



Arbitration CAS ad hoc Division (OG Tokyo) 20/013 Krystsina Tsimanouskaya v. National Olympic Committee of Belarus, order of 3 August 2021 (operative part of 2 August 2021)

Athletics (sprint)

Withdrawal of an athlete from participation in a competition

Conditions for granting a stay of the decision

Degree and conditions of exercise of discretion in the selection of athletes

1. The President of the CAS Ad hoc Division has the power to consider an application for provisional measure pursuant to Article 14 CAS Ad hoc Rules. According Article 14 CAS Ad hoc Rules, provisional relief may be granted (1) to protect the applicant from irreparable harm, (2) if there is a likelihood of success on the merits of the claim, and (3) if the interests of the applicant outweigh those of the opponent or of other members of the Olympic Community. The three requirements for the grant of provisional measures are cumulative. In an *ex parte* situation, particular care must be given in analysing these requirements.
2. The jurisprudence of the CAS provides many examples and much analysis of the degree, which can be significant and/or broad, to which National Federation or coaches may apply their subjective discretion to athletes' selection or team management. In addition, athlete codes of conduct and similar behavioural standards may be applicable in situations such as this. In all events, however, such discretion or the application of such standards must be exercised properly and within limitations used to safeguard athletes' rights.

1 PARTIES

- 1.1 The Applicant is Krystsina Tsimanouskaya, a track and field athlete of Belarussian nationality.
- 1.2 The Respondent is the National Olympic Committee of Belarus ("NOCB"), which the governing body for all recognised Olympic sports for Belarus.

2 FACTS

- 2.1 The elements set out below are a summary of the main relevant facts as established by the President of the CAS Ad hoc Division by way of a chronology on the basis of the submissions of the Applicant (in as much as the Operative Part of this Order was considered and issued *ex parte*). Additional facts may be set out, where relevant, in the legal considerations of the present award.

- 2.2 The Applicant is a track and field athlete of Belarussian nationality, competing in the women's 100m and 200m during the Tokyo Olympic Games (the "Tokyo OG").
- 2.3 A few days before the filing of the Application, the Applicant posted a video of herself on Instagram stating that she and another teammate had been included by the Belarus Athletics Federation (the "Federation") on the women's 4x400 relay team without apparently discussing it with the Applicant. The two Belarusian athletes who were going to compete on that relay team had been excluded from coming to the Tokyo OG because they had not undertaken sufficient doping tests.
- 2.4 The Applicant "*resented it in her in Instagram that the Federation made her and Elvira Herman take the rap and take part in the discipline they are not specialized in*" (the Applicant specializes in 100m and 200m; Ms Herman in 100m hurdles). The Applicant also stated that the Federation had made a mistake by not counting the number of tests of the excluded athletes.
- 2.5 After the Instagram video, the Belarussian government TV channel covered the story, stating:
The athlete Krystsina Tsimanouskaya was outraged by being applied to women's 4x400 relay rather than be willing to support the team in a difficult situation. Two our sprinters were not allowed to compete not of their making, but because of too strict rules. Instead of taking a chance to win a medal, she resented it before even entering a track. The scandalous runner made it clear that, to say the least, a victory, team's success and spectators do not matter to her.
- 2.6 The Applicant was subjected to negative and offensive comments from certain media outlets and received hateful messages in social media.
- 2.7 On 1 August 2021, the coaching staff of the Belarussian delegation decided to withdraw the Applicant from her participation in the women's 200m qualification scheduled on 2 August 2021 at 10h30 (time of Tokyo) pursuant to the following (the "Appealed Decision"):
The coaching staff of the Belarussian national athletics team made a decision to withdraw Krystsina Tsimanouskaya from the Olympic Games, according to the doctor's report on her mental and emotional state. Consequently, the application to her participation in women's 200m and women's 4x400 relay was dismissed.
- The Applicant refuted this in her Instagram stating that she had never been examined by a doctor.
- 2.8 Furthermore, the Applicant stated that she had had a conversation with the coaching staff, and
[T]he Applicant possess the copy of the audiorecording of the conversation with the coach staff where the coaches laid down it straight: the decision of getting Ms Tsimanouskaya out of qualifications had been made by the Belarussian senior officials since the video of Tsimanouskaya with comments of her appointment to women's 4x400 was spread widely and inspired people for reaction.
- 2.9 The Applicant then publicly expressed that the NOCB was trying to forcibly, without her consent, take her out of Japan and fly her back to Belarus.

- 2.10 The Applicant further stated that she does not know what to expect when returning to Belarus because, due to the current political situation, many athletes there have been subjected to physical and psychological violence, and that she would seek political asylum.
- 2.11 She asked the IOC to intervene. Prior to boarding the plane she was, and pursuant to her Application she has been, secured by the Japanese police at an undisclosed site since the Applicant had started the process of “*shelter granting*” (i.e. seeking asylum).

3 CAS PROCEEDINGS

- 3.1 On 2 August 2021 at 8.30 am (time of Tokyo), the Applicant’s urgent Application for the stay of the Appealed Decision was filed.
- 3.2 Considering that the women’s 200m qualifications were scheduled on the same day at 10h30 (time of Tokyo), the President of the CAS Ad hoc Division, in accordance with Article 14 of the CAS Arbitration Rules for the Olympic Games (the “CAS Ad hoc Rules”), ruled *ex parte* and issued at 10h00 (time of Tokyo) the following Order on Request for Stay:

1. *The urgent application for a stay filed at 8:30am on 2 August 2021 by Ms Krystsina Tsimanouskaya is dismissed.*

Such Order was the Operative Part, and the parties were notified that this Order on Request for Stay with Grounds would follow in due course.

4 PARTIES’ SUBMISSIONS

- 4.1 The Applicant’s 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.
- 4.2 The Applicant’s request for relief is as follows:

We apply for a stay of a decision to withdraw the application for the participation of the Claimant in the 200 m qualification run at 10:30 according to the official schedule of OG.

- 4.3 In light of the exceedingly short time in which to deliver a decision, the President of the CAS Ad hoc Division rendered his decision without appointing a panel and *ex parte*, i.e., without notifying interested parties or inviting the Respondent to file written submissions and requests for relief.

5 JURISDICTION AND ADMISSIBILITY

- 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 In light of the above, the President of the CAS Ad hoc Division considers that the CAS Ad hoc Division has jurisdiction to hear the present matter.

5.3 Article 1 of 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, a 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 of the Respondent to withdraw the Applicant from the women's 200m qualifications was issued on 1 August 2021, *i.e.*, within the time frame set out in Article 1 of the CAS Ad hoc Rules. The President of the CAS Ad hoc Division further determines that the time needed by the Applicant to exhaust any internal remedies would make any appeal to the CAS Ad Hoc Division ineffective.

5.5 As the dispute between the Parties arose during the Olympic Games, the President of the CAS Ad hoc Division shall therefore proceed on the merits of the Applicant's application.

6 DISCUSSION

6.1 The President of the CAS Ad hoc Division has the power to consider an application for provisional measure pursuant to Article 14 CAS Ad hoc Rules.

6.2 According Article 14 CAS Ad hoc Rules and to well established CAS jurisprudence, provisional relief may be granted if (1) to protect the applicant from irreparable harm, (2) there is a likelihood of success on the merits of the claim, and (3) the interests of the applicant outweigh those of the opponent or of other members of the Olympic Community (see also CAS 2003/O/486; CAS 2001/A/329; CAS 2001/A/324; CAS 2007/A/1317; CAS 2010/A/2071).

- 6.3 The three requirements for the grant of provisional measures (i.e., “irreparable harm”, “likelihood of success” and “balance of interests”) are cumulative (see CAS 2007/A/1403; TAS 2007/A/1397; CAS 2010/A/2071). The President of the CAS Ad hoc Division also notes that particular care must be given in analysing these requirements in an *ex parte* situation.
- 6.4 With respect to the likelihood of success requirement, the Applicant submits that “*factual circumstances point out the high likelihood of success on the merits of the claim – the Claimant is the victim of the discrimination due to her public criticism of the coaches and other officials of the Belarus’ Olympic Team of the Belarussian Athletic Federation*”.
- 6.5 The Applicant further submits that the explanations given by the Respondent to exclude her from the Tokyo OG are wrong and based on political reasons and should be considered as arbitrary and discriminatory.
- 6.6 The President of the CAS Ad hoc Division notes that, in the brief Appealed Decision, the Federation coaching staff based the withdrawal of the Applicant from the Tokyo OG upon a doctors’ report on her mental and emotional health. He also notes that the coaching staff appears to have stated to the Applicant in other conversations (which she states she had recorded) that the decision was made by “Belarusian senior officials” based on the negative public reaction to the Applicant’s comments in her Instagram video concerning her appointment to the women’s 4x400. Any discrepancy between these stories would have been reviewed, and the rationale (and its validity) for the Applicant’s exclusion would have been determined, by the Panel appointed for this case.
- 6.7 The jurisprudence of the CAS provides many examples and much analysis of the degree, which can be significant and/or broad, to which National Federation or Coaches may apply their subjective discretion to athletes’ selection or team management. In addition, the President of the CAS Ad hoc Division notes that Athlete Codes of Conduct and similar behavioural standards may be applicable in situations such as this. In all events, however, such discretion or the application of such standards must be exercised properly and within limitations used to safeguard athletes’ rights.
- 6.8 In light of the aforementioned, the President of the CAS Ad hoc Division determines that he does not have enough information and evidence at this time to conclude that the likelihood of success requirement is satisfied. In particular, he notes that, due to the extremely short period of time in which a determination must be made, the Respondent is not able to answer any of the questions raised by Paragraphs 6.6 or 6.7 above. But even more importantly, the President of the CAS Ad hoc Division could not ask any question or clarification to the Applicant – whose direct testimony and availability to answer questions is critical in casu, given the context at stake – because she was incommunicado and at an undisclosed location.
- 6.9 Based on the above, the President of the CAS Ad hoc Division considers that the likelihood of success requirement is not satisfied and that, therefore, the Application to stay the execution of the Appealed Decision shall be dismissed on this basis alone. Finally, and for procedural

economy, whether or not the requirements of irreparable harm and balance of interests have been satisfied shall and need not be addressed in the present Order.

- 6.10 However, the President of the CAS Ad hoc Division notes that this Application raises difficult issues concerning the balance of the interests requirement. Without undertaking a full analysis of whether or not this requirement has been satisfied here, he makes the following observations that make satisfaction unlikely.
- 6.11 A proper review of the Applicant's interests must, in light of the strong statements in her Application concerning her safety, entail going beyond merely the specific relief requested in the Application, which appears to be moot at this juncture. Ensuring that the Applicant and the President of the CAS Ad hoc Division or the CAS Panel understand those interests requires further investigation.
- 6.12 Further, the interests of World Athletics – which, if this procedure had not been *ex parte*, would have been joined as an interested party – must be considered. World Athletics' ability to manage the competition in a manner guarantying the safety of the Applicant (if she were to compete) and the effect thereof on the other athletes appears seriously compromised in light of the exceedingly short advance notice that it would receive of the present situation.

7 CONCLUSION

- 7.1 Considering that the Applicant failed to meet a requirement to be granted the stay of the execution of the Appealed Decision, her application shall be dismissed.

ON THESE GROUNDS

The President of the Ad hoc Division of the Court of Arbitration for Sport rules *ex parte* that:

1. The urgent application for a stay filed at 8:30am on 2 August 2021 by Ms Krystsina Tsimanouskaya is dismissed.