



Arbitration CAS ad hoc Division (OG PyeongChang) 18/004 Tatyana Borodulina, Pavel Kulizhnikov, Alexander Loginov, Irina Starykh, Dimitry Vassiliev, Denis Yuskov v. International Olympic Committee (IOC), award of 9 February 2018 (operative part of 8 February 2018)

Panel: Mr Mohamed Abdel Raouf (Egypt), President; Prof. Laurence Boisson de Chazournes (France); Mr Jinwon Park (Korea)

Multiple sports

Non-inclusion of members of support staff in the list of athletes and officials invited to participate in the Olympic Games

Jurisdiction ratione temporis of the CAS ad hoc Division

Definition of “dispute”

1. **Article 1 of the CAS Arbitration Rules for the Olympic Games provides that the CAS Ad Hoc Division only has jurisdiction if an application concerns disputes which “*arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games*”.**
2. **The definition of what constitutes a dispute given by the International Court of Justice has constantly been repeated: “*A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*”. Therefore, with regard to the establishment of a list of athletes and officials who may be eligible to be invited by the IOC to the Olympic Games, the dispute arises as soon as athletes and members of the support staff not included in the list become aware of their non-inclusion.**

1 PARTIES

- 1.1 Tatyana Borodulina, Pavel Kulizhnikov, Alexander Loginov, Irina Starykh, Dimitry Vassiliev, Denis Yuskov (hereinafter: the “Applicants”) are all Russian athletes who have not been invited to participate at the XXIII Olympic Winter Games in Pyeongchang.
- 1.2 The Respondent is the International Olympic Committee (hereinafter: 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.

2 FACTS

2.1 The elements set out below are a summary of the relevant facts as established by the Panel based on the submissions of the Parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.

2.2 On 5 December 2017, the IOC Executive Board decided to suspend the Russian Olympic Committee with immediate effect and to invite individual Russian athletes to the XXIII Olympic Winter Games in Pyeongchang according to the following guidelines (hereinafter: the “IOC EB Decision”):

“1. The invitation list will be determined, at its absolute discretion, by a panel chaired by Valerie Fourneyron, Chair of the ITA. The [IRP] will include members of the Pre-Games Testing Task Force: one appointed by WADA, one by the DFSU and one by the IOC, Dr Richard Budgett.

2. This panel will be guided in its decisions by the following principles:

a) It can only consider athletes who have qualified according to the qualification standards of their respective sport.

b) Athletes must be considered clean to the satisfaction of this panel:

- Athletes must not have been disqualified or declared ineligible for any Anti-Doping Rule Violation

- Athletes must have undergone all the pre-Games targeted tests recommended by the Pre-Games Testing Task Force.

- Athletes must have undergone any other testing requirements specified by the panel to ensure a level playing field.

The IOC, at its absolute discretion, will ultimately determine the athletes to be invited from the list.

3. These invited athletes will participate, be it in individual or team competitions, in the Olympic Winter Games PyeongChang 2018 under the name “Olympic Athlete from Russia (OAR)”. They will compete with a uniform bearing this name and under the Olympic Flag. The Olympic Anthem will be played in any ceremony.

4. These invited athletes will enjoy the same technical and logistical support as any other Olympic athlete.

5. The Panel, at its absolute discretion, will determine an invitation list for support staff and officials”.

2.3 The IOC EB Decision was challenged by the Applicants before the CAS (CAS 2017/A/5487, CAS 2017/A/5488, CAS 2017/A/5484, CAS 2017/A/5485, CAS 2017/A/5486, CAS 2017/A/5490). These procedures are currently pending before the CAS in Lausanne.

2.4 On 19 January 2018, the IOC communicated to the Russian Olympic Committee (hereinafter: the “ROC”) the list of Olympic Athletes from Russia (hereinafter: the “OAR”), which did not include the Applicants (hereinafter: the “List of 19 January 2018”).

2.5 On 22 January 2018, the Applicants filed a request for provisional measures before a Swiss Court (hereinafter: the “Request for Provisional Measures”), whereby they sought an order to “invite the applicants to participate in the Olympic Games” (free translation from the original text which

reads: “ordonne au Comité International Olympique d’inviter les requérants à participer aux Jeux Olympiques”).

- 2.6 On 25 January 2018, the IOC published a summary of some of the key elements of information used by the above-referenced panel during its deliberations, which determined the pool of Russian athletes who could be invited by the IOC to take part in the OWG 2018 as OAR (hereinafter: the “List of Information Release”).
- 2.7 On 30 January 2018, the IOC acknowledged that 169 Russian athletes would be invited in the Olympic Games. The Applicants are not amongst the invited athletes.
- 2.8 On 31 January 2018, one of the Applicants, through its Counsel, asked the IOC for certain information and documentation.
- 2.9 On 1 February 2018, Counsel for the Applicants wrote to Counsel for the IOC stating that: “*In the absence of answer by then [2 February 2018], we will take it for granted that the sole and only reason for not inviting our clients to the Olympic Games PyeongChang 2018 is the fact that they served a period of ineligibility in the course of their sporting career*” (emphasis added).
- 2.10 On 2 February 2018, Counsel for the IOC communicated a letter to Counsel for the Applicants referring to submissions made in the context of the Request for Provisional Measures, indicating: “*we refer to our detailed submissions of 29 and 30 January 2018 in answer to your request for provisional measures*” (hereinafter: the “Communication of 2 February 2018”).

3 CAS PROCEEDINGS

- 3.1 On 7 February 2018 at 5.15 pm (time of Pyeongchang), the Applicants filed an Application with the CAS Ad Hoc Division against the Respondent with respect to their non-invitation.
- 3.2 On the same day, at 6.30 pm (time of Pyeongchang), the CAS Ad Hoc Division notified the Application to the Respondent.
- 3.3 On 7 February 2018 at 11.50 pm (time of Pyeongchang), the Respondent responded to the Applicants’ Application asking the CAS Ad Hoc Division to declare the Application inadmissible.
- 3.4 On 8 February 2018 at 8.20 am (time of Pyeongchang), the CAS Ad Hoc Division notified the Respondent’s response to the Applicants.
- 3.5 On 8 February 2018 at 11.15 am (time of Pyeongchang), the CAS Ad Hoc Division notified the Parties of the following composition of the Panel:
 - Dr. Mohamed Abdel Raouf (Egypt), President
 - Prof. Laurence Boisson de Chazournes (Switzerland/France), as arbitrator
 - Mr. Jinwon Park (South Korea), as arbitrator

- 3.6 On 8 February 2018 at 1.45 pm (time of Pyeongchang), the Panel informed the Parties that it has decided to first rule on its jurisdiction based on the written submissions only.
- 3.7 There were no express objections to the constitution of the Panel or to the Parties' rights to be heard and treated equally in these proceedings.
- 3.8 On 8 February 2018 at 5.15 pm (time of Pyeongchang), the Panel issued the operative part of the award, which was notified to the Parties.

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. Applicants' Prayers for Relief

- 4.2 The Applicants' requests that the Panel rules as follows:

I. The appeal is upheld.

II. Tatyana Borodulina, Pavel Kulizhnikov, Alexander Loginov, Irina Starykh, Dimitry Vassiliev, and Denis Yuskov are declared eligible for the Olympic Winter Games PyeongChang 2018 and are invited to compete in such Olympic Games.

III. The International Olympic Committee shall be ordered to pay the Applicants a contribution towards the legal and/or other costs incurred in the framework of these proceedings in an amount to be determined at the discretion of the Panel".

B. Respondent's Request for Relief

- 4.3 The Respondent requests to declare the Application inadmissible.

5 JURISDICTION

- 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 Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter: the "CAS Ad Hoc Rules") provides as follows:

“Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective”.

- 5.3 The CAS Ad Hoc Division only has jurisdiction if an application concerns disputes which “*arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games*”.
- 5.4 In other words, the dispute should have arisen after 30 January 2018 which is 10 days before the Opening Ceremony, which is to be celebrated on 9 February 2018.
- 5.5 Even though the Respondent and other CAS Ad Hoc panels have in the past considered that the issue of the 10 days is a matter of admissibility, this Panel will treat such issue as a question of jurisdiction as it directly relates to the jurisdictional conditions required under Article 1 of the CAS Ad Hoc Rules for any dispute to be resolved by the Panel.
- 5.6 The Applicants allege that the Communication of 2 February 2018 is a decision because it informs the Applicants that they are not invited to the OWG 2018.
- 5.7 The Applicants further allege that their challenge of the Communication of 2 February 2018 falls within the jurisdiction of the CAS Ad Hoc Division “*as it has been notified during a period of ten days preceding the Opening Ceremony of the Olympic Games, which will take place on 9 February 2018*”.
- 5.8 The Panel notes that the Applicants consider that the dispute arose on 2 February 2018 with the IOC’s Communication of 2 February 2018.
- 5.9 The Panel disagrees with the Applicants in this respect.
- 5.10 This Panel recalls, as the one in CAS OG 14/003, the definition of what constitutes a dispute given by the International Court of Justice (ICJ) which has constantly been repeated: “*A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*” (PCIJ, *The Mavrommatis Palestine Concessions*, Serie A, n° 2, August 30th 1924, Rec. p. 11).
- 5.11 The Panel is of the view that, in the present case, the decision not to invite the Applicants was issued on 19 January 2018, when the Respondent sent to the ROC the List of 19 January 2018, which did not include the Applicants.

- 5.12 The Panel actually notes that the List of 19 January 2018 clearly indicates that the OAR Implementation Group formally approved the list of athletes and officials who may be eligible to be invited by the IOC to the OWG 2018 as OAR. It also encloses “*a letter explaining the decision of the Invitation Review Panel along with the list of athletes (Annex A) and officials (Annex B) for an OAR invitation*”.
- 5.13 The Panel is satisfied that the dispute arose as soon as the Applicants became aware of their non-selection and therefore that the date when the dispute arose was 19 January 2018 when the list of OAR was communicated by the IOC to the ROC, well before the 10 days before the Opening Ceremony, with the consequence that the Panel finds that it has no jurisdiction to deal with the Applicants’ Application.
- 5.14 This conclusion is supported by the various actions taken by the Applicants after 19 January 2018, namely:
- The Request for Provisional Measures whereby the Applicants sought an order to “*invite the applicants to participate in the Olympic Games*”;
 - The Request for Provisional Measures refers to the List of 19 January 2018 and notes that “*the six applicants have been precluded from the next Olympic Games*” (free translation from the original text which reads: “*Les six requérants ont donc été écartés des prochains Jeux Olympiques*”);
 - In a letter dated 31 January 2018, Counsel for one of the Applicants refers to the List of 19 January 2018 and to the List of Information Release, while clearly indicating that his client “*has not been invited [to] the Winter Olympic Games PyeongChang 2018*” (emphasis added); and
 - In an email dated 1 February 2018, Counsel for the Applicants acknowledges that his clients were not invited to the OWG 2018, while stating that “*in the absence of answer by them [2 February 2018], we will take it for granted that the sole and only reason for not inviting our clients to the Olympic Games PyeongChang 2018 is the fact that they served a period of ineligibility in the course of their sporting career*” (emphasis added).
- 5.15 The Panel is convinced that the above actions could only be directed against a decision not to invite the Applicants to the OWG 2018, which has been issued on 19 January 2018.
- 5.16 The Panel notes that the Communication of 2 February 2018 is not a decision. Indeed, contrary to the constant jurisprudence of CAS (see in particular CAS 2008/A/1633), it does not contain any ruling whereby the body issuing the decision (*i.e.* the IOC) intends to affect the legal situation of the addressee of the decision or other parties (*i.e.* the Applicants). It simply refers to submissions filed in other proceedings with respect to the Request for Provisional Measures. Moreover, it does not contain any of the information referred to by the Applicants in their Application.

6 CONCLUSION

- 6.1 In view of the above considerations, the CAS Ad Hoc Division does not have jurisdiction to hear the Applicants' Application filed on 7 February 2018.

DECISION

The Ad Hoc Division of the Court of Arbitration for Sport renders the following decision:

The CAS Ad Hoc Division of the Court of Arbitration for Sport does not have jurisdiction to deal with the Application filed by Tatyana Borodulina, Pavel Kulizhnikov, Alexander Loginov, Irina Starykh, Dimitry Vassiliev, Denis Yuskov on 7 February 2018.