



**Arbitration CAS 2011/A/2678 International Association of Athletics Federations (IAAF) v. Real Federación Española de Atletismo (RFEA) & Francisco Fernández Peláez, award of 17 April 2012**

Panel: Mr Romano Subiotto QC (United Kingdom), Sole Arbitrator

*Athletics (race walking)*

*Doping (substantial assistance)*

*Admissibility of the appeal (validity of the extensions of the deadline to appeal)*

*Power of review of an IF regarding decisions taken at national level in doping cases*

*Condition to benefit from a reduction of the sanction based on Substantial Assistance*

*Scope of the factors considered in assessing Substantial Assistance*

*Starting date of the sanction*

1. According to Article 42.13 of the IAAF Rules, an appellant shall have forty-five (45) days in which to file his statement of appeal with CAS starting from the date of communication of the written reasons of the decision to be appealed. The IAAF Rules do not require a particular justification for extending the deadline to file an appeal. However, it cannot be contested that administrative efficiency, and in particular the desirability for any International Federation (IF), to have all the elements in its possession in order to take a reasoned decision on whether to appeal, are sufficient grounds to warrant a postponement of the deadlines to appeal a decision rendered by a national federation until such time as the IF has been sufficiently informed on the meaning, nature, and scope of the national federation's decision.
2. It is fundamental that decisions taken at a national level in doping cases, particularly regarding the imposition of sanctions, be subject to the review of the relevant international sporting federation. The power conferred to the international federation aims, *inter alia*, at maintaining the integrity of international competitions by preventing national federations from not imposing any sanction at all on an athlete or imposing a less severe sanction than justified merely in order to allow the athlete to compete at international level. In this respect, a decision regarding an exception for Substantial Assistance must, in the last instance, remain under the control of the entity charged with enforcing the corresponding anti-doping rules, or to a body appointed by that entity. Criminal law provisions concerning confidentiality cannot justify non-compliance with the relevant IF provisions in order to obtain a reduction in the ineligibility period pursuant to the IF provisions.
3. In order to benefit from a reduction of the period of ineligibility under Article 40.5(c) of the IAAF Rules, it must be established that an athlete has provided Substantial Assistance to the IAAF, his/her National Federation, an Anti-Doping Organization, criminal authority or professional disciplinary body, resulting in the discovery or

establishment of an anti-doping rule violation by a third party, or in the discovery or establishment of a criminal offence or of a breach of professional rules by a third party. A simple indication of cooperation, which could hypothetically result in the discovery of a criminal offense, is not sufficient for the Assistance to be Substantial.

4. A commentary of a legal provision cannot replace the substance of the provision itself. In this respect, considering that the *sine qua non* condition that the assistance result in discovering or establishing doping or criminal offenses or a violation of professional rules by third parties must first be satisfied, the factors set forth in the commentary of the WADA Code can only be taken into account in assessing the importance of the Substantial Assistance in order to determine the extent of the reduction of the ineligibility period in each particular case.
5. The provisions regarding substantial delays do not provide an automatic right to start the period of Ineligibility at an earlier date than that stated, but a discretionary power to appreciate whether, taking into consideration the circumstances of the case, the ineligibility period should start earlier.

The International Association of Athletics Federations (IAAF), the Appellant, is the international governing body for track and field athletics. It has its headquarters in Monaco.

The Real Federación Española de Atletismo (RFEA) is the national federation of athletics in Spain and is a member of the IAAF. The RFEA oversees the Spanish national selection of athletes and administers athletic competitions in Spain.

Francisco Fernández Peláez (the “Athlete” or “Fernández”), the second Respondent, is a Spanish race walker, specialized in 20 km race walking. Fernández is a member of the RFEA and has competed at an international level for Spain on numerous occasions. The IAAF, the RFEA and the Athlete are collectively referred to as the “Parties”.

In August 2009, the Spanish *Guardia Civil* initiated investigations into a group of people, mostly in Valencia, who supplied doping products to people of different sports and categories.

In November 2009, the Spanish *Guardia Civil* carried out a number of police raids in locations across Spain that targeted an alleged doping ring involving doctors, pharmacists and athletes. This police operation, called “Operación Grial”, led to the arrest of 11 individuals, including 3 cyclists. The activities of the alleged doping ring included the distribution of EPO, growth hormones and masking agents. Fernández’s home was one of the locations raided by the Civil Guard, where EPO and other performance-enhancing drugs were reportedly found. These substances feature in the list of Prohibited Substances under the 2010 World Anti-Doping Agency (WADA) List of Prohibited Substances and Methods, which forms an integral part of the 2011 IAAF Anti-Doping Rules (the “IAAF Rules”), as provided by the IAAF Rules themselves (the “Prohibited List”).

On February 10, 2010, Fernández appeared voluntarily at the *Guardia Civil's* Central Operative Unit (the “UCO”) headquarters in Madrid.

On the same day, Fernández also appeared voluntarily (and absent disciplinary proceedings or adverse analytical findings formally lodged against him) before the Chairman of the RFEA and declared that (i) to date, no prohibited substance had ever been detected in his body; (ii) he violated the IAAF Rules due to the possession of substances included in the Prohibited List; (iii) he was not aware of the exact composition of these substances, which were provided by a doctor, but he believed they featured in sections S1 and S2 of the Prohibited List (iv) he had cooperated with the Spanish judicial authorities and the police, providing testimony in the context of “Operación Grial”; (v) his cooperation aimed at revealing information about medical treatments, the sale and distribution of prohibited substances, the organisation of the doping ring , and other data; and (vi) the Spanish police considered his cooperation to be substantial for the purpose of establishing criminal violations by third Parties in a Spanish Criminal Court.

On February 11, 2010, Fernández was provisionally suspended from competitions.

On February 25, 2010, Fernández appeared voluntarily for a second time before the UCO.

On June, 10, 2010, Fernández appeared before the Spanish judge in charge of the criminal case at the Investigating Magistrate’s Court no.14 in Valencia and confirmed the evidence that he had previously given to the police. Fernández allegedly answered all questions referring to (i) Doctor Virú’s codes as to the identification of prohibited substances; (ii) the involvement of third Parties; and (iii) doping offenses more broadly.

On November 30, 2010, the Parties signed an “Agreement to Co-operate” (the “Agreement”).

On February 10, 2011, Fernández started competing again, having served one year of the two-year ineligibility period first imposed on him.

On April 7, 2011, Fernández informed the IAAF that the criminal proceedings were now before the Audiencia Nacional de Madrid and that, pursuant to Article 301 of the Spanish Law on criminal proceedings, proceedings had to remain secret until the oral phase, and that he would therefore be unable to provide more information to the IAAF at this stage.

Following the IAAF’s referral of Fernández’s case to the CAS on December 20, 2011, the IAAF received a letter from the RFEA dated January 3, 2012, attaching a letter from Fernández. In that letter, Fernández informed the IAAF that his status had changed as a result of a judgment of the Court of First Instance No. 14 of Valencia dated December 12, 2011. Fernández requested, in the same letter, to make a personal statement to the IAAF Doping Review Board (the “DRB”). Accordingly, a meeting was scheduled in Monaco on February 3, 2012, and the Parties agreed to stay the proceedings before the CAS pending the outcome of the meeting. However, at the end of January 2012, the IAAF was advised that Fernández had cancelled the meeting for personal reasons and wished the case to proceed to the Court of Arbitration for Sport (the “CAS”).

### **Proceedings at national level**

In December 2009, the Commission for Control and Monitoring Health and Doping of the Council for Sport (the “CMHD Commission”) decided to start proceedings against Fernández, prior to the opening of a formal file, in order to determine whether there were any grounds for disciplinary proceedings.

On December 17, 2009, the RFEA Competition and Jurisdiction Committee, (the “RFEA Committee on Sports Discipline”) requested the CMHD Commission to supply all the relevant information so as to determine whether disciplinary proceedings should be initiated against Fernández.

On January 25, 2010, the CMHD Commission replied, by e-mail, explaining that (i) it had no access to the documentation related to the police’s “Operación Grial”; (ii) it had initiated secret proceedings in order to protect the athlete’s identity and the confidentiality of the case; (iii) criminal proceedings had started at the Magistrate’s Court No.14 of Valencia; and (iv) it allowed the RFEA Committee on Sports Discipline to start disciplinary proceedings against Fernández and to adopt provisional measures if necessary.

On February 11, 2010, the RFEA Committee on Sports Discipline initiated disciplinary proceedings against Fernández and provisionally suspended the athlete.

On February 24, 2010, the case-handler within the RFEA Committee on Sports Discipline proposed that Fernández be suspended for a period of two years due to a breach of the IAAF Rules, pursuant to Article 15.1 of the Organic Act of 7/2006 of November 21, 2006 on the protection of health care and against doping in sport (the “Organic Act”), Article 40.2 of the IAAF Rules, and Article 10.2 of the World Anti-Doping Code (the “WADA Code”).

On March 5, 2010, Fernández requested the RFEA Committee on Sports Discipline to reduce his period of ineligibility to 6 months.

On March 8, 2010, the RFEA Committee on Sports Discipline received a writ containing pleadings, supported by evidence, requesting that the case be declared inadmissible and that partial exoneration and suspension of execution of the sanction be allowed, pursuant to the Organic Act.

On March 18, 2010, receipt of Fernández’s pleadings of March 8, 2010, was acknowledged, his request for a reduced penalty was rejected, because of the lack of evidence on the extent of his cooperation with the authorities, and the case was referred to the RFEA Committee on Sports Discipline for further review.

On March 24, 2010, the RFEA Committee on Sports Discipline found Fernández guilty of an anti-doping rule violation, declared him ineligible for 2 years, and disqualified his results pursuant to the Organic Act, the WADA Code and the IAAF Rules. This period was reduced by the period already served by the Athlete during his provisional suspension. This decision did not take Fernández’s cooperation with the UCO into consideration, given that this cooperation had not been sufficiently evidenced.

On March 29, 2010, Fernández forwarded a statement to the RFEA Committee on Sports Discipline which he had obtained from the Police Chief in charge of the UCO, which sought to confirm the nature of his assistance to the police authorities. According to this statement, Fernández had provided assistance as a witness in the case of an alleged crime and Fernández's behaviour was effective in the fight against doping and could fall under Article 26 of the Organic Act. Article 26 of the Organic Act provides as follows:

*1. The sports person may be exonerated partially from administrative liability and, if applicable, shall not be submitted to a disciplinary procedure if he/she provides information before the competent authorities on the authors or cooperators, individual or corporate bodies, or cooperates and collaborates with the competent Authority, providing essential data or testifying, if applicable, in the corresponding proceedings or hearing against these. In order to apply this provision, the statement and, if applicable, the accompanying evidence must have sufficient entity to allow disciplinary proceedings to be brought or, if applicable, to start a judicial hearing.*

*2. The exoneration provided for in the previous paragraph and the total or partial annulment of the liability referred to in point c) of section 24 of this Act, shall be provided under the terms of the statement and the collaboration, its effectiveness and legal value to fight against doping. The disciplinary body or the body that originally adopted the penalty, respectively, shall be authorised to evaluate the exoneration and total or partial annulment of the penalties. This may not be granted before the disciplinary proceedings have been brought or, if applicable, the start of the corresponding judicial hearing deriving from the statement and, in all cases, shall require a report from the Health and Doping Control and Supervision Committee, unless the latter is the competent body.*

*3. Taking into account the attendant circumstances in the case, particularly the absence of a previous record on the part of the sports person, the disciplinary body may, in the event of exoneration and partial annulment, suspend the execution of the penalty provided that this constitutes a first doping penalty. In adopting this measure, the criteria provided for in the previous paragraph shall apply. The agreed suspension shall be automatically revoked if the sports person is submitted to subsequent disciplinary proceedings due to a violation of this Act.*

On April 7, 2010, the RFEA informed the IAAF, by letter, that one of its members, Fernández, had been found guilty of an anti-doping rule violation under the IAAF Rules and banned for a period of 2 years starting on February 11, 2010.

On April 9, 2010, Fernández appealed the decision dated March 24, 2010 before the Spanish Committee on Sports Discipline.

On April 12, 2010, upon receipt of the UCO's certificate, the RFEA Committee on Sports Discipline requested the CMHD Commission to provide a report concerning Fernández's assistance to the Spanish authorities.

On April 13, 2010, the Spanish Committee on Sports Discipline received Fernández's appeal against the decision of the RFEA Committee on Sports Discipline dated March 24, 2010.

On April 20, 2010, the CMHD Commission issued an official statement concerning the cooperation of Fernández and declared, inter alia, that Fernández's attitude supported the police investigation, and

that he had cooperated as a witness to an alleged crime. The CMHD Commission considered that Fernández's cooperation was sufficient to be covered by Article 26 of the Organic Act.

On May 10, 2010, the RFEA Committee on Sports Discipline decided (i) to send to the Spanish Committee on Sports Discipline the report favouring exoneration Article 26 of the Organic Act issued by the CMHD Commission on April 20, 2010; (ii) to notify the IAAF of the petition for exoneration and of the reports favouring exoneration dated April 20, 2010, and (iii) to declare that the RFEA Committee on Sports Discipline did not have jurisdiction to decide on Fernández's exoneration, since such a decision was within the exclusive competence of the IAAF's Doping Review Board (DRB).

On June 11, 2010, the Arbitrator of the Spanish Committee on Sports Discipline decided to reject Fernández's appeal against the decision of the RFEA Committee on Sports Discipline, and to refer the appeal back to the RFEA Committee on Sports Discipline.

On June 28, 2010, the RFEA Committee on Sports Discipline decided to reduce the 2-year penalty period of ineligibility imposed on March 24, 2010, and to approve the partial exoneration of the athlete by reducing his ineligibility to one year, on the grounds that it had been proven that Fernández was cooperating as a witness in the case of an alleged crime.

On July 13, 2010, the RFEA informed the IAAF, by fax, that it had issued a decision to reduce Fernández's penalty and to reduce his period of ineligibility to one year.

On July 16, 2010, the IAAF informed the RFEA, by fax, that pursuant to Article 40.5(c) of the IAAF Rules, any reduction of a sanction based on Substantial Assistance could only be decided after the DRB had determined that there was Substantial Assistance and even then, only if the WADA agreed with such consideration. Therefore, the IAAF invited the RFEA to submit the Athlete's case formally to the DRB, including its written submissions, and invited the Athlete to submit his written submission as to his Substantial Assistance to the DRB.

By letter dated July 22, 2010, the RFEA confirmed that the IAAF would submit the case to the IAAF DRB in conformity with the IAAF Rules.

On July 23, 2010, the RFEA received a letter from Fernández in support of his application to the IAAF DRB setting out further detail of the assistance that he had provided up to that point.

In response to the IAAF letter, and in compliance with the procedure set out in IAAF Rule 40.5, Fernández's case was referred to the IAAF's DRB by letter dated August 17, 2010.

On November 11, 2010, the DRB found that Substantial Assistance could apply in this case and that a part of Fernández's two-year ineligibility sanction could be suspended by the RFEA subject to the following conditions: (i) disclosure in a signed written statement of all information that Fernández possessed in relation to anti-doping violations; (ii) cooperation with the investigation and adjudication of any case related to the information that Fernández provided, including but not limited to presenting testimony at a hearing if requested to do so by the prosecuting authority or hearing panel; (iii) a bi-monthly written update of Fernández's ongoing cooperation; (iv) inclusion of these conditions in a

written Agreement; (v) at the lifting of the confidentiality obligations resulting from the criminal investigation into “Operación Grial” at the earliest, and 9 months before the end of Fernández’s two-year sanction at the latest, i.e., by May 11, 2011, the RFEA reconvene its tribunal to decide on the significance of Fernández’s Substantial Assistance at that time; and (vi) the possibility of appealing this further decision. As a result, the IAAF remitted the case to the RFEA, in order for it to decide the length of the period by which Fernández’s two-year sanction could be suspended pursuant to Article 40.5 of the IAAF Rules.

On February 10, 2011, and, given the RFEA’s silence, on May 12, 2011, the IAAF recalled that the RFEA was supposed to review Fernández’s case by May 10, 2011 at the latest.

In May 2011, the RFEA Committee on Sports Discipline was reconvened to review the significance of Fernández’s Substantial Assistance pursuant to the IAAF Rules.

On May 17, 2011, the RFEA Committee on Sports Discipline agreed not to extend the Athlete’s ineligibility beyond the reduced one-year term (the “RFEA Decision”).

Upon receipt, the IAAF wrote, by letter dated July 7, 2011, to the RFEA that, as the DRB had clearly stated, the RFEA Committee on Sports Discipline was tasked with conducting a further review of the Athlete’s case at a future date, and that only a final decision adopted by the RFEA would be open to an appeal before the CAS either by the IAAF or the WADA. The IAAF then invited the RFEA to provide further clarification as to its position and in particular, as to the final status of the RFEA Decision, by July 13, 2011 at the latest.

On July 4, 2011, the IAAF DRB extended the time for filing an appeal to the CAS under Rule 42.13 until August 5, 2011. This was notified to the RFEA by a letter dated July 7, 2011.

The IAAF received no response from the RFEA to its letter of July 7, 2011 and sent two written reminders to the RFEA on July 17, 2011 and on August 3, 2011.

On August 3, 2011, the DRB further extended the time for filing an appeal to the CAS until September 16, 2011.

On August 5, 2011, the RFEA Committee on Sports Discipline sent an e-mail to the IAAF, in reply to its letter dated July 7, 2011, that, under Spanish Law, the RFEA Committee on Sports Discipline acted as a first sports disciplinary instance and that the Spanish Committee on Sports Discipline acted as an appellate body. By the same letter the RFEA Committee on Sports Discipline explained that it is frequently faced with a clash between the disciplinary rules of procedure of the IAAF and the rules applicable under Spanish Law, and that this was such a case. According to the letter, the RFEA cannot violate Spanish Law, even where such a violation was to arise from compliance with the IAAF regulations, since the members of the Committee might be criminally liable for knowingly adopting a decision contrary to Spanish Law. Under the Organic Act, the disciplinary body (the RFEA Committee on Sports Discipline in this case) was the party empowered to determine the partial annulment of a penalty imposed on an athlete, subject to prior consultation, in writing, with the CMHD Commission. In the present case, on the basis of a positive certificate from the police, the

CMHD Commission issued a report in favour of the Athlete, finding that his cooperation was of sufficient importance to merit partial annulment of the penalties. The RFEA Committee on Sports Discipline conducted a review on May 17, 2011, and adopted a final decision confirming that no new circumstances had arisen that might justify the prolongation of the Athlete's one-year suspension.

On August 15, 2011, the IAAF informed the RFEA, by letter, that it appeared from the RFEA Committee's communication that the RFEA's further review of the Athlete's case on May 17, 2011 could be considered a final decision pursuant to the Agreement. Accordingly, the Athlete's case was subject to appeal to the CAS. The IAAF informed that the DRB had extended the time for the filing of any appeal until September 16, 2011. In its letter of August 15, 2011, the IAAF requested further information from the RFEA as to the facts and documents on which the RFEA Committee on Sports Discipline had relied in reaching its decision, together with any further statement from Fernández.

The IAAF received no response and sent a reminder to the RFEA on September 8, 2011.

On September 13, 2011, Fernández wrote to the RFEA explaining that he gave the Spanish Guardia Civil all the information and documentation in his possession and that the IAAF was seeking to oblige him to violate his duty of secrecy established by the Spanish Criminal Justice Law. He further explained that he gave information to the UCO as to the codes used within the network of people involved in anti-doping violations and explained that the network included doctors, athletes and people related to them as well as a pharmacy.

On September 15, 2011, since the RFEA had not provided the information the DRB had requested, the DRB further extended the time for an appeal to the CAS until October 17, 2011.

On October 17, 2011, after a meeting with the RFEA to advance the IAAF's previous request, the DRB further extended the time to appeal until October 25, 2011 and then until November 30, 2011, which was notified to the RFEA by a letter dated October 22, 2011.

On November 30, 2011, the IAAF decided to extend the deadline for filing an appeal to the CAS until December 20, 2011.

Fernández's case was subsequently referred back to the DRB pursuant to IAAF Rule 42.15 to decide whether to appeal the RFEA Decision to the CAS. The DRB met to review developments in the file within the 12-month period since the Agreement of November 2010. The DRB duly noted that the RFEA Decision was final and had been taken in circumstances where, despite the criminal investigation having been launched two years earlier, there was still no evidence of any anti-doping rule violation, criminal offence or breach of professional rules by a third party and still no evidence of the significance of Fernández's assistance to the fight against doping in Athletics. The DRB therefore decided, given the continuing absence of any evidence of Substantial Assistance in accordance with the IAAF Rules, that the RFEA's decision was erroneous and that there was no option but to file an appeal with the CAS.

On December 9, 2011, the DRB re-imposed a provisional suspension on Fernández pending the CAS hearing (the "IAAF Decision").

### **Proceedings before the CAS**

On December 20, 2011, the IAAF filed its Statement of Appeal against the RFEA and Fernández with respect to the RFEA Decision.

On December 23, 2011, the IAAF requested a first extension of time of the deadline to file its Appeal Brief.

On December 29, 2011, the RFEA answered, by letter, stating that it disagreed to the extension of the time limit to file the Appeal Brief.

On December 30, 2011, Fernández also objected to the extension of the time limit and alleged that the appeal was manifestly late.

On December 30, 2011, the CAS granted the IAAF an extension of the deadline to file its Appeal Brief until January 9, 2012.

On January 6, 2012, the IAAF requested an extension of the deadline to file its appeal brief until January 16, 2012 due to the in-person meeting with the DRB requested by Fernández. By letter dated January 9, 2012, the CAS agreed to grant the request of extension, unless the CAS Court office heard from the RFEA by fax on January 10, 2012 at the latest. The CAS further noted that the IAAF and Fernández agreed to an expedited procedure for determination before February 28, 2012 and to submit the proceedings to a Sole Arbitrator.

On January 10, 2012, the RFEA agreed to an expedited procedure and to submit the proceedings to a Sole Arbitrator.

On January 10, 2012, since no objection was raised within the prescribed deadline by the RFEA, the CAS invited the IAAF to file its Appeal Brief before January 16, 2012.

On January 13, 2012, the IAAF requested the CAS to stay the proceedings since the DRB had agreed to Fernández's request for a face-to-face meeting to be held on February 3, 2012.

On February 1, 2012, the CAS noted that, since neither the RFEA nor Fernández objected to the request to stay the proceedings, the present proceedings were suspended.

On February 23, 2012, the IAAF informed the CAS that the meeting of February 3, 2012 did not take place and that the Parties had agreed on an expedited calendar. The calendar submitted by the Parties was as follows: February 24, 2012: IAAF Appeal Brief, February 28, 2012: Athlete and RFEA Answers, March 1, 2012: IAAF Reply to Answers (if any), March 3, 2012: Athlete and RFEA Replies (if any).

By letter dated February 24, 2012, the CAS noted the Parties' agreement to the expedited calendar.

On February 24, 2012, the IAAF filed its Appeal Brief with the CAS requesting the CAS set aside the RFEA Decision and impose a two-year ineligibility period on Fernández, less the period of ineligibility already executed by him.

On February 27, 2012, Fernández informed the CAS of his wish for the operative part of the award to be communicated on March 5, 2012. The CAS acknowledged receipt on February 28, 2012.

On February 28, 2012, the CAS transmitted a copy of the Appellant's Appeal Brief to the Respondents.

On February 28, 2012, Fernández filed his Answer to the IAAF's Appeal Brief arguing that the appeal was inadmissible and subsidiarily, that the RFEA Decision be confirmed.

On February 29, 2012, the CAS informed the Parties that it had nominated Mr. Romano Subiotto, QC, as Sole Arbitrator.

On March 1, 2012, the IAAF filed its Reply Brief.

On March 5, 2012, the RFEA informed the CAS that it did not intend to take any action in its defense in the proceedings before the CAS. However, the RFEA explained, in that letter, the actions of the RFEA Committee on Sports Discipline, which were as follows: (i) under Spanish Law, the RFEA Committee on Sports Discipline exercises sports disciplinary power in the first instance and its decisions can be appealed before the Spanish Committee on Sports Discipline; (ii) Fernández committed a violation consisting of the possession of doping substances within the Spanish territory and was therefore subject to Spanish disciplinary rules; (iii) the RFEA Committee on Sports Discipline frequently finds itself in a situation where there is a clash between disciplinary rules and rules applicable under Spanish Law but it cannot, while discharging its duties, violate Spanish Law; (iv) under the Organic Act, the RFEA Committee on Sports Discipline is empowered to determine the partial annulment of the sanction imposed on an athlete; (v) as a result of a certificate from the authorities and a subsequent favorable report from the CMHD Commission, the RFEA Committee on Sports Discipline issued a decision in which it partially upheld the sanction imposed on the Athlete; (vi) that decision was final under Spanish Law.

On March 5, 2012, Fernández filed his Reply Brief to the CAS.

## **LAW**

### **CAS jurisdiction**

1. Article R47 of the Code of Sports-related Arbitration (CAS Code) provides, in part, as follows:

*Article R47 Appeal*

*“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”.*

2. Article 42.1 of the IAAF Rules provides that all decisions made under the IAAF’s Anti-Doping Rules may be appealed in accordance with the provisions contained in the IAAF Rules, which contemplate that appeals can be filed with the CAS.
3. Furthermore, on November 30, 2010, the Parties signed the Agreement, in which they agreed that the RFEA Decision would be subject to appeal to the CAS, in accordance with the IAAF Rules.
4. The Sole Arbitrator therefore has jurisdiction to consider Fernández’s appeal, and this is not contested by the Parties.

**Applicable law**

5. Article R58 of the CAS Code provides as follows:

*Article R58 Law Applicable*

*“This Arbitrator 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 Arbitrator deems appropriate. In the latter case, the Arbitrator shall give reasons for its decision”.*

6. The Sole Arbitrator notes that the decisions of the RFEA applied the IAAF Rules in determining whether an anti-doping rule violation had been committed and in setting the sanctions to be imposed on Fernández.
7. The Sole Arbitrator therefore concludes that this dispute has to be determined on the basis of the IAAF Rules, and this is not contested by the Parties.

**Admissibility**

8. Article R49 of the CAS Code provides as follows:

*“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the Parties, the Division President may refuse to entertain an appeal if it is manifestly late”.*

9. Article 42.13 of the IAAF Rules provides as follows:

*“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 with CAS starting from the date of communication of the written reasons of the decision to be appealed (in English or French where the IAAF is the prospective appellant) or from the last day on which the decision could have been appealed to the national level appeal body in accordance with Rule 42.8(b). Within fifteen (15) days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within thirty (30) days of receipt of the appeal brief, the respondent shall file his answer with CAS”.*

10. As a preliminary point, the Arbitrator wishes to recall the facts relevant to the deadline to file the appeal in this case.

11. On November 30, 2010, the Parties signed the Agreement in which they agreed that the decision of the RFEA would be subject to appeal to the CAS, in accordance with the IAAF Rules.

12. On February 10, 2011, the IAAF requested, by e-mail, that the RFEA review Fernández’s case as provided for by the Agreement. This e-mail was left unanswered.

13. On May 12, 2011, the IAAF sent a letter to the RFEA reminding it that it had to review Fernández’s case pursuant to the Agreement and that, since the date had passed, the IAAF asked the RFEA what steps had been taken to review the matter.

14. On May 17, 2011, the RFEA Committee on Sports Discipline approved the one-year sanction imposed on the Athlete. On May 18, 2011, the RFEA answered the IAAF and informed it of the result of the hearing of the RFEA Committee on Sports Discipline.

15. On July 7, 2011, the IAAF wrote to the RFEA in an attempt to obtain clarification of the RFEA Committee on Sports Discipline’s ruling and to seek whether the RFEA would take a subsequent decision, in conformity with the Agreement, which would then be subject to appeal to the CAS. The IAAF requested the RFEA to answer by July 13, 2011. This was left unanswered.

16. Pending such clarification, on July 4, 2011, the IAAF took the precaution to extend the time for appealing to the CAS until August 5, 2011, and this was communicated to the RFEA on July 7, 2011, by letter.

17. Since the IAAF’s request for clarification was left unanswered, on July 18, 2011, the IAAF reminded the RFEA to provide the IAAF with clarification as to Fernández’s case. This was left unanswered.

18. On August 3, 2011, the IAAF reminded the RFEA, again, that it had failed to answer the request for clarification on Fernández’s case. This communication was left unanswered.

19. Since the IAAF's communication remained unanswered, on August 3, 2011, the DRB further extended time for appealing to the CAS until September 16, 2011.
20. The RFEA finally replied, by e-mail, on August 5, 2011, attaching a letter of the RFEA Committee on Sports Discipline, confirming that it had taken a final decision on May 17, 2011, and explaining the reasons for such decision.
21. The second extension of the deadline was notified to the RFEA on August 15, 2011, along with a request for information concerning the facts and documents relied upon in reaching the RFEA Decision. This attempt of clarification was left unanswered. A reminder was sent on September 8, 2011, requesting clarification by September 9, 2011. The reminder was also left unanswered.
22. Due to the absence of the information requested (either from the RFEA or from Fernández), on September 16, 2011, the DRB further extended time for appealing under Article 42.13 of the IAAF Rules until October 17, 2011. This was notified to the RFEA by letter on September 16, 2011, along with a request to provide information as to Fernández's case by September 23, 2011.
23. On October 17, 2011, after a meeting with the RFEA to advance the IAAF's previous request, which had hitherto remained unanswered, the DRB further extended the time for an appeal under Article 42.13 until October 25, 2011, and then until November 30, 2011, in order to allow the members to meet in person to review the updated information in Fernández's case and to discuss the IAAF's position on appeal. This was notified to the RFEA, by letter, on October 22, 2011.
24. On November 30, 2011, the DRB finally extended the time for appealing to CAS until 20 December 2011. This was notified to the RFEA on November 30, 2011.
25. In accordance with the DRB's final extension of time on November 30, 2011, the IAAF filed its appeal with the CAS on December 20, 2011.
26. Concerning the first deadline of 45 days, the Sole Arbitrator holds that time could not run before August 5, 2011 since the IAAF, despite numerous reminders, had not received any answer to its basic question of whether the RFEA Decision was a binding act against which an appeal could be filed.
27. The Sole Arbitrator acknowledges that the RFEA mentioned in its Decision that it was a final decision, but such statement was contested because it did not comply with the Agreement and this was precisely the reason why the IAAF was seeking clarification. In addition, Article 40.5 of the IAAF Rules provides that "*If the Member suspends any part of the period of Ineligibility under this Rule, the Member shall promptly provide a written justification for its decision to the IAAF and any other party*". Since no justification had been provided concerning the RFEA's departure from the terms of the Agreement, the IAAF could justifiably question the binding character of the RFEA

Decision. Fernández's allegation that the RFEA Decision was identical to the communication of the reasoning dated August 5, 2011 is therefore rejected.

28. In any case, according to Article 42.13 of the IAAF Rules, "*the appellant shall have forty-five (45) days in which to file his statement of appeal with CAS starting from the date of communication of the written reasons of the decision to be appealed*". Since the written reasons of the RFEA Decision were communicated on August 5, 2011, the Sole Arbitrator considers that the 45-day deadline had not passed when the DRB took the first decision to extend it.
29. The Sole Arbitrator acknowledges that, should the deadline have started to run on May 18, 2010, the IAAF extended the time to file an appeal, pursuant to Article 42.13, on July 4, 2011, which was clearly within the deadline of 45 days from the date of the reception of the RFEA Decision.
30. As to the second extension of the deadline to file an appeal, the Sole Arbitrator notes that, on August 3, 2011, the IAAF extended the deadline to file an appeal until September 16, 2011, in conformity with Article 42.13 of the IAAF Rules.
31. Concerning the extension of the deadline agreed on November 30, 2011, the Sole Arbitrator considers that it was duly extended, in conformity with Article 42.13, until December 20, 2011.
32. The Sole Arbitrator finds that, in deciding whether a decision to extend the deadline was duly adopted before the expiration of the applicable deadline at that time, the date of the notification of the extension to the relevant entity, rather than the minutes of meetings at which the decision to extend was taken, or the decision itself, is relevant.
33. The Sole Arbitrator further finds that the IAAF Rules do not provide for a notification of the DRB's decisions to the Athlete. The IAAF's contractual relationship is with the RFEA. In any case, Article 30.7 of the IAAF Rules mentions expressly that "*Notice under these Anti-Doping Rules to an Athlete or other Person who is under the jurisdiction of a Member may be accomplished by delivery of the notice to the Member concerned. The Member shall be responsible for making immediate contact with the Athlete or other Person to whom the notice is applicable*". Therefore, the Sole Arbitrator considers that the IAAF did not need to notify the DRB's decisions to Fernández.
34. The Sole Arbitrator holds that, since the decisions to extend the deadlines were notified to the RFEA within the required deadlines and in conformity with the IAAF Rules, they were not arbitrary.
35. The Sole Arbitrator finds that the IAAF Rules do not require a particular justification for extending the deadline to file an appeal. However, it cannot be contested that administrative efficiency, and in particular the desirability for the IAAF, and any international federation for that matter, to have all the elements in its possession in order to take a reasoned decision on whether to appeal (particularly when the prospective appellant was not a party to the first instance proceedings), are sufficient grounds to warrant a postponement of the deadlines to

appeal a decision rendered by a national federation until such time as the IAAF has been sufficiently informed on the meaning, nature, and scope of the national federation's decision.

36. In this case, the correspondence shows that the IAAF addressed questions repeatedly to the RFEA; it either received no answers, or received them very late. The Sole Arbitrator considers that the difficulties encountered by the IAAF in obtaining information from the RFEA, and in particular on such a basic issue as the binding nature of the RFEA Decision, clearly justified the extensions of the deadline to appeal in this case. Taking into consideration all the documents submitted by the Parties, it clearly appears that the IAAF made its best efforts to seek clarification from the RFEA from the outset of the case. It is unfortunate that its numerous attempts were left unanswered. The absence of clarification on the part of the RFEA was precisely the reason why the IAAF was left with no other choice but to extend the deadline to file an appeal, in order for its rights of appeal to remain unaffected. The Sole Arbitrator acknowledges that the IAAF extended the deadline to file an appeal, in conformity with Article 42.13, in an attempt to protect its rights, given that the RFEA was not answering its requests for clarification.
37. For all the above-mentioned reasons, the Sole Arbitrator finds that the appeal was filed within the deadline provided by the IAAF Rules. It complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court office fee. It follows that the appeal is admissible.

### **Violation of doping Rule**

38. Article 32.2(f) of the IAAF Rules prohibits the possession of prohibited substances.
39. Fernández does not contest the fact that he was found in possession of sport enhancing substances and that these substances appear on the Prohibited List.
40. Fernández therefore admits to having committed a doping offence under the IAAF Rules.

### **Merits**

#### *A. Applicability of Spanish Law within the RFEA Decision*

41. The IAAF considers that, in taking the RFEA Decision, the RFEA Committee on Sports Discipline was wrong to have given precedence to Spanish Law over the IAAF Rules.
42. The Sole Arbitrator notes that the RFEA is the Member Federation of the IAAF for Spain, and is, as such, required to apply the IAAF Rules. Indeed, Member Federations are required to comply with all applicable IAAF Rules and Regulations pursuant to Article 4.8 of the IAAF Constitution. Furthermore, according to Article 30.1 of the IAAF Rules, the IAAF Rules shall apply to the IAAF, its Members and to Athletes. Finally, Article 30.2 of the IAAF Rules

provides that all Members and Area Associations are required to comply with the IAAF Anti-Doping Rules and Regulations. The RFEA recognized itself in its Decision that Fernández “*is subject to the Spanish disciplinary rules and administrative procedure, without prejudice to his also being subject to the rules of the IAAF*”.

43. Moreover, Fernández acknowledged, at various stage of the procedure, that the IAAF Rules are applicable. Indeed, he referred the case to the DRB pursuant to Article 40.5 (c) of the IAAF Rules; and he signed the Agreement according to which the issue of Substantial Assistance would be determined under the IAAF Rules.
44. Therefore, the Sole Arbitrator considers that, while deciding to disregard the IAAF Rules, the RFEA violated its obligations as a member of the IAAF.

*B. Violation of the Agreement by the RFEA*

45. On November 30, 2010, the Parties signed the Agreement. The Sole Arbitrator finds that the Agreement provides clearly that the RFEA had to review the Athlete’s case so as to verify that Fernández had complied with the conditions set forth in the DRB’s Decision. However, the RFEA deliberately violated the terms of the Agreement it had signed by deciding to take a final decision confirming a reduction of the sanction to one year, without explaining Fernández’s fulfilment of the conditions and without requiring any further assistance after the adoption of the RFEA Decision.
46. Fernández’s allegation that the Agreement was not renewed must be rejected since Fernández provides no evidence to support this statement. In addition, the IAAF contests such allegation. In any case, even in the absence of the Agreement, the Sole Arbitrator’s reasoning would not change materially for the following reasons.

*C. Clash between Disciplinary Proceedings and Criminal Proceedings*

47. The Sole Arbitrator notes that the Athlete invoked Spanish Law, according to which the Athlete’s testimonies must remain secret, to justify why he could not provide information on his assistance to the Spanish Authorities in the context of the criminal investigation.
48. Moreover, the RFEA itself, in its decisions and in its declaration to the CAS, invoked Spanish Law and mentioned that there was a clash between disciplinary and criminal proceedings.
49. The Sole Arbitrator acknowledges the potential difficulties resulting from the interplay of criminal and sport disciplinary proceedings. However, the rules and procedures in one of these proceedings cannot interfere with the other proceedings. In this case, the Sole Arbitrator holds that the Spanish criminal law provisions concerning confidentiality cannot justify non-compliance with the relevant IAAF provisions in order to obtain a reduction in the ineligibility period pursuant to the IAAF provisions, for the following reasons.

50. The IAAF Rules provide for anti-doping sanctions that apply to athletes licensed by the IAAF. In cases of Substantial Assistance, the IAAF has provided for a possible reduction in the ineligibility periods resulting from doping violations. The IAAF Rules provide that the arbiter of whether an athlete has provided Substantial Assistance is the DBR. Allowing national courts or others to judge whether Substantial Assistance has been given in any given case would effectively delegate the key decision on whether the applicable conditions have been met to entities or persons other than the DBR, with the result that (i) the consistent application of this provision could not be ensured, and (ii) its application could well be influenced by a range of factors and considerations straying from the need to fight doping.
51. More generally, the enforcement of anti-doping provisions contained in the rules of sports federations cannot be subject to provisions of national law that may or may not reflect the same anti-doping spirit and objectives, nor can they be subject to the vagaries of national judicial systems, particularly at a time when not all countries have shown the same degree of devotion to fighting doping.
52. As a result, the provisions of Spanish criminal law that prevent, or that are interpreted as preventing, athletes from complying with the relevant IAAF provision have the direct consequence that Spanish athletes will be unable to avail themselves of the Substantial Assistance ground to reduce their sanctions, until and unless such provisions are changed or interpreted in a manner that allows athletes to comply with the relevant provision of the IAAF Rules.
53. That the division between criminal and disciplinary anti-doping enforcement, as currently reflected in Spain, is not indispensable to protect any fundamental human rights is demonstrated by the approach adopted in a number of other countries in Europe, for example Italy, where criminal and administrative anti-doping enforcement work hand-in-hand, thereby achieving a more effective system to fight doping (as was obvious in case CAS 2009/A/1879).
54. It is of utmost importance that national sporting federations be controlled by international bodies, of which they are members, in order to promote, coordinate and monitor the fight against doping in all its forms internationally and on a level playing field. Moreover, the CAS must also seek to preserve some coherence between the decisions of the different federations in comparable cases in order to preserve the principle of equal treatment of athletes in different sports. If athletes were able to invoke their national laws to justify departures from international standards, the fundamental principle of equality between athletes would be severely undermined.
55. According to CAS jurisprudence (CAS 96/156; CAS 98/214; CAS 2005/A/872; CAS 2006/A/1119; CAS 2009/A/2014; CAS 2009/A/2020; CAS 2009/A/2021), it is fundamental that decisions taken at a national level in doping cases, particularly regarding the imposition of sanctions, be subject to the review of the relevant international sporting federations. The power conferred to the national federation aims, *inter alia*, at maintaining the integrity of international competitions by preventing national federations from not imposing any sanction at all on an

athlete or imposing a less severe sanction than justified merely in order to allow the athlete to compete at international level.

56. Furthermore, the Sole Arbitrator takes account of Fernández's statement of January 3, 2012, according to which, his status under Spanish Law had changed and he was therefore allowed to provide clarification during a meeting to be held on February 3, 2012. Then, Fernández mentioned that he would not be able to participate in the meeting for personal reasons, without further specification, and that he wished the case to proceed to the CAS. Later, in his Reply Brief, Fernández retracted from his statement that personal reasons had caused the cancellation of the meeting and mentioned that his cancellation of the meeting was due to confidentiality issues. The Sole Arbitrator considers that the Athlete has not sufficiently assessed why his status changed in the first place, and then suddenly changed again due to a publication in the Spanish media. Furthermore, it does not appear from the file that Fernández sought confidentiality for the meeting.
57. The Sole Arbitrator would also refer to the Athlete's signature of an agreement according to which he would provide full cooperation in the investigation and adjudication of *any* case related to information in his possession. The agreement specifically provides that "*for the avoidance of doubt, this condition relates to the investigation and adjudication of both criminal cases under Spanish or other applicable law and to cases brought under IAAF Anti-Doping Rules and/or the rules of any other sport compliant with the World Anti-Doping Code*".
58. To conclude, the decision regarding the exception for Substantial Assistance must, in the last instance, remain under the control of the entity charged with enforcing the corresponding anti-doping rules, or to a body appointed by that entity. This is why it is indispensable to comply with the IAAF rules provisions, which require the DRB to sign off on the application of this exception.

*D. Existence of the Anti-Doping Rule Violation*

59. It is undisputed that Fernández committed an anti-doping rule violation within the meaning of the IAAF Rules.
60. According to Article 40.3 of the IAAF Rules, such a violation is sanctioned with a two-year period of ineligibility, unless the conditions for eliminating, reducing or increasing this period are met.
61. Since the IAAF Rules apply in this case, the question that must therefore be decided is whether the conditions of Article 40.5(c) of the IAAF Rules concerning a reduction of sanctions on the grounds of Substantial Assistance are met, and whether the appropriate sanction was imposed, given all the relevant circumstances.

E. *Fulfilment of the Conditions to Benefit from a Reduction of the Sanction according to Article 40.5(c) of the IAAF Rules*

62. As indicated above, the Athlete was found guilty of a serious anti-doping rule violation under the IAAF Rules resulting from the possession of more than one prohibited substance listed under S1 and S2 of the Prohibited List.

63. Article 40.5(c) of the IAAF Rules provides as follows:

*Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations: The relevant tribunal of a Member may, prior to a final appellate decision under Rule 42 or the expiration of the time to appeal (where applicable in the case of an International-Level Athlete having referred the matter to the Doping Review Board for its determination under Rule 38.16) suspend a part of the period of Ineligibility imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to the IAAF, his National Federation, an Anti-Doping Organisation, criminal authority or professional disciplinary body resulting in the IAAF, National Federation or Anti-Doping Organisation discovering or establishing an antidoping rule violation by another Person or resulting in a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another Person. After a final appellate decision under Rule 42 or the expiration of time to appeal, an Athlete or other Person's period of Ineligibility may only be suspended by a Member if the Doping Review Board so determines and WADA agrees. If the Doping Review Board determines that there has been no Substantial Assistance, the determination shall be binding on the Member and there shall be no suspension of Ineligibility. If the Doping Review Board determines that there has been Substantial Assistance, the Member shall decide on the period of Ineligibility that shall be suspended. The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in Athletics. No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this Rule must be no less than eight (8) years. If the Member suspends any part of the period of Ineligibility under this Rule, the Member shall promptly provide a written justification for its decision to the IAAF and any other party having a right to appeal the decision. If the Member subsequently reinstates any part of the suspended period of Ineligibility because the Athlete or other Person has failed to provide the Substantial Assistance which was anticipated, the Athlete or other Person may appeal the reinstatement.*

64. In other words, in order to benefit from the reduction of the period of ineligibility under Article 40.5(c) of the IAAF Rules, it must be established that (i) the Athlete has provided Substantial Assistance to the IAAF, his National Federation, an Anti-Doping Organisation, criminal authority or professional disciplinary body, (ii) resulting in the IAAF, National Federation or Anti-Doping Organisation discovering or establishing an anti-doping rule violation by another Person, or, (iii) resulting in a criminal or disciplinary body discovering or establishing a criminal offence or the breach of professional rules by another Person.

65. The Athlete alleges that his Assistance was Substantial given that, inter alia, he cooperated with the Spanish Civil Guard and provided it information about (i) Dr Virú's codes to hide the names of the medical substances being used; (ii) other persons accused of doping in addition to Dr. Virú; and (iii) issues related to doping in general. The Athlete also submits that the Guardia

Civil affirmed that his behaviour was constructive in connection with the fight against doping, and the Council for Sport stated that it was able to continue its investigation as a consequence of the sportsman's assistance.

66. As a preliminary point, the Sole Arbitrator wishes to underline that the existing mechanism, which facilitates the provision of information by athletes in order to discover anti-doping offenses, is essential in the fight against doping. It is therefore important that the objective of Article 40.5(c), i.e., to encourage and incite athletes to come forward if they are aware of doping offenses committed by other persons, should not be undermined by an overly restrictive application of the provision (See e.g. CAS 2007/A/1368). However, it is equally important that reductions in sanctions for serious anti-doping violations are not handed down lightly without clear evidence of Substantial Assistance. In this context, each word used to express the nature and scope of the exception to the normal duration of an anti-doping sanction must be weighed carefully and interpreted strictly.
67. In order to evaluate whether the Assistance was Substantial pursuant to Article 40.5(c) of the IAAF Rules, the assistance must result in discovering or establishing an anti-doping rule violation by another Person, or, discovering or establishing a criminal offence or the breach of professional rules by another Person. The Sole Arbitrator considers that these words must be interpreted literally, in the sense that assistance will not qualify as substantial unless and until it actually results in the discovery or establishment of an anti-doping rule violation by a third party, or unless and until it actually results in the discovery or establishment of a criminal offence or of a breach of professional rules by a third party. The discovery or establishment of an illegal act by a third party as a direct result of the information provided by the athlete seeking to benefit from the Substantial Assistance exception is the cornerstone of this mechanism, as there would otherwise be no incentive for an anti-doping authority to apply lesser sanctions, unless it received something in return, which contributes to fighting doping in sport. However, the Sole Arbitrator finds that such a concrete result has not been demonstrated in this case.
68. Taking into account the nature of the conduct in question and the paramount importance of fighting against doping networks of any kind in sport as well as the restricted powers of the investigation authorities of the governing bodies of sport as compared to national authorities, the Sole Arbitrator is of the opinion that cases concerning doping networks should be dealt with in line with the consistent CAS jurisprudence on disciplinary doping cases. Therefore, the IAAF must establish the relevant facts "*to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made*" (See e.g., for match-fixing cases; CAS 2005/A/908 nr 6.2; CAS 2009/A/1920).
69. In addition, according to CAS 2007/A/1368, the Substantial character of the Assistance must be assessed on the basis of the qualitative and quantitative value of the evidence provided by the athlete, and on its scope and effectiveness in implicating third parties. That the assistance has been given spontaneously and voluntarily must also be taken into consideration.
70. In the present case, the Athlete relies on two letters from the Guardia Civil and the Council for Sport, acknowledging that he had assisted the police in its investigation, and provided

cooperation as a witness to an alleged crime. But none of these letters mention the implication of third parties resulting directly from the Athlete's assistance.

71. The Athlete also relies on a written statement evidencing the fact that he was interviewed by the Guardia Civil. This statement provides no information on the implication of third parties resulting directly from the Athlete's assistance. Neither does the press release submitted by the Athlete.
72. Finally, the Athlete relies on an order from the Investigating Court no. 14 of Valencia. However, it appears from that order that, while it confirms that the investigation is still on-going against 4 named persons, it does not ascertain that there have been third party violations. It also appears from the order that Fernández's name is not included in the names of individuals required to testify in the procedure. Also, the order confirms that Fernández himself is still subject to criminal proceedings. The Sole Arbitrator considers that no element of the order confirms an anti-doping rule violation by another person directly as a result of Fernández's assistance.
73. In the Sole Arbitrator's view, a simple indication of cooperation, which could hypothetically result in the discovery of a criminal offense, is not sufficient for the Assistance to be Substantial pursuant to Article 40.5(c) of the IAAF Rules.
74. Accordingly, the Sole Arbitrator is comfortably satisfied that the relevant facts on which Fernández relies do not meet the criteria set forth in Article 40.5(c) of the IAAF Rules. Indeed, there is no evidence in the file establishing that the Athlete's assistance led to the discovery or the establishment of an anti-doping rule violation or criminal offense or breach of professional rules by another Person pursuant to Article 40.5(c), neither at the level of the IAAF nor at the level of the RFEA or at any other level.
75. On the contrary, it appears from the file that Dr. Virú, along with various other persons, was already incriminated from the beginning of the investigation, at the same time as Fernández. Fernández's assistance may have improved the case brought against the person's involved, but the Sole Arbitrator is not even in a position to determine whether this is actually the case.
76. Furthermore, Fernández was given the opportunity to explain his case in front of the IAAF at a meeting scheduled for February 3, 2012, in order to provide further evidence or clarification as to the substance of his assistance, but he voluntarily did not attend the meeting for "personal reasons" without further explanation.
77. The Sole Arbitrator acknowledges that assistance may be provided after a case is initiated, as long as this assistance results in discovering or establishing doping or criminal offenses or a violation of professional rules by third parties. The voluntary character of the assistance is a factor that can be taken into account in order to assess the extent of the reduction of the sanction in the case of Substantial Assistance. However, the *sine qua non* condition that the assistance result in discovering or establishing doping or criminal offenses or a violation of professional rules by third parties must first be satisfied. In any event, the Sole Arbitrator notes that it is questionable whether the assistance provided by the Athlete was spontaneous nor

voluntary. Indeed, it is only after his implication into the “Operación Grial” and after the RFEA had already taken steps before the CMHD Commission to obtain information from the police record that Fernández decided to come forward.

78. The Sole Arbitrator considers that the fact that assistance might potentially be given in the future does not alter the fact that, to date, there is no evidence in the file demonstrating that Fernández’s Assistance satisfied the conditions of Article 40.5(c) of the IAAF Rules. In addition, Fernández has only affirmed that a judge will summon him on the day that the hearing will be held, in order to confirm his previous statements. As stated, such confirmation cannot, in this case, suffice to adduce the evidence required by Article 40.5(c) of the IAAF Rules. Furthermore, the order provided by Fernández himself does not confirm his alleged future testimony.
79. Concerning Fernández’s reliance on CAS 2011/A/2368, the Sole Arbitrator considers that the circumstances of that case cannot be compared to the circumstances in this case, since the Substantial character of the Assistance was not contested in CAS 2011/A/2368.
80. Furthermore, the commentary of Article 10.5.3 of the WADA Code provides as follows:
- Factors to be considered in assessing the importance of the Substantial Assistance would include, for example, the number of individuals implicated, the status of those individuals in the sport, whether a scheme involving Trafficking under Article 2.7 or administration under Article 2.8 is involved and whether the violation involved a substance or method which is not readily detectable in Testing. The maximum suspension of the Ineligibility period shall only be applied in very exceptional cases. An additional factor to be considered in connection with the seriousness of the anti-doping rule violation is any performance-enhancing benefit which the Person providing Substantial Assistance may be likely to still enjoy.*
81. The Athlete considers that the factors set forth in the commentary of the WADA Code are applicable given (i) the Athlete’s cooperation in a criminal investigation involving a group of people; (ii) the status of the people involved, which include people holding and not holding a license, and include people from various sports (iii) the doping network involved in the trafficking of prohibited substances and (iv) the Athlete did not benefit from any improvement in his performance.
82. The Sole Arbitrator does not contest that such factors are relevant in assessing the importance of Substantial Assistance, as the commentary just cited states. However, the commentary’s text itself is clear: these criteria are relevant to assess the importance of the Substantial Assistance, but not the existence of Substantial Assistance. In other words, the *sine qua non* condition that that the assistance result in discovering or establishing doping or criminal offenses or a violation of professional rules by third parties must first be satisfied. The factors set forth in the commentary can then be taken into account in assessing the importance of the Substantial Assistance in order to determine the extent of the reduction of the ineligibility period in each particular case. In addition, a commentary of a legal provision cannot replace the substance of that provision. A commentary is designed to assist in the interpretation of a provision. Both the WADA Code and the IAAF Rules expressly provide that “[r]esults in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person or which results in a criminal or

*disciplinary body discovering or establishing a criminal offense or the breach of professional rules by another Person*". As explained above, these conditions are not satisfied in this case.

83. Therefore, while the Sole Arbitrator acknowledges that Fernández provided at least some assistance to the authorities, the Sole Arbitrator finds that it cannot qualify as Substantial within the meaning of Article 40.5(c) of the IAAF Rules.
84. The Sole Arbitrator adds that, even if the Athlete had been found to have given Substantial Assistance, past CAS decisions in this area suggest that a one-year reduction would have been excessive. An overview of these cases is set forth below.
85. In CAS 2005/A/847, the information provided by the athlete resulted in a large amount of nutritional supplements being seized and confiscated and, as a result, products could not have been given to other athletes. The efficiency of the information provided was proven at the time of the appeal to the CAS and a reduction of 6 months was deemed proportionate.
86. In CAS 2007/A/1368, the athlete's Substantial Assistance resulted in the condemnation of third parties and the panel decided that a reduction of 3 months was appropriate.
87. In CAS 2008/A/1461-1462, the panel refused to reduce the sanction given that "*while Mr. J. may have offered as much assistance as he reasonably could have under the circumstances, this assistance did not lead to the discovery or establishing of any anti-doping rule violation by any person*".
88. In CAS 2010/A/2203-2214, the panel decided not to rule on the question of Substantial Assistance since it had very little information but, taking into consideration the circumstances of the case, it suspended the sanction for 6 months.
89. In CAS 2011/A/2368, the existence of the Substantial Assistance was not contested and yet the panel decided to reduce the sanction to a period of 18 months of ineligibility.
90. In light of the above-mentioned cases, the Sole Arbitrator considers that it was, in any event, disproportionate to reduce the period of ineligibility in this case by one half of the usually applicable sanction of two years.

#### F. *Start Date of Ineligibility Period*

91. Article in 40.10 of the IAAF Rules determines that:

*Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date the Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served.*

92. Article 10.9.2 of the WADA Code provides that:

*Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date, commencing as early as the date of Sample collection or the date on which another Anti-Doping Rule violation last occurred.*

93. The Athlete considers that substantial delays in the case are not attributable to him and that the ineligibility period should start on May 17, 2011. The Athlete further argues that he should not suffer as a result of the decision of the IAAF to extend the deadlines to appeal to the CAS and that, should the Sole Arbitrator decide to impose an ineligibility from the date of this award, namely March 14, 2012, he would suffer significant harm because he would not be able to participate in the 2012 Olympic Games in London.
94. The IAAF submits that Fernandez should be required to serve a two-year period of ineligibility from the date of the hearing of this matter, less any period of provisional suspension and/or ineligibility that he has already served.
95. The Sole Arbitrator recalls that the above provisions do not provide an automatic right to start the period of Ineligibility at an earlier date than that stated, but a discretionary power to appreciate whether, taking into consideration the circumstances of the case, the ineligibility period should start earlier.
96. In light of all the circumstances of this case, the Sole Arbitrator holds that no grounds justify modifying the start date of the period of ineligibility of the Athlete. However, Article 40.10(b) provides as follows:  
*If a Provisional Suspension is imposed and respected by the Athlete, then the Athlete shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed.*
97. As a result, the Sole Arbitrator finds that the period of ineligibility should be a period of 2 years, commencing on the date of this award, March 14, 2012, less the period of provisional suspension and/or ineligibility that he has already served namely one year, three months and four days.

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

1. The appeal filed by the International Association of Athletics Federations on 20 December 2011 against the decision of the Real Federación Española de Atletismo Committee on Sports Discipline of May 17, 2011 is admissible.
2. The appeal filed by the International Association of Athletics Federations is upheld.
3. The decision of the Real Federación Española de Atletismo Committee on Sports Discipline of May 17, 2011 is set aside.

4. Mr. Francisco Fernández Peláez is declared ineligible for a period of two years, commencing on March 14, 2012, less the period of provisional suspension and/or ineligibility that he has already served namely one year, three months and four days.

(...)

7. All other requests for relief are rejected.