



Arbitration CAS ad hoc Division (OG Rio) 16/015 Tjipekapora Herunga v. Namibian National Olympic Committee (NNOC), award of 5 August 2016

Panel: Mrs Andrea Carska-Sheppard (Czech Republic), Sole Arbitrator

Athletics

Non-qualification of an athlete for the Olympic Games

Date when a dispute arises

The date when a dispute arises is in general – in fact in most cases – the date of the decision with which the applicant disagrees. Such a date can arise later, in some cases, if, for example, the decision is not self-explanatory and requires some explanation in order for the parties to know with certainty that they are in disagreement. However, evidence would be required to establish whether a later date than the date of the decision should apply.

1. PARTIES AND FACTS

- 1.1 This summary represents basic relevant facts to this case as submitted by the Applicant and the Namibian National Olympic Committee (“NNOC”).
- 1.2 The Applicant Ms. Herugna Tjipekapora is a Namibian female Track & Field athlete who competes in 400m Women event. She is represented in the present proceedings by her coach Mr. Letu Hamhola.
- 1.3 The Respondent is the Namibian National Olympic Committee (“NNOC”).
- 1.4 Athletics Namibia, the International Associations of Athletics Federations (“IAAF”) and the International Olympic Committee (“IOC”) were named by the Applicant as Interested Parties.
- 1.5 On 5 February 2015, the NNOC released the 2016 Rio Qualifications System and Entry Standards issued by the IAAF. The same day, the Respondent held a meeting with all national federations including Athletics Namibia at which all the qualifications criteria were discussed and agreed. Amongst others, it was required that in the case of Athletics and Swimming, the athletes would qualify in two events between September 2015 and June 2016. The amended Entry Standards (from 26 November 2015) for the 400m Women event required the Applicant to achieve a qualifying time of 52.20.
- 1.6 On 14 April 2016, the President of Athletics Namibia issued a Press Release entitled “*Clarification on Qualification and Entry For Athletics to the RIO 2016 Olympic Games*”. The Press Release mentioned the names of the athletes who already achieved qualifying times including the

Applicant along with the following results for the 400m Women event: 51.51 (14/09/2015 Brazzaville, R. Congo); 51.55 (15/09/2015 Brazzaville, R. Congo); 52.03 (09/04/2016 Kingston, Jamaica).

1.7 The Press Release also referred, *inter alia*, to the fact that the All Africa Games were sanctioned by the Area association and conducted according to the IAAF Rules; therefore, athletes who took part in the All Africa Games were supposed to qualify as well. Furthermore, Athletics Namibia confirmed in this Press Release that the matter around who qualifies and on what basis and which athletes are considered is a matter for the NOC. In other words, the decision related to the selection of the Namibian athletes for the Olympic Games was vested with the NNOC.

1.8 On 12 May 2016, the Secretary General of the NNOC stated in writing to Athletics Namibia:

“As you are aware the qualification criteria of the NNOC requires athletes in Athletics (Marathon excluded) and Swimming to reach the qualification standard set by the IFs twice in two different events. According to the records we have Ms. Herunga has not yet qualified.

The All Africa Games in Congo, Brazzaville was not a qualification event as confirmed by Mr. Kalkaba from the Africa Confederation of Athletics”.

1.9 To address the issue whether or not the All Africa Games which took place in Brazzaville in September 2015 were a qualifying event, on 18 May 2016, the President of the Confederation of African Athletes (“CAA”) issued the following clarification:

“[...] Coming back to your request please be advised that the All Africa Games of Brazzaville in 2015 were not qualifying for Rio 2016 in the CAA Regulations. However, all performances achieved there by our athletes are considered as valid as ratification condition were all met (anti-doping control, track certification, age control etc.).

Therefore, if the performance achieved in Brazzaville is free from all irregularity and is within qualification period set by the Olympic standards, so, it can be taken in consideration for Rio 2016”.

2 CAS PROCEEDINGS

2.1 The CAS Ad Hoc Division received the Applicant’s application on 2 August 2016 at 4:30 pm (time of Rio de Janeiro).

2.2 On the same day, the President of the CAS Ad Hoc Arbitration Division appointed Ms Andrea Carska-Sheppard as Sole Arbitrator and issued Procedural Directions asking the Applicant to (i) clarify the names of the Respondents and of the Interested Parties; and (ii) to specify the decision the Applicant is contesting and date of notification of the same. The Sole Arbitrator issued a deadline to the Respondent to submit a reply to the application, as well as to the Interested Parties to submit an *amicus curiae* brief by 4 August at 10:00 am (Rio de Janeiro time).

2.3 On 3 August, 2016 the Applicant confirmed that (i) the names of the Respondents and Interested Parties were correctly mentioned by the Court Office of the CAS Ad Hoc Division, (ii) provided further particulars on the claim, and (iii) confirmed that the date of notification of

the contested decision is 15 July 2016 when the list of athletes was sent by the NNOC to the IAAF.

- 2.4 On 4 August 2016 at 10:00 am (time of Rio de Janeiro), the Respondent filed a reply along with the exhibits.
- 2.5 On 4 August 2016 at 5.05 pm (time of Rio de Janeiro), Athletics Namibia filed an *amicus curiae* brief. Even if filed outside the delay, the Sole Arbitrator has decided to consider such submission.
- 2.6 The other Interested Parties did not file any *amicus curiae* brief.

3 PARTIES' SUBMISSIONS

a. Applicant's Submissions and Requests for Relief

- 3.1 The Applicant is challenging her exclusion from the Games of the XXXI Olympiad in Rio de Janeiro because the NNOC did not accept any of her qualifying times of 51.51 and 51.55 during the All Africa Games held in September 2015 as the NNOC claimed it was not a qualifying event.
- 3.2 The standards of the NNOC state that she must meet the standards twice and she has done it three times, twice in Republic of Congo and one time in Kingston, Jamaica. Being unjustly excluded is causing her psychological and emotional distress and she feels victimized.
- 3.3 The Applicant alleges that she only found out on 15 July 2016 that she was not selected for the Games of the XXXI Olympiad in Rio de Janeiro when her name did not appear on the letter from the NNOC to the IAAF listing the names of athletes who will participate at such Games.
- 3.4 The Secretary General of Athletics Namibia considered the Applicant's exclusion as unfair, unjust and contrary to the Fundamental Principles of Olympism. By the letter of 22 July 2016, he sought the IOC's intervention in order to allow the Applicant to participate at the Games of the XXXI Olympiad in Rio de Janeiro.
- 3.5 The Applicant's requests for relief are as follows:
 - 1) Permission for her and her coach to travel and to compete in Track & Field 400m Women Event;
 - 2) The urgent intervention by the CAS to stop the victimization of the Applicant which is causing her physiological and emotional distress.

b. Respondent's Submissions and Requests for Relief

- 3.6 According to the Respondent, as early as 3 March 2016, the Applicant was aware that the All Africa Games were not a qualifying event before she even received the letter of 15 July 2016. Therefore, the Applicant did not qualify for the Games of the XXXI Olympiad in Rio de Janeiro as she did not meet the compulsory criteria determined and conveyed to her by the NNOC.
- 3.7 The Respondent considers that it has treated all Namibian athletes in a fair and equal manner and that, therefore, Ms. Herunga did not qualify to represent Namibia at the Games of the XXXI Olympiad in Rio de Janeiro.
- 3.8 Even though not formally indicated, the Sole Arbitrator understands that the Respondent requests that the Applicant's application be rejected.

c. Athletics Namibia amicus curiae brief

- 3.9 Athletics Namibia indicates that it has never received any information from the NNOC that the All Africa Games were not a qualifying event after having received the Rio Olympic Qualification Guidelines of 5 February 2015.
- 3.10 Athletics Namibia obtained confirmation that qualifications attained at the All Africa Games are eligible for consideration for qualification purposes.
- 3.11 In view of the above, Athletics Namibia considers that there are no grounds not to accept the All Africa Games as a qualifying event and that the Applicant, together with other athletes in a similar situation, are victims of the same.

4 JURISDICTION AND ADMISSIBILITY

- 4.1 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".

- 4.2 In the view of the above, the Sole Arbitrator considers that the CAS Ad Hoc Division has jurisdiction to hear the present matter.
- 4.3 In addition to the above provision, 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” (emphasis added).

- 4.4 The Opening Ceremony of the Games of the XXXI Olympiad in Rio de Janeiro is scheduled for 5 August 2016. In accordance with Article 1 of the CAS Ad Hoc Rules, the dispute should therefore have arisen on or after 26 July 2016. As confirmed by the Applicant, the challenged decision was notified to her on 15 July 2016.
- 4.5 The Sole Arbitrator therefore finds that the dispute arose well before the time limit of ten days prior to the Opening Ceremony of the Games of the XXXI Olympiad in Rio de Janeiro.
- 4.6 Indeed, as recalled in previous CAS jurisprudence, *“the date when a dispute arises is in general – in fact in most cases – the date of the decision with which the Applicant disagrees (...). Such a date can arise later, in some cases, if, for example, the decision is not self-explanatory and requires some explanation in order for the Parties to know with certainty that they are in disagreement. Evidence would be required to establish whether a later date than the date of the decision should apply”* (CAS OG 14/003, para. 5.28). It is the Sole Arbitrator’s analysis that, even adopting the most favourable analysis for the Applicant, in the present case, the dispute arose no later than when the Applicant found out on 15 July 2016 that her name did not appear on the letter from the NNOC to the IAAF listing the names of athletes who would participate at the Games of the XXXI Olympiad in Rio de Janeiro.
- 4.7 As such, in accordance with Article 1 of the CAS Ad Hoc Rules, the Applicant’s application must be considered as being inadmissible.
- 4.8 Notwithstanding the above, the Sole Arbitrator considers that, even if the application was deemed admissible, it would have been dismissed on the merits.
- 4.9 The statement in the Press Release from Athletics Namibia according to which it is for the NOC to nominate the athletes to the Olympic Games is correct. The Olympic Charter on the Mission and Role of the NOCs provides in Article 27.7.2 that NOCs have the right to *“[...] send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter. [...]”*.
- 4.10 It is also established by the Olympic Charter, at Rule 44.3, that *“nobody is entitled to any right of any kind to participate in the Olympic Games”* and, at Rule 44.2, that *“[o]nly NOCs recognized by the IOC may submit entries for competitors in the Olympic Games”*. The principle that only the NOCs have the right to enter the competitors to the Olympic Games is not only entrenched in the Olympic

Charter, it has been followed by the jurisprudence of this Court and its Ad-Hoc Divisions. In the case OG 08/003, the Panel held that “[i]t is not in issue that it is for an NOC to select its competitors for the Olympics. No other body or person within a member country has that right” (para. 9). This principle was confirmed in case OG 14/001 (para. 7.5).

4.11 Rule 44.4 of the Olympic Charter provides that: “[a]n 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. The OCOG must acknowledge their receipt. 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”. The Appellant does not allege that the Respondent discriminated against her “for racial, religious or political reasons or by reason of other forms of discrimination”, but only that she met the criteria twice during an event that the NNOC claims was not a qualifying event. Although there might have been some confusion as to whether or not the All Africa Games were a qualifying event, which prompted various sporting authorities to issue clarifications, this confusion impacted all athletes equally. There is no evidence in the file showing that the Applicant was singled out and treated in a discriminatory manner as regards the information that was given to her in relation to the qualifying events.

4.12 As a result and as stated above, the Application would also have failed on its merits.

The Ad Hoc Division of the Court of Arbitration for Sport rules that:

The application filed by Tjipekapora Herunga on 2 August, 2016 is inadmissible.