



Arbitration CAS ad hoc Division (OG London) 12/006 Ángel Mullera Rodriguez v. Royal Spanish Athletics Federation (RFEA), Spanish Olympic Committee (COE) & Superior Sports Council (CSD), award of 1 August 2012

Panel: Mr Michele Bernasconi (Switzerland), President, Prof. Massimo Coccia (Italy); Prof. Martin Schimke (Germany)

Athletics (middle-distance)

Selection for the Olympic national team

CAS jurisdiction

Exclusion of the athlete from the Olympic national team

Duty to respect the principle of legality in case of exclusion for suspicion of doping

1. The CAS ad hoc Division does not have any jurisdiction *ratione personae* over a body or entity that is neither bound by the Olympic Charter, nor by any other set of rules foreseeing the competence of CAS and of the CAS ad hoc Division in particular. However, it does have jurisdiction *ratione personae* over a national federation sending its athletes to the Olympic Games, as such national federation is bound by the Olympic Charter provisions, including the arbitration clause contained therein. It also has jurisdiction over the matter *ratione temporis* if the dispute started within the ten-day preceding the Opening Ceremony of the Olympic Games period provided by Article 1 of the CAS Arbitration Rules for the Olympic Games.
2. A consideration about the team's spirit put forward by the national federation cannot be characterized as a technical reason justifying the exclusion of the athlete from the Olympic national team.
3. The discretion that a national federation can exert in selecting or de-selecting an athlete may not go as far as to become arbitrary. This is not to be taken to mean that a national federation or a National Olympic Committee shall always be prevented from excluding an athlete from the national team if he or she is suspected of having doped, as is the case here. However, this precautionary exclusion of an athlete for ethical reasons, prior to any disciplinary sanction, must be provided by the pertinent selection rules. In the absence of such a clear provision, an athlete has a legitimate expectation that, once he has been selected in accordance with the national selection process, he will be permitted to enter and participate in his or her competition absent some new or other reason for excluding him or her from the team. It is, of course, a matter for the national federation to consider whether it wishes to amend its own rules in order to have the right to exclude an athlete from the national team if he or she is suspected of having behaved improperly with regard to doping matters.

The Applicant, Mr Ángel Mullera Rodriguez, is a runner of Spanish nationality, competing at international level in the 3000m Steeplechase.

The first Respondent is the Royal Spanish Athletics Federation (RFEA), which is a member of the International Association of Athletics Federations (IAAF).

The second Respondent is the Spanish Olympic Committee (COE). Pursuant to the Olympic Charter, Chapter 4, Rule 27.7.2, COE has *“the right to send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter”*.

The third Respondent is the Superior Sports Council (CSD), the Spanish governmental agency supervising Spanish sport pursuant to the Spanish Sports Act (Law N° 10/1990 of 15 October 1990, *“Ley del Deporte”*).

The first Interested Party is Mr Sebastián Martos Roa, a runner of Spanish nationality, competing at international level in the 3000m Steeplechase.

The second Interested Party is the International Olympic Committee (IOC), that is the organisation responsible for the Olympic movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the Summer and Winter Olympic Games, fulfilling the mission, role and responsibilities assigned by the Olympic Charter.

The third Interested Party is the London Organising Committee of the Olympic and Paralympic Games (LOCOG), that is the organising committee of the London 2012 Summer Olympic Games pursuant to Rule 35 of the Olympic Charter.

The fourth Interested Party is the IAAF, that is the world governing body for the sport of athletics.

The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.

Mr Mullera’s application to this CAS ad hoc Division concerns the selection process for the Spanish 3000m Steeplechase runners at the 2012 London Olympic Games. Indeed, the Applicant claims to have been unlawfully excluded from the Spanish Olympic athletics team.

On 9 July 2012, the RFEA issued a press release listing the Spanish athletes selected for the 2012 London Olympic Games. Three runners were selected for the 3000m Steeplechase: Mr Mullera, Mr Victor Garcia and Mr Abdelaziz Merzougui.

On 12 July 2012, the RFEA published a circular letter, i.e. Circular N° 145/2012, entitled *“Spanish Selection for the Olympic Games”*, which officially confirmed the selection of said three athletes for the 3000m Steeplechase Olympic race. Mr Mullera’s selection was communicated to the COE, which transmitted Mr Mullera’s name to the LOCOG and IOC for his entry in the 2012 London Olympic Games.

On 15 and 19 July 2012, the RFEA informed Mr Mullera about some social events and other matters in view of his forthcoming participation in the Olympic Games.

On 19 July 2012, the Spanish newspaper <AS> published an article entitled: *"We discovered the doping plan of a Spanish Olympic athlete"*. <AS> disclosed some emails exchanged between Mr Mullera and an unnamed trainer concerning doping practices. In those emails, Mr Mullera and the trainer were explicit in asking and giving advice on some very specific doping protocols and on how to come out clean in any anti-doping controls.

In the afternoon of that same day, Mr Mullera met with some RFEA representatives and declared that the emails had been partially manipulated. He admitted that some parts of the emails were authentic and that he had in fact inquired about some doping protocols. However, he denied he followed the trainer's advice or ever doped.

On the morning of 20 July 2012, Mr Mullera met with a RFEA's attorney, who informed him that the RFEA and CSD had anonymously received those emails about six months earlier and that, because of the emails' content, they had subjected him to several out-of-competition anti-doping tests, with no adverse analytical findings.

Later on 20 July 2012, the Technical Commission of the RFEA wrote to Mr Mullera the following email:

"Estimado atleta:

Lamento comunicarte que por decisión del Comité Técnico de esta Real Federación Española de Atletismo, una vez consultados el Consejo Superior de Deportes y el Comité Olímpico Español, y estudiadas las circunstancias que concurren en tu caso, no formarás parte del Equipo Español de Atletismo que participará en los próximos JJOO de Londres".

In the translation of the Panel:

"Dear athlete:

I regret to inform you that by decision of the Technical Committee of this Royal Spanish Athletics Federation, having consulted the Superior Sports Council and the Spanish Olympic Committee, and having studied the circumstances occurring in your case, you will not be part of the Spanish Athletics Team that will participate in the forthcoming London Olympic Games".

On 20 July 2012, the COE submitted a *"Late Athlete Replacement Form"* to the IAAF and the IOC, to replace Mr Mullera with Mr Martos. The form provides for replacement due to *"injury"*, *"illness"* or *"other"* reasons; the COE ticked the box for *"other"* and further specified *"technical reasons"*. Both the IAAF and the IOC asked the COE for more information regarding the basis of their request for replacement; the COE never provided any further information. On 21 July 2012 the IAAF approved it, but on 23 July 2012, the IOC rejected the request for replacement.

On 22 July 2012, the RFEA posted on its website a new list of the selected athletes, which included Mr Sebastián Martos (who in the previous list was only named as a reserve athlete) instead of Mr Mullera among the 3000m Steeplechase runners.

On 23 July 2012, the RFEA's Disciplinary Committee rejected an application to open disciplinary proceedings against Mr Mullera for an anti-doping rule violation, filed on 19 July 2012 by the CSD's Commission for Control and Monitoring of Health and Doping. The RFEA's Disciplinary Committee stated that the evidence was not sufficient to ascertain an anti-doping rule violation.

On 26 July 2012, the RFEA's Disciplinary Committee, again upon request of the CSD, opened a disciplinary procedure against Mr Mullera in relation not to anti-doping rules but to his possible violation of article 43.C of the Spanish Sports Disciplinary Regulation, prohibiting "*notorious and public acts going against the dignity and decorum of sports, when they are not particularly serious and do not fall within Title IV of this Regulation*". This disciplinary procedure is currently pending.

On the evening of 29 July 2012, Mr Mullera's attorneys filed with the CAS ad hoc Division an application with several exhibits. Essentially, Mr Mullera requested to be reinstated in the Spanish athletics team. Further, he requested provisional urgent measures to be ordered by the President of the CAS ad hoc Division.

In his application, the Applicant requested the CAS to grant the following reliefs:

- 1) To quash the Challenged Decision.*
- 2) To order the RFEA to re-admit him to the Spanish Athletics Team and to take all arrangements necessary to enable Mr Mullera to represent Spain in the 3,000-meter Steeplechase discipline in the XXX Olympic Games in London.*
- 3) To order the COE and the CSD to respect (to not interfere with) Mr Mullera's readmission to the Spanish Athletics Team and to take all arrangements necessary to enable Mr Mullera to represent Spain in the 3,000-meter Steeplechase discipline in the XXX Olympic Games in London.*
- 4) To order the RFEA to pay his costs of legal representation in these proceedings.*
- 5) To adopt any other measure that it deems appropriate".*

On 29 July 2012, the President of the CAS ad hoc Division for the Games of the XXX Olympiad in London, nominated a Panel composed of Mr. Michele Bernasconi (Switzerland), as President, Prof. Massimo Coccia (Italy) and Prof. Martin Schimke (Germany), as Arbitrators, to deal with the application.

The CAS Court Office communicated the application to the Respondents and to some of the Interested Parties.

At about 01:00 hr on 30 July 2012, the CAS notified its Procedural Directions to the parties and informed them that the Panel was considering to hold a hearing on 31 July 2012, at 11:00 hr, in London. Further, the CAS granted the Respondents and the Interested Parties a deadline until 30 July 2012, 18:00 hr, to answer and to comment on the application and the requests of the Applicant.

The RFEA, COE and CSD filed short written submissions by the set deadline on the afternoon of 30 July 2012. The CSD contested the jurisdiction of the CAS.

Later on 30 July 2012, the Panel submitted to the parties as well as to the Interested Parties (the latter including LOCOG), the Summons to Appear, confirming the Hearing would be held in London on 31 July 2012, at 11:00 hr.

On 31 July 2012, the hearing started at 11:00 hr and ended at approximately 14.30 hr. The Applicant appeared in person and was represented by Mr Alfonso Gomez-Acebo and Mr Marc Prat, attorneys-at-law; the RFEA was represented by Mr José Luis de Carlos Macho, Director General; the COE was represented by Mr Manuel Martín Domínguez, attorney-at-law and Mr Cayetano Cornet, Chef de Mission. None of the Interested Parties was present. CAS made available the services of a translator to assist the Applicant during the hearing.

At the outset of the hearing the parties confirmed that they had no objection as to the composition of the Panel.

At the end of the hearing, the Applicant and the Respondents expressed that they were satisfied with the way the hearing was held and acknowledged that they were treated equally and that their right to be heard had been respected.

The Applicant contends that his exclusion from the Spanish Olympic team was wrong and was contrary to the rule of law as:

- the RFEA's Technical Committee does not have the necessary competence to sanction an athlete for any doping or other disciplinary matters, as such sanctioning power, at the federation level, is instead reserved to the RFEA's Disciplinary Committee;
- there has been no breach of any applicable laws or regulations by the Applicant, and the RFEA's decision to exclude Mr Mullera amounts to a sanction which violates the principle of legal predetermination; and
- the sanction has been imposed in breach of the Applicant's procedural rights and, in particular, without following the proper disciplinary procedures or giving reasons for the decision of the RFEA to exclude him from the team.

The RFEA contests Mr Mullera's application, stating that the Applicant was selected according to Circular No. 258/2011 of 5 December 2011, and that pursuant to the second paragraph of such Circular, the RFEA has the technical discretionary power to select or non-select an athlete.

The COE contends that the decision to exclude Mr Mullera was within the exclusive competence of the RFEA's Technical Committee. It further states that the COE's role is limited to entering the athletes recommended by national federations, and in that respect it relied on the determination of the RFEA. Further, the COE assured itself to be willing and able to respect and enforce any award that the CAS may render in the present affair.

The CSD objects to the jurisdiction of the CAS and thus claims that the application against it should be dismissed. In particular, it states that the CSD is a public institution which exercises the competences of the Kingdom of Spain in relation to sports, and that under international law all States

are immune from the jurisdiction of tribunals other than their own. Accordingly, the CSD contends that the Kingdom of Spain is not subject to the jurisdiction of the CAS, and that the tribunal has no jurisdiction to subject the CSD to these proceedings, or to impose any obligation or award in respect of the Spanish State.

LAW

Jurisdiction

1. Article 61.2 of the Olympic Charter provides as follows:

“61 Dispute Resolution

[...]

2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration”.

2. Article 1 of the CAS Arbitration Rules for the Olympic Games (the “Ad Hoc Rules”) provides as follows:

“Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective”.

3. However, as mentioned above, the CSD disputes the jurisdiction of CAS over the CSD itself. As already notified to the parties before the hearing, the Panel is satisfied that it does not have any jurisdiction *ratione personae* over CSD. In fact, the latter is neither bound by the Olympic Charter, nor by any other set of rules foreseeing the competence of CAS and of the CAS ad hoc Division in particular.
4. The COE does not dispute the jurisdiction of the CAS.
5. The RFEA disputes the jurisdiction of CAS, by mainly alleging that CAS would not be able to review a discretionary decision of an internal body of RFEA itself. However, the Panel notes that such objection is more related to the Panel’s scope of review than to its jurisdiction. The Panel is indeed satisfied it has jurisdiction *ratione personae* over the RFEA, as national federations

sending their athletes to the Olympic Games are bound by the Olympic Charter provisions, including the arbitration clause contained therein. The Panel is also satisfied it has jurisdiction over the matter *ratione materiae* and *ratione temporis* (the dispute started after 20 July 2012, so within the ten-day period provided by Article 1 of the CAS Ad Hoc Rules).

6. In conclusion, the Panel determines it has jurisdiction – except over the CSD – based on the above quoted Article 1 of the CAS ad hoc Rules, as well as on the above quoted Rule 61 of the Olympic Charter.

Applicable Law

7. Under art. 17 of the Ad Hoc Rules, the Panel must decide the dispute “*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*”.
8. The Panel notes that the “*applicable regulations*” in this case are the rules and regulations of the RFEA and the COE, which apply in addition to the Olympic Charter and the other applicable IOC rules.

Merits

9. As mentioned above, in support of its decision to exclude the Applicant from the Spanish Olympic team, the RFEA relies principally upon the second paragraph of its Circular No. 258/2011 of 5 December 2011, setting forth the RFEA’s 2012 selection criteria and minimum results for international championships and competitions (“*Criterios de selección y mínimas para los campeonatos y competiciones internacionales de 2012*”). The second paragraph of Circular No. 258/2011 reads as follows:

“Como regla general, el Comité Técnico, en uso de sus funciones privadas federativas y no regladas, haciendo la valoración que estime conveniente y sin someterse a ninguna regla preestablecida, se reserva la facultad de decidir la elección de los atletas que formen el equipo nacional en todas sus categorías, prevaleciendo en todo caso su criterio técnico discrecional de selección sobre cualquier circunstancia”.

In the translation of the Panel:

“As a general rule, the Technical Committee, using its private unregulated federative functions, relying on the evaluation it deems appropriate and without being subject to any pre-established rules, reserves the right to make its choice of the athletes that form part of the national team in all categories, its own discretion and technical criteria prevailing in all cases over any other circumstance”.

10. The RFEA submits that it alone has the right to discretionally select athletes to be part of the Spanish national team, and that in the Applicant’s case, the decision to exclude him from the Olympic team has been a decision based on pure technical considerations. The RFEA further submits that, in excluding the Applicant, it is not imposing a sanction on him. At the hearing, the RFEA has specified that the technical reason consists in the fact that, due to the publicity

given to the Applicant's electronic correspondence related to doping, and the related articles in the Spanish media, the spirit of the Spanish team would be disrupted should the Applicant be part of the team, as many teammates would not accept the Applicant's presence at the 2012 London Olympic Games.

11. Therefore, the RFEA has acknowledged that the emails exchanged by the Applicant formed the background to its decision to exclude Mr Mullera's from the 2012 London Olympic Games. However, a disciplinary procedure to punish the Applicant for those emails is currently pending before the RFEA's Disciplinary Committee ("*Comité de Disciplina Sportiva*") and, as of today, no sanction for those facts has been imposed on Mr Mullera.
12. The Panel finds that the consideration about the team's spirit put forward by the RFEA cannot be characterized as a technical reason. Indeed, the RFEA's representative did not deny at the hearing that in terms of athletic performance, current shape and the like – what one would expect to be a "*technical*" reason (cf. also the examples provided in para. 5 of the Circular 258/2011: athlete's current form and results in top-level international competitions) – Mr Mullera fares better than Mr Martos, i.e. the athlete who according to the RFEA should replace the Applicant. In any event, the Panel can leave this question open, as the RFEA provided no evidence whatsoever (such as, for example, written or oral testimony by some of the Spanish Olympic team members) that the Spanish team's spirit might truly be affected by the Applicant's presence.
13. Accordingly, as the Panel has seen no evidence of a true technical reason behind the Applicant's exclusion, the Panel finds that the RFEA arbitrarily excluded Mr Mullera from the Spanish team and thus violated its own selection criteria. Indeed, the discretion that a national federation can exert in selecting or de-selecting an athlete may not go as far as to become arbitrary. The Panel points out that this is not to be taken to mean that a national federation or a National Olympic Committee shall always be prevented from excluding an athlete from the national team if he or she is suspected of having doped, as is the case here. However, this precautionary exclusion of an athlete for ethical reasons, prior to any disciplinary sanction, must be provided by the pertinent selection rules. It is, of course, a matter for the RFEA to consider whether it wishes to amend its own rules in order to have the right to exclude an athlete from the Spanish national team if he or she is suspected of having behaved improperly with regard to doping matters.
14. In the absence of a clear provision in the selection rules of the relevant national federation or National Olympic Committee entitling either body to exclude an athlete simply on the basis of a suspicion of doping, it is the Panel's opinion that an athlete has a legitimate expectation that, once he has been selected in accordance with the national selection process, he will be permitted to enter and participate in his or her competition absent some new or other reason for excluding him or her from the team.
15. This is even more true in situations like the present one, in which the national federation was aware for many months of evidence pointing to a possible anti-doping rule violation and, nevertheless, chose to select the athlete and then decided to drop him only after some articles

appeared in the media. A national federation should pursue the fight against immoral practices regardless of any pressure exercised by the media.

16. Notwithstanding the fact that the Panel is allowing the application filed by Mr Mullera, the Panel wishes to express in clear terms that it does not intend to condone Mr Mullera's inappropriate behaviour and that it fully understands the position of sports bodies which genuinely wish to fight against doping and, therefore, take appropriate measures in cases where one of their athletes behaves inappropriately. The Applicant's exchange of emails asking how to dope and how to escape anti-doping controls strikes at the very heart of the fight against doping. Whether such behaviour is simply reproachable, or an "attempted use" in the meaning of the World Anti-Doping Code or a "notorious and public act against the dignity and decorum of sports" in the meaning of the Spanish Sports Disciplinary regulation, is not for this Panel to decide. In any case, as accepted by the Applicant himself, his enquiries regarding doping methods were entirely inappropriate, and the Panel relies on the disciplinary proceedings that the RFEA's Disciplinary Committee has commenced against the Applicant in order that the matter be investigated and, as appropriate, pursued through the proper channels.
17. Many will consider Mr. Mullera to be extremely fortunate to be the beneficiary of the RFEA's improper procedural course and of the lacuna in the RFEA's selection criteria. However, under the current rules and considering the explanation given by the RFEA, the RFEA may not exclude Mr. Mullera from the Spanish team for the London Olympic Games.
18. Finally, the Panel wishes to point out that the fact that the IOC has rejected the late replacement request filed by COE on behalf of the RFEA somehow confirms that the "technical reasons" claimed by the RFEA seem not to be, under the present IOC rules (i.e. the Late Athlete Replacement Policy for the London 2012 Olympic Games), a situation of "*exceptional circumstances*" that would justify, *per se*, the replacement of the Applicant. Eventually, one may note that the confirmation of the selection of the Applicant does not trigger the exclusion of another athlete, in particular of Mr Martos, since the IOC refused to accept Mr Martos to replace Mr Mullera.

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

1. The application filed by Mr Ángel Mullera Rodriguez is partially upheld.
2. The CAS does not have jurisdiction *ratione personae* over the Superior Sports Council (Consejo Superior de Deportes).
3. The decision of the Royal Spanish Athletics Federation of 20 July 2012 to exclude Mr Ángel Mullera Rodriguez is set aside.
4. The selection of Mr Ángel Mullera Rodriguez in the Spanish Olympic team is confirmed.

5. The Royal Spanish Athletics Federation and the Spanish Olympic Committee are ordered to take all arrangements necessary to enable Mr Ángel Mullera Rodriguez to participate in the 3000m Steeplechase discipline at the XXX Olympic Games in London.
6. All other requests or motions for relief are rejected.