

**CAS 2010/O/2039 Fiji Association of Sports and National Olympic Committee v.
Commonwealth Games Federation**

ARBITRAL AWARD

issued by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Sir Oliver Popplewell, London, United Kingdom

Arbitrators: The Hon. Michael J. Beloff QC, London, United Kingdom

Mr Timothy J. Castle, Barrister, Wellington, New Zealand

in the arbitration between

FIJI ASSOCIATION OF SPORTS AND NATIONAL OLYMPIC COMMITTEE

Represented by its President, Mr Vidhya P. Lakhan

- Claimant -

and

COMMONWEALTH GAMES FEDERATION

Represented by its Chief Executive Officer Mr Michael Hooper, and Mr Terrence Mehigan,
12 Wentworth Selbourne Chambers, Sydney, Australia

- Respondent-

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1. THE PARTIES

- 1.1 The Fiji Association of Sports and National Olympic Committee (FASANOC) (the “Claimant”) was founded in 1949 and achieved International Olympic Committee (IOC) recognition in 1955. FASANOC is the organisation responsible for the co-ordination and management of Fiji teams participating in sports events, including the Olympic Games, Pacific Mini Games, Pacific Games and the Commonwealth Games.
- 1.2 The Commonwealth Games Federation (CGF) (the “Respondent”) is the organisation responsible for the direction and control of the Commonwealth Games.

2. FACTUAL BACKGROUND

- 2.1 Below is a summary of the main relevant facts, as established on the basis of the parties’ written submissions. Additional facts are set out, where relevant, in connection with the legal discussion which follows.
- 2.2 In December 2006, Fiji was suspended from the Councils of the Commonwealth following the military overthrow of its civilian government. Despite attempted dialogue with the interim government, facilitated by the Commonwealth and the United Nations, on 1 September 2009, on account of the refusal of its military rulers to commit to democratic elections, Fiji was fully suspended from the Commonwealth. On 11 October 2009 the Executive Board of the CGF met to consider the effect of the suspension in relation to the participation of the members of FASANOC in the Commonwealth Games, due to be held in New Delhi in 2010. On 12 October, 2009, the Executive Board issued a press release summarising the decision of the Board, “*that consequent on Fiji’s suspension from the Commonwealth, the Fiji Commonwealth Games Association’s (CGA’s) membership of the CGF has also been suspended*”.. so that members of FASANOC will not be not able to take part in the Commonwealth Games 2010.
- 2.3 The question which arises for determination by the Panel is whether under the Constitution of the CGF this decision is correct.
- 2.4 The Constitutions of the CGF are dated November 2007 and October 2009 respectively and do not in any material way differ.
- 2.5 The Mission Statement records that the mission of the CGF is to “*ensure the successful ... Commonwealth Games ... and to assist in the development of sport throughout the Commonwealth*”. The “*Vision of the Federation*” includes to “*strengthen the Commonwealth*”.

2.6 These materials assist in an understanding of the relevant substantive articles set out below.

2.7 The relevant Articles are as follows.

2.8 Article 4 . *“The Commonwealth Games--- shall be open to eligible competitors of the Affiliated CGAs of all Commonwealth Countries which are collectively referred in this Constitution as the “Commonwealth.””*

Article 5. “The Commonwealth Games are contests between athletes and not contests between countries.”

Article 24(1) “As a condition of entering to compete in the Commonwealth Games, all competitors must be citizens or subjects of the Commonwealth country that enters them.

Article 7 ”For the Commonwealth Games----- there shall be no discrimination against any country or person on any groundswhatsoever including ----- politics.”

2.9 Article 31 *“Commonwealth Countries means all Commonwealth Countries---“*

2.10 It is agreed between the parties that the only issue in the case is whether or not for the purposes of the Constution of the CGF, Fiji is “A Commonwealth Country” in relation to the forthcoming Commonwealth Games.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On 7 January 2010 the Claimant filed its Request for Arbitration. The parties agreed on an expedited procedure and timetable for the exchange of written submissions.

3.2 On 3 February 2010 the Respondent filed its Brief Statement of Defence.

3.3 On 17 February 2010, the parties were advised that the Panel appointed to decide the present dispute was constituted as follows:

President: Sir Oliver Popplewell, London, United Kingdom
Arbitrators: The Hon. Michael J. Beloff QC, London, United Kingdom
Mr Timothy J. Castle, Barrister, Wellington, New Zealand

3.4 On 19 February 2010 the Claimant filed its substantive submissions.

3.5 On 5 March 2010 the Respondent filed its substantive submissions.

- 3.6 On 9 March 2010 the Respondent filed an additional witness statement of Mr Amitav Banerji, Director of the Political Affairs Division of the Commonwealth Secretariat, which the Panel admitted.
- 3.7 After study of the parties submissions and the evidence, and after consulting the parties of whom CGF sought a hearing while FASANOC did not, the Panel determined for the purposes of Article R44.2 of the CAS Code that it was sufficiently well informed to be able to determine the arbitration without the necessity of a hearing.
- 3.8 Accordingly, by letter dated 11 March 2010, the parties were advised that having considered the papers carefully in this matter, the Panel was of the view that essentially, the dispute centres on a question of law and the factual ground is common and agreed. The Panel also granted the Claimant time to file any further and final submissions.
- 3.9 On 15 March 2010 the Claimant filed its further and final submissions.
- 3.10 By signature of the Order of Procedure, the parties confirmed their agreement that the Panel may decide this matter based on the parties' written submissions.

4. JURISDICTION OF THE CAS

- 4.1 Article R27 of the Code provides as follows:

“These Procedural Rules apply whenever the parties have agreed to refer a sports related dispute to the CAS.

Such disputes may arise out of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings) or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings). Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport.”

- 4.2 The Claimant relies on Article 28 of the Constitution of the Commonwealth Games Federation as conferring jurisdiction on the CAS. Article 28 provides:

Article 28

Arbitration

1. *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. *The decision of the Court of Arbitration for Sport shall be final.*
3. *All mediations and arbitrations conducted in accordance with Article 28(1) will be conducted in accordance with English law.*

4.3 The jurisdiction of the CAS is not disputed by the Respondent and is further confirmed by the signature of the Order of Procedure by the parties.

4.4 The CAS Code is accordingly engaged.

5. APPLICABLE LAW

5.1 Article R45 of the Code provides as follows:

“The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono.”

5.2 Article 28(3) of the CGF Constitution provides that

“All mediations and arbitrations conducted in accordance with Article 28 (1) will be conducted in accordance with English law”.

English law had therefore been chosen by the parties as the applicable law.

6. THE SUBSTANTIVE ARGUMENTS

6.1 At the heart of the Claimant’s submissions is the argument that suspension is not equivalent to expulsion and that Fiji remains a member of the Commonwealth. In addition to this argument it points out that the games are contests between athletes and not countries and that its athletes are being punished for the political behaviour of its government and for no fault of its own. Discrimination on the ground of politics is prohibited by Article 7. Further it relies on the press release of the Secretary General of the Commonwealth dated 1 September 2009, that “Fiji will remain a member of the Commonwealth”.

- 6.2 The Claimant further asserts that the suggestion that the Commonwealth has any authority to dictate what the CGF can do is mistaken. The CGF is an independent body and must abide by its Constitution. In this respect, reliance by the Respondent on previous practice when Nigeria were suspended in 1995 and prevented from participating in the Commonwealth Games in Kuala Lumpur in 1998 events is irrelevant to the issue of interpretation. Likewise the principles of the Commonwealth, fully set out in various declarations over the years are an extraneous issue and should be disregarded. The test of eligibility to compete is an objective one and the subjective intentions of the Commonwealth are irrelevant.
- 6.3 The Respondent argues that once a country is suspended from the Commonwealth it loses, until it is reinstated, all the rights and privileges of membership. The statement of the Secretary General of the Commonwealth on 1 September 2009 underpinning that argument needs to be read in context. He explained that “full suspension” meant (1) that representatives of the Interim Government of Fiji will be excluded from participation at all governmental Commonwealth meeting----- (2) Fiji will not be able to participate in Commonwealth sporting events. (3) No Commonwealth technical assistance can be provided to Fiji, with the exception of assistance aimed at facilitating the restoration of democracy (4) while Fiji will remain a member of the Commonwealth, all emblematic representation of Fiji at the Commonwealth Secretariat, at Commonwealth meetings and all other official Commonwealth events will cease (5) contact at professional and non-governmental levels with Fiji counterparts will be left to the discretion of individual pan-Commonwealth organisations.
- 6.4 Furthermore on 12 October 2009 the Commonwealth Secretariat confirmed “that as a result of the full suspension, Fiji’s membership is now in effect in abeyance and that all rights are fully suspended.”
- 6.5 The Respondent notes that the Commonwealth does not have a constitution but that certain principles and practices have been adopted over many years by means of Declarations made at meetings of Commonwealth Heads of Government. The Commonwealth Ministerial Action Group (CMAG), has as its function the monitoring of violations of the Harare Declaration. That Declaration on 20 October 1991 reaffirmed “*the inalienable right of individual to participate in the democratic political process of their society*”.
- 6.6 On 12 November 1995 the Millbrook programme was introduced to give effect to the Harare Declaration. It gave power of suspension. The CMAG are vested with the responsibility of taking measures to deal with violations. They include exclusion and suspension.
- 6.7 There are two forms of suspension. The first is suspension from the Councils of the Commonwealth and the second (full suspension) precludes the suspended member

from *inter alia* (b) participation in Commonwealth sporting events. That latter power was exercised in the case of Nigeria in 1995 without objection.

- 6.8 The Respondent further points out that in 2009 the Claimant sought an amendment to the Constitution to define a “member country“ as being a country whose Commonwealth Games Association is affiliated to the CGF. The Amendment was not made. That, says the Respondent, indicates that at that time, the Claimant thought an amendment necessary to avoid the conclusion that it was not for the purpose of the Constitution a “Commonwealth Country”.

7. THE PANEL’S FINDINGS ON THE MERITS

- 7.1 The Panel accepts the Claimant’s submission that the athletes of Fiji are being punished for no fault of their own. But notwithstanding the well presented submissions of the Claimant and, with sympathy for it in a situation not of its making, we are clearly of the view that the effect of Fiji’s full suspension is to deprive it of the rights and privileges of membership of a Commonwealth Country. A Commonwealth Country, for the purpose of Article 31 is a Country whose membership of the Commonwealth is not suspended fully. We see no difference in this case between expulsion and full suspension. Expulsion is not the only way in which a country which was a Commonwealth country under the CGF Constitution can cease to be so.
- 7.2 While it is a principle of CAS jurisprudence that where possible rules of sports governing bodies should be construed so as to enable athletes to compete. (*Perez v IOC No.2*) (CAS OG/005 paras 26, 27, 32), the Panel does not consider that the CGF rules allow a benevolent construction. On the contrary it is clear that giving them a purposive construction, a “Commonwealth country” in Article 31, means a country whose rights under the Constitution remain, for the purpose of participation in Commonwealth sporting events, intact. A suspension means, absent any particular qualification, denial of rights *pro tem* (see e.g. *John v Rees* 1970 Ch 345) at 397. *Lewis v Heffer* 1978 1 WLR 1061 at 1073.
- 7.3 There is, in our view, no basis for suggesting that Fiji or its athletes are the victims of discrimination on political grounds contrary to Article 7. To take action against a country because it does not countenance democracy does not *per se* discriminate against it even if the grounds for treatment could be described as “political”. As was held in *1 Congreso del Partido* 1978 1 QB 500 where the Cuban government determined not to deliver sugar, to the military regime in Chile, a submission of discrimination was rejected on the basis that “*there is no question of the Republic of Cuba having treated persons in like positions differently or having treated persons in different positions alike*”. (Goff J p.532)

- 7.4 Article 4 establishes beyond doubt that the integrity of the “ *Commonwealth*” is intrinsically linked to the eligibility of athletes of “*all Commonwealth Countries*” which are collectively referred to, in the Constitution as “ *the Commonwealth*”. If one asks the single question – did those who drafted the CGF, envisage that, under Article 4, athletes from countries which had been suspended from the Commonwealth for reasons such as obtained in case of Fiji, should nonetheless be able to participate in the Commonwealth Games?, the answer is obviously not. A commonsensical interpretation of the CGF Constitution dictates the failure of the Claimant’s application.
- 7.5 Finally, we observe that accompanying the formal international notification of the suspension, was the Secretary General’s statement that Fiji would not be able to participate in Commonwealth sporting events.

CONCLUSION

- 7.6 In summary, the Panel concludes that the Claimant’s application fails.

8. COSTS

- 8.1 Art. R64.4 of the CAS Code provides:

“At the end of the proceedings, the Court Office shall determine the final amount of the costs of the arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS fee scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties”.

- 8.2 Art. R64.5 of the CAS Code provides:

“The arbitral award shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties”.

- 8.3 As a general rule accordingly, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings.

8.4 However in our view the Claimant has brought this matter – which is one of principle and important Constitutional interpretation – before CAS in order to protect and advance the best interests of the athletes of Fiji who understandably aspire to compete in the Commonwealth Games. In the particular and unusual circumstances of the case including the disparity in resources, we consider that the costs of the arbitration, to be determined by the CAS Court Office, shall be borne equally by the Fiji Association of Sports and National Olympic Committee and the Commonwealth Games Federation. Furthermore, each party shall bear its own legal fees and other expenses incurred in connection with this procedure.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The claim for relief contained in the request for arbitration filed on 7 January 2010 by the Fiji Association of Sports and National Olympic Committee against the Commonwealth Games Federation is dismissed.
2. The costs of the arbitration, to be determined by the CAS Court Office, shall be borne equally by the Fiji Association of Sports and National Olympic Committee and the Commonwealth Games Federation.
3. Each party shall bear its own legal fees and other expenses incurred in connection with this procedure.
4. All other or further claims are dismissed.

Operative part of the award notified on 30 March 2010

Lausanne, 19 April 2010

THE COURT OF ARBITRATION FOR SPORT

Sir Oliver Popplewell
President of the Panel

The Hon. Michael J. Beloff QC
Arbitrator

Mr Timothy J. Castle
Arbitrator