



Arbitration CAS ad hoc Division (OG Rio) 16/026 Carvin Nkanata v. International Olympic Committee (IOC), award of 18 August 2016 (operative part of 14 August 2016)

Panel: Justice Catherine Anne Davani (Papua New Guinea), President; Mr José Juan Pinto (Spain); Mrs Rabab Yasseen (Iraq)

Athletics (sprint)

Denial of access to the Olympic Village

Form of the decision

Power of the IOC to take a decision regarding Art. 52.2 of the Olympic Charter

Link between the nationality of the athlete and the eligibility to hold an accreditation

1. The form of communication has no relevance to determine whether there exists a decision or not. It is qualified as a decision if it contains a ruling intended to affect the legal state of the addressee of the decision or other parties. The relevant criterion is not the form of the communication but its content.
2. With regard of article 52.2 of the Olympic Charter according to which *“the Olympic Identity and Accreditation Card is delivered, under the authority of the IOC, to persons eligible for accreditation. It gives access, to the degree necessary and as indicated thereon, to the sites, venues and events placed under the responsibility of the OCOG. The IOC Executive Board determines the persons entitled to such cards and the conditions applicable to their delivery”*, the IOC is acting well within its rights to deliver any decision in this respect and is not usurping the decision making process otherwise delegated to the IFs and the NOCs embodied in the Charter.
3. Article 41 and article 52 of the Olympic Charter must be read together to demonstrate the eligibility to hold an accreditation. In particular, the interpretation of article 52 cannot ignore the requirement of article 41 that *“any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor”*. Article 52.1 further provides that *“... together with a passport or other official travel documents of the holder, the Olympic Identity and Accreditation Card authorises entry into the country of the host city”*, thus operating as a visa waiver to enter the country.

1. PARTIES

- 1.1 The Applicant is Mr. Carvin Nkanata, a male 200 metre sprinter from the United States of America, to be referred to herein as the Applicant.

- 1.2 The Respondent is the International Olympic Committee based in Lausanne, Switzerland, the organisation responsible for the Olympic movement, to be referred to herein as the IOC.
- 1.3 The First Interested party is the International Association of Athletics Federation based in Monaco, the organisation responsible for the sport of Athletics, to be referred to herein as the IAAF.
- 1.4 The Second Interested Party is the National Olympic Committee Kenya based in Nairobi, Kenya, to be referred to herein as the NOCK.

2. FACTS

- 2.1 We set out below the facts that also serve as a chronology of the events that took place prior to and after the Applicant's arrival at the Olympic Games Village, Rio de Janeiro ("OGV"). We will refer to and discuss the contentious and disputed facts and the Articles in the Charter that are raised by the Applicant, under the part "Analysis of submissions by all parties". We also point out the fact that the proceedings were conducted by telephone for the Applicant's benefit because he is based in the United States of America. We also state for the record that even though the IAAF was informed of the date and time of the hearing, it chose not to appear. It also indicated halfway through the hearing, that it could give evidence by telephone, however, technically, that would not have been possible. The panel was also of the view that by then, it was not necessary to hear evidence from the IAAF.
- 2.2 The Applicant is a male, 200 metre sprinter. He holds citizenship from the United States of America ("US citizenship") having been born in the United States of America on 6th May, 1991, from a Kenyan born father.
- 2.3 The Applicant states in his application that on 5 August, 2016, before entering the OGV, "... *the IOC arbitrarily demanded... that he produce a Kenyan passport on the spot when he approached the entrance of the OGV*". He could not produce such a passport because he did not have one.
- 2.4 Indeed, an application for Kenyan citizenship was lodged on 4 July 2016, to which the Applicant received a document acknowledging receipt. This document which is exhibit "7" before us is titled "REPUBLIC OF KENYA – THE REGISTRATION OF PERSONS ACT (CAP 107) – APPLICATION FOR REGISTRATION ACKNOWLEDGEMENT". At the bottom of the page, this document reads: "*Note: this acknowledgement is not an identity card*". We refer to this document as the "Acknowledgement".
- 2.5 The Applicant claims that he was issued a Kenyan identification card bearing number 348.383.360, such number having been conveyed to him by his uncle in Kenya, before he left the United States for the Rio games, but was not received by him before he left. He told the hearing that the identity document would be mailed to his father's village in Kenya.

- 2.6 He was able to enter Brazil using his United States passport and the NOCK's Olympic Identity & Accreditation Card (the "Accreditation Card").
- 2.7 The Applicant further states in his application that, after being refused entry to the OGV on 5 August, 2016, that on 8 August 2016, the IOC announced and maintained its refusal and prohibited the Applicant's entry into the OGV (the "Decision"). It stated that its decision was final. On the same day, the Applicant returned to the United States.

3. CAS PROCEEDINGS

- 3.1 On 14th August, 2016, at 08.30 am (time of Rio de Janeiro), the Applicant filed his application at the CAS ad hoc Division, against the IOC. The Application named the IAAF and the NOCK as Interested Parties.
- 3.2. A Panel of arbitrators was appointed on 14th August 2016, composed of Justice Catherine-Anne Davani (President), José Juan Pintó and Rabab Yasseen. The composition of the Panel was communicated to the parties on the same day at 11.35 am (time of Rio de Janeiro).
- 3.3 By email of the same date, sent at 11.35 am (time of Rio de Janeiro) to all the named parties, the CAS ad hoc Division enclosed the Procedural Directions and Summons to Appear ("Procedural Directions") before the CAS Panel. It informed the parties that the hearing was scheduled to proceed at 16.00 pm (time of Rio de Janeiro). The Procedural Directions also requested that all the parties appear and produce any witnesses or evidence at the hearing after which the Panel would issue a final decision. The email also informed the IOC that it had until 15.00 pm (time of Rio de Janeiro), on the same date, to file its Reply.
- 3.4 The IOC responded by email of the same date to the CAS ad hoc Division, which received it at 14.56 pm (time of Rio de Janeiro). All parties were copied. The email stated, amongst others, that the Applicant had not provided clear proof that he was a national of Kenya; and that pursuant to Rule 41.1 of the Charter, "*any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor*", and that therefore, the IOC requested that the CAS dismiss the application.

4. THE 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 as contained in the Application, read as follows:

“The Competitor seeks:

- (a) *the CAS Ad Hoc Panel’s immediate repudiation of the IOC’s August 8, 2016 denial of his admission to the Olympic Village, including as may be necessary, a Stay on the IOC’s actions in disregard of its Charter in this particular case; and*
- (b) *the declaratory confirmation of his place in the heats of the men’s 200-Meter Dash, scheduled for August 16, 2016 and all other activities and privileges bestowed upon members of the Kenya Olympic Team.*

8. Application for a stay of the execution of the decision challenged

(...) The Competitor seeks a Stay of the IOC denial of his admission to the Olympic Village and to his event due to the fact that the event is scheduled for Tuesday, August 16, 2016 and without the intervention of the CAS, he will be unable to participate in the Olympic Games.

9. Application for other extremely urgent preliminary relief

(...) Please refer to the foregoing Legal Argument. The Applicant states that he has exhausted his administrative and other opportunities to redress the decision of the IOC given the time constraints of the ongoing Olympic Games and that further appeals to the IOC or the LAAF or the NOCK would render the instant appeal right ineffective. No referral pursuant to Article 20(a) of the CAS Arbitration Rules for the Olympic Games is requested”.

b. IOC’s Request for Relief

- 4.3 The IOC’s request for relief, as contained in its brief emailed Reply dated 14th August, 2016, is that the Applicants application must be dismissed.

5. JURISDICTION AND RULES APPLICABLE TO THE PROCEEDINGS

- 5.1 Article 61.2 of the Olympic Charter provides as follows:

“61. Dispute Resolution

[...]

61.2 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 appeal challenges a decision issued by the IOC on 8th August, 2016, when it refused entry by the Applicant to the OGV. Indeed, the decision of the 8th August 2016, by which the Applicant is aggrieved, is a “dispute” falling within the ambit of Article 61.2, above. Additionally, neither the IOC nor the interested parties, challenge the aspect of the CAS’s jurisdiction in this matter.

- 5.3 Article 1 of the CAS Arbitration Rules for the Olympic Games, to be referred to herein as the Ad Hoc Rules, reads 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 decision by which the Applicant is aggrieved is that of the IOC dated 8th August, 2016. The Applicant filed the Application on 14th August, 2016. Indeed, the dispute meets the requirements set in Article 1, above. No doubt, the proceedings are governed by the Ad Hoc Rules.

6. APPLICABLE LAW

- 6.1 Article 17 of the Ad Hoc Rules provides for how a panel can decide a dispute, which generally is that a panel must decide the dispute before it and rule on it *“... 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 in this case will consider and consult certain provisions of the Olympic Charter. If necessary, the Panel will also have recourse to Swiss Law, considering the IOC has its seat in Switzerland.

7. ANALYSIS OF SUBMISSIONS BY ALL PARTIES

a. Legal framework

- 7.1 These proceedings are governed by the Ad Hoc Rules, passed by the International Council of Arbitration for Sport (“ICAS”), on 14 October, 2003. Chapter 12 of The Swiss Private International Law Act of 18 December, 1987 (the “PIL ACT”) also governs these proceedings. 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 together with the fact that, in accordance with the Ad Hoc Rules, Lausanne, Switzerland, is the seat of the Ad Hoc division and of each Panel (see Article 7 of the Ad Hoc Rules).

7.2 In accordance with Article 16 of the Ad Hoc Rules, the Panel “... *shall have full power to establish the facts on which the application is based*”.

b. *Decision being appealed*

7.3 The decision being appealed is a verbal decision. We say verbal because according to the Applicant and which is not contested by the IOC, no written advice was sent to the Applicant to confirm the decision of 8th August 2016. Although the Applicant has not challenged the form of the Decision, he is very dissatisfied with the manner in which the Decision was conveyed to him, stating in his Application that:

“... there was no written decision issued by the IOC, simply an oral pronouncement of the decision to deny the Applicant access to the Olympic Village and his event”.

7.4 Regarding the form of the decision, it is immaterial what form the decision takes. It is qualified as a decision “... *if it contains a ruling intended to affect the legal state of the addressee of the decision or other parties The relevant criterion is not the form of the communication but its content*” (see MAVROMATI & REEB, *The Code of the Court of Arbitration for Sport – Commentary, Cases and Materials*, par.13 & 14, p. 384; CAS 2012/A/2750). The form of communication has no relevance to determine whether there exists a decision or not (see CAS 2012/A/2750).

c. *Articles 41 and 52 of the Charter*

7.5 The Applicant raises and relies in his submissions, on Articles 41 and 52 of the Charter. Before embarking on an analysis of submissions by all parties, it is appropriate that we set out below, Articles 41 and 52 of the Charter. They read as follows:

“41 Nationality of competitors

- 1. Any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor.*
- 2. All matters relating to the determination of the country which a competitor may represent in the Olympic Games shall be resolved by the IOC Executive Board.*

52 Olympic Identity and Accreditation Card – Rights attached thereto

- 1. The Olympic Identity and Accreditation Card is a document which establishes the identity of its holder and confers upon the latter the right to take part in the Olympic Games. Together with a passport or other official travel documents of the holder, the Olympic Identity and Accreditation Card authorises entry into the country of the host city. It allows the holder to stay and perform his Olympic function for the duration of the Olympic Games, including a period not exceeding one month before and one month after the Olympic Games.*
- 2. The Olympic Identity and Accreditation Card is delivered, under the authority of the IOC, to persons eligible for accreditation. It gives access, to the degree necessary and as indicated thereon, to the sites, venues*

and events placed under the responsibility of the OCOG. The IOC Executive Board determines the persons entitled to such cards and the conditions applicable to their delivery. The OCOGs, IFs, NOCs and all other persons or parties concerned shall comply with the manuals, guides or guidelines, and all other instructions of the IOC Executive Board, in respect of all matters subject to this Rule”.

- 7.6 The Applicant submits and maintains that the Decision was arbitrary considering that he had the Accreditation card and his United States passport, which, he submits, fully satisfies the requirements of Article 52 of the Charter.
- 7.7 The Applicant further submits that the IOC’s arbitrary imposition of the requirement that he produce a Kenyan passport at the entrance of the Games Village contradicts Article 52 of the Charter and that the IOC *“interfered with the operation of the otherwise clear Rule 52, and that by doing so, a) engaged in ad-hoc rule making contradicting its published Olympic Charter, and b) usurped the decision-making processes otherwise delegated to the IF and the NOC embodied in the Charter”.*
- 7.8 The Applicant also submits that when an IF and an NOC properly accredit an athlete, as was what he claims occurred in this case, that article 52 of the Charter provides that upon issuance of the Accreditation Card, that it confers the right upon the Applicant to participate in the Rio Olympic Games.
- 7.9 The IOC submits, in response to the Applicant’s submissions, that it is not clear that the Applicant is a National of Kenya; that although the Applicant indicated a Kenyan identity card number in his application, he was unable to show that he had such a card. The IOC submits that all athletes must comply with Article 41 of the Charter which provides that the athlete *“must be a national of the country of the NOC which is entering such competitor”.* The IOC submits further that an accreditation card is usually issued after sighting a passport. In this case, because the Applicant could not produce a Kenyan passport or an identity document, to support the fact that he is Kenyan, he was rightly refused entry into the OGV.
- 7.10 The NOCK submits, through its Chef De Mission, that it included the Applicant’s name in the list it submitted to the IOC to meet the deadline set of 29 April 2016. The Chef De Mission further submits that the issuance of the Accreditation Card was made under the assumption that the Applicant would be a Kenyan national, and that it would act as a visa waiver together with valid travel documents when the Applicant enters Brazil. He submits that as far as the NOCK is concerned, the document delivered is a *“pre-valid card”* which needs to be validated upon showing appropriate identity documents. What was issued is not an automatic qualification to the Olympic Games or a guarantee to enter the OGV.
- 7.11 Mr Sharad Rao, legal counsel of the NOCK, submits that since the passing of the new Kenyan National Constitution on 27 August 2010, its citizens can now hold dual citizenship. The Applicant is therefore eligible to apply for Kenyan citizenship considering he was born outside of Kenya, from a Kenyan born parent. Mr Rao submits that the Applicant has not shown or demonstrated to the NOCK, proof or evidence of his Kenyan citizenship. He submits that it is hearsay evidence, although he claims that his uncle gave him a purported identification number

348.383.360 and that, as far as the NOCK is concerned, it is just a number unsupported by documentation. He submits further that the Applicant is very much aware, on advice from the NOCK's Chef De Mission, that in the absence of proof of citizenship, that the NOCK will not support him.

- 7.12 The Panel finds the Applicant's notion that the IOC would have usurped the decision making process otherwise delegated to the IF and the NOC embodied in the Charter, to be misconstrued. Indeed, reviewing the text of article 52.2 of the Charter, the Panel finds that the IOC would be acting well within its rights to deliver any decision in this respect, and that, in relation to this particular case, the "arbitrariness" alleged by the Applicant is unfounded.
- 7.13 In relation to articles 41 and 52 of the Charter, the Panel, after consideration of the above submissions, finds that Article 41 of the Charter must be read together with Article 52 to demonstrate the eligibility to hold an accreditation. They must not be read in isolation of each other. The manner in which the Applicant has interpreted Article 52 is that it is done in complete isolation of Article 41, ignoring the requirement that "*any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor*". Article 52.1 further provides that "*... together with a passport or other official travel documents of the holder, the Olympic Identity and Accreditation Card authorises entry into the country of the host city*", thus operating as a visa waiver to enter the country.
- 7.14 For those reasons, we find the Applicants submissions more particularly in relation to Articles 41 and 52 of the Charter, to be misconceived. We find also that both the IOC and the NOCK, do not have any proof of the Applicant's nationality. The Applicant was indeed unable to prove that he is a Kenyan National. The Panel finds that because of this and the foregoing reasons, the Applicant's appeal must be dismissed.

d. Reliefs sought

- 7.15 The Applicant agrees, upon questioning by the Panel, that the stay orders and urgent preliminary reliefs, sought in reliefs nos. 8 and 9 are unnecessary. It was on this basis that the Panel struck out those reliefs during the hearing and which are no longer before the Panel.
- 7.16 Which means that the only relief now sought by the Applicant is one where he seeks "repudiation" of the IOC's decision of 8 August 2016 to be followed by the CAS declaring and ordering that he have a place in the men's 200 metre dash, confirmed for 16 August 2016. Because the Panel has ordered a dismissal of the proceedings, it follows that these reliefs go with the dismissal.

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 renders the following decision:

The application filed by Carvin Nkanata on 14 August 2016 is dismissed.