



Arbitration CAS ad hoc Division (OG Rio) 16/013 Anastasia Karabelshikova & Ivan Podshivalov v. Fédération Internationale des Sociétés d’Aviron (FISA) & International Olympic Committee (IOC), award of 4 August 2016

Panel: Mr Mark Hovell (United Kingdom), President; Mr Francisco Müssnich (Brazil); Mrs Rabab Yasseen (Iraq)

Rowing

Disqualification of athletes from the entry list of the National Olympic Committee for the Olympic Games

Collective vs individual liability

Enforceability of Point 3 of the IOC Executive Board decision

Characterisation of Point 3 of the IOC Executive Board decision

1. With its 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, the IOC decided to strike a balance between the collective responsibility, applying to Russian athletes in view of the State-organised doping scheme in Russia revealed by the “McLaren Report”, and the right of each athlete to have his/her case individually considered.
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. However, Point 3 of the IOC Executive Board decision, 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”*, contains simple, unqualified and absolute criterion impossible to reconcile with the stated aim to provide the athletes with an opportunity to rebut the presumption of guilt and to recognise the right to natural justice. As it offends the right to natural justice, it is therefore unenforceable.
3. Point 3 of the IOC Executive Board decision is a sanction additional to the sanction imposed by reasons of an anti-doping violation.

1 PARTIES

- 1.1 The First Applicant is Ms. Anastasia Karabelshikova (“Ms. Karabelshikova”), a rower from Russia.
- 1.2 The Second Applicant is Mr. Ivan Podshivalov (“Mr. Podshivalov”), a rower from Russia.
- 1.3 The First Respondent is the World Rowing Federation (“FISA”), based in Lausanne, Switzerland, the organisation responsible for the sport of rowing.
- 1.4 The Second Respondent is the International Olympic Committee (“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.
- 1.5 The First Interested Party is the Russian Rowing Federation (“the RRF”) based in Moscow, Russia, the organisation responsible for the sport of rowing in Russia.
- 1.6 The Second Interested Party is the Russian Olympic Committee (“the ROC”) based in Moscow, Russia, the National Olympic Committee for Russia.

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 On 14 January 2008, Mr. Podshivalov received a sanction of 2 years ineligibility, retroactively from 27 August 2007, from FISA’s Doping Hearing Panel as a result of an anti-doping rule violation (an “ADRV”) under Article 2.2 of FISA’s Anti-Doping Rules.
- 2.3 On 5 February 2008, Ms. Karabelshikova received a sanction of 2 years ineligibility from FISA’s Doping Hearing Panel as a result of an ADRV under Article 2.2 of FISA’s Anti-Doping Rules.
- 2.4 Before 18 July 2016, the ROC sent the names of the 26 rowers and two coxswains that were qualified for the 2016 Olympic Games in Rio de Janeiro (the “Rio Games”) to be registered by the IOC. The Applicants’ names were notified to the IOC.
- 2.5 On 18 July 2016, WADA’s Independent Person, Mr. Richard McLaren, published on the WADA website its official independent report (the “McLaren Report”) describing a fraudulent, government directed scheme to protect Russian athletes from ADRVs, including with respect to disqualification during the Sochi Winter Games.

2.6 On 24 July 2016, the IOC Executive Board issued a decision (the “IOC Decision”) concerning the participation of Russian athletes in the Rio Games. According to this decision the following was stated:

“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 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.*

[...]

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”.

2.7 On 25 July 2016, the FISA Executive Committee met to evaluate the conditions for participation established by the IOC and to comply with the IOC Decision. It issued the following *inter alia* conditions (the “FISA Statement”):

“2) In addressing the part of the IOC decision “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 FISA EC has determined that, in order to meet the requirements that the IOC has prescribed for it to accept the entry of a Russian rower, and recommend to the IOC that to rebut the applicability of collective responsibility in his or her individual case, as required by the IOC, the following requirement must be met:

A Russian rower must have undergone a minimum of three anti-doping tests analysed by a WADA accredited laboratory other than the Moscow laboratory and registered in ADAMS from 1 January 2015 for an 18 month period.*

** FISA considers a urine test, a blood test, or a urine and blood test or multiple tests taken on the same day to constitute one anti-doping test for this evaluation”.*

2.8 Additionally, the FISA Statement stated as follows:

“The FISA Executive Committee underlines that the above evaluation does not mean that it has been established that the remaining entered rowers would have committed a doping offence, rather that they do not meet the conditions established by the IOC in their decision of 24 July 2016 for their entry to be accepted for the Rio 2016 Olympic Games.

The FISA Executive Committee decision was made as appropriate to the circumstances and based on the available information at the time, in the interests of the sport of rowing”.

2.9 On 27 July 2016, the RRF was notified of the FISA Statement.

3 CAS PROCEEDINGS

- 3.1 On 2 August 2016 at 13h36 (time of Rio de Janeiro), the Applicants filed a joint application with the CAS Ad Hoc Division against the IOC Decision and the FISA Statement.
- 3.2 On 2 August 2016, the CAS Ad Hoc Division notified the Parties of composition of the Panel:
- President: Mr. Mark A. Hovell, United Kingdom
- Arbitrators: Mr. Francisco Antunes Maciel Müssnich, Brazil
Mrs Rabab Yasseen, Switzerland/Iraq
- 3.3 In the same communication, the Panel directed the Respondents to provide their replies to the Applicants' application and the Interested Parties their amicus curiae before 3 August 2016 at 10.30 (time of Rio de Janeiro). Moreover, such communication called the parties to a hearing on 3 August 2016 at 11.00 (time of Rio de Janeiro).
- 3.4 On 3 August 2016 at 09.23 (time of Rio de Janeiro), FISA filed its Answer.
- 3.5 On 3 August 2016 at 09.38 (time of Rio de Janeiro), the IOC filed its Answer
- 3.6 On 2 August 2016, at 13h30 (time of Rio de Janeiro), the hearing took place at the offices of the CAS Ad Hoc Division. The Panel was joined by Mr Brent J. Nowicki, Counsel to the CAS, and following persons also attended the hearing: for the Applicants, Ms Darina Nikitina and Yury Zaytsev, Counsel (both by telephone); for FISA, Mr Jean-Christophe Rolland, FISA President and Mr Matt Smith, FISA General Secretary (in-person); for the IOC, Messrs Howard Stupp, Director Legal Affairs, François Carrard and Nicolas Zbinden, Counsel (in-person).

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) *The Application filed by the Applicants is accepted;*
- 2) *The Challenged Decision of IOC Executive Board dated 24 July 2016, according to par. 3 of which 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, is nulled and void.*
- 3) *The Challenged decision of the FISA Executive Committee from 25 July 2016 must have undergone a minimum of three anti-doping tests analysed by a WADA accredited laboratory other than the Moscow laboratory and registered in ADAMS from 1 January 2015 for an 18 month period, is nulled and void;*

- 4) *The Applicants are entered for participation at the Rio 2016 Olympic regatta subject to they were qualified to the Rio 2016 Olympic Games and included into the list of participants by the ROC by the deadline of 18 July 2016;*
- 5) *The FISA is obliged to allow the Applicants to participate at the Rio 2016 Olympic regatta;*
- 6) *IOC shall accept entry of the Applicants in 2016 Rio Olympic Games;*
- 7) *The FISA shall bear all legal and other costs of the Applicants at the amount determined by the CAS Panel”.*

b. FISA’s Requests for Relief

4.3 FISA’s requests for relief are as follows:

*“... the appeals should be declared inadmissible to the extent they are directed against the FISA.
... the appeals should be rejected on the merits to the extent they are admissible”.*

c. IOC’s Requests for Relief

4.4 The IOC’s requests for relief are as follows:

“1. Dismiss the applications of Anastasia Karabelshikova and Ivan Podshivalov”.

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 (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 At the outset of the hearing, the Panel discussed with the Parties the fact that the IOC Decision and the FISA Statement were both rendered before the CAS Ad Hoc “window” opened, 10 days before the Opening Ceremony of the Rio Games. The Parties acknowledged that while theoretically there may be issues as to when the “dispute” arose, all Parties expressly waived any such issues and expressly confirmed that they wanted the Panel to treat the dispute as admissible and to proceed to render this Award.

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”.*
- 6.2 The Parties also referred in their submission to Swiss law regarding the legal position of a Swiss Association.
- 6.3 The Panel hereby confirms that 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.
- 6.4 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”.*

7 DISCUSSION

a. Position of the Applicants

- 7.1 In summary, the Applicants both had historic ADRVs that resulted in 2-year bans. The effect of the IOC Decision, which they allege had been implemented by the FISA Statement, was to sanction the Applicants again for the same ADRV. This is in breach of the legal principle *ne bis in idem* (no one shall be sanctioned twice because of the same offence), sometimes referred to as “double jeopardy”. The Applicants cited various CAS awards that collectively supported this position, including the “Osaka rule”. Additionally, they submitted that this new rule from the IOC had been applied retroactively, in breach of the legal principle *tempus regit actum*. There had also been breaches of procedural fairness by the Respondents, including a breach of their duty of good faith and providing the Applicants with a right to be heard.

b. Position of FISA

7.2 FISA submitted that it should not be a Respondent in this matter. The FISA Statement does not represent a decision at all, as it did not concern either of the Applicants. Rather, FISA noted the clear wording of paragraph 3 of the IOC Decision:

“The ROC is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping...”

7.3 This was directed at the ROC, not FISA. As such, FISA did not take any decision with regard to the Applicants, as it had noted that the ROC would not allow them to enter the Rio Games.

c. Position of the IOC

7.4 In its Reply the IOC first recalled the principles of autonomy applicable to any Swiss association such as the IOC. Then, the IOC argued that the "Osaka rule" was not applicable to the case at hand and, finally, the IOC explained why the principle of *ne bis in idem* was of no avail to the Applicants.

d. Considerations by the Panel

7.5 The issues before the Panel focused primarily upon the legality of paragraph 3 of the IOC Decision.

7.6 The Panel was grateful to the counsel of the Parties for attending the hearing at short notice and for their written submissions. This better enabled the Panel to understand the context in which and the circumstances that existed at the time the IOC Decision was taken.

7.7 The Panel noted that the timing of the McLaren Report put the IOC in an invidious position, so close to the Rio Games. As the IOC submitted, the McLaren Report revealed a State-organised doping scheme in Russia, involving the Deputy Minister of Sport, sample swapping during the Winter Olympic Games Sochi 2014 and falsification of analysis by the Moscow laboratory on the orders of the Deputy Minister of Sport.

7.8 The IOC faced calls from a significant part of the anti-doping community to ban all the ROC and all its athletes of any sport from competing at the Rio Games. The IOC decided not to do so. Instead, the Executive Board of the IOC decided to strike a balance between the collective responsibility, applying to Russian athletes in view of these exceptional circumstances, and the right of each athlete to have his/her case individually considered. The IOC Decision stated:

“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 the collective responsibility in his or her individual case”.

- 7.9 The IOC Decision went on to establish the criteria that any individual Russian athlete would need to meet in order to be eligible for the Rio Games. The criteria that is relevant for this matter was contained in paragraphs 2 and 3 of the IOC Decision.
- 7.10 The Panel notes that for any athlete that has attained the necessary sporting levels required for the Rio Games, he or she must first be deemed eligible to compete by their sport's International Federation; secondly, their countries Olympic Committee must then determine which eligible athletes to enter into the Games; and finally, the IOC will accept such athletes or not, pursuant to Rule 44.3 of the Olympic Charter. The criteria set at paragraph 2 of the IOC Decision was directed at the International Federations and the criteria at paragraph 3 of the IOC Decision was directed at the ROC alone.
- 7.11 The Panel has no doubts at all that the IOC acted in good faith and with the best of intentions when issuing such decision. The IOC confirmed that the aim of these criteria was to give an opportunity to those Russian athletes who were not implicated in the State-organised scheme to participate in the Rio Games.
- 7.12 The IOC noted that the IAAF had "*acted in an identical manner*" with respect to the Russian track and field athletes. The IAAF suspended the Russian Athletics Federation, which resulted in the IAAF Competition Rules being amended to include a new Rule 22.1 (A) on the eligibility of individual athletes, as follows:
- "1.A. Notwithstanding Rule 22.1 (a), upon application, the Council (or its delegate(s)) may exceptionally grant eligibility for some or all International Competitions, under conditions defined by the Council (or its delegate(s)), to an athlete whose National Federation is currently suspended by the IAAF, if (and only if) the athlete is able to demonstrate to the comfortable satisfaction of the Council that:*
- (a) the suspension of the National Federation was not due in any way to its failure to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport; or*
 - (b) if the suspension of the National Federation was due in any way to its failure to put in place adequate systems to protect and promote clean athletes, fair play, and the integrity and authenticity of the sport, (i) that failure does not affect or taint the athlete in any way because he was subject to other, fully adequate systems outside of the country of the National Federation for a sufficiently long period to provide substantial objective assurance of integrity and (ii) in particular the athlete has for such period been subject to fully compliant drug-testing in and out-of-competition equivalent in quality to the testing to which his competitors in the International Competition(s) in question are subject; or (c) that the athlete has made a truly exceptional contribution to the protection and promotion of clean athletes, fair play, and the integrity and authenticity of the sport".*
- 7.13 The Panel notes that the IAAF also sought to provide a set of rules that allow Russian athletes to demonstrate that they were outside of the State-organised system.
- 7.14 The IOC submitted that the criteria established by the IAAF was stricter than its own, as only 1 athlete had successfully been deemed eligible to participate at the Rio Games. The IOC also noted that the IAAF rules had been supported by a recent CAS decision.

- 7.15 This Panel notes all the IOC's submissions regarding its ability as a Swiss association to have significant autonomy to establish its own rules, including those in the IOC Decision, which it further notes has been accepted practically on a unanimous basis by its members.
- 7.16 Having noted the background to the IOC Decision, the Panel now examines its contents. The IOC Decision acts to deprive the Russian athletes of the presumption of innocence and rather establishes a presumption of guilt, but one that is rebuttable by the athletes on an individual basis. The Panel notes in particular the clear and correct references to the rules of natural justice. These rules act to limit the autonomy of the IOC, but such limitation was voluntarily adopted by the IOC itself. Paragraph 2 follows the introductory wording in the IOC Decision and establishes 5 bullet points of conditions that must be fulfilled, which, in the opinion of the Panel, further recognise the right of the individual athletes to natural justice.
- 7.17 Paragraph 3, on the other hand, contains simple, unqualified and absolute criterion. Any athlete that has convicted of a prior ADRV is not allowed by the IOC to be entered for the Rio Games. What strikes the Panel is that there is no recourse for such an athlete, no criteria that considers the promotion by the athlete of clean athletics (as the IAAF consider by way of an example) or any other criteria at all. The Panel struggles to reconcile this paragraph with the stated aim to provide the athletes with an opportunity to rebut the presumption of guilt and to recognise the right to natural justice.
- 7.18 While the IOC, as a Swiss association, has wide powers of rulemaking, it has itself in the IOC decision recognised that the rights of natural justice should be respected. The Panel also notes that, while the IOC submitted that the IAAF response resulting in Article 22, was identical, the IAAF rules have no blanket ban on previous dopers. In the determination of the Panel, this denial of the rules of natural justice renders paragraph 3 as unenforceable.
- 7.19 The Panel additionally was requested to address the issue as to whether paragraph 3 represents an eligibility rule (as the IOC contends) or an additional sanction on athletes that have already been sanctioned for an ADRV (as the Applicants contend). To do so, the Panel has noted the CAS jurisprudence referred to by the Parties.
- 7.20 The Panel notes the CAS panel's comments in *CAS 2011/O/2422* when considering the legal nature of such rules:
- "8.9 Other CAS jurisprudence has indicated that qualifying or eligibility rules are those that serve to facilitate the organization of an event and to ensure that the athlete meets the performance ability requirement for the type of competition in question. A CAS Panel noted in RFEC & Alejandro Valverde v. UCI (CAS 2007/O/1381 at paragraph 76) (hereinafter "Valverde case #1"), that a common point in qualifying (eligibility) rules is that they do not sanction undesirable behaviour by athletes. Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete. (See Valverde case #1 at paragraph 77). This same point is found in the IF Advisory Opinion.*
- 8.10 *In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behaviour on the part of the athlete. Such a rule, whose objective is to sanction the athlete's prior behaviour by barring participation in the event because of that behaviour,*

imposes a sanction. A ban on taking part in a competition can be one of the possible disciplinary measures sanctioning the breach of a rule of behaviour. The CAS first addressed the issue of whether the IOC can refuse entry into the Olympic Games to an athlete who has served an anti-doping rule related sanction in Prusis v. IOC. The Panel in Prusis said that the effect of refusing the athlete entry to the Games was to impose a further sanction on him for the same offense”.

- 7.21 It is worth noting that as stated in CAS 2011/A/2658, when examining the BOA’s By Law (that did not allow previous dopers to represent Great Britain at future Olympic Games) the panel noted *“The wording of the Bye-Law is of no real consequence. The Bye-Law must be examined in substance, rather than in form. Simply because the wording is not suggestive of a sanction does not mean that it is not a sanction as a matter of substance”* (para. 5.51). Further, the panel stated *“The effect of the Bye-Law is a bar on participation in the Games at the penultimate hurdle (selection to the team) in just the same way as the IOC Regulation was a bar on participation at the last hurdle (registration for the Games)”* (para. 5.62).
- 7.22 As such, the Panel sees no reason to depart from the line of CAS jurisprudence and determines that while it fully understands the exceptional circumstances that led the Executive Board to issue the IOC Decision, paragraph 3 results in an additional sanction. However this debate is largely moot, as the Panel finds that paragraph 3 does not respect the athletes’ right of natural justice. In conclusion, the Panel determines that paragraph 3 of the IOC Decision is unenforceable, as it does not respect the rules of natural justice.
- 7.23 The Panel now turns to the position of FISA. The Applicants’ prayers for relief against FISA are set out at paragraph 4.2 above, subparagraphs 3) and 5). The Panel notes that FISA did not apply paragraph 2 of the IOC Decision (in which it would have looked at the testing records of the Applicants over the prior 18 months, to see if these were not only clean, but that there were 3 such tests from bodies outside of Russia), rather it acknowledged the effect of paragraph 3 as it saw it, that, as the ROC would not enter these athletes to the Rio Games, there was no need or no point to apply paragraph 2. The Panel further notes the effect of paragraph 3; it prevented the Applicants being analysed by FISA in accordance with paragraph 2.
- 7.24 Further, the Panel notes that it is not in the domain of FISA to *“allow the Applicants to participate at the Rio 2016 Olympic regatta”*. Rather, after FISA determined eligibility, any athlete would still have to get passed the ROC and the IOC before entering the Rio Games.
- 7.25 As such, those prayers for relief are denied.
- 7.26 For the avoidance of doubt, the Panel supports the approach taken by the IOC at paragraph 2. As paragraph 3 is unenforceable, the Applicants should be considered by FISA pursuant to paragraph 2 of the IOC Decision to determine their eligibility or not without delay. The Panel recalls FISA’s statement at the hearing that it had all necessary information needed to make such a determination. Paragraph 3 should not then be applied by the ROC, as it is unenforceable and offends the rights of natural justice.

8 CONCLUSION

- 8.1 In view of the above considerations, the Applicants' application filed on 2 August 2016 shall be partially upheld and paragraph 3 of the IOC Executive Board's Decision dated 24 July 2016 is unenforceable.
- 8.2 All other prayers for relief are rejected.

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

1. The application filed by Anastasia Karabelshikova and Ivan Podshivalov on 2 August 2016 is partially upheld.
2. Paragraph 3 of the IOC Executive Board's Decision dated 24 July 2016 is unenforceable.
3. All other prayers for relief are rejected.