



Arbitration CAS ad hoc Division (AG Incheon) 14/002 Pg Mohammed Nasir Pg Anak Jaafar v. Brunei Darussalam National Olympic Council (BDNOC), award of 27 September 2014

Panel: Mr Chi Liu (China), President; Mr Dong Su Ahn (Korea); Mr Vinayak Pradhan (Malaysia)

Equestrian (jumping)
Eligibility to participate in the Asian Games
Jurisdiction of the CAS ad hoc Division

While there may be eligibility cases that fall within the confines of Article 1 of the CAS Arbitration Rules for the XVII Asian Games in Incheon, it cannot be said of a dispute that it “*arise[s] in the host country of the Asian Games ...*”, as required under Article 1, if the decision giving rise to the dispute was rendered by a National Olympic Committee in a country other than the host country of the Asian Games and arises out of facts and circumstance solely within the borders of such country. Moreover, if the dispute in question relates to a decision taken outside the timeframe provided for in Article 1, the CAS ad hoc Division does not have jurisdiction to hear the appeal.

1. BACKGROUND

A. Factual Background

- 1.1. This claim arises out of a dispute between Pg Mohammed Nasir Pg Anak Jaafar, a Brunei Equestrian athlete (the “Applicant” or “Pg. Nasir”), and Brunei Darussalam National Olympic Council (the “Respondent” or “BDNOC”) concerning the eligibility of Pg. Nasir to participate in the discipline of Equestrian during the XVII Asian Games in Incheon, Korea on 28 September 2014.
- 1.2. On 20 August 2014, Haji Abdul Malik bin Haji Mohamad, Director of Youth and Sports, as the Secretary of High Level Evaluation and Selection Committee of National Athletes of Brunei (the “Committee”), wrote to the Vice President of the Brunei Equine Association (the “BEA”) concerning Pg. Nasir’s eligibility to participate in the XVII Asian Games (the “Decision”). More specifically, the Committee stated as follows:

For your information, the High Level Evaluation and Selection Committee of National Athletes met on 21 May 2014 and confirmed the participation of athlete Pengiran Mohd Nasir bin Pengiran Anak Haji Jaafar, Equestrian athlete in Individual Jumping event subject to be passed a fitness test and shall submit the said result before the closing date of Entry by Name on 15 August 2014. At the same time the organizers of Incheon Asian Games Organizing Committee (LAGOC) has granted an opportunity for Brunei Darussalam

to confirm and submit the athlete's participation until 18 August 2014, however the result of the fitness test was only received by the Secretariat on 19 August 2014 and it has passed the period of registration granted by the organizers.

Therefore the committee could not meet because the fitness test result was not received within the stipulated period as such the registration of athlete cannot be submitted to the organizer.

(English translation provided by the Applicant)

- 1.3. It is unclear how the Decision was transmitted to the BEA and/of Pg. Nasir. But it is noted that such Decision contains a handwritten note indicating that such letter was “Received [by the BEA] 21/8/2014 at 8.17pm at [illegible]”.
- 1.4. On 22 August 2014, the President of the BEA, Pengiran Anak Haji Jaafar Ibni Al-Marhum Pg Pemancha Pg Anak HJ Mohammed Alam, responded to Pg. Malik and sought to clarify certain issues as they related to Pg. Nasir's eligibility. In particular, Pg. Anak pleaded for reconsideration of the Decision and noted that Pg. Nasir had completed his fitness training and was prepared and ready to compete in the Asian Games.
- 1.5. On 8 September 2014, Pg. Anak wrote to Yang Berhormat Pehin, Minister at the Ministry of Culture, Youth & Sports of Brunei (the “Ministry”) further explaining that Pg. Nasir had no intention of not fulfilling the fitness requirement necessary to enter the Asian Games. Moreover, Pg. Anak noted that such late submission of his test results was no fault of Pg. Nasir, as he was informed by the Ministry that the filing deadline was 31 August 2014, not 15 August 2014. An exchange of “What's App” electronic messages between “Natasha Youth & Sport” and Pg. Nasir confirming the 31 August 2014 deadline was attached to such letter.
- 1.6. On 11 September 2014, H.A. Karim Wahab, Secretary General of the BEA wrote to Mr. Hj Mohammed Zamri bin Dato Paduka Hj Hamdani, Secretary General of the BDNOC, seeking directions as to which committee at either the BDNOC or the Committee Pg. Nasir should appeal the Decision.
- 1.7. It is unknown whether Mr. Wahab ever received a response to his inquiry.
- 1.8. On 24 September 2014, HRH Princess Haya Al Hussein, President of the Fédération Equatre Internationale (“FEI”), sent a letter to both Mr. HH Sheikh Ahmed Al. Fahad Al Sabah, President of the Olympic Council of Asia, and Mr. Kim Young-Soo, President of the 2014 Incheon Asian Games Organizing Committee, stating that “[i]t is clearly understood that the Brunei Olympic Committee must submit an appeal for the late entry of their Athlete and that the organizing committee (LAGOC) cannot entertain entry from other sources”.
- 1.9. On 25 September 2014, Jo Youngha, Director General, 2014 Incheon Asian Games Organizing Committee, responded to Princess Haya stating that it was the BDNOC who made a final decision to exclude Pg. Nasir from competition in the Asian Games and therefore, they would “uphold the Brunei NOC's decision in accordance with the Article 54 of the OCA

Constitution and Rules stating only the Member NOCs of the OCA are responsible for the entries of their respective athletes and officials into the OCA Games”.

- 1.10. Both the 24 and 25 September 2014 letters were filed by the Applicant with the CAS *ad hoc* Division on 27 September 2014.

B. Procedural Background

- 1.11. An *ad hoc* Division of the Court of Arbitration for Sport (“CAS”) has been established for the XVII Asian Games in Incheon. The purpose of this *ad hoc* division, generally, is to hear any dispute on an urgent and timely basis that falls within the ambit of the CAS Arbitration Rules for the XVII Asian Games in Incheon (“CAS *Ad Hoc* Rules”) taking place from 19 September 2014 to 4 October 2014.

- 1.12. On 16 September 2014, Pg. Nasir tried to electronically file an appeal with the CAS *ad hoc* Division. Pg. Nasir sent a follow-up email inquiry on 18 September 2014 seeking confirmation that his appeal had been received by the *ad hoc* Division. Due to technical reasons (presumably because of oversized attachments), neither email was received by the *ad hoc* Division and therefore, the CAS Court Office could not (and did not) acknowledge receipt of Pg. Nasir’s appeal.

- 1.13. On 26 September 2014, Pg. Nasir re-filed his appeal, including an Application Form and several exhibits in separate messages, by email in accordance with Article 10 of the CAS *Ad Hoc* Rules (the “Application”), which was duly received by the CAS *ad hoc* Division. The Application does not specify the relief sought however, it sets forth the following grounds for the Panel’s intervention:

1. *Disqualified without a just cause in the Asian Games Incheon 2014 which is due to start on the 28 September 2014. If the issue is concerning the criteria of qualification requirement then the qualification standard does not arise because I the rider already registered by the Asian Games committee. Furthermore if the fitness test is required it should have been clearly established on selection criteria identified and published in a timely manner so that athletes can understand those criteria and the qualification standard they are required to meet.*
2. *Negligence on submission deadline.*

- 1.14. That same day – 26 September 2014 – the *ad hoc* Division acknowledged receipt of Pg. Nasir’s appeal.

- 1.15. Pursuant to Article 15 of the CAS *Ad Hoc* Rules, the President of the *ad hoc* Division, Mr Michael Hwang SC, appointed Mr Chi Liu (China), President of the Panel, Mr. Dong Su Ahn (Korea) and Mr. Vinayak Pradhan (Malaysia) to hear the present dispute.

- 1.16. Having considered this Application, the Panel, exercising its powers under Article 15 of the CAS *Ad Hoc* Rules, decides to render the following decision on Pg. Nasir's appeal.

2. JURISDICTION

A. Jurisdiction of the *Ad Hoc* Panel (Incheon)

- 2.1. The CAS *Ad Hoc* Rules concerning the jurisdiction of the Panel at the Asian Games provide 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 Article 34 of the Constitution of the Olympic Council of Asia, insofar as they arise in the host country of the Asian Games (the “Asiad”) between 15 September 2014 and 4 October 2014.

Article 2 Ad hoc Division

For the period fixed in Article 1, the ICAS shall establish an ad hoc Division of the CAS (hereinafter the “ad hoc Division”), the function of which is to provide for the resolution by arbitration of the disputes covered by Article 1 by means of Panels set up in accordance with the present Rules.

The ad hoc Division consists of arbitrators appearing on a special list, a President and a Court Office”.

- 2.2. Article 1 refers to Article 34 of the Constitution of the Olympic Council of Asia, which reads:

“Settlement of Disputes / Complaints

- 1- *Every NOCs Member shall be deemed to hold its membership of the OCA on the specific condition that it voluntarily surrenders its right of seeking redress against the OCA in any Court of Law;*
- 2- *There shall be a “Court of Arbitration” appointed by the OCA President for all unresolved disputes, including relating to validity of a NOC and any other sports organisation recognized by or to the OCA including the Host and Bidding Cities of any Asian Games.*
- 3- *The OCA President at his discretion shall nominate either a sole arbitrator or an Arbitration Panel more for the resolution or decision of any unresolved dispute. The decision of the Arbitration Panel will be reported to the OCA Executive Board and can be appealed to the Court of Arbitration for Sports (CAS) in Lausanne.*
- 4- *The Terms and Conditions as well as the time frame for the proceedings to be completed will be specified by the OCA President;*

- 5- *The “Court of Arbitration”, appointed by the OCA President will be responsible for investigating complaints raised in relation to the disrespect of ethical principles laid down in the OCAS Constitution or Olympic Charter including but not limited to the breach of the code of ethics and conduct. If necessary proposed sanctions will be submitted to the EB for approval.*

Bye-Law [sic] to Article 34

The Court of Arbitration for Sports (CAS) in association with the OCA will set up a small working group from CAS that will be present and working alongside the OCA in the Asian Games period only, on the same lines as done during the Olympic Games. The participating athletes can address any issues that they may have directly with CAS, during the Asian Games”.

- 2.3. As is always the case, the Panel must follow the proper rules governed by the CAS *Ad Hoc* Rules enacted by the International Council of Arbitration for Sport (“ICAS”) on 3 June 2014. The Panel is 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 the result of the location of the seat of the CAS *ad hoc* Division in Lausanne Switzerland, pursuant to Article 7 of the CAS *Ad Hoc* Rules.
- 2.4. Under Article 17 of the CAS *Ad Hoc* Rules, the Panel must decide a dispute “*pursuant to the Constitution of the Olympic Council of Asia, the applicable regulations, the general principles of law and the rules of law whose application the Panel deems appropriate*”.
- 2.5. Based on the foregoing, the Panel determines that it does not have jurisdiction to decide Pg. Nasir’s appeal. As an initial matter, Pg. Nasir’s claim relates to whether he timely submitted his fitness test results for eligibility purposes (and whether he was properly informed of the time requirements for completion of a fitness test by the Committee/BDNOC). Such decision was rendered by the Committee/BDNOC in Brunei and arose out of facts and circumstance solely with the borders of Brunei. While there may be eligibility cases that fall with the confines of Article 1 CAS *Ad Hoc* Rules, it cannot be said that this dispute itself “*arise[s] in the host country of the Asian Games ...*” as required under Article 1.
- 2.6. Moreover, the dispute in question relates to a decision taken on 20 August 2014 – twenty-six (26) days prior to commencement of the CAS *ad hoc* Division and the applicable rules. The CAS *ad hoc* Rules were not in place at the time the Decision was rendered.
- 2.7. Accordingly, the Panel does not have jurisdiction to hear Pg. Nasir’s appeal.
- 2.8. Nevertheless, for purposes of completeness, the Panel will consider whether it has jurisdiction under the CAS Code of Sports-related Arbitration (the “Code”), which applies to disputes solely filed in accordance with Articles R47 *et seq.* of the Code at the CAS Court Office in Lausanne, Switzerland.

B.1 Jurisdiction of the CAS (Lausanne)

2.9. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Applicant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

2.10. Paragraph 25 of the Constitution of the BDNOC provides as follows:

COURT OF ARBITRATION FOR SPORT

a. Any decision made by Brunei Darussalam National Olympic Council the highest internal competent organ / authority, may be submitted exclusively by way of appeal to the Court of Arbitration for Sport in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the code of sports-related Arbitration. The time limit for appeal is twenty one days after the reception of the decision concerning the appeal.

2.11. Based on the foregoing, and for the sake of completeness only, the Panel determines that the CAS would have had jurisdiction under the Code to render a decision on this appeal solely under the provisions set forth in the Code.

B.2 Admissibility

2.12. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

2.13. As set forth above, Paragraph 25 of the Constitution of the BDNOC enumerates the same twenty-one (21) day filing deadline for filing a CAS appeal.

2.14. The decision challenged is dated 20 August 2014 and by indication of the handwritten note, was received by the Applicant on 21 August 2014 (or, at the very latest 22 August 2014 considering Pg. Anak's letter of that same date to Pg. Malik refers to such 20 August 2014 decision). Such decision could indeed have been the object of an appeal to the CAS in accordance with Article 25a of the Constitution of the BDNOC. However, the same provision mentions that the time limit for appeal is "*twenty one days after the reception of the decision concerning the appeal*". Consequently, the deadline to file an appeal against the Committee/BDNOC decision of 20 August 2014 was 11 September 2014 (or at the latest 12 September 2014).

- 2.15. Therefore, even considering the Applicant's attempt to electronically file his application to the CAS *ad hoc* Division by email on 16 September 2014, Pg. Nasir's appeal would have been manifestly late and this appeal would not have been admissible.

The *ad hoc* Division of the Court of Arbitration for Sport renders the following decision:

1. The application filed by Pg. Mohammed Nasir Pg. Anak Jaafar on 16 September 2014 is dismissed.