



Arbitration CAS anti-doping Division (OG Rio) AD 16/001 Pavel Sozykin & Russian Yachting Federation (RYF) v. World Sailing (WS) & International Olympic Committee (IOC), award of 14 August 2016

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mrs Tricia Kavanagh (Australia); Justice Hugh Fraser (Canada)

Sailing

Decision of an International Federation to reject the entry of an athlete for the Olympic Games

Jurisdiction of the CAS anti-doping Division

Transfer to the competent jurisdiction

1. It is a *sine qua non* of the jurisdiction of the CAS anti-doping Division (ADD) that an alleged anti-doping rule violation (ADRV) has been asserted and referred to it under the IOC anti-doping regulations (ADR). A decision that simply states conditions of eligibility to be satisfied by Russian athletes who wish to compete in Rio and is addressed to IFs and the ROC, not to CAS ADD, cannot be construed as such an assertion or reference. Furthermore, from Article 1 of the CAS ADD rules read as a coherent whole and in the context of the IOC ADR which apply only to doping controls “over which the IOC has jurisdiction in connection with the Olympic Games Rio 2016” and are part of the legal matrix of the CAS ADD Rules, it is clear that the alleged ADRV must have occurred “on the occasion of the OG”. A date of sample collection in October 2014 falls far outside the occasion or period of Rio 2016.
2. Even if principles of Swiss law, according to the Swiss Federal Tribunal, demand transfer by a (jurisdictionally) incompetent judge to a competent one, such principles are not shown to be applicable directly if at all to the two CAS Divisions at the Olympic Games, in a structure which is *sui generis*. While a specific rule exists for the transfer of an arbitration case from the CAS Ordinary Division to the CAS Appeals Division and vice-versa, it does not exist for the transfer of a case from the CAS ADD to the CAS ad hoc Division (AHD). Such silence in the CAS rules cannot be construed as a gap, given that the CAS AHD is clearly identified as the appeals body of the CAS ADD in the CAS ADD Rules. It is therefore for the applicant to redirect the application to the other CAS Division who can itself determine whether to accept it. The absence of an automatic transfer within the CAS Divisions does not affect the rights of any applicant to file the same application to both the CAS ADD and the CAS AHD, either simultaneously, to ensure that at least one of them would retain jurisdiction, or following an award denying jurisdiction by the first of the two Divisions, given that there is no particular time limit to refer a case to the CAS ADD and/or the CAS AHD during the Olympic Games.

I. INTRODUCTION

1. On 2 August 2016 the Applicants, Pavel Sozykin, a Russian sailor, and The Russian Yachting Federation (“RYF”) submitted to the CAS Anti-Doping Division (“CAS ADD”) an application (“The Application”) for review of two decisions.
 - (1) The decision of World Sailing (“WS”) dated 24 July 2016 by which WS informed IOC that Mr. Sozykin’s entry for Rio 2016 was rejected (“the first decision”).
 - (2) The decision of the IOC Executive Board itself (the basis for the first decision) dated 24 July 2016 that no athlete implicated in the McLaren report would be permitted to compete in Rio 2016 (“the second decision”).
2. The McLaren report had identified one Russian positive sailing test result said to be suppressed by the Moscow laboratory. WADA informed WS that this pertained to Mr. Sozykin and came from a sample collected on 4 October 2014. The substance said to be detected was JWH 018, a cannibanoïd.
3. On 6 August 2016 the Applicants informed the CAS ADD that the IOC had added Mr. Sozykin to the entry list with the concurrence of WS so rendering moot any ruling on the merits of the Application. They asked, however, that each party be given an opportunity to “*express its opinion on the liquidation of the procedure*”. The Applicants have not vouchsafed to the ADD to what such opinion might relate but the Panel appointed to consider The Application (Michael J. Beloff Q.C., President, Dr. Tricia Kavanagh, Arbitrator, Justice Hugh Fraser, Arbitrator) infers that it may concern the allocation of inter-party costs.
4. On the same day the Panel gave directions to all parties for submission (or in the case of the Applicants’ further submission) on the issue only of whether CAS ADD as distinct from the CAS Ad Hoc Division (“CAS AHD”) had jurisdiction over the Application.
5. For the purpose of Rio 2016, ICAS created within CAS distinct bodies i.e.: CAS AHD and CAS ADD, each with its own distinct jurisdiction save that the former was, *inter alia*, the appellate body from decisions of the latter [IOC Anti-Doping Rules applicable to the Olympic Games Rio 2016 (“IOC ADR”) para 12.2.1].

II. PARTIES’ SUBMISSIONS

6. The Applicants’ key submission on jurisdiction was originally set out at paragraphs 51-55 of The Application as follows:
 - “51. *As per Art. 61 of the Olympic Charter, “1. The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).*”

2. *Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-related Arbitration”.*

52. *According to The International Olympic Committee Anti-Doping Rules applicable to the Olympic Games Rio 2016 (IOC ADR), “a decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation [...] may be appealed exclusively as provided in this Article 12” (Art. 12.2 IOC ADR).*

53. *The Anti-Doping ad-hoc Division of the Court of Arbitration for Sport (CAS ADD) is the first instance authority for doping-related matters, responsible for the conduct of the proceedings and the issuance of decisions when an alleged anti-doping rule violation has been asserted and referred to it under the IOC ADR (Art. 1 of the Arbitration Rules applicable to the CAS Anti-Doping Division).*

54. *In view of the foregoing provisions, the present application is brought to challenge a Decision of the IOC Executive Board (Art. 61.1 of the Olympic Charter) and against the ensuing Decision of an International Federation World Sailing taken in application of the above IOC Executive Board Decision on an alleged violation of an anti-doping rule (Art. 12.2 IOC ADR).*

*The dispute pertaining to the decision has arisen on the occasion or in connection with the Olympic Games (Art. 61.1 of the Olympic Charter), thereby justifying the exclusive jurisdiction of CAS *ratione materiae*. Finally, both disputed decisions are decisions that an anti-doping rule violation was allegedly committed and a decision imposing Consequences, within the meaning of Art. 12.2 IOC ADR. As the dispute is clearly related to doping related matters within the meaning of IOC ADR, the Anti-Doping ad hoc Division (CAS ADD) of the Court of Arbitration for Sport is the only specialized competent authority to hear this Application, within the Court of Arbitration for Sport.*

55. *The jurisdiction of the Anti-Doping ad hoc Division of the Court of Arbitration for Sport is therefore established *ratione materiae*”.*

7. The Applicants also asserted jurisdiction *ratione personae* (at paragraphs 56-58 of The Application) but their standing was a necessary but not a sufficient condition to establish their right to have their Application dealt with by the CAS ADD and is not itself in issue.

8. In a letter dated 11 August 2016 the Applicants, *inter alia*, asserted further that in the second decision (before the interpretative guidance given on 2 August 2016) the IOC Executive Board gave of the McLaren report “*a sort of allegation of violation of Anti-Doping rules in connection with the then forthcoming Olympic Games in Rio*” which in itself justified the Application being submitted to the CAS ADD. In a further letter dated 12 August 2016, the Applicants, *inter alia*, adhered to their previous submissions.

9. The IOC submission is contained in their letter of 3 August 2016 as follows:

“Contrary to what the Applicants suggest, the issue of jurisdiction is straightforward. In this case, no anti-doping rule violation has ever been asserted against the Applicants. This has not been disputed by the Applicants. This case pertains to a question of eligibility to compete at the Olympic Games Rio 2016 (see para. 7.14 of the CAS ad hoc decision CAA OG 16/12). Moreover, the CAS Anti-doping Division (“CAS ADD”) is a first instance body and manifestly does not have power to review decisions.

The Applicants have misconceived the function of the CAS ADD. As the Preamble of the Arbitration Rules applicable to the CAS Anti-doping Division (“ADD Rules”) set out, the CAS ADD was set up on the basis of a delegation of power by the IOC to decide on anti-doping rule violations. It is the first instance body set up to decide on all matters which fall under Art. 8 of the ADR”.

10. The WS submission is contained in their letter of 11 August 2016 as follows:

“The primary matter in this dispute was the eligibility of the Appellant, the status of the Russian Olympic Committee’s entry of the Appellant to the Olympic Games and the IOC’s decision on that entry. This concerned the criteria laid down by the IOC for the acceptance of entries from Russian athletes and the Appellant’s circumstances in relation to those criteria. It was not a dispute over an allegation by IOC or by World Sailing that an anti-doping violation had occurred.

Therefore World Sailing’s position is that the Ad Hoc Division was the proper authority to entertain any application for arbitration by the Appellants concerning this matter, and World Sailing notes the numerous other cases heard by the Ad Hoc Division concerning Russian athletes. It requests that the Panel rule the application inadmissible on these grounds”.

III. LEGAL PROVISIONS

11. The IOC ARD Article 8, so far as material, provides as follows.

“8.1 CAS Anti-Doping Division

8.1.1. Where the IOC decides to assert an anti-doping rule violation, the IOC shall promptly file an application with the CAS Anti-Doping Division as per the CAS Anti-Doping Division Rules.

8.2.2. The composition of the panel and procedures applicable to the CAS Anti-Doping Division shall be as per the CAS Anti-Doping Division Rules.

8.2 Hearings and disciplinary procedures of the CAS Anti-Doping Division

8.2.1 In all procedures relating to any alleged anti-doping rule violation pursuant to these Anti-Doping Rules, the right of any Person to be heard pursuant to paragraph 3 to the Bye-law to Rule 59 of the Olympic Charter will be exercised solely before the CAS Anti-Doping Division.

8.2.2. Pursuant to Rule 59.2.4 of the Olympic Charter, the IOC Executive Board delegates to the CAS Anti-Doping Division all powers which are necessary for it to take the measures and sanctions envisaged by these Rules including, in particular, Articles 9, 10.1, 10.2 and 11”.

12. The delegation envisaged in IOC ADR Article 8.2.2 is reflected in the Preamble to the Arbitration rules applicable to the CAS ADD (“CAS ADD Rules”) which states:

“WHEREAS the Executive Board of the International Olympic Committee (hereinafter the “IOC”) has delegated its power to decide upon any violation of the World Anti-doping Code arising upon the occasion of the Olympic Games (hereinafter the “OG”), based on Rule 59.2.4 of the Olympic Charter.

WHEREAS such delegation of power is to devolve upon a specially created Division of the Court of Arbitration for Sport, to be described as the CAS Anti-Doping Division (hereinafter the “CAS ADD”).

WHEREAS the CAS ADD and these procedural rules have been established for the resolution by arbitration of alleged anti-doping rule violations referred to it in accordance with the IOC Anti-Doping Rules applicable to the Olympic Games (hereinafter the “IOC ADR”).

13. Article 1 of the CAS ADD rules itself provides:

“The CAS ADD shall be the first instance authority for doping-related matters, responsible for the conduct of the proceedings and the issuance of decisions when an alleged anti-doping rule violation has been asserted and referred to it under the IOC ADR.

The CAS ADD shall have jurisdiction in cases of alleged doping violations linked with any subsequent re-analysis of samples collected on the occasion of OG. With the agreement of the parties concerned, any alleged doping violations linked with the re-analysis of samples collected on the occasion of OG prior to 2016 may be referred to the Court of Arbitration for Sport”.

IV. THE JURISDICTION ISSUE

14. The Panel essentially adopts and endorses the analysis of the IOC and WS on the jurisdiction issue and respectfully disagrees with the Appellant’s view articulated in its letter of 11 August 2016 that it has “*some complexity*”. On the contrary it requires consideration only of the meaning of Article 1 of the CAS ADD Rules which uniquely describes and delineates the CAS ADD’s jurisdiction (as its title suggests).
15. It is a *sine qua non* of the jurisdiction of the CAS ADD that an alleged anti-doping rule violation (“ADRV”) has been asserted and referred to it under the IOC ADR. This did not occur in the case of Mr. Sozykin: No alleged ADRV of Mr. Sozykin was referred to the CAS ADD by the IOC.
16. Furthermore, the second decision cannot be construed as such an assertion or reference contrary to the Applicants’ contention in their letter of 11 August 2016. In its material part it simply states conditions of eligibility to be satisfied by the Russian athletes who wish to compete in Rio and is addressed to IFs and the ROC, *not* to CAS ADD.

The salient words at page 3 of that decision are “*The IOC will not accept any entry of any Russian athlete in the Olympic Games Rio 2016 unless such athlete can meet the conditions set out below*”.

17. Furthermore, from Article 1 of the CAS ADD rules read as a coherent whole and in the context of the IOC ADR which apply only to doping controls “*over which the IOC has jurisdiction in connection with the Olympic Games Rio 2016*” (p.4/40) and are part of the legal matrix of the CAS ADD Rules, it is clear that the alleged ADRV must have occurred “*on the occasion of the OG*” [Appendix 1 of the IOC ADR defines the period of the Olympic Games Rio 2016 to commence on the date of the opening of the athlete village on 24 July 2016 and to end on the day of the closing ceremony on 21 August 2016].

4 October 2014, the date of the sample collection whose result, according to the McLaren report, was suppressed, falls far outside the occasion or period of Rio 2016.

18. The Applicants' error is to focus on the phrase "*doping related matters*" as by itself endowing the CAS ADD with jurisdiction over Mr. Sozykin's case, and to ignore the kind of doping-related matter which the remainder of Article 1 of the CAS ADD Rules in which are identified the necessary criteria to be satisfied for such jurisdiction to exist.
19. The Panel accordingly concludes that it lacks jurisdiction over The Application and, necessarily in consequence, over matters ancillary thereto.
20. The Panel is gratified to note that its interpretation of the limits of its jurisdiction as conferred by Article 1 of the CAS ADD Rules is in harmony with (1) Article 8.1 of the IOC ADR and (2) the consistent practice of the CAS AHD in dealing with sundry Russian appeals against denial of their eligibility to compete in Rio 2016.
21. Mr. Sozykin and RYF did not want for a body to determine the merits of The Application. The CAS AHD was such a body. In short eligibility disputes are paradigm examples of "*disputes covered by Rule 61 of the Olympic Charter in so far as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony...*" (CAS Arbitration Rules for the Olympic Games Article 1). ADRVs asserted or referred to CAS ADD during the same temporal period are, subject to any appeal, for the CAS ADD. There is no overlap of each's first instance jurisdiction. Never the twain shall meet.

V. TRANSFER TO CAS AHD?

22. In their letter of 12 August 2016, the Applicants made a secondary submission, alternative to their primary submission that CAS ADD has jurisdiction over The Application, namely that, as a matter of Swiss law which applies to the CAS ADD (see Articles 7 and 17 of the CAS ADD Rules), the CAS ADD should if, it deems itself to lack jurisdiction over the Application itself to transfer The Application to the CAS AHD.
23. The Panel considers that even if principles of Swiss law, according to the Swiss Federal Tribunal, demands transfer by a (jurisdictionally) incompetent judge to a competent one, such principles are not shown to be applicable directly if at all to the two emanations of CAS Rio 2016 in a structure which is *sui generis* and consider that it is for the Applicants, if they seek to rely on the jurisprudence to which they refer, to redirect the Application to CAS AHD who can itself determine whether to accept it. The Panel finds persuasive the IOC argument in its letter of 11 August 2016. "*As for the request to have the case transferred to the CAS or the Ad hoc Division, nothing in the rules provides for it. In any event each division of CAS has its own requirements, notably in terms of filing deadlines, etc*".
24. Indeed, while such a specific rule exists for the transfer of an arbitration case from the CAS Ordinary Division to the CAS Appeals Division and vice-versa (Article S20 of the Code of Sports-related Arbitration), significantly it does not exist for the transfer of a case from the CAS ADD to the CAS AHD. Such silence in the CAS rules cannot be construed as a gap, given that

the CAS AHD is clearly identified as the appeals body of the CAS ADD (Articles 21 of the CAS ADD Rules).

25. Furthermore, the absence of an automatic transfer within the CAS Divisions does not affect the rights of any applicant to file the same application to both the CAS ADD and the CAS AHD, either simultaneously, to ensure that at least one of them would retain jurisdiction, or following an award denying jurisdiction by the first of the two Divisions, given that there is no particular time limit to refer a case to the CAS ADD and/or the CAS AHD during the Olympic Games.

VI. ADJOURNMENT

26. Finally, in their correspondence of 6, 11 and 12 August 2016, the Applicants constantly argue for a postponement of resolution of the jurisdiction issue, on the basis of absence of urgency (given the settlement referred to in para 3 above), their need to concentrate on the forthcoming sailing competition and their desire to cogitate further on the issue itself.
27. The Panel does not accede to this request for adjournment. It cannot easily conceive of what further viable submissions the Applicants could make, given that (and in any event) they have now had no less than three bites of the cherry. Furthermore, it behoves any applicant to choose the correct forum for dispute resolution at the outset.
28. As the Panel said in its own email of 6 August 2016, the correct allocation of jurisdiction between CAS AHD and CAS ADD has implications for all cases which arise during the period of Rio 2016, and it is in the general interest that it be resolved as soon as possible.

The anti-doping Division of the Court of Arbitration for Sport renders the following decision:

1. The Panel determines that it has no jurisdiction over the Application.
2. The Panel declines to make any order for transfer of the Application to CAS AHD.