



# ***Football Legal***

*The international journal dedicated to football law*

# 8 – December 2017

— Special Report —  
Data in Football

## Harold MAY-NICHOLLS’s Quest for Justice



By Juan de Dios CRESPO PÉREZ & Paolo TORCHETTI  
Lawyers, Ruiz-Huerta Crespo Sports Lawyers  
Valencia - Spain

→ **FIFA – Governance – Corruption – FIFA World Cup – FIFA Ethics Committee – FIFA Appeal Committee – Court of Arbitration for Sport (CAS)**

*Adjudicatory Chamber of the FIFA Ethics Committee, 6 July 2015 (grounds date: 14 January 2016), no. 140 662 CHI ZH; FIFA Appeals Committee, 22 April 2016 (grounds date: 8 February 2017), no. 140 662 CHI ZH; CAS 2017/A/5006 Harold Mayne-Nicholls v. FIFA*

*As the FIFA World Cup in Russia approaches, scrutiny of the combined bid processes for the 2018 and 2022 tournaments has revealed a dark side that the football world can no*

*longer afford to ignore. It was widely reported that members of the FIFA Executive Committee shamelessly sold their influence behind closed doors in exchange for personal benefits. Some have even alleged that the selection of Russia and Qatar as hosts suggest that the football world is being used for ulterior and greater geopolitical motives. The culmination of various investigations resulted not only in the expulsion of football officials from the football world but to the arrests and criminal trials of some of the biggest names in sports administration. Buried within these tales is the protracted story of Harold MAYNE-NICHOLLS, the president of the 2018 and 2022 FIFA World Cup bid selection committee, who was originally banned by the FIFA Ethics Committee from all football related activity for seven years. The sanction was ultimately reduced to two years by the Court of Arbitration for Sport (CAS) which found that he did not receive a benefit as prohibited by the FIFA Code of Ethics (FCE).<sup>1</sup> In any event MAYNE-NICHOLLS ended up serving a ban longer than what was imposed by the CAS.*

The case is particularly egregious considering that (a) FIFA used the incorrect version of the FIFA Code of Ethics as it applied the 2012 version to events that occurred in 2010; (b) MAYNE-NICHOLLS served a sanction longer than what ultimately handed down because of the delay of the FIFA Ethics Committee and Appeal Committee in issuing the grounds of the two decisions; and (c) FIFA refused to provide the Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process, otherwise known as the “GARCIA Report”, that contained evidence relevant to the case.

### FIFA World Cup 2018 and 2022 Bid Evaluation Committee

Harold MAYNE-NICHOLLS, a Chilean national and journalist by trade, has worked in football administration for over 20 years as the president of the Chilean Football Federation and the Chilean National Professional Football Association. Having served as a FIFA official, Harold MAYNE-NICHOLLS was the chairman of the 2018 and 2022 FIFA World Cup Bid Evaluation Committee (the “Bid Evaluation Committee”) which is the working group established to visit each country submitting bids to host the World Cup. Generally speaking, the Bid Evaluation Committee is responsible for the review of each bid and produces a report provided to the (then) FIFA Executive Committee. This report merely identifies the benefits and risks of each bid and does not recommend

which country should be selected. To be clear, the Bid Evaluation Committee does not actually select which country will host the World Cup. Its function focuses on determining whether the various bids are in fact as represented by the bidding countries. Ultimately the choice as to where the World Cup is to be held was a decision of the FIFA Executive Committee body.

The Bid Evaluation Committee visited Qatar in September of 2010 for the purposes of reviewing Qatar’s bid for the 2022 World Cup. The Bid Evaluation Committee visited the *Aspire Academy for Sports Excellence* (“Aspire”) in Doha. There the members of the Bid Evaluation Committee met Aspire’s Executive Director for International Football affairs Mr Andreas BLEICHER.

<sup>1</sup> CAS 2017/A/5996 *Harold Mayne-Nicholls v. FIFA* (award dated 14 July 2017).



**” MAYNE-NICHOLLS did not actually receive any benefit, material or otherwise “**

Upon his return home, *Harold MAYNE-NICHOLLS* emailed Mr *BLEICHER* asking if it would be possible if his son and nephew could be enrolled in the *Aspire* academy. In addition, Mr *MAYNE-NICHOLLS* asked if *Andreas BLEICHER* knew of any possibilities for his brother-in-law to work as a tennis coach. The two emailed back and forth, however in the end nothing came of it as the boys did not attend the academy and the brother-in-law did not pursue any tennis coaching opportunities in Qatar. It is of particular importance to note that *Andreas BLEICHER* was not asked to arrange any special privileges nor did *Harold MAYNE-NICHOLLS* request that *BLEICHER* or *Aspire* pay for any expenses. The result is that Mr *MAYNE-NICHOLLS* did not actually receive any benefit, material or otherwise. As we know, the 2022 World Cup was eventually awarded to Qatar.

### **The FIFA Investigation and Subsequent Proceeding against Harold MAYNE-NICHOLLS**

The English newspaper, *The Sunday Times*, published a series of investigative journalism pieces that uncovered corruption within FIFA at the highest levels. *The Sunday Times* forwarded their files and evidence that it compiled to FIFA which initiated its own investigation carried out by the Investigative Committee of the FIFA Ethics Committee. Ultimately, FIFA produced the Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process.

As we know now, FIFA's investigation unearthed a plethora of unsavory behaviour where proceedings under the FIFA Code of Ethics were initiated against some of the world's most famous football administrators.

The investigation also revealed the relatively benign correspondences between *MAYNE-NICHOLLS* and *BLEICHER* and the Investigatory Chamber of the FIFA Ethics Committee commenced an investigation. Once the investigation was complete the case was referred to the Adjudicatory Chamber of the FIFA Ethics Committee. The Adjudicatory Chamber found that Mr *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 banned him from participating in football-related activity for seven years. Again, it must be noted that *Harold MAY-NICHOLLS* received no benefit whatsoever.

Parenthetically, the Adjudicatory Chamber of the FIFA Ethics Committee made an explicit finding that *MAYNE-NICHOLLS* did not violate Article 18, the duty of disclosure, cooperation and reporting, or Article 42, the general obligation to collaborate, of the FIFA Code of Ethics despite these charges being recommended to be pursued by the Investigatory Chamber. Subsequently, the Adjudicatory Chamber then took over six months to issue the actual reasons behind the decision. Once the grounds of the decision were delivered, Mr *MAYNE-NICHOLLS* immediately appealed this decision to the FIFA Appeals Committee which eventually reduced the sanction from seven years to three. Again, inexplicably, the FIFA Appeals Committee took another ten months to issue the full grounds of the decision after the initial decision was originally communicated, further delaying the proceedings.

Almost two years after the initial sanction was handed down, FIFA's three-year ban was appealed to the CAS and was further reduced to two years. The CAS found that *MAYNE-NICHOLLS* did not violate Article 20 of the FIFA Code of Ethics where he did not offer or accept gifts or other benefits. The CAS upheld the violations of Articles 13 (general rules of conduct), 15 (loyalty)

and 19 (conflict of interest) of the FIFA Code of Ethics.

### **The Merits of the Appeal: Article 20 of the FIFA Code of Ethics**

The main provision of the FIFA Code of Ethics that FIFA alleged that *Harold MAY-NICHOLLS* violated was Article 20, the prohibition of FIFA officials from offering and accepting gifts and other benefits. Here it must be noted that *MAYNE-NICHOLLS* did not actually receive any benefit, pecuniary or otherwise. Moreover, both FIFA judicial bodies applied the incorrect version of the Code of Ethics. The series of email correspondences between Mr *MAYNE-NICHOLLS* and Mr *BLEICHER* took place in October of 2010. Both the Adjudicatory Chamber of the FIFA Ethics Committee and the Appeals Committee concluded that Article 5(2) of the 2012 edition prohibits the “attempt” of receiving a benefit and found a violation of Article 20. This article 5(2) prohibiting an “attempt” is not present in the 2009 edition of the FIFA Code of Ethics and was only added in 2012. Despite this occurrence both FIFA judicial bodies reviewing the case stubbornly applied the incorrect version of the Code of Ethics. Both the Adjudicatory Chamber of the Ethics Committee and the Appeals Committee found a violation of Article 20 in conjunction with Article 5(2) despite explicitly finding that no benefits were actually received. The FIFA decision even made a specific finding that the conditions of Article 20 of the 2012 edition of the Code of Ethics were not met.

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 than the maximum sanction applicable at the time the conduct occurred.”*

It must be noted that *Harold MAY-NICHOLLS* specifically appealed the decision of the Adjudicatory Chamber to the Appeals Committee on the basis 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 not only rejected this argument but determined that the 2009 version was correctly applied. This finding was made despite the fact that the Adjudicatory Chamber decision explicitly, verbatim, relied on Article 5(2) of the 2012 edition. As both FIFA judicial bodies relied on Article 5(2) of the 2012 edition of the FIFA Code of Ethics, it is incredulous that both decisions stubbornly claim that the correct version, 2009, was relied upon.

**” The FIFA Appeals Committee not only rejected this argument but determined that the 2009 version was correctly applied “**

*Harold MAY-NICHOLLS* eventually appealed these decisions to the CAS on the exact same basis, that FIFA incorrectly applied the 2012 edition to events that occurred in 2010. The CAS agreed and found that *MAYNE-NICHOLLS* did not offer or accept gifts and other benefits in contravention of Article 20 of the 2012 Code of Ethics.

Moreover, the CAS accepted the argument that the 2009 edition of the FIFA Code of Ethics is the applicable law. It was reasoned that the 2012 edition is wider in scope as a result

of the addition of Article 5(2) of the 2012 edition. Because an “attempt” at a violation was not in the 2009 edition the application of Article 3 of the 2012 version prohibits FIFA from retroactively applying Article 20. The significance of this finding is that the CAS specifically endorsed the argument made by *MAYNE-NICHOLLS* that was rejected by both the FIFA judicial bodies. FIFA's decision to incorrectly apply the 2012 edition of the Code of Ethics is further aggravated considering that the proceedings were delayed by 16 months while Mr *MAYNE-NICHOLLS* was waiting for the grounds of the two FIFA decisions.

### **Delay in the Communication of the Grounds and Request for Provisional Measures**

The Adjudicatory Chamber of the FIFA Ethics Committee originally banned *Harold MAYNE-NICHOLLS* from football related activities as of 6 July 2015. *MAYNE-NICHOLLS* immediately requested the grounds. The grounds were only delivered more than six months after they were requested. The FIFA Appeals Committee further reduced the sanction to three years but once again FIFA caused delay and only delivered the grounds nine and a half months later.

At the time when *MAYNE-NICHOLLS* was able to file an appeal with the CAS he had already served 20 months of a 36-month sanction. It is clear, however, that according to the timeline as described in the CAS award the CAS arbitrators and administrators did work quickly to resolve this case quickly.

The problem is that it appears that the time that elapsed between issuance of the decisions and the release of the grounds by both FIFA judicial bodies caused *MAYNE-NICHOLLS* to serve sanction longer than what ultimately imposed. Mr *MAYNE-NICHOLLS* was diligent at every point of the proceedings. The grounds were requested at both stages within 48 hours of the decision

being rendered. In addition, *Harold MAYNE-NICHOLLS* sought to expedite matters before the CAS where he 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 he request a stay of the appealed decision further to Article 37 of the Code of Sports-related Arbitration (the CAS Code), as opposed to filing the statement of appeal and appeal brief separately taking the full 31 days.

With respect to the request for the stay of a decision, three factors must be cumulatively proven (1) whether the relief is necessary to protect the applicant from irreparable harm; (2) the likelihood of success on the merits of the claim must be demonstrated; and (3) the interests of the appellant must outweigh those of the respondent. The President of the Appeals Division of the CAS, and not the Panel, denied the motion on the basis 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.*”<sup>2</sup>

It is possible that the decision to reject the stay appears to have been inconsistent with some previous CAS jurisprudence that defines irreparable harm. Irreparable harm is satisfied where “*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 stage.*”<sup>3</sup> The Swiss Federal Tribunal has endorsed this perspective:<sup>4</sup>

*“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*

<sup>2</sup> CAS 2011/A/2479 *Sinkewitz v. UCI* at par. 4(a).

<sup>3</sup> CAS 2011/A/2479 *Sinkewitz v. UCI* at par. 4(a).

<sup>4</sup> CAS 2011/A/2615 *Thibaut Fauconnet v. International Skating Union (ISU)* & CAS 2011/A/2618 *International Skating Union (ISU) v. Thibaut Fauconnet*.



a damage which shall be difficult to remedy if it was not ordered immediately' (see *F. HOHL, Procédure civile, T. II, Berne 2002, p. 234*)."

Ultimately, the assessment of irreparable harm is a factual test looking at the circumstances of each individual case. Mr *MAYNE-NICHOLLS* was originally banned for seven years from all football-related activities. The ban was later reduced to three years. As of the date of the filing of the request for the stay almost 20 months of the total ban of 36 months was served. At that time, there was a real possibility that if the request for the stay was denied and the CAS further reduced the sanction by more than a year *MAYNE-NICHOLLS* would serve a ban longer than the one imposed. This is exactly the type of irreparable harm "that would be impossible, or very difficult, to remedy or cancel at a later stage."<sup>5</sup> If we consider the timeline of the FIFA proceedings it is arguable that the stay ought to have been granted:

- ➔ 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;
- ➔ It took the Adjudicatory Chamber of the FIFA Ethics Committee 6 months and 1 week to release the grounds of its decision;
- ➔ It took the FIFA Appeals Committee 9 months and 3 weeks to release the grounds of its decision; and
- ➔ Of the 19 total months of the FIFA procedure, 16 of them are solely and exclusively attributable to the time that both the Adjudicatory Chamber of the FIFA Ethics Committee and the FIFA Appeals Committee took to release the grounds of the decisions.

This delay is perplexing in comparison to the *PLATINI* case. There, the Adjudicatory Chamber of the Ethics Committee

held rendered the decision the very same day of the oral hearing, delivered that decision five days later and communicated the complete grounds of the decision two weeks later.<sup>6</sup> Additionally this was over the Christmas holiday presumably during a period of the year which offices may be closed. The FIFA Appeals Committee dealt with the case in a similarly expedited manner as the decision was again rendered the very same day as the oral hearing and the final grounds were delivered 9 days later.<sup>7</sup> Mr *PLATINI* had the ability to appeal his sanction to the CAS approximately 2 months and one week after the sanction was applicable. *Harold MAYNE-NICHOLLS*, on the other hand, was only able to do so almost 20 months later effectively ensuring that he would receive a two-year ban no matter the result.

Finally, Mr *MAYNE-NICHOLLS* ended up serving a sanction longer than what was ultimately imposed by one week. Although it may not be much, this occurrence can be entirely attributable to the delays committed by FIFA in producing the decisions of its judicial bodies. CAS jurisprudence has been very specific on this point where it has stated that in cases where one can serve almost the entire suspension that it must be considered in as a factor to be recognized in assessing irreparable harm.<sup>8</sup> In this case, a longer suspension was served and it is difficult to understand how this cannot be classified as an irreparable harm.

The GARCIA Report

In addition to the delay, FIFA's position with respect to the production of the *GARCIA* Report to *MAYNE-NICHOLLS* is also curious. The *GARCIA* Report remained concealed by FIFA for approximately three years.<sup>9</sup>

In the interim, Dr. *ECKERT* - the Chair of the Adjudicatory Chamber of the FIFA Ethics Committee - instead released a 42-page summary. FIFA only publicly released the *GARCIA* Report, only after German journalist *Peter ROSSBERG* had a copy and was going to release it via the German publication *Bild*, which was after the *MAYNE-NICHOLLS* CAS hearing took place.

The investigation into *MAYNE-NICHOLLS* was based on the information in the *GARCIA* Report. We now know that the *GARCIA* Report contained an entire chapter on *Harold MAYNE-NICHOLLS* and his conversation with *Andreas BLEICHER*. Mr *NICHOLLS* asked the FIFA Appeals Committee to order the Ethics Committee to disclose this document 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."

The FIFA Appeals Committee refused the request for production. 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 and *Harold MAYNE-NICHOLLS* was indeed referred to it could be argued that it ought to have been disclosed at the earliest opportunity.

Conclusion

Ultimately, the CAS found that Mr *MAYNE-NICHOLLS* transgressed Articles 13 (general rules of conduct), 15 (loyalty) and 19 (conflict of interest) of the FIFA Code of Ethics. The Panel correctly noted that the *nulla poena sine legge praevia* argument did not apply to those provisions because (a) the corresponding articles in the 2009 and 2012 editions are fundamentally

identical; and (b) Article 5(2) of the 2012 edition, prohibiting an attempt, was not relied on. In any event, the CAS reduced the sanction from three to two years on the basis that it is disproportional in comparison to other cases that resulted in a three or four-year ban from football related activity. In its reasoning, the CAS identified three mitigating factors in favour of *Harold MAYNE-NICHOLLS*: (1) a long and distinguished career in football; (2) Mr *MAYNE-NICHOLLS* was contrite and sincere; and (3) Mr *MAYNE-NICHOLLS* was honest and cooperative.

If we look at some of the existing CAS jurisprudence, it is arguable that even a two-year ban on *Harold MAYNE-NICHOLLS* may be excessive.

*Amos ADAMU* was a member of the FIFA Executive Committee and was caught on audio and video tape by two journalists soliciting bribes in the hundreds of thousands of U.S. dollars in exchange for supporting the U.S. bid for the 2022 World Cup. The CAS found *ADAMU* to have violated the general rules; loyalty and confidentiality rules and the bribery rules of the old version of the FIFA Code of Ethics and imposed a ban from football related activities for three years. A fine of CHF 10,000 (approx. EUR 8,600) was also applied, half as much as that imposed on *MAYNE-NICHOLLS*.<sup>10</sup> In a case very similar to *ADAMU*, the CAS imposed a two-year ban on another member of the FIFA Executive Committee, *DIAKITE*.<sup>11</sup>

It would appear that the violations in these cases are much more egregious and a lower sanction could have been appropriate in comparison. In any event, it would not have mattered because by causing the delay FIFA unilaterally ensured that *Harold MAYNE-NICHOLLS* would be out from football for a minimum of two years no matter the CAS' decision.

5 CAS 2011/A/2479 Sinkewitz v. UCI at par. 4(a).

6 TAS 2016/A/4474 Michel Platini v. FIFA at par. 94 to 96.  
7 TAS 2016/A/4474 Michel Platini v. FIFA at par. 100 to 103.  
8 CAS 2015/A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO) par. 6.9.  
9 The Guardian, 24 September 2014, "FIFA prosecutor Michael Garcia calls for World Cup report to be made public".

10 CAS 2011/A/2426 Amos Adamu v. FIFA.  
11 TAS 2011/A/2433 Diakite v. FIFA.