



Arbitration CAS ad hoc Division (OG PyeongChang) 18/005 Pavel Abratkiewicz, Victor Sivkov, Anna Vychik, Evgeny Zykov, Anatoly Chelyshev, Danil Chaban, Konstantin Poltavets 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 athletes in the list of athletes 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 Pavel Abratkiewicz, Victor Sivkov, Anna Vychik, Evgeny Zykov, Anatoly Chelyshev, Danil Chaban, Konstantin Poltavets (hereinafter: the “Applicants”) are all Russian coaches and physicians of various 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, coaches and support staff 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.

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

a) No member of the leadership of the Russian Olympic Team at the Olympic Winter Games Sochi 2014 can be included on the invitation list.

b) No coach or medical doctor whose athlete has been founded to have committed an Anti-Doping Rule Violation can be included on the invitation list. All coaches and medical doctors included in the invitation list must sign a declaration to this effect.

c) Any other requirement considered necessary to protect the integrity of the Olympic Games.

7. The IOC, at its absolute discretion, will ultimately determine the support staff and officials to be invited from the list”.

- 2.3 The IOC EB Decision was challenged by the Applicants before the CAS (CAS 2017/A/5492). In their appeal, the Applicants challenge the criterion provided for under item II, para. 6.b of the IOC EB Decision and claim that they should be invited by the IOC to the Olympic Winter Games in Pyeongchang 2018 (hereinafter: the “OWG 2018”). This appeal is 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”) as well as the list of coaches and officials who could also be invited (hereinafter: the “List of 19 January 2018”). The Applicants were not on such list of coaches and officials.
- 2.5 On 1 February 2018, the CAS delivered its decisions (operative parts only) in 39 of the 42 cases filed by Russian athletes against the decisions taken by the IOC in relation to the 2014 Sochi Olympic Winter Games (hereinafter: the “CAS Decisions”). In 28 cases, the evidence collected was found to be insufficient to establish that an anti-doping violation (ADRV) was committed by the athletes concerned. With respect to these 28 athletes, the appeals were upheld, the sanctions annulled and their individual results achieved in Sochi 2014 were reinstated. In 11 cases, the evidence collected was found to be sufficient to establish an individual ADRV, the IOC decisions in these matters were confirmed, with one exception: the athletes are declared ineligible for the next edition of the OWG 2018 instead of a life ban from the Olympic Games.
- 2.6 On 1 February 2018, Counsel for the Applicants wrote an email to Counsel for the IOC stating that: *“In view of the above [the CAS Decisions], it seems that these individuals [the Applicants] are now eligible since they meet the criteria decided by the IOC. It is reasonable to continue the proceedings [CAS 2017/A/5492] in these circumstances? I would be very grateful if you can provide my [me] with the position of the IOC by tomorrow since our clients are seriously considering to file provisional measures in order to protect their interests”* (emphasis added).
- 2.7 On 4 February 2018, Counsel for the IOC replied to the above email from Counsel for the Applicants stating that: *“In its process, the Invitation Panel has only been considering requests submitted or maintained through the ROC. No corresponding requests having been received so far, no review has been correspondingly conducted”* (emphasis added) (hereinafter: the “Communication of 4 February 2018”).

3 CAS PROCEEDINGS

- 3.1 On 7 February 2018 at 5.45 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 6.45 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 5.20 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. This application is allowed.

II. The decision of the IOC dated 4 February 2018 that it would not accept Pavel Abratkiewicz, Victor Sivkov, Anna Vychbik, Evgeny Zykov, Anatoly Chelyshev, Danil Chaban and Konstantin Poltavets' inscriptions for Olympic Winter Games PyeongChang 2018 is set aside.

III. Pavel Abratkiewicz, Victor Sivkov, Anna Vychbik, Evgeny Zykov, Anatoly Chelyshev, Danil Chaban and Konstantin Poltavets are invited in the Olympic Winter Games PyeongChang 2018.

IV. 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 4 February 2018 is a decision because it refused to consider the Applicants’ request to be invited to the OWG 2018 further to the CAS Decisions.

- 5.7 The Applicants further allege that their challenge of the Communication of 4 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 4 February 2018 with the IOC’s Communication of 4 February 2018.
- 5.9 The Panel disagrees with the Applicants in this respect.
- 5.10 This Panel recalls, as the one in CAS OG 14/03, 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 further notes that on 19 January 2018 the IOC also made the following statement with respect to coaches and medical doctors: “*The Invitation Review Panel had decided to limit its decisions to coaches and medical doctors associated with athletes who have been sanctioned by the Oswald Commission. As such, the Panel recommended that 51 coaches and 10 medical staff cannot be offered an invitation to the Olympic Winter Games PyeongChang 2018. The OARIG [OAR Implementation Group] confirmed this decision*” (emphasis added).
- 5.14 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.
- 5.15 This conclusion is supported by the fact that, in the Applicants’ own submission, by virtue of the Counsel for the Applicants’ email dated 1 February 2018, the IOC was requested to “*review its decision not to invite them in the Olympic Winter Games PyeongChang 2018*”. As indicated above, such decision 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. Furthermore, in the same email of 1 February 2018, Counsel for the Applicants explicitly refers to the possibility of filing “*provisional measures in order to protect their interests*”. In the Panel’s judgement, such possibility confirms the existence of a dispute arising out of the List of 19 January 2018.

- 5.16 The Panel is therefore convinced that the Applicants' email dated 1 February 2018 could only be directed against a decision not to invite the Applicants to the OWG 2018, which has been issued on 19 January 2018.
- 5.17 The Panel finally notes that the Communication of 4 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 responds to Counsel for the Applicants' email dated 1 February 2018, by informing him that, since no corresponding requests had been submitted through the ROC, no review of the question whether the Applicants could be invited had been conducted. Accordingly, the Respondent's Communication of 4 February 2018 simply informed Counsel for the Applicants that no new decision had been made in their respect and that the decision not to invite the Applicants, issued on 19 January 2018, is still valid.
- 5.18 The Panel therefore concludes that the Communication of 4 February 2018 does not constitute a decision on behalf of the IOC, but is rather a confirmation that the Applicants' position, as reflected in the List of 19 January 2018, had not been reconsidered.

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 Pavel Abratkiewicz, Victor Sivkov, Anna Vychik, Evgeny Zykov, Anatoly Chelyshev, Danil Chaban, Konstantin Poltavets on 7 February 2018.