



COURT OF ARBITRATION FOR SPORT (CAS)
TRIBUNAL ARBITRAL DU SPORT (TAS)
Ad hoc Division – XIX Commonwealth Games in New Delhi

CAS arbitration N° CG2010/01

FINAL AWARD

in the arbitration between

Phillip Darrell Jones
(the "Applicant")

and

Commonwealth Games Federation
(the "Respondent")

1. FACTS

- 1.1. Phillip Jones (the “Applicant”) has achieved a world ranking of seventeen in the sport of lawn bowling.
- 1.2. The Applicant has lived on Norfolk Island since 2001. Norfolk Island is an external territory of Australia. However, for the purposes of the Commonwealth Games, Norfolk Island is recognised as a “Commonwealth Country”. Athletes representing Norfolk Island are, subject to the applicable rules, therefore entitled to participate in the Commonwealth Games as members of the Norfolk Island team.
- 1.3. In February 2010, Mr Jones was told by officials of the Norfolk Island Amateur Sports and Commonwealth Games Association (the “CGA”) that he had been selected to represent Norfolk Island in the singles event in the bowling competition at the Commonwealth Games.
- 1.4. Following notification of his selection Mr Jones has devoted much of his time and energy to preparation for the competition at the Commonwealth Games.
- 1.5. In June 2010 Mr Jones completed an “*Entry and Eligibility Conditions Form*” for the Commonwealth Games.
- 1.6. Shortly after completing and submitting his entry form, Mr Jones was told by officials of the CGA that he was not eligible to participate in the Games as a member of the Norfolk Island Team. He was told that this was because he did not qualify as a “citizen or subject” of Norfolk Island, as those terms are understood under the *Commonwealth Games Federation Constitution* (the “Constitution”).
- 1.7. Mr Jones, who currently holds a General Entry Permit under the *Norfolk Island Immigration Act 1980*, then applied to the Supreme Court of Norfolk Island for a declaration that he is lawfully entitled to be regarded and designated as a citizen of the political entity known as Norfolk Island. That application was denied on the basis that, inter alia, the Constitution provides that any dispute arising under or in connection with the interpretation of the Constitution is to be solely and exclusively resolved by arbitration by the Court of Arbitration for Sport (the “CAS”).
- 1.8. The Court’s decision was released on 30 September 2010. On 3 October 2010 the Applicant filed an appeal to the Ad hoc Division of the CAS. A hearing was held on 4 October 2010 which was the first day of competition of the Games. In that application, which, in addition to identifying the Commonwealth Games Federation (the “CGF”) as a Respondent, also identifies the CGA as an interested party whose presence may be necessary or desirable at the hearing. The Applicant seeks a ruling that he be eligible to enter and compete in the current Games as a member of the Norfolk Island team or that the provisions of Article 24.1 (which require competitors to be “citizens or subjects” of the Commonwealth Country that enters them to compete in the Games) of the Constitution be dispensed with to allow him to enter and compete in accordance with Article 24.5.
- 1.9. On 9 June 2010 the Executive Board of the CGF resolved that, for the purposes of Article 24.1 of the Constitution, a citizen or subject of Norfolk Island would be defined as:

“The holder of permanent residency status as set out in the advice from the legal counsel of the Norfolk Island administration dated April 26, 2010.”

- 1.10. The Executive Board's resolution of 9 June 2010 was communicated to the CGA on 17 June 2010.
- 1.11. On 30 June 2010 the CGA submitted to the CGF a request for dispensation for a number of Norfolk Island Athletes, including the Applicant, all of whom were General Entry Permit or Temporary Entry Permit Holders in Norfolk Island. On 2 July 2010, the Operations Director of the Commonwealth Games Federation notified the CGA that the requests for dispensation had been denied. Reference was made to the Executive Board resolution of 9 June 2010 that to be eligible to compete at a Commonwealth Games, Norfolk Island Athletes must hold "residency" status.
- 1.12. Mr Jones acknowledges that he was shown a copy of the email communicating this decision within two or three weeks of 3 July 2010.
- 1.13. There were then a number of communications between Mr Jones and the CGF in which Mr Jones sought written confirmation of his ineligibility and other particulars.
- 1.14. In August 2010 Mr Jones obtained two opinions from Senior Counsel (the Hon. Adrian Cook R.F.D., Q.C.). Senior Counsel concluded that the length of Mr Jones' residency of Norfolk Island and his other strong ties to the Norfolk Island community, which included having stood for election to the Norfolk Island Legislative Assembly, were such that he should be regarded as meeting the qualification of "citizen or subject" of Norfolk Island.
- 1.15. Having failed in efforts to secure a reconsideration of the CGF's decision, on 16 September 2010, Mr Jones filed an Originating Summons seeking a declaration of rights and other orders with the Supreme Court of Norfolk Island.
- 1.16. As previously noted, the Norfolk Island Supreme Court dismissed Mr Jones' application on 30 September 2010.

2. LEGAL ASPECTS

Procedure

- 2.1. On 30 September 2010 Mr Jones lodged an application with the Oceania Division of the CAS in Sydney, Australia. Following review by the CAS secretariat of Mr Jones' application, he was advised to, and did, re-file his application with the Ad hoc Division of the CAS. That application was filed on 3 October 2010.
- 2.2. A hearing was held in Delhi, India on 4 October 2010. The CAS Secretary General, Mr Matthieu Reeb attended the hearing and the Panel was assisted by Ms Louise Reilly, Counsel to the CAS. The Applicant and his counsel, the Honourable Adrian Cook, Q.C., participated by telephone from Norfolk Island. Mr. Sharad Rao attended as Legal Advisor for the CGF together with Mr Vidushpat Singhania, advocate of the Delhi High Court. Mr Stuart Corbishley, representing the Organising Committee, attended as an observer.

Legal Framework

- 2.3. These proceedings are governed by the CAS Arbitration Rules for the XIX Commonwealth Games in New Delhi (the "Ad hoc Rules") enacted by the International Council of Arbitration for Sport ("ICAS") on 3 May 2010. 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 as the result of the location of the seat of the CAS ad hoc Division in Lausanne Switzerland, pursuant to art. 7 of the CAS ad hoc Rules.

- 2.4. The jurisdiction of the ad hoc Division arises out of Article 28 and 30 of the Constitution of the Commonwealth Games Federation.
- 2.5. Under Article 17 of the ad hoc Rules, the Panel must decide a dispute *"pursuant to the Constitution of the Commonwealth Games Federation, the applicable regulations, general principles of law and the rules of law whose application the Panel deems appropriate"*.
- 2.6. According to art. 16 of the CAS ad hoc Rules, the Panel has *"full power to establish the facts on which the application is based"*.
- 2.7. The purpose of the Ad hoc Rules is stated in Article 1, namely *"to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Article 28 of the Constitution of the Commonwealth Games Federation and by the arbitration clause inserted in the entry form for the Commonwealth Games (the "CG"), insofar as they arise in the host country of the CG between 30 September 2010, and 14 October 2010"*.

Merits of the application

Standing of the Applicant

- 2.8. The CGF submit that the Applicant does not have standing to bring his application. According to the CGF, the party applying should be the CGA, because the Constitution of the CGF governs "the Federation" which is made up of appropriate sports bodies of "Commonwealth Countries".
- 2.9. The term "*Commonwealth Countries*" is defined in Article 31 of the Constitution in the following terms: "*Commonwealth Countries* means all Commonwealth countries and any colonies or dependent or associated territories of Commonwealth countries and *Commonwealth Country* means any of them".
- 2.10. It was noted that the CGA had been notified of the hearing but had elected not to participate in the hearing, merely requesting instead that it be kept informed of what transpires at the hearing.
- 2.11. Having regard to Article 1 of the Ad hoc rules, it would be contrary to both the letter and spirit of the Ad hoc Rules and the purposes for which the Ad hoc Division was established, for individual athletes to be denied access to the CAS during the Games to the extent suggested by the CGF. This is particularly so where the national CGA has made no decision and has declined to take any action on behalf of the athlete. The Tribunal is therefore satisfied that the athlete has standing.

Timeliness of the application

- 2.12. Article 28 of the Constitution provides that *"any dispute arising under or in connection with the interpretation of this Constitution or the Regulations shall be solely and exclusively resolved by mediation or arbitration by the Court of Arbitration for Sport according to the Code of Sports-Related Arbitration"*.

2.13. Both parties acknowledge that the application is properly characterised as an “Appeal” as that term is defined in the *Code of Sports-related Arbitration* (the “Code”).

2.14. The Constitution does not specify the time limit within which an application must be made to the CAS in connection with a dispute arising under or in connection with the interpretation of the Constitution. Consequently, Article R47 of the Code is engaged. Article R47 provides:

“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 Appellant 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”.

Article R49 of the Code provides the time limit for Appeal in the following terms:

“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 receipt of the decision appealed against”

2.15. In the Tribunal’s view, the Code does not provide any discretion to waive or extend the 21 day period within which an appeal must be initiated. While Article R32 of the Code, which deals with time limits, permits the extension of time in certain circumstances, this discretion is expressly not applicable to the time limit for filing a statement of appeal.

2.16. The CGF submits that because the CGA was notified of the Executive Board’s resolution concerning the eligibility of Norfolk Island athletes on 17 June 2010, the Applicant’s deadline for filing an appeal would have been 8 July 2010.

2.17. In our view, the appeal period would run from the date when the Applicant was provided with a copy of the written communication from the Commonwealth Games Federation refusing to grant dispensation for compliance with Article 24.1 to the Applicant. This did not occur until 2 to 3 weeks after 3 July 2010.

2.18. Even if one were to assume that the Applicant was notified of the CGF’s decision at the end of July, which is taking the evidence at its best, his application was not brought until 30 September 2010, many weeks after the expiry of the 21 day appeal period.

2.19. Counsel for the Applicant submits that, Articles R49 and R32 notwithstanding, the Tribunal should consider the unique circumstances of the case and give credit to the Applicant for attempting to clarify his status by resort to the Norfolk Island Supreme Court.

2.20. Regrettably, the Tribunal cannot agree with this submission. The Applicant was aware as early as 17 June 2010 that the fact that he did not possess “residency” status in Norfolk Island, pursuant to the *Norfolk Island Immigration Act 1980*, formed the basis for a conclusion by the CGF that the Applicant was not eligible to participate as a member of the Norfolk Island Commonwealth Games team. The subsequent request for dispensation, made by the CGA on behalf of the Applicant and several other athletes, was unsuccessful. The Applicant was informed, verbally of the refusal to grant dispensation in early July, and had seen a copy of the written communication which conveyed that decision by no later than the end of July.

- 2.21. The explanation given for the subsequent delay in taking further steps is that the Applicant was seeking the advice of senior Counsel, attempting to obtain further clarification from the CGA as to his status, attempting to obtain a re-consideration by the CGF of its initial decision, and ultimately, assembling the necessary material to bring the Court application which was launched on 16 September 2010.
- 2.22. Throughout this period, the Applicant would have been very conscious of the impending start of the Commonwealth Games. By the time the Applicant filed his application with CAS, the start of the Commonwealth Games was just three days away.
- 2.23. While the Tribunal has a great deal of sympathy with the Applicant's predicament, in the Tribunal's view, even if we had discretion to extend the time limit for commencing the Applicant's appeal, which we do not, we would decline to exercise that discretion in favour of the Applicant.

Substantive Issue

- 2.24. Given the Tribunal's view on the lack of timeliness of the Applicant's appeal, it is not necessary for us to deal with the substantive merits on the Applicant's eligibility. However, we have decided to do so, having regard to the interests of both the athlete, who will no doubt be disappointed with the consequences of our decision, and the Respondent, which will wish to avoid eligibility disputes such as this in the future.
- 2.25. There are 71 Commonwealth Countries participating at the XIX Commonwealth Games 2010 Delhi. Not all of these "*Commonwealth Countries*" are sovereign nations. The Commonwealth is an association of 53 nations. For the purposes of the Commonwealth Games, however, countries which are not, in a public international law sense, sovereign nations, are nevertheless recognised as separate countries. For instance, the four countries which collectively comprise the political entity known as the United Kingdom (England, Wales, Scotland, Northern Ireland) participate as separate countries for the purposes of the Commonwealth Games.
- 2.26. As a matter of general policy, the CGF has determined that, in the case of countries which do not have in the country's laws a definition of citizenship in that country, 5 years of permanent residence in the country should be the basic requirement for eligibility. This policy is implemented through consideration, on a country by country basis, of local legislation pertaining to citizenship and residency.
- 2.27. Norfolk Island is an external territory of Australia. It has a measure of self-government. However, as noted by Jacobsen CJ in *Jones and Tall v. The Norfolk Island Amateur Sports and Commonwealth Games Association et al*, (not yet reported SC 7 of 2010, 30 September 2010), commencing at paragraph 36, the *Australian Citizenship Act 2007* (Cth) applies to Norfolk Island as an external territory with the effect that persons born and/or holding Residency status on Norfolk Island are subject to both the privileges and obligations conferred by the *Citizenship Act*. However, as his Honour notes, at paragraph 42:

"although the Citizenship Act applies to Norfolk Island, it does not seem to me to follow that a citizen of Australia is necessarily a citizen of Norfolk Island. The extension of the Citizenship Act to the External Territories does not seem to me to carry with it the concept of citizenship of the Territory as a separate polity"

- 2.28. Because there is no such things as “citizenship” of Norfolk Island, regard must therefore be had to the legislation governing the residency of Norfolk Island, namely, the *Immigration Act 1980* (Norfolk Island).
- 2.29. Pursuant to Sections 28 and 29 of that Act, “Residency” of Norfolk Island is acquired by one of two routes. Section 28 which provides for “Residency by birth”, has no potential application here. Section 29 provides for “Residency by declaration” which is available to an individual who satisfies all of the following criteria:
- (a) the person is a permit holder under a General Entry Permit;
 - (b) the person is ordinarily resident in Norfolk Island and has been so resident (other than as the holder of a Temporary Entry Permit) for a period of at least 5 years during the period of 7 years immediately preceding the making of the application;
 - (c) the person has not during the period of 5 years immediately preceding the making of the application been ordinarily resident elsewhere; and
 - (d) the person intends, if declared to be a resident, to continue to reside in Norfolk Island.
- 2.30. The Applicant acknowledges that he did not acquire a General Entry Permit until 1 June 2006. Prior to that, he was the holder of a succession of Temporary Entry Permits. Time spent living on Norfolk Island on a Temporary Entry Permit does not count towards the computation of time spent as an ordinary resident for the purposes of obtaining Residency by declaration.
- 2.31. For nine months or so there were ongoing communications between the Norfolk Islands CGA and the CGF concerning the application of the “*citizenship or subject*” rule to athletes from Norfolk Island. These discussions culminated with the resolution of the Executive Board on 9 June 2010.
- 2.32. It is indeed unfortunate that the Executive Board’s decision was not conveyed to the CGA until 17 June 2010, which was two days after the deadline for athletes to complete their Entry and Eligibility Conditions Forms.
- 2.33. It is equally unfortunate that, when the Applicant was told, in February 2010, that he had been selected to participate in the Commonwealth Games as a member of the Norfolk Island team, he was not told that his selection would be subject to confirmation of his eligibility to compete.
- 2.34. The CGA attempted, but failed, to seek dispensation from Article 24.1 for Mr Jones and several other athletes. None of the athletes concerned, who were all holders of either Temporary Entry Permits or General Entry Permits, were granted dispensation.
- 2.35. It cannot, accordingly, be said that Mr Jones, in particular, has been discriminated against. Nor can it be said that the resolution of the Executive Board was in any way improper. Indeed, the Executive Board’s decision seems to have been consistent with the general policy of the CGF (five years of permanent residence as the equivalent of “citizen or subject” status), and is also consistent with decisions made by the CGF in relation to the eligibility of athletes from other Commonwealth countries.
- 2.36. By reason of the foregoing, we are of the view that the Applicant does not meet the requirements of Article 24.1 in that he is not a “*citizen or subject*”, or the equivalent thereof, of Norfolk Island. Nor are we persuaded that the Respondent unfairly, or improperly exercised its discretion not to grant dispensation to the Applicant with reference to Article 24.1.

- 2.37. The Tribunal notes that the unique characteristics of the Commonwealth Games are such that it is important for athletes and CGAs of Commonwealth Countries to have a clear understanding of the application of Article 24.1 to their territory. Determinations of the type made by the CGF with respect to Norfolk Island on 9 June 2010 should, ideally, be made well in advance of a Commonwealth Games so that athletes and CGAs know where they stand. It is equally important that CGAs do not engender unjustified expectations of eligibility by prematurely selecting athletes to participate in Commonwealth Games teams without being absolutely sure that they will meet eligibility requirements.
- 2.38. As Mr Jones stated at the hearing, it has been his dream to play in the Commonwealth Games. That dream has been thwarted, for the time being, at least, as a result of circumstances largely beyond his control. Although we are, for the reasons stated, unable to grant the Applicant the relief that he has sought, we have considerable sympathy for his position. His disappointment has been heightened by the unnecessary experience of having been initially told he had been selected, and then, effectively, being de-selected when, as Mr Jones put it "*the rules changed*". Although the rules have not so much changed as been clarified, the result is the same: confusion and profound disappointment. The situation is one, which, with the benefit of hindsight, could, and should, have been avoided.

3. DECISION

On the basis of the foregoing facts and legal aspects, the ad hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The Applicant's appeal is dismissed.

New Delhi, 4 October 2010

THE AD HOC DIVISION OF THE COURT OF ARBITRATION FOR SPORT

Graeme Mew
President of the Panel

Henry Jolson QC
Arbitrator

Mark Hovell
Arbitrator