



Arbitration CAS 2016/A/4746 Sibel Özkan Konak v. International Olympic Committee (IOC), award of 21 November 2016

Panel: The Hon. Michael Beloff QC (United Kingdom), Sole Arbitrator

Weightlifting

Doping (stanozolol)

Automatic consequences of anti-doping rule violation

Article 2.1 of the Rules applicable to the Games of the XXIX Olympiad, Beijing 2008 (the Rules) foresees that the presence of a prohibited substance (or its metabolite) in an athlete's system constitutes an Anti-Doping Rule Violation (ADRV). Furthermore, Article 8 of the Rules makes disqualification and forfeiture of medals, points and prizes an automatic sanction for such an ADRV. Therefore issues of how and why a prohibited substance was present in an athlete's system or the existence or degree of fault, if any, on the part of the athlete for its presence, are irrelevant to the outcome of an appeal by which the athlete is seeking annulment of a first instance decision under which all his medals, results etc. won had been disqualified.

I. PARTIES

1. Sibel Özkan Konak ("the Appellant") is a professional international weightlifting athlete.
2. The International Olympic Committee ("the Respondent") is the world governing body of Olympic Sport.

II. FACTUAL BACKGROUND

A. Background Facts

3. 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.

4. The Appellant, born in 1988, has had a successful career in weightlifting (-48 kg event), winning many international championships and prizes, both before and after the Beijing Olympiad of 2008 including an Olympic silver medal at that Olympiad.
5. Until the event hereinafter described she had been tested on many occasions, including at that Olympiad, always with negative results.
6. On 18 May 2016 she was informed by the Turkish National Olympic Committee that her urine sample (“the Sample”) tested at that Olympiad had been reanalysed and now showed the presence of a Stanozolol metabolite, a prohibited substance, both then and now under the World Anti-Doping Code (“WADC”). The B Sample analysis carried out on 27 May 2016 confirmed that positive result.

B. Proceedings before the IOC Disciplinary Commission (“IOC DC”)

7. In consequence of the above the Respondent set up a disciplinary commission, to which the Appellant made written representations.
8. On 21 July 2016 the IOC DC handed down its decision (“the Decision”) finding the Appellant guilty of an anti-doping rule violation (“ADRV”) by use of Stanozolol, contrary to Article 2.1 and 2.2 of the Rules applicable to the Games of the XXIX Olympiad, Beijing 2008 (“the Rules”), disqualifying her results obtained at the Beijing Olympiad, and ordering her to return her silver medal, pins and diploma obtained thereat.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (“CAS”)

9. On 11 August 2016 the Appellant filed her statement of appeal against the Decision in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration, 2016 edition (“the Code”).
10. On 29 August 2016 the Appellant filed her appeal brief in accordance with Article R51 of the Code.
11. On 3 October 2016 the Respondent filed its answer in accordance with Article R55 of the Code.
12. On 12 October 2016 the Sole Arbitrator invited the parties to answer certain questions arising from their respective pleadings by 19 October 2016. The parties duly replied on the latter date.
13. On 27 October 2016 the Sole Arbitrator invited the parties to file any comments on those replies by 2 November 2016. The parties did not avail themselves of that opportunity, and the Sole Arbitrator, in particular since he had given the Appellant every chance to make good her case, deemed himself in a position to resolve the appeal without the need for an oral hearing.
14. Both parties signed the Order of Procedure for the present matter, expressly confirming that their right to be heard has been respected in this way.

IV. SUBMISSIONS OF THE PARTIES

15. The Appellant's submissions, in essence, may be summarized as follows:

- The Appellant had limited financial resources and relied on her experienced coach, Mr Talat Unlu, to advise her on vitamin and medications which she could take in compliance with the WADC.
- The Appellant always additionally checked such vitamins and medications against the WADC list and purchased them from a well-known laboratory.
- The Appellant always informed the Doping Control Officer on her Doping Control Form ("DCF") including at the Beijing Olympiad of what she had taken.
- The Appellant has sought, despite the passage of time and limited financial resources, to identify the source of the Stanozolol.
- The Appellant has concluded that *"the only way for the Stanozolol to have entered the Appellant's organism was through the very likely contaminated source of the supplement, namely a Whey protein supplement she could have taken on a regular basis before and during the Beijing games"*. She relies for that purpose on a scientific paper ("the Paper") in the Journal of Mass Spectrometry 2008 pp. 892-902 "Nutritional supplements cross-contaminated and faked with doping substances".
- The low level of Stanozolol in the Sample - a concentration of 2.5.pg/mL - could not have been of assistance in increasing her sporting performance.
- The Appellant's ingestion of Stanozolol was involuntary, not deliberate.
- In all the circumstances she was not at fault or negligent at all, or, if, contrary to her primary contention, she was held to be so, her degree of fault was minimal; *"any sanction to be imposed must be measured against the reality of the harm caused and the totality of the circumstances of the case bearing in mind the purpose of the anti-doping rules"*.
- The Appellant has already suffered loss and damage to her reputation, and if she loses her silver medal, she will lose sponsorship and her career will be prematurely ended.
- The Appellant also offers to provide substantial assistance to the Respondent by disclosure of sensitive information about the Turkish Weightlifting Federation in exchange for a possible agreement with the Respondent to dispose of this case.

16. The Appellant sought the following relief that:

- The appeal be admitted.
- The decision is set aside.
- The Appellant be allowed to keep her silver medal awarded during the Beijing Olympiad as well as her results, pin and diploma.
- The Respondent reimburses any and all costs of the Appellant including costs relating to the document package, testing etc.

- The IOC be ordered to pay the Appellant a contribution towards legal costs and fees in an amount to be determined by the Sole Arbitrator.

17. The Respondent's submissions, in essence, may be summarised as follows:

- The analytical results of the Appellant's sample are not challenged by her.
- The admitted presence of Stanazolol renders automatic a finding of an ADRV under Article 2.1 of the Rules.
- The sanctions imposed by the IOC DC are an equally automatic consequence of the finding under Article 8.1 of the Rules.

Without prejudice to the foregoing

- The Appellant has provided no evidence of the contamination by Stanazolol of the whey protein supplement said to be taken by her during the Beijing Olympiad; the Paper contains no evidence to that effect.
- There are other supplements recorded on the relevant DCF which are likelier candidates for such contamination.
- In any event warnings against use of unreliable supplements have been published for many years.
- The Appellant's own evidence reveals no due diligence, still less absence of any fault.
- The use by the Appellant of "*a classical doping substance for its straightforward purpose does not appear to be the most unlikely hypothesis*".
- The offer of substantial assistance was not a matter for the Respondent and sat oddly with the Appellant's denial of the case against her.

18. The Respondent sought the following relief that:

- The appeal of the Appellant be dismissed.
- The Respondent is granted an award for costs.

V. JURISDICTION

19. 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.

20. Article 12.2 of the Rules and Article 61 of the Olympic Charter confer jurisdiction on CAS. The jurisdiction of the CAS is not disputed by the Respondent and is confirmed by the parties' signature of the Order of procedure.

VI. ADMISSIBILITY

21. 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.

22. As appears from III above, the appeal was filed within twenty-one days of the Decision. It is therefore admissible. Admissibility is not disputed by the Respondent.

VII. APPLICABLE LAW

23. 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.

24. The applicable rules are the Rules. Subsidiarily Swiss law applies as Switzerland is the domicile of the Respondent.

VIII. MERITS

24. In the light of the arguments raised by the parties and in view of the applicable rules, the present case is straightforward.

25. Article 2.1 of the Rules makes the presence of a metabolite of a prohibited substance in the Athlete's system an ADRV. Stanozolol is such a substance.

26. Article 8 of the Rules makes disqualification and forfeiture of medals, points and prizes an automatic sanction for such an ADRV.

27. The appeal must therefore be dismissed.

28. Issues of how and why the Stanozolol was in the Appellant's system or the existence or degree of fault, if any, on the part of the Appellant for its presence, are therefore irrelevant to the outcome of the appeal. The Sole Arbitrator sees no need to address them or to resolve the competing arguments of the parties on such issues nor, in his view, would any useful purpose be served by his so doing.

29. The Sole Arbitrator would, however, comment that the ability to reanalyse samples with the benefit of advanced techniques, reflected in this case, is a valuable weapon in the battle against

doping in sport and should further deter athletes from deliberate cheating and further encourage them to take care not inadvertently to ingest prohibited substances.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Sibel Özkan Konak on 11 August 2016 against the decision rendered on 21 July 2016 the IOC Disciplinary Commission is dismissed.
- (...)
4. All other motions or prayers for relief are dismissed.