



**Arbitration CAS ad hoc Division (OG Rio) 16/018 Kiril Sveshnikov, Dmitry Sokolov & Dmitry Strakhov v. Union Cycliste Internationale (UCI), award of 8 August 2016 (operative part of 5 August 2016)**

Panel: Justice Catherine Anne Davani (Papua New Guinea), President; Prof. Ulrich Haas (Germany); Mr Mohammed Abdel Raouf (Egypt)

*Cycling*

*Decision to declare athletes ineligible to compete at the Olympic Games*

*Consequences of the withdrawal of the application against a party*

*Notion of appealable decision*

*Standing to appeal*

1. If an applicant has properly withdrawn its action against a party, the latter is not a respondent anymore but only an interested party in the proceedings.
2. The term “decision”, as defined in CAS jurisprudence and Swiss law, is that it must “*contain a ruling*” of some kind. It covers all declarations by any organ of the association that produces legal consequences.
3. Only an aggrieved party, having something at stake and, thus, a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against a decision. It is only where a party does not have a cause of action or legal interest to act against the appealed decision that such party would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing. If the applicant, because it has withdrawn its action against the party that had taken the only decision that aggrieved it, now only challenges a decision that is not affecting its legal position and therefore is not an appealable decision, it lacks standing to sue.

**1. PARTIES**

- 1.1 The First Applicant is Mr. Kirill Sveshnikov (“Mr. Sveshnikov”), a road racing cyclist from Russia.
- 1.2 The Second Applicant is Mr. Dmitry Sokolov (“Mr. Sokolov”), a road racing cyclist from Russia.
- 1.3 The Third Applicant is Mr. Dmitry Strakhov (“Mr. Strakhov”), a road racing cyclist from Russia.

- 1.4 The First, Second and Third Applicants are hereinafter collectively referred to as the (“Applicants”).
- 1.5 The Respondent is the Union Cycliste Internationale or International Cycling Union (“UCI”), based in Aigle, Switzerland, the organisation responsible for the sport of cycling.
- 1.6 The First Interested Party is the International Olympic Committee (“IOC”), based in Lausanne, Switzerland, the organisation responsible for the Olympic Movement.
- 1.7 The Second Interested Party is the Russian Olympic Committee (“ROC”), based in Moscow, Russia.
- 1.8 The Third Interested Party is the World Anti-Doping Agency (“WADA”), having its legal seat in Switzerland and headquartered in Montreal (Quebec), Canada.
- 1.9 The Fourth Interested Party is Professor Richard H. McLaren (“Prof. McLaren”).

## 2 FACTS

- 2.1 The elements set out below are a summary of the 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 18 July 2016, WADA’s Independent Person (“IP”), Prof. McLaren, published on the WADA website its official independent report (the “McLaren Report” or the “IP Report”) describing a fraudulent, government directed scheme to protect Russian athletes from ADRVs, including with respect to disqualification during the Sochi Winter Games.
- 2.3 On 22 July 2016, The UCI received correspondence from WADA attaching information from the IP Report that related specifically to the UCI.
- 2.4 On 24 July 2016, the IOC Executive Board issued a decision setting forth criteria (the “IOC Criteria”) for the participation of Russian athletes in the Rio Games, which reads as follows (points 2 and 3 only):
  - “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 the 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”.*
- 2.5 On 25 July 2016, the IOC sent an email to the UCI referring to the IOC Criteria and setting out the list of cyclists provisionally entered by Russia for the Rio 2016 Olympic Games. The IOC requested the UCI to confirm its position on the eligibility of each of the athletes on the list including *“confirmation that no implicated athletes, officials or NFs will be accepted for entry or accreditation at Rio 2016”.*
- 2.6 On 27 July 2016, the UCI responded to the IOC by confirming that, under the UCI Constitution and Regulations, all riders on the provisional list would be eligible to participate in the 2016 Olympic Games.
- 2.7 On 28 July 2016, the UCI issued the following statement (the “UCI Statement”):
- [...].*
- Following the publication of the McLaren Investigation Report, the UCI immediately sought information from the World Anti-Doping Agency (WADA) related to the sport of cycling and was informed that three riders named by the Russian Olympic Committee (ROC) to compete in Rio 2016 were potentially implicated. The UCI, through the Cycling Anti-Doping Foundation (CADF), is in the process of identifying relevant rider samples and is in close dialogue with WADA to move forward with these cases immediately. It has also passed the names of these three athletes to the IOC in the context of its Executive Board decision.*
- Three other riders who have previously been sanctioned for Anti-Doping Rule Violations have been withdrawn by the ROC.*
- In addition, the CADF has carried out a careful assessment on the other 11 riders named by the ROC to participate in Rio 2016 cycling events. After thorough analysis of the testing history of these riders and considering the scrutiny currently being applied to all of them, the UCI and CADF believe that this is sufficient for these athletes to meet the relevant requirement of the decision of the IOC Executive Board.*
- The examination has purposely not considered tests conducted by the Russian Anti-Doping Agency (RUSADA). Furthermore, it is also important to stress that since the publication of the Independent Commission Report in November 2015, the UCI requested that the CADF intensify testing of Russian cyclists – and this level of heightened testing will continue before, during and after Rio 2016.*
- [...].*
- 2.8 On 1 August 2016, the Russian Cycling Federation (the “RCF”) and Mr. Alexander Kuznetsov, the coach of certain Russian riders, requested the UCI and the IOC to provide them with the

names of the athletes implicated in the IP Report and to provide details of the violations and evidence against these riders.

2.9 On 2 August 2016, the UCI responded to the RCF that it had passed on the names of the implicated riders to the IOC and to no-one else as it had received such names for the purpose of confirming them to the IOC and on a “litigation privileged” basis. The UCI also confirmed that the IOC had received the information and that the IOC would liaise with the independent CAS arbitrator and confirm the eligibility of each of the Russian athletes on the ROC shortlist.

2.10 On 2 August 2016, the IOC sent a letter to the Presidents and Secretaries General of Summer IFs including the UCI clarifying the meaning of the notion “implicated” in the IOC Criteria. The IOC encouraged *“all International Federations to review as a matter of urgency their lists of eligible persons taking into account the present notice”*.

2.11 On 3 August 2016, the UCI responded to the IOC’s letter as follows:

*“On 27 July the UCI provided you with a comprehensive reply to your request following your Executive Board decision on 24 July.*

*That reply contained our confirmation that all riders named under the list submitted by you on 25 July 2016, would be eligible to participate in the Rio 2016 Olympic Games under the UCI Constitution and Regulations.*

*In that letter of 27 July we also sent you a copy of all the information we received from Prof McLaren through WADA about any athletes mentioned in the WADA IP Report. The UCI has no further information in this regard and we take it that you will be in a position to determine whether the three riders on McLaren List fall within your new definition of “implicated” described in your recent letter.*

*These riders are eligible under the UCI Regulations to participate in the Rio 2016 Olympic Games as the information provided so far by Prof. McLaren is not sufficient to instigate disciplinary proceedings or impose provisional suspensions under the UCI Anti-Doping Rules.*

*[...]”*.

2.12 On 3 August 2016, the IOC sent a letter to the UCI indicating that, in accordance with the IOC Criteria, the IOC Executive Board has subsequently delegated the final review of entries of Russian athletes to a Review Panel composed of three IOC Executive Board members operating in the light of point 4 of the IOC Criteria. The same letter included the IOC’s decision regarding the eligibility of the Applicants for the Rio 2016 Olympic Games (the “IOC Decision”), as follows:

*“Following the completion of this process, including the review of the UCI proposal by an expert from the CAS list of arbitrators, the Review Panel confirmed the eligibility of the 11 Russian athletes and 2 reserve athletes specified in your letter of 27 July and subsequent correspondence.*

*However, the three athletes Dmitri Sokolov, Dmitri Strakhov and Kirill Sveshnikov do not meet the criteria set by the IOC Executive Board and are therefore not deemed eligible for entry in the Olympic Games Rio 2016 and therefore we request for UCI to reallocate the quota places next best ranked NOC according to your qualification system.*

*Please note that the IOC will inform the Russian Olympic Committee and Rio 2016 for implementation and finalisation of entries”.*

### **3 CAS PROCEEDINGS**

- 3.1 On 3 August 2016 at 12:50 (time of Rio de Janeiro), the Applicants filed their application with the CAS Ad Hoc Division against the IOC and the UCI (CAS OG 16/018). The Applicants also named as interested parties the ROC, the WADA and Prof. McLaren.
- 3.2 At 16:00 (time of Rio de Janeiro), the Court Office of the CAS Ad Hoc Division informed the Applicants of receipt of the application.
- 3.3 On the same day at 18:45 pm (time of Rio de Janeiro), the Applicants through their counsel, by email to the CAS ad hoc Division, stated that they *“do not consider the IOC as one of the respondents anymore in this case. As stated above, this was just a legal formality, since the applicants has never called in question the IOC’s firm determination to protect the integrity of sport and to fight against doping. The key decision which is the real basis for the athletes’ non-eligibility for Rio is the UCI’s decision (interpreting and applying the IOC criteria in an extremely wrong and severe way). The Applicants, as is seems clear from their applications, intended to: - rebut the presumptions of guilt on their particular part, - challenge the UCI’s decision by which the IOC’s criteria were applied in a wrong way in direct violation of the Olympic Charter and the WADA Code; and – be declared eligible for the Rio Olympics”.*
- 3.4 On 4 August 2016, the UCI filed its submission.
- 3.5 On 5 August 2016, WADA submitted its *amicus curiae* brief.
- 3.6 On the same day at 12:00 (time of Rio de Janeiro), the Parties and the Interested Parties were informed that the President of the CAS Ad Hoc Division had decided that the two procedures shall be submitted to a Panel of arbitrators constituted as follows: Justice Catherine Davani (President); Mr Mohamed Abdel Raouf and Mr Ulrich Haas (arbitrators).
- 3.7 On the same day, the CAS Court Office sent an email to the Applicants and informed them that: *“The CAS ad hoc Division is in possession of the Answer from Respondent. Having perused the Answer, the Applicants are invited to indicate whether they wish to proceed with the case and must do so before 13:00 (Rio time). Within the same deadline, the IOC is invited to inform the CAS about the status of the Applicants. Furthermore, in view of the fact that the competition starts tomorrow, in the absence of an express withdrawal of the application or in case there is no answer from the IOC within the given deadline, the Panel shall proceed and render an award”.*
- 3.8 By email of the same day, the IOC filed a statement, stating that: *“the IOC understands that it is no longer a party in this arbitration. The email sent by the IOC therefore cannot be considered as its “Answer”. This notwithstanding, as an interested party, the IOC files the present an Amicus Brief”.*

- 3.9 By another email of the same day, the IOC informed the CAS Court Office that “*the Applicants were not deemed eligible for entry in the Olympic Games Rio 2016*” (emphasis in the IOC’s email referred to herein).
- 3.10 By email of the same day, the Applicants contested the declarations contained in the WADA *amicus curiae* and the Affidavit by Prof. McLaren attached to it. However, the email did not alter the Applicants’ prayers for relief.
- 3.11 By email of the same day, at 16:58 (time of Rio de Janeiro), the Panel issued the operative part of the award and informed the Applicants as follows: “*The Panel acknowledges receipt of the Applicants’ last submission (enclosed). In view of the fact that the Applicants did not amend their requests for relief against the IOC, the Panel has issued the attached Operative Part of the award for this case. The full award, with the grounds for the Panel’s decision, will be notified as soon as possible*”.

#### **4 PARTIES’ REQUESTS FOR RELIEF**

- 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 Applicants requests for relief as contained in the Application dated 3 August 2016, read as follows:

*“on the preliminary basis:*

- *to order the UCI to produce the documents containing the names of these three still unknown riders and the concrete allegations against them (see page 5 of this Application).*

*on the merits:*

1. *This application is allowed.*
2. *The IOC Executive Board decision of 24 July 2016 ... setting the new criteria for the Russian athletes to satisfy for the acceptance of their entries to the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016, is invalid and unenforceable.;*
3. *The UCI decision of 28 July 2016 and the relevant actions leading to the Applicants’ ineligibility for participation in the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016 shall be set aside and declared unenforceable.*
4. *The Applicants shall be declared eligible to participate in the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016.*
5. *The IOC is obliged to accept the entry of the Applicants submitted by the ROC to compete in the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016”.*

**b. UCI's Request for Relief**

4.3 The UCI's requests for relief are as follows:

- (i) Rejecting the Applicants' request for document production from the UCI.*
- (ii) Confirming that the UCI did not take any decision declaring the Applicants to be ineligible for the 2016 Rio Olympic Games.*
- (iii) Confirming that the UCI correctly held that the Applicants were eligible under the UCI Regulations.*
- (iv) Dismissing the Applicants' application and all prayers for relief".*

**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 The present dispute deals with an appeal against a decision allegedly issued by the UCI against the Applicants. This dispute is covered by the above arbitration clause. Furthermore, the Panel notes that the jurisdiction of the CAS has not been contested by any of the parties. Consequently, CAS has jurisdiction over the present matter.

5.3 In addition to the above provision, Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter referred to as 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".*

5.4 The Applicants submit that UCI took a decision affecting them on 28 July 2016. The alleged decision by the UCI was challenged by the Applicants on 3 August 2016, when they filed their Application with the Ad Hoc Decision of the CAS. Consequently, the prerequisites of Article 1 of the Ad Hoc Rules are equally met and the proceedings are governed by the Ad Hoc Rules.

## 6 APPLICABLE LAW

- 6.1 Under Article 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*”.
- 6.2 The Panel notes that the “applicable regulations” to the merits in the case at hand are the eligibility criteria issued by the IOC Criteria and the UCI rules and regulations. Furthermore, the Panel will take – subsidiarily – recourse to Swiss law, since both the UCI, the IOC and at least one of the Interested Parties, i.e. WADA, have their seat in Switzerland.

## 7 DISCUSSION

### a. *Legal framework*

- 7.1 These proceedings are governed by the 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 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 Ad Hoc Rules.
- 7.2 According to Article 16 of the Ad Hoc Rules, the Panel has “*full power to establish the facts on which the application is based*”.

### b. *The withdrawal of the application against the IOC*

- 7.3 In their original applications the Applicants challenged not only the UCI Statement, but also the IOC Criteria and the IOC Decision. By letter dated 3 August 2016, the Applicants amended their prayers for relief. In their letter, the Applicants stated that “*taking into account the IOC’s position stated on its circular letter of 2 August 2016, [they] ... do not consider the IOC as one of the respondents anymore in this case ... The key decision which is the real legal basis for the athletes’ non-eligibility for Rio is the UCI’s decision (interpreting and applying the IOC criteria in an extremely wrong and severe way)*”.
- 7.4 Neither UCI nor IOC objected to or raised issue with this amendment. The Applicants, following the response submitted by the UCI and the IOC, were invited by email dated 5 August 2016 by the CAS Court Office to state whether or not they intended to proceed with the case, solely against the UCI. The Applicants were given a deadline to comment until 13:00 (Rio time). No comments were received. A second time limit was accorded to the Applicants until 16:30. Again, the Applicants did not alter their requests for relief. It is on this basis that the Panel finds that the Applicants have properly withdrawn their action against the IOC. Therefore, the IOC is deemed only to be an interested party in these proceedings.

**c. No appealable decision**

7.5 In accordance with Swiss law, any member is entitled to challenge a decision of an association (Article 75 of the Swiss Civil Code, hereinafter “SCC”). The UCI is an association within the meaning of Article 60 et seq. SCC. The term “member” is generally construed widely and covers every person bound by the rules and regulations of an association. Also, according to Swiss law, the term “decision” within the meaning of Article 75 SCC is construed widely. It covers all declarations by any organ of the association that produces legal consequences. This definition is also in line with the constant jurisprudence of the CAS. The term “Decision”, as defined in CAS Jurisprudence and Swiss Law, is that it must “*contain a ruling*” of some kind (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, Article R47 no. 13 et seq.; CAS 2014/A/3744 & 3766). In that decision at para. 192, the Panel held in relation to the term and meaning of “Decision” that: “*The Panel is of the opinion that the Second Challenged Letter did not constitute a decision because it did not contain a ruling affecting the rights of the Appellant*”. In the matter now before us, the UCI Statement must be a “Decision” falling within the definition of a Decision before the Applicants can even challenge it.

7.6 Additionally, according to Swiss law, only a member who has not participated in the decision-making process has standing to appeal the decision, if he or she is adversely affected by the said decision (BK-ZGB/RIEMER, 1990, Art. 75 SCC no. 20). This is also in line with constant CAS jurisprudence. In CAS 2014/A/3744 & 3766 (para 175) the Panel held as follows:

*“According to well-established CAS jurisprudence, the Appellant must have standing to appeal in order for the Panel to hear its dispute. In analysing whether the Appellant has standing to appeal, the Panel must determine whether the Appellant has shown that it has sufficient legal interest in the matter being appealed (CAS 2008/A/1674, order of 12 December 2008, at para. 12 et seq.). Indeed, only an aggrieved party, having something at stake and, thus, a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against a decision (CAS 2009/A/1880-1881, award of 1 June 2010, at para. 29). It is only where a party does “not have a cause of action or legal interest (‘intérêt à agir’) to act against the Appealed Decision [that such party] would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing (‘pas intérêt, pas d’action’) (Idem at para. 28 et seq.)”.*

7.7 Indeed, in this case, the Panel finds that the Applicants have no such standing to appeal, because the only decision taken by the UCI in respect of the Applicants and communicated to the IOC on 3 August 2016 stated – *inter alia* – as follows:

*“On 27 July the UCI provided you with a comprehensive reply to your request .... These riders [Kirill Sveshnikov, Dmitry Sokolov and Dmitry Strakhov] are eligible under the UCI Regulations to participate in the RIO 2016 Olympic Games as the information provided so far by Prof. McLaren is not sufficient to instigate disciplinary proceedings or impose provisional suspensions under the UCI Anti-Doping Rules”.*

7.8 It follows from the above, that the UCI did not take any decision that adversely affected the legal position of the Applicants. The only decision taken that aggrieved the Applicants was the

IOC Decision, which explicitly stated that “*the three athletes Dmitrii Sokolov, Dmitrii Strakhov and Kirill Sveshnikov do not meet the criteria set by the IOC Executive Committee Board and are therefore not deemed eligible for entry in the Olympic Games Rio 2016 and therefore we request for UCI to reallocate the quota places next best ranked NOC according to your qualification system*”. It was, thus, the IOC and not the UCI that excluded the Applicants from the participation in the RIO 2016 Olympic Games. It is apparent that the Applicants are aggrieved by the IOC Decision and not the UCI Statement. The Applicants cannot maintain an appeal against a decision made by the IOC, when it is not a party to these proceedings. According to the jurisprudence issued by the Swiss Federal Tribunal (ATF 128 11 50, 55) the prerequisite of the standing to sue is to be treated as an issue of merits and not as a question in relation to the admissibility of the appeal (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, 2015, p. 411). However, upon a matter being deemed inadmissible, it follows that the whole claim must be dismissed. The position taken by the Panel in this case is that the Appeal or application must be dismissed because the Applicants lack standing to sue, as demonstrated above.

**d. Reliefs sought**

- 7.9 It is appropriate that we address the Reliefs sought by the applicant and rule on their outcome. Because the IOC is no longer a party to these proceedings, the reliefs sought are obviously affected. Relief 1 is rendered nugatory and is now moot because the Applicants have been named in Prof McLarens affidavit, which is before us in evidence. Relief 2 is rendered nugatory because the IOC is no longer a party to these proceedings.
- 7.10 Reliefs 3, 4 and 5 are consequential orders which the CAS Ad Hoc Panel does not need to make under the circumstances, the IOC not being a party to the proceedings following the Applicants’ withdrawal, and the relief sought against the UCI being moot.
- 7.11 In relation to the reliefs sought by the UCI, it is now not necessary to consider these, in view of all the above.

**8 CONCLUSION**

- 8.1 In view of all the above, the Panel finds that the appeal must be dismissed.

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

The application filed by Kirill Sveshnikov, Dmitry Sokolov and Dmitry Strakhov on 3 August 2016 is dismissed.