



**Arbitration CAS 2017/A/4962 World Anti-Doping Agency (WADA) v. Comitato Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi, award of 3 August 2017**

Panel: Mr Murray Rosen QC (United Kingdom), Sole Arbitrator

*Judo*

*Doping (dehydrochloromethyltestosterone)*

*Burden of proof*

*Balance of probability*

*Duty of the athlete to establish how the prohibited substance entered his/her body*

*Intentional violation*

1. It is the athlete that bears the burden of proof of establishing that the anti-doping rule violation was unintentional and thus to establish how the relevant forbidden substance entered into his/her body.
2. The standard of proof applicable in this respect is based on the “balance of probability”, which entails that the athlete has the burden of convincing that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence.
3. To establish the origin of a prohibited substance, it is not sufficient for an athlete merely to protest his or her innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product, which the athlete was taken at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular product that the athlete ingested contained the substance in question, as a preliminary to seeking to prove that it was unintentional or without fault or negligence.
4. If an athlete fails to establish how a prohibited substance entered into his/her body, her/his anti-doping rule violation shall be deemed intentional and sanctioned accordingly based on the applicable regulations.

**I. PARTIES**

1. The World Anti-Doping Agency (“WADA” or “Appellant”) is the independent international anti-doping agency, constituted as a private law foundation under Swiss law, whose aim is to promote and coordinate the fight against doping in sport internationally.

2. The Comitato Permanente Antidoping San Marino (“CPA” or “First Respondent”) is an anti-doping agency established to promote and coordinate the fight against doping in sport in San Marino, and for that purpose among other things to maintain rules (the Anti-doping Regulations of the CPA - the “NADO Rules”) which accord with the World Anti-Doping Code (“WADC”), to cooperate with other organisations and to pursue all potential anti-doping violations within its jurisdiction.
3. Karim Gharbi (“Athlete” or “Second Respondent”) is an international-level judoka from San Marino, born on 5 January 1992.

## II. FACTUAL BACKGROUND

4. While the Sole Arbitrator has considered all the facts and matters submitted in these proceedings, this Award refers expressly only to those which he considers necessary to explain his reasoning.
5. On 5 July 2016 the Athlete underwent out-of-competition doping control in Serrevalle, San Marino. The A-Sample revealed on analysis the presence of Dehydrochloromethyltestosterone (“DHCMT”) of exogenous origin, being an anabolic agent prohibited under S1.1a of the 2015 WADA Prohibited List and not a “specified substance”. The analysis of the B-sample confirmed those findings.
6. The Athlete was charged with a doping violation (his first) of the NADO Rules (2015 Edition, then applicable) and maintained that whilst on Slovenia from 16 to 19 June 2016 he had purchased at a local supermarket and consumed supplements, in particular Carnidyn Plus and Isotar tablets.
7. On 6 August 2016 the Athlete was provisionally suspended and on 21 November 2016, following a hearing before the Doping Hearing Panel of the CPA, he was sanctioned for the presence of a prohibited substance (DHCMT) in his samples with a 2-year ineligibility period commencing on the date of his provisional suspension (the “Decision”).
8. The basis of the Decision was that:
  - (a) the documentation showed that the testing of the A- and B-samples had been carried out in the compliance with the WADA International Standards on Testing (“ISTP”) and the Athlete had not disputed the accuracy of the methods or the outcome nor established that he had taken contaminated supplements or that they had been the cause of the test results;
  - (b) under article 10.2.1 of the NADO Rules, the “basic” period of “disqualification” was 4 years but the CPA did not find it proved that the violation was intentional, given that (i) this was a first violation (ii) the Athlete had been cooperative and truthful and (iii) his personal and financial situation, in the light of which it was appropriate to apply instead the 2 year period of “disqualification” under Article 10.2.2 of the NADO Rules.

9. WADA received the case file relating to the Decision (at least in part) on 4 January 2017.

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

10. On 25 January 2017, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2017 edition, the “Code”), the Appellant filed its statement of appeal.
11. On 3 February 2017, the Appellant filed its appeal brief, in accordance with Article R51 of the Code.
12. On 21 February 2017, the First Respondent filed its answer, in accordance with Article R55 of the Code.
13. On 24 February 2017 the Second Respondent filed his answer, in accordance with Article R55 of the Code.
14. On 2 May 2017, the CAS Court Office issued an order of procedure, which was signed by all parties by 5 May 2017.
15. Pursuant thereto, a hearing was convened and took place on 8 May 2017 in Lausanne, Switzerland. WADA was represented by Messrs Ross Wenzel and Nicolas Zbinden; the CPA by Messrs Claudio Muccioli, Loris Valentini and Genni Mucioli; and the Athlete attended with his lawyers Messrs Angelo Bartolotti, Elisa Bilotti, Umberto Bartolotti and Francesco Ballardini.
16. The Sole Arbitrator was addressed by all those attending the hearing, and they confirmed at the end of the hearing that the parties’ rights to be heard had in each case been fully respected.

### **IV. SUBMISSIONS OF THE PARTIES**

17. The Sole Arbitrator has carefully considered all the parties’ submissions, and the following summary is to assist in understanding his reasons as below and does not need or purport to be more comprehensive.

#### **A. The Appellant**

18. The Appellant’s main submissions were briefly as follows:
  - a. The violation had been proved before the CPA and had not been appealed by the Athlete, and it was not open to the Athlete to seek to challenge that finding of violation at later stage, nor had he put forward any valid grounds for doing so.

- b. Under Article 10.2.1.1 of the NADO Rules the period of ineligibility is 4 years for a violation not involving a specified substance, such as in this case, unless the athlete can establish that the anti-doping violation was not intentional.
  - c. This burden requires the athlete to establish *in limine* how the substance entered his body, by proof on the “balance of probability” and in the present case, the Athlete’s attempted explanation was wholly unsupported.
  - d. Accordingly the 4 year period of ineligibility should be applied and the Athlete’s alleged personal mitigation could not, nor did it render this disproportionate or a breach of human rights.
19. WADA requested by way of relief that “CAS (...) rule that
1. *The Appeal of WADA is admissible.*
  2. *The decision rendered by the Doping Hearing Panel of the CPA dated 21 November 2016 in the matter of Karim Gharbi is set aside.*
  3. *Karim Gharbi 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 or provisional suspension effectively served by Karim Gharbi 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 Karim Gharbi from and including 5 July 2016 are disqualified with all of the resulting consequences (including forfeiture of any medals, points and prizes).*
  5. *WADA is granted an award for costs”.*

## **B. The First Respondent**

20. The First Respondent submitted in summary that the violation which it found against the Athlete was not intentional because that required it to be satisfied that the Athlete had willingly engaged in a patent violation, thus subjectively being aware of and intending forbidden conduct. Whilst the CPA appeared to acknowledge that the burden of proof as to lack of intention was on the Athlete and that this entailed his proving the likely method of ingestion, it suggested that there must be a gradation from fault or negligence to intention, and that Italian case law stressed that disciplinary sanctions should be weighed for the effect on the individual.
21. The CPA requested CAS to maintain the 2-year disqualification under the Decision.

## **C. The Second Respondent**

22. The principal submissions of the Second Respondent began by seeking to uphold the Decision, explaining that he had been previously tested with negative results, had indicated his willingness

to a B-sample and to test the supplements which he allegedly took (although he lacked the economic resources in fact to do so). Accordingly he claimed that it was justifiable to exclude intention on his part to commit the violation.

23. The Second Respondent also submitted that there were anomalies in the testing process which amounted to breaches of the ISTI mainly: (a) as regards the recorded times (testing said to have started before arrival at the laboratory); (b) transport and/or storage of samples allegedly without temperature control; (c) an alleged omission by the CPA to notify the Athlete of his right to copy documentation; (d) a purported inconsistency relating to the reporting of results by the International Judo Federation and the International Olympic Committee at Rio de Janeiro on the occasion of the 2016 Olympic Games; and (e) an alleged failure to report on the Non-Threshold Substances in the A-sample.
24. Finally, the Second Respondent submitted at the hearing that two published papers by Geyer, Parr, Mareeck, Schanzer and others at the German Sports University Cologne, which were not adduced before the Doping Hearing Panel of the CPA, showed a likelihood that supplements purchased in Italy and elsewhere might be contaminated with DHCMT, thus supporting his explanation as to how he came to ingest the same unintentionally.
25. The Athlete requested by way of relief that WADA's appeal be dismissed, the Decision be confirmed and he be granted his costs and that his financial position be taken into account.

## V. JURISDICTION

26. Article R47 of the Code provides:

*“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide (...).”*

27. WADA relies on articles 13.2.1 and 13.2.3 of the NADO Rules as conferring jurisdiction on CAS. Such provisions provide, indeed, the possibility to appeal before CAS.
28. As stated in the Order of Procedure, this is not contested by either of the Respondents.
29. It follows from the above that CAS has jurisdiction to hear this matter.

## VI. ADMISSIBILITY

30. Article R49 of the Code provides:

*“In the absence of a time limit set in the statutes or regulations 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 (...).”*

31. Article 13.7.1 of the NADO Rules provides that the filing deadline for an appeal by WADA shall be the later of 21 days after (a) the last day on which any other party in the case could have appealed, or (b) WADA's receipt of the file relating to the decision.
32. WADA has stated that it received parts of the relevant file on 4 January 2017, and it is not asserted otherwise by any of the Respondents. Whenever the remainder of the file was received, WADA's appeal was filed on 25 January 2017, within the 21 days prescribed, and is accordingly admissible.

## VII. APPLICABLE LAW

33. Article R58 of the Code provides:

*“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

34. Accordingly WADA's appeal must be considered under the NADO Rules and insofar as necessary with the WADC, so as to harmonise anti-doping policies, rules and regulations in all sports in the region and globally, including judo and in San Marino. In this respect, it was not asserted by any other parties that any other set of laws or procedures should apply.

## VIII. MISSION OF THE SOLE ARBITRATOR

35. Article R57 of the Code provides that, *“The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”.*
36. This CAS review is *de novo*, such as to enhance harmonisation, check extreme cases, allow correction of factual or legal errors, ensure the *lex sportiva* is consistent as much as reasonably possible, and otherwise builds trust in the system of results management.
37. Indeed, Article 13.1.1 of the NADO Rules (entitled *“Scope of Review Not Limited”*) provides that *“The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker”*; and Article 13.1.2 (entitled *“CAS Shall Not Defer to the Findings Being Appealed”*) provides that *“In making its decision, CAS need not give deference to the discretion exercised by the body whose decision is being appealed”*.

## **IX. MERITS**

### **A. The Anti-Doping Rule Violation**

38. The Athlete was charged with the presence in his sample of DHCMT, a prohibited substance, a violation of Article 2.1 of the NADO Rules. DHCMT is not a Specified Substance, but is a synthetic anabolic androgenic steroid well-known to affect among other things, muscle size and strength and red blood cell production.
39. The Decision recorded that there had been submitted on behalf of the Athlete a request for a preliminary dismissal of the charge against him on the basis of a list of objections to the testing procedure and alleged breaches of ISTI but held that the testing procedure was in accordance with ISTI, the analyses were correctly performed and the laboratory results were accurate.
40. The Athlete did not appeal from those findings or the Decision as regards his violation. In effect he then sought to raise the same or very similar complaints in his response to WADA's appeal concerning sanction.
41. Moreover, there are no sufficient grounds to challenge the CPA's findings in this regard. Indeed, none of the Athlete's complaints can be shown to have affected the substance of the test results or cast significant doubt on the fact that DHCMT of exiguous origin was present in the Athlete's body.
42. Accordingly the Sole Arbitrator proceeds on the basis of the CPA's findings on this aspect, and so far as necessary finds that the Athlete did indeed commit an anti-doping rule violation in accordance with Article 2.1 of the NADO Rules.

### **B. The Athlete's Explanation**

43. The Decision also recorded the Athlete's contention as at 18 August 2016 that *"I am still unaware of how I could have taken this substance (...). I have gathered every possible supplement taken (...). I have often thought about where I could have taken the (...) substance, most recently I have been training in Slovenia but I honestly do not remember where I might possibly have ingested this substance"*. This was amplified by the Athlete later, on 19 October 2016.
44. However, as the CPA found, there was no evidence that supplements (allegedly) innocently taken by the Athlete were contaminated, with DHCMT or at all. Whether or not the Athlete can be excused (for financial reasons or otherwise) from testing the supplements he had taken and kept, would not, in any case, change that fact.
45. The two published papers produced on behalf of the Athlete at the hearing on 8 May 2017 take the matter no further at all. Dated 2004 and 2008, they reported on the results of investigations in 2000-2002, largely relating to "faked" prohormones and cross-contamination. The reported fact that out of 634 samples of non-hormonal nutritional supplements, some 15% contained small amounts of various steroids, whether intentionally or not, does not add materially to the knowledge of the cause of the DHCMT in the Athlete's body.

46. In particular, these old studies provide no specific information as regards the supplements allegedly purchased and taken by the Athlete, which might very well be entirely different in relation to any risk of accidental contamination in the light of more recent practices and standards as regards nutritional supplements in the supermarket.
47. This late attempt to challenge the CPA's findings on behalf of the Athlete was not properly developed and was potentially disruptive, and must in any event fail.

### **C. The Sanction and Test**

48. Under Article 10.2.1 of the NADO Rules, the sanction for this offence is 4 years where:

*"10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional".*

49. Article 10.2.3 of the NADO Rules provides that:

*"As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk (...)"*

50. The athlete bears the burden of establishing that the violation was not intentional within the above meaning, and it naturally follows that the athlete must also establish how the substance entered his or her body on the "balance of probability", a standard long established in CAS jurisprudence.
51. To establish the origin of the prohibited substance, it is nowhere near enough for an athlete to protest innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which he or she was taking at the relevant time.
52. Rather, an athlete must adduce actual evidence to demonstrate that a particular product ingested by him or her contained the substance in question, as a preliminary to seeking to prove that it was unintentional, or without fault or negligence.
53. Some previous expressions regarding this test were recently referred to in *CAS 2016/A/4662* as including the following points among others:
  - a. *"The raising of an unverified hypothesis is not the same as clearly establishing the facts"* (*CAS 99/A/234 & 235*) and *"The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred"* (*CAS 2006/A/1067*).
  - b. *"To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination*

*- two prevalent explanations volunteered by athletes for such presence - do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature for the athlete's basic personal duty to ensure that no prohibited substances enter his body" (CAS 2010/A/2230).*

#### **D. The Present Case**

54. In the present case, the Athlete's contention that he must have ingested the DHCMT from contaminated supplements had no evidentiary basis at all by reference to (including test results of) the supplements he had allegedly taken or from any other persuasive source. If such an "explanation" was dispositive, any athlete whose body contained a prohibited drug could assert that it had come from contaminated supplements of any sort. That would destroy the effectiveness of WADC and of the anti-doping regulations based on it and amount to a license to cheat and an abject surrender in the battle against doping.
55. Accordingly, the Sole Arbitrator finds that the Athlete wholly failed to meet his burden of proof; his doping violation must be deemed to be intentional and he must therefore be sanctioned with a 4-year period.
56. Unfortunately the CPA seems to have ignored the clear wording of Article 10.1.1 of the NADO Rules and the reinforcing commentary in CAS cases and elsewhere, and both its submissions and those on behalf of the Athlete confuse the rule, and its proportionality, with the allegedly mitigating factors in this case and a subjective perception of the Athlete's good character.
57. The Athlete's family and financial means and his apparent cooperation and truthfulness, do not demonstrate in any way that his violation was unintentional under the clear test in the NADO Rules. To reverse the burden so that it must be established in the face of the Athlete's bare assertions of innocence that the violation was intentional (whether "beyond reasonable doubt" or to a lesser standard) is to flout the relevant rules and to undermine the fight against doping.
58. That fight is a global fight requiring the cooperation and collective efforts of all the countries and agencies involved including San Marino and its NADO. To allow personal appearance and circumstance in the present case to reduce the required sanction, contrary to harmonised rules, is to damage sport not only in the relevant country (where the athlete concerned may be especially valued) but internationally, by diluting the reciprocity and "level playing field" which fairness in international sport demands.
59. The collateral qualities of the athlete concerned, and even previous local "heroism", must not detract from this principle. On the contrary this encapsulates why the rules must be followed in word and in spirit. There is nothing remotely "disproportionate" in consistently applying the anti-doping measures now in place; and this cannot depend on personal considerations without damaging the system as a whole.
60. Accordingly, the full, 4-year sanction should and shall apply in this case and there is no justification in principle or on the facts of this case for seeking to depart from it.

## ON THESE GROUNDS

### The Court of Arbitration for Sport rules that:

1. The appeal filed by World Anti-Doping Agency against the decision issued on 21 November 2016 by the Doping Hearing Panel of the Comitato Permanente Antidoping San Marino in the matter of Karim Gharbi is upheld.
2. The Decision of the Doping Hearing Panel of the Comitato Permanente Antidoping San Marino issued on 21 November 2016 in the matter of Karim Gharbi is set aside.
3. Karim Gharbi is sanctioned with a 4-year period of ineligibility, commencing with the date of this award, less the period served under suspension or ineligibility imposed by the Doping Hearing Panel of the Comitato Permanente Antidoping San Marino and all and any results, medals, points and prizes obtained during the periods of ineligibility are forfeited.
4. (...).
5. (...).
6. All other prayers for relief are dismissed.