



Arbitration CAS 2010/A/2216 Ryan Napoleon v. Fédération Internationale de Natation (FINA), award of 22 December 2010

Panel: Mr Stuart McInnes (United Kingdom); Mr Malcolm Holmes, QC (Australia); Mr Olivier Carrard (Switzerland)

Aquatics (swimming)

Doping (Formoterol)

Elimination of the period of ineligibility

Reduction of the period of ineligibility

Early commencement of the period of ineligibility

Early commencement of the period of disqualification

- 1. Where “utmost caution” is not demonstrated by the athlete in connection with the storage and usage of a medication, and where the involvement of a third party is immaterial and not considered as qualifying under ‘exceptional circumstances’ in order to warrant the elimination of the period of ineligibility, the athlete fails to establish that he acted with “No Fault or Negligence” in relation to his anti-doping violation.**
- 2. Where the athlete has established how a specified substance entered his body and that it was not intended to enhance his competitive performance, the degree of fault must be considered in order to assess any reduction of the period of ineligibility. The circumstances considered must be specific and relevant to explain the athlete’s departure from the expected standard of behaviour.**
- 3. According to FINA Doping Control Rule DC 10.9.1, the early commencement of a period of ineligibility is allowed wherein the delays are not attributable to the Competitor.**
- 4. Under FINA Doping Control Rule DC 10.8, fairness may require that the period of disqualification of results should commence earlier based on the particular circumstances of a case and notably on the fact that the delays might not be attributable to the competitor**

Mr Ryan Napoleon (the “Appellant” or the “Athlete”) is a 20 year old Australian professional male swimmer.

The Fédération Internationale de Natation (FINA; the “Respondent”) is the international federation governing disciplines related to swimming.

On the 16th November 2009, the Appellant was subjected to an out-of-competition doping control test. The specimen collected was split into an A sample and a B sample.

On the 30th March 2010, the Appellant was notified by the FINA Executive Director who advised the Appellant that the A sample of the out-of-competition doping control test had returned an Adverse Analytical Finding (AAF) for the prohibited substance Formoterol, under class S3 Beta-2 Agonists on the WADA prohibited substance list 2009 and 2010.

By letter dated 8th April 2010, the Appellant asked that the B Sample analysis be conducted.

By letter dated the 21st April 2010, FINA Executive Director advised that the B sample analysis had also confirmed an AAF, finding that the same prohibited substance Formoterol was present in the Athlete’s specimen. In the same letter the Appellant was further advised that his case would be forwarded to the FINA Doping Panel for further consideration and the FINA Executive Director invited the Appellant to provide evidence of a Therapeutic Use Exemption (TUE) for the medication.

The Appellant was unable to provide a TUE for this substance. The Appellant has suffered from asthma from a young age and was prescribed the medication Pulmicort 400 (for which he was granted a TUE on the 28th July 2008). Mr Christopher Napoleon, the Appellant’s father, also suffers from acute asthma and takes the same medication as his son. The Appellant and his father stored their asthma medication in the same cupboard in the family home and acknowledge that they may have, on occasion, inadvertently used each other’s inhaler.

It is accepted that the reason for the Appellant’s AAF was due to his using his father’s inhaler, which had been incorrectly labelled by the dispensing pharmacist and was in fact another type of asthma medication, Symbicort 400, which contained Formoterol.

Mr Christopher Napoleon believed he had obtained a repeat prescription of the medication Pulmicort. The Pulmicort prescription label however, was accidentally affixed to a Symbicort inhaler, which contained the prohibited substance Formoterol.

On the 25th May 2010, the FINA Executive turned down the request of the Appellant’s Counsel for the case to be referred to the FINA Executive pursuant to FINA DC 7.1.10 to determine that there was not a sufficient scientific factual basis to proceed further with the case.

By letter dated the 28th June 2010 the FINA Executive Director advised that the FINA Executive had decided that responsibility for resolution of this matter should continue to rest with the FINA Doping Panel.

The FINA Doping Panel was formed on the 20th August 2010 pursuant to FINA Rule C 21.6 and in advance of the hearing the Chairman of the FINA Doping Panel requested that the Appellant submit the various inhalers in question to the Panel for examination at the hearing.

The FINA Doping Panel conducted the hearing on the 20th August 2010 at the FINA Headquarters, Lausanne and found that the Appellant's degree of care was less than should be expected from an elite athlete who should exercise greater vigilance to ensure compliance with anti-doping rules. However as a result of the positive drug test from the coincidence of a number of factors they were sympathetic and did not suggest there was any intention to cheat on behalf of the Appellant.

FINA's doping control rule 10.4 which provides for "*Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances*", was applied in order to consider the circumstances of the Appellant and his request for a reduced sanction. The doping control rule provides that in order "*to justify this reduction or elimination, the Competitor must produce corroborating evidence in addition to his word which will comfortably satisfy to the hearing panel the absence of an intent to enhance sport performance or mask the use of a performing enhancing substance*".

The FINA Doping Control Panel found after considering the factors under FINA Doping Control Rules 10.4 and acknowledging the existence of corroborating evidence, that whilst the Appellant's practice of intermingling his medications in a common area was below the standard of care that should be demonstrated by a professional athlete. It was found understandable to a degree in the context of his family relationship and living situation.

On the 20th August 2010, the FINA Doping Panel imposed a 3 month period of ineligibility under the FINA Doping Control Rules pursuant to FINA DC 10.9 to run from the date of the hearing, the 20th of August. In addition, all results which were achieved by the swimmer from the 16th November 2009 until the 6th April 2010 would be annulled. By reference to Doping Control 10.8 "*all competitive results obtained from the date of the sample through the commencement of any provisional suspension or ineligibility period shall unless fairness requires otherwise be disqualified*". The Appellant did not serve a provisional suspension and taking into account the unique set of facts and requirement of fairness, the FINA Doping Panel concluded that the Appellant's results only for the period from his positive doping control on the 16th November 2009 until the 6th April 2010 be disqualified.

On the 2nd September 2010 the Appellant filed his application form to the Appeal Division of the CAS Oceania Registry on an urgent basis against the decision rendered by the FINA Doping Control Panel on the 20th August 2010 (the "FINA Decision") and issued a request for a stay on the period of ineligibility and a stay of the annulment of the athlete's results.

On the same day the Appellant filed his Appeal Submission against the FINA Decision. The Appellant requested the CAS Panel to decide as a matter of urgency and grant the following relief:

"that the decision of FINA Doping Panel be set aside; there is a finding of no fault or negligence under Doping Control 10.4 or alternatively a lesser sanction is imposed; (a) a reprimand and no period of ineligibility; (b) that any period of ineligibility run only from the 21st August 2010 to the date of the determination of the appeal or (c) an otherwise order under Doping Control 10.8 providing that fairness does

require that the results obtained by Mr. Napoleon subsequent to the 16th November 2009 should not be disqualified”.

By letter dated the 8th September 2010, the CAS informed the parties that the hearing would be held by video conference on Friday, 10th September at 8.a.m. CET. The parties were also advised that Mr Stuart McInnes had been appointed as President of the Panel.

The Appellant does not contest that the prohibited substance Formoterol (Class S.3 Beta-2 Agonists) was detected in his system, and does not dispute that a doping offence has been committed under FINA Rules and DC 2.1. and 10.4 respectively.

However, the Appellant maintains that he had no intention of enhancing his performance and requests the Panel to take into consideration the following arguments in order to find that he bore No Fault or Negligence or No Significant Fault or Negligence:

- the Appellant has never before tested positive in an Anti-Doping Control Test;
- the Appellant has suffered from asthma since childhood and has taken Pulmicort 400 and Ventolin (Salbutamol) for which he obtained a TUE, dated 28th July 2008;
- Mr Christopher Napoleon also suffers from acute asthma and is treated for this condition with “Pulmicort 400” the same medication as the Appellant, therefore there are multiple Pulmicort inhalers stored in the family medicine cabinet and on occasion both the Appellant and Mr Christopher Napoleon have used these inhalers interchangeably;
- the Appellant and Mr Christopher Napoleon have had the same asthma medication for the last 10 years;
- the Appellant has demonstrated how the substance Formoterol entered his body due to the use of a wrongly labelled inhaler dispensed by the pharmacist;
- the inhaler medication was issued by the pharmacist, in a repeat prescription to Mr Christopher Napoleon on the 6th November 2009. The pharmacist dispensed what she thought was the routine Pulmicort prescription but was in fact a wrongly labelled container of Symbicort 400, which contained the prohibited substance, Formoterol;
- neither the Appellant nor Christopher Napoleon examined the inhalers stored in the medicine cabinet before usage;
- on receiving the results of the AAF from the Appellant was not aware as to how such a result could materialise or how Formoterol could have entered his system.

FINA submits:

- that the Appellant has failed to establish that he acted with “No Fault or Negligence” in the relation to his anti-doping violation, and that the Appellant could have avoided the use of a product containing Formoterol through the exercise of “utmost caution” by undertaking several of the reasonable precautions, that should be expected of elite athletes subject to anti-doping rules.

- that there is no dispute in relation to the facts of the case and therefore in relation to the hearing before the CAS, the discussion pertains to:
 - the application of FINA DC 10.5.1: No Fault or Negligence;
 - the application of FINA DC 10.4: appropriate sanction/measure of sanction;
 - the application of DC 10.8: disqualification of results in events subsequent to Sample Collection.
- that regardless of accepting the credibility of the Appellant's testimony, this does not eliminate the personal responsibility of athletes to properly control any substance they ingest and/or let enter their body which serves as the fundamental basis of the Anti-Doping System (FINA DC 2.1). Therefore, in the case of the Appellant this substance control was below the requisite standard of care imposed upon elite athletes.
- that there is a very stringent and onerous personal duty of care. Athletes cannot rely on the fact that a medical professional is involved and must at all times remain on their guard (CAS 2008/A/1488).
- that a high level of attention is always required and this high standard of care is illustrated in a recent decision of CAS where the mistaken use of another's glass resulted in disqualification and ineligibility (CAS 2006/A/1025).

LAW

Jurisdiction

1. The jurisdiction of the CAS is derived from article 13 of the FINA Doping Control Rules DC 13.2.1. which states that,
"in cases arising from participation in an International Competition or in cases involving International-Level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court".
2. Furthermore, Article R47 of the Code of Sports-related Arbitration (the "CAS Code") states
"an appeal against the decisions 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".
3. Pursuant to Article R57 of the Code the Panel has full power to review the facts and the law and to hear the case *de novo*, wherein at R57 it provides that,
"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".

4. The jurisdiction of the CAS has not been contested by the Respondent. Furthermore, § V.5.4 of the FINA Decision provides that “*Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this judgment (FINA Rule C 12.9.3)*”. Based on the foregoing, the Panel is satisfied that the CAS has jurisdiction to hear this matter.

Applicable Law

5. Article R58 of the CAS Code provides 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”.
6. As the out-of-competition test was conducted on the 16th of November 2009, the regulations applicable to the present case are FINA’s Doping Control Rules 2009. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the rules and regulations of FINA shall apply primarily and Swiss law shall apply complementarily.

Discussion

7. Under the CAS Code, all appeals before CAS shall take the form of a rehearing *de novo* of the issues raised by the case and the CAS Panel shall be able to substitute its decisions for the decision of the Anti-Doping Panel where it considers the decision of such an Anti-Doping Tribunal to be erroneous or procedurally unsound. The CAS decision shall have immediate effect and all parties shall take action to ensure that it is effective.
8. The CAS Panel must determine in this appeal whether the Appellant has satisfied the conditions set out in provisions of FINA Doping Control Rules thus DC 10.4 or whether the circumstances are more appropriate under DC 10.5.1. The Panel must assess whether or not these provisions are applicable to exercise its discretion to reduce the period of ineligibility or eliminate the period imposed.
9. The Panel primarily addressed whether this case can fall under 10.5.1. The Panel concludes the case fails under the criteria set out. The Panel accepts and upholds the findings of the FINA Doping Panel that “utmost caution” was not demonstrated by the Appellant, and the involvement of a third party “the Pharmacist” is immaterial and not considered as qualifying under ‘exceptional circumstances’ to warrant the elimination of the period of ineligibility. Furthermore, sufficient caution was not used on behalf of the athlete and third party involvement does not exonerate the Athlete from his responsibilities to ensure that he complies with his duty of care which is very stringent and onerous at all times. The Panel

further concludes from Exhibit D which is attached to the Statutory Declaration of Mr Jordan Farr, that the different colour of the bases of the inhalers provided a means of differentiating the inhalers and this supports the finding of negligence and carelessness by the Appellant.

10. Under the provision of 10.4 *“Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances”*; the Panel accepts that whilst the Appellant has established how the specified substance “Formoterol” entered his body, it was not intended to enhance his competitive performance. Having determined that the degree of fault must be considered under DC 10.4, this element of fault is the criterion for assessing any reduction of the period of ineligibility. Therefore in assessing the Appellant’s degree of fault, the circumstances considered must be specific and relevant to explain the Appellant’s departure from the expected standard of behavior (FINA Doping Control Rules “comment to DC 10.4”).
11. The Panel was provided with the decision of the ATP Tour Anti-Doping Tribunal Appeal of Todd Perry to demonstrate how in similar medical circumstances, an athlete was found to have committed no Fault or Negligence in respect of the use of the Specified Substance. However on examining this case further, the CAS Panel distinguished the facts of the Perry case as different to the Appellant’s because in Perry, “utmost caution” was exercised by the Athlete. In addition, the chain of events in the case of Perry was different to the Appellant’s wherein several causative steps occurred involving negligent behaviour and eventual consumption of the prohibited substance. The Panel felt it cannot decide the Appellant’s situation under the same grounds as Perry case to eliminate the period of ineligibility.
12. The Panel finds that there is a sufficiently strong degree of culpability and that neither in the Appellant’s oral evidence nor submissions did he provide any evidence that he had exercised the stringent duty of care in the household and practical management of his medication. There was a clear indication of the distinction in the colours of the inhalers as displayed at “Exhibit D” of Mr Jordan Farr’s declaration.
13. Based on the application and assessment of the provisions under FINA DC 10.4 and 10.5.1 in relation to the circumstantial evidence of the case, the CAS Panel does not consider the three month period of ineligibility rendered by the FINA Doping Panel to be a disproportionate sanction correlating to the level of culpability and negligence demonstrated by the Appellant. The CAS Panel concurs with the FINA Doping Panel’s belief that Mr Napoleon’s behaviour was *“below the standard of care for an elite athlete to store his medications in a common area.... and admittedly not review the label of the products used by him”*. There must be a clear and definitive compliance to which all athletes are held accountable.
14. Having ascertained that the decision issued by the FINA Doping Panel was correct, and is upheld by the Panel, the Panel accepts FINA’s determination that no circumstances existed in this case that would warrant the elimination or the reduction of the three month period of ineligibility and upholds the decision and reasons for imposing same.

15. Although the Panel is in agreement with FINA's rationale for awarding the three month sanction, the Panel found that a valid argument exists under FINA DC 10.9.1 "to vary the terms of the sanction imposed, Para 10.9.1 states as follows:

"where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Competitor or other person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred".

16. In relation to this provision 'FINA DC 10.9.1.' the Panel determined from the appeal submission of the Appellant that he was tested for an anti-doping violation on several occasions 'in the period November 2009 through March 2010', and in one of these tests, the results produced an AAF. This AAF was discovered in the sample collected on the 16th November 2009. By virtue of letter dated the 8th April 2010 the Appellant was notified by FINA's Executive Director of this AAF for the prohibited substance Formoterol, under class S3 Beta Agonists and subsequently a "B" Sample analysis was requested. In a letter dated the 21st April 2010, the FINA Executive Director advised that the B sample analysis also confirmed the AAF in the Appellant's specimen. The FINA Executive Director confirmed on the 28th of June 2010 that the Doping Control Panel would hear the case on the 20th August 2010 pursuant to Rule C 21.6. The Doping Control Panel found on even date that the Appellant's degree of care was less than should be expected of an elite athlete and imposed a 3 month period of ineligibility from the 20th August 2010 and in addition all results achieved by the Appellant were annulled from the dates the 16th November 2009 until the 6th of April 2010. From the foregoing timelines detailed, the panel calculated that the length of the period from the collection of the first sample (16th November 2009) until the decision of the FINA Doping Control Panel was 9 months, 3 weeks and 4 days. The Panel decided this was an unduly lengthy period of time, from collection to imposition of ban in relation to the Appellant's situation; firstly, as previously mentioned the delay between the "A" sample collection which took place on 16th November 2009 and the opportunity to arrange the "B" sample analysis in a letter from the FINA Executive dated 30th March 2010. Secondly, the substantial delay which occurred regarding the Appellant's hearing coming before the FINA Doping Panel from the date of the sample "A" collection i.e. 16th November 2009 until the 20th August 2010. The Panel confirms that such were substantial delays when viewed in totality of the circumstances and in light of these extensive delays the Appellant has been prejudiced. Therefore the Panel applied provision 10.9.1, which allows for the early commencement of a period of ineligibility wherein the delays were not attributable to the Competitor. Whilst upholding FINA Doping Panel's decision of a three-month period of ineligibility, the CAS Panel under FINA DC 10.9.1 commenced the sanction at an earlier date and concluded that this period is to commence on the 14th June 2010 – so that it comes to the end on the day when the present award is issued – as a result of the substantial delays in the hearing process not attributable to the Appellant.
17. Finally in the relation to the period of disqualification of results, the FINA Doping Panel annulled the Appellant's results during the period from 16 November 2009 to 6th April 2010. Under DC 10.8 all competitive results from the date of collection of the positive sample through the Ineligibility period shall be disqualified *"unless fairness requires otherwise"*. Based on

the particular circumstances of this case and the foregoing delays, the Panel finds that in the Appellant's situation fairness requires that the period of disqualification of results should run from the 16th November 2009 to the 29th January 2010 in addition to the period of disqualification running concurrently with the CAS Sanction (14th June 2010 until the 20th August 2010), i.e. for a period of 4 months and 3 weeks. These periods of disqualification equate to the ban imposed by FINA but take account of the undue delay which would have otherwise precluded the Appellant from fair participation in future competitions.

The Court of Arbitration for Sport rules:

1. The appeal filed by Ryan Napoleon on 2 September 2010 against the decision of the FINA Doping Panel of 20 August 2010, decision 03/10, is partially upheld.
2. The decision of the FINA Doping Panel of 20 August 2010, decision 03/10, is partially set aside.
3. Ryan Napoleon is sanctioned with a three-month period of ineligibility commencing on 14 June 2010.
4. All competitive results obtained by Ryan Napoleon from 16 November 2009 up to and including 29 January 2010 shall be disqualified, with all of the resulting consequences including forfeiture of any medals, points and prizes.
5. (...).
6. All other motions or prayers for relief are dismissed.