



Arbitration CAS anti-doping Division (OG Rio) AD 16/002 International Olympic Committee (IOC) v. Tomasz Zielinski, award of 12 August 2016

Panel: Mr Efraim Barak (Israel), President; Mrs Tricia Kavanagh (Australia); Mr Juan Pablo Arriagada (Chile)

Weightlifting

Doping (19-Norandrosterone)

19-Norandrosterone as threshold substance

19-Norandrosterone is a non-specified substance prohibited under S1.1b of the WADA Prohibited List which can also be produced endogenously. Therefore, it is a Threshold Substance for which the International Standard for Laboratories established special criteria for the evaluation of a Sample with particular regard to the decision limits (DL) that shall be applied to determine whether the result indicates an Adverse Analytical Finding.

I. FACTS

1. The elements set out below are a summary of the main relevant facts as established by the Panel by way of a chronology on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the other chapters of the present award.
2. On 31 July 2016, Mr. Tomasz Zielinski, a Polish Athlete selected for the Olympic Games Rio 2016 (the “Athlete”), underwent an out-of-competition doping control.
3. The Athlete was due to compete in the 2016 Rio Olympic Games on 13 August 2016.
4. On 6 August 2016, the International Olympic Committee (the “IOC”) informed the Athlete that the results of his A Sample analysis revealed the presence of 19-Norandrosterone, which is a non-specified substance prohibited under S1.1b of the WADA Prohibited List.
5. Later that same day, 6 August 2016, the Athlete’s Chef de Mission requested, on behalf of the Athlete, the analysis of the B Sample and the production of the associated documentation package. The Athlete also asserted his right to attend the opening of the B Sample.
6. On 7 August 2016 at 15h04 (all times mentioned in this award are in time of Rio de Janeiro), the IOC filed an application at the Anti-Doping Division of the Court of Arbitration for Sport (“CAS ADD”) asserting the following:

- (a) The results of the A sample analysis of the Athlete revealed the presence of 19-Norandrosterone;
 - (b) The IRMS result was consisted with an exogenous origin of the substance;
 - (c) The detected substance is a non-specified substance prohibited under S1.1b of the WADA Prohibited List; and
 - (d) The Athlete committed an Anti-Doping rule violation.
7. In the Application, the IOC seeks the following relief:
- (a) The Application of the International Olympic Committee is admissible.
 - (b) The Athlete be found guilty of an anti-doping violation in accordance with Article 2.1 of the IOC Anti-Doping Rules applicable to the Olympic Games Rio 2016 (the “IOC ADR”).
 - (c) All results obtained by the Athlete in the Olympic Games Rio 2016 (if any) be disqualified with all consequences, including forfeiture of all medal, points and prizes.
 - (d) The Athlete be declared ineligible to compete in all competitions in which he has not yet participated at the Olympic Games Rio 2016.
 - (e) The Athlete excluded from the Olympic Games Rio 2016.
 - (f) The Athlete’s accreditation (number 1051326) be withdrawn.
 - (g) The matter of the Athlete be referred to the International Weightlifting Federation to impose Consequences that extend beyond the Olympic Games Rio 2016 upon the Athlete.
8. In the Application the IOC also asked the following provisional relief:
“The Athlete be provisionally suspended”.
9. On 7 August 2016, the composition of the Panel was communicated to the Parties:
- President: Mr. Efraim Barak
Arbitrators: Mr. Juan Pablo Arriagada
Ms. Tricia Kavanagh
10. On 8 August 2016 at 15h52, the Athlete filed his answer to the IOC’s application with respect to the request for the Provisional Suspension. The content of this answer, as well as other facts and legal aspects related to the request for the Provisional Suspension were detailed in a separate order in an Application for Provisional Suspension rendered by this Panel. To the extent that any of the arguments or legal aspects contained in the submissions with respect to the Provisional Suspension is relevant to this award, they will be set out in the relevant parts of the Award.

11. Apart from the request to dismiss the Application for Provisional Suspension, the Athlete requested in his Answer that the Panel order the Laboratory to immediately provide him with:
 - (a) The information about the concentration of the detected substance in the “A” Sample and the explanation in regard to the departure from the International Standard for Laboratories (ISL) and WADA Technical Document TD2014DL.
 - (b) The Laboratory Documentation Packages of the “A” and “B” Samples (“LDPs”).
12. On 9 August 2016 at 10h20, the IOC notified the B Sample analysis result to the Athlete and filed the result with the CAS ADD.
13. The Application for Provisional Suspension was granted on 9 August 2016 at 19:45 and the order in this respect was communicated to the parties immediately thereafter.
14. In the Order for Provisional Suspension, the Panel further ordered the following:
 - (a) The IOC was directed to file, and send to the other parties, the documentation package associated with the Athlete’s samples (LDPs) no later than 10 August 2016 at 9h00.
 - (b) The parties were directed to file written submissions in support of their position on the merits of this Application no later than Thursday, 11 August 2016 at 9h00.
 - (c) A hearing on the merits of this Application was scheduled for Thursday 11 August 2016 at 15h00.
15. Following a request by the IOC, the deadline to file the LDPs was extended and the other deadlines were adjusted accordingly in order to provide the Athlete sufficient time to study the LDPs before filing his further submission on the merits.
16. The LDP’s were filed and sent to the other parties on 10 August at 13h24.
17. On 11 August at 12h19 the IOC submitted a second submission in support of its position on the merits of the Application.
18. In the second submission, the IOC basically refers to the Application stating that the IOC position is set therein, and in addition asserts that the B Sample was opened in the presence of the Athlete and his representatives. The IOC confirmed that there was no apparent tampering of the bottle, the integrity of the seal, and its intact content, attesting that the B Sample was in suitable condition for analysis. The IOC further submits the analysis of the B Sample confirmed the findings of the A Sample and that the IOC provided the Panel and the other parties, in a timely manner, with the LDPs related to both Samples.
19. The IOC further submits that according to the relevant rules of the IOC ADR, *“WADA accredited laboratories and other laboratories approved by WADA are presumed to have conducted Sample analysis and custodial procedures in accordance with the applicable ISL”, and that “the Scientific Experts of the IOC Medical & Scientific Commission Games Group confirmed that they considered that the results from these analysis (GC-C-IRMS) are consistent with the administration of the anabolic agent nandrolone or related*

substance prohibited under S1 of the WADA Prohibited List 2016” and that *“there was no apparent departures from the WADA ISL”*.

20. The IOC concludes its submission by maintaining its Prayers for Relief set out in the Application.
21. Also on 11 August 2016, the Athlete submitted his “written explanations” where he states the following:
 - (a) He has never consciously taken any prohibited substance listed in the WADA list of Prohibited Substances.
 - (b) As a participant in international competitions, the Athlete always keeps due diligence in terms of nutrition and supplementation.
 - (c) As a leading contestant in his weight category in the world, he is frequently subject to anti-doping controls. In 2016, he went through more than 10 doping controls alone. Therefore, the information regarding the results of the analysis of the A and B Samples were received by him *“with disbelief”*.
 - (d) Being sure of his innocence, he submitted during the analysis of the B Sample to prepare a DNA analysis of the urine which was in the A and B Sample and/or maintain another anti-doping control. Both requests were dismissed by the Laboratory.
 - (e) Following the notification of the result of the analysis of the B Sample confirming the finding of the A Sample, the Polish National Olympic Committee decided to exclude the Athlete from the Polish Olympic Team and sent the Athlete back to Poland.
22. Considering the above and the understanding that proceedings beyond the participation in the Olympic Games would be referred to the International Weightlifting Federation, as well as the fact that *“at this time he is not able to maintain all legal and factual actions and refer to the laboratory documentation packages due to the expedited proceedings before CAS AD”* the Athlete *“resigned to the fact that he will not be able to participate in Olympic Games Rio 2016”*. In the e-mail to which the letter was attached, counsel for the Athlete informed the Panel that the Athlete *“would not be able to participate in the hearing due to the fact that he was obliged to return back to Poland”*.
23. On August 12 2016, considering the above-mentioned submissions, and referring to Article 15(c) and (e) of the CAS Anti-Doping Division Rules, the Panel informed the parties that it considered itself sufficiently well informed to render a decision without an oral hearing. However, to the extent the IOC preferred an oral hearing be held, it shall inform the CAS ADD accordingly.
24. The IOC informed the Panel that it did not deem an oral hearing necessary.

II. LEGAL ASPECTS

A. Jurisdiction

25. Pursuant to Rule 59.2.4 of the Olympic Charter, the IOC Executive Board has delegated to the CAS ADD its power to decide upon any violation of the World Anti-Doping Code arising upon the occasion of the Olympic Games (Art. 8.2.2 IOC ADR).
26. Pursuant to Article 8.1.1 of the IOC ADR:
“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 Rules”.
27. Pursuant to Article 1 of the Arbitration Rules applicable to the CAS ADD:
“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”.
28. The parties do not contest the Jurisdiction of the CAS ADD to decide the dispute.
29. It follows that the CAS ADD is competent and has jurisdiction over the Application.

B. Applicable Law

30. Article 17 CAS ADD Rules reads as follows:
“The Panel shall rule on the dispute pursuant to the IOC ADR, the applicable regulations, Swiss Law and general principles of law”.
31. The Introduction to the IOC ADR refers *inter alia* to the scope of the Rules and stipulates the following:
“These Rules apply in connection with the Olympic Games Rio 2016. They shall, without limitation, apply to all Doping Controls over which the IOC has jurisdiction in connection with the Olympic Games Rio 2016. These Rules shall, without limitation, apply automatically to (a) the IOC; (b) Athletes entered in the Olympic Games Rio 2016 ...
(...)
Athletes entered in the Olympic Games Rio 2016 or who have otherwise been made subject to the authority of IOC in connection with the Olympic Games Rio 2016 are bound by these Rules as condition of eligibility to participate in the Olympic Games Rio 2016...”.
32. The Panel hereby confirms that it will apply primarily the IOC ADR, and complimentary as far as needed Swiss Law and general principles of law. The Panel further confirms that these proceedings are governed by the CAS ADD Rules. 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 ADD Rules and as a result, the choice of Lausanne, Switzerland as the seat of the CAS ADD and the Panel, pursuant to Article 7 of the CAS ADD Rules.

C. Legal Framework

33. The most relevant articles of the Applicable Law for the discussion on the merits of this Application are the following:

34. Art. 2 IOC ADR reads as follows:

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.

Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample

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 Samples. 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 rule violation under Article 2.1.*

2.1.2 *Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete’s A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete’s B Sample is analyzed and the analysis of the Athlete’s B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete’s A Sample; or, where the Athlete’s B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.*

2.1.3 *Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the 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.*

2.1.4 *As an exception to the general rule of Article 2.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.*

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 *It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. 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 rule violation for Use of a Prohibited Substance or a Prohibited Method.*

35. Art. 3.1 IOC ADR reads as follows:

3.1 Burdens and Standards of Proof

The IOC shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IOC has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made.

This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

36. Art. 8.2 IOC ADR reads as follows:

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.*

37. Art. 10 IOC ADR reads as follows:

10.1 Disqualification of Results in the Olympic Games Rio 2016

An anti-doping rule violation occurring during or in connection with the Olympic Games Rio 2016 may, upon the decision of the CAS Anti-Doping Division, lead to Disqualification of all of the Athlete's individual results obtained in the Olympic Games Rio 2016 (or in one or more Events or Competitions) with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

Factors to be included in considering whether to Disqualify other results in the Olympic Games Rio 2016 might include, for example, the seriousness of the Athlete's anti-doping rule violation and whether the Athlete tested negative further to Testing conducted after other Competitions.

10.1.1. *If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified, unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.*

...

10.2 Ineligibility and other consequences

10.2.1 *Should an Athlete or other Person be found to have committed an anti-doping rule violation, the CAS Anti-Doping Division may declare the Athlete or other Person ineligible for such Competitions at the*

Olympic Games Rio 2016 in which he/she has not yet participated, along with other sanctions and measures which may follow, such as exclusion of the Athlete and other Persons concerned from the Olympic Games Rio 2016 and the loss of accreditation.

No Person who has been declared ineligible may, during the period of ineligibility, participate in any capacity in the Olympic Games Rio 2016.

10.2.2 *In accordance with Article 7.1.2, responsibility for results management in terms of sanctions beyond the Olympic Games Rio 2016 itself shall be referred to the applicable International Federation.*

10.3 Automatic Publication of Sanction

A mandatory part of each sanction shall include automatic publication, as provided in Article 13.3.

III. MERITS

38. The analysis of Samples A and B revealed the presence of 19-Norandrosterone in the Athlete's body. 19-Norandrosterone is a non-specified substance prohibited under S1.1b of the WADA Prohibited List.
39. 19-Norandrosterone can also be produced endogenously. Therefore, it is a Threshold Substance for which the ISL established special criteria for the evaluation of a Sample with particular regard to the decision limits (DL) that shall be applied to determine whether the result indicates an Adverse Analytical Finding.
40. The Test report for Sample A states, *inter alia*, the following:
 - (a) The result of the analysis identified the presence of 19- Norandrosterone.
 - (b) The finding constitutes an Adverse Analytical Finding.
 - (c) The GC/C/IRMS result is consistent with an exogenous origin.
 - (d) The above findings are confirmed by a second opinion provided by Prof. Dr. Peter van Enoo.
41. The LDP related to Sample A contains a confirmation by Prof. Van Enoo which also confirms the presence of the substance was in compliance with the relevant Technical Documents (TD 2015IDCR & TD 2016NA).
42. The LDP also contained a second opinion signed by Dr. Thomas Piper and Prof. W. Schanzer of the German Sport University in Cologne confirming that "*the values in the test report fulfil the criteria of a positive result under the Technical Document TD 2015NA and are not in agreement with the natural carbon isotope ratio of endogenous steroid and therefore constitute an Adverse Analytical Finding*".
43. The Test Report for the B Sample confirms the presence of the Prohibited Substance and is also supported by Prof. Van Enoo's second opinion.

44. The Test Report, as well as the LDPs, were adduced and presented by the IOC. The Athlete did not adduce any documents rebutting the finding of the Adverse Analytical Finding and did not actually submit any defence except for the explanation letter dated 11 August 2016, which by itself does not deny the findings of the Test Reports and does not provide any explanation for the presence of the prohibited substance.

IV. CONCLUSION

45. In view of the above considerations, the Panel finds that the IOC met the burden of proof under Art. 3.1 IOC ADR. The documents adduced by the IOC establish sufficient proof, to the comfortable satisfaction of the Panel, that the Athlete committed an anti-doping rule violation under Art. 2 IOC ADR.
46. As the Athlete committed an anti-doping rule violation in connection with the Olympic Games Rio 2016, the Panel finds it appropriate to impose on the Athlete the following consequences:
1. The Athlete is declared ineligible to compete at the Olympic Games Rio 2016.
 2. The Athlete is excluded from the Olympic Games Rio 2016.
 3. The Athlete's Accreditation (number 1051326) is withdrawn.
 4. The responsibility for the Athlete's results management in terms of sanction beyond the Olympic Games Rio 2016 is referred to the International Weightlifting Federation being the applicable International Federation.

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

On the basis of the facts and legal arguments set forth above, the application is granted.

1. The Athlete is declared ineligible to compete at the Olympic Games Rio 2016.
2. The Athlete is excluded from the Olympic Games Rio 2016.
3. The Athlete's Accreditation (number 1051326) is withdrawn.
4. The responsibility for the Athlete's results management in terms of sanction beyond the Olympic Games Rio 2016 is referred to the International Weightlifting Federation being the applicable International Federation.