



Arbitration CAS ad hoc Division (OG Athens) 04/004 David Munyasia v. International Olympic Committee (IOC), award of 15 August 2004

Panel: Prof. Richard McLaren (Canada), President; Mrs Maidie Oliveau (USA); Prof. Jin Huang (China)

Boxing

Doping (cathine)

Jurisdiction of the CAS ad hoc Division in case of exclusion from the Olympic Games and withdrawal of the Olympic accreditation

If an appeal is lodged against a decision of exclusion from the Olympic Games and withdrawal of the Olympic accreditation, the jurisdiction of the CAS ad hoc Division is to confirm or reverse the decision of the IOC Executive Board. Any submission regarding deferral of the decision until further analysis of the urine had been undertaken and the implications thereof must be made before the International Federation within whose competence it is to further sanction or not sanction the athlete.

This is an appeal by the Applicant, Mr. David Munyasia (“Munyasia”), an athlete member of the Kenya Olympic Team in the sport of boxing, against the decision of the Respondent, the International Olympic Committee (IOC) made by its Executive Board (“EB”). The EB on 10 August 2004 excluded Munyasia from the Games of the XXVIII Olympiad in Athens in 2004 and withdrew his Olympic accreditation because of a doping offense pursuant to Article 2.1 of “*IOC Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in 2004*” (the “Rules”).

On Friday 6 August 2004, in Athens, Munyasia provided a urine sample for a doping control. The World Anti-Doping Agency (WADA) reported through its WADA Accredited Laboratory (the “Lab” in Athens, Greece) on 8 August 2004 that it had found an adverse analytical finding on an “A” sample collected on Friday 6 August 2004 in Athens. Dr. Patrick Schamasch in his capacity as representative of the chairman of the IOC Medical Commission was informed by the WADA Lab of the analytical positive.

Dr. Schamasch decoded the sample pursuant to Article 7.2.1 of the Rules and determined the athlete to be Munyasia. Following the necessary verifications that there was in fact an adverse analytical finding and that there had been no departures from the International Standards for Testing or the International Standards for Laboratories, he determined the validity of the adverse analytical finding.

Under Article 7.2.3 of the Rules, Dr. Schamasch informed the IOC President, Dr. Jacques Rogge of the finding. Dr. Rogge in turn under Article 7.2.4 of the Rules established a Disciplinary Commission.

The Disciplinary Commission held a hearing on 9 August 2004 in the presence of Munyasia and the Chef de Mission of the Kenyan National Olympic Committee (NOC). Also present were the Association Internationale de Boxe (AIBA) and Dr. Schamasch and Mr. Howard Stupp, IOC Director of Legal Affairs.

The Disciplinary Commission found that Munyasia had a concentration of cathine above the permitted threshold of 5 micrograms per millilitre (mgr/mL). It further found that a doping offense had occurred pursuant to Article 2.1 of the Rules. Therefore, the Disciplinary Commission recommended to the IOC Executive Board the action that is now under appeal.

In his appeal application Munyasia asserts that the cathine found in his urine analysis was in it through a mistake or by taking something unknowingly. He then listed six drinks and four food substances taken within the 24 hours previous to the urine sample. He asserts that during his career as a boxer he has never thought of using any substance to enhance his performance. He asserts that he was tested at the Commonwealth Games in Manchester, England in 2002 and there was no adverse analytical finding. He has also cleared prior WADA doping controls.

The appeal document also asserts that a boil on the athlete's right thigh may have contributed to the finding because of the antibiotics given to him in Cuba where he was training at the time.

Finally the appeal document requests that the "sealed sample" be taken to another laboratory for independent analysis. At the hearing, the representative of the Applicant sought deferral of the decision of the Panel until further analysis of the urine had been undertaken.

The Applicant elected not to be present at the CAS ad hoc Division (Athens, Greece) hearing nor did he attend by telephone. Upon convening the hearing at 10:00am on 15 August 2004 there was no objection to the jurisdiction or composition of the Panel. Present and representing the Applicant was Mr. Francis Hiram Wachira Ndegwa (Boxing team leader) and Mr. Carrard and Mr. Stupp for the IOC. Also present were Jorge Ibarrola, Counsel to the CAS and clerk to the Court. In attendance as well were two CAS volunteer researchers Julie Duranceau and Andreas Zagklis.

LAW

1. These proceedings are governed by 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 ("PIL Act"). The PIL Act applies to this arbitration as a result of the express choice of law contained in Article 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 Article 7 of the CAS ad hoc Rules.

2. The jurisdiction of the CAS ad hoc Division of the Court of Arbitration for Sport (Athens, Greece) arises out of the entry form signed by each and every participant in the Olympic Games as well as out of Rule 74 of the Olympic Charter.
3. The appeal described in paragraph 1.1 arose within the period of the CAS Ad Hoc Division jurisdiction as required by Article 1 of the CAS ad hoc Rules. Under Article 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*”.
4. According to Article 16 of the CAS ad hoc Rules, the Panel has “*full power to establish the facts on which the application is based*”.
5. Articles 2.1 and 8.2 of the IOC Anti-Doping Rules provide:
 - 2.1 *The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s bodily Specimen*
 - 2.1.1 *It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping violation under Article 2.1.*
 - 2.1.2 *Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample shall constitute an anti-doping rule violation.*
 - 2.1.3 *As an exception to the general rule of Article 2.1, the Prohibited List may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.*
 - 8.2 *Ineligibility:*

Should an Athlete be guilty of an anti-doping rule violation before he has actually participated in a Competition at the Olympic Games or, in the case where an Athlete has already participated in a Competition at the Olympic Games but is scheduled to participate in additional Competitions at the Olympic Games, the IOC may declare the Athlete ineligible for such Competitions at the Olympic Games in which he has not yet participated, along with other sanctions which may follow, such as exclusion of the Athlete and other persons concerned from the Olympic Games and the loss of accreditation. In addition, the IOC may declare the Athlete, as well as other persons concerned, ineligible for editions of the Games of the Olympiad and the Olympic Winter Games subsequent to the Olympic Games.

6. Rule 25 of the Olympic Charter provides:

2.2 *In the context of the Olympic Games:*

2.2.1 *with regard to individual competitors and teams: temporary or permanent ineligibility or exclusion from the Olympic Games, disqualification or withdrawal of accreditation; in the case of disqualification or exclusion, the medals and diplomas obtained in relation to the applicable infringement of the Olympic Charter shall be returned to the IOC. In addition, at the discretion of the IOC Executive Board, a competitor or a team may lose the benefit of any ranking obtained in relation to other events at the Olympic Games at which he or it was disqualified or excluded; in such case the medals and diplomas won by him or it shall be returned to the IOC (Executive Board).*

7. It is admitted that the urine sample which was analysed was that of the Applicant. The presence of cathine in the Applicant's urine is unchallenged in this proceeding. Therefore, there was a prohibited substance in the Applicant's bodily specimen. Article 2.1.1 of the Rules makes it an "*Athlete's personal duty to ensure that no prohibited substance enters his or her body*". The Panel finds that a doping offense has been established.
8. The testimony of Dr. Schamasch at the hearing established that the drinks and food substances referred to in the application to CAS are not a contributing factor or explanation concerning the adverse analytical result. It was further established that any kidney infection that the Applicant had several years before would delay excretion of urine but not affect the concentration of cathine excreted.
9. The Panel cannot accept the request for deferral of this decision. The jurisdiction of the Panel is to confirm or reverse the decision of the IOC Executive Board. Any submission regarding further Lab analysis and the implications thereof are properly made before the AIBA within whose competence it is to further sanction or not sanction the Applicant.
10. This Panel confirms the decision of the IOC Executive Board to exclude the Applicant from the Games of the XXVIII Olympiad in Athens in 2004. It also confirms the legal authority to have the Applicant's Identity and Accreditation Card immediately withdrawn.

The CAS ad hoc Division rules:

The Application is rejected and the decision of the IOC Executive Board is confirmed.