

The case of Harold Mayne-Nicholls: A relentless pursuit

It is no secret that FIFA and FIFA associated football officials have been embroiled in a series of scandals over the course of the past several years. From the arrangement of television marketing rights through the International Sport and Leisure Corporation to the more current series of cases involving members of the FIFA Executive Committee allegedly selling their influence, the members of both the Investigatory Chamber of the FIFA Ethics Committee ('FIFA Ethics Committee IC') and the Adjudicatory Chamber of the FIFA Ethics Committee ('FIFA Ethics Committee AC') have been busy attempting to enforce the application of the FIFA Code of Ethics. This process has touched the highest offices in the football world; however there is one case, that of Harold Mayne-Nicholls, that appears to be quite different. Juan de Dios Crespo Pérez and Paolo Torchetti of Ruiz-Huerta & Crespo Sport Lawyers, analyse the case of Mayne-Nicholls in detail and the legal ramifications of the delays throughout the legal proceedings, which resulted in Mayne-Nicholls serving a longer ban from football than was ultimately handed down by the Court of Arbitration for Sport.

Mayne-Nicholls is a Chilean national who has spent over 20 years in football administration. He has served as the president of the Chilean Football Federation and the Chilean National Professional Football Association and as a FIFA official. Most recently Mayne-Nicholls was the Chairman of the 2018 and 2022 FIFA World Cup Bid Evaluation Committee. The Bid Evaluation Committee is the working group established by FIFA to visit each country submitting bids to host the World Cup and is responsible for the review and evaluation of those bids. The Bid Evaluation Committee does not select which countries will host the World Cup but focuses on determining whether the various bids are as represented by the various countries in the official bid documents provided to FIFA and provides a report summarising the bids to the FIFA Executive Committee, the ultimate deciding body.

The Bid Evaluation Committee visited Qatar in September 2010 to conduct a technical inspection with respect to Qatar's bid for the 2022 World Cup. Included in the Bid Evaluation Committee's review of the Qatari bid was a visit to the Aspire Academy for Sports Excellence in Doha where the Bid Evaluation Committee met with Andreas Bleicher, Aspire's Executive Director for International Football Affairs. Shortly after the visit to Qatar Mayne-Nicholls sent an electronic correspondence to Bleicher asking whether his son and nephew would be

able to attend the Aspire Academy and if he was aware of any opportunities for his brother-in-law to work as a tennis coach. After several pieces of correspondence the matter was not pursued, Mayne-Nicholls' son and nephew did not attend the Aspire Academy and no opportunities were explored for his brother-in-law. It is worth noting that Mayne-Nicholls did not request that Bleicher arrange that Aspire or any other organisation or person incur expenses on behalf of his son, nephew or brother-in-law. Subsequently the FIFA Executive Committee met in Zurich on 2 December 2010 and voted to award the 2022 World Cup to Qatar.

The FIFA proceedings

Amid the suspicion of corruption FIFA decided to investigate, through the FIFA Ethics Committee IC, the selection process of the 2018 and 2022 World Cups. This investigation resulted in FIFA producing a Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process, known as the 'Garcia Report,' named after its principal author, Michael Garcia, the then Chairman of the FIFA Ethics Committee IC. The Garcia Report outlines the genesis of the referral from FIFA to commence the investigation as follows: 'On November 18, 2012, the Sunday Times (of London) published an article alleging that the Qatar bid team paid \$1 million to Samson Adamu, the son of FIFA Executive Committee member Amos Adamu, in the months prior to the vote for World Cup host. The newspaper stated the money was offered to "sponsor" an "African

[Football] Legends Dinner" hosted by Samson Adamu in Johannesburg before the World Cup in South Africa. In advance of publication, the *Sunday Times* forwarded to FIFA certain material in their possession, and FIFA in turn forwarded the same information to the Chair of the Investigatory Chamber. The communication from FIFA noted that the material was being forwarded for the Chair's "information and analysis." This referral to the Investigatory Chamber of specific allegations of misconduct by a bid team led to the initiation of a preliminary investigation.'

The investigation uncovered a systemic pattern of misconduct and violations of the FIFA Code of Ethics. It is worth noting that this investigation resulted in the commencement of proceedings against some of the most powerful football officials in the world, alleging that members of the Executive Committee were selling influence and colluding in the World Cup selection process. The relatively benign electronic correspondence between Mayne-Nicholls and Bleicher were included in this investigation. Subsequently the FIFA Ethics Committee IC initiated an investigation where Mayne-Nicholls voluntarily attended a deposition in New York where he answered questions put to him by Garcia and subsequently provided written answers to further questions². The investigation was then referred to the FIFA Ethics Committee AC where Mayne-Nicholls gave oral evidence. The FIFA



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Ethics Committee AC found that for the electronic correspondence with Bleicher, Mayne-Nicholls violated Articles 13 (general rules of conduct), 15 (loyalty), 19 (conflict of interest) and 20 (offering and accepting gifts and other benefits) of the FIFA Code of Ethics and that he was to be banned from participating in any football related activity at national or international level for a period of seven years³.

It must be noted that the FIFA Ethics Committee AC did not find that Mayne-Nicholls violated Article 18, the duty of disclosure, cooperation and reporting, or Article 42, the general obligation to collaborate, further to the FIFA Code of Ethics. Subsequently the FIFA Ethics Committee AC took over six months to issue the reasons for the decision⁴. Mayne-Nicholls appealed the decision to the FIFA Appeals Committee which reduced the sanction from seven to three years⁵. The FIFA Appeals Committee took approximately ten months to issue the full grounds of the decision after the initial decision was originally communicated⁶.

Appeal to the CAS

Mayne-Nicholls appealed the decision of the FIFA Appeals Committee to the Court of Arbitration for Sport ('CAS'). The CAS further reduced Mayne-Nicholls' ban from football related activities to two years on the basis that there was no violation of Article 20 of the FIFA Code of Ethics, pertaining to the offering and accepting of gifts and other benefits, and that such a sanction was

proportionate in the circumstances. The CAS upheld the violations of Articles 13, 15 and 19 of the FIFA Code of Ethics. Four interesting and important legal issues were raised during the course of this saga: (1) the delay of the FIFA proceedings and the subsequent request for a stay of proceedings; (2) the production and publication of the Garcia Report; (3) the application of the principle of *nulla poena sine legge praevia* as FIFA consistently applied the 2012 edition of the FIFA Code of Ethics to events that occurred in 2010; and (4) the ultimate proportionality of a two year ban.

The delay and request for provisional measures

The FIFA Ethics Committee AC initially applied the seven year prohibition from football related activities via a decision dated 6 July 2015 where Mayne-Nicholls immediately requested the grounds of the decision on 8 July 2015⁷. The grounds for the decision of the FIFA Ethics Committee AC were finally delivered to the Appellant on the 14 January 2016, more than six months after they were requested⁸. After hearing the appeal the FIFA Appeals Committee reduced the sanction to three years on 22 April 2016, however only communicated the grounds of that decision on 8 February 2017, almost nine and a half months later⁹. At that point in time Mayne-Nicholls was banned from football related activities for 36 months, for which he had already served almost 20 months when he was able to file an appeal with the CAS. It must be noted that according to the

timeline described in the CAS award it is clear that the CAS arbitrators and the administrators worked quickly in order to resolve the dispute in a timely manner.

The issue, however, is that the delays appear to have caused Mayne-Nicholls to serve a sanction that was more than that imposed. When initiating proceedings before the CAS Mayne-Nicholls filed a consolidated statement of appeal and appeal brief 19 days after the grounds of the FIFA Appeals Committee decision was communicated, and at the same time requested a stay of the appealed decision further to Article 37 of the Code of Sports-related Arbitration¹⁰. Generally speaking the following factors must be cumulatively demonstrated in deciding to issue a stay of a decision (1) whether the relief is necessary to protect the applicant from irreparable harm; (2) the likelihood of success on the merits of the claim; and (3) whether the interests of the appellant outweigh those of the respondent¹¹. The President of the Appeals Division of the CAS rejected this request for provisional measures as it was determined that "the Appellant has not evidenced any irreparable harm and therefore the first of the criteria for granting a stay of the decision under appeal was not made out"¹².

Given the circumstances of the case it appears that the decision to refuse the request for a stay of proceedings may have been made in a manner inconsistent with previous jurisprudence of the CAS defining irreparable harm.

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To satisfy the irreparable harm test “(t)he Appellant must demonstrate that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage¹³.” This view has been confirmed by the Swiss Federal Tribunal¹⁴: “Considering that according to the jurisprudence of the Swiss Federal Tribunal, there is irreparable harm when a final decision, even favourable to the applicant, would not completely remedy such harm (see ATF 126 I 207). The Swiss doctrine considers that ‘the conservatory measure shall avoid a damage which shall be difficult to remedy if it was not ordered immediately’ (see HOHL F., Procédure civile, T. II, Berne 2002, p. 234).”

The result is that the determination of irreparable harm is a fact specific test that is analysed within the context of the circumstances of each case. Here Mayne-Nicholls was originally banned for seven years from all football related activities, the ban was later reduced to three years and as of the date of the filing of the request for the stay almost 20 months of the total ban had been served. There was a real possibility that if the request for the stay was denied and the sanction further reduced that Mayne-Nicholls would serve a ban longer than the one imposed. This is precisely the type of irreparable harm “that would be impossible, or very difficult, to remedy or cancel at a later stage” specifically because it would be too late to rectify the situation¹⁵. Relevant to this enquiry are the details concerning the delay:

- 19 months elapsed from the time of the application of the original sanction until the FIFA Appeals Committee released the final grounds of the decision;
- six months and one week elapsed from the time that the full grounds of the decision of the FIFA Ethics Committee AC were requested and the time that they were released;
- nine months and three weeks elapsed from the time that the full grounds of the decision of the FIFA Appeals Committee was requested and the time that they were released; and
- of the 19 total months of the FIFA procedure, 16 of them are solely and exclusively attributable to the time that both the FIFA Ethics Committee AC and the FIFA Appeals Committee took to release the grounds for the decisions.

This delay is particularly troubling if we compare the timeline to that of the *Platini* case. There, the FIFA Ethics Committee AC held its hearing on 18 December 2015, the decision was rendered the same day, and communicated on 23 December 2015. The grounds were produced to the parties on 8 January 2016, two weeks after the decision was initially communicated¹⁶. It is also notable that this period spanned the Christmas holidays. In addition the FIFA Appeals Committee *Platini* hearing was heard on 15 February 2016, the decision again rendered the same day, and the final grounds communicated to the parties on 24 February 2016¹⁷. The *Platini* case and that of *Mayne-Nicholls* are comparable in that they both deal with issues arising under the FIFA Code of Ethics. Where they differ is that Platini had the ability to appeal his sanction to the CAS approximately two months and one week after the sanction was applicable, and Mayne-Nicholls was only able to do so almost 20 months later.

The result is that Mayne-Nicholls ended up serving a sanction longer than that which was imposed due to the delays in receiving the full grounds of the FIFA judicial bodies. CAS jurisprudence has been very specific on this point, stating that in cases where one can serve almost the entire suspension that it must be considered as a factor to be recognised in assessing irreparable harm¹⁸. Although it was only a week extra it is unfortunate that Mayne-Nicholls served a longer sanction than that which was ultimately decided.

The Garcia Report

The now infamous Garcia Report was originally delivered to FIFA in September 2014, however it was subsequently announced by Dr Hans-Joachim Eckert, the Chair of the FIFA Ethics Committee AC, that it would not be made public for legal reasons¹⁹. Dr Eckert released a 42-page summary of his findings after reviewing the Garcia Report on 13 November 2014 which prompted Garcia's resignation²⁰. It was only after journalist Peter Rossberg announced that he had a copy of the Garcia Report and that its contents would be disclosed to the public via the newspaper *Bild* the next day that FIFA unilaterally publicly disclosed the document in full. In relation to this case, the Garcia Report was released by FIFA after the CAS hearing was concluded. The issue in this case is that the investigation into the correspondences

between Mayne-Nicholls and Bleicher was initiated based on the information in the Garcia Report. Mayne-Nicholls requested that this document be divulged to him before the FIFA Appeals Committee on the basis of Article 39(1) of the FIFA Code of Ethics that establishes the right to be heard: ‘The parties shall be granted the right to be heard, the right to present evidence, the right for evidence leading to a decision to be inspected, the right to access files and the right to a reasoned decision.’

FIFA refused this request and the same request was made before the CAS further to Article R44.3 of the CAS Code, which was also denied. In hindsight, as the Garcia Report is now public it appears that Mayne-Nicholls was indeed referred to in the Report and his communication with Bleicher was discussed. Moreover Article 39 of the FIFA Code of Ethics allows officials in proceedings ‘the right for evidence leading to a decision to be inspected’ and ‘the right to access files’ without the further caveat the basis of which was justified to deny its production.

Nulla Poena Sine Legge Praevia

The FIFA Ethics Committee AC found that Mayne-Nicholls violated, *inter alia*, Article 20 of the 2012 edition of the FIFA Code of Ethics which is the prohibition of FIFA officials from offering and accepting gifts and other benefits²¹. It is necessary to note that the events took place in 2010. The decision noted that no actual benefits were received and the conditions of Article 20 of the 2012 edition were not met. The FIFA Ethics Committee AC, however, concluded that Article 5(2) of the 2012 edition prohibits the ‘attempt’ and found a violation of Article 20. This Article 5(2) is not present in the 2009 edition of the FIFA Code of Ethics and was only added in 2012. This decision was appealed to the FIFA Appeals Committee on the basis of Article 3 of the 2012 edition, which embodies the principle of *nulla poena sine legge praevia*:

‘This Code shall apply to conduct whenever it occurred including before the passing of the rules contained in this Code except that no individual shall be sanctioned for breach of this Code on account of an act or omission which would not have contravened the Code applicable at the time it was committed nor subjected to a sanction greater

CAS jurisprudence has been very specific [...] stating that in cases where one can serve almost the entire suspension that it must be considered as a factor to be recognised in assessing irreparable harm.

than the maximum sanction applicable at the time the conduct occurred.’

Furthermore, it was argued before the FIFA Appeals Committee that the addition of prohibiting an ‘attempt’ in Article 5(2) of the 2012 edition of the FIFA Code of Ethics is the precise change that renders it as ‘an act or omission which would not have contravened the Code applicable at the time it was committed’ as specified in Article 3 of the 2012 edition. The FIFA Appeals Committee rejected this argument and determined that the FIFA Ethics Committee AC correctly applied the 2009 edition, despite that decision explicitly relying on Article 5(2) of the 2012 edition. The FIFA Appeals Committee again relied on the 2012 edition of the FIFA Code of Ethics.

That decision was appealed to the CAS on the exact same basis, that FIFA incorrectly applied the 2012 edition to events that occurred in 2010²². The CAS Panel agreed with Mayne-Nicholls and quashed the violation in relation to the prohibition of FIFA officials from offering and accepting gifts and other benefits. The Panel’s decision rejected FIFA’s argument that the circumstances in this case amounted to Mayne-Nicholls ‘accepting’ a benefit. Moreover, the Panel agreed with the argument that the 2009 edition of the FIFA Code of Ethics is the applicable law because the 2012 edition is wider in scope as a result of the addition of Article 5(2) of the 2012 edition where the operation of Article 3 of the 2012 edition negates its application. This is notable because this argument was made before the FIFA Appeals Committee where it was entirely rejected. This is significant when viewed in light of the 16 month delay that accumulated during the period that Mayne-Nicholls was waiting for the grounds of the two FIFA decisions. The concept of *nulla poena sine legge praevia* is fundamental in all legal systems. For someone to be

prohibited from working in their chosen field and be forced to wait for such a long period of time for the opportunity to have the decision reviewed by an independent panel aggravates the circumstances.

Proportionality

The CAS upheld the contraventions of Articles 13, 15 and 19 of the FIFA Code of Ethics where the Panel ruled that the *nulla poena sine legge praevia* argument did not apply as the corresponding articles in the 2009 and 2012 editions are fundamentally the same²³. Moreover the CAS reasoned that the sanction imposed by FIFA in this case was disproportionate in light of those sanctions in other cases that merited a three or four year ban from football related activity and reduced the ban to two years. In this sense the CAS identified three mitigating factors in favour of Mayne-Nicholls: (1) a long and distinguished career in football; (2) Mayne-Nicholls was contrite and sincere; and (3) Mayne-Nicholls was honest and cooperative. With respect to the application of a two year ban it may be argued that the CAS could have exercised its discretion to further reduce the sanction, considering there was no violation of accepting or receiving gifts. In any event the CAS does retain discretion in the application of a sanction. In this sense we note two of the more notorious CAS cases.

In CAS 2011/A/2426 *Amos Adamu v. FIFA* the CAS affirmed that a ban from taking part in any football related activity for a period of three years as well as a fine of CHF 10,000 was appropriate. There the Appellant was a member of the FIFA Executive Committee, the President of the West African Football Union, an Executive Member of the Confederation of African Football, the Chairman of the CAF Ethics Committee and the former Director General of Sports in Nigeria. In his capacity as a member of the FIFA Executive Committee Adamu was

caught on tape soliciting bribes in the hundreds of thousands of US dollars for the Nigerian Football Federation in exchange for supporting the US bid for the 2022 World Cup. Adamu was found to have violated the general rules, loyalty and confidentiality rules and the bribery rules of the old version of the FIFA Code of Ethics. It would appear that the *Adamu* case was worse in terms of the seriousness of the violations given the amount of money involved and the nature of the evidence. We also note that Mayne-Nicholls received a fine of CHF 20,000, twice as much as Adamu. Moreover, in TAS 2011/A/2433 *Diakite c. FIFA*, the CAS affirmed a two year ban. The facts in *Diakite* are similar to the *Adamu* case where he was a member of the FIFA Executive Committee and was caught on tape soliciting bribes in relation to the voting of the decision to award the 2018/2022 World Cups. A general reading of these decisions perhaps suggests that if the delay had not occurred perhaps the CAS would have had the ability to consider a lower sanction.

Conclusion

Ultimately Mayne-Nicholls suffered through a legal saga of two years fighting for the ability to work in his chosen profession. The delay in this case had wide ranging effects on his ability to work, but also had serious legal ramifications. The effect of the delay was exacerbated by the rejection of several applications for the stay of the decision. In addition the delay contributed to the occurrence that his sanction would be in the area of two years no matter what the result of any dispute resolution process, as he had already been sanctioned for 20 months at the time he was able to appeal to the CAS. Hopefully, going forward, sporting bodies, when taking fundamental decisions with respect to someone’s right to work, will issue swift and decisive decisions so that the pursuit of meaningful legal recourse is guaranteed.

1. The Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process (the ‘Garcia Report’), at pages 2 to 3.

2. Award CAS 2017/A/5996 Harold Mayne-Nicholls v. FIFA, at page 9, paragraphs 29 to 32.

3. Ibid, at page 10, paragraph 39.

4. Ibid, at page 10, paragraph 41.

5. Ibid, at page 15, paragraph 64.

6. Ibid, at page 15, paragraphs 64 to 65.

7. Ibid, at page 10, paragraphs 39 to 40.

8. Ibid, at page 10, paragraph 41.

9. Ibid, at page 15, paragraphs 64 to 65.

10. Ibid, at page 19, paragraph 85.

11. Award CAS 2011/A/2479 Sinkewitz v. UCI at paragraph 4.

12. Award CAS 2017/A/5996 Harold Mayne-Nicholls v. FIFA, at page 19, paragraph 87.

13. Award CAS 2011/A/2479 Sinkewitz v. UCI at paragraph 4(a).

14. Award CAS 2011/A/2615 Thibaut Fauconnet v. International Skating Union (ISU) and CAS 2011/A/2618 International Skating Union (ISU) v. Thibaut Fauconnet.

15. See footnote 13.

16. Award TAS 2016/A/4474 Michel Platini

c. FIFA at paragraphs 94 to 96.

17. Ibid at paragraphs 100 to 103.

18. Award CAS 2015/A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO) paragraph 6.9.

19. ‘FIFA prosecutor Michael Garcia calls for World Cup report to be made public,’ The Guardian, 24 September 2014.

20. ‘Michael Garcia: FIFA investigator resigns in World Cup report row,’ BBC Sport.

21. See footnote 2, at page 10, paragraph 39.

22. Ibid, at page 23, paragraphs 103 to 104.

23. Ibid, at page 23, paragraph 196.