



Arbitration CAS ad hoc Division (OG Vancouver) 10/004 Claudia Pechstein v. Deutscher Olympischer Sportbund (DOSB) & International Olympic Committee (IOC), award of 18 February 2010

Panel: Mr Yves Fortier QC (Canada), President; Mr Olivier Carrard (Switzerland); Mr José-Juan Pintó (Spain)

Skating (speed skating)

CAS jurisdiction

Absence of decision

According to the CAS Arbitration Rules for the Olympic Games, the dispute to be resolved by arbitration must be against ***“a decision pronounced by the IOC, an NOC, an International Federation or an Organizing Committee for the Olympic Games”***. A simple assumption by an athlete that his/her NOC will deny his/her demand for nomination to participate in the Olympic Games cannot, on any reading, rise to the level of a decision which may be appealed to the CAS ad hoc Division. In the same way, the absence of any decision of the NOC regarding the nomination of the athlete cannot be characterized as a decision of the NOC not to nominate him/her and cannot be equated with a decision which can form the basis of an appeal before the CAS ad hoc Division.

The Applicant, Ms Claudia Pechstein, is a German speed skater who has belonged to the World Elite of speed skating since 1988.

The First Respondent is the Deutscher Olympischer Sportbund (DOSB), the German National Olympic Committee.

The Second Respondent is the International Olympic Committee (IOC).

The First Interested Party is the Deutsche Eisschnelllauf-Gemeinschaft e.V. (DESG), the German Speed Skating Association.

The Second Interested Party is the International Skating Union (ISU).

The Applicant, in her Application of 15 February 2010, requests the DOSB, the first Respondent:

“to nominate the Applicant for the participation in the competitions of the female speed skaters during the Olympic Winter Games in Vancouver 2010”.

and the IOC, the Second Respondent:

“to allow the participation of the Applicant in those competitions mentioned above”.

In order to understand the context in which the present Application has been filed, it is essential for the Panel to set out the following relevant facts:

- On 5 March 2009, the Second Interested Party, the ISU, filed a Statement of Complaint with the ISU Disciplinary Commission accusing the Applicant of having used a prohibited substance and/or a prohibited method which constituted an anti-doping rule violation under Article 2.2 of the ISU Anti-Doping Rules.
- On 1 July 2009, following a hearing, the ISU Disciplinary Commission issued a decision ruling, in part, as follows:
 1. *Claudia Pechstein is declared responsible for an Anti-Doping violation under Article 2.2 of the ISU ADR by using the prohibited method of blood doping.*
 2. *The results obtained by Claudia Pechstein in the 500m and 3000m races at the World Allround Speed Skating Championships on February 7, 2009, are disqualified and her points, pri[z]es and medals forfeited.*
 3. *A two years' ineligibility, beginning on February 9, 2009, is imposed on Claudia Pechstein.*
- On 21 July 2009, the Applicant and the First Interested Party, the DESG, filed with the Court of Arbitration for Sport (CAS) an appeal against the decision of the ISU Disciplinary Commission.
- On 25 November 2009, following a hearing, the CAS dismissed the appeals and ruled, in part, as follows:
 1. *The appeals of Claudia Pechstein and of the Deutsche Eisschnelllauf Gemeinschaft e.V. against the decision dated 1 July 2009 of the Disciplinary Commission of the International Skating Union are dismissed.*
 2. *The decision dated 1 July 2009 of the Disciplinary Commission of the International Skating Union is upheld, with the following modification as set out in para. 3.*
 3. *Ms Claudia Pechstein is declared ineligible for two years as of 8 February 2009.*
 4. *The results obtained by Ms Claudia Pechstein on 7 February 2009 at the ISU World Allround Speed Skating Championships are disqualified, with related forfeiture of any medals, points and prizes.*

The Applicant, on 7 December 2009, filed an appeal (“recours”) with the Swiss Federal Tribunal against the CAS Award of 25 November 2009.

On 10 February 2010, the Swiss Federal Tribunal dismissed the appeal of the Applicant.

The Panel notes that, as one of the consequences of that decision of the Swiss Federal Tribunal, the Applicant, to the present day, remains ineligible to compete in any speed skating competition.

On 12 February 2010, the Applicant wrote to the First Respondent, the DOSB. The Applicant alleged that, “after the CAS hearing” she had obtained “new medical evidence”. She concluded as follows:

“I demand the DOSG to make sure that I'm allowed by the DOSB and the IOC to participate in the Olympic Team race in speed skating on 26 and 27 February 2010 in Vancouver. I expect your confirmation of my nomination and my right to start until Monday, 15 February 2010, 12 h CET”.

There was no reply from the DOSB by 12 h CET on 15 February 2010. In her Application of 15 February 2010 (see above), the Applicant asserts that since there had been no reply from the DOSB *“within the time limit, it must be assumed that the Respondent (DOSB) will deny the Applicant's demand for nomination at the current Olympic Games”.*

The Applicant also argues in her Application that the Panel is not bound by the CAS Award of 25 November 2009 since *“the proceedings were filed only against the ISU and the Respondents, the DOSB and IOC, were not involved at all. Thus, the ad hoc panel will act as first instance”.*

Finally, the Applicant avers that the jurisdiction of the CAS follows from the fact that the conflict concerned happened *“in the preparation for the Olympic Winter Games”.*

As mentioned above, the Applicant filed her Application with the Court of Arbitration ad hoc Division (CAS) on 15 February 2010.

Having reviewed the Application filed by the Applicant, the Panel issued the following procedural directions on 16 February 2010:

- a. *The Applicant is requested to provide details with respect to the urgency of her case by 18:00 today, 16 February 2010.*
- b. *The Respondents are invited to file a brief answer to the Application by midday tomorrow, 17 February 2010.*
- c. *The Interested Parties have the opportunity to file written observations regarding the application also by midday tomorrow, 17 February 2010.*

The First Respondent, DOSB, on 17 February 2010, filed its Answer to the Application requesting that the Application be rejected. It submitted, with respect to the CAS jurisdiction, as follows:

“This dispute is about the participation of the Applicant in the forthcoming Olympic Winter Games. The Applicant has not been registered by the German National Olympic Committee (“NOC”) as an Olympic athlete for the Olympic Winter Games in Vancouver 2010 and has not signed the requisite Entry Form. The jurisdiction of arbitration provided for in the Respondent's statutes, precisely in the DOSB Statutes § 32 clause 5, only refers to members of the German NOC, for example unions and not for athletes. Therefore this is no arbitration settlement between the parties”.

The DOSB further concluded that the ad hoc Panel was bound by the CAS award of 25 November 2009 which was not set aside by the Swiss Federal Tribunal on 10 February 2010 and that *“the courts have already adjudicated on the Application”.*

The Second Respondent, the IOC, also submitted its Answer on 17 February 2010 and concluded with respect the jurisdiction of the CAS, as follows:

“The Rules require that a request for arbitration be directed at a “decision” pronounced by the IOC; an NOC, an IF or an OCOG. IN this case, the decision which would be challenged emanates from the CAS itself. Therefore, one could doubt whether the Ad Hoc Division of the CAS - or the CAS itself - has jurisdiction to hear the Applicant's case”.

The Second Interested Party, the ISU, also filed its observations regarding the Application on 17 February 2010. The ISU submitted that the CAS ad hoc Division was without jurisdiction to consider the application since art. 1 of the Arbitration Rules for the Olympic Games only provides jurisdiction over disputes *“arising during the Olympic Games or during a period of ten days prior to the Opening Ceremony of the Olympic Games”*. The ISU concludes that, in the present case, no decision arising on or after 2 February 2010 has occurred to vest jurisdiction in the ad hoc CAS Panel.

The ISU further invokes the binding effect of the CAS decision of 25 November 2009 concluding that *“the Ad hoc Panel is not constituted to serve as an appellate body in respect of final CAS decisions”*.

The Tribunal notes that the Applicant did not file any observations with CAS within the deadline of Tuesday, 16 February 2010.

At 13:00 on 17 February 2010, the Panel issued the following direction to the Applicant:

The panel after thorough study of the parties' submissions notes that the jurisdiction of CAS has been challenged by the Respondents and the ISU in their respective answers for different reasons. In view of that, the Panel is interested to learn the Applicant's position in this respect and hereby invites Ms Pechstein to file a short answer limited to CAS jurisdiction at the latest today at 17 February 2010 at 20:00pm (Vancouver time). The Panel invites the Applicant to address the following issues:

- *What is the appealed decision? (art. 10 of the CAS ad hoc Rules) Ref. ISU answer point 1.*
- *The non registration by the German National Olympic Committee of Ms Pechstein and Ms Pechstein not having signed the requisite entry form. Ref. DOSB answer, point 3.*
- *The issues raised in IOC's Answer, point 3.1.*

At 16:24 on 17 February 2010, the Applicant filed “additional explanations”. She represented, in part, as follows:

“1. The decision which is appealed is not the CAS award of 25 November 2009, but the decision of DOSB of 29 January 2010, not to nominate the Applicant for the Olympic Winter Games, although the Deutsche Eisschnelllauf - Gemeinschaft (DESG) had proposed her nomination to DOSB on 15.12.2009.

The DOSB had already taken another decision on 22 January 2010 not to nominate the Applicant. Such a decision can be appealed by the athlete who was not nominated (see CAS OG 10/002).

I emphasize that the Respondents IOC and DOSB accept the jurisdiction of CAS [Emphasis added by the Panel].

2. *The application was filed on 15 January 2010, that means after the opening ceremony of the Winter Games. This is the relevant date when the dispute arose (CAS OG 06/002 and CAS OG 10/002). ...”.*

At 19.30 on 17 February 2010, the Applicant submitted additional remarks. In the view of the Panel, these remarks from the Applicant because of their importance to its decision should be reproduced in full. She wrote:

“The applicant appeals all the decisions of DOSB concerning the nomination of athletes to IOC, mentioned earlier [Emphasis added by the Panel].

The Applicant agrees on the conclusion of an agreement about the jurisdiction of CAS, in case the CAS should not have jurisdiction provided for in the statutes and regulations of the Respondents”.

Later in the evening of 17 February 2010, the members of the Panel met and reviewed all the written submissions of the parties. After deliberating, the Panel decided that it would not hold a hearing since it considered itself sufficiently well informed by the parties' written submissions and would render an award as soon as possible.

LAW

Jurisdiction and Analysis

1. The Panel's analysis must commence, and in the present instance end, with Article 1 of the CAS Arbitration Rules for the Olympic Games (the “ad hoc Rules”) which is abundantly clear. It provides, in part, that the dispute to be resolved by arbitration must arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games and must be against *“a decision pronounced by the IOC, and NOC, an International Federation or an Organizing Committee for the Olympic Games”* [Emphasis added by the Panel].
2. Quite logically, Article 10 of the CAS ad hoc Rules then stipulates that any individual wishing to bring before the ad hoc Division of the CAS *“a dispute within the meaning of Article 1 of the present Rules shall file a written application with the Court Office”* and that the application shall include:
 - a copy of the decision being challenged ... [Emphasis added by the Panel].
3. In the present case, as seen above, the file reveals one key decision which is binding on the Applicant. That is the Award of the CAS Panel of 25 November 2009 which upheld the earlier decision of the Disciplinary Commission of the ISU and declared the Applicant, Ms Claudia Pechstein, *“ineligible for two years as of 8 February 2009”* to wit until 7 February 2011. The effect of the ruling on 10 February 2010 of the Swiss Federal Tribunal is that the Applicant is ineligible to participate in the XXI Olympic Winter Games in Vancouver.

4. The Panel notes that the Applicant admits that it is not appealing the CAS award of 25 November 2009. Indeed, it could not do so.
5. In her Application, the Applicant, seeking to identify a “decision” which she could appeal stated that since the DSOB did not “*nominate her as an athlete participating in the current Winter Games after having noted the judgment of the Swiss Federal Court (sic) from 10 February 2010*” it must be assumed that the Respondent (DOSB) shall deny the Applicant's demand for nomination at the current Olympic Games [Emphasis added by the Panel].
6. In the Panel's view, such an assumption by the Applicant cannot, on any reading, rise to the level of a “decision” which may be appealed to the ad hoc Division. The Panel recalls again that the Applicant was then and remains today ineligible to compete in the present Olympic Games.
7. When asked by the Panel to identify with precision the “decision” which she was appealing, the Applicant then stated that it was “*the decision of DOSB of 29 January 2010, not to nominate her for the Olympic Winter Games although the DESG had proposed her nomination to DOSB on 15 December 2009*”.
8. The Panel has reviewed the letter of the DESG to the DOSB of 15 December 2009, Simply put, the Panel finds that this letter, contrary to the Applicant's assertion, is not a proposal by DESG to nominate her. In that letter, DESG states very clearly: “*Claudia Pechstein Nominierung u.a. abhängig v. Entscheid Schweizer Bundesgericht*” which can be translated roughly as “*Nomination depending inter alia on the decision of the Swiss Federal Tribunal*”. As noted above, on 10 February 2010, the Swiss Federal Tribunal rejected the Applicant's appeal.
9. It follows that what the Applicant characterizes as “*a decision of the DOSB not to nominate her*” cannot, on any reading, be equated with a decision which can form the basis of an appeal before the ad hoc Division.
10. Finally, in what the Panel can only label as a desperate attempt by the Applicant to convince the Panel to hear her case, she submitted that she “*appeals all the decisions of DOSB concerning the nomination of athletes to IOC mentioned earlier*” [Emphasis added].
11. Out of deference to the Applicant and her lawyer, the Panel will refrain from stating more than the following at this point: The Applicant has not identified any specific decision by the IOC, an NOC, and International Federation or an Organising Committee for the Olympic Games which has arisen during the Vancouver Olympic Games or during a period of ten days preceding the Opening Ceremony of the Games on 12 February 2010 which could be the subject of an appeal to the ad hoc Division. The Panel has, on its own, searched the record and found no such decision.
12. Therefore, the Panel finds that it lacks jurisdiction to hear the present matter and it so rules.
13. Before closing and in order to determine another preliminary issue which is before the Panel, the Panel adds that even if, *ex hypothesis*, it had jurisdiction to hear the Applicant's appeal, it does

not have the authority to lift her binding ineligibility and thus allow her to participate in the present Winter Games. If the Applicant was minded to request the suspension of her ineligibility, she must address herself to a competent tribunal which is not the ad hoc Division of the Court of Arbitration for Sport.

The ad hoc Division of the Court of Arbitration for Sport rules:

1. The ad hoc Division lacks jurisdiction to hear the present Application.
2. The Application of Ms Claudia Pechstein is dismissed.
3. (...).