Arbitration CAS 2011/A/2337 Marius Ilas v. World Karate Organization (WKO), award of 23 March 2012

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Jacques Baumgartner (Switzerland); Prof. Akira Kotera (Japan)

Karate
Doping (human chorionic gonadotropin - hCG)
Stay of execution of a disciplinary decision
Mission of the CAS Panel under Article R57 of the CAS Code
Presence of hCG of endogenous origin in the athlete's sample

1. **A WADA's statement that the athlete's case *"might not be a case of doping"* can be a sufficient reason to stay the execution of a contested decision related to the suspension of an athlete.**

2. **The mission of a CAS panel under Article R57 CAS Code is to make an independent determination as to whether the parties' contentions are inherently correct rather than only to assess the correctness of the appealed decision.**

3. **WADA's criterion for an Adverse Analytical Finding of hCG in urine of a male athlete stands at densities greater than 5mlU/ml. The athlete whose sample is greater than the aforementioned limit has to demonstrate that the high density of hCG in the sample was due to a physiological or pathological condition and is therefore of endogenous origin. The unchallenged opinions of experts in the field of hCG that such is the case, confirmed by a WADA accredited laboratory, constitute sufficient evidence in this respect.**

Marius Ilas (the "Appellant") is a Romanian karate athlete who has represented Romania in karate competitions on numerous occasions.

The World Karate Organization (the "Respondent" or WKO) is the world governing body for karate and has its registered seat in Tokyo, Japan.

On 20/21 June 2009, the Appellant competed in the WKO 4th Karate World Cup in Saint Petersburg, Russia.

On 21 June 2009, immediately after the competition, the Appellant provided a urine sample in connection with a doping control run by WKO. The sample was designated as sample number 09-

562-2 ("the Sample") and was analyzed by the Anti-Doping Centre of the Ministry of Sport, Tourism & Youth Policy of the Russian Federation (RFAC).

On 2 July 2009 RFAC reported to WKO that the A-sample of the Sample ("the A-Sample") was found to contain human chorionic gonadotrophen (hCG) in a concentration greater than 5 mlU/ml (concentration measured: 16 mlU/ml).

On 6 August 2009 the Appellant was informed about this test result.

By email dated 9 August 2009 the Romanian Karate Federation (RKF) informed the Respondent's Anti-Doping Committee ("Respondent's ADC") that the Appellant had already shown high levels of hCG on the occasion of a doping control during the 2005 Karate European Championships in Denmark, and also that subsequently the Danish Anti-Doping Agency had informed the RKF that hCG found in men's samples can mean the beginning of the development of cancer in the testicles and that the result did not indicate an anti-doping rule violation.

By email dated 10 August 2009 the Respondent's ADC confirmed that it would take the foregoing information into consideration. It further pointed out that the Appellant would be prohibited to participate in any WKO tournaments for the time being because of the adverse analytical finding in the A-Sample.

By letter dated 9 September 2009 RKF informed the Respondent's ADC that it had consulted a physician specialized in endocrinology regarding the Appellant's test results. According to RKF the specialist had concluded after conducting various tests on the Appellant's blood that

> *"Marius [the Appellant] produces the hCG naturally in excess and in the meantime his production of testosterone is very low especially for a young athlete. […] A high level of hCG, although it is abnormal according to WADA's standards, it is normal for his organism being a natural hormonal dysfunction".*

By letter dated 5 October 2009 RKF submitted to the Respondent's ADC the following request:

> *"Until now, the result of the A-Sample is an adverse analytical finding, not a 'positive result' (as you are stating). Please inform the laboratory in Moscow to perform an analysis of the A-Sample (not B) to establish the origin of the hormone (exogenous or endogenous). According to the WADA Regulations, if the origin of the adverse analytical finding is endogenous, then the case should be closed. This examination is mandatory according to the WADA-Code".*

By letter dated 10 November 2009 the Respondent's ADC replied that it was the Appellant's responsibility to demonstrate that the high density of hCG was of endogenous origin.

After further correspondence between the RKF and the Respondent's ADC, by letter dated 11 January 2010 the RKF informed the World Anti-Doping Agency (WADA) of the case.

By email dated 5 February 2010 WADA informed RKF as follows:

> *"When such an hCG concentration is detected in an athlete's sample there are normally only two possible explanations: Doping or testicular cancer. However, in very rare cases (approximately 1/1 million individual)*

a high hCG concentrate can be natural. We would therefore recommend that follow-up testing is conducted on this athlete: two urinary hCG tests within an interval of one or two months. The results which will be obtained and are to be compared with data from previous testing on his athlete, and notably with the tests conducted in 2005".

By email dated 10 March 2010 WADA informed the Respondent's ADC that it had discussed the Appellant's case with its experts and it found that a follow-up was necessary. WADA suggested the Respondent's ADC the following approach:

"Given this uncertainty, we would therefore recommend the following:

1) WKO informs the athlete that the proceedings are currently stayed until further notice and that he is allowed to compete.

2) There is no need for the moment to analyze the B sample. It should be however kept by the laboratory.

3) Follow up testing shall be conducted on this athlete: Two urinary hCG tests within an interval of one or two months.

4) The results which will be obtained are then to be compared with the data from previous testing on this athlete, and notably with the test conducted in 2005".

By email dated 11 May 2011 the Respondent asked the Romanian Anti-Doping Agency (ANAD) to carry out the two follow-up tests suggested by WADA on the Appellant.

On 30 May and on 24 July 2010 ANAD performed two out-of-competition tests on the Appellant with the following results:

- Test on 30 May 2010: hCG Concentration 4.11 mIU/ml, negative;
- Test on 24 July 2010: hCG Concentration 21.70 mIU/ml, positive.

On 24 September 2010 the RKF requested ANAD to send the B sample of the positive test performed on 24 July 2010 to the Laboratory of Doping Analysis of the German Sport University in Cologne ("Cologne Laboratory") in order to determine whether the hCG found in the sample was of endogenous or exogenous origin.

On 30 October 2010 the Appellant informed the Respondent's ADC that the B sample of the test conducted on 24 July 2010 had been sent to the Cologne Laboratory for further testing of the origin of the detected hCG.

By letter dated 18 November 2010 the Cologne Laboratory informed ANAD as follows:

"Based on our analytical results it is likely, that the athlete secretes ß-hCG endogenously. Further medical investigations are highly recommended".

On 7 December 2010 the RKO submitted this information to the Respondent and to WADA.

On 27 December 2010 the Respondent issued a decision (hereinafter "Decision") finding the following:

"1. It is perceived that the above-mentioned competitor used (Doping Rule Violation) a prohibited substance mentioned in the WADA Code.

2. In accordance with Article 14 of 'the Code', all of his results obtained in the WKO 4th Karate World Cup held on June 20th and 21st, 2009, as well as the WKO European Championship held on June 5th, 2010 shall become void, and he shall be deprived of the trophies and prizes obtained at the Competitions.

3. In accordance with Article 15.2 of 'the Code', his qualification shall be suspended for two (2) years from January 1st, 2011".

On 14 January 2011 the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS).

By letter dated 24 January 2011 WADA informed the Respondent as follows:

"As regards to the last documentation provided by Cologne, the laboratory may be right to suspect that the athlete may be suffering of some kind of cancer (e.g. testicular or other), since this pathology typically involves predominant and elevated levels of free hCGß. However, we believe it is premature to conclude, from the results of these assays, that the detected hCGß is of endogenous origin.

[…]

In view of the above and in order to secure the case, we consider it necessary to have two internationally-recognized experts on hCG reviewing the results of the tests conducted on Mr. Ilas on an anonymous basis".

By letter dated 3 February 2011 WADA informed the Respondent as follows:

"As mentioned in our letter dated 24 January 2011 and given the complexity of this case, associated with the complex biology of hCG and its relationship with several physiological and pathological phenomena (pregnancy, cancer, familial hCG", etc.) in addition to possible doping, we have contacted two internationally renowned experts in this field: Dr. Larry Cole, Director of USA hCG Reference Service and Prof. Ulf-Håkan Stenman (Head, Hormone and Tumor Marker Labs, Helsinki University Central Hospital).

Both these experts have provided their preliminary opinions based on the information available, which tends to indicate that this might not be a case of doping. However, it is very difficult to come to a final conclusion without performing more tests on the athlete's blood and urine samples with a battery of specific assays (at least 4), which are not all available in anti-doping laboratories. Dr. Cole and Prof Stenman have offered to perform those expert analyses.

Based on this, our recommendations are the following:

1. Contact Dr. Cole and Prof. Stenman (independently from one another) on WADA's behalf for analyses of samples as indicated below; their email addresses are larry@hcglab.com *and* ulf-hakan.stenman@helsinki.fi.

2. Collect, without informing the athlete in advance 2 urine and 2 blood samples (matched blood/urine) with at least one week between the two collections, and send the samples for analysis to these two experts. They will also need a case history and pertinent clinical information if available. WKO should cover the costs of collections and shipment. We recommend that you consult the experts to determine the best way to collect the blood and urine samples (tubes, matrix, whole blood/serum/plasma) and to transport them

(refrigerated/frozen etc). Last but not least, the samples shall be sent to the reference experts without any reference to the identity of the athlete.

3. *On its side, WADA will bear the costs of the analyses. The results and interpretation of the analyses shall be sent to WADA and to WKO.*

4. *As regards the pending proceedings before the Court of Arbitration for Sport (CAS), we would recommend you request CAS to stay the proceedings to conduct further investigations. We also recommend that you find an agreement with the athlete to have his running ban lifted until the results of these investigations are known. However, we remind you that the athlete shall not be informed that two additional controls will be conducted as it is crucial that these controls remain unannounced.*

5. *Should WKO wish to discuss the above with us by conference call, given the particularly complex nature of this case, we are at your disposition".*

On 31 March 2011 the CAS ordered a stay of the execution of the Decision until delivery of the conclusions submitted by the experts suggested by WADA or until further notice from the CAS.

By letter dated 21 July 2011 the Respondent submitted to the CAS that it had decided to request the two internationally-recognized experts introduced by WADA, Dr Cole and Professor Stenman, to carry out the further hCG tests on the Appellant and that it has put the sanction imposed on the Appellant as of 4 July 2011 *"on hold"* until an official decision by the CAS.

Dr Cole was unavailable for testing the Appellant's samples until October 2011. Therefore, the Respondent and WADA agreed that the tests carried out by Professor Stenman would be sufficient for the Respondent's determination in its results management process and that the second opinion by Dr Cole was not strictly necessary, especially considering his current unavailability and the long time that this process has taken.

On 23 September 2011 the Respondent received the following result from Professor Stenman in respect of the Appellant's blood and urine samples:

"We have analyzed the samples and the message is clear. The samples do not contain hCG, only hCGbeta and some hCGbeta core fragment in urine. The latter is obviously derived from hCGbeta. Thus there is no evidence for illicit use of hCG injections. This is probably a case of 'familial hCG', which has now been detected in about 10 persons. It is notable that all cases that we have studied so far have much higher concentrations of hCGbeta in urine than in serum.

Results:

436055 serum hCG 0,04 pmol/L, hCGbeta 7.7 pmol/L

436079 serum hCG 0,15 pmol/L, hCGbeta 9.2 pmol/L

1975897 urine hCG 0,2 pmol/L, hCGbeta 37 pmol/L, hCGbeta core fragment 6.4 pmo/L

1976369 urine hCG 0 pmol/L, hCGbeta 23 pmol/L, hCGbeta core fragment 7.3 pmo/L

1975897 urine hCG 0 pmol/L, hCGbeta 45 pmol/L, hCGbeta core fragment 7.5 pmo/L

1975897 urine hCG 0 pmol/L, hCGbeta 71 pmol/L, hCGbeta core fragment 9.1 pmo/L

[…]".

On 3 October 2011 the Respondent informed WADA about this result.

By email dated 10 October 2011 the Respondent proposed to Prof. Stenman to re-test the B sample of the Sample ("the B-Sample") in order to verify Prof. Stenman's results.

By email dated 10 October 2011 Prof. Stenman responded to such proposal as follows:

> *"I have sent the results of our tests and my conclusions to Mr. Barroso at WADA. I do not need to analyze more samples to interpret the results. On the basis of the determinations of samples provided to me, it is clear that the hCG immunoreactivity in the serum and urine samples from Marius Ilas is not hCG but free hCGbeta. Thus there is no evidence for use of hCG for doping and WADA has decided to acquit Marius Ilas of any doping charges. […] Based on your conclusions we will recommend the International Federation to acquit the athlete of any doping charges, but still advice periodic clinical follow ups to make sure that there is no underlying pathological condition".*

On 14 January 2011 the Appellant filed a statement of appeal with the CAS pursuant to the Code of Sports-related Arbitration (the "Code") to challenge the Decision. He submitted the following prayer for relief:

> *"I request the cancellation/annulation of the Decision of Penalty of WKO Doping Agency that I received on 30th of December 2010".*

By letter dated 18 January 2011 CAS notified the appeal to the Respondent and invited the Respondent to nominate an arbitrator from the list of CAS arbitrators published on the CAS website and invited the Appellant to file his appeal brief pursuant to Article R51 of the Code or in case the statement of appeal was to be considered as appeal brief to so inform the CAS Court Office within ten days of receipt of this letter.

By letter dated 27 January 2011 the Respondent nominated Mr Akira Kotera as arbitrator and requested clarification from the CAS whether the statement of appeal was considered to be the appeal brief.

By letter dated 28 January 2011 the Appellant informed the CAS Court Office that his statement of appeal was to be considered his appeal brief.

By letter dated 1 February 2011 the CAS Court Office forwarded the Appellant's 28 January letter to the Respondent and invited it to submit to the CAS within twenty days of receipt of such letter an answer containing:

- a statement of defense;
- any defense of lack of jurisdiction;
- any exhibits or specification of other evidence upon which the Respondent intended to rely.

By letter dated 21 February 2011 the Respondent submitted its statement of defense.

In the same letter the CAS Court Office:

(i) informed the parties that in accordance with Article R56 of the Code

"unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and the answer";

and

(ii) invited the Parties to inform the CAS by 7 March 2011 whether their preference was for a hearing to be held in this matter or for the Panel to issue an award based on the parties' written submissions.

By letter dated 17 March 2011 the Appellant submitted to the CAS a copy of an email dated 3 February 2011 from WADA to the Respondent adding some comments in respect of such email and requested a stay of execution of the Decision.

By letter dated 18 March 2011 the Respondent requested to be informed whether the documents submitted by the Appellant on 17 March 2011 would be considered as part of this case despite Article R56 of the Code and whether it was required to respond to such submission.

By letter dated 22 March 2011 the Appellant submitted that in his opinion the correspondence between WADA and the Respondent was crucial to decide the case and that therefore *"exceptional circumstances"* pursuant to Article R56 of the Code were given.

By letter dated 23 March 2011 the CAS Court Office informed the Parties (i) that the Respondent could file its observations on the Appellant's letter dated 17 March 2011 within five days of receipt of this letter, (ii) that the Panel would decide on the requested stay of execution after receipt of the submissions under (i), and (iii) that in view of WADA's suggestion on page two of its letter of 3 February 2011 the Panel proposes to stay the present proceedings until the *"two internationally recognized experts on hCG"* have delivered their conclusions or until further notice from the Panel, and invited the Parties to inform the CAS Court Office within five days of receipt of this letter whether or not they agree with such proposal.

By letters dated 28 March 2011 the Appellant and the Respondent agreed to the Panel's proposal. The Respondent further submitted its comments to the Appellant's submission dated 17 March 2011.

By letter dated 31 March 2011 the CAS Court Office informed the Parties on behalf of the Panel that the documents submitted by the Appellant on 17 March 2011 were admitted pursuant to Article R56 of the Code and that a stay of the execution of the Decision was ordered until delivery of the conclusions submitted by the experts suggested by WADA or until further notice from the Panel.

By letter dated 6 April 2011 the Respondent requested the Panel to reconsider its decision ordering a stay of the Decision.

The Appellant responded to such request by letter dated 11 April 2011.

By letter dated 18 April 2011 the CAS Court Office informed the Parties on behalf of the Panel that it had considered the Respondent's request and had decided to maintain its decision to stay the execution of the Decision. By the same letter the CAS Court Office invited the Respondent to inform the CAS within one week upon receipt of the letter whether it has taken any measures to follow WADA's 3 February 2011 recommendations to conduct further investigation.

By letter dated 22 April 2011 the Respondent requested the Panel again to reconsider its decision ordering a stay of the Decision with reference to the comments to S2 of the 2009 International Standard Prohibited Substance List of WADA.

By letter dated 28 April 2011 CAS advised the parties that in making its order dated 31 March 2011, the Panel inter alia relied – in the interest of both parties – on WADA's statement in its letter of 3 February 2011 to the Respondent that *"two internationally renowned experts (…) have provided their preliminary opinions based on the information available, which tends to indicate that this might not be a case of doping"* and that therefore the Panel maintained its order dated 31 March 2011.

By letter dated 10 May 2011 the Respondent submitted that it questioned its obligation to conduct further tests regarding the Appellant and asked the CAS to inform it whether a single act of not following such order would bring about negative effects in the judgment of the Panel.

By letter dated 8 June 2011 CAS advised the parties that pursuant to Article 44.3 of the Code the Panel found that the burden of proof is on the Respondent to establish that a doping violation has occurred, particularly considering the fact that according to WADA's letter dated 3 February 2011 *"this might no be a case of doping"*.

By the same letter CAS ordered the Respondent to carry out WADA's recommendations in its letter dated 3 February 2011 and invited the Respondent to submit the results of such additional tests within 3 months upon receipt of such letter from the CAS.

By letter dated 21 July 2011 the Respondent submitted to the CAS that it had decided to request the two internationally-recognized experts introduced by WADA, Dr Cole and Professor Stenman, to carry out the further hCG tests on the Claimant and that it has put the sanction imposed on the Claimant as of 4 July 2011 *"on hold"*, until an official decision by the CAS.

By letter dated 7 September 2011 the Respondent informed the CAS that Dr Cole was unavailable for testing the Appellant's samples until October 2011. The Respondent submitted further that it had agreed with WADA that the tests carried out by Professor Stenman would be sufficient for the Respondent's determination in its results management process and that the second opinion by Dr Cole was not strictly necessary, especially considering his current unavailability and the long time that this process has taken.

By letter dated 15 September 2011 the Appellant submitted to the CAS a copy of a circular regarding the Appellant's case sent by the Respondent on 5 September 2011 to the Branch Chiefs & Board

Members of the European Karate Organization, the Japanese Karate Organization and the Respondent, according to which *"(I)f by any chance, these series of additional tests are not concluded by the tournament* [meaning the 10th Karate World Championships of 22/23 October 2011], *the athlete* [meaning the Appellant] *will not be allowed to participate in the tournament"*.

On 21 September 2011 the CAS Court Office reminded the parties of the Panel's decision of 31 March 2011, which ordered a stay of the execution of the Decision until delivery of the conclusions of the experts suggested by WADA or until further notice from the Panel and advised the parties that this order stands.

By letter dated 3 October 2011 the Respondent informed the CAS Court Office about the result of Professor Stenman's tests.

By the same letter the Respondent submitted that it had requested Prof. Stenman to re-test the B-Sample.

On 10 October 2011 the CAS Court Office ordered the Respondent to produce Prof. Stenman's report dated 23 September 2011 and WKO's letter to Prof. Stenman requesting a re-test of the sample taken on 21 June 2009, within seven days.

On 17 October 2011 the Respondent submitted to the CAS Court Office the entire correspondence between it and Prof. Stenman.

On 19 October 2011 the CAS Court Office reminded the Parties again of the Panel's decision of 31 March 2011, which ordered a stay of the execution of the Decision until delivery of the conclusions submitted by the experts suggested by WADA or until further notice from the Panel and advised the Parties that this order stands.

On 28 October 2011 the CAS Court Office advised the Parties that the Panel had taken note of the documents submitted by the Respondent on 17 October 2011 and requested the Parties to submit their comments on Prof. Stenman's statement in his email dated 10 October 2011 (2.30 above) within one week upon receipt of this letter.

By letter dated 4 November 2011 the Respondent informed the CAS that as a result of the statements by CAS and WADA, as well as the test results by Prof. Stenman it had approved the continuation of the suspension of the ban imposed on the Appellant. The Respondent further requested the CAS to make its judgment *"based on thorough discussion"*.

On 18 November 2011 the CAS Court Office requested the Parties to clarify on or before 23 November 2011 whether they wanted a hearing to be held in this matter.

By letter dated 22 November 2011 the Appellant informed the CAS that he considered a hearing not to be necessary.

By letter of the same date the Respondent informed the CAS that it preferred not to hold a hearing in this matter. The Respondent also submitted to the CAS two doping test results from the Mitsubishi Chemical Medience Cooperation dated 26 October 2011 of samples taken during the 10th Karate World Championships and a letter from the same laboratory dated 16 November 2011. In such letter the laboratory stated with reference to the Sample with the Sample Code 3377980 that intact hCG had not been detected and that therefore this case was reported as negative.

By letter dated 30 November 2011 the CAS Court Office requested the parties on behalf of the Panel to declare within 5 days, whether they confirm that they do not challenge the findings of Prof. Stenman, particularly those in his statement of his email dated 10 October 2011. In the same letter the Panel gave the parties the possibility to submit within a week final comments on the points each of it considered are important to argue for the resolution of this matter. Further, the Panel informed the parties that once this deadline had expired the Panel would make a final determination whether or not to hold a hearing in this case.

By letters dated 5 December 2011 the parties submitted their final comments.

On 13 December 2011 the CAS Court Office advised the parties that the Panel had decided not to hold a hearing and would therefore issue a decision on the basis of the written submissions filed by the parties within this procedure.

On 19 December 2011 the CAS Court Office submitted to the parties the Order of Procedure and requested them to return a copy of such order to the CAS Court Office by 22 December 2011.

On 22 December 2011 the Respondent and on 23 December 2011 the Appellant returned signed copies of the Order of Procedure to the CAS Court Office.

In summary, the Appellant submits the following in support of his appeal:

- He did not use any prohibited substance and that the hCG detected in the Sample is of endogenous origin.
- According to the Appellant he went through a similar situation 2005 after the Danish Anti-Doping Agency found an excess of hCG in a sample from him, but came to the conclusion that this had not been an anti-doping rule violation.
- The Appellant contends that ANAD had confirmed that hCG is not verified in all tests which explained why the excess of hCG was not detected in other doping tests the Appellant had gone through.
- The Appellant submits that he had repeatedly requested the Respondent to investigate the origin of the detected hCG, but to no avail.
- The Appellant refers to Art. 2.1.4 of the WADA Code which states:

  "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".

- The Appellant further refers to the Comment to Class S2 according to "The 2009 Prohibited List of WADA", which provides:

  "If a laboratory reports, using a reliable analytical method that the Prohibited Substance is of exogenous origin, the Sample will be deemed to contain a Prohibited Substance and shall be reported as an Adverse Analytical Finding".

- The Appellant contends that he had requested that the B Sample be analyzed in the event that the laboratory determined the exogenous origin of the hCG in the A Sample.
- The Appellant contends that according to the Cologne Laboratory, the excess of hCG in the Appellant's body is of endogenous origin, and that the conclusions by Prof. Stenman that this is a case of familial hCG are clear and can not be challenged in any way.
- The Appellant submits that these conclusions were also confirmed by WADA and the Japanese Doping Association after he had been tested in October 2011 in Japan at the 10th Karate World Championships where the test results were positive "at first glance" but turned out negative after completion of the testing procedure.
- Finally, the Appellant submits that the procedure having lasted for two years affected his career as an athlete and coach seriously.

In summary, the Respondent submits the following in defense:

- The Appellant did not demonstrate that the hCG detected in the Sample was of endogenous origin.
- The Respondent submits that the Appellant, and not the Respondent, had the burden of proof to demonstrate that the hCG detected in the Sample was of endogenous origin.
- The Respondent refers to the Comments to S2 of "The 2009 Prohibited List of WADA", which states:

  "Unless the Athlete can demonstrate that the concentration was due to a physiological or a pathological condition, a Sample will be deemed to contain a Prohibited Substance where the concentration of the Prohibited Substance or its metabolites and/or relevant ratios or markers in the Athlete's Sample satisfied the positivity criteria established by WADA or otherwise so exceeds the range of values normally found in humans that it is likely to be consistent with normal endogenous production".

- The Respondent submits that the positivity standard for hCG provided by WADA is 5 mIU/ml and the hCG density detected in the A-Sample therefore exceeded this threshold by three times.
- The Respondent contends that the analysis performed by the Cologne Laboratory was conducted by "the Romanian side" as a result of its own judgment and it is not in any way binding on the Respondent's ADC or WADA.
- According to the Respondent the Cologne Laboratory simply pointed out the general possibility of reasons, such as cancer etc., for the high density of hCG in the Appellant's sample, but did not determine an endogenous origin of the hCG.

- The Respondent submits that its ADC did not need to wait for the results from the Cologne Laboratory before it issued its decision, because neither the Respondent's ADC nor WADA requested the analysis at the Cologne Laboratory.
- The Respondent submits that before issuing the Decision it had concluded in a telephone conference with WADA that (i) no cancer cells were found in the Appellant's body; (ii) the detected levels of hCG in the Appellant's samples abnormally fluctuated within several months, and no possibility of a familial origin nor cancer was realistic; and (iii) that it was likely that hCG was used to cover up testosterone or other substances the Appellant used.
- The Respondent submits that it does not have any objections to the test results and statements of Prof. Stenman.
- The Respondent however questions that Prof. Stenman's test results can prove that the hCG detected in the Sample was of endogenous origin.
- The Respondent submits that the Appellant was aware of the letter that was sent to the Respondent by WADA on 3 February 2011. Such letter suggested taking two urine and two blood samples from the Appellant without prior notice with at least one week between the two collections and send the samples for analysis to the experts suggested by WADA. Contrary to this suggestion, the Appellant was fully aware of WADA's letter dated 3 February 2011 so that Prof. Stenman performed his tests on samples which did not fulfill the requirements set by WADA.
- Finally, the Respondent submits that according to Mr. Julien Sieveking, Mr. Osquel Barroso and Dr. Larry Cole familial hCG is seen in persistently constant levels and does not fluctuate sharply in contrast to increased hCG levels caused by doping, and that the Appellant's hCG levels had repeatedly fluctuated in the various tests performed.

LAW

CAS Jurisdiction

1. The competence of CAS to decide the Appeal at hand results from Article R47 (1) of the Code, which stipulates the following:

   "An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

2. The Decision by the Respondent is a decision within the meaning of Article R47 (1) of the Code.

3. Additionally, the WKO Anti-Doping Code 2009 provides that the Decision is subject to an appeal to the CAS. Article 12.1.7 of the WKO Anti-Doping Code 2009 reads as follows:

"Decisions of the WKO Doping Hearing Panel may be appealed to Court of Arbitration for Sport as provided in Article 17".

Articles 17.2.1 and 17.2.3 of the WKO Anti-Doping Code 2009 stipulate the following:

"17.2.1 Appeals Involving International Level – Athletes

In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to in accordance with the provisions applicable before such court".

[…]

"17.2.3 Persons entitled to Appeal

In cases under Article 17.2.1 the following parties shall have the right to appeal to CAS: (a) the Athlete […]".

4. Further, the jurisdiction of CAS is not disputed by the parties.

5. Therefore, CAS has jurisdiction to decide the present dispute between the parties.

Applicable law

6. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

7. The Panel finds that in this case the applicable regulations are all pertinent WKO rules and regulations. In view of the fact that the WKO has its seat in Tokyo (Japan) Japanese law shall apply on a subsidiary basis.

8. The provisions of the WKO Anti-Doping Code 2009 relevant in this arbitration are the following:

"2. Anti-Doping Rule Violation

The following constitute anti-doping rule violation:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

[…]

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.

[…]

3.1 Burdens and Standards of Proof

IF and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether WKO or its National Federation 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.

[…]

4. The Prohibited List

4.1 Incorporation of the Prohibited List

These anti-doping rules incorporate the Prohibited List, which is published and revised by WADA as described in Article 4.1 of the Code. The Prohibited List is to be prepared by World Anti Doping Agency (WADA) and made available at the website (http://www.wada-ama.org) and shall be referenced.

[…]".

9. The provisions of the 2009 Prohibited List ("Prohibited List") relevant for these proceedings are:

"S2. HORMONES AND RELATED SUBSTANCES

The following substances and their releasing factors, are prohibited:

1. Erythropoiesis-Stimulating Agents (e.g. erythropoietin (EPO), darbepoietin (dEPO), hematide);

2. Growth Hormone (GH), Insulin-like Growth Factors (e.g. IGF-1), Mechano Growth Factors (MGFs);

3. Chorionic Gonadotrophin (CG) and Luteinizing Hormone (LH) in males;

4. Insulins;

5. Corticotrophins;

and other substances with similar chemical structure or similar biological effect(s).

[Comment to class S2:

Unless the Athlete can demonstrate that the concentration was due to a physiological or pathological condition, a Sample will be deemed to contain a Prohibited Substance (as listed above) where the concentration of the Prohibited Substance or its metabolites and/or relevant ratios or markers in the Athlete's Sample satisfies positivity criteria established by WADA or otherwise so exceeds the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production. If a laboratory reports, using a reliable analytical method, that the Prohibited Substance is of exogenous origin, the Sample will be deemed to contain a Prohibited Substance and shall be reported as an Adverse Analytical Finding]".

Admissibility

10. The statement of appeal was filed within the deadline set out in Article R47 of the Code. It further complies with the requirements of Article R48 of the Code.

11. Accordingly, the Appeal is admissible.

Stay of Execution and Scope of Review

12. On 31 March 2011 the Panel ordered a stay of the execution of the Decision and indicated that it would explain the reasons for this order in the final award.

13. The request for a stay of the execution of a contested decision is a request for a provisional measure within the meaning of articles R37 and R52 of the Code. When determining whether such a measure must be ordered the Panel has to consider whether the measure is useful to protect the appellant from irreparable harm, the likelihood of success on the merits of the appeal and whether the interest of the appellant outweigh those of the opposite party.

14. When considering the foregoing elements the Panel found that WADA's 3 February 2011 statement that the Appellant's case *"might not be a case of doping"* was a sufficient reason to stay the execution of the Decision.

15. According to Article R57 of the Code the Panel has *"full power to review the facts and the law"*. As repeatedly stated in CAS jurisprudence, this means that the CAS appellate arbitration procedure entails a *de novo* review of the merits of the case, which it is not confined to merely deciding whether the body that issued the appealed ruling was correct or not. Accordingly, it is the mission of this Panel to make an independent determination as to whether the parties' contentions are inherently correct rather than only to assess the correctness of the appealed Decision (see CAS 2007/A/1394, para. 21).

Merits

16. It is undisputed that hCG is a Chorionic Gonadotrophin (CG) and therefore a prohibited substance according to S2 number 3. of the Prohibited List. WADA's criterion for an Adverse Analytical Finding of hCG in urine of a male athlete stands at densities greater than 5mlU/ml. The density of hCG in the Sample was 16 mIU/ml.

17. With regard to the merits of this case, the Panel must simply address one main issue:

    Did the Appellant demonstrate in accordance with the Comment to class S2 of the Prohibited List that the high density of hCG in the Sample was due to a physiological or pathological condition and therefore of endogenous origin?

18. The Panel finds that the concentration of hCG in the Sample was of endogenous origin. This conclusion is in particular based on the expert opinion of Prof. Stenman, an expert on the field of hCG, who was requested, upon WADA's suggestion, to examine the Appellant's case.

19. The Panel notes that Prof. Stenman submitted to the Respondent the following results of the tests performed on Appellant's blood and urine samples by email dated 23 September 2011:

"We have analyzed the samples and the message is clear. The samples do not contain hCG, only hCGbeta and some hCGbeta core fragment in urine. The latter is obviously derived from hCGbeta. Thus there is no evidence for illicit use of hCG injections. This is probably a case of 'familial hCG', which has now been detected in about 10 persons. It is notable that all cases that we have studied so far have much higher concentrations of hCGbeta in urine than in serum.

Results:

436055 serum hCG 0,04 pmol/L, hCGbeta 7.7 pmol/L

436079 serum hCG 0,15 pmol/L, hCGbeta 9.2 pmol/L

1975897 urine hCG 0,2 pmol/L, hCGbeta 37 pmol/L, hCGbeta core fragment 6.4 pmo/L

1976369 urine hCG 0 pmol/L, hCGbeta 23 pmol/L, hCGbeta core fragment 7.3 pmo/L

1975897 urine hCG 0 pmol/L, hCGbeta 45 pmol/L, hCGbeta core fragment 7.5 pmo/L

1975897 urine hCG 0 pmol/L, hCGbeta 71 pmol/L, hCGbeta core fragment 9.1 pmo/L

[…]" (emphasis added).

20. The Panel also notes that according to Prof. Stenman a further testing of the Appellant's B-Sample was not necessary to confirm that the high hCG density in the Sample was of endogenous origin. Prof. Stenman answered to the Respondent's question whether it should submit the B-Sample for further testing by email dated 10 October 2011 to the Respondent as follows:

"I have sent the results of our tests and my conclusions to Mr. Barroso at WADA. I do not need to analyze more samples to interpret the results. On the basis of the determinations of samples provided to me, it is clear that the hCG immunoreactivity in the serum and urine samples from Marius Ilas is not hCG but free hCGbeta. Thus there is no evidence for use of hCG for doping and WADA has decided to acquit Marius Ilas of any doping charges. […] Based on your conclusions we will recommend the International Federation to acquit the athlete of any doping charges, but still advice periodic clinical follow ups to make sure that there is no underlying pathological condition" (emphasis added).

21. The Panel notes that upon the Panel's explicit request the Respondent confirmed that it does not challenge Prof. Stenman's findings.

22. The Panel therefore finds that under these circumstances it has to rely on the statement of the independent expert, Prof. Stenman and that an additional test of the B-Sample was not necessary to interpret the result.

23. The Panel is of the opinion that the samples tested by Prof. Stenman further fulfilled the requirements set by WADA (to be taken without prior notice). There is no indication that the Appellant had knowledge at what particular point in time the samples would be taken. The Panel finds that even if the Appellant knew that further tests would be conducted, there is no indication that the individual tests were announced to the Appellant. Moreover, there is no

indication that the Appellant would have had the theoretical possibility to manipulate his bodily fluids in a way that the results of future tests would be altered to bring the level of hCG down.

24. The Panel further does not find that Prof. Stenman's results can be challenged by the Respondent's submission according to which increased levels of hCG with endogenous origin do not fluctuate.

25. The Panel notes that Prof. Stenman's findings were approved by the test results of the Cologne Laboratory, which summarized its analysis as follows:

"it is likely, that the athlete secretes ß-hCG endogenously".

26. The Panel also notes that the experts Prof. Stenman and Dr. Cole in a preliminary opinion found, that the Appellant's case might not be a case of doping, but a case of familial hCG.

27. The Panel does not see a reason to question the conclusions of three independent experts on the field of hCG which have also been expressly accepted by the Respondent.

Conclusion

28. To sum up, the Panel finds that the concentration of hCG in the Sample was due to a physiological or pathological condition and therefore of endogenous origin. Hence, the Panel finds that the Appellant did not violate Article 2.1 of the WKO Anti-Doping Code 2009.

29. As a result, for all the above reasons, the Appeal is upheld.

The Court of Arbitration for Sport rules:

1. The appeal filed on 14 January 2011 by Mr. Marius Ilas against the decisions issued on 27 December 2010 by the Respondent is upheld.

2. The decision issued on 27 December 2010 by the Respondent is set aside.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.