



**Arbitration CAS ad hoc Division (OG Tokyo) 20/013 Krystsina Tsimanouskaya v. National Olympic Committee of Belarus, award of 8 August 2021**

Panel: The Hon. Annabelle Bennett AC SC (Australia), Sole Arbitrator

*Athletics (sprint)*

*Withdrawal of an athlete from participation in an competition*

*Exhaustion of internal remedies*

*Referral to regular CAS procedure*

1. **If an application is not made by an athlete to enable him/her to participate in a race that has not yet been run but, once the race has been run and no urgency exists anymore, is only made to set aside the decision in order to affirm the asserted rights and interests of the athlete, the internal remedies available prior to an appeal to the CAS must be exhausted.**
2. **As the CAS Ad Hoc Rules make clear, the purpose of the Ad Hoc Division is to make urgent decisions during the currency of the Olympic Games. Article 20 provides for referral of a dispute to arbitration by the regular CAS procedure where, for example, the request for relief, the nature and complexity of the dispute and the extent of evidence required and of the legal issues to be resolved make it appropriate.**

## **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 (the “Belarus NOC”), which the governing body for all recognised Olympic sports for Belarus.

## **2 FACTS**

- 2.1 The Sole Arbitrator will rely upon the factual background set out in the motivated Order on Request for Stay notified on 3 August 2021, which reads as follows:
- 2.2 The elements set out below are a summary of the main relevant facts as established by the President of the CAS Ad hoc Division in the grounds of the Order on Application for a Stay of 3 August 2021. Additional facts may be set out, where relevant, in the legal considerations of the present award.

- 2.3 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").
- 2.4 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 Belarussian 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.
- 2.5 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.
- 2.6 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.*
- 2.7 The Applicant was subjected to negative and offensive comments from certain media outlets and received hateful messages in social media.
- 2.8 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.*
- 2.9 The Applicant refuted this in her Instagram stating that she had never been examined by a doctor.
- 2.10 Furthermore, the Applicant stated that she had had a conversation with the coaching staff, and  
*The Applicant possess the copy of the audio recording 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.*
- 2.11 The Applicant then publicly expressed that the Belarus NOC was trying to forcibly, without her consent, take her out of Japan and fly her back to Belarus.

- 2.12 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.
- 2.13 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:

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

- 3.3 On 3 August 2021, the grounds of the Order on Request for Stay were notified to the Parties.
- 3.4 On the same day, the CAS Ad Hoc Division granted the Applicant a 48-hour deadline to indicate whether she intends to further proceed in this matter, failing which the CAS Ad Hoc Division would deem the Application withdrawn.
- 3.5 On 5 August 2021, the following events occurred:
- At 7.29 am (Tokyo time), the Applicant requested the CAS Ad Hoc Division to further proceed with the present matter and submitted a “Legal Brief”.
  - At 2.00 pm (Tokyo time), the Parties were informed that the Hon. Dr Annabelle Bennett AC SC had been nominated as Sole Arbitrator and were instructed as follows: (i) the Applicant to file by 4.00 pm (Tokyo time) the prayers for relief she was seeking for; (ii) her Counsel and the Belarussian Sports Solidarity Foundation (“BSSF”) to file valid powers of attorney within the same time limit; and (iii) the Respondent to file its position on this matter.
  - At 4.01 pm (Tokyo time), the Applicant filed a “Supplemental Brief”.
  - At 4.49 pm (Tokyo time), the Respondent requested an extension of time to file its position.
  - At 5.02 pm (Tokyo time), the Sole Arbitrator granted the Respondent a time limit until 6 August 2021 at 9.00 am to file its position.

- At 5.48 (Tokyo time), the Sole Arbitrator summoned the Parties to a preliminary hearing to be held on 6 August 2021 at 3.00 pm (Tokyo time).
  - At 9.08 pm (Tokyo time), the Respondent requested the postponement of the hearing, justifying such request on the fact that it needed more time to prepare its defence.
- 3.6 On 6 August 2021 at 8.56 am (Tokyo time), the Respondent filed its Reply to the Applicant's Application.
- 3.7 On the same day at 9.41 am (Tokyo time), the CAS Ad Hoc Division acknowledged receipt of the Respondent's Reply and, on behalf of the Sole Arbitrator, rejected its request to postpone the preliminary hearing on the ground that the only purpose of such hearing was to determine the relief sought by the Applicant, to confirm the power of attorney that she had signed in favour of the BSSF and her Counsel to consider the method of dealing with the issues raised by the Respondent with respect to the jurisdiction of the CAS Ad Hoc Division, but not to assess the merits of the case.
- 3.8 The preliminary hearing was held on 6 August 2021 at 3.00 pm (Tokyo time), by videoconference. The Sole Arbitrator was assisted by Mr. Fabien Cagneux, Counsel to the CAS. The Applicant herself was present, assisted by her Counsel and a representative of BSSF; the Respondent was represented by its legal representative and assisted by its Counsel.
- 3.9 At the end of the hearing, the Parties confirmed that they had no objection to the constitution of the Sole Arbitrator and to the procedural directions issued by the latter, *i.e.* the submission of various Belarus NOC Regulations by 6 August 2021 at 10.00 pm (Tokyo time) and by 7 August 2021 at 12.00 noon (Tokyo time).
- 3.10 The Parties agreed that the Sole Arbitrator would determine the question of jurisdiction as a preliminary matter. The Parties also agreed that the submissions on which they relied were set out in the documents already filed with the CAS and the Belarus Regulations referred to in the preceding paragraph.
- 3.11 Later on 6 August 2021, at 10.01 pm (Tokyo time), the Respondent submitted English translations of the relevant passages of the applicable Belarus NOC regulations as requested by the Sole Arbitrator.
- 3.12 On 7 August 2021, the following events occurred:
- At 5.48 am (Tokyo time), the Respondent filed English translations of some passages of the relevant applicable Belarus NOC Disciplinary and Anti-Doping Regulations;
  - At 10.21 am (Tokyo time), the Applicant filed an unsolicited "Brief on internal remedies" together with four annexures;
  - At 12.59 pm (Tokyo time), the Respondent objected to the "Brief on internal remedies" and annexures filed by the Applicant and filed responsive submissions;

- At 3.41 pm (Tokyo time), the Respondent filed further submissions in response to the Applicant's "Brief on internal remedies" and annexures.

#### 4 PARTIES' SUBMISSIONS

- 4.1 The Parties' submissions and arguments on the matter of jurisdiction 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 confirmed that the request for relief that she seeks is as set out in the Supplemental Brief, as follows:
- a) To set aside the decision made by the NOC Belarus on 1<sup>st</sup> August 2021 to withdraw eligibility of participation.
  - b) To declare the decision by NOC Belarus infringes para 1, 2, 3, 4 and 6 of the fundamental principle of the Olympic Charter and human rights (including principle of non-discrimination, prohibition of harassment and abuse, and/or natural justice and due process).
- 4.3 The Respondent challenges the jurisdiction of the CAS, in essence, on the following bases:
- a) The Athlete has not sought any internal remedies available under the Respondent's statutes or regulations and thus the CAS does not have jurisdiction and the Application is inadmissible by reason of Article 1 of the CAS Arbitration Rules for the Olympic Games (the CAS ad hoc Rules)
  - b) There is no « decision » of the Respondent which can be challenged as the decision to withdraw the Applicant from the competition was taken by her coaching staff and not by the Respondent.
- 4.4 The Applicant submits that the CAS does have jurisdiction, in essence for the following reasons:
- a) The decision taken by the Respondent to withdraw the Applicant from participation is a case of disciplinary action, as well as eligibility. She refers to it as the "*sanction decision*".
  - b) The Applicant accepts that she can no longer compete in the womens' 200m race, as it has finished but submits that the relief is not moot, as she has a tangible interest to set aside the disciplinary sanction against her.
  - c) Her tangible interest, being an interest worthy of protection and sufficient interest in the matter being appealed, is constituted by:
    - Her sporting interests in that the reason for the decision was said to be her "*emotional, psychological state*" which is false and will affect her ability to compete

in international competitions and her ability to acquire financial opportunities as a top athlete;

- Her moral interest as the sanction was because she had criticised the Respondent and thus the disciplinary sanction contravened her right to freedom of expression;
- Her moral interest in that the asserted basis of her “*emotional psychological state*” infringed the “*rights to protection of health or moral of the applicant*”;
- Her “*procedural interest*” in that the decision was made without any opportunity to be heard and without ensuring her rights to counsel, in violation of “*article 6 of European Court of Human Rights*”;
- The decision contravenes the Olympic Charter and the mission of the Respondent as a NOC;
- The decision should be set aside as it is “*no ground, arbitrary, discriminated or procedural error*”.

4.5 The Applicant, by its later written submission, contends, in essence, that:

- a) There was no time to exhaust any internal remedies before the filing of the Application
- b) The need to exhaust internal remedies would make the appeal to the CAS ad hoc Division ineffective
- c) The Regulations of the Belarus Athletics Federation are not relevant, as it is not a party to this proceeding and the decision in question was made on behalf of the Belarus National team “*ruled by the Respondent*”.

## 5 JURISDICTION AND ADMISSIBILITY

5.1 Article 61.2 of the Olympic Charter provides as follows:

### *61 Dispute Resolution*

[...]

*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 This dispute arose on the occasion of, and in connection with, the Olympic Games.

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 determined, for the purposes of the Application for a Stay, 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 It is not in dispute that the Applicant has not sought, let alone exhausted, any available internal remedies.
- 5.6 The Respondent has provided a translation of the relevant parts of the Statutes of the National Olympic Committee of the Republic of Belarus (the Belarus NOC Statutes). The translation is not disputed:

*Any disputes arising with the participation of the NOC, including disputes between the NOC and its members, shall be resolved by the NOC Executive Committee (in close cooperation and coordination with the international federation concerned if the case affects the federation's interests). In case of non-resolution of the dispute by the Executive Committee of the NOC, the case shall be submitted to the General Assembly of the NOC. The General Assembly may take a final decision in the dispute in question or take a decision on the appointment of a conciliation commission (conciliator) to resolve the dispute.*

*Any final decision made by the General Assembly of the NOC in the dispute in question or by the conciliation commission (conciliator) appointed by the General Assembly may be challenged exclusively by way of appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Swiss Confederation which will resolve the dispute in accordance with the Code of Sports Related Arbitration. The appeal shall be filed not later than 21 (twenty-one) day from the date of rendering of the challenged decision.*

- 5.7 The Respondent also provided the Regulations on the Disciplinary and Anti-Doping Commission of the public association "Belarusian Athletics Federation", as translated into English (The Belarusian Athletics Federation Regulations). The translation is not disputed. Those Regulations relevantly provide for the formation of a permanent disciplinary and anti-doping commission (the "Commission"). Many of those Regulations, which concern disciplinary action and doping, are not presently relevant. The Regulations do relevantly provide:

- a) The tasks of the Commission are:
- resolution of disputes and conflict situations arising between the subjects of athletics;
  - ensuring compliance by persons engaged in athletics with the norms and rules of sports ethics and anti-doping rules;
  - monitoring of compliance by members of the OO “BFLA”, i.e. the Belarussian Athletics Federation and participants of sports and mass sports events with the norms and rules of sports ethics and antidoping rules;
  - improvement of the moral and ethical environment at all events held by the OO “BFLA”, in places of education, training, training camps and places of residence of athletes;
- b) To implement the main tasks the Commission has the right to:
- determine the list of disciplinary violations and measures to respond to them, as well as the procedure for application and execution of these measures;
  - make decisions on disciplinary action against members of the OO “BFLA” resulting from the violations of the rules of sports ethics;
- c) In order to implement the main tasks the Commission has an obligation to:
- actively participate in the activities of the OO “BFLA” and to assist the OO “BFLA” in the implementation of its statutory goals;
  - implement the decisions of the bodies and officials of the OO “BFLA”;
  - thoroughly and impartially investigate the circumstances of conflicts and Violations
  - consider and resolve situations and (or) events arising during sports events related to disciplinary violations on the part of athletes, coaches and representatives of participating sports organizations;
  - send the decisions taken by the Commission in relation to athletes and (or) the personnel of athletes who have violated the anti-doping rules to the Chairman of the OO “BFLA”.

5.8 As the Applicant characterises the decision as a disciplinary sanction and submits that the nature of the case is disciplinary, also relevant is Article 6, which relevantly provides:

- a) The grounds for considering disciplinary violations are:



- submission of a written application or complaint by a member of the OO “BFLA”.
- b) Disciplinary violations to be considered by the Commission:
  - violations of the Charter and other regulatory legal acts of the OO “BFLA”;
  - violations of the principle of “fair play”;
  - actions that can be qualified by the Commission as a violation of the norms of sports ethics.
- c) Sanctions that may be imposed by the Commission in regard to disciplinary violations:
  - warning;
  - reprimand;
  - temporary suspension the loss of the opportunity to take part in competitions or other events held by the OO “BFLA”;
  - additional penalties: loss of a title or award, transfer of materials on violation to the Presidium of the OO “BFLA” for consideration and exclusion from the OO “BFLA”, etc.

## 6 DISCUSSION WITH RESPECT TO JURISDICTION AND ADMISSIBILITY

6.1 The Sole Arbitrator has taken into account all of the written material filed by the Parties.

6.2 The first question that needs to be determined is whether the Applicant has exhausted all internal remedies available pursuant to the Statutes or Regulations of the sports body concerned before filing this Application. The Applicant says that this is not relevant because:

- a) There was no time to exhaust any internal remedies;
- b) The Applicant is not obliged to comply with the Belarus NOC Statutes;
- c) The Athletics Federation Regulations do not apply as the Belarus Athletics Federation cannot be considered an actor in the decision in question and, consequently, it is not a party to the proceedings.

### a) Was there time to exhaust internal remedies:

6.3 When she originally filed the Application, the relief requested related to the possibility for the Applicant to participate in the women’s 200 m qualification, which was to be held approximately two hours after the filing. In those circumstances there was, as pointed out by the President of

the Ad Hoc Division in determining whether to grant a stay of execution of the decision to withdraw the Applicant's application to participate, the requirement to exhaust internal remedies would make any appeal to the CAS Ad Hoc Division ineffective.

- 6.4 The present situation is different. The race has been run. The Applicant is no longer present in Tokyo. She does seek to have the decision to withdraw her eligibility for participation to be set aside but, as made clear from her submissions and the present facts, this is not to enable her to participate but to set aside the decision in order to affirm her asserted rights and interests. Including her ability to compete in the future and maintain her financial opportunities, as well as demonstrate the substantive and procedural failings in the decision.
- 6.5 There is no urgency in the determination of her entitlement to the relief sought that would make her appeal to the CAS ineffective if she exhausted the internal remedies available prior to an appeal to the CAS.
- 6.6 It could be said that an appeal to the CAS Ad Hoc Division would be ineffective, as the purpose of that Division is to resolve disputes, relevantly, insofar as they arise during the Olympic Games (Article 1 of the CAS Ad Hoc Rules) and the Division ceases to be established at the end of the Olympic Games. This case cannot properly be resolved in that time frame and where it is envisaged that decisions are rendered within 24 hours of the lodgement of the application. It should be noted that the Respondent asserts that it wishes to call numerous witnesses and needs time to assemble its case. The Respondent must also be afforded procedural fairness. As the CAS Ad Hoc Rules make clear, the purpose of the Ad Hoc Division is to make urgent decisions during the currency of the Olympic Games. Article 20 provides for referral of a dispute to arbitration by the regular CAS procedure where, for example, the request for relief, the nature and complexity of the dispute and the extent of evidence required and of the legal issues to be resolved make it appropriate. This, in the view of the Sole Arbitrator, could be characterised as such a case.
- 6.7 Further, pursuant to the Belarus NOC Statute, there is a right to appeal to the CAS after the internal remedies there provided for have been exhausted.

**b) Does the Belarus NOC Statute apply to the Applicant?**

- 6.8 The Applicant points out that the Belarus NOC Statute refers to "*disputes arising with the participation of the NOC, including disputes between the NOC and its members*". She contends that this does not apply to her, as she is not a member of the Belarus NOC. She points to the agreement that she signed with the Belarus NOC which has been provided to the Sole Arbitrator as translated into English. In that agreement, the Applicant undertook, *inter alia*, to "*scrupulously follow and fulfil the requirements of*" the International Olympic Committee and the Belarus NOC and also to "*scrupulously follow the instructions of the mission chief as well as other heads of the sports delegation of the Republic of Belarus*".
- 6.9 The Belarus NOC Statutes provide for dispute resolution in the case of "*any disputes arising with the participation of the NOC*". It is then stated to include disputes between the NOC and its members but is not so limited. There is then a procedure set out for resolution by the Belarus

NOC Executive Committee and then, in the case of non-resolution, to be submitted to the General Assembly of the Belarus NOC. Any final decision made by the General Assembly of the Belarus NOC or by a conciliation commission appointed by the General Assembly, may be challenged by appeal to the CAS.

- 6.10 This dispute, as set out in the Application, arises from a decision asserted to have been made by the participation of the Belarus NOC. There are internal remedies provided in the Belarus NOC Statute that have not been exhausted.
- 6.11 The Applicant says that she does not have any documents that contain or provide relevant application forms or reference to compliance with the Belarus NOC Statutes, which is not specifically referred to in the agreement that she did sign. That, however, is not to the point. Her recourse to complain about a decision said to have been made by the Belarus NOC is set out in the Belarus NOC Statutes. Nor is it to the point that she says that the Executive Board of the Belarus NOC is not scheduled to meet soon or that there is no information made available by the Belarus NOC as to how a complaint would be made. The Belarus NOC, as Respondent to this Application is well aware that the Applicant challenges the decision. If it failed to assist the Applicant to make a timely appeal from, or challenge to, the decision and/or failed to consider such an application in conformity with due process, it could be said to have declined to consider the Applicant's case such that the Applicant would have exhausted internal remedies and be able to lodge an appeal to the CAS. Of course, once such a case was considered and determined, the Applicant would have a right of appeal in any event. Further, the CAS Code sets out the circumstances of a right to appeal to CAS.

**c) Do the Belarusian Athletics Federation Rules apply?**

- 6.12 In the facts as set out in the Application, it is asserted that *"the coaching staff be a part of the Belarusian delegation headed by the Chief of Mission, Mr Dzmitry Daubalionak, NOC Belarus Vice-President National Olympic (sic), took the decision"* to take the Applicant out of the 200m qualification run. It also cites the official reason provided by the Belarus NOC as *"the coaching staff of the Belarusian national athletics team"* made the decision. She also states that she possesses a copy of the audio recording 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 Belarusian senior officials"*.
- 6.13 If the decision imports the application of the Belarusian Athletics Federation Rules, for example in relation to what amounts to a complaint against the coaching staff as envisaged in article 3.2, this also provides an internal avenue of redress for the Applicant that would, if applicable, need to be exhausted prior to an appeal to the CAS. The Sole Arbitrator does not need to consider whether this would necessitate joinder of the Belarus Athletics Federation to this proceeding, nor whether this means that the Applicant can choose between two internal systems, or needs to pursue both, or can pursue both in one application. The information available to the Sole Arbitrator is insufficient to make any such determination. What is clear is that there is at least one path of internal remedies that needed to have been attempted and exhausted before enlivening the jurisdiction of the CAS Ad Hoc Division.

**d) Conclusion**

6.14 It follows that the CAS Ad Hoc Division does not have jurisdiction over this case and the Application.

6.15 The Sole Arbitrator makes no decision as to whether the Applicant has a tangible or concrete interest, or an interest worthy of protection in the declarations sought.

**7 COSTS**

7.1 Article 22 of the CAS Ad Hoc Division Rules provides that the facilities and services of the CAS Ad Hoc Division are free of charge and that the Parties pay their own costs of legal representation, experts, witnesses and interpreters.

**ON THESE GROUNDS**

**The Sole Arbitrator renders the following decision:**

1. The CAS Ad Hoc Division has no jurisdiction to rule on the Application filed on 2 August 2021 by Ms Krystsina Tsimanouskaya.
2. Each Party shall bear its own legal costs and other expenses incurred by this procedure.