



Arbitration CAS ad hoc Division (OG London) 12/005 Jan Sterba v. World Anti-Doping Agency (WADA), award of 30 July 2012

Panel: Mr Efraim Barak (Israel), President; Mr Ricardo de Buen Rodríguez (Mexico); Mr Thomas Lee (Malaysia)

Canoe

Request to confirm the decision appealed

Standing to appeal

When coming to decide the issue of the standing to appeal, the constant CAS' jurisprudence establishes very clearly that only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to CAS against that decision. This reflects the principle of the *"Aggrievement Requirement"* established in CAS case law and embodied in the CAS Ad hoc Rules. In this respect, when the only requested relief is to confirm a legal valid decision totally in the applicant's favor, the latter has no legal interest. He is therefore not an aggrieved party and does not have standing to appeal.

The Applicant, Mr Jan Sterba, is an Athlete of Czech nationality, competing in Canoeing, as part of the K4 and K2 crews.

The Respondent is the World Anti-Doping Agency (WADA). WADA is a Swiss private law Foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. Its mission is to coordinate and monitor the fight against doping in sports in all its forms at international level.

The Interested Parties are the International Canoe Federation (ICF), the Czech Olympic Committee (COC) and the International Olympic Committee (IOC).

The ICF is the worldwide governing body of Canoe sport and is recognised as such by the IOC.

The COC is the national Olympic Committee in the Czech Republic. As such, and pursuant to the Olympic Charter, Chapter 4, Rule 27.7.2, COC has *"the right to send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter"*.

The IOC is an international not-for-profit organisation, in the form of an association with the status of a legal entity, recognized by the Swiss Federal Council. The seat of the IOC is in Lausanne, Switzerland. The object of the IOC is to fulfil the mission, role and responsibilities as assigned to it

by the Olympic Charter. In between these missions one of the paramount roles of the IOC is “to ensure the regular celebration of the Olympic Games” (Art. 2(3) Olympic Charter).

The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.

On 17 May 2012, during the Olympic Games ICF European Qualifiers competition held in Poznan, Poland, the Applicant was submitted to a doping control.

By letter dated 14 June 2012, the ICF notified the Czech Canoe Union (CCU) of an Adverse Analytical Finding concerning Applicant’s “A” sample. Same letter stipulates, inter alia, the following:

“The substances found are:

Beta-methylphenylethylamine (Group S6 Stimulant)

Elevated Testosterone/Epitestosterone 6.19 (The ICF has requested further IRMS analysis)”.

On his application the Applicant mentions also another letter, apparently dated 21 June 2012. However, this second letter was not submitted as part of the exhibits to the application. According to the Applicant, in this second letter the ICF changed the name of the substance to “*Beta Methylphenylamine*”.

By a resolution dated July 9 2012, the International Canoe Federation Doping Control Panel (ICFDCP), found the Applicant guilty of an anti-doping rule violation and imposed on the Applicant a sanction of six months suspension, commencing on 14 June 2012 (which is the starting date of the previous provisional suspension which was also imposed on the Athlete) and until 14 December 2012.

On July 16 2012 the Applicant filed an appeal against the above mentioned decision of the ICFDCP before the International Canoe Federation Court of Arbitration (ICFCA).

On 24 July 2012 the ICFCA, communicated the operative part of its decision granting the appeal filed by Mr. Sterba, setting aside the decision taken by the ICFDCP, and replacing it with the following decision: “*No anti-doping rule violation has been committed by Mr. Sterba*”. The award with reasons was communicated on 29 July 2012.

The above mentioned decision of the ICFCA is the subject matter of the present proceedings and will hereinafter be referred to as the “*Appealed Decision*”.

On 28 July 2012, the CAS ad hoc Division received an application from the Applicant regarding the Appealed Decision. The application consisted of the Application form and a document considered and named by the Applicant as “*Statement of Appeal*” which included also the exhibits (“*The Statement of Appeal*”).

On 29 July 2012, the President of the CAS ad hoc Division for the Games of the XXX Olympiad in London, nominated a Panel composed of Mr. Efraim Barak (Israel), as President, Mr. Thomas Lee (Malaysia) and Mr. Ricardo de Buen Rodríguez (Mexico), as Arbitrators, to deal with the application.

The application was lodged against WADA as Respondent while the ICF and the COC were referred to as "*Other Parties*". Therefore, the CAS Court Office communicated the application to WADA as Respondent, and to the ICF and the COC as Interested Parties. The Panel also decided to invite the IOC as an additional Interested Party. The CAS granted the Respondent and the Interested Parties until 6:00 pm on 29 July 2012 to file their written submissions, if they choose to do so.

In § 7 of the Statement of Appeal, the Applicant submits that: "*... his only prayer to CAS is to confirm this decision in full with no more delay so that he can be sure to compete in the Olympic Games now*". At the end of this same document the Applicant alternatively asks for various other reliefs "should the Court not share the opinion of ICF CA and reach the conclusion the Athlete committed an anti-doping rule violation". These alternative reliefs includes the elimination of the otherwise applicable period of ineligibility or to replace the otherwise applicable period of ineligibility or to impose on the Applicant a sanction of ineligibility for the minimum length possible.

Later on 29 July 2012, within the designated time period, the COC submitted its observations to the Application.

In the COC's submission, among some other statements it submits that "*... we fully support athlete's request for a decision in shortest time. It is necessary to be certain as soon as possible whether the athlete can compete or not*".

WADA also submitted its observations on time by way of an e-mail to which the document with the observations was attached.

The ICF and the IOC did not send any observations.

After analysing the submissions of the parties, and pursuant to Art. 15 c) of the Arbitration Rules for the Olympic Games, the Panel decided that it was not necessary to have a hearing, as the written submissions were, in the Panel's opinion, sufficient in order to issue a decision in this case.

Prior to the presentation of the Applicant's submissions, the Panel would like to point out a preliminary remark. Since the Application is, as already explained, merely a request to confirm the Appealed Decision and not an appeal against the appealed decision, the Applicant actually brought forward in his submissions a list of arguments that normally and reasonably could appear in an answer to an appeal against the Appealed Decision if such was the case. For the reasons explained in the discussion chapter of this award, the Panel came to the conclusion that there is no need to deal in the framework of this application with these arguments. Nevertheless, a brief summary of these submissions will be presented.

In a nutshell, The Applicant submits that:

1. He committed no violation of the Anti-Doping Rules as his sample did not contain any prohibited substance.
2. The charge against him was based on the presence of a substance (B-MPEA) which is not in the Prohibited List, neither could it have been regarded as a substance with similar chemical structure or biological effects in the sense in which such similar substances can be considered as a prohibited substance under the terms of the Prohibited List.
3. The Applicant further argues that there were serious faults in the result management process of the samples, being of such intensity each of them individually and, obviously, all of them together that as a consequence should bring to the conclusion that the result management process should be considered illegal. The Applicant also argues that his elementary rights of defence were grossly violated by the ICF.
4. Although the Application is a request to confirm the decision that was totally in favour of the Applicant, in his submissions the Applicant raises allegations against the decision of the ICFDCP (the Panel whose decision was eventually quashed by the ICFCA) and in respect of an alleged impartiality of this Panel.
5. Following these above-mentioned arguments in respect of the decision of the ICFDCP, the Applicant also submits a list of arguments, referred by him as "*Special Circumstances given in this case*", and resulting in the Applicant's submission that even if "*the CAS does not accept the Athlete's defence*" the Applicant insists that he bears no fault or negligence and therefore the period of ineligibility (that, and this should be reminded again, was already cancelled) should be replaced by a reprimand.
6. Finally the Applicant sets forth various facts regarding his career in general, including the fact that he has never committed any anti-doping offence, in order to support his statement that he has been on a long-term basis an honest person with important personal integrity.
7. Based on these arguments, the Applicant requests that the CAS Panel grants his application and issue an award confirming the Appealed Decision (or alternatively issuing a new decision consisting of one of the alternative reliefs contained in the Application).

In its observations regarding the Application WADA submits, in summary, the following:

1. WADA was never a party to the procedure that took part either in front of the ICFDCP or in front of the ICFCA.
2. Although WADA has a right, under rule 13.2.1 and 13.2.2 of the ICF Anti-doping Rules, of appeal to the CAS against the Appealed Decision, nevertheless, given the facts that:
 - (a) Up to the moment WADA submitted its observations, WADA had not been notified the reasons of the Appealed Decision, and;
 - (b) The ICF informed WADA that they will appeal in a timely manner the appealed decision, in order for the matter to be decided by the CAS prior to the date on which the Athlete is due to compete at the Olympic Games;therefore WADA does not intend to exercise independently its right of appeal.

3. WADA further states that it has no standing to be Respondent in a case in which it has never been a party.
4. Finally WADA expresses its understanding that at present the Appealed Decision is in force and that the athlete is therefore allowed to compete. This fact, in the opinion of WADA, brings to the conclusion that the Appeal seems to be premature and without any merit.

Although invited by the Panel to submit its observations the ICF did not submit any answer or any observations on the Application.

In its observations regarding the Application the COC submits, in summary, the following:

1. The Applicant is known as an athlete competing on the top international level, and the COC is unaware of any doping or disciplinary offence committed by him.
2. The Applicant has won several awards, he is an example for younger athletes and is preparing to become a coach.
3. Following the suspension of the Applicant, the COC cancelled his nomination for the Olympic Games, however after the rendering of the Appealed Decision which lifted the suspension the COC immediately started the process for a late entry for the Olympic Games for him.
4. In the opinion of the COC “... *the late entry process cannot be finalized until the final decision that can only be done by the CAS*”.
5. The COC also establishes that it supports the Applicant’s request for a decision in a short time, and also gives various arguments regarding the substances related to the doping case in which the Applicant has been involved similar to those submitted by the Applicant.
6. Finally, the COC submits that it agrees with the Appealed Decision and asks the CAS to impose a sanction corresponding to similar cases, should the CAS find that the Applicant is guilty of a doping rule violation.

Although invited by the Panel to submit its observations, the IOC did not submit any answer or any observations on the Application.

LAW

Jurisdiction

1. The jurisdiction of the CAS Ad hoc Division, which is undisputed, derives from Rule 61.2 of the Olympic Charter which provides as follows:

“61 Dispute Resolution

[...]

2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration”.

2. These proceedings are therefore governed by the CAS Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”) enacted by the International Council of Arbitration for Sport (“ICAS”) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (“PIL Act”). The PIL Act applies to this arbitration as a result of the fact that the seat of the CAS is in Lausanne, Switzerland (cf. Art. 7 of the CAS ad hoc Rules) and that neither of the parties is domiciled nor is habitually resident in Switzerland.

Applicable Law

3. Under Art. 17 of the CAS ad hoc Rules, the Panel shall rule on the dispute “*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*”.
4. Already at this stage, the Panel finds it important to mention that the Application at stake is a request to confirm a decision already in favour of the Applicant. This calls for a preliminary examination by the Panel of the question of the Applicant’s standing to appeal a decision in his favour just in order for the CAS to confirm such decision. In this respect, the Applicable Law governing this specific issue is the Olympic Charter, the CAS Ad hoc Rules (being part of the Code of Sports-Related Arbitration) as well as general principles of Law the application of which the Panel deems appropriate.

Discussion

5. As already mentioned on several occasions in this award, the Application at stake asks the Panel to confirm the Appealed decision. In Art. 8 of the Statement of Appeal the Applicant set forth his request for relief in the following words:

*“From the above explanation it is obviously that the Athlete fully agrees with appealed decision (sic), which he considers correct and **his only prayer to CAS** is to confirm this decision in full ...”.*

6. Indeed, in Chapter VII of the Statement of Appeal, where the Applicant details his final request, he added three other alternative reliefs; however these reliefs are totally groundless. These reliefs are hypothetical and are based on the wrong assumption of the Applicant as if this Panel may come to a different opinion than the Opinion of the ICFCA in the Appealed decision while actually, until the moment the Application was lodged and dealt with, no one asked the CAS to cancel the Appealed decision. As any other tribunal, and especially Arbitral Tribunals, the CAS cannot and shall not interfere on its own initiative in decisions of competent tribunals. Therefore, the only real prayer and request in front of this Panel is the request to confirm the Appealed Decision.
7. The Applicant explains in his application the reason for which he asks CAS to confirm a decision granted fully in his favour. According to the Applicant's submissions the ICF seems to refuse to issue its approval for the participation of the Applicant in the Olympic Games, in spite of the Appealed Decision since ICF considers the possibility of an appeal to the CAS against the Appealed decision.
8. In this respect the Panel notes that this alleged intention of the ICF, even if indeed is true, has no legal impact per se on the validity and enforceability of the Appealed Decision. The Panel also notes that this is rightly also WADA's opinion as WADA clearly stated in its observations: *"It is also WADA's understanding...that at present the 24th of July decision from the ICF Court of Arbitration is in force and that the athlete is therefore allowed to compete"*.
9. It follows that at the present stage the Panel is not aware of any valid legal reason preventing the Applicant from participating in the Olympic Games. The Appealed Decision is totally in his favour in the sense that it abolished and lifted the sanction previously imposed by the ICFDCP, and thus the only question to be decided by this Panel is if the Applicant has standing to appeal in such circumstances.
10. Moreover, as the Applicant has chosen to direct the Application against WADA as the Only Respondent, a second question that may be analysed by the Panel in light of WADA's submission that it was not a party to the previous proceedings in front of the ICF Panels, is the question of the standing of WADA to be sued in this proceedings and the possible implications of any such decision of the Panel on the outcome of this Application.
11. When coming to decide the issue of the standing of the Applicant to appeal in the specific circumstances of this case, when the only requested relief is to confirm a legal valid decision totally in his favour, this Panel is guided by the constant CAS' jurisprudence which establishes very clearly that *"only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to CAS against that decision"*. This reflects the principle of the *"Aggrievement Requirement"*. This principle is *"... an essential element to determine the legal interest and the standing of a party to appeal before the CAS a sports body decision ..."* (CAS 2009/A/1880 & 1881).
12. This principle of the *"Aggrievement Requirement"* is also embodied in Article 1 of the CAS Ad hoc Rules which refer to *"a request of arbitration against a decision pronounced by the IOC, an NOC, an*

International Federation or an Organizing Committee for Olympic Games ...” as well as in Article 10 of the same Rules which stipulates that “... *the application shall include a copy of the decision challenged ...*”.

13. In the present case the Applicant did not submit an application against a decision but actually requested the confirmation of a decision and as he himself, in his own words wrote “*the Athlete fully agrees with appealed decision*”. Therefore it is clear and obvious that the Applicant has no concrete legal interest in challenging the decision. In such circumstances the Applicant is not an affected party in the sense of this principal due to the fact that he is not an aggrieved party. It follows that the Applicant does not have standing to appeal in this case.
14. In light of the above conclusion, the Panel finds that there is no need to address the second question regarding the standing to be sued of WADA. However the Panel finds it important to note that this fact by itself i.e. that the only Respondent is a party that was not a party in the previous proceedings and was not a party to the Appealed decision, could be sufficient, by itself, to deny the Application.

The ad hoc Division of the Court of Arbitration for Sport rules:

1. Based on the Appealed Decision and the submissions of the parties, the Panel finds that there is presently no case or controversy preventing the Applicant from participating in the XXX Olympic Games. Therefore, the Applicant has no legal interest and standing to appeal against the decision issued on 24 July 2012 by the International Canoe Federation Court of Arbitration.
2. The Application of Mr. Jan Sterba submitted on 28 July 2012 is denied.