



**Arbitration CAS 2007/A/1426 Giuseppe Gibilisco v. Comitato Olimpico Nazionale Italiano (CONI), award of 9 May 2008**

Panel: Mr José Juan Pintó Sala (Spain), President; Mr Michele Bernasconi (Switzerland); Mr Dirk-Reiner Martens (Germany)

*Athletics (pole vault)*

*Doping (attempt to use prohibited substances)*

*Anti-doping rule violation resulting in the attempt to use prohibited substances*

*Evidence of attempt to use prohibited substances*

*CAS scope of review*

- 1. The World Anti-Doping Code (i) treats as an anti-doping rule violation not only the use of prohibited substances but also a conduct constituting an attempt to use them, and (ii) includes an autonomous definition of the concept of “Attempt” that shall be applied in the assessment of any conduct eventually leading to such violation. Proof of intent on the athlete’s part is expressly required to establish an attempt to use.**
- 2. The evidence is not of such a level to be considered as showing an attempt to use prohibited substances when it merely shows that the athlete, although aware that a doctor has been involved in doping matters, continues to use the assistance of this medical person and exchanges with him information on doubtful substances as well as on the modalities of the doping controls.**
- 3. Although, pursuant to art. R57 of the CAS Code, a CAS panel has full power to review the facts and the law and to issue a decision *de novo*, when acting following an appeal against a decision of a federation, association or sports-related body, the power of review of such panel is also determined by the relevant statutory legal basis and, therefore, is limited with regard to the appeal against and the review of the appealed decision, both from an objective and a subjective point of view. Therefore, if a motion was neither object of the proceedings before the previous authorities, nor in any way dealt with in the appealed decision, the panel does not have the power to decide on it and the motion must be rejected.**

Giuseppe Gibilisco (the “Athlete” or the “Appellant” or “Gibilisco”) is a professional pole vaulter affiliated with the Federazione Italiana di Atletica Leggera (FIDAL) and belongs to the Italian military corps called “Guardia di Finanza”.

Comitato Olimpico Nazionale Italiano (CONI) is the Italian National Olympic Committee and has the mission to develop, promote and protect the Olympic movement within the territory of Italy in accordance with the Olympic Charter. The Ufficio Procura Antidoping of CONI (“UPA-CONI” or the “Respondent”) is an organisation within CONI which is in charge of prosecuting possible anti-doping rule violations by athletes affiliated to Italian National Federations, and represents CONI before the sports arbitration courts in disciplinary proceedings for violation of anti-doping rules.

In the course of 2004 a criminal investigation named “Oil for Drugs” was commenced by the Procura della Repubblica of Rome, i.e. the state Public Prosecutor Office, in order to uncover the relationship between several athletes and Dr. Carlo Santucci (the “Doctor”), suspicious of providing prohibited substances to such athletes. The Doctor had already been suspended from 1995 to 2000 by the Italian Cycling Federation.

On 15<sup>th</sup> February 2004, on the occasion of an indoor athletic meeting in Donetsk (Ukraine), Gibilisco was submitted to a doping control in which no prohibited substances were detected.

On 10<sup>th</sup> May 2004 the Nucleo Antisofisticazioni e Sanità (NAS), a unit of the Carabinieri, i.e. the Italian military police force, within the framework of the above-mentioned investigation “Oil for Drugs” recorded by wire-tapping a conversation between the Doctor and Gibilisco at the Doctor’s office in Pescara. In such conversation the Doctor and Gibilisco spoke, among other issues, (i) about diets, medicines and supplements, and (ii) about Testovis, which is a product including testosterone, and about IG (growth hormone).

On 26<sup>th</sup> May 2004 the NAS carried out a search in Gibilisco’s domicile in Formia, where they confiscated (i) a personal agenda of the Athlete showing on the pages for January and February the letters “A-P-G” which, according to NAS, correspond to the prohibited substances Andriol, Profasi and Growth Hormone - the same letters had been found during a police investigation performed with regard to the prescription of prohibited substances to the cyclists D. and G. - and (ii) inside a package of Supradyn tablets a pill containing 247,7 mg of caffeine, which is well known to be a stimulant of the nervous system and which despite having been removed from the WADA list of prohibited substances in 2004, was included again in the list in the year 2005.

Also according to the investigation and the relevant file “Oil for Drugs”, the cyclist G. admitted (i) that he was advised by the Doctor to take prohibited substances, and (ii) that the Doctor never prescribed him any substance in writing, but used initials (letters) to describe such substances and dots to identify the doses.

On 15<sup>th</sup> July 2004 the NAS interrogated Gibilisco about the result of the search made in his domicile. During such interrogation Gibilisco admitted (i) having been in contact with the Doctor for a period starting at the end of 2002 or early 2003, because he was unhappy with the doctors of FIDAL who were taking care of him, (ii) not having communicated his visits with the Doctor to his military superiors in order to avoid that his sporting results would be associated with doping (this, only after Gibilisco had heard about the Doctor’s involvement in doping proceedings), (iii) having requested information from the Doctor about doping substances, (iv) having been advised by the Doctor to take Growth Hormones, although he insisted that he never took it, (v) that the pill that was found

during the search in his domicile contained caffeine and that it was given to him by a North-American athlete on the occasion of the indoor meeting in Donetsk on February 2004, and (vi) that the letters A, P and G written down in his agenda referred to training programs.

On 26<sup>th</sup> June 2007 Gibilisco was interrogated by the UPA-CONI. In such interrogation the Athlete only confirmed his declarations made before the police and refused to make further declarations.

On 29<sup>th</sup> June 2005 the criminal investigation of the Public Prosecutor's Office was closed by the Judge with respect to Gibilisco.

On 5<sup>th</sup> July 2007 Gibilisco was interrogated again by the UPA-CONI. In such interrogation the Athlete (i) denied that the Doctor had advised him to take doping substances, (ii) reiterated that the letters written down in his agenda corresponded to a training programme which information had already been provided in 2004 by his lawyer to clarify Gibilisco's position in the criminal proceedings, (iii) declared that he had not followed this training program because he was injured, (iv) admitted that he did not know about CONI's Sports Medicine Institute but said that he was happy with the medical staff of FIDAL, especially in orthopaedic aspects, (v) confirmed that he had never informed his military superiors about his visits with the Doctor, and (vi) denied having used doping substances or having had the intention to do so.

On 6<sup>th</sup> July 2007 the UPA-CONI interrogated Captain (now Major) Di Paolo (Gibilisco's military superior) and Dr. Fischetto, doctor of FIDAL. Both confirmed that Gibilisco had never informed them about his visits with the Doctor.

On 18<sup>th</sup> July 2007 the Commissione Giudicante Nazionale of FIDAL imposed on Gibilisco a sanction of two years of ineligibility for attempted use of prohibited substances (article 2.2 of the WADA Code, "WADC"). The following elements were considered by the Commission to determine that an "attempt to use" prohibited substances was committed by the Athlete:

- The fact that Gibilisco kept on calling on the Doctor even after having become aware that he was involved in doping matters.
- The contradictions in Gibilisco's declarations about the reasons why he called on the Doctor.
- Gibilisco's declaration confessing that the Doctor had advised him to take Growth Hormones.
- The fact that Gibilisco had not communicated his visits with the Doctor to his military superiors or to FIDAL.
- The terms of the conversation held between Gibilisco and the Doctor recorded at the Doctor's office within the framework of the investigation "Oil for Drugs".
- The letters written in Gibilisco's agenda in connection with the declarations made by the cyclists G. and D. in similar proceedings.

Gibilisco appealed from such decision before the Commissione d'Appello Federale of FIDAL, which in its decision of 12<sup>th</sup> September 2007 set aside the decision of the Commissione Giudicante Nazionale

and acquitted Gibilisco of the sanction. The Commissione d'Appello stressed that Gibilisco had not been very cooperative in the proceedings and that the independence of the sports procedure of the criminal procedure had to be respected, but considered that according to the concept of "attempt" described in article 56 of the Italian Criminal Code it was not possible to condemn the Athlete for an attempt to use prohibited substances. In the Appeal Commission's opinion the elements considered by the Commissione Giudicante Nazionale of FIDAL were not sufficient to establish a conduct unequivocally directed to consume doping substances. In addition, the fact that Gibilisco had been submitted to a doping control in February 2004 with a negative result and the fact that no prohibited substances were found in Gibilisco's possession had to be taken into account in his favour.

UPA-CONI appealed from the decision of the Commissione d'Appello Federale before the Giudice di Ultima Instanza in Materia di Doping of CONI (hereinafter "GUI"). UPA-CONI prevailed in such appeal and GUI, in its decision dated 26<sup>th</sup> October 2007, imposed on the Athlete a sanction of two years of ineligibility (deducting from such period the part of the sanction already served by the Athlete), based on the following considerations:

- Sports law rules are specific and independent from the rules of other areas of law. The sports system shall be governed by those specific rules (not by the rules of civil or criminal law) and particularly by the rules of the WADC accepted by CONI. Therefore (i) the termination of the criminal proceedings with respect to Gibilisco does not bind the sporting disciplinary authority, and (ii) the concept of "attempted use" which shall be applied to the facts giving rise to the sporting disciplinary proceedings is not the one established in article 56 of the Italian Criminal Code, but the one established in the Definitions of the WADC (i.e. "*purposefully engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person gives up to the attempt prior to it being discovered by a third party not involved in the Attempt*").
- The termination order of the criminal proceedings against Gibilisco expressly states that the results of the investigation were, at least at that time, not sufficient to continue the proceedings against Gibilisco, which means that the termination of the case made reference to a conduct that took place before the date of such termination, but investigations continued subsequently.
- The termination order deals with the use of prohibited substances and not with an "attempted use" of them, which is the conduct that is the subject of the sporting disciplinary proceedings. This implies that the facts that led to the criminal procedure and to the sporting procedure are partially different.
- Gibilisco's training headquarters were located in Formia and he had at his disposal the doctors of FIDAL and the military doctors, but he preferred to call on the Doctor, whose office is located in Pescara and who is known for his involvement in doping cases. Gibilisco has not been able to give a plausible explanation why he called on the Doctor. It is not credible that he visited the Doctor just to obtain nutritional supplements that the doctors of FIDAL had refused to prescribe to him. If these nutritional supplements were legal there is no reason to think that the doctors would have refused to provide them to Gibilisco.

- Gibilisco admitted that (i) since 2003 he had known about the Doctor's involvement in doping cases and in spite of this he continued calling on him at least until 10<sup>th</sup> May 2004 (date of the recording of Gibilisco's conversation with the Doctor), and (ii) he did not inform FIDAL and his military superiors about his visits with the Doctor because he was afraid that they would relate them with doping practices.
- Gibilisco declared - although he denied it afterwards - that the Doctor had advised him to take Growth Hormones.
- Gibilisco refused to reveal the name of the person who had given him the contact details for the Doctor.
- The results of the recording made at the Doctor's offices on 10<sup>th</sup> May 2004 are self-explanatory. In the course of the conversation, among other issues:
  - The Doctor tells Gibilisco "*take IG at night*" and then mentions Testovis and immediately afterwards he says "*take 2 pills of 4.000 and we will decide after that*". The Doctor would have never given this advice if the Athlete had not previously asked for it.
  - The Doctor informs Gibilisco about the time of the day when certain substances should be taken and asks him about the doping controls to which he is being submitted and whether these are just urine tests or also blood tests.
- The letters written in Gibilisco's agenda (A-P-G), combined with the results of the investigations carried out with respect to the cyclist D., must be deemed to correspond to the prohibited substances Andriol, Profasi and GH, especially bearing in mind that Gibilisco has not given a plausible explanation of the training programmes to which those letters allegedly refer.
- The renunciation referred to in the last section of the "Attempt to use" definition of the WADC does not apply to the present case, as is argued by the Athlete. Gibilisco alleges that he could not have successfully passed the doping control on the occasion of the event in Donetsk in February 2004 if he had taken the prohibited substances to which the letters of his agenda allegedly refer, so such negative results of the control shall be understood as a renunciation within the meaning of the WADC. However, such position is untenable. First of all, because the renunciation shall be explicit and unequivocal, which is not the case, as the Athlete, far from declaring his intention to renounce, did exactly the opposite by continuing calling on a doctor under suspect of doping practices. And secondly, because if Gibilisco knew that he was going to compete on 15<sup>th</sup> February 2004, he could have adapted the necessary dosage so that he would not be found positive in the doping control, especially if it is taken into account that he was advised by a doctor who is an expert in doping matters.
- All of the above elements demonstrate that Gibilisco called on the Doctor with the aim of getting prescriptions for doping substances. Therefore he is guilty of an attempt to use prohibited substances according to article 2.2 of the WADC.

Gibilisco appealed from the GUI decision (the “Appealed Decision”) before the CAS requesting to be acquitted of the sanction imposed on him. A stay of the execution of the Appealed Decision was requested as a provisional measure.

CONI answered to the appeal asking the CAS to uphold the Appealed Decision and to declare Gibilisco ineligible for two years. It opposed to the stay of the execution of the Appealed Decision.

The hearing took place in Lausanne on 3<sup>rd</sup> April 2008. At the hearing, the Appellant declared that the request for provisional measures was withdrawn. Therefore, the Panel will decide only and directly on the merits of the case.

## LAW

### CAS Jurisdiction

1. The jurisdiction of CAS is acknowledged, inter alia, by article 13.2.1. of the WADC, article 2.26 of the Norme Sportive Antidoping – Documento tecnico attuativo del Programma Mondiale Antidoping WADA, article R47 of the CAS Code and the “Order of Procedure” signed by the parties.
2. Consequently, CAS is competent to deal with this matter.

### Applicable law

3. Article R58 of the CAS Code states the following:  
*“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”.*
4. As both parties have made reference to Italian law and as the athlete and CONI are domiciled in Italy, the Panel will apply all the applicable regulations, in particular, the WADC which has been adopted by CONI, and Italian law.

### About the dispute submitted to the Panel by the parties

5. In summary, according to the written submissions filed by the parties in the present proceedings it appears that:
  - Gibilisco requests to be acquitted of the sanction imposed by the Appealed Decision as he contends that he has never used or attempted to use prohibited substances within the meaning of article 2.2. WADC.
  - CONI asks for the confirmation of the Appealed Decision as it understands that the conduct of Gibilisco giving rise to these proceedings constitute an attempt to use prohibited substances.
6. The Panel notes that at the end of the hearing the representative of Gibilisco made a subsidiary motion to the effect that the Athlete be sanctioned, if at all, not for an attempt to use prohibited substances but for having requested the medical assistance of the Doctor, i.e. of a medical person without legitimacy (“persona inibita”) because of his involvement in doping practices and the respective suspension. CONI commented on such subsidiary motion by stating that the illicit visits (“frequentazione illecita”) of the Athlete with the Doctor are one of the elements corroborating the attempted use by Gibilisco of prohibited substances. In any event, because of the repeated visits of the Athlete with the Doctor, the maximum possible sanction applicable for such illicit visits should apply. The Panel will deal with that subsidiary motion below.
7. As regards the Appellant’s conduct which formed the basis of the sanction in the Appealed Decision, article 2.2 WADC reads as follows:

*“The following constitute anti-doping rule violations:*

  - 2.2. *Use or **Attempted Use** of a Prohibited Substance or Prohibited Method.*
    - 2.2.1. *The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation”.*
8. The concept of “Attempt” is defined in Appendix 1 of the WADC as follows:

*“Attempt: **purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation.** Provided, however, there shall be no anti-doping rule violation based solely on an Attempt to commit a violation if the Person renounces the attempt prior to it being discovered by a third party not involved in the Attempt”.*
9. It is therefore clear that the WADC (i) treats as an anti-doping rule violation not only the use of prohibited substances but also a conduct constituting an attempt to use them, and (ii) includes an autonomous definition of the concept of “Attempt” that shall be applied in the assessment of any conduct eventually leading to such violation.
10. The Panel must therefore analyse the Appellant’s conduct with a view to determine whether it can be qualified as an “attempt” within the WADC definition.

11. To this end the Panel notes that in the comment to article 2.2.1, WADA expressly provides that “*proof of intent on the Athlete’s part*” is required to establish an attempt to use:  
*“Demonstrating the “Attempted Use” of a Prohibited Substance requires proof of intent on the Athlete’s part. The fact that intent may be required to prove this particular anti-doping rule violation does not undermine the strict liability principle established for violations of Article 2.1 and Use of a Prohibited Substance or Prohibited Method”.*
12. In addition the Panel takes into consideration that article 3 of the WADC allocates the burden and standards of proof in doping matters as follows:  
*“The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing body 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 the Code places 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”.*
13. After having reviewed the facts giving rise to this dispute and all the evidence produced by the parties, the Panel considers as proven that:
  - Gibilisco called on the Doctor on several occasions, even after having become aware that the Doctor was involved in doping matters. In fact, the Athlete has expressly admitted it.
  - At least once (on 10<sup>th</sup> May 2004), Gibilisco and the Doctor talked about prohibited substances in the Doctor’s office.
  - Gibilisco informed neither FIDAL’s doctors nor his military superiors about his visits with the Doctor. The witnesses Dr. Fischetto (from FIDAL) and Major Di Paolo (from military corps) who were heard by telephone during the hearing, confirmed that they were never informed about those visits.
  - During the proceedings, Gibilisco contradicted himself in his statements before the Italian authorities and institutions with regard to his relationship with the Doctor and the purpose of his visits with him.
  - No explanation (at least no convincing explanation) has been provided by Gibilisco about the letters which appeared in his agenda and their alleged reference to a training program.
14. These facts do in fact provide some indication that the Appellant may have been involved in doping practices. However, the relevant issue to be considered for determining whether the violation foreseen in article 2.2 WADC has been committed or not is whether these facts constitute an “Attempt” within the meaning of the definition of the WADC (“*purposefully engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation*”).



15. First of all, the Panel finds that although it is undisputed that the Appellant visited with the Doctor several times and did not disclose these visits to FIDAL's and the military corps' doctors, it has not been proven that the Doctor prescribed to the Athlete prohibited substances in any way. Also, the content of the conversation held on 10<sup>th</sup> May 2004 in the Doctor's office as made available through its transcript, does not provide other conclusive evidence. Further, no medical prescription or other kind of document referring to prohibited substances and made out either by the Doctor or by the Athlete has been found in the course of the investigations, and no other evidence shows conclusively the prescription of prohibited substances.
16. Secondly, even though Gibilisco failed to provide a convincing explanation about the letters which appeared in his agenda, the Panel finds that no conclusive evidence has been provided which would link such letters to doping substances or to doping programmes followed by Gibilisco. The mere fact that similar (not the same) letters have been found in the agendas of other athletes who admitted that these letters were related to doping practices cannot by itself, in the Panel's opinion, be deemed sufficient to hold that Gibilisco was also following or intending to follow such doping practices.
17. In addition, as mentioned above, WADA stipulates that proof of the athlete's intent to attempt to use prohibited substances shall be demonstrated in order to establish a violation of article 2.2. WADC. In the present case the Athlete has always denied having intended to take prohibited substances, and no conclusive evidence has been produced to the contrary by CONI, which according to article 3 WADC has the burden of proof.
18. The above arguments lead the Panel to conclude that although some of Gibilisco's conduct raises doubts about the truthfulness of his statements (especially his calling on the Doctor fully conscious of the fact that the Doctor was involved in doping practices), there are not sufficient elements to determine that Gibilisco attempted to use prohibited substances within the meaning of the WADC. The facts deemed as proven (individually or combined) cannot, in the Panel's opinion, be considered as conduct constituting a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation.
19. The Panel is aware that it is not possible to state in this case that the Athlete has had absolutely nothing to do with doping matters, as the evidence produced shows that the Athlete at least continued to use the assistance of a clearly "tainted" medical person like the Doctor and that he exchanged with him information on doubtful substances and on the modalities of the doping controls. However, the Panel is also of the opinion that it is also not possible to interpret the evidence to be of such a level to be considered as showing an attempt to use prohibited substances as defined in the WADC. This is not a case in which, for instance, prohibited substances are found in the athlete's possession or domicile (in fact, in this case, a search was conducted in the Appellant's home with no relevant result). It is much less than this. The events proven in the present case do certainly cast a questionable light on the Athlete but are not sufficiently probative of a plan of the Athlete directed at committing a violation of the anti-doping rules.

20. In conclusion, because of the absence of conclusive evidence, the Panel decides to acquit Gibilisco of the sanction imposed by the GUI in the Appealed Decision.
21. As mentioned above, in his closing remarks at the hearing, the representative of Gibilisco asked, as a subsidiary motion, that Gibilisco may, if at all, be considered guilty not of attempted use of prohibited substances but only for having used the assistance of a medical person not eligible because of a suspension of his status, i.e. a "*frequentazione di un soggetto inibito, e cioè colpito da provvedimento sanzionatorio per fatti di doping*". As mentioned above, the Respondent commented on such subsidiary motion by stating that the illicit visits ("*frequentazione illecita*") of the Athlete with the Doctor is one of the elements corroborating the attempted use by Gibilisco of prohibited substances. In any event, because of the repeated visits of the Athlete with the Doctor, the maximum possible sanction applicable for such illicit visits should apply.
22. The Panel is of the view that such subsidiary motion is not admissible for the following reasons: It is true that pursuant to art. R57 of the CAS Code the Panel has the full power to review the facts and the law and to issue a decision *de novo*. However, when a CAS Panel is acting following an appeal against a decision of a federation, association or sports-related body, the power of such a Panel to rule is also determined by the relevant statutory legal basis and, therefore, is limited with regard to the appeal against and the review of the appealed decision, both from an objective and a subjective point of view (see recently CAS 2007/A/1433; CAS 2005/A/835-942; CAS 2006/A/1206).
23. The Panel is of the view that it may indeed be true that the Athlete, as argued by his representative during the closing remarks, may have violated another rule by seeking repeatedly the assistance of the Doctor. However, as the subsidiary motion of the Appellant was neither object of the proceedings before the Italian sport authorities, nor in any way dealt with in the Appealed Decision, the Panel does not consider itself to have the power to decide on it. Therefore, the subsidiary motion is not admissible and must be rejected. It will be for the competent Italian authorities to decide whether to open or not disciplinary proceedings against Gibilisco for a possible violation of doping rules by the Athlete in connection with the use of the assistance of the Doctor.
24. This conclusion, finally, makes it not necessary for the Panel to consider the other requests submitted by the parties to the Panel. Furthermore, all other prayers for relief are rejected.

**The Court of Arbitration for Sport rules:**

1. The decision of the Giudice di Ultima Instanza in Materia di Doping of CONI dated 26<sup>th</sup> October 2007 imposing a sanction of two years of ineligibility on Giuseppe Gibilisco is set aside.
2. The further motions of the parties are not accepted and all other prayers for relief are dismissed.  
(...).