Arbitration CAS 2015/A/4304 Tatyana Andrianova v. All Russia Athletic Federation (ARAF), award of 14 April 2016

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Athletics
Re-analysis of samples
Scope of application of a statute of limitation
Duty for a federation to respect the principles of human rights
Limits to the retroactive application of the statute of limitation

1. **According to the plain wording of the provision, the new statute of limitation contained in Rule 47 of the 2015 IAAF Anti-Doping Rules (ADR) implementing the 2015 World Anti-Doping Code *"shall only be applied"* to cases that have occurred prior to the entering into force of the 2015 ADR (Effective Date), if the *"statute of limitation period has not already expired"* by that date. It is rather obvious that the latter term (*"statute of limitation period"*) does not refer to the "new" statute of limitation in the 2015 ADR. Instead, it refers to the (old) statute of limitation previously in force. This is clearly evidenced by the fact that no reference is made in this context to "Rule 47". Furthermore, any different reading would make little sense, because then the second half of the sentence (*"provided however that Rule 47 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date"*) would be superfluous.**

2. **Even if the 2015 ADR deleted all references to human rights and have not – at least in this respect – implemented the 2015 WADC *verbatim*, a federation cannot opt out from an interpretation of its rules and regulations in light of principles of "human rights" just by omitting any references in its rules and regulations to human rights.**

3. **It does not necessarily follow from the qualification of the statute of limitation as a "procedural rule" that there are no limits to a retroactive application of such rule. Instead, it follows from Art. 6(1) ECHR that the procedure must be "fair". CAS panels have repeatedly found that arbitral tribunals are indirectly bound by the ECHR. Applying retroactively a longer statute of limitation to a case that was already time-barred at the time of the entry into force of the new provision is incompatible with a "fair proceeding". All the interests protected by a statute of limitation, in particular the legitimate procedural interests of the "debtor"/"defendant" would be violated if an association could retroactively allow for the persecution of a disciplinary offense already time-barred. Such open-ended approach to disciplinary cases poses a serious threat to the principle of legal certainty that constitutes a violation of Art. 6(1) ECHR. Therefore, the 10-year statute of limitation in Rule 47 of the 2015 ADR can only apply to those cases that were not already time-barred on 1 January 2015, i.e. at the time of the entry into force of the 2015 ADR.**

I. THE PARTIES

1. Ms Tatyana Andrianova (the "Athlete" or the "Appellant"), is a middle distance runner.

2. The Respondent, the All Russia Athletic Federation (the "Respondent" or "ARAF"), is Russia's national member federation in the International Association of Athletics Federation (the "IAAF") and the European Athletics Association (the "EAA").

II. THE FACTS

3. On 9 August 2005, the Athlete competed at the IAAF World Championships in Helsinki. On the same day, the Athlete underwent an in-competition anti-doping control. The analysis of the sample (code 691833) did not detect the presence of any prohibited substance. Accordingly, the Athlete's A and B samples were transferred for long-term storage to the WADA-accredited Laboratory in Lausanne (the "Laboratory").

4. On 6 August 2015, the A sample was re-analysed by the Laboratory. The Doping Control Report (the "Report") issued by the Laboratory asserts that the sample provided by the Athlete contained metabolites of the substance *Stanozolol. Stanozolol* is a Prohibited Substance classified under S1 (Anabolic Agents) on the WADA 2005 Prohibited List. The substance is prohibited at all times. The Laboratory notified the IAAF of the Adverse Analytical Finding ("AAF").

5. By letter dated 7 August 2015, the IAAF notified the Respondent of the AAF and the Report. The ARAF then notified the Athlete.

6. With letter dated 22 September 2015, the IAAF notified the ARAF that the Athlete had been provisionally suspended.

7. A hearing was held on 2 October 2015 before the "ARAF Anti-Doping Commission" (the "Commission"), which was attended by the Athlete.

8. On the same day, the Commission rendered its decision (the "Appealed Decision"), which reads, *inter alia*, as follows:

   [the Commission] *considered the case of alleged anti-doping rule violation committed by Ms TATYANA ANDRIANOVA (hereinafter referred as Athlete) and ruled:*

   1) To declare that Ms TATYANA ANDRIANOVA committed an anti-doping rule violation under the IAAF Rule 2005 art. 32.2.(a) (the presence of a prohibited substance or its metabolites or markers in an athlete's sample);

   2) To determine 2-year period of ineligibility for Ms TATYANA ANDRIANOVA under art. 40.1 of IAAF Rule 2005;

   3) To establish that the period of applicable ineligibility expired on 21 September 2017;

4) To disqualify all results achieved by Ms TATYANA ANDRIANOVA at the 10th IAAF World Championships 2005;

5) To disqualify all results achieved by Ms TATYANA ANDRIANOVA in the period from 09.08.2005 until 08.08.2007.

9. On 9 October 2015, the Athlete received notice of the Appealed Decision.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

10. On 23 November 2015, the Appellant filed her Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport (the "CAS"). In her Statement of Appeal, the Appellant requested that the procedure be bifurcated and that the question concerning the statute of limitations (the "Limitation Period") be dealt with as a preliminary issue. The Athlete also requested to be allowed to file an Appeal Brief limited to the issue of the Limitation Period and that the deadlines for filing additional briefs regarding the merits be provisionally suspended until a decision was rendered with respect to the Limitation Period. Moreover, the Appellant nominated Prof. Ulrich Haas as arbitrator.

11. By letter dated 30 November 2015, the CAS Court Office informed the Respondent of the Appellant's requests and invited the Respondent to comment within a deadline of 3 days.

12. On 3 December 2015, the Respondent informed the CAS Court Office that it agreed with the Appellant's requests. Furthermore, the Respondent suggested that this procedure be referred to a Sole Arbitrator, namely Prof. Haas.

13. In a letter dated 4 December 2015, the CAS Court Office informed the parties that the Respondent's request to appoint Prof. Haas as Sole Arbitrator had been approved by the Appellant's counsel by telephone and therefore, the President of the Appeals Arbitration Division would be asked to confirm the appointment of Prof. Haas as Sole Arbitrator in accordance with Article R54 of the Code of Sportzs-related Arbitration (the "Code"). Furthermore, the CAS Court Office informed the parties of the suspension of the proceedings until the Sole Arbitrator rendered a decision whether or not to birfucate the proceedings, and in the meatime, that the deadline for the Appellant's appeal brief would remain suspended.

14. On 22 December 2015, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed the appointment of Prof. Haas as Sole Arbitrator in the procedure.

15. On 6 January 2016, the CAS Court Office invited the Appellant to file her submission limited to the question of the Limitation Period by no later than 13 January 2016. The Parties were also invited to state whether they preferred a hearing to be held on this preliminary matter.

16. On 13 January 2016, the Appellant filed her submission on the Limitation Period and informed the CAS Court Office that she did not deem a hearing necessary.

17. On 15 January 2016, the CAS Court Office invited the Respondent to file its response to the Appellant's submission on the Limitation Period within a deadline of 7 days.

18. On 29 January 2016, the CAS Court Office informed the parties that it had not received a response submission from the Respondent.

19. On 2 February 2016, the CAS Court Office advised the parties that no further written submission on the Limitation Period would be accepted on file. Furthermore, to the extent not already expressed, the parties were again invited within a deadline of three days to state their preference on whether a hearing should be held.

20. On 3 February 2016, the Respondent informed the CAS Court Office that the Sole Arbitrator could freely render a decision on the Limitation Period issue without a hearing.

21. On 5 February 2016, the Appellant reiterated her position that a decision *"can be taken based on the written submissions"*.

22. On 16 February 2016, the CAS Court Office informed the parties that the Sole Arbitrator deemed himself sufficiently well informed to render the decision on the written submissions.

23. On 22 February 2016, the CAS Court Office communicated to the parties the Order of Procedure.

24. On 23 February 2016 and 3 March 2016, the Appellant and Respondent, respectively, returned the Order of Procedure duly signed.

IV. THE PARTIES' POSITION ON THE LIMITATION PERIOD

25. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the parties' claims in this award, the Sole Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

A. The Appellant

26. In her Appeal Brief, the Appellant requested the Sole Arbitrator to:

(a) annul the Decision;

(b) confirm that no sanctions or consequences can be imposed on the Appellant with regards to the Sample;

(c) order the Respondent to:

(i) reimburse the Appellant her legal costs and other expenses pertaining to these Appeal proceedings before CAS;

(ii) bear the costs of the arbitration.

27. The Appellant's submissions in support of her requests may be summarized as follows:

(a) The Limitation Period with regard to the alleged anti-doping rule violation has expired. The Limitation Period commenced on 9 August 2005, i.e. the date of sample collection, and expired 8 years later, i.e. on 8 August 2013.

(b) Every version of the IAAF Anti-Doping Rules (the "ADR") between 9 August 2005 and 31 December 2014 provided for an 8-year Limitation Period.

(c) The latest possible date for the Respondent to initiate proceedings against the Athlete would have been 8 August 2013.

(d) The sample was only re-analysed on 6 August 2015, i.e. two years after the expiry of the Limitation Period.

(e) There is no legal basis for the retroactive application of the 10-year Limitation Period in the ADR (which only took effect in 2015). The 2015 version of the ADR explicitly regulate the intertemporal scope of application of the new Limitation Period. Accordingly, the 10-year Limitation Period may only be applied retroactively if the previously applicable Statute of Limitation has not already expired as of 1 January 2015 ("Effective Date"). Since in the given case the previous Statute of Limitation (laid down in Rule 44 of the ADR 2004-2005) expired on 8 August 2013, the new Limitation Period cannot be applied retroactively.

(f) With regard to the law applicable to the merits, the Appellant submits that Swiss law is the most appropriate law. The Appellant justifies the application of Swiss law by pointing to the legislative origins of the 2015 ADR. The latter implement the World Anti-Doping Code ("2015 WADC"). In light of the fact that WADA has its legal seat in Switzerland and in order to ensure uniformity in the application of the 2015 WADC throughout all sports, Swiss law should be applied.

(g) Finally, the Athlete disputes having knowingly used or consumed prohibited substances, which allegedly have caused the alleged AAF.

B. The Respondent

28. The Respondent did not submit any prayers of relief or statements in response to the Appellant's Statement of Appeal and/or Appeal Brief.

V. JURISDICTION OF THE CAS

29. Article R47 of the Code reads as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

30. The jurisdiction of the CAS to rule on the present dispute follows from Rule 42 of the 2015 ADR. According thereto, *"all decisions made under these Anti-Doping Rules may be appealed … to the CAS"*. The Appealed Decision is based on the ADR (2005 and 2015). Furthermore, the jurisdiction of the CAS follows from the Order of Procedure, duly signed by all parties. Finally, the Sole Arbitrator notes that the jurisdiction of the CAS has not been contested by any party to these proceedings in the abundant correspondence with the CAS Court Office.

VI. ADMISSIBILITY

31. In order for the appeal to be admissible, Article R47 of the Code requires

- that there must be a *"decision"* of a federation, association or another sports-related body forming the matter in dispute and
- that the *"internal remedies available prior to the appeal"* to CAS must have been exhausted, in accordance with the statutes or regulations of the mentioned bodies, and

32. The Appealed Decision is – beyond doubt – a *"decision of an association"* within the meaning of Article R47 of the Code since it has been issued by the *"ARAF Anti-Doping Commission"*.

33. Moreover, the second prerequisite of Article R47 of the Code is met in the present case since there are no internal remedies available against the Appealed Decision within ARAF. This follows from Rule 42.3 of the 2015 ADR, which reads as follows:

In cases arising from an International Competition or involving International-Level Athletes or their Athlete Support Personnel, the first instance decision of the relevant body of the Member shall not be subject to further review or appeal at national level and shall be appealed exclusively to CAS in accordance with the provisions set out below.

34. The Appellant is an International-Level athlete within the above meaning, since the sample was collected from her at the IAAF World Championships in 2005 (see definition of the term "International-Level Athlete" in the definition section of the 2015 ADR). Thus, no further internal legal recourse is available in the case at hand.

35. Finally, in order to be admissible the appeal must have been filed within the prescribed deadlines. Article R49 of the Code, which deals with the time limits for appeal, reads as follows:

In the absence of a time limit set in the statutes or regulation of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.

36. Rule 42.15 of the 2015 ADR provides that:

Unless stated otherwise in these Rules (or the Doping Review Board determines otherwise in cases where the IAAF is the prospective appellant), the appellant shall have forty-five (45) days in which to file his statement of appeal to CAS, such period starting from the day after the date of receipt of the decision to be appealed (…).

37. The Appealed Decision was notified to the Athlete on 9 October 2015. On 23 November 2015, the Appellant filed her appeal. Hence, the Appellant complied with the time limits prescribed by Rule 42.15 of the 2015 ADR and the Code.

VII. SCOPE OF REVIEW

38. The Sole Arbitrator is not prevented from issuing this award by the mere fact that ARAF failed to submit an Answer in the present proceedings. This follows from Article R55 (3) of the Code, which provides as follows:

If the Respondent fails to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award.

39. According to Article R57 of the Code, the Sole Arbitrator has full power to review the facts and the law. He may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

40. In application of the aforementioned rule, the Sole Arbitrator is entitled to hear the present case *de novo* (CAS 2012/A/2107 [6.12.2010] no. 9.1).

VIII. APPLICABLE LAW

41. According to Article R58 of the Code, the Sole Arbitrator shall decide the dispute as follows:

… 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 Court deems appropriate. In the latter case the Court shall give reasons for its decision.

42. The applicable regulations in the given case are the ADR, which provide the main legal framework to decide the dispute on the merits. The Appellant requests that – additionally / subsidiarily – Swiss law shall apply in the case at hand. However, the parties have neither agreed to Swiss law nor is Switzerland the country in which the association / federation (that has issued the Appealed Decision) is domiciled. The Sole Arbitrator notes that the referral to Monegasque law in Rule 42.24 ADR is not applicable in the present case, since this CAS proceeding does

not involve the IAAF. In the absence of any other law chosen by the Parties, the Sole Arbitrator finds that Russian law shall apply subsidiarily to the ADR.

IX. MERITS

43. This dispute is about the interpretation of the transitional rule contained in Rule 49 of the 2015 ADR. The provision reads as follows:

> ***Non-retroactive except for … Rule 47 …*** *the statute of limitations in Rule 47 are procedural rules and should be applied retroactively; provided however that Rule 47 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date. …*

44. Any interpretation of said provision must start with the plain wording of the provision. According thereto, the new statute of limitation contained in Rule 47 of the 2015 ADR *"shall only be applied"* to cases that have occurred prior to the entering into force of the 2015 ADR (Effective Date), if the *"statute of limitation period has not already expired"* by that date. It is rather obvious to the Sole Arbitrator that the latter term (*"statute of limitation period"*) does not refer to the "new" statute of limitation in the 2015 ADR. Instead, it refers to the (old) statute of limitation previously in force. This is clearly evidenced by the fact that no reference is made in this context to "Rule 47". Furthermore, any different reading would make little sense, because then the second half of the sentence (*"provided however that Rule 47 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date"*) would be superfluous.

45. The Sole Arbitrator further notes that the 2015 WADC makes frequent references to "human rights" (cf. page 11, 17, 57 [comment], 113 [comment]). The Sole Arbitrator also notes that the 2015 ADR deleted all references to human rights and have not – at least in this respect – implemented the 2015 WADC verbatim. Whether this is in line with the obligations of a Signatory to the Code can be left unanswered here. It is – again – rather obvious for the Sole Arbitrator that a federation cannot opt out from an interpretation of its rules and regulations in light of principles of "human rights" just by omitting any references in its rules and regulations to human rights.

46. The 2015 ADR qualify the rule pertaining to the statute of limitation as a "procedural rule". However, it does not necessarily follow from this qualification that there are no limits to a retroactive application of such rule. Instead, it follows from Art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR") that the procedure must be "fair". CAS Panels have repeatedly found that arbitral tribunals are indirectly bound by the ECHR. In CAS 2011/A/2384 & 2386, the Panel held (no. 172) as follows:

> *The Panel is of the view that even though it is not directly bound by the provisions of the ECHR (cf. Art. 1 ECHR), it should nevertheless account for their content within the framework of procedural public policy.*

47. Equally, in CAS 2011/A/2433 (no. 58) the Panel held:

> *Toutefois, la Formation arbitrale est consciente du fait que certaines garanties procédurales découlant de l'article 6.1 de la CEDH, dans les litiges portant sur des droits et obligations de caractère civil, sont indirectement*

applicables même devant un tribunal arbitral – d'autant plus en matière disciplinaire. Cela est dû au fait que la Confédération suisse, en tant que partie contractante à la CEDH, doit veiller à ce que, au moment de la mise en en oeuvre des sentences arbitrales (au stade de l'exécution de la sentence ou à l'occasion d'un appel tendant à son annulation), les juges s'assurent que les parties à l'arbitrage aient pu bénéficier d'une procédure équitable, menée dans un délai raisonnable par un tribunal indépendant et impartial.

*[*free translation*: However, the Panel is conscious of the fact that certain procedural guarantees enshrined in article 6(1) of the ECHR, in disputes relating to civil rights and obligations, are indirectly applicable even before an arbitral tribunal – even more so in disciplinary matters. This follows from the fact that Switzerland, being a member state of the ECHR, the judges must ensure that when implementing arbitral awards (in the stage of enforcement of the arbitral award or in the context of an appeal against the latter), that the parties to the arbitral proceeding had the benefit of an equitable procedure, that was conducted within reasonable time by an independent and impartial tribunal.]*

48. Applying retroactively a longer statute of limitation to a case that was already time-barred at the time of the entry into force of the new provision is incompatible with a "fair proceeding". Limitation periods are a common feature of most legal system as regards criminal, civil or disciplinary matters. A statute of limitation serves different purposes. The European Court of Human Rights (ECHR) has described them in a decision dated 9 January 2013 (*Oleksandr Volkov v. Ukraine*, application no. 21722/11) at marg. no. 137 as follows:

The Court has held that limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.

49. All these interests, in particular however the legitimate procedural interests of the "debtor" / "defendant" would be violated if an association could retroactively allow for the persecution of a disciplinary offense already time-barred. Deciding otherwise would result, ultimately, in a situation where an association could prevent a claim from being time-bared at all. Such "*open-ended approach to disciplinary cases … poses a serious threat to the principle of legal certainty …* [that constitutes] *a violation of Article 6§1 of the Convention*" (ECHR [9 January 2013] *Oleksandr Volkov v. Ukraine*, application no. 21722/11, no. 139 seq.). To conclude, therefore, the Sole Arbitrator finds that the 10-year statute of limitation in Rule 47 of the 2015 ADR can only apply to those cases that were not already time-barred on 1 January 2015, i.e. at the time of the entry into force of the 2015 ADR.

50. In the case at hand, the alleged anti-doping rule violation of the Athlete is asserted to have occurred on 9 August 2005 (the day of the sample collection). Every version of the ADR in force between 9 August 2005 and 31 December 2014 (i.e. the day prior of the entry in the force of the 2015 ADR) provided for an eight-year limitation period. Thus, any disciplinary proceedings against the Athlete became time-barred with the expiry of 8 August 2013, i.e. well before the new 2015 ADR providing for a 10-year statute of limitations coming into force. To conclude, therefore, the Sole Arbitrator finds that the ARAF erroneously opened disciplinary proceedings in 2015 against the Athlete based on the sample (code 691833) and that for this reason the appeal must be admitted and the Appealed Decision annulled.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Ms Tatyana Andrianova against the decision of the Anti-Doping Commission of the All Russia Athletic Federation dated 2 October 2015 is upheld.

2. The decision of the Anti-Doping Commission of the All Russia Athletic Federation dated 2 October 2015 is set aside.

(…).

5. All other or further claims are dismissed.