



Arbitration CAS ad hoc Division (OG Beijing) 08/005 Azerbaijan Field Hockey Federation (AFHF) & Azerbaijan National Olympic Committee (ANOC) v. Fédération Internationale de Hockey (FIH), award of 8 August 2008

Panel: Mr Alan J. Sullivan QC (Australia), President; Ms Margarita Echeverria (Costa Rica); Mr Liu Chi (China)

*Field Hockey
Olympic Games
Standing to bring an application before the CAS Ad hoc Division*

The Applicants have no standing to file an application before the CAS Ad hoc Division because no adverse finding has been made against them by the Judicial Commission of FIH and thus there was no breach of the rules of procedural fairness in not giving the Applicants an opportunity to be heard.

The Applicants are the Azerbaijan Field Hockey Federation and the Azerbaijan National Olympic Committee.

The Respondent is the International Hockey Federation.

The Affected Parties are:

- (a) Two Spanish hockey players whom we do not identify;
- (b) Real Federación Española de Hockey (RFEH);
- (c) Spanish Olympic Committee;
- (d) International Olympic Committee (IOC);
- (e) World Anti-Doping Agency (WADA).

On 7 August 2008, the Applicants filed an application before the ad hoc Division of CAS seeking both final relief and also what was termed “extremely urgent” preliminary relief.

The final relief sought is to declare that the decision of the Judicial Commission of the Respondent of 15 July 2008 (the “Decision”) was taken in violation of the principles of procedural fairness, as stipulated in article 22.1 of the FIH Statutes and Bye-laws and therefore to annul said Decision.

The preliminary relief sought is to stay the effect of the Decision in accordance with article 14 of the Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”), and to provisionally

disqualify the Spanish hockey team from participating in the Olympic Games, until the ad hoc Division has reheard and decided the matter de novo.

In support of their application, the Applicants rely, in summary, on the following facts and legal arguments as set out in their application under the heading “Brief statement of facts and legal arguments” (the “Applicants’ submissions”).

From 12 to 20 April 2008, one of the three Women’s World Hockey Qualifier competitions was held in Baku, Azerbaijan (the “Event”).

The winner of the Event would qualify for the Olympic Games.

The final of the Event was a match on Sunday, 20 April 2008, between the team representing the Real Federación Española de Hockey and the team representing the Azerbaijan Field Hockey Federation.

The Spanish team won the final 3-2.

On 21 May 2008, the FIH communicated that the A-samples of two players, who competed for the Spanish team, taken during anti-doping tests carried out at the Event showed adverse analytical findings (AAF).

On 4 June 2008, the FIH communicated that the B-samples confirmed the A-samples. In the same communication, the FIH stated that the players concerned had requested a hearing by the FIH Judicial Commission (the “Judicial Commission”).

The hearing impacted not only the players but could also have affected the entire Spanish team by virtue of article 11.1 of the FIH Anti-Doping Policy, which reads:

“if more than one team member in a Team Sport is found to have committed an Anti-Doping Rule violation during the Event, the team may be subject to Disqualification or other disciplinary action”.

The FIH requested that the Judicial Commission find that the two players had committed an anti-doping rule violation and as a result disqualify the Spanish team from the Event.

The Judicial Commission found that one of the players committed an anti-doping rule violation. However, there was no fault or negligence on her part so no sanction was imposed; the second player was not found to have committed an anti-doping rule violation (the “Decision”).

On 31 July 2008, AFHF, together with the players of the Azerbaijan Women’s Field Hockey team (the “Players”) and the ANOC, filed an application with the ad hoc Division of the CAS.

By decision of 2 August 2008, the ad hoc Division of the CAS dismissed the application filed by the ANOC, the AFHF and the Players on 31 July 2008 (the “First Award”). In the First Award, the CAS Panel found that ANOC, AFHF and the Players did not have standing to bring an appeal of the Decision.

Faced with the absence of standing, on 5 August 2008, the Applicants brought a further application before the CAS ad hoc Division seeking an order that FIH itself bring an appeal to CAS against the Decision.

By decision of 5 August 2008, the CAS ad hoc Division dismissed the application filed on 5 August 2008, including the requests for preliminary relief (the “Second Award”).

This amounts to a third appeal to the CAS ad hoc Division by the Applicants seeking substantially the same final relief as sought in the application which led to the First Award.

According to the Applicants’ submissions, this application arises by reason of their consideration, for the first time, of a copy of the Decision which was made available to them as a result of a direction given by the CAS Panel which delivered the First Award (see para. 1 of the First Award).

The Applicants submit that the Decision *“shows the Applicants were openly blamed for committing sabotage of the Spanish team”* and that in the Decision, *“the Judicial Commission endorsed the allegations put forward by the Respondents”*.

The Applicants contend that the alleged findings of the Judicial Commission against them were made in circumstances where they had a right to be heard and were not heard. They submit that, in accordance with article 22.1 of the FIH Statutes and Bye-laws, article 6.1 of the European Convention on Human Rights and general principles, since they have been denied procedural fairness by the Judicial Commission, the Decision should be annulled.

LAW

1. We note and adopt the views expressed in para. 1 to para. 2 of the First Award and in para. 1 to para. 4 of the Second Award.
2. We also note that, by reason of article 1 of the CAS ad hoc Rules, this Panel only has jurisdiction to resolve disputes *“in so far as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games”*.
3. The Opening Ceremony of these Olympic Games is to occur later today, 8 August 2008 and thus, this Panel only has jurisdiction in respect of disputes which have arisen since, at the earliest, 28 July 2008.
4. The Applicants submit that the dispute arose on 2 August 2008, that being the date upon which they were provided with a copy of the Decision.

5. Article 15 of the CAS ad hoc Rules provides, amongst other things, that "*if it considers itself to be sufficiently well informed, the Panel may decide not to hold a hearing and to render an award immediately*".
6. This Panel is in the fortunate position of having access to the First and Second Awards as well as to the Applicants' submissions, which are detailed, and to the various exhibits to those submissions, including a copy of the Decision. Given the availability of all of this material, this Panel does consider itself sufficiently well informed to resolve the dispute before it without the need to hold a hearing. Accordingly, the Panel has decided not to hold a hearing and this document constitutes its Award.

Discussion

7. In our view, in order for the Applicant to establish any right to either the final relief or the preliminary relief which is summarised above, the Applicants need to satisfy this Panel that:
 - (a) the Panel has jurisdiction to hear the application; and
 - (b) that the Applicants have standing to make this application.
8. In the event that this Panel is satisfied of each of those matters, then, as accepted in the Applicants' submissions, in order for the Applicants to obtain the preliminary relief sought, they will need to demonstrate:
 - (a) that they will suffer irreparable harm if the relief is not granted;
 - (b) that there is a reasonable possibility that the appeal on the merits has a sufficient likelihood of success; and
 - (c) that the balance of convenience favours the granting of the preliminary relief.
9. In order to obtain the final relief which they seek the Applicants must establish, on the balance of probabilities, that they were denied procedural fairness by the Judicial Commission.

A. Jurisdiction

10. The Decision was handed down on or about 17 July 2008 and, thus, any hearing which led to that decision must have been held on or before 17 July 2008. The Applicants allege, in this application, that they were denied procedural fairness in respect of the hearing. If they had a right to be heard before the Decision was handed down and were not heard, then, arguably, the dispute arose on or about 17 July 2008. That is, outside the period in respect of which the CAS ad hoc Division has jurisdiction (see para. 3 above).
11. However, the Applicants submit that they did not see a copy of the Decision until it was provided to them on or about 2 August 2008 as a result of the Order of the CAS Panel which made the First Award. The Applicants submit that, in such circumstances, the relevant dispute

arose on or after 2 August 2008, because, until they read the Decision, they did not know of the allegations and findings said to have been made against them in the Decision.

12. Like the Panel which made the first award (see para. 6 of the First Award), this Panel proceeds on the assumption it has jurisdiction, without deciding whether it has jurisdiction in this matter. Based on that assumption of jurisdiction, we turn to the standing of the Applicants.

B. *Standing*

13. The Panel which made the First Award dealt with the issue of standing at para. 7 to para. 17 of the First Award. For the reasons there given, the Panel concluded that the Applicants had no standing either to seek the final relief or the preliminary relief sought in the application which was the subject of the First Award.
14. The only difference, factually, between the matters which were before the Panel for the purposes of the First Award and the matters which are before this Panel is the Applicants' contention that, since delivery of the First Award, they have discovered that the Decision in fact involved findings of "*sabotage*" by them against the Spanish Women's Hockey Team, and that, therefore, necessarily, they were an "*interested party*" in any hearing before the Judicial Commission leading to the Decision.
15. This Panel would accept pursuant to article 22.1 of the FIH Statutes and Bye-laws and general principles that a party against whom serious findings are likely to be made has a right to be heard before such a tribunal makes any such adverse findings. It would also accept that a failure by the tribunal to give such a person a hearing before making such an adverse finding would amount to a breach of the rules of procedural fairness, which, ordinarily, would result in the decision being set aside.
16. However, this Panel has carefully examined the Decision. Contrary to the Applicants' submissions, there is no adverse finding made by the Judicial Commission against either of the Applicants.
17. In respect of the first Spanish athlete who was the subject of the Decision, the Judicial Commission's finding was that 11 of 14 people at a dinner at 17 April 2008 ingested a prohibited substance at that dinner, including the first athlete. However, the Judicial Commission did not in any way suggest that either of the Applicants was responsible for those persons, including the first athlete, ingesting the prohibited substance at that dinner.
18. Accordingly, in respect of the first athlete, there was no adverse finding made by the Judicial Commission in the Decision against either of the Applicants.

19. In respect of the second athlete, the Judicial Commission determined that there had been a sample substitution. However, it did not, in any way, suggest that either of the Applicants had been responsible for that sample substitution.
20. Accordingly, once more, there is no adverse finding in the Decision against the Applicants in respect of the second athlete.
21. In these circumstances, we cannot accept the Applicants' submission that there were adverse findings made against them in the Decision.
22. In those circumstances, there are no material facts to distinguish this matter from the circumstances considered by the Panel who delivered the First Award.
23. Although we are not a court of law so that principles such as *res judicata* do not apply, nevertheless, we are strongly of the view that such principles, should, by analogy, apply in cases like this where two panels of CAS have cause to consider the very same issues between the very same parties within a very short period of time. We do not believe that we should come to a conclusion different to that reached by the Panel which decided the First Award unless we are clearly satisfied that the first Panel's reasoning was erroneous.
24. We are reinforced in taking this approach by article 21 of the CAS ad hoc Rules. In effect, the Applicants seem to us to be seeking to appeal against the First Award, which is a course precluded by Article 21.
25. In any event, we are not satisfied that the First Award was erroneous. Indeed, with great respect, we consider that it was clearly correct.
26. In these circumstances, we conclude that the Applicants have no standing to bring this application.

C. Merits

27. In the light of this Panel's finding that the Applicants have no standing it is not necessary to consider the merits of the application or whether the Decision was, in fact, a correct one.

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

The application filed by the Azerbaijan Field Hockey Federation and the Azerbaijan National Olympic Committee on 7 August 2008 is hereby dismissed.