



Arbitration CAS ad hoc Division (OG Rio) 16/004 Yulia Efimova v. Russian Olympic Committee (ROC), International Olympic Committee (IOC) & Fédération Internationale de Natation (FINA), award of 5 August 2016 (operative part of 4 August 2016)

Panel: The Hon. Annabelle Bennett (Australia), President; Justice Catherine Anne Davani (Papua New Guinea); Mrs Rabab Yasseen (Iraq)

Aquatics (swimming)

Disqualification of an athlete from the entry list of the National Olympic Committee for the Olympic Games

Characterisation of a specific point of a decision

Enforceability of that specific point

1. **Point 3 of the IOC Executive Board decision of 24 July 2016 concerning the eligibility of Russian athletes for competing in the Games of the XXXI Olympiad in Rio de Janeiro, according to which the Russian Olympic Committee “is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping, even if he or she has served the sanction”, is a sanction additional to the sanction imposed by reasons of an anti-doping violation.**
2. **In accordance with the principle of the autonomy of the association, an international body such as the IOC is entitled to take a decision applying collective responsibility and removing the presumption of innocence, while giving to each affected athlete the opportunity to rebut the applicability of collective responsibility in his or her individual case in application of the rules of natural justice and individual justice. However, if a specific point of its decision constitutes a denial of these personal rights, it is unenforceable.**

1 PARTIES

- 1.1 The Applicant is Yulia Efimova, a swimmer of Russian nationality, who is a resident of the U.S.A.
- 1.2 The First Respondent is the Russian Olympic Committee (hereinafter, the “ROC”), the National Olympic Committee for Russia.
- 1.3 The Second Respondent is the International Olympic Committee (hereinafter, the “IOC”), 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.

- 1.4 The Third Respondent is the Fédération Internationale de Natation (hereinafter, “FINA”), the International Federation responsible for the sport of aquatics, having its headquarters in Lausanne, Switzerland.

2 FACTS

- 2.1 The elements set out below are a summary of the main relevant facts as established by the Panel by way of a chronology 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.
- 2.2 Based on information accepted by all parties during the hearing, results of drug testing undergone by the Applicant have been given to the Panel. Between 2012 and 2016, there were 33 negative tests and no positive tests apart from positives from meldonium and the test in October 2013 in Los Angeles which was the subject of a doping sanction.
- 2.3 On 12 May 2014, the FINA Doping Panel found the Applicant had committed an anti-doping regulation violation and pronounced a sanction of ineligibility for a period of 16 months commencing on 31 October 2013. The FINA Doping Panel held that the Applicant had been negligent in failing to read the label of the product concerned but that *“subjective considerations unique to her situation [did] justify evaluating her fault at a lower level than if these considerations were not present”*.
- 2.4 On 20 July 2016, the ROC Executive Board approved the composition of the Olympic Delegation of the Russian Federation, comprising, *inter alia*, the entry list of the Russian Olympic Team for participation in the Games of the XXXI Olympiad in Rio de Janeiro. The Applicant was included in such list.
- 2.5 On 24 July 2016, the IOC took a decision concerning the eligibility of Russian athletes for competing in the Games of the XXXI Olympiad in Rio de Janeiro.
- 2.6 According to the IOC Executive Board:
“Under these exceptional circumstances, Russian athletes in any of the 28 Olympic summer sports have to assume the consequences of what amounts to a collective responsibility in order to protect the credibility of the Olympic competitions, and the “presumption of innocence” cannot be applied to them. On the other hand, according to the rules of natural justice, individual justice, to which every human being is entitled, has to be applied. This means that each affected athlete must be given the opportunity to rebut the applicability of collective responsibility in his or her individual case.”

After deliberating, the IOC EB decided:

1. The IOC will not accept any entry of any Russian athlete in the Olympic Games Rio 2016 unless such athlete can meet the conditions set out below.
2. *Entry will be accepted by the IOC only if an athlete is able to provide evidence to the full satisfaction of his or her International Federation (IF) in relation to the following criteria:*
 - *The IFs, when establishing their pool of eligible Russian athletes, to apply the World Anti-Doping Code and other principles agreed by the Olympic Summit (21 June 2016).*
 - *The absence of a positive national anti-doping test cannot be considered sufficient by the IFs.*
 - *The IFs should carry out an individual analysis of each athlete's anti-doping record, taking into account only reliable adequate international tests, and the specificities of the athlete's sport and its rules, in order to ensure a level playing field.*
 - *The IFs to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games.*
 - *The IFs will also have to apply their respective rules in relation to sanctioning of entire NFs.*
3. The ROC is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping, even if he or she has served the sanction.
4. *The IOC will accept any entry by the ROC only if the athlete's IF is satisfied that the evidence provided meets conditions 2 and 3 above and if it is upheld by an expert from the CAS list of arbitrators appointed by an ICAS Member, independent from any sports organisation involved in the Olympic Games Rio 2016.*
5. *The entry of any Russian athlete ultimately accepted by the IOC will be subject to a rigorous additional out-of-competition testing programme in coordination with the relevant IF and WADA. Any non-availability for this programme will lead to the immediate withdrawal of the accreditation by the IOC".*

(emphasis added).

- 2.7 Following the IOC Executive Board's decision, the FINA Bureau on 25 July 2016 considered the issue of eligibility of the Russian athletes and determined that seven Russian swimmers were not eligible to compete at the Games of the XXXI Olympiad in Rio de Janeiro. Four of those athletes, including the Applicant, were said to be withdrawn by the ROC.
- 2.8 Following the IOC Executive Board's decision, the ROC Executive Board decided on 25 July 2016 that the Head of the Russian Olympic delegation should make alterations to the entry list based on the criteria set by the IOC. The Applicant was excluded from this entry list.

- 2.9 FINA subsequently noted that the Applicant's name was among those withdrawn by the ROC. It also stated "*FINA has noted the requirement that the Russian Olympic Committee (ROC) shall not enter any athlete having been already sanctioned. Accordingly, no such athlete will be declared eligible*".

3 CAS PROCEEDINGS

- 3.1 On 30 July 2016 at 5.45 pm (time of Rio de Janeiro), the Applicant filed an application with the CAS Ad Hoc Division against the ROC, the IOC and FINA, seeking orders, *inter alia*, that "*2. The IOC Executive Board preliminary decision of 24 July 2016 (paragraph 3) setting the new criteria for the Russian athletes to satisfy the acceptance of their entries to the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016, is invalid and unenforceable*".
- 3.2 On 30 July 2016 at 7.00 pm (time of Rio de Janeiro), the Court Office of the CAS Ad Hoc Division notified the application from the Applicant.
- 3.3 On 31 July 2016 at 1.30 pm (time of Rio de Janeiro), the Applicant filed another submission indicating that the application was finally not aimed at the IOC Executive Board's decision, but at the ROC Executive Board's decision to exclude her from the entry list to the Games of the XXXI Olympiad in Rio de Janeiro. The Applicant indicated that she "*does not insist that the general criteria set forth in IOC EB's decision of 24 July 2016 shall be declared void. The applicant, as it seems clear from her application, intend to rebut the presumption of guilt on her particular part, and to be included into the entry list of the Russian national team and to be accepted for the Rio Olympics*".
- 3.4 On 31 July 2016, the Parties were informed that the President of the CAS Ad Hoc Division had decided to appoint the following Panel of arbitrators: The Hon. Dr. Annabelle Bennett A.O. S.C. (President); Justice Catherine Anne Davani and Ms Rabab Yasseen (arbitrators).
- 3.5 The Panel allowed the Respondents to file their respective submissions to the Applicants' application by 1 August 2016, 11.00 am (time of Rio de Janeiro).
- 3.6 The Parties were also summoned at a hearing to be held on 1 August 2016, 2.00 pm (time of Rio de Janeiro).
- 3.7 On 1 August 2016 at 10.15 am (time of Rio de Janeiro), the IOC filed its submission.
- 3.8 On 1 August 2016 at 10.45 am (time of Rio de Janeiro), FINA filed its submission.
- 3.9 The ROC did not submit an answer within the prescribed deadline.
- 3.10 On 1 August 2016 at 1.30 pm (time of Rio de Janeiro), the Applicant filed an additional urgent submission purporting to clarify her earlier additional submission. The Applicant clarified that she only intended to amend her request for relief n°2 to remove the allegation of invalidity but maintained the allegation of unenforceability. She further maintains that the IOC remains a Respondent.

- 3.11 On 1 August 2016 at 1.50 pm, the ROC indicated it will not attend the hearing and that it leaves it to the Panel's "*full discretion*" to decide the matter.
- 3.12 On 1 August 2016, at 02.00 pm (time of Rio de Janeiro), the hearing took place at the temporary offices of the CAS Ad Hoc Division. The following persons attended the hearing: for the Applicant, Messrs Artem Patsev and Andrey Mitkov, Counsel; for the IOC, Messrs Howard Stupp, Director Legal Affairs, François Carrard, Tamara Soupiron and Nicolas Zbinden, Counsel; for FINA, Mr Cornel Marculescu, Executive Director. The ROC did not appear at the hearing notwithstanding an express request from the President of the Panel in this respect after it indicated it would not attend. Furthermore, William Sternheimer and Jean-Philippe Dubey attended the hearing on behalf of CAS.
- 3.13 At the hearing, the Panel requested the Applicant to comment on the issue of the admissibility of the application. The Applicant considers that her application, having been filed within the deadline when the CAS Ad Hoc Division has the right to hear proceedings, is admissible. The Respondents did not raise any formal issue of inadmissibility of the application in their submissions and have expressly waived any exception in this respect.
- 3.14 In the light of the Applicant's additional submissions of 31 July and 1 August 2016, the Panel requested that the Applicant explain precisely how these two submissions were compatible and how they related to the application. The Applicant finally confirmed at the hearing her requests for relief as initially submitted, that is, that she challenged the validity and enforceability of the IOC Executive Board's decision. In view of the fact that the IOC was not prepared to address such requests in response to the additional submissions from the Applicant, the Panel adjourned the hearing and granted the Respondents a new deadline to file their comments.
- 3.15 FINA filed a reply on 3 August 2016 at 10.15 am (time of Rio de Janeiro).
- 3.16 The IOC filed its reply on 3 August 2016 at 10.45 am (time of Rio de Janeiro).
- 3.17 The ROC filed its reply on 3 August 2016 at 8.30 pm (time of Rio de Janeiro).
- 3.18 On 4 August 2016 at 10.00 am (time of Rio de Janeiro), the Panel resumed the hearing. The ROC again did not appear. At the end of the hearing at 1.00 pm (time of Rio de Janeiro), the Parties present were satisfied that their right to be heard and to be treated equally had been respected.

4 PARTIES' SUBMISSIONS

- 4.1 The Parties' submissions and arguments shall only be referred to in the sections below if and when necessary, even though all such submissions and arguments have been considered.

a. Applicant's Requests for Relief

4.2 The Applicant's requests for relief are as follows:

1. *This application is allowed.*
2. *The IOC Executive Board preliminary decision of 24 July 2016 (paragraph 3) setting the new criteria for the Russian athletes to satisfy the acceptance of their entries to the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016, is invalid and unenforceable.*
3. *The decision of the FINA Bureau of 25 July 2016 that confirms Ms Efimova's ineligibility for participation in the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016, is set aside.*
4. *The Russian Olympic Committee is allowed to enter Ms Yulia Efimova to enter for the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016.*
5. *Ms Yulia Efimova is eligible to participate in the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016.*
6. *The IOC is obliged to accept the entry of Ms Yulia Efimova to compete in the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016".*

4.3 At the hearing, the Applicant accepted that requests 4, 5 and 6 were not appropriate.

b. ROC's Requests for Relief

4.4 The ROC did not attend the hearing and did not submit any request for relief.

c. IOC's Requests for Relief

4.5 The IOC requests that the Applicant's application be dismissed.

d. FINA's Requests for Relief

4.6 FINA requests that the Applicant's application be rejected.

5 JURISDICTION AND ADMISSIBILITY

5.1 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".

5.2 In view of the above, the Panel considers that the CAS Ad Hoc Division has jurisdiction to hear the present matter. The jurisdiction of the CAS Ad Hoc Division was not contested in the written submissions and was expressly confirmed by all parties at the hearing.

5.3 Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter referred to as the “CAS 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”.

5.4 The Panel notes that the challenged decisions from FINA and the ROC were notified on 25 July 2016. Therefore, there is a clear issue on the admissibility of the Applicant’s application. Such issue does not, however, need to be decided as all Respondents, at the hearing, expressly waived any objection in this respect.

5.5 In view of the Parties’ agreement, the Panel shall therefore proceed on the merits of the Applicant’s application.

6 APPLICABLE LAW

6.1 Under Article 17 of the CAS 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”.*

7 DISCUSSION

a. Legal framework

7.1 These proceedings are governed by the CAS Ad Hoc Rules enacted by the International Council of Arbitration for Sport (“ICAS”) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (“PIL Act”). The PIL Act applies to this arbitration as a result of the express choice of law contained in Article 17 of the CAS Ad Hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of arbitrators, pursuant to Article 7 of the CAS Ad Hoc Rules.

7.2 According to Article 16 of the CAS Ad Hoc Rules, the Panel has “*full power to establish the facts on which the application is based*”.

b. Merits

7.3 As the Applicant acknowledges, Rule 44 of the Olympic Charter provides for a series of steps for the selection and entry of athletes for the Olympic Games. The final step before an athlete can compete is that the IOC accepts the entries of the athletes selected by the National Federation, in accordance with the selection criteria of the International Federation, and approved by the National Olympic Committee. The IOC Executive Board decided that it will not accept any entry of any Russian athlete in the Games of the XXXI Olympiad in Rio de Janeiro unless the athlete can meet the conditions, which include the criteria of points 2 and 3 as set out above at par. 2.4.

7.4 The Applicant has been sanctioned for doping, albeit it was found that she had not so erred intentionally.

7.5 The Applicant asserts that, in including point 3 in the IOC Executive board’s decision, the “Osaka Rule” was impermissibly “revitalized” by the IOC Executive Board.

7.6 The Applicant’s case is also based on an impermissible change of the rules stated by the Olympic Charter for accepting of entries for the Games of the XXXI Olympiad in Rio de Janeiro. She submits that the direction to the ROC not to allow entry of any athlete for the Games of the XXXI Olympiad in Rio de Janeiro who has ever been sanctioned for doping violates Rule 44 of the Olympic Charter which provides for the steps to be taken for selection and entry of athletes for the Olympic Games and also provides that a National Olympic Committee shall ensure that no one has been excluded from entry for submission to the OCOG for acceptance by the IOC for, relevantly, a form of discrimination. This, she contends, represents an amendment to the Olympic Charter contrary to Rule 18 of that Charter, beyond the power of the IOC Executive Board as provided in Rule 19 of the Olympic Charter.

7.7 The other basis for challenge set out in the application is that the IOC Executive Board violated the Fundamental Principles of Olympism in discriminating against the Applicant according to national origin and also violated numerous of the World Anti-Doping Code (hereinafter, the “WADA Code”) provisions.

7.8 The reference to the selection by the ROC, which then seeks the IOC’s acceptance for the nomination, is in the context of the direct effect of “*the newly-made criteria*” which, she contends, impermissibly constitute a sanction and, further, contravene the athletes’ “*due-process fundamental rights*”. She states in the application that the “*crucial factor*” is the effect of a rule in operation, being the IOC Executive Board’s decision and the subsequent FINA statement and removal of the applicant’s name from the ROC’s entry list of the Russian national team. Again, she submits that if the effect of the rule (the IOC Executive Board’s rule) is to bar participation in a n event on account of past behaviour, it is a sanction.

- 7.9 The Applicant contends that the FINA statement of 25 July 2016 also violates the Fundamental Principles of Olympism stated in the Olympic Charter and the WADA Code but her application makes clear that this is because FINA implemented the IOC Executive Board's decision and applied the criteria stated in that decision. No independent action by FINA is cited.
- 7.10 The issues in this case mirrored those considered in CAS OG 16/013. The primary consideration here is similarly the validity of point 3 of the IOC Executive Board's decision. The Panel has read the reasons of the Panel in CAS OG 16/013 carefully and considered that reasoning in light of the submissions advanced in this case.
- 7.11 In particular, the Panel notes that the IOC Executive Board issued its decision as a matter of urgency in view of the immediacy of the Olympic Games in what have been described as the "*extraordinary circumstances*" of findings in the Independent Report of Richard McLaren, commissioned by WADA (hereinafter, the "IP Report") of a State-organised scheme of doping. Those findings were said to be beyond a reasonable doubt, but no such definitive findings were made with respect to individual athletes.
- 7.12 The Panel has formed the same view as that set out in the reasons of CAS OG 16/013. The Panel has no doubts at all that the IOC acted in good faith and with the best of intentions when issuing its decision. The IOC confirmed to this Panel that the aim of its decision was to give an opportunity to those Russian athletes who were not implicated in the State-organised scheme to participate in the Games of the XXXI Olympiad in Rio de Janeiro.
- 7.13 The Panel notes that there was no contention that the IOC Executive Board lacked power to make the decision, or that it was beyond power within Rule 19 of the Olympic Charter or, indeed, to make a decision that responded to the publication of the IP Report. Rather, the challenge was to the inclusion of point 3, which constituted a direction to the ROC not to enter any athlete for the Games of the XXXI Olympiad in Rio de Janeiro who has ever been sanctioned for doping, even if he or she has served the sanction.
- 7.14 The submissions advanced in this case centred on:
- Whether the IOC Executive Board's decision implemented the Osaka Rule, found to be invalid in CAS 2011/O/2422 and CAS 2011/A/2658.
 - Whether the IOC was entitled to include point 3 in the decision of the IOC Executive Board, in circumstances that it did not provide for natural justice.
 - Whether the exceptional circumstances justified the IOC Executive Board's decision and its inclusion of point 3 to be implemented by the International Federations and the ROC.
 - Whether the decision in CAS 2016/O/4684 which upheld the IAAF Competition Rules should be applied to the IOC Executive Board's decision such that point 3 is valid and enforceable.

- 7.15 It is apparent that the same issues were considered by the Panel in CAS OG 16/013. The Panel agrees with the reasoning in that case and comes to the same conclusions. The Panel does, however, add some observations that relate to matters specifically raised before us.
- 7.16 In CAS 2016/O/4684, the CAS confirmed that Rules of the IAAF applied to Russian athletes so as to prevent them from participating in the Games of the XXXI Olympiad in Rio de Janeiro. The Panel in CAS OG 16/013 considered the effect of this decision and the relevance of the IAAF Rules to those of FISA. That reasoning applies in the present case to those of FINA.
- 7.17 Similarly, there is no need to consider further the legal nature of the Osaka Rule as discussed in previous CAS cases, in particular CAS 2011/O/2422 and CAS 2011/A/2658. This Panel is similarly of the view that point 3 is properly characterised as a sanction additional to the sanction imposed by reasons of an anti-doping rule violation. It is also unnecessary to consider the further submissions of the IOC that the only legal matter that arises from this characterisation is some kind of private right for breach of contract, in circumstances where the IOC imposes a sanction outside those provided for by the WADA Code.
- 7.18 However, the Panel specifically agrees with the Panel in CAS OG 16/013 that point 3 denies to the athlete natural justice, being the very right emphasised in the IOC Executive Board's decision itself.
- 7.19 The IOC emphasised its right to autonomy. It contends that if it chose to deprive the athlete of the right to natural justice in the application of point 3, that was its right and was a right recognised under the Olympic Charter and, in particular, Rule 44.
- 7.20 However, the IOC does not suggest that the IOC Executive Board's decision was made under Rule 44 of the Olympic Charter, which relevantly provides:
- “3. Any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds. Nobody is entitled as of right to participate in the Olympic Games”.*
- 7.21 The challenge is not to the IOC's right to refuse entry to an athlete whose name is submitted by the ROC but to the direction to the ROC not to submit a name where the athlete concerned has ever been subject to a sanction for a doping violation.
- 7.22 The IOC relies on the principle of autonomy and the contention that, under Swiss law, there is no right of natural justice and, in particular, no right of natural justice where an autonomous body chooses to abrogate it. That, however, is not the situation here. Point 3 should not be considered in isolation.
- 7.23 The IOC Executive Board made it clear that its decision should be understood to recognise that, where it applied collective responsibility and removed the presumption of innocence, an athlete was entitled to be accorded the rules of natural justice and individual justice. Further, it clearly stated that *“each affected athlete must be given the opportunity to rebut the applicability of collective responsibility in his or her individual case”.*

- 7.24 Thus, the IOC Executive Board exercised its autonomous right to accord these personal rights by reason of its decision. Thus, it bound itself in that way. Points 2 and 3 then represented the implementation of the decision. Contrary to its own decision to accord natural justice to an individual athlete, and in accordance with the Olympic Charter, point 3 constitutes a denial of that personality right.
- 7.25 Accordingly, the IOC Executive Board's decision which, on the one hand, seeks to implement the IOC decision to provide an opportunity to a Russian athlete to rebut the presumption of guilt of participation in the State-sponsored doping scheme but, on the other hand, by point 3 denies that opportunity, is unenforceable.
- 7.26 Where an International Federation, here FINA, declined to consider the criteria of point 2 because it was aware that the athlete failed the criterion of point 3, the athlete was deprived of the right provided for in the IOC Executive Board to rebut the presumption of guilt by reason of being a Russian athlete.
- 7.27 FINA did not make a decision. It noted that the Applicant's name had been withdrawn by the ROC. The Applicant seeks an order that the decision of FINA is set aside but there was no operative decision. Therefore, such request cannot be granted.

8 CONCLUSION

- 8.1 It follows that the Applicant's application should be partially upheld in that point 3 of the IOC Executive Board's decision dated 24 July 2016 is unenforceable. As was also stated in CAS OG 16/013, the Panel supports the approach taken by the IOC in point 2.
- 8.2 All further prayers for relief should be rejected.

The ad hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The application filed by Ms Yulia Efimova on 30 July 2016 is partially upheld.
2. Point 3 of the IOC Executive Board's Decision dated 24 July 2016 is unenforceable.
3. All other prayers for relief are rejected.