



Arbitration CAS ad hoc Division (O.G. Atlanta) 96/005 A., W. and L. / NOC Cape Verde (NOC CV), award of 1 August 1996

Panel: Mr. Michael Beloff (England), President; Mr. Christopher Campbell (USA); Prof. Mingzhong Su (China)

*Exclusion of three participants
Right to be heard*

- 1. Any person at risk of withdrawal of accreditation should be notified in advance of the case against him and given the opportunity to dispute it, in accordance with the elementary rules of natural justice and due process. This is because of the important rights and privileges to which accreditation gives rise and because of the particular consequences of a summary withdrawal, which entails deprivation of access to sleeping quarters and personal goods.**
- 2. It is not for the CAS ad hoc Division to rule on the merits of the NOC's grounds for the exclusion of the claimants, considering that the powers of the NOC in matter of exclusion arise out of the provisions of the Olympic Charter.**

This case is a sequel to the case discussed in this Panel's award of 27 July 1996 (Award 002) to which immediate response should be made. In brief this Panel then held that the Respondent purported withdrawal of the Claimants' accreditation on disciplinary grounds was invalid and of no effect because of absence of consent of the IOC Executive Board ("the IOC Board").

Since that award the Respondent has sought and obtained the consent of the IOC Board. It has therefore cured the procedural irregularity identified in the first award. This Panel is accordingly now confronted with the issue presented by Claimants' counsel of whether the withdrawal can be impeached on other grounds.

By fax received on the 30 July 1996 at 9:45 p.m., the Claimants forwarded this application to the Court of Arbitration for Sport (CAS), ad hoc Division in Atlanta ("AHD").

LAW

1. These proceedings are governed by the Rules for the Resolution of Disputes Arising During the Olympic Games (the “ad hoc Rules”) of CAS enacted by the International Council of Arbitration for Sport (ICAS) on 28 September 1995. They are 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 because the seat of the ad hoc Division and of its panels of Arbitrators was established at Lausanne, Switzerland, by a decision issued by the President of the AHD on 11 July 1996.
2. The jurisdiction of the ad hoc Division arises out of Rule 74 of the Olympic Charter (see also Rule 1.2).
3. Under Article 17 of the ad hoc Rules, the Panel must decide a dispute “*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*”.
4. Under Article 16 of the ad hoc Rules, the Panel has “*full power to review the facts on which the application is based*”.
5. For the background reference should be made to paragraphs 13 and 14 of Annex 1. Since the date of the first proceedings the first Claimant participated in the first round heats of the 110 metres hurdles but, on account of injury, was able only to leave the blocks.
6. Relevant Rules of Olympic Charter

Rule 31 *Mission and Role of the NOCs*

31.3 *The NOCs have the exclusive powers for the representation of their respective countries at the Olympic Games ...*

Bye Law to Rule 31

8. *The NOCs perform the following tasks:*

8.1 *They constitute, organize and lead their respective delegations at the Olympic Games and at the regional, continental or world multi-sports competitions patronized by the IOC. They decide upon the entry of athletes proposed by their respective national federations. Such selection shall be based not only on the sports performance of an athlete but also on his ability to serve as an example to the sporting youth of his country.*

Rule 41 *Chef de Mission*

2.1 *During the period of the Olympic Games, the competitors, officials and other team personnel of an NOC are placed under the responsibility of a chef de mission, ...*

Rule 49 Entries

- 49.1 *Only NOCs recognized by the IOC may enter competitors in the Olympic Games. The right of final acceptance of entries rests with the IOC Executive Board.*
- 49.2 *An NOC shall only exercise such attributions upon the recommendations for entries given by national federations.*

Bye-law to Rule 49

7. *The withdrawal of a duly entered delegation, team or individual shall, if effected without the consent of the IOC Executive Board, constitute an infringement of the Olympic Charter and shall be the subject of disciplinary action.*

Rule 50 Infringement of the Olympic Charter

The IOC Executive Board may withdraw accreditation from any person who infringes the Olympic Charter.

Rule 66 Accreditation Card

- 66.1 *The accreditation card gives, to the degree necessary in each case and as indicated thereon, access to the sites and events placed, by the IOC, under the responsibility of the OCOG. The IOC determines the persons entitled to such cards and sets the conditions of their granting and procedures for their issuance. It is the duty of the OCOG to deliver the cards to the persons entitled to them.*
- 66.2 *Details relating to the accreditation cards, including specifications, categories and populations, privileges, procedures and deadlines, are contained in the "Entries for Sports Competitions and Accreditation Guide", adopted by the IOC Executive Board.*

Bye-law to Rule 69 Opening and Closing Ceremonies

- 69.1.3 *Each delegation, dressed in its official uniform, must be preceded by a name-board bearing its name and must be accompanied by its flag, to be carried by a member of the delegation.*
7. This Panel finds as fact that neither the Respondent nor the IOC Board notified any of the Claimants of the proposal to withdraw accreditation or entertained any representations from any of the Claimants in respect of the allegations made in the allegations letter before making their respective decisions. The Respondent contended that there had been opportunity for dialogue; but such opportunity is manifestly insufficient when the subject matter of the dialogue, i.e. the threat of withdrawal of accreditation on particular ground is not identified. While this Panel does not consider that natural justice or due process requires the full panoply of a trial procedure to be deployed before such decisions are taken, it considers that any person at risk of withdrawal of accreditation should be notified in advance of the case against him and given the opportunity to dispute it, in accordance with elementary rules of natural justice and due process. This is because of the important rights and privileges to which accreditation gives rise and because of the particular consequences of a summary withdrawal, e.g. deprivation of access to sleeping quarters and personal goods. It is not without significance in this context that the sixth principle of the Olympic Charter stresses the

importance of “fair play”, which, in the view of the Panel, is as pertinent to the disciplinary process as it is to competitive sport.

8. A useful, although not unique, summary of what is required by due process in this context is found in Grayson's Sports and the Law, p. 306 (2nd ed.).
*“(1) avoid any risk of pre-judgment or prejudice or bias or likelihood of it,
(2) formulate and notify clearly, preferably in writing, any assertions needing reply,
(3) notify clearly, and preferably in writing, any date for investigation or hearing,
(4) act intra vires, within any rules, and not ultra vires, outside them,
(5) remember the right to be heard in deference of any allegation,
(6) in cases of difficulty or complexity, consider carefully any request for legal representation”.*
9. Whether or not it is necessary for both the NOC and the IOC to comply with the basic rule *audi alteram partem* (“hear the other side”) when allegations of misconduct are made and said to justify withdrawal of accreditation is not a matter which strictly falls for consideration in a case when neither of them did. As at present advised this Panel inclines to the view that it is certainly necessary for the NOC to do so and for the IOC to confirm that the NOC has done so. It would be prudent for the IOC to invite any person threatened with withdrawal of accreditation to comment on a letter inviting the IOC's consent. Whether it is mandatory in point of law is a question upon which this Panel has not yet heard submissions, and upon which it accordingly declines to express an opinion.
10. In reaching this conclusion this Panel has considered whether it could cure any procedural defects by holding a full hearing of its own in which each party could present its view as to the rights and wrongs of the dispute. This Panel bore in mind in particular Article 16 of the ad hoc Rules and the full power to review facts. It came to the conclusion that this solution was not available to it. Under the Olympic Charter Bye-law 7 to Rule 49 the NOC is the decision maker in relation to withdrawal of accreditations with the IOC having the final authority to give the consent to the decision made by the NOC. The Panel's function is to review the propriety, in the broadest sense, of the decision of the decision maker; it is not to become the decision maker itself. Article 16 of the ad hoc Rules gives Claimants additional safeguards, not safeguards in substitution for those conferred by the rules of due process.
11. There are, of course, exceptional cases when a body such as this Panel, can overlook a clear departure from due process because it can determine that the decision would have been the same in any event; i.e. that there was nothing that the victim of the decision could have said to persuade a reasonable decision maker to change his mind. But the law has always recognized that such cases are rare, and the Respondent did not seek to content before this Panel that the present was such a case. Once it was made known that the Claimants would strenuously dispute the allegations made in due letter of 26 July, such a contention would have been doomed to failure.
12. Accordingly, once again, this Panel found it unnecessary, indeed, unwise, to form any view of the underlying merits of the case; and otiose to entertain full evidence and submissions on

them. Suffice it is to say that were the allegations of deliberate indiscipline made against the Claimants in the allegation letter to be shown to be well-founded on the facts to an appropriate standard of proof this Panel is far from presently persuaded that it would be an improper exercise of power to visit the sanction of withdrawal of accreditation upon the Claimants. But it has heard no submissions from the Respondent side on this issue; and only succinct opening from the Claimants that the sanction would even then be disproportionate. However, this Panel has no doubt that, members of a delegation must respect, not reject the authority of the NOC; and nothing it has said is intended to cast doubt on that principle.

13. This Panel can only, in conclusion, regret again that the issue of participation in the closing ceremony should be a source of controversy rather than of comity. The Olympic Charter refers in its sixth principle to “the Olympic Spirit, which requires mutual understanding with a spirit of friendship”. Both sides may care to bear this in mind during the last days of the Centennial Games.