



**Arbitration CAS (Oceania Registry) A1/2015 Australian Sports Anti-Doping Authority (ASADA), on behalf of Australian Canoeing (AC) and the Australian Sports Commission (ASC) v. Tate Smith, award of 2 October 2015**

Panel: The Hon Jerrold Cripps QC (Australia), Sole Arbitrator

*Canoeing*

*Doping (stanozolol)*

*Burden of proof*

*Adverse inference*

1. **In accordance with Article 3.1 of the WADA Code, the athlete bears the onus of proof to establish first how the substance was ingested and second that he was neither negligent nor at fault. He must establish his case on the balance of probabilities as understood in Australian civil law, as the law of the dispute is the law of New South Wales, and constant CAS jurisprudence.**
2. **The fact that three other team members were tested at the same time as the athlete concerned and that no Adverse Analytical Findings were recorded permits of an inference that the prohibited substance was either not present in the training waters or, if it was, could not penetrate their skins.**

**I. PARTIES**

1. The Australian Sports Anti-Doping Authority (the “Applicant” or “ASADA”) commenced these proceedings on behalf of Australian Canoeing (“AC”) and the Australian Sports Commission (“ASC”). ASADA is the national anti-doping agency and the competent body for anti-doping issues in Australia.
2. Mr Tate Smith (the “Respondent”) was a member of the Australian Canoeing Team. Mr Smith is an experienced international competitor, having won a gold medal at the London Olympics in 2012.

**II. FACTUAL BACKGROUND**

3. In July 2014, Mr Smith was training in Szolnok, Hungary with three other members of the Australian Canoeing Team in preparation for the world championships scheduled to be held in Moscow in August 2014.

4. During such training, and on or about 21 and 22 July 2014 respectively, Mr Smith provided two urine samples in out-of-competition doping control tests. Those samples were tested by the appropriate authority which recorded an Adverse Analytical Finding for the presence of metabolic stanozolol in respect of each sample. Stanozolol is a Prohibited Substance that is not produced by the human body. Therefore, the detection of metabolic stanozolol (being the by-product of the consumption of stanozolol) in the body is indicative of 'Use' of stanozolol, as that term is defined in Appendix 1 of the World Anti-Doping Authority ("WADA") Code.
5. By infraction notices dated 22 December 2014 and 15 January 2015, anti-doping violations (being the presence and use of a Prohibited Substance) were alleged against Mr Smith by ASADA on behalf of AC and the ASC respectively. In the infraction notice dated 22 December 2014, Mr Smith was notified that a sanction of a period of ineligibility of two years was proposed, to be backdated to commence on 8 September 2014, being the date on which a provisional suspension had been imposed upon Mr Smith by AC.

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

6. Mr Smith requested the matter be referred to the Court of Arbitration of Sport (the "CAS") by ASADA to determine whether, in fact, violations had been proved and, if so, the appropriate sanctions.
7. In accordance with the CAS Code of Sports-related Arbitration (the "Code"), on 3 February 2015 ASADA filed an application with CAS (dated 28 January 2015) on behalf of AC and ASC. The application named Mr Smith as the Respondent.
8. On 9 March 2015, the CAS Court Office confirmed the parties' agreement to appoint the Honourable Mr Jerrold Cripps QC to serve as the Sole Arbitrator in this case.
9. On 2 April 2015, the Applicant filed with the CAS Oceania Registry and served on the Respondent its submissions and evidence to be relied upon in relation to the dispute.
10. On 15 May 2015, the Respondent filed with the CAS Oceania Registry and served on the Applicant its outline of submissions.
11. On 15 and 16 June 2015, the Respondent filed with the CAS Oceania Registry and served on the Applicant its evidence to be relied upon in relation to the dispute. Additional materials referred to in one of the Respondent's witness statements were filed with the CAS Oceania Registry and served on the Applicant on 24 June 2015.
12. On 6 July 2015, the Applicant filed with the CAS Oceania Registry and served on the Respondent its submissions and evidence in reply.
13. On 27 and 28 July 2015, a hearing took place in Sydney, Australia. The Applicant was represented by Mr Christopher Johnstone, Barrister, Brisbane, Australia (instructed by Ms Kate Corkery, Lawyer, ASADA, Canberra, Australia). The Respondent was represented by

Mr Jonathan Horton QC, Brisbane, Australia (instructed by Mr Nick Dore, Fisher Dore Lawyers, Brisbane, Australia).

14. The following persons gave testimony for the Applicant:

- Mr Stephen Northey, Sports Operations Manager at ASADA; and
- Professor David Le Couteur, University of Sydney and Concord Hospital.

15. The following persons gave testimony for the Respondent:

- Mr Tate Smith, the Respondent;
- Mr Murray Stewart, member of the Australian Canoeing Team;
- Dr Jacobus Gerber, University of South Australia; and
- Professor Michael Roberts, University of Queensland and University of South Australia.

#### **IV. SUBMISSIONS OF THE PARTIES**

16. The Applicant's submissions, in essence, may be summarised as follows:

- In July 2014 two samples of the Respondent's urine returned Adverse Analytical Findings for 3-hydroxystanozolol glucuronide (being a metabolite of stanozolol).
- The detection of 3-hydroxystanozolol glucuronide is consistent with the administration of stanozolol.
- Stanozolol is a Prohibited Substance (S1. Anabolic Androgenic Steroids) and was on the Prohibited List as defined in Article 4.1 of WADA Code.
- The Respondent has therefore committed anti-doping rule violations by reason of the presence of metabolic stanozolol in the relevant samples.

17. The Applicant seeks the following relief:

*ASADA requests the CAS:*

*1. Determine that the Respondent has committed the anti-doping rule violation of Presence of a Prohibited Substance, namely 3-hydroxystanozolol glucuronide (a metabolite of Stanozolol) arising out of sample number 2787711, in breach of Article 7 of the [Canoeing Australia Anti-Doping Bylaw] (which incorporates by reference Article 2.1 of the WADA Code) and Article 6.1 of the [Australian Sports Commission Anti-Doping Policy];*

2. *Determine that the Respondent has committed the anti-doping rule violation of Presence of a Prohibited Substance, namely 3-hydroxystanozolol glucuronide (a metabolite of Stanozolol) arising out of sample number 2788071, in breach of Article 7 of the Bylaw (which incorporates by reference Article 2.1 of the WADA Code) and Article 6.1 of the Policy;*
  3. *Determine that the Respondent has committed the anti-doping rule violation of Use of a Prohibited Substance, namely Stanozolol, on and/or before 22 July 2014, in breach of Article 7 of the Bylaw (which incorporates by reference Article 2.2 of the WADA Code) and Article 6.2 of the Policy; and*
  4. *If it determines that the Respondent has committed anti-doping rule violation/s, sanction the athlete in accordance with Article 17 of the Bylaw and Articles 18 and 19 of the Policy.*
18. Prior to the hearing, Mr Smith claimed the tests purporting to disclose anti-doping violations by the presence and use of a Prohibited Substance were void by reason of irregularities but that *“there exists a real possibility that, even if the test results can be regarded as sufficiently reliable, the Prohibited Substance was ingested innocently, namely by Mr Smith being exposed to, or consuming water contaminated with that Substance”*.
  19. At the commencement of the hearing, Mr Smith withdrew the allegation that the tests were void but maintained that the Prohibited Substance was ingested innocently.
  20. Mr Smith’s submissions, in essence, may be summarised as follows:
    - Unknown to Mr Smith, and at the relevant time, the Prohibited Substance (stanozolol) was present, or might have been present, in and about the training area at Szolnok and other places visited by him.
    - There were three ways in which stanozolol may have entered Mr Smith’s body innocently, namely:
      - drinking local water;
      - the possibility that Mr Smith’s manner of drying his hands (by shaking) prior to testing caused contaminated water to enter the sample; and/or
      - absorption of the substance through Mr Smith’s skin through clothing and massaging, etc. It is further alleged that the absorption of the Prohibited Substance may have been exacerbated by injuries such as blisters.
  21. Accordingly, Mr Smith submits that ASADA’s requests for relief ought not be made but makes no formal request in this regard.

## **V. JURISDICTION**

22. The parties acknowledged in signing the Order of Procedure dated 14 April 2015 (the “Order of Procedure”), that the CAS has jurisdiction to determine this dispute pursuant to Article 16 of the Australian Canoeing Anti-Doping Bylaw adopted by the Australian Canoeing Board on 31 December 2009 and effective 1 January 2010 (the “Bylaw”) and Article 17 of the Australian Sports Commission Anti-Doping Policy effective 1 January 2009 (the “Policy”).
23. The parties also acknowledged in the Order of Procedure that the dispute has been filed in the Ordinary Division of CAS and that the decision of CAS will be final and binding on all parties.
24. The Sole Arbitrator, therefore, confirms that CAS has jurisdiction to hear this appeal.

## **VI. ADMISSIBILITY**

25. In accordance with Article 16 of the Bylaw and Article 17 of the Policy, the Applicant submitted the present application to convene CAS to determine whether an anti-doping rule violation was committed and, if so, the appropriate sanction. The application is therefore admissible.

## **VII. APPLICABLE LAW**

26. Article R45 of the Code provides as follows:

*The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono.*

27. The parties acknowledged in signing the Order of Procedure, that the law of the merits, being the substantive law of the dispute, shall be the law of New South Wales.

## **VIII. MERITS**

28. As mentioned above, it is now no longer in dispute that stanozolol was present in Mr Smith’s urine samples. Nor is it in dispute that, subject to the provisions of 10.5.1 and 10.5.2 of the WADA Code, the out-of-competition result would have the consequence that Mr Smith would face two years’ ineligibility commencing, as indicated in the ASADA infraction noticed dated 22 December 2014, on 8 September 2014 (see 10.2 of the WADA Code and 2.1.2 of the WADA Code).

29. Section 10.5.1 of the WADA Code relevantly provides:

***Elimination for reduction of period of ineligibility based on exceptional circumstances***

***10.5.1 No fault or negligence***

*If an Athlete establishes in an individual case that he or she bears No Fault or Negligence the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.*

30. The Respondent has referred to 10.5.2 of the WADA Code which, if made out, would halve the period of ineligibility. However, as the case was presented, if the Sole Arbitrator's findings accord with the Respondent's submissions, the period of ineligibility would be eliminated.
31. Article 3.1 of the WADA Code provides:

***Burdens and Standards of Proof***

*The Anti-Doping Organisation shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where 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 and circumstances, the standard of proof shall be via a balance of probability, except as provided in Articles 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.*

32. The Respondent accepts that he bears the onus of proof to establish first how the substance was ingested and second that he was neither negligent nor at fault. He must establish his case on the balance of probabilities as understood in Australian civil law and constant CAS jurisprudence. That is to say, he has made out his case if he tips the scales (ever so slightly) in support of his case.
33. Conformably with that standard, the Respondent must establish that there was stanozolol in and about the training area or other areas he visited and that, by reason of one or more of the activities identified in paragraph 20 above, a measurable amount of the Prohibited Substance entered his body.
34. The Sole Arbitrator received no direct evidence of the presence of stanozolol in and about the training area or other areas visited by Mr Smith at the relevant time i.e. July 2014. Material relied on to establish the presence of stanozolol was, according to some experts, to be found

in a report published in 2011 (the “Deshmukh Report”) which established the presence of stanozolol in the Danube river, approximately 110 kms from the subject site. That report is set out in the statement furnished by Dr Jacobus Gerber called by Mr Smith.

35. The Deshmukh Report reveals that, in the last part of 2009 and the first half of 2010, minute quantities of stanozolol were detected in the Danube river. Samples taken in December 2009, April 2010 and July 2010 revealed a diminishing presence of stanozolol from 1.82 pictograms per litre in December 2009 declining to a final positive reading in July 2010 of 0.54 pictograms per litre. Three additional samples were examined in September, October and November 2010 and no stanozolol was detected. The authors of the report could not identify the cause of the presence of stanozolol.
36. Three other team members were tested at the same time as Mr Smith. No Adverse Analytical Findings were recorded. That circumstance permits of an inference (which does not support Mr Smith’s case) that stanozolol was either not present in the training waters or, if it was, could not penetrate their skins. All but one of the team has returned to Szolnok where they had been training last year.
37. One team member has furnished a statement in which he said that he would not return to Szolnok – not because of the unreliability of the test (which, at the time of him making the statement, was said to be in issue) but because he was dissatisfied with the manner of testing. He claimed that the conduct of the testers was unsatisfactory and inconvenient to him.
38. The Sole Arbitrator received no evidence from either party concerning the present state of the water at Szolnok in January 2015. In closing, the Respondent submitted that the Sole Arbitrator should have regard to the fact that any attempt to test the water for minute quantities of stanozolol would be beyond his financial means. However, there is no evidence to establish such assertion.
39. It is the Respondent’s submission that, once it is established that there is a possibility that stanozolol (of whatever quantity) was present in the area, an evidentiary burden shifts to ASADA to negate that possibility, failing which the Sole Arbitrator could conclude, in effect, that what has been described as a bare possibility could be treated by the Sole Arbitrator as a probability. To accept the submissions would be to engage in impermissible speculation.
40. To the extent that speculation is permitted, it is that if AC, ASC or ASADA had information that may have supported Mr Smith’s case, that information would have been made available to Mr Smith. There is no material before the Sole Arbitrator to suggest that any of the parties referred to above had information which may have assisted Mr Smith or that otherwise they failed to meet their obvious obligations.
41. Uninstructed, the Sole Arbitrator would have thought that waters would have flown from the training site into the Danube, and not out of the Danube into the training site. However, there is evidence by Mr Smith (not subject to challenge) that the water could have travelled 110 kms from the Danube to the training area in Szolnok. That being so, the Panel will accept that evidence.

42. Nonetheless, the connection between the presence of stanozolol in the first half of 2010 (and not at all in the second half) in the Danube, and its presence nearly six years later in Szolnok 110 kms away is so slim as to be negligible. Of course, it cannot be established conclusively that there were no prohibited substances in the water over which Mr Smith trained but the evidence does not go beyond establishing the presence as anything other than a bare possibility.
43. The very plinth upon which Mr Smith rests his case is that there was, on the probabilities, stanozolol in the water in and about where he trained. The Sole Arbitrator does not regard the Deshmukh Report as lending any support to his case whatsoever.
44. It is the Sole Arbitrator's opinion that Mr Smith has failed to discharge the onus of establishing the presence of stanozolol in and about the training areas.
45. Of course, in order to establish a defence under section 10.5.1 of the WADA Code, Mr Smith must also establish on the probabilities that stanozolol entered his system by the means claimed by Mr Smith and set out in paragraph 20.
46. It is unnecessary for the Sole Arbitrator to deal in detail with Mr Smith's claim that it was probable that, if stanozolol was in the water, it could have entered his body by the means suggested by him at paragraph 20. The experts could not find any scientific data that suggests stanozolol, if present in the water, could enter the skin (although one expert called on behalf of Mr Smith said he considered it possible in given circumstances for that to happen). Mr Smith would need to drink an enormous amount of water for a minute amount of stanozolol to enter his body. He is an experienced athlete and it is highly unlikely that he did not provide his samples in an appropriate way. Finally, bearing in mind that there was no scientific data (at least to this hearing) supporting the proposition that stanozolol could have "*penetrated the skin*", the Panel regards the evidence as merely reflecting a possibility.
47. In all the circumstances, the Sole Arbitrator is of the opinion that Mr Smith has failed to discharge the onus upon him to establish how stanozolol entered his system and hence concludes that ASADA's application must succeed.

## ON THESE GROUNDS

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

1. On or about 22 July 2014, the Respondent committed the anti-doping rule violations of Presence and Use of a Prohibited Substance in breach of Article 7 of the Bylaw (which incorporates by reference Article 2 of the WADA Code) and Article 6.1 of the Policy.
  2. In accordance with Article 17 of the Bylaw (which incorporates by reference Article 10 of the WADA Code) and Article 19.2 of the Policy, a period of ineligibility be imposed upon the Respondent for a period of two (2) years, backdated to commence on 8 September 2014.
  3. All competitive results obtained by the Respondent from 22 July 2014 shall be invalidated with all resulting consequences including forfeiture of any medals, points or prizes.
- (...)
6. All other requests for relief are dismissed.