



Arbitration CAS 2015/A/4273 World Anti-Doping Agency (WADA) v. Sri Lanka Anti-Doping Agency (SLADA) & Don Dinuda Dilshani Abeysekara, award of 29 April 2016

Panel: Mr Alexander McLin (Switzerland), Sole Arbitrator

Weightlifting

Doping (mesterolone)

Requirement to establish the source of the prohibited substance

Harmonisation of sanctions under the World Anti-Doping Code

1. **The need for an athlete to establish how a prohibited substance entered his or her system is a condition precedent to a finding of absence of fault or no significant fault. The applicable standard of proof in this respect is at a balance of probability.**
2. **The World Anti-Doping Code is intended to harmonise sanctions in such a way that is equally applicable to athletes young and old, amateur or professional. It does however allow for youth and inexperience to be considered as factors when determining an athlete's degree of fault, which, if somehow deemed to be less than significant, could lighten an otherwise standard period of ineligibility of two years.**

I. PARTIES

1. The World Anti-Doping Agency (“WADA” or the “Appellant”) is a Swiss private law foundation with its headquarters in Montreal, Canada, and its seat in Lausanne, Switzerland, whose object is to promote and coordinate the fight against doping in sport in all its forms.
2. The Sri Lanka Anti-Doping Agency (“SLADA” or the “First Respondent”) is the sole national anti-doping organization in Sri Lanka.
3. Ms. Don Dinuda Dilshani Abeysekara (the “Athlete” or the “Second Respondent”) is a weightlifter. She is an international-level Sri Lankan athlete.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions. Additional facts and allegations found therein may be set out, where relevant, in

connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his award only to the submissions and evidence he considers necessary to explain his reasoning.

5. On the occasion of the Commonwealth Games held in Kandy, Sri Lanka, the Athlete underwent an in-competition doping control on 27 April 2014, at which she provided two urine samples that subsequently tested positive to mesterolone. The second sample was taken due to the fact the specific gravity of the first sample was not at the required level.
6. Mesterolone is listed as a substance prohibited both in and out of competition according to the 2014 WADA Prohibited List, classified under “S1” (*Anabolic Agents*).

B. Proceedings before the Sri Lanka Anti-Doping Agency

7. A preliminary hearing was held at SLADA on 19 May 2014, at which time the Athlete waived her right to have her B sample analysed and accepted a provisional suspension.
8. The SLADA Disciplinary Committee issued a decision dated 3 November 2014 imposing an 8-month period of ineligibility on the Athlete, beginning on 27 April 2014 (the “Appealed Decision”).
9. WADA requested, and ultimately received, a copy of the case file on 9 October 2015.
10. It is from the Appealed Decision that WADA now appeals to the Court of Arbitration for Sport (“CAS”).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 30 October 2015, the Appellant filed its Statement of Appeal against the Respondents with the CAS with respect to the Appealed Decision in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”). In its Statement of Appeal, the Appellant requested that the matter be submitted to a Sole Arbitrator pursuant to Article R50 of the Code.
12. On 5 November 2015, the CAS Court Office acknowledged receipt of the Statement of Appeal and, *inter alia*, invited the Respondents to state whether they agreed to submit this appeal to a Sole Arbitrator. They were notified that in the absence of an agreement or response, the issue would be resolved by the President of the CAS Appeals Arbitration Division, or her Deputy, in accordance with Article R50 of the Code.
13. On 9 November 2015, the Appellant filed its Appeal Brief in accordance with Article R51 of the Code.
14. On 17 November 2015, the CAS Court Office notified the Appellant that the courier had been unable to locate both Respondents at the addresses provided in the Statement of Appeal, and

had therefore been unable to notify the Respondents of the Statement of Appeal in this procedure. The Appellant was asked to provide relevant contact information in order for the courier to complete delivery. The same day, the Appellant provided addresses, contact numbers and email addresses for each Respondent, with the suggestion that the Athlete be notified through the Sri Lanka Weightlifting Federation. The CAS Court Office proceeded to redirect the courier accordingly and service was effectuated.

15. On 16 December 2015, having received no objection or response from the Respondents as to the Appellant's proposal to refer this case to a Sole Arbitrator, the parties were informed by the CAS Court Office that the Deputy President of the Division had decided to submit the matter to a Sole Arbitrator. The next day, on 17 December 2015, the CAS Court Office notified the parties that the Deputy President appointed Mr. Alexander McLin, Attorney-at-law in Geneva, Switzerland as Sole Arbitrator.
16. On 28 December 2015, the CAS Court Office wrote to the parties referring to its letter of 19 November 2015 and stating that no answers had been received within the deadline and drawing the parties' attention to Article R55 para. 2 of the Code providing for the Sole Arbitrator's ability to render an award despite the lack of a response. In the same letter, the parties were invited to express their position on whether a hearing was necessary in this appeal.
17. On 29 December 2015, the Appellant responded that its preference was for the Sole Arbitrator to issue an award solely on the basis of written submissions. No response was received from the Respondents.
18. On 7 January 2016, the CAS Court Office notified the parties that the Second Respondent had expressly refused delivery of its letters of 16 and 17 December 2015 and asked the Appellant either to provide a new address for her, or continue to use the address of the Sri Lanka Weightlifting Federation.
19. On 12 January 2016, the Appellant provided the CAS Court Office with the Athlete's address in Polonnaruwa from its database, and suggested that if notification could not be made at this address, correspondence should be sent to the Athlete's attention directly through SLADA.
20. The CAS Court Office made further unsuccessful attempts at notifying the Athlete at the Polonnaruwa address. On 22 January 2016, it sent all previously undelivered correspondence addressed to the Athlete to her attention at the address of the First Respondent.
21. On 16 February 2016, the CAS Court Office informed the parties that the Sole Arbitrator deemed himself sufficiently well informed to render a decision in this appeal without a hearing.
22. On 23 February 2016, the CAS Court Office sent the parties the Order of Procedure for this appeal, which noted that the Sole Arbitrator deemed himself sufficiently well informed to render a decision without a hearing in accordance with Article R57 of the Code.

23. On 24 February 2016, the Appellant signed and returned the Order of Procedure in this appeal to the CAS Court Office. The Respondents did not sign or return the Order of Procedure, and did not otherwise object to its contents.

IV. SUBMISSIONS OF THE PARTIES

24. WADA's submissions, in essence, may be summarized as follows:

- Mesterolone is an anabolic androgenic steroid that appears on the 2014 WADA Prohibited List, which indicates that it is prohibited both in and out of competition. Its presence was detected in the Athlete's bodily sample. Mesterolone is not among the substances classified as "specified substances" by the 2014 WADA Prohibited List.
- The presence of the prohibited substance in the Athlete's bodily sample (which is not challenged by the Athlete) constitutes a violation of Article 2.1 of the SLADA Anti-doping Rules ("SLADA ADR").
- Article 10.2 of the SLADA ADR provides for a two-year period of ineligibility from competition unless specific conditions are met for a reduction in the period of ineligibility. These are provided for in Article 10.5 SLADA ADR and allow for the reduction of this applicable period of ineligibility in the event there is no significant fault or negligence by the athlete, or even its elimination in the event no fault or negligence is found.
- In order to reduce or eliminate the period of ineligibility under the SLADA ADR, the Athlete must first establish how the prohibited substance entered her system. In the present case, she has not provided any explanation to this effect.
- As the origin of the substance is not established, the application of Article 10.4 SLADA ADR was erroneous and the Athlete must be imposed a two-year period of ineligibility. Article 10.4 SLADA can be applied for specified substances, and mesterolone is not a specified substance.
- There are no applicable mitigating factors that might otherwise allow a reduction of the period of ineligibility, including the Athlete's age.
- Since the Athlete has already been ineligible to compete for seven months and eight days under a provisional suspension, this time should be credited against the two-year ban and she should serve an additional 16 months and 22 days of ineligibility from competition.

25. WADA requests that CAS rule as follows:

1. *The Appeal of WADA is admissible.*
2. *The decision rendered by SLADA Disciplinary Committee on 3 November 2014, in the matter of Ms Don Dinuda Dilshani Abeysekara, is set aside.*

3. *Ms Don Dinuda Dilshani Abeysekara is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility, whether imposed on, or voluntarily accepted by, Ms Don Dinuda Dilshani Abeysekara before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.*
 4. *All competitive results obtained by Ms Don Dinuda Dilshani Abeysekara from 27 April 2014 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
 5. *WADA is granted an award for costs.*
26. The Respondents did not file written submissions or otherwise participate in this appeal. The rationale for the Appealed Decision can only therefore be understood from the language contained within it.
 27. From the Appealed Decision, it appears that while the Athlete had disclosed certain substances she had taken in the doping control form, none of them explain the presence of mesterolone in her system. At the SLADA hearing held on 3 November 2014, she stated that she had not taken vitamins or supplements other than those given by her coach. She also stated that she had received vitamin B12 injections for hand pain.
 28. The Appealed Decision also states that the Athlete is a minor and lacks experience, and indicates that this circumstance should allow for the reduction of the sanction under Article 10.4 of the World Anti-doping Code.
 29. By virtue of the absence of any written submissions, the Respondents have not articulated any requests for relief.

V. JURISDICTION

30. 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.
31. Articles 13.1.1 and 13.2.3 (6) of the SLADA ADR grants WADA a direct right of appeal to CAS from a decision of the SLADA Disciplinary Committee, without having to exhaust any internal remedies.
32. The CAS, therefore, has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

33. Article R49 of the 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.

34. Article 13.2.3 of the SLADA ADR provides that “*the filing deadline for an appeal or intervention filed by WADA shall be the later of:*

- (a) Twenty-one (21) days after the last day on which any other party in the case could have appealed, or*
- (b) Twenty-one days after WADA’s receipt of the complete file relating to the decision”.*

35. WADA received the case file on 9 October 2015, and filed its Statement of Appeal on 30 October 2015. It is therefore compliant with the time limit set forth in Article 13.2.3 of the SLADA ADR.

36. The Sole Arbitrator, therefore, confirms that this appeal is admissible.

VII. APPLICABLE LAW

37. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

38. The applicable regulations are the SLADA ADR. In the event of relevant gaps in the SLADA ADR, Sri Lanka law applies as the domicile of both Respondents (that having issued the Appealed Decision, and the Athlete, its subject). Moreover, Article 20.3 SLADA ADR provides that “*Sri Lanka law governs these Anti-Doping Rules*”.

VIII. MERITS

39. The issue at hand is whether the SLADA ADR allows, in the present circumstances, for a period of ineligibility of less than two years. The Athlete’s anti-doping rule violation is uncontested. The prohibited substance, mesterolone, is not a “specified substance” under the applicable WADA Prohibited List. The Athlete has not provided an explanation as to the manner in which the prohibited substance came to be in her system.

40. The Appellant correctly points out that CAS case law has consistently held that the need for an athlete to establish how a prohibited substance entered his or her system is a condition precedent to a finding of absence of fault or no significant fault (CAS 2005/A/922, 923 & 926; CAS 2006/A/1067; CAS 2006/A/1130, para. 41). The applicable standard of proof being a balance of probability, the absence of any explanation from the Athlete means that she cannot hope to meet this standard.
41. As the Appellant notes, the ability for an athlete to reduce a standard applicable period of ineligibility on the basis of an anti-doping rule violation on a “no fault or negligence” or “no significant fault or negligence” rationale is reserved for specific circumstances which are not present here. This is borne out not only in the comments to Article 10.5.2 SLADA ADR, but also in the now abundant CAS case law which underscores the athlete’s responsibility with respect to whatever he or she ingests or otherwise administers to his or her body. Such case law is replete with language to the effect that an athlete has “*a duty of utmost caution to avoid that a prohibited substance enters his or her body*” (CAS 2005/C/976 & 986). Failing to inquire as to whether a product contains a prohibited substance constitutes significant fault in and of itself, according to CAS precedent (see e.g. CAS OG 04/003; CAS 2006/A/1067).
42. The Appealed Decision refers to the Athlete’s minor status as a potential factor that might have been considered in reducing the otherwise applicable sanction, as well as her relative lack of experience. The Appellant, however, correctly points out that the World Anti-Doping Code is intended to harmonise sanctions in such a way that is equally applicable to athletes young and old, amateur or professional. This is supported by CAS case law (CAS 2009/A/2012, CAS 2012/A/2959, CAS 2009/A/2012 and CAS 2010/A/2268). The World Anti-Doping Code allows for youth and inexperience to be considered as factors when determining an athlete’s degree of fault, which, if somehow deemed to be less than significant, could lighten an otherwise standard period of ineligibility of two years. This is however predicated on the existence and assessment of an athlete’s explanation for the presence of a prohibited substance in his or her system. In the present case, no explanation has been provided and it is therefore not possible to assess the Athlete’s degree of fault, and the extent of her youth or inexperience as factors in this assessment.
43. Since the SLADA ADR imposes a two-year period of ineligibility absent conditions that would meet the requirements of Articles 10.5.1 or 10.5.2, and these conditions are not met, the Appealed Decision cannot be deemed compliant with the applicable rules, and an additional period of ineligibility must be imposed in order to bring the sanction in line with the rules.
44. Consequently, the Sole Arbitrator determines that the Athlete has committed an anti-doping rule violation in accordance with Article 2.1 of the SLADA ADR (presence of a prohibited substance or its metabolites or markers in an athlete’s bodily specimen) and therefore shall serve a two-year period of ineligibility from the date of this award in accordance with Article 10.2 of the SLADA ADR. Any period of ineligibility served by the Athlete as a result of the Appealed Decision shall be credited against the total period of ineligibility to be served.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency on 30 October 2015 against the Sri Lanka Anti-Doping Agency and Ms Don Dinuda Dilshani Abeysekara with respect to the decision rendered by the Sri Lanka Anti-Doping Agency Disciplinary Committee on 3 November 2014 is upheld.
 2. The decision rendered by the SLADA Disciplinary Committee on 3 November 2014 is set aside.
 3. Ms Don Dinuda Dilshani Abeysekara is sanctioned with a two-year period of ineligibility commencing on the date of this award with credit given for any period of ineligibility already served by Ms Don Dinuda Dilshani Abeysekara between 18 May 2014 and 27 December 2014.
- (...)
6. All other motions or prayers for relief are dismissed.