



Arbitration CAS 2011/A/2469 World Anti-Doping Agency (WADA) v. Doping Board of the Danish Sport Confederation & Philipp Nielsen, partial award of 4 October 2011

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Hans Nater (Switzerland); Mr Lars Halgreen (Denmark)

Cycling

Doping (clenbuterol)

Meaning of the “case file” of the hearing body of the National Federation

Transmission of the case file by third parties and time limit to file an appeal to the CAS

1. According to Article 334 of the UCI Anti-Doping Rules (UCI-ADR), as long as WADA timely requests the case file, the time limit to file the statement of appeal to the CAS begins upon WADA’s “receipt of the full case file from the hearing body of the National Federation”. The full “case file” within the meaning of the aforementioned provision is a file provided upon request by WADA by the hearing body of the national federation after the decision by the national hearing body has been notified to WADA. In fact, a transmission of documents to WADA in the course of the national proceedings is not even provided for in the UCI-ADR, with the exception of the request for disciplinary proceedings. If the national hearing body provides WADA with any other documents before a decision is taken, this transmission is outside the scope of the UCI-ADR. Such documents can therefore not be regarded as a “case file” within the meaning of Article 334 UCI-ADR.
2. Even if a transmission of the case file by third parties (i.e. by UCI, not the national hearing body) is regarded as sufficient, the time limit of Article 334 UCI-ADR can only be triggered once the competent body declares, at least implicitly, that the documents provided to the requesting body indeed constitute the complete case file. This interpretation is necessary to protect the appellant’s right to take an informed decision about whether to file an appeal or not.

The World Anti-Doping Agency (WADA) is an international organization founded in 1999 to promote, coordinate and monitor the fight against doping in sport. WADA is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA has established a uniform set of anti-doping rules, the World Anti-Doping Code (WADC).

The Doping Board of Sports Confederation of Denmark (“Danish Doping Board”) is the competent body of the Danmarks Idræts-Forbund (Sports Confederation of Denmark and National Olympic Committee, “Sports Confederation of Denmark”) to hear cases involving anti-doping rule violations.

Mr. Philip Nielsen is a professional Danish cyclist and holds a license of the Union Cycliste Internationale (UCI). The Danish Doping Board and Mr. Nielsen are hereinafter collectively referred to as the “Respondents”, WADA and the Respondents as the “Parties”.

The subject-matter of this appeal (the “Appeal”) is a decision rendered by the Danish Doping Board on 21 March 2011 in relation to an alleged anti-doping rule violation by Mr. Nielsen.

In April 2010, Mr. Nielsen participated in the Vuelta Mexico which is part of the UCI America Tour. On 25 April 2010, after the 8th stage of the race, he was selected to provide a urine sample.

The “A” sample was analyzed by the UCLA Olympic Analytical Laboratory, Los Angeles, California, USA (“UCLA Laboratory”). The analysis revealed the presence of clenbuterol (a prohibited substance under the WADC) at a concentration of 0.3 ng/mL. Mr. Nielsen was informed of this finding by a letter from UCI dated 27 September 2010.

Mr. Nielsen was provisionally suspended by UCI as of 30 September 2010.

UCI disclosed the adverse analytical finding regarding the “A” sample to the Danmarks Cykle Union (“Danish Federation”) on 4 October 2010.

By email of 21 December 2010, the complete documentation regarding the “A” sample was forwarded by UCI to WADA.

Upon request of Mr. Nielsen, the “B” sample was analyzed by the UCLA Laboratory on 4 January 2011. The analysis revealed that the “B” sample also contained clenbuterol.

By letter of 12 January 2011, UCI requested the Danish Federation to initiate disciplinary proceedings against Mr. Nielsen. The letter also contained the information that Mr. Nielsen had already been sanctioned with a warning for a first anti-doping rule violation committed on 29 May 2004. On this date, Mr. Nielsen tested positive for prednisolone and metabolites thereof due to the use of eye drops. These eye drops had been prescribed by a doctor, but Mr. Nielsen had failed to apply for a therapeutic use exemption.

By e-mail of 10 February 2011, WADA received the result of the “B” sample analysis from the Sports Confederation of Denmark along with other relevant documents.

By decision dated 21 March 2011 (the “Decision”), the Danish Doping Board lifted the provisional suspension imposed by UCI and disqualified Mr. Nielsen from the race on 25 April 2010. No period of ineligibility was imposed as the Danish Doping Board held that Mr. Nielsen had successfully established that he bore no fault or negligence as stipulated in Article 296 of the UCI Anti-Doping Regulations (UCI-ADR).

By email of 21 March 2011, WADA received the Decision in Danish language from the Sports Confederation of Denmark.

By email of 5 April 2011, WADA requested the full case file from the Danish Federation, as well as an English translation of the reasoned decision.

On 8 April 2011, Mr. Davide Delfini, UCI Coordinator of Anti-Doping Results, forwarded to WADA by e-mail *“the translation of some of the documents of the Nielsen’s file”* and added that he *“did not receive yet the complete file, though I receive an email confirming that UCI should already have the complete documentation of the dossier”*.

By e-mail dated 18 May 2011, Mr. Delfini informed WADA as follows:

“Let me also know if you need to receive a copy of the complete file which was finally received by UCI via post mail on 9th May.

Finally I confirm to you that we considered our deadline for appeal the 6th of May since on 6th of April we had received (see e-mail attached) the confirmation that the file was already in our hands”.

On 14 June 2011, the Sports Confederation of Denmark sent a letter to WADA which read, in relevant part, as follows:

“Please find enclosed the complete case file for the Nielsen case, as previously sent to the UCI. We apologise for the misunderstanding that lead to WADA not receiving the documents at the same time as the UCI.

[...] the rider’s explanation about his staying at the official hotel and eating from the hotel’s buffet with the other riders, including Colo, has been accepted as such by both parties and the doping tribunal. We do not have any more specific information about the nature, quantity and dates of the meat eaten in the days prior to the doping control”.

By email dated 15 June 2011, WADA received from the UCLA Laboratory a copy of the “A” documentation. In the same correspondence, the UCLA Laboratory informed WADA that a “B” documentation had not been requested by UCI.

By letter dated 8 June 2011 and sent to the Court of Arbitration for Sport (CAS) on the same day, WADA filed its Statement of Appeal with CAS against the Decision.

By letter of 22 June 2011, the Respondents requested inter alia that the Appeal be dismissed as manifestly late.

By letter dated 27 June 2011 and sent to the CAS on the same day, WADA filed its Appeal Brief.

By letter dated 21 July 2011, the Parties were informed of the decision of the President of the Appeal Arbitration Division according to which the appeal was not manifestly late.

On 26 July 2011, the Respondents requested an extension of the time limit to file their Answer until 15 August 2011. Since no objections were raised by WADA, the requested extension was granted by letter from CAS dated 27 July 2011.

On the same date, the CAS issued a notice to the Parties that the Panel was constituted in the following composition: Mr. Dirk-Reiner Martens as President, Mr. Hans Nater as Arbitrator appointed by the Appellant and Mr. Lars Halgreen as Arbitrator appointed by the Respondents.

By letter dated 15 August 2011 and sent to the CAS on the same day, the Respondents filed their Answer.

By letter of 23 August 2011, the Respondents informed CAS that they preferred the CAS to issue an award based on the Parties' written submissions.

By letter dated 24 August 2011, WADA requested that a hearing be held. Furthermore, WADA requested that the issue of admissibility be decided in a preliminary partial award before examining the merits of the case, and that a hearing on this issue be held, should the Panel deem it necessary, by way of teleconference.

WADA contends that the Appeal is admissible and, in particular, was timely filed. In support of this contention, WADA argues that it did not know until 18 May 2011 that the documents it already had in its possession constituted the complete case file, and that the Appeal was therefore timely filed on 8 June 2011.

WADA submits the following prayers for relief:

- “1. The Appeal of WADA is admissible.*
- 2. The Appealed Decision rendered on 21 March 2011 by the Doping Board of Sports Confederation of Denmark in the matter of Mr. Philipp Nielsen is set aside.*
- 3. Mr. Philipp Nielsen is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility, served by Mr. Philipp Nielsen before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.*
- 4. All competitive results obtained by Mr. Philipp Nielsen from 25 April 2011 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
- 5. WADA is granted an award for costs”.*

The Respondents contend that the Appeal is inadmissible because the Statement of Appeal was not timely filed. Neither the WADC nor the UCI-ADR requires that the full case file is provided in a language of WADA's choice. Furthermore, according to the Respondents, WADA is entitled to receive only the material used by the national tribunal. All files used by the Danish Doping Board in its Decision had already been sent to WADA by e-mail of 10 February 2011. Therefore, WADA received the full case file once it was provided with the Decision, i.e. on 22 March 2011, which means that the time limit began to run on this date and expired on 12 May 2011.

The Respondents request CAS to rule

- “a) That the appeal of WADA is inadmissible*

-or-

b) That the appealed Decision rendered on 21 March 2011 by the Doping Board of the National Olympic Committee and Sports Confederation of Denmark in the matter of Mr. Philip Nielsen is upheld.

-or-

c) Should the Court find that the appealed decision should be set aside, that Mr. Nielsen is sanctioned as Mr. Coló and a one year period of ineligibility be imposed. The period should be started from the date WADA received the results of the A- sample.

-and-

d) The respondents are granted an award for costs”.

LAW

CAS Jurisdiction

1. The Panel finds that it has jurisdiction to adjudicate the present dispute according to Article R47 of the Code of Sports-related Arbitration (“CAS Code”) in conjunction with Article 13.2.1 of the National Danish Anti-Doping rules, which have been adopted by the Sports Federation of Denmark and the Danish Anti-Doping Agency on 10 September 2009. The latter Article provides that CAS has sole jurisdiction as the appeal body in cases involving Danish athletes on an international level.
2. Furthermore, neither side has raised any objection as to the jurisdiction of CAS in the present dispute.

Applicable law

3. The Panel finds that the UCI-ADR and, subsidiarily, the laws of Switzerland are applicable to the present dispute pursuant to Article R58 of the CAS Code, read in conjunction with Article 345 of the UCI-ADR.

4. R58 of the CAS Code stipulates that

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a 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 law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

5. According to Article 345 of the UCI-ADR,
“CAS shall decide the dispute according to these Anti-Doping Rules and for the rest according to Swiss law”.

Partial Award

6. Pursuant to Article 188 of the Swiss Private International Law Act, the Panel may render a partial award unless the parties have agreed otherwise.
7. Given that the admissibility of the appeal is in dispute between the parties, and in view of WADA’s explicit request for a partial award on this issue, the Panel deems it appropriate to decide upon the admissibility of the Appeal by way of a partial award.
8. The decision on all other prayers for relief shall be reserved to the final award.

Admissibility

9. The Panel finds that the Appeal is admissible. In particular, it was timely filed.
10. Pursuant to Article 334 UCI-ADR, which is applicable according to Article R49 of the CAS Code,
“The statement of appeal by the [...] WADA must be submitted to the CAS within 1 (one) month of receipt of the full case file from the hearing body of the National Federation in cases under article 329.1, 329.2 and 329.5 and from the UCI in cases under article 329.3, 329.4, 329.6 and 329.7. Failure to respect this time limit shall result in the appeal being barred. Should the appellant not request the file within 15 (fifteen) days of receiving the full decision as specified in art. 277 [...], the time limit for appeals shall be 1 (one) month from the reception of that decision. In any event, WADA may lodge an appeal 21 (twenty-one) days after the last day on which any other party in the case could have appealed”.
11. It follows from this provision that the applicable time limit was one month. This is because firstly, the Decision falls under Article 329.1 of the UCI-ADR (which refers to *“a decision of the hearing body of the National Federation under article 272”*). Secondly, WADA requested the case file on 5 April 2011 and therefore within 15 days of receiving the Decision (in Danish language) from the Sports Confederation of Denmark on 21 March 2011. It can thus be left open whether a decision in Danish language was indeed sufficient to trigger the 15-day time limit for WADA to request the case file.
11. What remains to be determined is the date on which the time limit of one month began to run. According to Article 334 UCI-ADR, given that WADA timely requested the case file (see above), the time limit begins upon WADA’s *“receipt of the full case file from the hearing body of the National Federation”*.
12. The Respondents contend that WADA had already received all relevant documents from the Danish Doping Board on 10 February 2011 in the course of the proceedings before this national

body. Hence, according to the Respondents, the time limit began to run when WADA received the Decision on 21 March 2011, because at that point it had the full case file in its possession.

13. The Panel does not endorse the Respondent's argument. It finds, for the reasons detailed below, that the time limit had begun to run on 18 May 2011 at the earliest and therefore had not expired when the Statement of Appeal was filed on 8 June 2011.
14. First of all, the Panel finds that the documents provided to WADA on 10 February 2011 cannot be qualified as a "case file" within the meaning of Article 334 UCI-ADR.
15. As becomes clear from sentence 3 of said Article, a "case file" is a file provided upon request by WADA by the hearing body of the national federation after the decision by the national hearing body has been notified to WADA.
16. In fact, a transmission of documents to WADA in the course of the national proceedings is not even provided for in the UCI-ADR, with the exception of the request for disciplinary proceedings (see Article 249 of the UCI-ADR). If the national hearing body provides WADA with any other documents before a decision is taken, this transmission is outside the scope of the UCI-ADR. Such documents can therefore not be regarded as a "case file" within the meaning of Article 334 UCI-ADR. In the present case, this is confirmed by the fact that WADA could not possibly have known whether there were any other documents exchanged before the Decision was rendered (given that, as indicated above, WADA does not have a right to receive such documents under the UCI-ADR).
17. Secondly, the Panel finds that WADA also did not receive the full case file on 8 April 2011.
18. Article 334 UCI-ADR stipulates that the time limit begins to run upon receipt of the full case file "*from the hearing body of the National Federation*". On 8 April 2011, however, WADA received documents from UCI, not from the Danish Doping Board (which did not send the full case file until 14 June 2011, i.e. after the Appeal had been filed). Pursuant to the wording of Article 334 UCI-ADR, the transmission of documents on 8 April 2011 could therefore not have triggered the running of the time limit.
19. Even if a transmission of the case file by third parties (i.e. by UCI, not the national hearing body) could be regarded as sufficient, the Panel finds that the time limit of Article 334 UCI-ADR would only be triggered once the competent body declares, at least implicitly, that the documents provided to the requesting body indeed constitute the complete case file. The Panel deems such interpretation necessary in view of the *ratio* of Article 334 UCI-ADR, namely to protect the appellant's right to take an informed decision about whether to file an appeal or not. It can be left open whether UCI, in the circumstances of the present case, could have validly made such declaration of completeness in lieu of the national hearing body. In any event, it clearly did not make such declaration. Mr. Delfini of UCI forwarded the documents to WADA with the express *caveat* that he "*did not receive yet the complete file, though I receive an email confirming that UCI should already have the complete documentation of the dossier*".

20. Before this background, it can also be left open whether the documents provided by UCI to WADA on 8 April 2011 could be regarded as the full case file despite the fact that only “*some of the documents*” were provided in English language, the other documents apparently being in Danish. Even if this were the case, the time limit could at the earliest have begun to run on 18 May 2011. On this day, Mr. Delfini of UCI sent an email to WADA which might be interpreted as a declaration that the documents already sent to WADA on 8 April 2011 constituted the complete file (in view of the Appeal having been filed on 8 June, the Panel does not need to decide whether the e-mail did indeed contain such declaration)

The Court of Arbitration for Sport rules:

1. The appeal filed on 8 June 2011 by the World Anti-Doping Agency is admissible.
2. The decision on all other prayers for relief including costs connected with the present partial award shall be reserved to the final award.