



Arbitration CAS ad hoc Division (OG Beijing) 08/003 Rainer Schuettler v. International Tennis Federation (ITF), award of 4 August 2008

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Prof. Luigi Fumagalli (Italy); Mr Alan Sullivan QC (Australia)

Tennis

Olympic Games

Eligibility

NOC's discretionary power relating to the selection of tennis players for the OG

In the particular case and in the context of the 2008 OG, the German NOC has discretion to enter the players of its choice from amongst the 48 top players eligible for the Olympic Tournament according to the ITF criteria included in the NOC's rules. No ITF rule has been identified that subordinates the NOCs power of selection to the obligation to nominate players strictly in accordance with the ITF's competition rankings.

The Applicant is a professional tennis player of German nationality who, amongst other achievements, reached the semi-finals of the Wimbledon Championship Men's singles in 2008.

The Respondent is the International Federation for the sport of tennis recognized by the IOC.

The issue is whether the Respondent can be required to enter the Applicant in the men's singles competition of the 2008 Olympic Tennis event of the XXIX Olympiad, Beijing, which they have declined to do.

On 3 August 2008, a hearing took place in the Court of Arbitration for Sport at the Park Plaza Hotel in Beijing. Representations were made by:

- Ms Susanne Rademacher, Counsel for the Applicant;
- Mr Michael Vesper, General Secretary of the German NOC (Interested Party);
- Mr Francesco Ricci Bitti, ITF President;
- Mr Paul Smith, ITF General Secretary;
- Mr Pierre Ducrey, Sports Operation Manager of the IOC attended in Observer capacity.

We note that Mr Ricci Bitti for the Respondent formally protested against the short notice given, but waived any right to ask for an adjournment. We are completely satisfied that he had in the event

a full opportunity to put his case which he did (as the representative of all parties did) with expertise and eloquence.

On 9 June 2008, the competition rankings of the ITF (the “List”) was published. At that moment the Applicant was ranked no. 89 only.

Various of the players then listed were ineligible because of the rule that no country can have more than 4 players [ITF Rule III 1 (a)] (the “4 maximum rule”).

Others withdrew at various times because of injury or other valid causes.

The German NOC, who had their own criteria for nomination, which added to the international eligibility criteria a top 20 world ranking, a semi-final place in a Masters Tournament or a quarter-final place in a Grand Slam Tournament (including the Wimbledon Championships), nominated the Applicant and not Mr Gremelmayer and Mr Berrer, both German nationals ranked in the List above the Applicant. They took the view, consistent with their own criteria, that the Applicant has better chances of success in the Olympic Tournament. It is not for us to say whether in this they were right or wrong. We should note, however, that Mr Gremelmayer, who might well have been disappointed with their choice, has not sought to challenge the German NOC's exercise of its selectorial function.

It was accepted on all sides that if the ITF was obliged to discount players in the List, who had not been nominated by their NOC, they would be obliged to select the Applicant [pursuant to the imperatives of ITF Rule III 3 (i)-(iii)] as being in the 56th place in the List.

The Applicant would rank 56th through a combination of four factors: (i) his position in the list, (ii) the ineligibility of players above him in the list because of the 4 maximum rule, (iii) the withdrawal of players above him on account of injury – none of which was controversial, (iv) the non-nomination of other players above him in the List by national NOCs – which was controversial and identified precisely what divided the parties.

LAW

Jurisdiction

1. These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”) enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (the “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. The jurisdiction of the CAS ad hoc Division in relation to the Applicant arises out of the entry form signed by each and every participant in the Olympic Games as well as out of Rule 59 of the Olympic Charter and in relation to the Respondent by reason of Rule 3.3, 26, 27 and 59 of the same Charter (see CAS ad hoc Division OG 04/006, para. 1).
3. Under art. 17 of the CAS ad hoc Rules, the Panel must decide the 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. 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”*.

Applicable law

5. The Olympic Tennis Event 2008 Regulations (the “ITF Rules”) are the applicable Regulations in the present case. The relevant provisions read as follows:

SECTION II – COMPETITORS

1. ELIGIBILITY TO COMPETE AND CONDITIONS OF COMPETING

- (a) Any tennis player is eligible for nomination to the Olympic Tennis Event provided he is in good standing with his National Tennis Association and the International Tennis Federation (ITF) as follows:
 - i) Is not under a suspension imposed by his National Association, or by the International Tennis Federation, or through the imposition of a suspension under a Code of Conduct accepted and approved by the ITF.
 - ii) Is accepted by his National Association as being under its jurisdiction while competing in events for which he has been nominated by his Association.
 - iii)* Makes himself available for selection to represent his country in any of the International Team Championships of the Federation for two (2) of the following years – 2005, 2006, 2007, 2008 – provided however that one of those years is either 2007 or 2008. During the time of such competition, the player must agree to accept the jurisdiction of his National Association.
 - iv) Respects the spirit of fair play and non-violence at all times.
 - v) Accepts the conditions of entry of the events he enters, including the conditions of any Code of Conduct adopted for those events.
 - vi) Agrees to undergo any medical control and anti doping tests which are in operation during the event. Female players must agree to femininity control testing if requested.

** In 2005, 2006, 2007 or 2008 of the Davis Cup or Fed Cup, a player who makes himself available for selection for one Tie will be deemed to have fulfilled the requirement for that year.*

- (b) As a condition of eligibility, players shall:
- i) Arrange with their National Olympic Committee ("NOC"), through their National Tennis Association, to come under the formal responsibility and disciplinary control of their NOC and to comply with the Regulations established by their NOC for its Olympic delegation.
 - ii) Be part of the Olympic delegation of their NOC, who shall be responsible for all aspects of participation, including uniform, travel, accreditation and accommodation.
 - iii) The period during which this Regulation shall apply is the entire duration of the Olympic Games and such period prior, not in excess of fourteen days, established by the NOC for purposes of preparation for and travel to the 2008 Olympic Games.
- (c) While participating in the Olympic Tennis Event a player:
- i) Must accept all the applicable provisions of the Olympic Charter. In the case of matters not covered by the IOC Charter, the current Rules of the ITF will be enforced.
 - ii) May not accept, either directly or indirectly, any form of financial reward whatsoever in respect of the same, except for any payment which may have been established in respect of their Olympic team.
 - iii) May not have on his clothing or equipment any commercial identifications, and therefore any contractual requirements he may have with any person or organisation to have such commercial identification must be put into suspension for the period of the Olympic Games (Detailed rules regarding manufacturer's identifications appear in Appendix E – Code of Conduct).

2. NOMINATION OF COMPETITORS

- (a) A National Tennis Association, with the endorsement of its NOC, may nominate a player provided that:
- i) The National Olympic Committee is recognised by the International Olympic Committee; and
 - ii) The National Tennis Association is affiliated to that National Olympic Committee and to the International Tennis Federation.
 - iii) The player conforms to and agrees to abide by Section II of these Regulations "Eligibility to Compete and Conditions of Competing"; and
 - iv) The player is eligible to represent the country concerned in accordance with the Olympic Charter (Appendix A) and v) In the case of male players the player has reached the age of fourteen (14) years by 10 August 2008, and in the case of female players the player has reached the age of fifteen (15) years by 10 August 2008, the opening day of the 2008 Olympic Games Tennis Event.
- (b) The International Tennis Federation shall be responsible for ensuring that all competitors nominated are eligible.

3. NUMBER OF NOMINATIONS PER COUNTRY

- (a) ...
- (b) ...
- (c) A maximum of four (4) men may compete in the men's singles and a maximum of four (4) women may compete in the women's singles.
- (d) A maximum of four (4) men and four (4) women may compete as teams in the men's and women's doubles.

4. ENTRIES

- (a) Only National Tennis Associations which have been members of the ITF prior to 1 January 2008 may nominate players for participation in the 2008 Olympic Tennis Event. For the purposes of such eligibility, both Full and Associate Members of the ITF may participate.
- b)
 - i) Entry forms (by country) will be sent by the ITF to all National Tennis Associations eligible to participate no later than 5 February 2008.
 - ii) The completed Entry forms, endorsed by each National Olympic Committee, are to be received by the ITF no later than 3 April 2008.

5. SELECTION DATES

- (a) By no later than 12 June 2008, the ITF shall confirm to National Associations/NOCs the names of players eligible for direct acceptance for singles and/or doubles based on the international computer rankings of 9 June 2008.
- (b) By no later than 23 June 2008 the National Associations/NOCs shall
 - i) Advise the ITF which of their eligible players have been selected to compete in the singles and doubles competitions; and
 - ii) Submit to the ITF their applications for ITF Places.
- (c) By no later than 2 July 2008 the ITF shall select the ITF Places and advise the National Associations/NOCs.
- (d) ...

SECTION III – THE COMPETITION

1. SIZE AND COMPOSITION OF DRAWS

The maximum number of players accepted into the Competition shall be as follows:

(a) Men's Singles

Draw of sixty-four (64) players, with not more than four (4) players from any one (1) country, comprising:

48 Direct Acceptances

14 ITF Places

2 Invitations

2. CRITERIA FOR SELECTION

(a) Direct Acceptances

i) Men's Singles

Forty eight (48) players will receive direct acceptance into the men's singles event at the 2008 Olympic Tennis Event based on the recognised international singles computer rankings of 9 June 2008. A National Association/National Olympic Committee who has more than four (4) players eligible for direct acceptance into the men's singles event should select its four (4) highest ranked eligible players based on the computer ranking. Any player nominated and accepted for the singles event will automatically be eligible for selection for the doubles event.

(b) ITF Places and Invitations

i) Men's Singles

Eight (8) of the fourteen (14) ITF places shall be selected solely on the singles computer ranking. The remaining six (6) places shall be selected taking into consideration the following:

- Singles Computer Ranking
- Whether the country is represented in the Tennis Event
- Number of players on site
- Geographical location

3. WITHDRAWALS

(a) Singles

i) Having received direct acceptance into the 2008 Olympic Tennis Event, a player who withdraws for reasons of illness, injury or bereavement prior to 12.00 midnight GMT on 2 August 2008 may be replaced by his National Association/NOC with an alternative player from its country who was included on the list of players eligible for direct acceptance sent to the National Association/NOC by the ITF.

If there is no other player on the list from the country from which the player withdrew the next highest ranked eligible player, based on the international computer rankings of 9 June, 2008, will gain direct acceptance providing such player does not bring the number of players from that nation to more than four

(4) in the men's and women's singles events. In this case, the next eligible highest ranked player will gain direct acceptance.

- ii) A player who withdraws for reasons other than illness, injury or bereavement prior to 12.00 midnight GMT on 2 August 2008 will be replaced by the ITF with the highest ranked nominated player based on the international computer rankings of 9 June 2008, providing such player does not bring the number of players from that country to more than four (4) in the men's and women's singles events. In this case, the next eligible highest ranked player will gain direct acceptance.
- iii) After 12.00 midnight GMT on 2 August 2008, if a player withdraws from the Olympic Tennis Event a player who is on site and not competing in the singles event will be selected by the Referee and the ITF Technical Delegates to take his or her place. The selection shall be based on the latest recognised international singles computer rankings and the selected player must not bring the number of players from that country in the men's or women's singles events to more than four (4).

6. The following provisions of the Olympic Charter (the "OC") are also material:

27 Mission and Role of the IFs within the Olympic Movement

1 The mission and role of the IFs within the Olympic Movement are:

...

- 1.5 to establish their criteria of eligibility for the competitions of the Olympic Games in conformity with the Olympic Charter, and to submit these to the IOC for approval;

...

28 Mission and Role of the NOCs

....

7 NOCs have the right to:

...

- 7.2 send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter;

...

45 Invitations and Entries

...

- 2 Only NOCs recognised by the IOC may enter competitors in the Olympic Games. Any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds. Nobody is entitled to any right of any kind to participate in the Olympic Games.

Analysis

7. From the perspective of first principle there are powerful arguments on both sides. The ITF argue for the primacy of their right to control their sport, and fairness and certainty for players who wish to rely on an expertly and objectively compiled ranking list in order to gain entry to the prestigious quadrennial Olympic Tournament. The German NOC (supporting the Applicant) argue the primacy of their right to select the players to represent their country, and their own ability to rely on high level (and in this instance recent) performance as distinct from performance over of period of time to justify their selection, which, they would also contend, is fair to the players.
8. Our function, however, is to construe the relevant legal instruments as they are, not as they might be, not least because there is no obvious tie break between the competing principles to which we have referred.
9. The Charter does not point conclusively in either direction. It is not in issue that it is for an NOC to select its competitors for the Olympics. No other body or person within a member country has that right (OC Rule 28.7.2 and 45.2). It is equally not in issue that an IF has the right to establish its criteria of eligibility for Olympic competitions, subject only to IOC approval (OC Rule 27.1.5). The ITF has indeed done so in the present case (see ITF Rule 1). It is not disputed that the Applicant satisfies these basic eligibility criteria.
10. The real issue is whether the ITF Rules oblige NOCs to nominate players strictly in accordance with the List. For the reasons hereinafter set out, we do not consider that they have such effect.
 - (i) No ITF Rule has been identified to us that subordinates the NOCs power of selection in that way either expressly or by necessary implication.
 - (ii) Even where, as in the Rules concerning direct acceptance, NOCs, when they enjoy the luxury of more than 4 players in the top 48 to choose from, are encouraged to select them in order of ranking, they are not compelled to do so. The phrase used is “should select” (IF rule III 2 (a)) not shall or must or will select and contrast, for example, ITF Rule III 3 (a) (i) (ii) (iii) [This provision does not currently apply to the German NOC, who do not enjoy such luxury.]
 - (iii) ITF Rule II 5 (a) deals with players eligible for direct acceptance (which on 12 June 2008 the Applicant was not), a matter which the ITF confirms to the NOCs. By contrast Rule II 5 (b) stipulates that, outside that group, it is for the NOC to advise the ITF of which players eligible for selection (that is to say within the terms of ITF Rule II 1), the NOC has selected to compete in the Singles.
 - (iv) Contextually, we also take note of the fact that in other sports whereas the IF sets basic selection criteria (e.g. in track and field “A” and “B” standard) the NOCs (with the concurrence no doubt of the NF) decides which sportsmen or women meeting those standards will in fact represent their country (e.g. the notorious USA sudden death trials). We are not aware of any objection to this dichotomy of function which respects the dual sovereignties of national and international bodies: nor do we consider that such

dichotomy when applied to tennis would lead to anarchy in the sport, when, as Mr Ricci Bitti noted, the right (as we perceive it) to depart from the ranking list seems to be exercised only by European members and then not as a matter of course.

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

The ITF is required to enter Mr Rainer Schuettler for the Men's Single Tennis Tournament of the XXIX Olympiad.