



Arbitration CAS ad hoc Division (OG Athens) 04/003 Torri Edwards v. International Association of Athletics Federations (IAAF) & USA Track & Field (USATF), award of 21 August 2004

Panel: Mr Hans Nater (Switzerland), President; Mr Dirk-Reiner Martens (Germany); Mr Malcolm Holmes (Australia)

Athletics

Doping (nikethamide)

CAS ad hoc Division power of review

Exceptional circumstances

Negligence

Sanction

1. The limitation in the IAAF Rules of the scope of review by CAS is not in line with Article 16 of the CAS ad hoc Rules, under which the Panel shall have unrestricted authority to review the facts and the law. It is also not in line with the WADA Code and, in particular, with the IAAF's commitment thereunder to "*incorporate (...) without any substantive changes*", *inter alia*, Article 13 (Appeals) of that Code.
2. Under the IAAF Rules, the exceptional circumstances provisions can only apply either when there is "*no fault or no negligence*", as defined, in which case the athlete may have the period or ineligibility "*eliminated*". Alternatively, if the athlete can demonstrate that there is "*no significant fault or no significant negligence*", as defined, then the period of ineligibility may be reduced but the reduced period may not be less than half the minimum period of ineligibility otherwise applicable.
3. There is an obligation and a duty on an elite athlete to ensure that no prohibited substance enters his/her body, tissues or fluid. There is negligence in failing to inquire or ascertain whether a product contains a prohibited substance. The negligence (at a minimum) of the athlete's chiropractor who had access to the box which stated the substances contained in the product (including nikethamide) and to the leaflet which even contained a warning for athletes must be attributed to the athlete who uses him in supplying either a food source or a supplement. It would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/herself did not know of that substance.
4. In the fight against doping in sport, federations must be supported in their adoption of the WADA Code. Therefore, a sanction of two years of ineligibility in application of the newly promulgated IAAF rules is not inequitable even if all Olympic Movement sports athletes are currently not subject to the same sanction for the same type of doping

offence because not all federations have yet implemented the WADA Code.

This is an appeal by the Appellant, Ms. Torri Edwards (“Edwards”) against the final award of the American Arbitration Association Panel (“AAA Panel”) dated 10 August 2004. In its final award, the AAA Panel imposed a two-year period of ineligibility upon the Appellant, to expire on 17 July 2006, and ordered disqualification of all results obtained by the Appellant as of 24 April 2004, pursuant to, respectively, Rules 40.1(a)(i), 39.1 and 39.4 of the International Association of Athletics Federations’ (IAAF) Competitions Rules 2004-2005, Chapter 3, Anti-Doping (the “IAAF Rules” or, individually, the “IAAF Rule”).

Edwards is a 27 years old athlete member of the United States Olympic Team (USOT) in the sport of athletics. In July 2004, Edwards qualified for the USOT in the 100 meter and 200 meter events.

On 24 April 2004, Edwards provided a urine sample for a doping control at an IAAF meet in Martinique.

Pursuant to IAAF Rule 37.4, Edwards was notified on 19 May 2004 that her sample showed the presence of nikethamide, a stimulant included in section S1 of the IAAF List of Prohibited Substances and Methods.

Pursuant to IAAF Rule 37.4(c), Edwards responded to the IAAF’s notice and explained in a letter dated 25 May 2004 (the “Letter”) the presence of nikethamide in her urine. In this Letter, which was provided to the Panel at the hearing, Edwards submitted that the prohibited substance was contained in two glucose tablets ingested by her after having been given by her physical therapist, Christopher Vincent. The glucose tablets were labelled Coramine Glucose.

Edwards subsequently asked the Aegis Sciences Corporation, an accredited laboratory, to test the Coramine Glucose tablets. The results confirmed the presence of nikethamide in such tablets and the United States Anti-Doping Agency (USADA) confirmed that the levels found were consistent with her ingestion of the two tablets.

On 21 June 2004, USADA charged Edwards with an anti-doping rule violation and asked that she be suspended for a period of two years. USADA is the independent anti-doping agency for sport in the United States and is responsible for conducting doping tests and adjudicating positive test results. Edwards requested her case to be arbitrated before the AAA pursuant to IAAF Rules 38.5 and 38.6.

On 19 July 2004, an AAA Panel of three arbitrators conducted a hearing pursuant to IAAF Rule 38.8. In this hearing, Edwards admitted she had committed a doping offense but that the existence of exceptional circumstances pursuant to IAAF Rule 38.12 *et seq.* should allow her to get a reduction or elimination of her sanction.

On 22 July 2004, the AAA Panel rendered an interim award whereby it concluded that exceptional circumstances may exist and that it would consequently refer the determination of such to the IAAF Doping Review Board, pursuant to IAAF Rule 38.16.

On 3 August 2004, the Doping Review Board concluded that there were no exceptional circumstances in this case and, pursuant to IAAF Rule 38.18, remitted the matter to the AAA Panel to impose the appropriate sanction.

On 5 August 2004, the AAA Panel, by way of letter, invited the parties to submit further evidence or arguments.

On 10 August 2004, the AAA Panel rendered its final award to which reference is made above.

On 13 August 2004, Edwards filed an application before the CAS ad hoc Division for the 2004 Athens Olympic Games.

Edwards voluntarily accepted, and has been serving a provisional suspension since her last competition in the 2004 United States Olympic on 18 July 2004.

The present arbitration was commenced by the filing of the Appellant's appeal, with attached exhibits, on 13 August 2004.

By fax letter dated 14 August 2004, the USADA advised CAS that it had agreed with the IAAF that the latter will present the case including any oral arguments that no exceptional circumstances exist in Edwards' case and that the two-year suspension resulting disqualification should stand.

The hearing in this matter was held on 16 August 2004 in Athens, Greece, at the offices of the CAS ad hoc Division.

At the hearing, which began at 05:00pm and continued until 10:40pm the Panel heard the submissions of Counsel as well as the testimony of Prof. Ljungqvist who testified on behalf of the IAAF. The Appellant was present and answered questions from the Panel. Both parties placed additional documents as evidence.

At the conclusion of the hearing, and in response to the President of the Panel's query, each party affirmed that it had received a full and fair hearing and that there were no additional matters that they wished to raise. The President then declared the proceeding closed.

LAW

1. These proceedings are governed by the IAAF Anti-doping Rules passed by the IAAF Council in accordance with the mandate of the IAAF Congress on 20 August 2003, the CAS Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”) enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (the “PIL Act”). The PIL Act applies to this arbitration as a result of the express choice of law contained in art. 17 of the CAS ad hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to art. 7 of the CAS ad hoc Rules.
2. The jurisdiction of the CAS ad hoc Division arises out of IAAF Rule 60.10(b) as well as out of Rule 74 of the Olympic Charter.
3. Pursuant to IAAF Rule 60.20, the Respondent is the IAAF. USATF was also named as a Respondent in the proceedings by the Appellant. The International Olympic Committee (IOC) and the United States Olympic Committee (USOC) were represented and acted as observers in the hearing. USADA was not represented at the hearing. However, by its letter of 14 August 2004, it agreed that the IAAF would present the case and USADA would be available by telephone.
4. Under art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute “*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*”.
5. According to art. 16 of the CAS ad hoc Rules, the Panel has “*full power to establish the facts on which the application is based*”.
6. According to IAAF Rule 60.27, “*where the appeal to CAS in a doping-related case is made pursuant to Rule 60.10(b), [...], the hearing before CAS on the question of exceptional circumstances shall be limited to a review of the materials before the Doping Review Board and to its determination. The CAS Panel will only interfere with the determination of the Doping Review Board if it is satisfied:*
 - a) *that no factual basis existed for the Doping Review Board’s determination;*
 - b) *the determination reached was significantly inconsistent with the previous body of cases considered by the Doping Review Board, which inconsistency cannot be justified by the facts of the case;*
 - c) *that the determination reached by the Doping Review Board was a determination that no reasonable review body could reach*”.
7. According to IAAF Rule 60.28, “*in all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Procedural Guidelines). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence*”.

8. The Panel is of the opinion that there is an inconsistency between the ample power to review granted to it under Article 16 of the CAS ad hoc Rules and the limited grounds for its review provided for in IAAF Rule 60.27. In the case at hand, this circumstance has no bearing on the Panel's decision. However, the Panel believes that CAS, which is bound by its own rules, has unrestricted authority to review the facts and the law. It is also noted that the limitation in the IAAF Rules of the scope of review by CAS is not in line with the WADA Code and, in particular, with the IAAF's commitment thereunder to "*incorporate (...) without any substantive changes*", *inter alia*, Article 13 (Appeals) of that Code. The Panel finds that it is competent and sufficiently informed to dispose of all claims brought by the Appellant in these proceedings.
9. The Appellant does not contest the occurrence of the doping infraction or the fact that nikethamide was detected in her body fluids, but she argues that exceptional circumstances exist that should allow her to have the sanction eliminated or reduced pursuant to IAAF Rules 40.2, 40.3 and 40.4.
10. The Appellant argues:
 - That the sanction imposed on her is so overtly wrong and violates every principle of fairness in sport. The Appellant claims that her suspension is the harshest punishment ever given to any athlete, in any sport, for a first time doping offence involving nikethamide. There was no finding by the IAAF Doping Review Board or the AAA Panel of intentional doping that would justify her receiving this harsh punishment.
 - That the IAAF's new fixed sanctions run counter to CAS precedents holding that punishment should be a function of the athlete's culpability. The Appellant states that her positive test is the unfortunate result of an isolated, inadvertent, unknowing, and unintentional ingestion of an innocuous food product at a non-competition track meet. Edwards claims that she should not receive the same sanction as an athlete who has admitted to intentional doping.
 - That she did not receive a fair review of her case because a member of the IAAF Doping Review Board was predisposed to rule against her.
 - That pursuant to IAAF Rule 60.27(a), the CAS could and should reverse the determination of the Doping Review Board because no factual basis existed for the IAAF Board's determination of no exceptional circumstances. The Doping Review Board did not explain and/or clarify what would constitute "Exceptional Circumstances".
 - That she acted reasonably in carrying out her duty to avoid ingesting a prohibited substance. It is also argued that glucose is a food and not a supplement or medication. Additionally, according to the Appellant, she had no reason to believe or suspect that Coramine Glucose was anything other than pure glucose.
 - That pursuant to IAAF Rule 60.27(a), the CAS could and should reverse the determination of the Doping Review Board because the decision reached by the IAAF Board was significantly inconsistent with the previous body of cases considered by the IAAF Doping Review Board, which inconsistency cannot be justified by the facts of the case.

- That pursuant to Rule 60.27(a), the CAS could and should reverse the determination of the IAAF Doping Review Board because the determination reached by the IAAF Board was a determination that no reasonable review body could reach.
- That the newly promulgated IAAF Rules are inequitable given that not all Olympic Movement sports athletes are currently subject to the same sanctions for the same type of doping offence.

11. The Appellant requests from this Panel:

- A decision that would allow her to retain the competition results she earned after the Martinique meeting, specifically the United States Olympic Trials results;
- A decision to have the two-year ineligibility sanction eliminated, or reduced to time already served under the provisional suspension, rendering her eligible to compete at the Athens Olympic Games;
- In the event the Panel grants the relief above, Edwards requests the Panel to issue any orders necessary for the IOC, IAAF, USOC, and/or USATF to grant her entry to compete in all events for which she is qualified to participate.
- Alternatively, Edwards requests her sanction be reduced in line to that imposed on other athletes similarly situated.

12. The Respondent argues:

- That the sanction imposed on Edwards is not overtly wrong and does not violate every principle of fairness in sport. Pursuant to IAAF Rule 34.1, the list of prohibited substances will be published and revised by WADA. This list is final and not subject to legal challenge (IAAF Rule 34.4). Nikethamide is on this list of prohibited substances and the appropriate sanction for a first violation is a two year period of ineligibility (IAAF Rule 40.1). Therefore, the sanction has legal basis and was properly applied in this case.
- That the IAAF's new fixed sanctions do not run counter to CAS precedent holding that punishment should be a function of the athlete's culpability. The Respondent submits that there are many CAS cases where the fixed sanction rule has been upheld. The Respondent argues that the sanction imposed on the Appellant is consistent with her culpability. The Respondent alleges that her doping offence was attributable to her negligence and that she was not without culpability.
- That Edwards did receive a fair review before an unbiased IAAF Doping Review Board. It refutes the allegation that Dr. Arne Ljungqvist had already prejudged her case. The comment from Dr. Ljungqvist were of a general nature about the interpretation of IAAF rules and were not specifically about Edwards' case.
- That there was ample factual basis for the Doping Review Board to reach its determination. The Doping Review Board did not disregard the findings of the AAA Panel. The AAA Panel is to refer the matter to the Doping Review Board if there are circumstances which, in the AAA Panel's view, may be exceptional. It is then the obligation of the Doping Review Board to determine if exceptional circumstances do

exist. Therefore, there is no inconsistency between the decision of the AAA Panel and the Doping Review Board.

- That the determination reached by the Doping Review Board is not inconsistent with the previous body of cases. This was the first case before the Doping Review Board under the new rules. Therefore, no inconsistency can exist.
- That the potential differences in sanctions between the IAAF and other sports federations is irrelevant. This athlete is governed by the IAAF Rules and it does not matter what happens in other sports.

13. The Respondent requests this Panel to uphold the 10 August 2004 AAA Panel Award.

14. The IAAF Anti-doping Rules of particular relevance to this case are the following:

Definitions

(...)

No fault or No Negligence

When exceptional circumstances have been determined in an athlete's case under Rule 38 to demonstrate that the athlete did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered a prohibited substance or prohibited method.

No Significant Fault or No Significant Negligence

When exceptional circumstances have been determined in an athlete's case under Rule 38 to demonstrate that the athlete's fault or negligence, when viewed in the totality of the circumstances, was not significant in relationship to the anti-doping rule violation.

(...)

RULE 32

Anti-Doping Rule Violations

1. *Doping is strictly forbidden under these Anti-Doping Rules.*
2. *Doping is defined as the occurrence of one or more of the following anti-doping rule violations:*
 - (a) *the presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluids.*

All references to a prohibited substance in these Anti-Doping Rules and the Procedural Guidelines shall include a reference, where applicable, to its metabolites or markers.

- (i) *it is each athlete's personal duty to ensure that no prohibited substance enters his body tissues or fluids. Athletes are warned that they are responsible for any prohibited substance found to be present in their bodies. It is not necessary that intent, fault, negligence or knowing use on an athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 32.2(a).*

- (ii) *except those prohibited substances for which a reporting threshold is specifically identified in the Prohibited List, the detected presence of any quantity of a prohibited substance in an athlete's sample shall constitute an anti-doping rule violation.*
- (iii) *as an exception to the general application of Rule 32.2(a), the Prohibited List may establish specific criteria for the evaluation of prohibited substances that can also be produced endogenously.*

(...)

RULE 38

Disciplinary Procedures

1. *Where it is asserted that an anti-doping rule violation has been committed under these Anti-Doping Rules, disciplinary procedures shall take place in the following three stages:*
 - (a) *provisional suspension;*
 - (b) *hearing;*
 - (c) *sanction or exoneration.*
- (...)

Hearing

5. *Every athlete shall have the right to request a hearing before the relevant tribunal of his National Federation before any sanction is determined in accordance with these Anti-Doping Rules. (...)*
- (...)
8. *The athlete's hearing shall take place before the relevant hearing body constituted or otherwise authorised by the Member. The relevant hearing body shall be fair and impartial and the conduct of the hearing shall respect the following principles: the right of the athlete to be present at the hearing and to present evidence, including the right to call and question witnesses, the right to be represented by legal counsel and an interpreter (at the athlete's expense) and a timely and reasoned decision in writing.*
 9. *At the hearing of the athlete's case, the relevant tribunal shall consider first whether or not an anti-doping rule violation has been committed. The Member or other prosecuting authority shall have the burden of proving the anti-doping rule violation to the comfortable satisfaction of the tribunal (see Rule 33.2 above).*
 10. *If the relevant tribunal of the Member considers that an anti-doping rule violation has not been committed, this decision shall be notified to the IAAF Anti-Doping Administrator in writing within 5 working days of the decision being made (together with a copy of the written reasons for such decision). The case shall then be reviewed by the Doping Review Board which shall decide whether or not it should be referred to arbitration before CAS pursuant to Rule 60.23 below. If the Doping Review Board does so decide, it may at the same time re-impose, where appropriate, the athlete's provisional suspension pending resolution of the appeal by CAS.*
 11. *If the relevant tribunal of the Member considers that an anti-doping rule violation has been committed, prior to the imposition of any period of ineligibility, the athlete shall have the opportunity to establish that there are exceptional circumstances in his case justifying a reduction of the sanction otherwise applicable under Rule 40.1 below.*

Exceptional Circumstances

12. *All decisions taken under these Anti-Doping Rules regarding exceptional circumstances must be harmonised so that the same legal conditions can be guaranteed for all athletes, regardless of their nationality, domicile, level or experience. Consequently, in considering the question of exceptional circumstances, the following principles shall be applied:*
 - (i) *it is each athlete's personal duty to ensure that no prohibited substance enters his body tissues or fluids. Athletes are warned that they shall be held responsible for any prohibited substance found to be present in their bodies (see Rule 32.2(a)(i) above).*
 - (ii) *exceptional circumstances will exist only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*
 - (iii) *the following will not be regarded as cases which are exceptional: an allegation that the prohibited substance or prohibited method was given to an athlete by another person without his knowledge, an allegation that the prohibited substance was taken by mistake, an allegation that the prohibited substance was due to the taking of contaminated food supplements or an allegation that medication was prescribed by athlete support personnel in ignorance of the fact that it contained a prohibited substance.*
 - (iv) *exceptional circumstances may however exist where an athlete has provided substantial evidence or assistance to the IAAF, his National Federation or other relevant body which has resulted in the IAAF, his National Federation or other relevant body discovering or establishing an anti-doping rule violation by another person involving possession (under Rule 32.2(f)), trafficking (under Rule 32.2(g)) or administration to an athlete (under Rule 32.2(h)).*
13. *The determination of exceptional circumstances in cases involving International-Level athletes and in cases arising from an International Competition shall be made by the Doping Review Board (see Rule 38.17 below).*
14. *If an athlete seeks to establish that there are exceptional circumstances in his case, the relevant tribunal shall consider, based on the evidence presented, and with strict regard to the principles set out in Rule 38.12 above, whether, in its view, the circumstances in the athlete's case may be exceptional.*
15. *If, having examined the evidence presented, the relevant tribunal considers that there are no exceptional circumstances in the athlete's case, it shall impose the sanction prescribed in Rule 40.1 below. The Member shall notify the IAAF and the athlete in writing of the relevant tribunal's decision, within 5 working days of the decision being made.*
16. *If, having examined the evidence presented, the relevant tribunal considers that there are circumstances in the athlete's case which may be exceptional, if the case involves an International-Level athlete or arises from an International Competition, it shall:*
 - (a) *refer the matter to the Doping Review Board (via the General Secretary), together with all material and/or evidence which, in its view, demonstrates the exceptional nature of the circumstances; and*
 - (b) *invite the athlete and/or his National Federation to support the referral of the relevant tribunal or to make independent submissions in support of such referral; and*
 - (c) *adjourn the hearing of the athlete's case pending the Doping Review Board's determination on exceptional circumstances.*

The athlete's provisional suspension shall remain in place pending the receipt of the Doping Review Board's determination on exceptional circumstances.

17. *Upon receipt of a reference from the relevant tribunal, the Doping Review Board shall examine the question of exceptional circumstances only, on the basis of the written materials which have been submitted to it. The Doping Review Board shall have the power:*
 - (a) *to exchange views on the matter by e-mail, telephone, facsimile or in person;*
 - (b) *to call for further evidence or documents;*
 - (c) *to call for any further explanation from the athlete;*
 - (d) *if necessary, to request the attendance of the athlete before it.*

Based on a review of the written materials submitted to it, including any further evidence or documents, or further explanation provided by the athlete, the Doping Review Board, having strict regard to the principles set out in Rule 38.12 above, shall make a determination on whether there are exceptional circumstances in the case and, if so, into which category they fall, i.e., whether the exceptional circumstances demonstrate no fault or no negligence on the athlete's part (see Rule 40.2 below) or no significant fault or no significant negligence on the athlete's part (see Rule 40.3 below) or substantial evidence or assistance by the athlete resulting in discovering or establishing an anti-doping rule violation by another person (see Rule 40.4 below). This determination shall be conveyed to the Member in writing by the General Secretary.

18. *If the Doping Review Board's determination is that there are no exceptional circumstances in the case, the determination shall be binding on the relevant tribunal, which shall impose the sanction prescribed in Rule 40.1 below. The Member shall notify the IAAF and the athlete in writing of the relevant tribunal's decision, which shall incorporate the Doping Review Board's determination, within 5 working days of the decision being made.*
19. *If the Doping Review Board's determination is that there are exceptional circumstances in the case, the relevant tribunal shall decide the athlete's sanction in accordance with Rule 40.2, 40.3 or 40.4 below, consistent with the Doping Review Board's categorisation of the exceptional circumstances in Rule 38.17 above. The Member shall notify the IAAF and the athlete of the relevant tribunal's decision in writing, within 5 working days of the decision being made.*
20. *The athlete shall have the right to seek a review of the Doping Review Board's determination on exceptional circumstances to CAS, either as part of an appeal against the decision of the Member in accordance with Rule 60.10(a) below or pursuant to Rule 60.10(b) below. In all cases, the standard of review of the Doping Review Board's determination on the question of exceptional circumstances shall be as set out in Rule 60.27 below.*
21. *In cases which do not involve International-Level athletes or do not arise from an International Competition, the relevant tribunal shall consider, having strict regard to the principles set out in Rule 38.12 above, whether there are exceptional circumstances in the athlete's case and decide upon the athlete's sanction accordingly. The Member shall notify the IAAF and the athlete of the relevant tribunal's decision in writing, within 5 working days of the decision being made. If the relevant tribunal concludes that there are exceptional circumstances in an athlete's case, it shall set out the full factual basis for such conclusion as part of its written decision.*

RULE 40

Sanctions against Individuals

1. *If any person commits an anti-doping rule violation under these Anti-Doping Rules, he shall be subject to the following sanctions:*
 - (a) *for a violation under Rules 32.2(a),(b) or (f) (prohibited substances and prohibited methods), except where the prohibited substance is a specified substance in a case under Rule 40.5 below, or Rule 32.2(i) (competing whilst suspended or ineligible):*
 - (i) *first violation: for a minimum period of two years' ineligibility.*
 - (ii) *second violation: ineligibility for life*
 - (...)

Elimination, reduction or replacement of ineligibility period

2. *If, in a case involving an anti-doping rule violation under:*
 - (a) *Rule 32.2(a) (presence of a prohibited substance); or*
 - (b) *Rule 32.2(b) (use of a prohibited substance or prohibited method);*

the relevant tribunal of the Member decides (where applicable, having referred the matter to the Doping Review Board for its determination under Rule 38.16 above) that there are exceptional circumstances in the case such that the athlete or other person bears no fault or negligence for the violation, the otherwise applicable period of ineligibility under Rule 40.1(a) shall be eliminated. When a prohibited substance is detected in an athlete's sample in violation of Rule 32.2(a) (presence of a prohibited substance), the athlete must establish how the prohibited substance entered his system in order to have his period of ineligibility eliminated.

In the event that this Rule is applied and the period of ineligibility otherwise applicable under Rule 40.1(a) is eliminated, the antidoping rule violation shall not be considered a violation for the limited purpose of determining the period of ineligibility for multiple violations under Rules 40.1(a)-(c) above and Rules 40.5 and 40.6-8 below.

3. *If, in a case involving an anti-doping rule violation under:*
 - (a) *Rule 32.2(a) (presence of a prohibited substance);*
 - (b) *Rule 32.2(b) (use of a prohibited substance or prohibited method);*
 - (c) *Rule 32.2(c) (refusal or failure to submit to doping control);*
 - (d) *Rule 32.2(h) (administration of a prohibited substance or prohibited method); or*
 - (e) *Rule 32.2(i) (competing whilst suspended or ineligible)*

the relevant tribunal of the Member decides (where applicable, having referred the matter to the Doping Review Board for its determination under Rule 38.16 above) that there are exceptional circumstances such that the athlete or other person bears no significant fault or no significant negligence for the violation, the period of ineligibility may be reduced but the reduced period may not be less than half the minimum period of ineligibility otherwise applicable. If the otherwise applicable period is a lifetime, the reduced period under this Rule may be no less than 8 years. When a prohibited substance is detected in an athlete's sample in violation of Rule 32.2(a) (presence of a prohibited substance), the athlete must establish how the prohibited substance entered his system in order to have his period of ineligibility reduced.

4. *The relevant tribunal of the Member may also decide (where applicable, having referred the matter to the Doping Review Board for its determination under Rule 38.16 above) to reduce the period of ineligibility in an individual case on account of exceptional circumstances because the athlete or other person has provided substantial evidence or assistance to the IAAF, his National Federation or other relevant body which has resulted in the IAAF, National Federation or other relevant body discovering or establishing an anti-doping rule violation by another person involving possession (under Rule 32.2(f)), trafficking (under Rule 32.2(g)) or administration to an athlete (under Rule 32.2(h)). The reduced period may not, however, be less than half the minimum period of ineligibility otherwise applicable. If the otherwise applicable period is a lifetime, the reduced period under this Rule may be no less than 8 years.*

RULE 60

Disputes

Appeals

9. *All decisions subject to appeal under these Rules, whether doping or non-doping related, may be appealed to CAS in accordance with the provisions set out below. All such decisions shall remain in effect while under appeal, unless determined otherwise (see Rules 60.23-24 below).*
10. *The following are examples of decisions that may be subject to appeal under these Rules:*
- (a) *Where a Member has taken a decision that an athlete, athlete support personnel or other person has committed an antidoping rule violation.*
 - (b) *Where an athlete accepts a Member's decision that he has committed an anti-doping rule violation but seeks a review of the Doping Review Board's determination under Rule 38.18 that there are no exceptional circumstances in the case justifying a reduction of the period of ineligibility to be served.*
 - (c) *Where a Member has taken a decision that an athlete, athlete support personnel or other person has not committed an antidoping rule violation.*
 - (d) *Where testing has indicated the presence of a prohibited substance or the use of a prohibited method and, contrary to Rule 38.7, the Member has refused or failed to provide the athlete with a hearing within the relevant time period.*
 - (e) *Where the IAAF has taken a decision to deny an International-Level athlete a TUE under Rule 34.5(a).*
 - (f) *Where the IAAF has issued a sanction against a Member for a breach of the Rules.*
 - (g) *Where a Member has taken a decision that an athlete, athlete support personnel or other person has not committed a breach of Rule 22.*
11. *In cases involving International-Level athletes (or their athlete support personnel) or arising from an International Competition, or involving the sanction of a Member by the Council for a breach of the Rules, whether doping or non-doping related, the decision of the relevant body of the Member or the IAAF (as appropriate) may be appealed exclusively to CAS in accordance with the provisions set out in Rules 60.25 - 60.30 below.*

The CAS Appeal

25. *Unless the Council determines otherwise, the appellant shall have 60 days from the date of communication of the written reasons of the decision to be appealed in which to file his statement of appeal with CAS. Within ten days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within thirty days of receipt of the appeal brief, the respondent shall file his answer with CAS.*
 26. *All appeals before CAS (save as set out in Rule 60.27 below) shall take the form of a re-hearing de novo of the issues raised by the case and the CAS Panel shall be able to substitute its decision for the decision of the relevant tribunal of the Member or the IAAF where it considers the decision of the relevant tribunal of the Member or the IAAF to be erroneous or procedurally unsound.*
 27. *Where the appeal to CAS in a doping-related case is made pursuant to Rule 60.10(b), or is pursuant to Rule 60.10(a) and the athlete seeks as part of the appeal a review of the Doping Review Board's determination on exceptional circumstances, the hearing before CAS on the question of exceptional circumstances shall be limited to a review of the materials before the Doping Review Board and to its determination. The CAS Panel will only interfere with the determination of the Doping Review Board if it is satisfied:*
 - (a) *that no factual basis existed for the Doping Review Board's determination; or*
 - (b) *the determination reached was significantly inconsistent with the previous body of cases considered by the Doping Review Board, which inconsistency cannot be justified by the facts of the case; or*
 - (c) *that the determination reached by the Doping Review Board was a determination that no reasonable review body could reach.*
 28. *In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Procedural Guidelines). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence.*
 29. *In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise.*
 30. *The CAS Panel may in appropriate cases award a party its costs, or a contribution to its costs, incurred in the CAS appeal.*
 31. *The decision of CAS shall be final and binding on all parties, and on all Members, and no right of appeal will lie from the CAS decision. The CAS decision shall have immediate effect and all Members shall take all necessary action to ensure that it is effective. The fact of the referral to CAS and the CAS decision shall be set out in the next notice to be sent by the General Secretary to all Members.*
15. In her letter of 25 May 2004, Edwards provided a written explanation of why her urine sample from the Martinique meet of 24 April 2004 tested positive for salbutamol and nikethamide. She stated that the presence of salbutamol in her sample came from her asthma medication. Regarding nikethamide, Edwards stated the following:
- "The appearance of nikethamide in my Martinique sample was a shock to me. Before this matter, I didn't know what nikethamide was since I had never heard of it.*

On the date of the Martinique meeting, I ate food from the hotel restaurant, drank bottled water provided by the meet, and used my asthma medication. Glucose was the only other substance I ingested. The glucose, it turns out, is the apparent source of the nikethamide.

The glucose I ingested was purchased by Chris Vincent, a licensed chiropractor who I have used as a physical therapist for the last two years. I know that he can and does review the ingredients of over the counter medications before I take them. I used him as a back up to my typical personal review of ingredients. Chris carries in his bag the list of prohibited substances for reviewing ingredients of over the counter medicinal products. For example, when I needed a decongestant, he wouldn't let me take it until he himself had checked the list, asked the on-site doctor, called USADA, called the Olympic Training Center, and finally got an approval.

In Martinique, before the meeting, I asked Chris if he had any glucose with him. He had a powdered form of glucose that he had purchased four months earlier and had been used by other athletes. Because of the potential for contamination by other athletes, I asked him to purchase new glucose. He purchased it from a tourist shop that provided toiletries and travel items. I took two tablets of the glucose Chris had purchased not knowing that the name "coramine" had any significance. I know a B sample test would confirm the existence of only trace amounts of nikethamide associated with the two glucose tablets. Enclosed is a photocopy of the packets which show the name "Coramine Glucose" and a letter from Chris Vincent, D.C."

These are the facts as stated by the Appellant.

16. Edwards did not contest or dispute before the IAAF Doping Review Board, the AAA Panel or the CAS that she had committed an anti-doping rule violation pursuant to IAAF Rule 32.2 (a). Edwards submitted that the facts of the case established that there were "exceptional circumstances" which justified a reduction or elimination of the period of ineligibility resulting from her Anti-doping Rule violation.
17. It is important to recognize how the question of "exceptional circumstances" arises in the course of the disciplinary procedures under the IAAF Rules. Under Rule 38.1, the procedures take place in three stages, namely a provisional suspension followed by a hearing and then a sanction or exoneration.
18. The athlete's hearing pursuant to Rule 38.8 takes place before the relevant hearing body in this case the AAA Panel. The IAAF rules require that "*the relevant hearing body shall be fair and impartial and the conduct of a hearing shall respect the following principles: the right of the athlete to be present at the hearing and to present evidence, including the right to call and question witnesses, the right to be represented by legal counsel and (...) a timely and reasoned decision in writing*". If during the hearing, the athlete seeks to establish that there are exceptional circumstances then the relevant tribunal is required to consider, based on the evidence presented and "with strict regard" to the principles relating to exceptional circumstances set out in Rule 38.12, whether in the tribunal's view the circumstances in the athlete's case "may" be exceptional. This is what occurred in the present case. The AAA Panel found that there may be exceptional circumstances but under the IAAF Rules, the AAA Panel was not empowered to make a determination on this question. Having decided that there "may" be exceptional circumstances, the AAA Panel was required under Rule 38.16 to adjourn the hearing of the athlete's case and to refer the matter to the Doping Review Board via the General Secretary.

19. The Doping Review Board under Rule 31.8 of the IAAF Rules, is appointed as a sub-commission of the Council under Article 6.11[j] of the Constitution of the IAAF with the task of deciding whether exceptional circumstances exist. Article 6.11(j) of the Constitution states that the Council has power “to establish any Commission or sub-Commission, whether on an ad hoc or permanent basis, that it deems to be necessary for the proper functioning of the IAAF”. The IAAF submitted that no other body including the relevant hearing body or CAS is empowered to make a decision as to the existence of exceptional circumstances.
20. As can be seen from the IAAF Rules set out above, the exceptional circumstances provisions can only apply either when there is “no fault or no negligence”, as defined, in which case the athlete may have the period or ineligibility “eliminated” pursuant to Rule 40.2. Alternatively, if the athlete can demonstrate that there is “no significant fault or no significant negligence”, as defined, then the period of ineligibility may be reduced but the reduced period may not be less than half the minimum period of ineligibility otherwise applicable pursuant to Rule 40.3.
21. After the Doping Review Board has made a decision (as it did in the present case), that there are no exceptional circumstances, this determination “shall be binding” on the AAA Panel and the AAA Panel is obliged to “impose” the sanction accordingly. Even though a relevant hearing body such as the AAA Panel may have a different view on whether or not the circumstances are exceptional to that formed by the Doping Review Board, it has no power to make any decision other than to “incorporate the Doping Review Board’s determination”.
22. In relation to the particular facts of the present case, the Panel has regard to all of the submissions and materials put forward on behalf of Edwards. Having heard from Edwards personally, the Panel is satisfied that she has conducted herself with honesty, integrity and character and that she has not sought to gain any improper advantage or to “cheat” in any way. The evidence demonstrates that she has been a diligent and hard working athlete who had gradually reached the pinnacle in her chosen sport. She had purchased glucose tablets in stores in the past. Usually she went to a “Wal-Mart” or “Target” store but she did not necessarily buy the same brand name all the time. She did not understand that glucose was for medical use but understood it to be a food source.
23. On this occasion, when being presented by her chiropractor with a sachet of glucose tablets, it was argued that it was reasonable for her to accept that she was about to ingest a brand name glucose product. However, this product which was not available for purchase in the athlete’s own country, had been purchased in a foreign country earlier that day and no one had examined the packet or the leaflet which accompanied the sachet in the packet. It is obvious from an examination of the packaging and the leaflet that the product contains more than glucose. The leaflet specifically draws attention to its composition containing more than glucose. The leaflet states that the composition is:

“Composition quantitative:

Nicéthamide 125,00mg

glucose monohydrate 1500,00mg

Pour un comprimé de 4,5 g”.

24. In addition, the leaflet draws attention to those involved in sport in the following way:
“Sportifs: attention, cette spécialité contient un principe actif pouvant induire une réaction positive des tests pratiqués lors de contrôles antidopage”.
(The Panel’s free translation: *“Athletes: Caution, this product contains an active principle which can result in a positive test in case of an anti-doping control”*).
25. The Panel agrees with the finding of the Doping Review Board that it would have been *“clear to any person reviewing the tablets that there was more than one ingredient in the tablets”* and that there was negligence in not ascertaining that no prohibited substance was present within the tablets before they were ingested. In the circumstances of purchasing a product in a foreign country in this packaging, more steps could and, in fact, should have been taken. There is an obligation and a duty on an elite athlete to ensure that no prohibited substance enters his/her body, tissues or fluid. On balance, the Panel finds that there was negligence in failing to inquire or ascertain whether the product contained a prohibited substance.
26. In the Panel’s view, the Appellant herself has been negligent in not paying attention to the obvious fact that the tablets contain two different substances. In fact, the sachets of the individual tablets given to her state: *“0,125 g/1,5 g”* without specifying what substances these numbers refer to. This fact alone should have alerted the Appellant. In addition, and more importantly, the Appellant’s chiropractor had access to the box of *“Coramine Glucose”* which stated the substances contained in the tablet (including nikethamide) and to the leaflet which even contained a warning for athletes (see above). To ignore these facts was at a minimum negligence on the part of the chiropractor and such a negligence must be attributed to the athlete who uses him in supplying the athlete either a food source or a supplement. It would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/herself did not know of that substance.
27. The Panel is of the view that this case provides an example of the harshness of the operation of the IAAF Rules relating to the imposition of a mandatory two-year sanction. If the breach had occurred at a IAAF Meet some two months earlier, the Panel was informed that it would have resulted in only a public warning under the IAAF Rules then in force. But it will now, as a result of the IAAF Rule which entered into force on 1 March 2004, result in a two-year period of ineligibility.
28. The Panel notes the submission of the IAAF that the *“schemata of the rules is intended to narrow those cases of exceptional circumstances”*. The Panel agrees with the written submissions of USADA that *“regrettably, the circumstances [of this case] do not appear to make the threshold for the sort of rare and ‘truly exceptional’ facts necessary for a reduction of the minimum sanction applicable for a doping offence”*. The harshness of the IAAF Rules was also implicitly recognized by USADA when it submitted that circumstances *“such as a misunderstanding of the contents of a supplement or medicine or bad advice received from a coach, doctor or athlete, support personnel will rarely if ever, justify a reduction of a doping sanction”* (our emphasis).

29. During the hearing it was urged by the IAAF that the Panel should adopt a “*purposive wording of the rules*”. It was necessary to use a purposive approach to the construction of the rules because there appears to be what the IAAF described as “*a printing error*” in Rule 38.12 (iii). This sub-rule contains the principles which shall be applied in determining whether exceptional circumstances may exist. The AAA Panel was required to have “*strict regard*” to these principles under the obligation imposed in Rule 38.14.
30. Rule 38.12(iii) states that “*the following will not be regarded as cases which are exceptional: an allegation that the prohibited substance (...) was given to an athlete by another person without his knowledge (...)*” (our emphasis). This and the other examples set out in this rule which follow are stated as not being capable of constituting exceptional circumstances. This Rule appears to be inconsistent with other Rules such as Rule 40.2 and Rule 40.3 which would allow such circumstances to be exceptional
31. However, it was submitted that this Rule could be harmonized by the insertion of the word “normally” between the words “not” and “be” in Rule 38.12. Thus it was submitted that a case may not normally be regarded as exceptional under Rule 38.12 but if the Doping Review Board exercising its powers under Rule 40 decides that there are exceptional circumstances in the case, such that the athlete or other person bears no fault or negligence/no significant fault or significant negligence for the violation and also establishes how the prohibited substance entered her system, then there may be an elimination or reduction in the eligibility period.
32. The Panel notes with unease that the IAAF Rules are unclear and that they make it almost impossible to establish that there are exceptional circumstances.
33. The Doping Review Board in this case comprised the IAAF President, IAAF Senior Vice-President and IAAF Council member, and their decision could not be reconsidered, reviewed or reassessed in any way by the AAA Panel which was required under the IAAF Rules to adopt it. The athlete brought her appeal to CAS in the belief that she would receive a full and fair hearing of her appeal.
34. On the hearing of the appeal, both the athlete and the IAAF presented the evidence which was before the Doping Review Board and supplemented that evidence by oral evidence from Edwards and from Prof. Ljungqvist. In addition, both parties placed documents before the Panel including the form completed by Edwards on the occasion of her drug test. In these circumstances the Panel was in a position to consider all of the material as if it were providing a full hearing pursuant to the Code of Sports-related Arbitration and in particular Article 16 of the CAS ad hoc Rules. Under this article, the Panel shall have full power to establish the facts. This is the generally accepted full and fair hearing that athletes and federations have before CAS. Having heard such an appeal, the Panel is of the view that the appeal should be dismissed.
35. The IAAF, in its submissions, relied upon in particular Rule 60.27 which states in part that “*the hearing before CAS on the question of exceptional circumstances shall be limited to a review of the materials before the Doping Review Board and to its determination*”. The Panel, on this appeal, was placed in a position by the parties of receiving supplementary material and in this regard was not so limited.

36. The IAAF also relied on that part of Rule 60.27 which states that:

“The CAS Panel will only interfere with the determination of the Doping Review Board if it is satisfied:

- a) that no factual basis exists for the Doping Review Board determination ; or*
- b) the determination reached was significantly inconsistent with the previous body of cases considered by the Doping Review Board, which inconsistency cannot be justified by the facts or the case; or*
- c) that the determination reached by the Doping Review Board was a determination that no reasonable review body could reach”.*

37. Notwithstanding the limitation in IAAF Rule 60.27, the Panel has considered, and was entitled to consider (see 8 and 31 above), the materials before the Doping Review Board, its decision and the submissions and additional evidence placed by the parties before the Panel to determine whether or not the decision under appeal was correct. It is satisfied that the determination of the Doping Review Board is the correct decision according to the terms of the IAAF Rules.

38. In the Appellant’s written brief to the Panel there were seven grounds of appeal.

1. The sanction imposed on Ms Edwards so overtly wrong and violates every principle of fairness in sport.

The Panel finds that there was negligence on the part of Ms Edwards and also negligence on the part of support personnel employed by her. In those circumstances a two-year sanction which is the uniform standard sanction imposed by the WADA Code does not violate principles of fairness in sport even though it may appear to be harsh.

2. The IAAF’s new fixed sanctions run counter to CAS precedents holding that punishment should be a function of the athlete’s culpability.

The parties placed various CAS decisions before the Panel showing that the sanction may vary according to the particular applicable rules and the circumstances of each case. The IAAF has adopted the WADA Code and its objective of a uniform standard of sanctions. It was adopted by the IAAF at the 44th IAAF Congress in Paris on 20 August 2003. The Congress decided to accept the World Anti-doping Code as a basis for the fight against doping. In these circumstances, this argument is rejected.

3. Ms Edwards did not receive a fair review of her case because a member of the IAAF Doping Review Board was predisposed to rule against her.

A copy of an article by Philip Hersh from the Chicago Tribune dated 18 July 2004 was placed before the Panel. In the article, Prof. Ljungqvist is quoted as saying the following “*«It is no excuse to say something got in the body unknowingly», Ljungqvist said*”. Prof Ljungqvist gave evidence that he had an interview with a journalist and stated what the Rules of the IAAF provided in the terms which have been quoted. He stated that he did not express any opinion on Ms Edwards’ case as this was something he was not familiar with and was taking place in another country. The Panel accepts the evidence of Prof. Ljungqvist and, in so far as the journalist has drawn conclusions elsewhere in the publication, finds that these are not an accurate statement of what was said by Prof. Ljungqvist. The Panel finds that there was no prejudging of her case by the Doping Review Board and finds that there

was no predisposition to rule against her and that her case was considered on the merits in accordance with the strictness of the IAAF Rules relating to exceptional circumstances. In any event, the Appellant had the benefit of full hearing before CAS.

4. Pursuant to IAAF Rule 60.27(a), the CAS tribunal could and should reverse the determination of the IAAF Board because no factual basis existed for the IAAF Board's determination of no exceptional circumstances.

The Panel finds that there was a factual basis for the determination.

5. Pursuant to IAAF Rule 60.27(b), the CAS tribunal could and should reverse the determination of the IAAF Board because the decision reached by the IAAF Board was significantly inconsistent with the previous body of cases considered by the IAAF Board which inconsistency cannot be justified by the facts of the case.

Both parties placed case law before the Panel. These cases showed a variety of sanctions. They did not establish that the decision of the AAA Panel and the Doping Review Board was significantly inconsistent with any other case or body of cases.

6. Pursuant to IAAF Rule 60.27(c), the CAS tribunal could and should reverse the determination of the IAAF Board because the determination reached by the IAAF Board was a determination that no reasonable review body could reach.

As mentioned above the Panel has considered all of the evidence and submissions of the parties both before the Doping Review Board and at the hearing before the Panel and agrees with the determination reached by the Doping Review Board.

7. The application of the newly promulgated IAAF rules is inequitable given that not all Olympic Movement sports athletes are currently subject to the same sanction for the same type of doping offence.

The Appellant submitted that until all Federations have implemented the WADA Code, equity justifies a sanction pursuant to the IAAF Rules in effect prior to the IAAF's implementation of the WADA Code on 1 March 2004. The Panel would regard this as a retrograde step and accepts that in the fight against doping in sport, federations should be supported in their adoption of the World Anti-Doping Code.

On the basis of the foregoing facts and legal aspects, the ad hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The appeal by Ms Edwards is dismissed.
2. The decision issued by the North American Court of Arbitration for Sport Panel dated 10 August 2004 is upheld.