*
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> *55.4 In the event agreement on the NNZ application is not reached through mediation, the issue should then be referred to an independent arbitrator of international standing, expertise and experience for determination in accordance with a procedure to be agreed upon prior to that referral".*

On 11 July 2010, the IFNA Board met and considered the first memorandum. The minutes record that the Board *"noted that it had considered this matter in March 2009 and then again in October 2009"*. The

Board noted that there was insufficient support to re-consider the matter. The minutes also record that IFNA's Chief Executive was to write to NNZ advising that the Board *"was not prepared to revisit the matter and stood by its original decision. The Board believed it had followed due process and had acted in accordance with the Regulations and Memorandum and Articles in force at the time"*. There was some discussion regarding a meeting with NNZ at which the Board's decision could be explained in an effort to avoid legal action.

By letter dated 14 July 2010, IFNA advised NNZ that the Board resolved not to re-consider the matter *"as it was satisfied that the decision reached and the processes it followed in October 2009 were in accordance with the IFNA Regulations and IFNA Memorandum and Articles in force at that time"*. IFNA also advised that *"IFNA Regulations have been amended and were circulated to all Members on 22nd December 2009. Clause 5.4 in the new Regulations replaces clause 11.5.6 in the old regulations"*. The letter concluded that the Vice President and the President of the Oceania Region would be willing to meet with the CEO of NNZ to discuss the matter further.

On 9 August 2010, a meeting was held between IFNA (Keryn Smith, Vice President IFNA, Tina Brown) and NNZ (Raewyn Lovett, Chair, Timothy Castle, Counsel and advisor, and Raelene Castle, CEO). During the meeting, IFNA representatives asked NNZ to identify options for the IFNA Board. Timothy Castle advised that he believed the IFNA Board could reconsider the matter under Regulation 16.

On 23 August 2010 NNZ sent a four-page memorandum to IFNA ("the second memorandum") setting out the position if the IFNA Board *"declines to reconsider the decision"*.

By letter dated 26 August 2010, IFNA sent a letter to NNZ acknowledging the meeting on 9 August 2010 where NNZ *"indicated that they were not satisfied with the decision taken by the Board"*, asking NNZ to identify provisions in IFNA Regulations which NNZ could rely on to *"support its application for a rehearing"* and advising that a report had *"been circulated to members of the IFNA Board"* and that IFNA would revert to NNZ as soon as possible on the matter.

On 4 September 2010, the Board of NNZ met and considered the matter. The minutes note:

> *"AGENDA ITEM 4.4: Cathrine Latu Eligibility*
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> *Raelene updated the Board on the recent meeting with IFNA representatives Keryn Smith (IFNA Vice President) and Tina Browne (Oceania Region President) along with Raewyn and Tim Castle and noted that during the meeting an indication was given that IFNA would try and find a way to review the processes and the decision on the eligibility of Cathrine Latu. Subsequent to the meeting Raewyn received a letter from Molly Rhone (IFNA President) advising that IFNA would only be prepared to look at the issue if NNZ could identify the provisions in the IFNA regulations which IFNA (sic) relied on to support its application for re-hearing.*
>
> *Raelene advised that the only way forward is for NNZ to proceed to the International Sports Disputes Tribunal".*

By letter dated 13 October 2010, IFNA advised NNZ that the matter had been discussed again at Board level and that IFNA had taken legal advice. IFNA also advised that *"we remain of the view that the initial decision we took...was a decision we were entitled to take pursuant to our own rules and regulations. We have*

reviewed the way we took the decision and believe that we followed the correct internal procedure in considering the merits of the submissions made by you and Ms Latu. We are also completely confident that the issues were considered in full view of the facts and the written submissions of Netball New Zealand. We therefore believe that we have been fair in our assessment of the submissions and proceeded fairly in arriving at our decision. Certainly, we take exception to the suggestion that there might be bias among the Board members who took this decision. We are absolutely certain that this is not the case". The letter also set out the reasons why the *"Board decided not to exercise its discretion to waive the application of rule 5.4.2…"*.

On 19 November 2010, NNZ sent an email to IFNA CEO, enclosing a three-page memorandum dated 11 November 2010 ("the third memorandum") from the CEO of NNZ to the IFNA Secretariat, criticising the "decision", which *"denies Cathrine Latu the right, enshrined in the Constitution, Rules and Regulations, to play international netball for the country of her birth. That offends against international human rights protocols"*. The memorandum requested Board papers, and *"urged* [IFNA] *for the last time to please overturn all decisions made to* [the athlete's] *disadvantage"*. The third memorandum stated that *"NNZ asks that IFNA now grant the eligibility sought"* and concluded with NNZ stating that *"NNZ reserves all its rights in the event that the principled decision confirming* [the athlete's] *eligibility to play for New Zealand is now not made"*.

On 21 and 22 November 2010, the IFNA Board members discussed the matter at a meeting in Delhi. The draft minutes record:

> *"The following decisions made by the Board via email were confirmed:*
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> ...
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> *3. Catherine Latu – Agreed via email to act on advice of lawyer to send two letters one without prejudice and one refuting the claim. Later agreed via Directors present in Delhi to act on revised advice of lawyer and only send one letter refuting the claim"*.

By letter dated 14 December 2010, IFNA responded to the third memorandum. The letter, in relevant part, states: *"We have now had an opportunity to consider the Memorandum and our response is set out in this letter. In so making our response, we will take in turn each of the main issues raised and demands made by NNZ in the Memorandum"*. The letter then discusses the request for disclosure of confidential information, the allegation of recent invention, the NNZ analysis of the athlete's eligibility to play for New Zealand and the demand that the decision be overturned. The letter at page 3 states that *"after careful consideration of the issues, we have decided not to exercise our discretion in her favour for the reasons advanced in previous correspondence"* and concludes by stating that *"we do believe that we have taken a reasonable decision in accordance with our rules. We do not therefore see any reason to alter our position"*.

On 22 December 2010, NNZ filed its statement of appeal and appeal brief by fax at the Court of Arbitration for Sport (the "CAS") pursuant to the Code of Sports-related Arbitration (the "Code") 2010 edition. The appeal is against the "decision" contained in IFNA's letter dated 14 December 2010.

On 27 January 2011, further to several requests by the CAS office asking for exhibits referred to but not enclosed with its submission, NNZ sent its exhibits to the CAS.

On 28 January 2011, IFNA was granted 20 days to file its answer to the appeal brief.

On 31 January 2011, IFNA raised a preliminary issue ("the admissibility issue") and submitted that the appeal was out of time.

On 15 February 2011, NNZ filed its opposition to IFNA's submission.

On 18 February 2011, IFNA filed its reply to NNZ's opposition.

On 24 February 2011, NNZ filed its response to IFNA's reply.

By letter dated 7 March 2011, the parties were advised that, having reviewed the file, pursuant to Article R57 of the Code applying Articles R44.2 and R44.3 by analogy, the Panel requested that the parties produce certain documents, germane in particular to the admissibility issue.

On 17 March 2011, the parties produced the requested documents.

On 7 April 2011, the parties were provided with a copy of an article published by Professor Ulrich Haas entitled *"The 'Time Limit for Appeal' in Arbitration Proceedings before the Court of Arbitration for Sport (CAS)",* Schieds VZ 1/2011, ("the Haas article") (soon to be republished in Sweet and Maxwells International Sports Law Review) and requested to comment on the article.

0n 20th April 2011, the parties duly filed their comments on the Haas article.

On 21 April 2011, the Panel deliberated by conference call and determined that the appeal was inadmissible, and the CAS office so advised the parties. The parties were at the same time requested to file brief submissions on costs by 6 May 2011.

LAW

CAS Jurisdiction

1. 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.

   An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance".

2. In its statement of appeal, the Appellant relied on Rule 16.2 of the applicable IFNA Regulations as granting a right of appeal to the CAS. The jurisdiction of the CAS is not disputed by the Respondent and the Panel is satisfied that it has jurisdiction to hear this dispute.

Applicable Law

3. 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".

4. In their submissions, the parties refer to IFNA Regulations but have not chosen any rules of law. IFNA – the federation which issued the challenged decision – is domiciled in England. Accordingly, the Panel shall apply the rules and regulations of IFNA and, to the extent necessary, English law.

Admissibility

5. The relevant Articles of the Code are Article R47 entitled "Appeal" which provides:

"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.

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance".

6. and Article R49 entitled "Time Limit for Appeal" which provides:

"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".

7. It is necessary first to consider what is a "decision" for the purposes of Article R47.

8. Here the Panel has the advantage of several previous CAS decisions, which provide an illuminating analysis of what is involved in the concept of a decision, with which the Panel respectfully agrees.

9. The characteristic features of a "decision" stated in the relevant CAS jurisprudence are set out in the following passages:

- *"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 constitute 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. 31).
- *"A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects"* (CAS 2004/A/659 para. 36; CAS 2004/A/748 para. 89; CAS 2008/A/1633 par. 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: The Proceedings before the CAS, ed. by* RIGOZZI/BERNASCONI, Bern 2007, p. 273; CAS 2008/A/1633 para. 32).
- In short (i) what constitutes a decision is a question 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.
- It should be noted, however, that the issue before the Panel in this case focuses on when a decision is taken for the purposes of Article R49 and not only on what constitutes a decision for the purposes of Article R47. In this context the Panel had the benefit of the Haas article referred to above.

10. In the Panel's view, by reference to the test elaborated in the CAS decisions cited above and its own analysis of them, IFNA's decision taken by the Board on its meeting on 15 March 2009 and expressed in the letter of 18 March 2009 ("the original decision") was indisputably a decision which could have been appealed. Furthermore IFNA's decision of 13th October 2009 and expressed in the letter of 14 October 2009 ("the second decision"), responsive to, *inter alia*, the fresh material provided by Ms Latu herself, was also a decision which could have been appealed.

11. Swiss law, the *lex fori*, provides that in administrative law, time does not run for the purposes of a limitation period for an appeal to be launched, until the person who is the addressee of the decision, is sufficiently apprised of the basis for it in order sensibly to be in position to evaluate whether or not to exercise any right of appeal (see, e.g., art. 35 of the Federal law on Administrative Procedure). (By instructive contrast, the new Federal law on Civil Procedure provides that the time limit for an appeal still begins to run on the day following the communication even if the first instance Court has issued only the *dispositif*. If a party appeals against a decision which does not yet contain the reasons, the first instance court must deliver the reasons later (Art. 239 of the new Federal law on Civil Procedure)). Sufficient reasons were

provided on 2nd November 2009 for both decisions and the Panel accepts that the 21 days for Article R49 purposes ran from that date.

12. When it received the letters of 18th March and 14th October 2009, NNZ had a choice either to appeal to the CAS or to attempt to persuade IFNA to change its mind and risk being out of time for any appeal to CAS. In respect of the original decision, NNZ opted for the latter course of action and prompted the second decision, itself appealable. Thereafter, rather than exercising its right of appeal, NNZ chose again to attempt to persuade IFNA to change its mind, on a number of occasions in 2010. In that exercise it failed. IFNA was indeed never prepared to overturn its original decision; indeed it questioned whether it had power to do so - see e.g. the NNZ record of the meeting of August 2010.

13. NNZ cannot be permitted simply to resurrect an option (i.e. to appeal) open to it, but not pursued, at an earlier date since this would frustrate the policy of Article R49. To call the decision of 14 December 2010 the final decision elevates form over substance. Neither the original nor the second decision with which NNZ sought to contrast it, was in any sense provisional. The logical conclusion of NNZ's line of argument would mean by constantly asking for a reconsideration of a decision duly taken and receiving a refusal, the subject of that original decision could indefinitely perpetuate the limitation period by characterising that refusal as itself an appealable decision. In common parlance the refusal might be said to be a decision; but the issue is whether, in the context of Article R49, it qualifies as such. The decision which affected NNZ's (and Ms Latu's legal rights) was in the Panel's view taken on either or both of 15 March and 13 October 2009. The repeated refusals of IFNA thereafter to reconsider did not further affect either's legal rights. Professor Haas rightly, in the Panel's view, argued that a request for reconsideration cannot extend a time limit (p. 10). The Panel would add only that a refusal to reconsider cannot restart the limitation clock running.

14. The Panel recognizes, as indeed does Article R47, that where the regulations of the decision maker specify a process of reconsideration by a first instance body or appeal to a second instance one, it is necessary for an aggrieved person to exhaust those domestic remedies; and it follows that time does not run against him until he has done so. The Panel also recognizes that if - which is not, notwithstanding NNZ's contrary contentions the case here - the body that takes the adverse decision at the same time encourages the object of it to seek to reopen it, time for the purposes of a limitation period pro tem stand still. Furthermore, if the aggrieved person advances a substantially different case or, even the same case in a substantially different way, one with fresh evidence or legal argument with which the body with power to decide deliberately and conscientiously re-engages, any further adverse decision then reached may itself be an appealable decision. But even if the "decision" of 13 October 2010 could fall into that category - an issue on which the Panel recognizes competing arguments which it does not have to resolve - NNZ never sought to appeal that "decision" but continued again vainly to persuade IFNA to change its mind. Nothing that transpired between 13 October 2010 and 14 December 2010 (including the third memorandum) could convert what the IFNA did on the latter occasion into itself an appealable decision.

15. The Panel has no dispensing power and thus does not need to consider what factors might have been relevant to its exercise.

16. Time 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.

17. For the reasons set out above the Panel must decline to enter upon a consideration of the merits but must dismiss the Appeal.

18. For all these above reasons, any other or further prayer for relief must be rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed by Netball New Zealand on 22 December 2010 is inadmissible.

2. (…).