Arbitration CAS 2010/A/2046 Samir Ibrahim Ali Hassan v. National Anti-Doping Committee of the United Arab Emirates (UAE), award of 5 October 2010

Panel: Mr Gerhard Bubnik (Czech Republic), Sole Arbitrator

Football
Doping (19-Norandrosterone)
CAS jurisdiction
Principles applicable to doping
Invalidation of the proof of the violation
Procedural rights violation justifying the invalidation of a positive test

1. **A letter from one of the party might amount to an offer to submit a dispute to CAS arbitration which the other party can accept by filing its appeal. The parties can thereby conclude a specific agreement to arbitrate within the meaning of Article R47 of the CAS Code.**

2. **In principle, the finding of a prohibited substance in sample A which is confirmed in sample B is sufficient proof of an anti-doping offence. The allegations of an athlete (speculation) would not represent sufficient grounds for elimination or reduction of the standard sanction; not only the applicable regulations establish strict liability of the athletes for everything that enters their system, but athletes cannot rely on representations made about the composition of the food supplements by the manufactures of such products. Moreover an athlete has the duty to inform all physicians treating him/her of the Prohibited List and the athlete commits negligence if s/he does not do so.**

3. **As far as the proof of the violation of an anti-doping rule and the legal conclusions are concerned, the results of the re-analysis of the player's sample by an accredited laboratory following the withdrawal of the WADA accreditation to the laboratory in charge of the previous analysis might change the whole situation if the only evidence proving the violation has been invalidated.**

4. **Besides the right to have the opportunity to be present at the opening of the B sample, the athlete's right to be heard, to be represented by counsel and to be informed in a fair and timely manner of the asserted Doping Rule violation are fundamental rights. The deprivation of such fundamental rights of the athlete are sufficient to make the whole urine test invalid.**

Samir Ibrahim Ali Hassan (the "Player" or "Appellant") born on 7 September 1978 and a citizen of the United Arab Emirates (UAE) is a professional football player with Ajman Sports Club, UAE.

The National Anti-Doping Committee of the United Arab Emirates (the "Respondent") is the national body responsible for managing the UAE's anti-doping policy ("NADO").

On 24 October 2004, the Appellant was subject to an in-competition doping control test following a UAE Football League match.

On 3 December 2009 the doping control laboratory reported that the Appellant's A sample analysis showed the presence of 19-Norandrosterone at 6.0 ng/mL greater than the threshold of 2 ng/mL. On 30 December 2009 the laboratory reported that the B sample analysis confirmed the A sample result.

The Appellant was summoned to appear before the Respondent's hearing committee on December 8, 2009 and on 3 January 2010, the Respondent convened to discuss the hearing committee's report. Upon reading the report and all documents relating to the result of the doping control test, the Disciplinary Committee of the Respondent concluded and rendered a Decision that:

> *There is a violation of the international anti-doping rules as provided for in Para 2.1 of the International Anti Doping Code i.e. the presence of prohibited substances, their metabolites, or markers in the sample drawn from the athlete. The presence of (19-Norandrosterone) of 6ng/mL greater than the threshold 2 ng/mL.*
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> *In view of the above, the sanction provided for in Article 10 of World Anti Doping in Code is accorded as follows:*
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> *Imposition of a two years ineligibility on the said athlete as provided for in Article 10.2 of World Anti Doping Agency (WADA) Code, as of 06/12/2009 up to 05/12/2011.*

The Respondent's decision (the "Decision") which is not dated was notified to the Appellant on 4 January 2010.

On 23 January 2010, the Appellant filed an appeal at the Court of Arbitration for Sport (the "CAS") against the Decision pursuant to the Code of Sports-related Arbitration (the "Code") 2010 edition.

The Appellant requested, *inter alia*, the annulment of the Decision and a stay of execution so that *"the Player is able to continue his employment contract with the club"*.

On 13 February 2010, the Appellant filed its appeal brief.

On 3 March 2010, the Respondent filed its Answer.

On 3 March 2010, the CAS issued an Order for Provisional Measures, rejecting the Appellant's application for provisional and conservatory measures.

On 6 April 2010, the Sole Arbitrator issued procedural directions and requested the parties to provide additional information in relation to certain issues.

On 14 and 15 April 2010, the Appellant and the Respondent provided their respective answers to the Sole Arbitrator's request for additional information.

On 13 May 2010, the Respondent announced for the first time that it intended to call Dr Olivier Rabin as expert witness in this matter. The Appellant objected to testimony of Dr Rabin. By letter dated 17 May 2010, the parties were reminded that pursuant to Article R55 of the Code, the Respondent's Answer shall contain the names of the witnesses and experts whom it intends to call. As Dr Rabin was not designated as an expert witness in the Respondent's answer, any issue as to the admissibility of Dr Rabin's evidence would be decided by the sole arbitrator.

3.11. By letter dated 20 May 2010, the parties were advised that having considered the Respondent's letter dated 13 May 2010 the Sole Arbitrator had decided not to admit the testimony of Dr Rabin. The parties were reminded that they were informed of the provisions of Article R56 of the Code and furthermore, the Respondent did not claim any exceptional circumstances as to why Dr Rabin's testimony should be admitted.

On 10 and 14 June 2010 respectively, the Appellant and the Respondent signed and returned the Order of Procedure to the CAS Court Office.

The Appellant denied that he had ever used any Prohibited Substance and stated that the substance had probably entered his body during a hernia operation which he underwent on July 9, 2009 and by injection which had received on September 9, 2009 against back pains. In addition, the substance might have been in some nutritional supplements, in meat which he had eaten, as well as in some special home made honey with herbs given to him by his relatives.

The Appellant raised a number of objections against the procedure conducted by the bodies of the Respondent such as:

1. his right to be heard was not respected.
2. he was summoned to both the preliminary hearing and to the main hearing only by phone at the very last moment,
3. he was treated by the Chairman of the Respondent as being guilty from the very beginning and he had no proper opportunity to defend himself,
4. he was forced to sign the minutes of the hearing without having been given the opportunity to read it first (he reads Arabic rather slowly); he signed the last page but the first two pages were not even shown to him,
5. he does not speak English and did not understand those documents which were drafted only in English, including both reports from the Laboratory and the appealed Decision,
6. he did not receive the letter from the Respondent dated December 6, 2009 (Annex 4) informing him on the positive findings and inviting him to a hearing to be held on December 8, 2009; the signature on the Arabic original is not his own signature,

7. the DC is not a qualified independent body since the Chair and the members are full time governmental employee (civil servants),
8. the Chairman of the Respondent Dr. Al-Hashimy acted in his case in three different capacities, (Chairman of the UAE NADO, doping control officer, and Chair of the DC),
9. he was not informed about his right to ask for opening of B sample and of his right to be present at the opening,
10. the opening was done upon the Request of the Respondent without his knowledge and he was not informed in advance about the date of the opening,
11. the Hearing Committee held a hearing already on December 8, 2009 although the Decision of the Chair of the Respondent appointing this committee was issued only on December 31, 2009,
12. some documents presented by the Respondent are not authentic and translations made by Respondent are not fully correct.

The Appellant requested that the appealed Decision be cancelled and alternatively that the sanction be reduced to a minimum on the ground that he had no fault or negligence for the violation of the anti-doping rule.

The Respondent:

1. denied all objections made by the Appellant,
2. argued that in case that there were any procedural defects, these can be corrected by the CAS and in fact the hearing provided both parties the opportunity to fully present their case,
3. argued that the Appellant has not presented any evidence about the source of the Prohibited Substance,
4. admitted that the Appellant did not master the English language and claimed that everything was always orally explained to the Appellant in Arabic in the presence of the Appellant's doctor,
5. confirmed that the Respondent issued both Administrative Decisions No. 2 and No.3 (Annexes c) and d)),
6. confirmed that the Reports from the laboratory (annexes 3 and 7) have never been given (sent) to the Appellant and were only translated to him into Arabic at the hearing held on January 3, 2010,
7. confirmed that the Appellant has not been informed in advance about the date when the B Sample will be opened,
8. opposed the request of the Appellant to send the B sample to another laboratory for a new analysis.

The Respondent requested that the appeal be dismissed and the appealed Decision confirmed.

LAW

Jurisdiction of the CAS

1. Article R47 of the Code provides 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.

   An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance".

2. In its statement of appeal, the Appellant relied on Article 13 of the Regulations for the National Anti-Doping Organization as granting him a right of appeal to the CAS. Article 13 provides as follows:

   "Regulations For The National Anti Doping Organization

   Article (13): Appeals

   13/1 The Decisions Subject to Appeal

   All issued decisions of the national Anti Doping Organization are subject for appeal in accordance with article 13 and in accordance with the World Anti Doping Agency regulations and all the decisions will be valid during the appeal procedures.

   With regards to the local athletes and before they apply to proceed with their appeal application, they must exhaust their best efforts of reviewing the decision in accordance to the regulations of the Anti Doping.

   13/1/1 At the time of appeal by the World Anti Doping Agency against the Final Decisions of the National Anti Doping Organization in accordance with article 13 and if no other party has appealed the decisions then the World Anti Doping Agency can proceed to appeal the Decisions in front of Court of Arbitration for Sport (CAS) directly".

3. As this is a case involving a national level athlete, the Sole Arbitrator does not consider that the above provision provides for CAS jurisdiction. However, by letter dated 3 January 2010, the Respondent sent the Player the Decision and advised him that *"you are entitled to file appeal within twenty days with Court of Arbitration for Sport, at Lausanne City in Switzerland as from 3/1/2010"*. In addition, the Respondent confirmed that in the UAE the so called "national appeal committee" which should under art. 13/2 above-cited Regulations act as the appellate body in cases of national level athletes, was not in operation yet.

4. The Sole Arbitrator notes that the Respondent does not dispute the veracity of the above letter nor does it contest the CAS' jurisdiction. Therefore, the Sole Arbitrator may be satisfied that the letter from the Respondent amounts to an offer to submit to CAS arbitration which the Player accepted by filing his appeal. The parties have thereby concluded a specific agreement to arbitrate within the meaning of Article R47 of the Code. In addition, the Respondent explicitly

stated at the outset of the hearing that it accepted the jurisdiction of CAS in this matter. Furthermore, the parties confirmed the jurisdiction of the CAS by signing and returning the Procedural Order.

Applicable Law

5. Article R58 of the Code provides as follows:

"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".

6. In their submissions, the parties rely on the provisions of the Regulations for the National Anti-Doping Organization issued by the Respondent ("Regulations"). Accordingly, these are the rules and regulations which shall be applicable to this dispute. Since these Regulations are based on the WADA Code, those rules of the WADA Code which according to the Code and to the Model Rules for National Anti-Doping Organizations issued by WADA must be respected, will be applied too. In fact the appealed Decision quotes the rules of the WADA Code and not the national Regulations.

Admissibility

7. By letter dated 3 January 2010, the Respondent sent the Player its decision and advised him that *"you are entitled to file appeal within twenty days with Court of Arbitration for Sport, at Lausanne City in Switzerland as from 3/1/2010".*

8. The Statement of Appeal was filed on 23 January 2010, within 20 days of 3 January 2010. It follows that the appeal was filed in due time and is admissible.

Merits

A. General Principles

9. At the beginning, this case appeared to be a rather simple one. The appealed decision is based on evidence proving presence of a Prohibited Substance in the urine sample of the Appellant. Under art. 2.1.2. of the Regulations, finding of a Prohibited Substance in Sample A which is confirmed in Sample B is sufficient proof of an anti-doping – rule violation under article 2.1.

10. In case that the Athlete wishes that no sanction or reduced sanction be applied, the burden of proof is shifted to the Athlete and the Athlete has to establish that he/she does not bear any fault or negligence in the violation and must further prove how the Prohibited Substance

entered his or her system. Statements made by the athlete are not sufficient if they are not supported by evidence (CAS 95/41, CAS 97/180, 2002/A/2002).

11. The explanations as to how perhaps the Substance might have got into his system given by the Appellant in his Appeal remained only allegations (speculations) with no evidence supporting them.

12. In view of the constant CAS jurisprudence, even if the allegations of the Appellant would have been proved as true, they would not represent sufficient grounds for using article 10.5. of the Regulations for elimination or reduction of the standard sanction. Not only article 2.1.1 establishes strict liability of the athletes for everything that enters their system, but a great number of CAS decisions explicitly stated that athletes cannot rely on representations made about the composition of the food supplements by the manufactures of such products (CAS 2003/A/448, CAS 2002/A/385). Other CAS decisions ruled that an athlete has the duty to inform all physicians treating him or her of the Prohibited List and that the athlete commits negligence if he or she does not do so (CAS 2005/A/828; cf. also Comments of WADA to art. 10.5.1. and 10.5.2.).

13. From the above points of view, the Appeal would not have any chance to be successful. Of course, the results of the re-analysis of the Appellant's sample by the Cologne laboratory (following the withdrawal of the WADA accreditation of the Panang laboratory) have changed the whole situation, both as far as the proof of the violation of an anti-doping rule and the legal conclusions are concerned. The only evidence proving the violation has been invalidated.

14. The appeal has therefore to be upheld on this ground alone.

15. However, there are other reasons which would have also led to the same result and which support this decision. They relate to severe defects of the procedure as conducted by the Respondent from the very beginning until the announcement of the appealed Decision. Due to the results of the new analysis of the Appellant's sample, the Sole Arbitrator does not find it necessary to review all the objections of the Appellant against the procedure in details and specifies only the main and critical ones.

16. There is no question that under rule R57 of the CAS Code the arbitrator has the power to review all facts and the law and to conduct a trial de novo. In addition, there are a number of CAS decisions stating that in the appellate proceeding the defects of the preceding procedure including certain violations of the due process may be corrected (CAS 94/129; 98/211**;** 2005/A/835/; 2005/A/872; 2005/A/1001; 2007/A/1343; 2006/A/1110; 2005/A/961).

17. On the other hand, it is also evident that certain defects cannot be corrected at all. In addition, it depends how serious the defects were and how many defects there have been.

18. In CAS 2009/A/1903 the panel wrote:

"Albeit the Panel's power of review the case de novo, the Panel in this case found that a serious formal irregularity of the proceedings related to the lower instance like the one of the present case, could not be cured at CAS level

because this would lead to the restriction or limitation of a party to one single instance of defence" (underlined by the Arbitrator).

19. In CAS 2002/A/385 (followed by CAS 2003/A/477) the Panel ruled that

"***The failure to provide the athlete with an opportunity to be present or be represented at the opening and analysis of the B-sample constitutes a procedural error compromising the limited rights of an athlete to such an extent that the results of the analysis of the B-sample and thus the entire urine test should be disregarded*** (emphasis added by the Sole Arbitrator).

20. The Panel further wrote:

"Athletes' rights during the course of the sample collection and testing process are relatively limited. This makes it even more important that those rights are respected and adhered to".

21. In CAS 2007/A/1343 the panel stated:

"(...) the World Anti-Doping Agency and the WADA Code play a crucial role. The structure and content of the WADA Code, including the Prohibited List and other relevant WADA rules, are detailed and precise in order to ensure a uniform and consistent application of these rules. The rules strike an important balance between the fight against doping and the rights of individual athletes to a fair process. In order to maintain this balance, it is a minimum requirement that the applicable rules for establishing a positive finding are complied with".

22. Rule 7.3.5.2 of the Regulations require explicitly the notification of the athlete of the date of the analysis of sample B.

23. It has been confirmed by both parties that the Appellant had not been informed about the date of the opening of the B sample and its analysis and therefore has been deprived of his right to be present or to be represented by another person.

24. According to the above cited CAS precedents this fact alone would be sufficient to make the whole urine test invalid and to annul the appealed decision since there would be no valid evidence of the anti-doping rule violation.

25. It further appears that the majority of the DC which should hear and decide the case and which should be independent and impartial was formed by members of the executive board of the prosecuting party. The prosecuting body and the judicial body were thus indeed the same which is in sharp contradiction with the elementary principles of justice and due process.

26. The evidence has further proved that certain other elementary rights of the Appellant have not been respected as well.

27. Besides the already mentioned right to have the opportunity to be present at the opening of the B sample, it was the Appellant' s right to be heard, the right to be represented by counsel and the right to be informed in a fair and timely manner of the asserted Doping Rule violation.

28. Regardless of whether the invitation to the hearing to be held on January 3, 2010 have been sent to the Appellant in writing or communicated only by a phone call, there is a non-disputed fact that it was communicated to the Appellant only on Friday December 31, 2010. Just three days in advance of which two were National Holidays. Within this short time the Appellant neither could prepare himself sufficiently for the hearing nor could he retain a counsel who would be fully informed and prepared. This impedes the Appellant's right to be heard and to be assisted by a counsel.

29. In CAS 2007/A/1343 the panel found even a 5 full day advance notice of the hearing to be *"too short a time for the Appellant to be able to prepare his case properly"*.

Conclusion

30. For the reasons stated at above, the appeal shall be upheld considering that on the basis of the results of the new analysis of the Appellant' s sample by the Cologne laboratory, there is no evidence that the Appellant had committed any anti-doping rule violation.

The Court of Arbitration for Sport rules:

1. The appeal filed by Samir Ibrahim Ali Hassan on 24 January 2010 is upheld.

2. The decision of the National Anti-Doping Committee of the United Arab Emirates taken on 3 January 2010 is set aside.

(...)

5. All other or further claims are dismissed.