



Arbitration CAS 2016/A/4512 World Anti-Doping Agency (WADA) v. Turkish Football Federation (TFF) & Ahmet Kuru, award of 21 November 2016

Panel: Mr Alexander McLin (Switzerland), Sole Arbitrator

Football

Doping (clomiphene)

Specific sporting or general intent to violate an anti-doping rule

A plain reading of Art. 19.3 of the FIFA Anti-Doping Regulations leaves little doubt that the drafters intended for the requirement of “intent” to be satisfied by a situation in which there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and the player manifestly disregarded that risk. Therefore, there is no need to prove that, in addition, there was a separate and distinct intent to cheat by enhancing performance on the field of play. This interpretation is supported (i) by the absence of any indication of a separate intent requirement, whether in the WADC, commentary or CAS jurisprudence, and (ii) by the fact that the structure of the WADC and of the anti-doping rules enacted pursuant to the WADA model rules is based on strict liability, in part due to the inherent difficulty associated with proving the specific intent of an athlete whose sample has tested positive to a prohibited substance.

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 Turkish Football Federation (“TFF” or the “First Respondent”) is the sole national governing body for football in Turkey.
3. Mr Ahmet Kuru (“Player” or the “Second Respondent”) is a professional footballer from Turkey, playing for the club known as Orduspor.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced. Additional facts and allegations found in the

parties' written submissions, pleadings and evidence 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. The Player filed an application for a Therapeutic Use Exemption ("TUE") with the TFF on 6 November 2014 seeking permission to use the medications "Clomiphene sitrat 50 mg 1x1" and "Proxceed plus 5 mg" during a two-year treatment for infertility.
6. The TFF Anti-Doping Committee denied the application on 4 December 2014. In its decision, it included the following warning: *"We remind that substance may be found in the sample taken and that this will result in commencement of disciplinary process in the event that you keep going using such medication and that you undergo a doping control"*.
7. On 15 November 2015, the Player underwent an in-competition doping control after a match between Ordupsor and Ümraniyespor. The resulting analysis of the A Sample (urine) conducted by the Cologne WADA-accredited laboratory, the report of which was sent to the TFF on 3 December 2015, revealed the presence of clomiphene, a prohibited substance in category S4.3 of the 2015 WADA Prohibited List (Hormones and Metabolic Modulators).
8. As a result, the TFF provisionally suspended the Player on 4 December 2015.
9. The Player requested testing of the B Sample, which took place at the same Cologne laboratory on 16 and 17 December 2015. The result of this test confirmed the presence of clomiphene in the Player's urine sample.

B. Proceedings before the Turkish Football Federation and FIFA

10. In the proceedings before the TFF's Professional Football Disciplinary Board, the Player stated that he had used the medications "Klomen" and "Proxceed Plus" in order to treat infertility between 5 May and 30 May 2015, a period of time at which no football matches were played. The Player attributes the adverse analytical finding to the intake of the medications during this time.
11. On 1 February 2016, the TFF Disciplinary Board sanctioned the Player with a six-month period of ineligibility from official games, beginning on the date of his provisional suspension on 4 December 2015 (the "First TFF Decision").
12. The Player appealed this decision to the TFF's Appeal Committee (also referred to as the Arbitration Board), who rejected the appeal (the "Second TFF Decision") and confirmed the First TFF Decision on 11 February 2016 (together the First TFF Decision and the Second TFF Decision are referred to as the "Appealed Decisions").
13. The TFF wrote to FIFA on 16 February 2016, seeking an extension of the sanction against the Player so that it may have worldwide effect.

14. WADA was notified by FIFA with a copy of the emailed Appealed Decisions on 19 February 2016; the full case file in Turkish on 23 March 2016; and the full case file translated into English on 1 April 2016.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. The Appellant filed its Statement of Appeal with the Court of Arbitration for Sport on 24 March 2016 in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”) and requesting that the matter be submitted to a Sole Arbitrator pursuant to Article R50 of the Code. The filing of the appeal was notified by the CAS Court Office to the Respondents on 31 March 2015.
16. In its Statement of Appeal, Appellant requested CAS to invite the TFF to confirm that the Second TFF Decision did indeed replace the First TFF Decision, in which case the appeal would only be aimed at the Second TFF Decision.
17. The First Respondent responded on 7 April 2016, agreeing to the appointment of a Sole Arbitrator and to English as the language of arbitration, and confirming “*that the decision of Professional Football Discipline Committee dated 1 February 2016 is upheld and confirmed by the decision of TFF Arbitration Committee on 11 February 2016*”. No response was provided by the Second Respondent.
18. On 11 April 2016, the CAS acknowledged receipt of Appellant’s appeal brief dated 8 April 2016, and invited the Respondents to submit their answer within 20 days, further to Article R55 of the Code.
19. On 13 April 2016, the CAS informed the parties that its courier service had been unable to deliver correspondence addressed to the Second Respondent due to the remoteness of the area in which he lives, and invited the Appellant to provide an alternative address or other means of proceeding. Appellant responded on 18 April suggesting that under the circumstances, the Second Respondent be notified via the TFF. On 19 April 2016, the CAS informed the parties of its intent to serve documents on the Second Respondent through the TFF upon return of the documents by the courier service, and resetting the time limits for response accordingly. This was done on 20, 21 and 25 April 2016.
20. On 29 April 2016, the First Respondent informed the CAS of its intent not to pay any share of the advance on costs, and, requested an extension of the deadline to file its answer, the deadline to be fixed after the payment by Appellant of its share of the advance on costs. The same day, the CAS acknowledged receipt and informed the parties that the then-current deadline for filing of the answer was set aside, and that a new deadline would be communicated once the Appellant had paid its share of the advance. The CAS Court Office informed the parties on 23 May 2016 of its new deadline to file an answer, Appellant having paid the entire advance on costs.

21. On 27 May 2016, the parties were informed that the President of the Appeals Arbitration Division appointed Mr. Alexander McLin, attorney-at-law in Geneva, as Sole Arbitrator.
22. On 14 and 23 June 2016, the First and Second Respondent, respectively, filed their answers in accordance with Article R55 of the Code.
23. On 25 June 2016, after consulting the parties, the Sole Arbitrator confirmed that he was sufficiently well informed to render a decision on the merits of this appeal without a hearing in accordance with Article R57 of the Code.
24. On 27 July 2016 and 4 August 2016, the Appellant and First Respondent, respectively, signed and returned the Order of Procedure to the CAS Court Office without objection. The Second Respondent did not sign or return the order of procedure, or otherwise object to its contents.

IV. SUBMISSIONS OF THE PARTIES

25. The Appellant's submissions, in essence, may be summarized as follows:
 - The existence of an anti-doping rule violation is not contested.
 - The Appealed Decisions are erroneous in that the TFF applied an outdated rule (Art. 39.1 of the Turkish Football Federation Anti-Doping Rules ("TFF ADR"), which was supplanted by the FIFA Anti-Doping Regulations in force as of 1 January 2015 ("FIFA ADR") at the time the anti-doping violation occurred. Moreover, the sanction pronounced by the TFF providing for suspension from "official matches" is narrower than that foreseen by the applicable rules, which prevents participation in any competition or other activity and includes other consequences, such as restricting funding.
 - Applying Article 19 of the FIFA ADR and accepting that clomiphene is a "Specified Substance" under the FIFA ADR, the period of ineligibility must be four years if FIFA (or in this case WADA) can establish that the anti-doping rule violation was intentional.
 - The Player's conduct was intentional when applying the definition of "intentional" under Article 19 FIFA ADR, which *"therefore requires that the Player or other Person engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk"*. The Player was clearly aware that the use of clomiphene was prohibited, seeing as he had applied for a TUE for this substance the previous year. As such, the use of the substance despite with knowledge of its prohibited nature was, at best, extremely reckless.
 - Moreover, the four-year period of ineligibility mandated by the FIFA ADR can only be reduced if the Player's degree of fault is non-existent or not significant. Such a

reduction is not applicable here due to the fact that the Player had knowledge of the prohibited nature of the substance and nevertheless chose to take it, making his fault clearly significant.

26. The Appellant makes the following requests for relief:

“WADA hereby respectfully requests CAS to rule that:

1. *The Appeal of WADA is admissible.*
2. *The decisions rendered by the Turkish Football Federation Professional Football Disciplinary Board on 1 February 2016 and by the Turkish Football Federation Appeal Committee on 11 February 2016 in the matter of Ahmet Kuru are set aside.*
3. *Ahmet Kuru is sanctioned with period of ineligibility of four years starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility, whether imposed on, or voluntarily accepted by, Ahmet Kuru before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.*
4. *WADA is granted an award for costs”.*

27. The Respondents’ submissions, in essence, may be summarized as follows:

- First Respondent, while agreeing that Art. 19 para. 3 of the FIFA ADR applies, states that while WADA must prove that the Player either *“engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk”*, this is not sufficient to discharge Appellant’s burden. In the TFF’s view, the same provision, which in the preceding sentence states *“the term ‘intentional’ is meant to identify those Players who cheat”* creates an additional burden: that of proving not only that the Player knew that his conduct would or was likely constitute an anti-doping rule violation, but that he sought to cheat.
- The TFF purports that the primary rationale underlying the Appealed Decisions is the fact, which Appellant accepts, that the Player was taking clomiphene for the purpose of treating infertility in order to conceive a child, as opposed to seeking to improve his performance on the field of play. As such, the Player was not cheating in the sense that he was not seeking to improve his sporting abilities, but was rather attending to the business of starting a family.
- WADA’s rigid approach based on the language of the FIFA ADR fails to make the distinction which fairness requires when it comes to distinguishing a player who intends to check for sporting purposes, and one who erroneously uses a substance out of competition for legitimate purposes.

- The TFF disciplinary bodies did not apply Art. 19 of the FIFA ADR because, to their comfortable satisfaction, the Player was not cheating. Their application of Art. 39.1 para. 1 of the TFF ADR is compatible with Art. 22 para. 1(a) of the FIFA ADR.
- The Second Respondent provides medical records supporting his testimony before the TFF disciplinary bodies, namely that he took the drugs Klomen and Proxeed Plus for the purpose of infertility treatment between 5 May 2016 and no later than 30 May 2016. He also provides evidence of some research into the likelihood that it was the ingestion of these drugs during this period that caused the adverse analytical finding some five and a half months later.
- The Player also provides medical documentation to support his statements that treatment with these drugs was discontinued on 30 May 2016 in order to pursue efforts at *in vitro* fertilization.
- The Player considers that he has met his burden of proving that he had no intent to increase his performance and has provided an explanation of how the prohibited substance entered his system.
- Finally, the Second Respondent states that the sanction provided by the Appealed Decisions is already severe in light of the circumstances. A longer period of ineligibility would force the Player to leave football, due to his age.

28. The First Respondent makes the following requests for relief:

“The Turkish Football Federation hereby respectfully requests CAS to order that:

[...] The present Appeal by WADA is inadmissible.

[...] The decisions rendered by the TFF Professional Football Disciplinary Committee dated 1 February 2016 and by the TFF Appeal Committee dated 11 February 2016 in the case of Ahmet Kuru are confirmed.

[...] All the costs and expenses of the present Appeal shall be borne by the Appellant”.

29. The Second Respondent makes the following requests for relief:

“... we kindly submit and demand by proxy to have these decisions:

1. *The refusal of the application made by WADA and not giving additional and another penalty to the client football player and affirming the penalty given by TFF Professional Disciplinary Committee and TFF Appeal Committee.*

2. *All the costs and expenses of the present Appeal shall be born by the Appellant” (sic).*

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. WADA considers that the FIFA ADR constitute the applicable regulations in the present case. This is so despite the fact that the TFF ADR were applied in the Appealed Decisions, which were based on the 2009 World Anti-Doping Code (“WADC”). The TFF considers that the TFF ADR and the FIFA ADR are applicable together, with the FIFA ADR prevailing in the event of “discrepancy”. The parties agree that the TFF was aware that its rules had not been updated to reflect the 2015 WADC, and therefore implemented the following provision in order to ensure the application of the FIFA ADR which were up-to-date:

“Provisional article 1. FIFA Anti-doping Regulations and its annexes which were come into force on 01.01.2015 shall be put on the effect simultaneously with the provisions of present Anti-Doping Regulations. If there is any contradiction between the texts of this regulations, including the provisions with regard to the sanctions, the FIFA Anti-doping Regulations and its annexes which were come into force on 01.01.2015, shall be effective” (sic).

32. In addition, Article 1 of the FIFA ADR reads as follows:

“These Regulations shall apply to FIFA, its Member Associations and the Confederations and to Players, clubs, Player Support Personnel, Match Officials, Officials and other Persons who participate in activities, Matches or Competitions organised by FIFA or its Associations by virtue of their agreement, membership, affiliation, authorisation, accreditation or participation”.

33. Given that the anti-doping rule violation took place in 2015, the applicable rules in force are the FIFA ADR, by operation of the provisional article 1 of the TFF ADR.

34. Art. 75 para. 2 FIFA ADR reads as follows:

“In cases where art. 75 par. 1 (Appeals involving International-Level Players or International Competitions) is not applicable, the decision may be appealed to a national-level appeal body, being an independent and impartial body established in accordance with the rules adopted by the National Anti-Doping Organisation having jurisdiction over the Player or other Person. The rules for such appeal shall respect the following principles: a timely hearing; a fair and impartial hearing panel; the right to be represented by counsel at the Player’s or other Person’s own expense; and a timely, written, reasoned decision. If the National Anti-Doping Organisation has not established such a body, the decision may be appealed to CAS in accordance with the provisions applicable before such court”.

35. Art. 75 para. 3 FIFA ADR lists WADA as a person having the “right to appeal to CAS with respect to the decision of the national-level body”.

36. In addition, Art. 75 para. 3 FIFA ADR states: “Where WADA has a right to appeal under arts 74 to 80 and no other party has appealed a final decision within FIFA’s process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in FIFA’s process”.
37. WADA’s position was that the TFF Appeal Committee that issued the Second TFF Decision is a “national-level appeal body” within the meaning of FIFA ADR Art. 75 para. 2, and that in the event it is not, WADA would in any event have a direct ability to appeal to CAS further to Art. 74 para. 3 FIFA ADR.
38. As it happens, the First Respondent has confirmed that the Second TFF Decision replaces the first. While this decision appears to qualify as one which emanates from an applicable national-level appeal body, the second route to appeal, when considered together with the fact that neither Respondent contests the jurisdiction of CAS confirms that CAS has jurisdiction in the present matter.
39. The Sole Arbitrator confirms that the CAS has jurisdiction to hear this appeal.

VI. ADMISSIBILITY.

40. Art. 80 para. 1.2 of the FIFA ADR provides that “the filing deadline for an appeal filed by WADA shall be the later of:
- (a) Twenty-one 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”.
41. WADA received the complete file (in Turkish) on 23 March 2016, and filed its Statement of Appeal on 24 March 2016, and its Appeal Brief on 8 April 2016. The time limit is therefore respected.
42. It follows, therefore, that WADA’s appeal is admissible.

VII. APPLICABLE LAW

43. Article R58 of the Code provides as follows:
- The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*
44. As determined above, the applicable regulations are the FIFA ADR and the TFF Anti-Doping Regulations to the extent that they do not conflict with the FIFA ADR.

VIII. MERITS

45. The main issue at hand is whether the TFF applied the anti-doping rules properly given the FIFA ADR provisions incorporated into the TFF ADR through provisional Art. 1. While the parties agree that the FIFA ADR apply to the present case, the key issue is the divergence as to the interpretation of Art. 19 para. 3 FIFA ADR.

46. Art. 19 para. 3 FIFA ADR bears quoting in its entirety in light of the facts:

“As used in arts 19 (Ineligibility for presence, Use or attempted Use, or Possession of a Prohibited Substance or Prohibited Method) and 20 (Ineligibility for other anti-doping rule violations), the term “intentional” is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. With regard to anti-doping rule violations resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition, there shall be a rebuttable presumption that said violations are not intentional if the substance is a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance”.

47. Art. 19 para. 1 FIFA ADR, which specifies the applicable sanctions, states:

“The period of Ineligibility shall be four years where:

- a) The anti-doping rule violation does not involve a Specified Substance unless the Player or other Person can establish that the anti-doping rule violation was not intentional;*
- b) The anti-doping rule violation involves a Specified Substance and FIFA can establish that the anti-doping rule violation was intentional”.*

Finally, Art. 19 para. 2 FIFA ADR states:

“If art. 19 par. 1 does not apply, the period of Ineligibility shall be two years”.

48. Appellant takes the position that the second sentence of the rule is all that is needed in order to determine whether conduct was “intentional”, and that if the Player’s conduct meets these criteria, his conduct was intentional and therefore meets prong 1(b) of Art. 19 para 1 FIFA ADR, leading to a four-year period of Ineligibility.

49. The First Respondent interprets the second sentence to be only part of Appellant’s burden, namely that WADA must not only prove that the Player knew that his conduct would constitute an anti-doping rule violation or disregarded the significant risk that it would, but also that there was a separate and distinct intent to cheat by enhancing performance on the field of play. This justifies the application of Art. 39.1 para. 1 of the TFF ADR, which the

TFF contends is compatible with Art. 22 para. 1(a) of the FIFA ADR, thereby ensuring that the rules were properly applied.

50. Before considering this interpretive distinction, the Sole Arbitrator is comfortably satisfied that the Player's conduct, having been clearly warned when his TUE application was declined of the risks associated with taking the medication, knew that his conduct would constitute an anti-doping rule violation and disregarded the significant risk associated therewith. This meets the test of the second sentence of Art. 19 para. 3 FIFA ADR.
51. This difference in interpretations leads nevertheless to consideration of the rules and case law for further indications as to whether a specific sporting intent to cheat is required, and if so, how one may distinguish such a specific intent from a more general intent to violate an anti-doping rule.
52. For a number of reasons, the Sole Arbitrator is not convinced by the Respondents' position.
53. First, under the FIFA ADR, which both parties agree is applicable, one must determine whether the substance found in the athlete's sample is a "Specified Substance". This is the case.
54. Second, Art. 19.1 (b) FIFA ADR establishes FIFA's (or in the present case WADA's) burden of proving that the violation was intentional, and that if this intent is indeed proven, the penalty must be a four-year period of ineligibility.
55. Third, a plain reading of Art. 19.3 leaves little doubt that the drafters intended for the requirement of "intent" to be satisfied by a situation in which *"there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and [the Player] manifestly disregarded that risk"*. This interpretation is supported by the following:
 - The absence of any indication of a separate intent requirement, whether in the WADC, commentary or CAS jurisprudence, demonstrates that such an approach is not appropriate and was not foreseen.
 - The structure of the WADC and of the anti-doping rules enacted pursuant to the WADA model rules is based on strict liability, in part due to the inherent difficulty associated with proving the specific intent of an athlete whose sample has tested positive to a prohibited substance (see e.g. CAS 2009/A/1768; CAS 2012/A/2760).
56. Finally, it is misguided to enter into the analysis of whether the application of Art. 39.1 TFF ADR is compatible with Art. 22 para. 1(a) FIFA ADR, given that the FIFA ADR supplanted the TFF ADR and the consequences associated with the nature of the prohibited substance and the considerations of fault and of the impact on an ultimate sanction follow distinct rationales. As acknowledged by the First Respondent, the FIFA ADR are applicable their rationale must be independently applied to the facts.

57. While the Sole Arbitrator is, to a degree, sympathetic to the Player's position that the resulting sanction of a four-year period of ineligibility appears harsh if the use of the medication was indeed solely aimed at treating infertility, the rules do not permit another outcome. The Player had the ability to resubmit a TUE application meeting stated requirements, and he chose not to do so. Instead, he chose to roll the dice, in full knowledge of the risks he was taking for his career.
58. The Player's conduct is therefore to be considered "intentional" within the meaning of Art. 19 para. 3 FIFA ADR, and results in a period of ineligibility of four years under Art. 19 para 1(b) FIFA ADR.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency on 24 March 2016 is upheld.
 2. The decision of the Appeal Committee / Arbitration Board of the Turkish Football Federation dated 11 February 2016 and confirming the disqualification of Mr Ahmet Kuru from "official games for 6 months" is set aside.
 3. Mr. Ahmet Kuru is sanctioned with a four-year period of ineligibility commencing on the date of this award with credit given for the time already served by Mr. Ahmet Kuru between 4 December 2015 and 3 June 2016.
- (...).