



Arbitration CAS 2008/A/1615 Hellenic Modern Pentathlon Federation (HMPF) v. Union Internationale de Pentathlon Moderne (UIPM), Australian Olympic Committee (AOC), Modern Pentathlon Australia (MPA) & Angela Darby, award of 31 October 2008

Panel: Mr Patrick Lafranchi (Switzerland), President; Mr Mark Hovell (United Kingdom); Mr Michele Bernasconi (Switzerland)

Modern Pentathlon

Eligibility to compete for the 2008 Olympic Games

Eligibility period

Qualification criteria

- 1. The applicable 2008 Qualifications Rules do not specify the time bracket to achieve eligibility. According to practice of the IOC and the UIPM, the eligibility period is derived from the beginning of the time opened for continental championships. Considering the above, the same timeframes for obtaining the qualification place and achieving eligibility can be accepted.**
- 2. Whereas the 2008 Qualification Rules do not explicitly define the kind of competitions in which eligibility scores must be achieved, it can be accepted that such competitions must reach the level of a UIPM Competition described by the Modern Pentathlon Competitions Rules which include the 2007 Open Australian Championship.**
- 3. “Qualification” is attributed to an athlete by name and means that this athlete at selected competitions has achieved a rank defined for being qualified. An Oceanian athlete can qualify for his/her NOC only by having achieved the 1st place at the Oceania Championships 2007 or for having achieved a defined top ranking in one of the other qualification competitions or via the Pentathlon World Ranking.**

The Appellant is the national federation governing the sport of modern pentathlon in Greece (the “Appellant” or HMPF). It is a member of the UIPM. HMPF is the responsible federation for Ms Donna Vakalis who may become the successor of Ms Darby as a participant in the modern pentathlon event at the 2008 Olympic Games if Ms Angela Darby cannot participate.

The first Respondent is the international federation governing the sport of modern pentathlon (the “First Respondent” or UIPM). It has its registered seat in Monaco.

The second Respondent is the National Olympic Committee of Australia (the “Second Respondent” or AOC). It has its seat in Sydney, Australia.

The third Respondent is the national federation governing the sport of modern pentathlon in Australia (the “Third Respondent” or MPA). The UIPM Court of Arbitration has ruled prior to this hearing that MPA may join the arbitration as an affected party since it is the national federation responsible for Ms Darby whose participation in the 2008 Olympic Games has been challenged by the Appellant.

The fourth Respondent is Ms Angela Darby, a modern pentathlete from Australia (the “Fourth Respondent” or “Ms Darby”).

Modern pentathlon is an Olympic Sport under the Charter of the International Olympic Committee (IOC) and part of the Programme of the XXIX Olympic Games in Beijing 2008 (the “2008 Olympic Games”).

The parties are in dispute whether Ms Angela Darby of Australia is entitled to participate in the modern pentathlon competition at the 2008 Olympic Games, or whether she is not eligible but should be replaced by Ms Donna Vakalis of Greece.

By written communication to its members and the media dated 1 June 2008, the First Respondent confirmed the “achieved qualification positions to the National Olympic Committees (NOCs)” according to a list of countries and athletes. The list named Ms Darby as the female athlete holding the qualification position for Australia. Ms Vakalis was not listed as a qualified athlete. The NOCs were called “to confirm to UIPM the athletes they wish to enter in the qualification positions. By 30 June UIPM will confirm the re-allocation of all unused quota places again using the Pentathlon World Ranking or the Continental Qualification, as necessary. A complete list of the 72 athletes who are confirmed, for Beijing will be issued following this date”.

By letter dated 4 June 2008, the Australian Olympic Committee confirmed “that the qualified modern pentathlon athletes below will participate in the 2008 Olympic Games: (...) Women: Angela Darby”.

Accordingly, the UIPM set up a list with 36 male and 36 female athletes participating in the modern pentathlon competition at the 2008 Olympic Games. It lists Ms Darby as a participant and Ms Vakalis as her substitute (‘Reserve’).

On 30 June 2008, the Court of Arbitration for Sport (CAS) rendered an award by which Mr Parygin, the Australian male participant in the modern pentathlon competition at the 2008 Olympic Games, was declared ineligible and replaced by a British athlete who had been listed as the ‘Reserve’ of the Australian athlete (the “Parygin-Decision”). The British athlete and his national federation had also been represented by Mr Townley who is acting for the Appellant in this arbitration.

By letter dated 7 July 2008, Mr Townley, then acting on behalf of Ms Vakalis and referring explicitly to the Parygin-Decision, requested the Respondent to replace also Ms Darby by her ‘Reserve’ Ms Vakalis. The Respondent refused to do so.

On 23 July 2008 the UIPM Court of Arbitration issued a decision (the “UIPM Court’s Decision”), holding that:

1. *The UIPM Court of Arbitration is competent to decide upon the claim of the HMPF against the UIPM and MPA.*
2. *The claim filed by the HMPF against the UIPM on 10 July 2008 is dismissed.*
3. *The UIPM Court of Arbitration confirms that Ms Angela Darby is qualified and eligible to participate in the modern pentathlon event at the 2008 Olympic Games.*
4. *All other prayers for relief are dismissed.*

The UIPM Court’s Decision was rendered on the basis of the UIPM Disciplinary Rules, the Modern Pentathlon Competition Rules and the 2008 Olympic Games Qualification Rules.

The UIPM Court of Arbitration was of the opinion that the matter at hand constitutes at least a controversy according to Article 11.3 a) of the Disciplinary Rules which falls under the jurisdiction of the UIPM Court of Arbitration. Therefore the UIPM Court of Arbitration concluded that it was competent to decide upon the matter at hand.

The UIPM Court’s Decision was based – briefly summarized – on the following considerations:

The Court holds that the qualification system for modern pentathlon at the 2008 Olympic Games provides that 36 men and 36 women shall participate in the 2008 Olympic Games (the “2008 Qualification System”). To be eligible to fill the qualification places, athletes must have achieved the minimum standards of 5’100 points (men) and 4’800 points (women) on the UIPM qualification list. The Court establishes that the 2008 Qualification System does not refer to certain competitions in which the eligibility scores must be reached nor does it define a timeframe of such competitions.

Then the Court emphasized that an athlete should not be allowed to rely on her best performance which she achieved years ago to participate in the 2008 Olympic Games. Hence, the Court accepted the timeframe for qualification of the 2008 Qualification System which started on 1st January 2007 for both, obtaining the qualification place and achieving eligibility.

Having set the timeframe, the Court had to decide whether the 2007 Victoria / Open Australian Championships fall within this timeframe and whether this Championship, where Ms Darby achieved the required score of 4’800 points, is a competition which is relevant for the 2008 Qualification System.

The Court noted that the 2008 Qualification System does not explicitly define the kind of competitions in which the eligibility score must be achieved. The Court ruled that such competitions must reach the level of a UIPM Competition as described by the Modern Pentathlon Competition Rules. Finally, the Court qualified the 2007 Victoria / Open Australian Championships as competition in terms of the Modern Pentathlon Competition Rules.

As a result, the Court accepts that by scoring 4'992 points at the 2007 Open Australian Championships, Ms Darby has become eligible to fill her qualification place to participate in the Modern Pentathlon Event at the 2008 Olympic Games.

Having ruled that Ms Darby is eligible to participate in the Modern Pentathlon Event at the 2008 Olympic Games, the Court finds the question, whether Ms Vakalis would automatically replace Ms Darby in case she would be declared ineligible to compete at the 2008 Olympic Games, obsolete.

On 24 July 2008 the HMPF – the Appellant – filed a statement of appeal with the CAS pursuant to the Code of Sports Related Arbitration (the “Code”), to challenge the UIPM Court’s Decision from 23 July 2008. On 28 July 2008 the Appellant filed its appeal brief.

On 4 August 2008 the First Respondent, the UIPM, filed its answer.

On 1 August 2008 the MPA (Second Respondent) and the AOC (Third Respondent) filed with the CAS their answer.

A hearing was held in Lausanne on 6 August 2008.

LAW

Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from article 13.15 of the UIPM Disciplinary Rules.

Appeal Proceedings

2. As these proceedings involve an appeal against the decision in a dispute relating to the determination of the field of participants in the pentathlon event at the 2008 Olympic Games according to the Olympic Qualification Rules, issued by a Federation (UIPM), which Statutes provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a non-disciplinary case in the meaning and for the purposes of the Code.

Admissibility

3. The Appellant’s statement of appeal was filed within the deadline set down in article 13.1 of the UIPM Disciplinary Rules. No further recourse against the UIPM Court of Arbitration decision is available within the structure of the UIPM.

4. The Panel considers that the Appellant's request for relief, contained in the statement of appeal, which was challenged by the Respondents, satisfies the requirements of article R48 of the Code as it clearly requests CAS "to accept the appeal" which is aimed to set aside the UIPM Court of Arbitration decision of 23 July 2008. Additionally, because the dispute is not a disciplinary one, the 21 days deadline is not applicable. Furthermore, the Panel notes that the Appellant's prayers for relief have been confirmed in its appeal brief.
5. Accordingly, the appeal is admissible.

Scope of Panel's review

6. According to article R57 of the Code, a panel has full power to review the facts and the law of the case. Furthermore a panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

Applicable law

7. Pursuant to article R58 of the Code a panel is required to decide the dispute:
"According to the applicable regulations and rules of the law chosen by the parties, or in the absence of such choice, according to the law of the country in which the federation, association or sports related body which has issued the challenged decision is domiciled or according to the rules of the law, the application of which the panel deems appropriate. In the latter case, the panel shall give reasons for its decision".
8. In this case, therefore, the UIPM Rules fall to be applied primarily, with the law of Monaco applying subsidiarily.

Merits

9. In legal terms, the dispute between the Parties is about the determination of the field of participants in the pentathlon event at the 2008 Olympic Games, which became final upon confirmation of the respective NOCs.
10. The Court has basically to answer the following questions:
 - A. Did Ms Darby achieve the required 4'800 points to be eligible to fill the qualification places?
 - B. If the question under A. is answered in the affirmative, did Ms Darby achieve the qualification position for the Australian NOC and therefore is allowed to participate in the modern pentathlon event at the 2008 Olympic Games?
 - C. If the question under A. is answered in the negative or if the question under A. is answered in the affirmative but the question under B. is answered in the negative, the

following question arises: is Ms Donna Vakalis the first international reserve athlete and therefore the athlete to be brought into the 2008 Olympic Games in the event that Ms Darby is not eligible and qualified?

A. Did Ms Darby achieve the required 4'800 points to be eligible to fill the qualification places?

11. It is an established and undisputed fact between the parties that according to the UIPM-IOC Olympic Qualification Rules (the "2008 Qualification Rules"), athletes must have achieved the minimum standards of 5'100 points (men) and 4'800 points (women) on the UIPM Qualification List of 1 June 2008 to be eligible to fill the qualification places.
12. There has been a controversy as to what constituted the relevant 'UIPM Qualification List of 1 June 2008'. The Appellant relies on the list titled 'Modern Pentathlon Olympic Qualification List 15' dated 31 May 2008. The Appellant is of the view that there is no need to look at any results other than those that make up the above mentioned list. The First Respondent in contrast seems not to rely on the 'Modern Pentathlon Olympic Qualification List 15' of 31 May 2008. Instead the respondent relies on a document titled 'Modern Pentathlon Olympic Qualification Update' / Press Release, dated 1 June 2008. The document says: "UIPM as the governing body of Modern pentathlon confirms the achieved qualification positions to the national Olympic Committees (as listed by countries and names)" subject to confirmation by the NOCs.
13. However, because both parties agree that the relevant document to determine whether Ms Darby is eligible and qualified to participate in the 2008 Olympic Games are the 2008 Qualification Rules, it can remain open which one of the above mentioned lists is the relevant one.
14. The 2008 Qualification Rules do not specify the types of competitions where athletes can achieve eligibility nor do they define a 'time bracket' to achieve eligibility. However, the Court confirms the opinion of the UIPM Court of Arbitration that an athlete should not be allowed to rely on his/her best performance which he/she achieved years ago to participate in the 2008 Olympic Games. Furthermore, according to practice of the IOC and the UIPM the beginning of the period of competitions counting for eligibility is derived from the beginning of the time to earn qualification places, which is the timeline opened for continental championships. Considering the above mentioned, the Court is ready to accept the same timeframes for both, obtaining the qualification place and achieving eligibility. According to the 2008 Qualification Rules, the timeframe for qualification started on 1 January 2007. The assertions of the Appellant in its Appeal Brief are insofar not convincing.
15. The 2007 Open Australian Championships, at the occasion of which Ms Darby scored more than 4'800 points, were held on 27 January 2007. Therefore, this competition does fall within the time frame defined above and hence eligibility can be achieved at the 2007 Open Australian Championships. The Appellant concurs with the First and Third Respondent that Ms Darby scored more than 4'800 points at the 2007 Open Australian Championships.

16. The Appellant is of the opinion that the 2007 Open Australian Championships were not an official UIPM competition nor did they comply with the UIPM Competition Rules and therefore they cannot form the basis of an eligibility score.
17. Again, the 2008 Qualification Rules do not explicitly define the kind of competitions in which eligibility scores must be achieved. However, the Court, as did the UIPM Court of Arbitration, accepts that such competitions must reach the level of a UIPM Competition described by the Modern Pentathlon Competitions Rules.
18. The Court notes that the First Respondent and MPA undertook significant efforts to have a relevant qualification competition taking place in Australia. As a consequence, the 2007 Open Australian Championships was supervised by a Technical Observer appointed by the First Respondent. The competition was announced, listed and carried out as the 'Open Australian Championships' and not only as the local championship of Victoria. It was open not only to Australian competitors but also to athletes from all over the world, including Canada and Greece. It may be true that the international invitation did not comply with the formal requirements of the applicable rules, in particular Article 1.12.3 of the Competition Rules. However, such an omission may not lead to the disqualification of the entire event and the results achieved by the participants. The event was still announced in the Annual UIPM Calendar and indicated as 'open', with an explicit reference to 'accommodation and training facilities available to international teams'. The fact that overseas competitors did not find it attractive enough or too expensive to travel to Australia must not harm the case of Ms Darby and does not downgrade the event. It may however illustrate the disadvantage of Australian athletes compared to their European competitors to find suitable competition opportunities.
19. The tasks of the Technical Observer were described in advance and she had to provide a report. The Technical Observer attended the competition and provided a short report which was accepted by the First Respondent. Under these circumstances, the Court is extremely reluctant to put the (factual) findings of an experienced Technical Observer into question and to completely disregard the First Respondent's recognition of the 2007 Open Australia Championships as a relevant event for eligibility purposes. The Appellant has not demonstrated that the Technical Observer did not provide an accurate report or that the results of the competition have been achieved by undue means or even fraud.
20. To sum up, the Court accepts that by scoring 4992 points at the 2007 Open Australian Championships, Ms Darby has become eligible to fill her qualification place to participate in the Modern Pentathlon Event at the 2008 Olympic Games.

- B. *If the question under A. is answered in the affirmative, did Ms Darby achieve the qualification position for the Australian NOC and therefore is allowed to participate in the modern pentathlon event at the 2008 Olympic Games?*
21. “Qualification” is attributed to an athlete by name and means that this athlete at selected competitions has achieved a rank defined for being qualified. An Oceanian athlete could qualify for her NOC only by having achieved the 1st place at the Oceania Championships 2007 or for having achieved a defined top ranking in one of the other qualification competitions or via the Pentathlon World Ranking. Ms Darby participated in the Oceania Championships 2007 which took place in the period 9 – 13 May 2007 in Tokyo and finished in 11th place as best Oceanian athlete with the total score of 4’616 points. The Appellant does not dispute that Ms Darby did win the Oceania Championships 2007.
 22. Therefore, by having won the Oceania Championships 2007 in Tokyo, Ms Darby did achieve the qualification position for the Australian NOC.
 23. Considering the above findings, Ms Darby therefore is eligible and qualified to participate in the Modern Pentathlon Event at the 2008 Olympic Games.
- C. *If the question under A. is answered in the negative or if the question under A. is answered in the affirmative but the question under B. is answered in the negative, the following question arises: is Ms Donna Vakalis the first international reserve athlete and therefore the athlete to be brought into the 2008 Olympic Games in the event that Ms Darby is not eligible and qualified?*
24. Because Ms Darby is eligible and qualified to participate in the Modern Pentathlon Event at the 2008 Olympic Games the question, if Ms Vakalis is the first international reserve athlete and therefore the athlete to be brought into the Olympic Games in the event that Ms Darby is not eligible and qualified, may remain open.

The Court of Arbitration for Sport rules:

1. The appeal filed by the Hellenic Modern Pentathlon Federation against a decision of the UIPM Court of Arbitration dated 23 July 2008, is dismissed.
2. Ms Angela Darby is qualified and eligible to compete in the Women’s Modern Pentathlon event at the 2008 Olympic Games in Beijing.
3. (...).
4. All other prayers for relief are dismissed.