



Arbitration CAS ad hoc Division (OG Rio) 16/005 & 16/007 Mangar Makur Chuot Chep & South Sudan Athletics Federation (SSAF) v. South Sudan Olympic Committee (SSNOC), award of 7 August 2016 (operative part of 3 August 2016)

Panel: Prof. Ulrich Haas (Germany), President; Mrs Carol Roberts (Canada); Mrs Margarita Echeverría (Costa Rica)

Athletics

Selection for the Olympic Games

Qualification system providing for the registration of unqualified athletes

Legitimate expectations and procedural fairness

1. The decision of an NOC which, in accordance with the relevant Qualification System that entitles a NOC without male or female qualified athletes to enter their best male and best female athlete in one athletic event, chose another male athlete than the athlete challenging the decision to represent the country, is, in absence of any submission that the athlete challenging the decision would be better qualified than the other athlete, not contrary to any provision of the Olympic Charter nor of the Qualification System.
2. The doctrine of legitimate expectations provides a procedural and, in some jurisdictions, a substantive right, where representations have been made to a person by someone in authority. It is designed to protect individuals from an abuse of process. A procedural legitimate expectation is based on the presumption that a person in authority will follow a certain process in making decision, while a substantive legitimate expectation arises where a person in authority makes a lawful representation that an individual will receive a substantive benefit. However, if the relevant Qualification System provides for only one male athlete to be chosen and the national federation nominates two male athletes, an athlete cannot rely on representations. Therefore, the actions of a person in authority leading an athlete to believe that he/she would be representing his/her country, while unfair to the athlete, do not create a substantive right such that the athlete should be selected.

I. PARTIES

- 1 The Applicant in the case CAS OG 16/005 is an athlete from South Sudan in the sport of athletics (hereinafter, the “Athlete”).
- 2 The Applicant in the case CAS OG 16/007 is the national sport organization for athletics in South Sudan, the South Sudan Athletics Federation (hereinafter, the “SSAF”).

3 The Respondent is the South Sudan National Olympic Committee (hereinafter, the “SSNOC”). One of the primary responsibilities of SSNOC is to carry out the roles and responsibilities assigned by the Olympic Charter in South Sudan.

4 The Interested Party is an athlete in the sport of athletics representing South Sudan.

II. FACTS

5 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.

6 South Sudan is the world’s newest nation, having gained its independence from Sudan in 2011. This is the first time the country has been represented at the Olympic Games.

7 The Athlete resides, and trains, in Perth, Australia. He holds dual citizenship. Ms. Hassan resides and trains in South Sudan. Neither Mr. Chuot nor Ms. Hassan, nor indeed any other athlete from South Sudan in the sport of athletics, has attained qualifying times in their respective events for the Games of the XXXI Olympiad in Rio de Janeiro (“Rio 2016”).

8 In accordance with the International Amateur Athletics Federation’s (hereinafter, the “IAAF”) Qualification System for Rio 2016, National Olympic Committees (“NOCs”) with no male or female qualified athletes are entitled to enter their best male athlete and best female athlete in one athletic event at the Games. (IAAF Qualification System – Games of the XXXI Olympiad – Rio 2016, December 2015)

9 On 21 December 2015, the Athlete received a letter from the President of the SSAF informing him that he would be participating in a number of championships, including Rio 2016.

10 Thereafter, South Sudan prepared a list of 5 female and 11 male athletes whose names they could potentially forward for consideration for Rio 2016. All 16 of the athletes received full Rio 2016 athlete accreditation.

11 Subsequently, the SSAF nominated two athletes to represent South Sudan in athletics at the 2016 Olympics; Mr. Chuot and Santino Kenyi.

12 On 4 July 2016, Dr. Tong Chor Malek, the President of SSNOC, forwarded the names of two athletes to the IAAF, Mr. Santino Kenyi, and Ms. Hassan, in accordance with the IAAF Qualification System:

“Universality Places (Unqualified Athletes)

NOCs with no male or female qualified athlete or relay team will be allowed to enter their best male athlete and their best female athlete in one athletic event each, with the exception of the Combined events, 10,000m and 3000m Steeplechase.

This applies equally to unqualified female entries from an NOC with qualified males, and vice versa.

Acceptance of unqualified entries in the Field Events and Road Events will be at the discretion of the IAAF Technical Delegates, based on the technical standard of the athlete and the numbers of qualified athletes in the respective event. In order to allow the IAAF Technical Delegates to assess the technical level of such athletes, a specific application form indicating the event in which the entry is requested and the proof of the technical level and international participation of the nominated athlete must be submitted to the IAAF. The IAAF shall subsequently confirm, in writing to the NOCs, with a copy to the Rio 2016 Sport Entries Department, the approval or otherwise of the entry of the specified athlete(s).

The application forms of all unqualified athletes must be submitted by NOCs to the IAAF no later than 4 July 2016.

E. Confirmation Process for Quota Places

Following the end of the qualification period, IAAF shall assess the number of athletes having achieved the entry standard plus the approved unqualified athletes. In order to achieve the ideal number of entries by the event, IAAF shall then determine the athletes to be invited through the IAAF World Ranking List in each event (except the 5000m, 10,000m and road events) and inform each NOC accordingly. The IAAF World Ranking List for each event shall be published on the IAAF website on 12 July 2016. NOCs shall enter all athletes to Rio 2016 by the entries deadline of 18 July 2016” (hereinafter, the “Universality Provision”).

- 13 On 20 July, 2016, Dr. Tong forwarded an e-mail to Mr. Chuot confirming that he would be attending the 2016 Olympics. Mr. Chuot also received a scanned copy of his Olympic accreditation that day.
- 14 On 21 July, 2016, the IOC informed South Sudan’s Chef de Mission and First Vice President of the SSNOC, Juma Stephen Lugga, that South Sudan’s team would be composed of Ms. Hassan, Mr. Kenyi and Guor Marial, a male athlete in the marathon event. Although Mr. Marial had initially been identified as a coach, he was permitted to compete following a delegate registration meeting on 20 July 2016. Mr. Marial competed at the 2012 Olympics in London under the IOC flag.
- 15 Mr. Chuot became aware he had not been selected to participate in Rio 2016 Games by way of an e-mail on 28 July, 2016.

III. PROCEEDINGS BEFORE THE CAS

- 16 On 31 July 2016 at 10:00 am (time of Rio de Janeiro), Mr. Chuot filed an application with the CAS Ad Hoc Division against SSOC (CAS OG 16/005). The Applicant identified Margaret Hassan as an Interested Party.
- 17 On the same day, at 11:45 am (time of Rio de Janeiro), the CAS Ad Hoc Division notified the application filed by the Athlete to the SSOC and the Interested Party.
- 18 On the same day, at 1:15 pm (time of Rio de Janeiro), the SSAF filed an application with the CAS Ad Hoc Division against the SSOC (CAS OG 16/007). SSOC also identified Margaret Hassan as an interested party.
- 19 On the same date, at 14:35 pm (time of Rio de Janeiro), the CAS Ad Hoc Division notified the application of the SSAF to the SSOC and the Interested Party.
- 20 On the same, the Parties and the Interested Party were informed that the President of the CAS Ad Hoc Division had decided that the Panel of arbitrators for this case shall be constituted as follows: Prof. Dr. Ulrich Haas (President); Mrs Carol Roberts and Mrs Margarita Echeverria Bermúdez (arbitrators). Furthermore, the President of the CAS Ad Hoc Division decided to join procedures CAS OG 16/005 & CAS OG 16/007.
- 21 The Panel asked the parties to provide it with the eligibility rules of the South Sudan National Olympic Committee (in English) and the statutes of the South Sudan National Olympic Committee (in English) by 2 August 2016, 12.00 am (time of Rio de Janeiro).
- 22 The Parties were also summoned at a hearing to be held on 3 August 2016, 17:00 pm (time of Rio de Janeiro).
- 23 On 3 August 2016, at 2:16 pm (time of Rio de Janeiro) the first Applicant submitted a series of documents to the Panel. These documents were immediately forwarded to the other (interested) parties.
- 24 On 3 August 2016, at 17:00 p, (time of Rio de Janeiro), the hearing took place at the temporary offices of the CAS Ad Hoc Division. The Panel was assisted by Mr Antonio de Quesada, counsel to the CAS. The following persons attended the hearing: for the first Applicant, Messrs Joaquim de Paiva Muniz, Favio Spaccaquerche Barbosa, Pedro Felipe Gomes da Silva, Lucas Mendes, Rodrigo Moreira, Bichara Abidao Neto, Victor Eleuterio and Thiago Stüssi, and Mlle Isabel Cantidiano; for SSOC Juma Stephen Lugga, Chef de Mission. No one appeared for the SSAF. The Interested Party also attended the hearing, with the assistance of a translator.

IV. PARTIES' SUBMISSIONS

25 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. Applicants' Requests for Relief

26 The Applicants' requests for relief are as follows:

"The South Sudan Olympics Committee be directed that Mangar Makur Chuot Chep be nominated for the Mens 200 metres at the Rio Olympics Games and airfare be provided to him immediately so that he can attend from Australia in a timely manner for to prepare".

b. Respondent's Request for Relief

27 The Respondent did not file a formal response or submit any specific requests for relief. However, at the hearing, the Respondent asked that the application be dismissed.

V. JURISDICTION AND ADMISSIBILITY

28 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".

29 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.

30 Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter, 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".

31 The Applicant became aware of the Challenged Decision on 28 July 2016 and filed his appeal on 31 July 2016. Consequently, the dispute arose “*during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games*” and the appeal is admissible.

VI. APPLICABLE LAW

32 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*”.

33 The parties have not made any submissions as to the applicable regulations. In the hearing, however, SSOC submitted an extract from the IAAF Qualification System for the Olympic Games Rio 2016 containing the Universality Provision. The parties present at the hearing both referred to this Universality Provision. Consequently, the Panel finds that the Universality Principle is part of the applicable regulations in the case at hand.

VII. DISCUSSION

a. *Legal framework*

34 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.

35 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*

36 The scope of review of this Panel is limited. The Applicants say that the SSOC unlawfully excluded the Athlete from the Rio Olympics. They also say that the SSOC led the Athlete to legitimately expect that he would be representing his country in Rio Olympic Games.

aa) Was SSOC’s decision not to register Mr. Chuot for the Rio Olympics unlawful?

37 The Applicants say that SSOC’s decision to register Ms. Hassan rather than the Athlete was in contravention of Section 44 of the Olympic Charter.

38 Section 44 of the Olympic Charter provides:

44 Invitations and Entries

1....

2. *Only NOCs recognised by the IOC may submit entries for competitors in the Olympic Games.*

...

4. *An NOC shall only enter competitors upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the OCOG. ... NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination.*

- 39 In the Panel’s view, the procedure governing registration of unqualified athletes is set out by the IAAF Qualification System. That procedure provides for the registration of one male and one female athlete from each country. In this case, the SSOC put forward two names, one male and one female, in accordance with the Qualification System. The Panel finds that the challenge to Ms. Hassan’s nomination to the team is misplaced. There is no evidence that the Athlete was replaced by Ms. Hassan. The Athlete’s allegation that Mr. Tong chose Ms. Hassan because of her advertising contract with Samsung, even if it is accurate, is not relevant to the issue before us. If the Athlete was displaced from the Olympic team, it was by Mr. Kenyi, as only one male athlete could be selected.
- 40 Whether Mr. Kenyi or the first Applicant is the “best male athlete” within the meaning of the Universality Provision, is difficult to answer. Both athletes compete in very different disciplines. In the letter by the SSAF to IAAF dated 29 July 2016, in which the SSAF protested against the nomination of – inter alia – Ms Hassan, it was not suggested that the first Applicant was the better (male) athlete to represent South Sudan. Furthermore, Mr. Lugga testified that, in choosing Mr. Kenyi over the First Applicant, the SSOC considered the fact that Mr. Kenyi represented South Sudan at the Youth Games and had demonstrated future potential. In addition, Mr. Lugga submitted, that in the African Championship in Durban in July 2016, Mr. Kenyi – unlike the first Applicant – proceeded to the final round. Furthermore, The Panel notes that Mr. Kenyi was also one of the athletes nominated by the SSAF to represent South Sudan. The Panel also notes that the first Applicant has not submitted that he would be better qualified than Mr. Kenyi to represent his country. Consequently, the Panel considers that Mr. Kenji is equally qualified to represent South Sudan at the Olympics.
- 41 The Panel observed that on 21 July 2016 the IOC advised Mr Lugga that the Rio delegation for South Sudan will be exceptionally composed of three athletes, including a second male athlete (Mr. Guor Marial). On what grounds this additional spot has been allocated to SSOC is unknown. The first Applicant, however, did not submit that the inclusion of Mr. Guor Marial was contrary to the rules or that Mr. Guor Marial should be substituted with the first Applicant.

42 The Panel is unable to find that the SSOC's decision to select Mr. Kenyi and Mr. Guor Marial as the two male athletes to represent South Sudan at the 2016 Olympics to be contrary to the Olympic Charter or to the IAAF Qualifications System.

bb) No breach of procedural fairness

43 The Panel finds that the Athlete was misled by Dr. Tong, as Dr. Tong led Mr. Chuot to believe, as recently as 20 July, 2016 that he would be representing South Sudan at the Olympics. The Panel accepts that the Athlete legitimately expected he would be competing at the Rio 2016 Olympics.

44 The doctrine of legitimate expectations provides a procedural and, in some jurisdictions, a substantive right, where representations have been made to a person by someone in authority. It is designed to protect individuals from an abuse of process.

45 A procedural legitimate expectation is based on the presumption that a person in authority will follow a certain process in making decision, while a substantive legitimate expectation arises where a person in authority makes a lawful representation that an individual will receive a substantive benefit.

46 The Panel was provided with no evidence regarding the selection criteria. In the absence of any information about how athletes were to be selected, the Panel has basis to conclude that the Athlete's reliance on Dr. Tong's representations were well founded. Given that the IAAF Qualification System provided for only one male athlete from South Sudan to be chosen and the SSAF nominated two male athletes, it appears that the Athlete could not rely on the representations. Further, the Panel has no information on any representations that might also have been made to Mr. Kenyi, who was not identified as an interested party.

47 The Panel finds that Mr. Tong's actions, while unfair to the First Applicant, do not create a substantive right such that the Athlete should now be selected.

VIII. CONCLUSION

48 The Panel had great difficulty in coming to this conclusion. First, the relevant rules were only partially submitted. Second, the Panel acknowledges the Athlete's determination to compete for South Sudan in honour of his late father who died in the civil war. The Panel respects his determination and passion and understands that this result must be disappointing for him. However, in view of the evidence before the Panel and the fact that the places to represent South Sudan in athletics are limited, the Panel had no other option – from a legal point of view – to uphold the SSOC's decision. In view of all of the above, the Challenged Decision must be upheld and the Applicants' applications, filed on 31 July 2016, shall be dismissed.

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

1. The applications filed by Mr Mangar Makur Chuot Chep and South Sudan Athletics Federation are dismissed.