



Arbitration CAS ad hoc Division (OG Rio) 16/023 Ihab Abdelrahman v. Egyptian NADO, award of 16 August 2016 (operative part of 11 August 2016)

Panel: Mrs Carol Roberts (Canada), President; Prof. Ulrich Haas (Germany); Mrs Andrea Carska-Sheppard (Czech Republic)

Athletics (javelin)

Doping (testosterone)

Time when a dispute arises

Provisional suspension

Legal basis for the lifting of the provisional suspension

Adverse analytical finding

Timing of the AAF notification and substantial delay

1. A dispute – in principle – does not arise before the athlete is (properly) notified of the consequences of an adverse analytical finding (AAF).
2. Article 7.9.1 of the WADA Code provides that when an AAF is received for a Prohibited Substance (that is not specified), a provisional suspension shall be imposed promptly after the review and notification. However, an athlete must be given an opportunity for a hearing on the provisional suspension. Furthermore, an athlete has standing to appeal, because Article 42.2 of the IAAF Competition Rules provides that the athlete is entitled to appeal against all decisions imposing “consequences” on him/her. The definition of “consequences” includes provisional suspensions.
3. In assessing whether the athlete has established a legal basis for the lifting of a provisional suspension, the adjudicating body must consider factors including the athlete’s reasonable chance of success on appeal following the testing of the B sample, irreparable harm and the balance of interests.
4. The mere assertion that the athlete did not take a Prohibited Substance is not a basis to contest the existence of an AAF with respect to a non-specified substance, which is – absent any deviations in the results management process – the main basis for a mandatory provisional suspension according to the applicable rules.
5. Substantial delay between the date of testing and the communication of the results, while unfortunate for an athlete, is not unusual in view of the case load of the various laboratories and the complexity of the analysis. In relation to the competition schedule and the delay in the analysis of the sample, a notification of the AAF shortly before the beginning of the competition, although rendering difficult for the athlete to defend his/her case, in and of itself, is not a sufficient reason to stay or suspend the mandatory provisional suspension.

1 PARTIES

- 1.1 The Applicant Mr. Ihab Abdelrahman is an Egyptian athlete in the sport of athletics. (the “Athlete”).
- 1.2 The Respondent is the Egyptian National Anti-Doping Agency (“Egyptian NADO”).
- 1.3 The Interested Parties are National Olympic Committee of Egypt, the International Olympic Committee (“IOC”) and International Association of Athletics Federations (“IAAF”).

2 FACTS

- 2.1 The Athlete is an international-level athlete qualified to compete in XXXI Olympiad in Rio de Janeiro (“Rio 2016”) in the javelin throw event.
- 2.2 On 17 April 2016, the Athlete was subjected to an out-of-competition (“OOC”) test. On 20 July 2016, Egyptian NADO was notified that the sample revealed the presence of testosterone consistent with an exogenous origin. This constitutes an adverse analytical finding (“AAF”), since exogenous Steroids are Prohibited Substances under category S1 (Anabolic Agents) of the 2016 WADA Prohibited List.
- 2.3 As the presence of a Prohibited Substance in an athlete’s sample constitutes an anti-doping rule violation (“ADRF”) under IAAF Rule Rules 32.2 (a) ad 32.2 (b), the Athlete was provisionally suspended by the Egyptian NADO.
- 2.4 In a letter dated 21 July, 2016, the Egyptian NADO notified the chairperson of the Egyptian Athletic Federation (“EAF”), Mr Walid Atta, as follows:
“For your concern that Barcelona International Anti-Doping Laboratory sent results of doping analysis for Athlete Ihab Abdelrahman. He tested for doping [...] for the prohibited substance: Exogenous metabolites of testosterone [...] The International Code for Anti-Doping mention that the Athlete can not participate in any International of national Championship and should be provisionally suspended till (B) Sample Analysis [...]”.
- 2.5 On 24 July 2016, the EAF verbally notified the Athlete of the AAF and the Athlete requested the immediate analysis of his B sample.
- 2.6 On 25 July 2016, the EAF requested that Egyptian NADO only conduct the analysis of the B sample in the presence of the Athlete and his representative. At the request of the EAF two possible dates for the B sample testing in the presence of the Athlete and his representative, were proposed: 26 July 2016 or 30 August 2016, after the Barcelona lab re-opened after summer holidays. Because of the difficulties scheduling the Athlete’s travel on such a short notice, the Athlete chose to have his B sample analysed on 30 August 2016.
- 2.7 On 27 July 2016, the IAAF wrote to the Athlete as follows:
“[...] We have been informed by the Egyptian Anti-Doping Agency that:

- *you were already notified of this adverse finding on 21st July 2016 and consecutively provisionally suspended pending resolution of your case.*
- *you have requested the analysis of your B sample, which will take place on 30th August 2016 at the Barcelona laboratory”.*

3 CAS PROCEEDINGS

- 3.1 The Athlete filed an application against the Egyptian NADO with the CAS Ad Hoc Division on 7 August 2016 at 14.00 (time of Rio de Janeiro).
- 3.2 On the same day, the President of the CAS Ad Hoc Arbitration Division appointed Ms. Carol Roberts as the President of the Panel along with Mr. Ulrich Haas and Ms. Andrea Carska-Sheppard as Arbitrators.
- 3.3 On 7 August 2016, the Court Office of the CAS Ad Hoc Division notified the Egyptian NADO of the application and asked for its reply by 8 August 2016 at 17.00 (time of Rio de Janeiro). The Application was also forwarded to the Olympic Committee of Egypt, the IOC and the IAAF, advising that if they wished to file *amicus curiae* briefs, then it must be done by 8 August, 2016 at 17.00 (time of Rio de Janeiro).
- 3.4 The Panel further asked the Parties whether they considered it necessary to hold a hearing and requested the Athlete to specify the latest point in time when a decision needs to be rendered. Subsequently, the Athlete requested that the decision be rendered no later than 11 August 2016.
- 3.5 The Panel granted the Respondent’s request for the extension of time to respond to the Procedural Order and requested that the Answer and any *amicus* briefs to be filed by 9 August 2016 at 17.00 (time of Rio de Janeiro).
- 3.6 On 11 August 2016, at 09.00 (time of Rio de Janeiro), the hearing took place at the temporary offices of the CAS Ad Hoc Division. The following persons attended the hearing by teleconference: for the Athlete, Ibrahim El Said, for Egyptian NADO its Executive Director, Dr. Osama Ghomiem, and for IAAF Mr. Thomas Capdevielle. No one appeared for the IOC or the National Olympic Committee of Egypt.

4 PARTIES’ SUBMISSIONS

- 4.1 The Parties’ submissions and arguments shall only be referred to in the sections below if and when necessary, even though all such submissions and arguments have been considered.

a. Applicant’s Request for Relief

- 4.2 The Applicant’s requests for relief are as follows:

- 1) *Suspend the ineligibility period and lift the provisional suspension until the analysis results of B Sample.*
- 2) *Allow him to compete in the Rio 2016 Olympic Games.*

b. Respondent's Request for Relief

4.3 The Egyptian NADO response to the Application was an explanation rather than a request for relief. At the hearing, Egyptian NADO contended that it was bound by the provisions of the World Anti-Doping Code (hereinafter, the "Code") and took the position that the Panel should declare the application inadmissible on the basis that it notified the Athlete of the AAF on 24 July 2016.

c. The Position of the Interested Parties

4.4 The IAAF contended that, if the Egyptian NADO decision was communicated to the Athlete on 21 July 2016 as indicated in his application, the dispute was inadmissible on the grounds that the dispute arose before the time frame stipulated in Article 1 of the Ad Hoc Rules. However, IAAF agreed that, if the Athlete had not been notified in writing of the AAF until 27 July 2016, the application was admissible.

4.5 Neither the IOC nor the National Olympic Committee of Egypt filed an *amicus* brief.

5 JURISDICTION AND ADMISSIBILITY

5.1 Article 61.2 of the Olympic Charter 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".

5.2 In the case at hand the competence of the CAS derives from the above provision. In addition, none of the parties to this procedure objected to the competence of the CAS.

5.3 Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter referred to as the "CAS Ad Hoc Rules") provides as follows:

"Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective” (emphasis added).

- 5.4 As the Opening Ceremony of Rio 2016 was held 5 August 2016, the dispute should therefore have arisen on or after 26 July 2016.
- 5.5 Article 7.3 of the Code sets out specific criteria for the notification of an AAF, including, among other things, notification of the scheduled date, time and place for the B sample analysis.
- 5.6 In CAS OG 12/002, the CAS Ad Hoc Panel found as follows:

“In this case, as of 28 June the Applicant already knew that he had not been awarded a place for the Olympic Games and had sought legal advice (see the letter of Mr. Ward’s solicitor to the IOC dated 28 June 2012, supra at para 1.1 : ‘You will be aware that our Client was not selected as the next best boxer to compete in the 81kg division of the upcoming London Olympics’).

Then, a written explanation of why he had not been selected was provided in full by the IOC on behalf of the Tripartite Commission on 2 July 2012 [...] and the Applicant objected by letter dated 11 July 2012 [...]

Therefore, at the latest, the ‘dispute arose’ on 11 July 2012, when the Applicant objected formally, based on the receipt of the rationale for the decision. Thus the dispute did not arise within the time period required by Article 1 of the Ad Hoc Rules, which begins 17 July 2012. Indeed, on 11 July 2012 the Applicant through his solicitor clearly stated that he did not agree with the decision made, as he disputed the basis for the decision, thus having explicitly identified that a dispute had arisen. At that point, it is obvious, based on the facts of this case, that the Applicant took issue with the decision. The Panel is not saying that it is up to the athlete to decide when the issue arose, but rather the facts will be examined in each case based on the good faith understanding of the athlete or other aggrieved party and the relevant facts giving rise to when the dispute arose. Another element in this analysis is that at no time did the IOC (acting on behalf of the Tripartite Commission) alter its rationale for the decision, but rather, the IOC sought to clarify the rationale based upon the specific questions of the Applicant.

An applicant to the CAS ad hoc Division cannot rely on the Schuler award to mean that she, through an exploration designed to learn the rationale for a decision with which she disagrees, can extend the time when a “dispute arose” in to the period identified in Rule 1 of the Ad Hoc Rules. As set forth in the Schuler award, Ms. Schuler first received a written explanation of her exclusion on 1 February 2006. Then Ms. Schuler considered the issues, and, having done so, complained for the first time through her application on 6 February 2006, within the time period required by Rule 1 of the Ad Hoc Rules. That is distinct from this case. Even if the Panel accepts that “a written explanation of [his] exclusion” is required as Ms Schuler received, that written explanation was provided by the IOC on 2 July 2012 and, as said, the Applicant objected by letter dated 11 July 2012”.

- 5.7 The Athlete challenges the decision to provisionally suspend him pending the testing of his B sample. The Panel finds that this decision, which included the reasons for the provisional

suspension, the opportunity to provide an explanation and the Athlete's rights, was communicated to the Athlete by the IAAF on 27 July 2016 by way of facsimile. It is not clear if and on what date the Athlete received a copy of the letter sent to the EAF from Egypt NADO indicating the positive test for a Prohibited Substance. However, that letter did not fulfill the legal notice requirements under the Code. Although the Athlete had taken steps to set in motion the testing of the B sample on or about 24 July 2016, he had no written decision, with reasons and the opportunity to provide an explanation, until 27 July 2016.

- 5.8 The Panel therefore finds that the dispute is admissible, since a dispute – in principle – does not arise before the athlete is (properly) notified of the consequences of an AAF. Since the notice was received and the application was filed within ten days prior to the Opening Ceremony of Rio 2016, the Panel deems the application to be admissible.

6 APPLICABLE LAW

- 6.1 Under Article 17 of the CAS Ad Hoc Rules, the Panel must decide 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*”.
- 6.2 The Panel notes, that the Athlete is an “International-Level Athlete” within the meaning of the IAAF Competition Rules (hereinafter, the “ADR”), since the Athlete was included in the IAAF’s Registered Testing Pool. Consequently, results management rests with the IAAF Anti-doping Administrator (Art. 37.2 ADR). The Panel, therefore, finds that the applicable regulations in the case at hand are the ADR.

7 DISCUSSION

- 7.1 Having found the application to be admissible, the issue is whether the Panel should grant the Athlete’s request to suspend the period of ineligibility.

a. *Legal framework*

- 7.2 These proceedings are governed by 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 express choice of law contained in Article 17 of the CAS Ad Hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of arbitrators, pursuant to Article 7 of the CAS Ad Hoc Rules.
- 7.3 According to Article 16 of the CAS Ad Hoc Rules, the Panel has “*full power to establish the facts on which the application is based*”.

b. *The positions of the Parties*

7.4 The Athlete says that the Panel should suspend the period of ineligibility because:

- i) he has been tested over 20 times in his athletic career and at no other time has he tested positive;
- ii) the delay in processing the OOC sample has prevented him from challenging the results in a timely fashion, denying him the opportunity to compete at Rio 2016;
- iii) the Egyptian NADO mismanaged the testing procedures, including a misrepresentation by the anti-doping control officer as a WADA representative at the time of the OOC testing.

7.5 Egypt NADO says that it is bound by the Code and that it is obliged to impose the provisional suspension in light of the AAF.

7.6 IAAF says that the Panel must balance the interests of the Athlete, who may be deprived of being able to compete and winning a medal if his B sample does not subsequently establish an ADRV, against the interests of the other competitors; noting that if the Athlete's B sample also tests positive for a Prohibited Substance and the Athlete is retroactively disqualified, other athletes will be adversely affected.

c. *The Position of the Panel*

7.7 Article 7.9 of the Code sets out the Principles Applicable to Provisional Suspensions. Article 7.9.1 of the Code provides that when an AAF is received for a Prohibited Substance (that is not specified), a provisional suspension shall be imposed promptly after the review and notification. However, an athlete must be given an opportunity for a hearing on the provisional suspension. This is in line with Article 37.16 of the ADR. In this case, the Athlete responded to IAAF's 27 July 2016 communication on 2 August 2016 seeking the same remedy he seeks before this Panel. Furthermore, the Athlete has standing to appeal, because Article 42.2 ADR provides that the Athlete is entitled to appeal against all decisions imposing "consequences" on him. The definition of "consequences" in the ADR includes provisional suspensions.

7.8 It is beyond the jurisdiction of this Panel to determine whether an ADRV has been committed by the Athlete, and if so, whether he should be sanctioned. This determination is left to a competent body which will assess the evidence, including expert opinions, and apply the appropriate rules. As a consequence, any decision taken by this Panel with respect to the Athlete's request for lifting of the Provisional Suspension does not affect the different question of the existence of an ADRV or bind any body (including any possible CAS panel at a later stage) called to adjudicate that issue.

- 7.9 The sole issue for this Panel is to determine whether the Athlete has established a legal basis for the lifting of the provisional suspension. In our view, he has not. In assessing the remedy sought by the Athlete, the Panel must consider factors including the Athlete's reasonable chance of success on appeal following the testing of the B sample, irreparable harm and the balance of interests.
- 7.10 Despite the Athlete's previous history of no positive tests, the Panel notes that the test results demonstrate, on a *prima facie* basis, the presence of a Prohibited Substance, i.e. an AAF. In its 27 July 2016 letter to the Athlete, the IAAF Anti-Doping Administrator determined that the Athlete had no applicable Therapeutic Use Exemption recorded on file and that there was no apparent departure from the IAAF Anti-Doping Regulations or the International Standard for Laboratories that caused the AAF. Furthermore, although the Athlete raised "serious questions" about the accuracy of the A Sample, he did not, for example, assert that there was a departure from the International Standard for Testing or, that the lab was not properly accredited. (see, for example, CAS 2011/A/2479 and CAS 2008/A/1654) The Athlete raised questions about the validity of the results based solely on the assertion that he followed the same nutrition scheme he always followed, including all declared food supplements. The mere assertion that the Athlete did not take a Prohibited Substance is not a basis to contest the existence of an AAF with respect to a non-specified substance, which is – absent any deviations in the results management process – the main basis for a mandatory provisional suspension according to the applicable rules.
- 7.11 In coming to this conclusion the Panel has also considered the interests of the Athlete in not being able to compete and possibly obtain a medal as well as of the other athletes who would be deprived of their opportunity to be awarded medals at the Rio Olympic Games should the Athlete successfully medal and is later determined to have committed an ADRV. The Panel has further considered the interests of sports in general and the IAAF in particular, noting the importance of protecting the image of sport from being tarnished by the participation of athletes in competitions who are facing proceedings against them for the use of prohibited substances.
- 7.12 The Panel also finds that the substantial delay between the date of OOC testing and the communication of the results, while unfortunate for the Athlete, is not unusual in view of the case load of the various laboratories and the complexity of the analysis. Even though it is preferable that the time between the taking of the sample and its analysis be a short one, the Panel also notes that the Athlete was able to compete during that time period. The Panel does not ignore that the specific time line in this case (notification of the AAF shortly before the Rio Olympic Games) made it difficult for the Athlete to defend his case. However, this aspect in relation to the competition schedule and the delay in the analysis of the sample, in and of itself, is not a sufficient reason to stay or suspend the mandatory provisional suspension.
- 7.13 In the Panel's view, the Athlete has not met the requirements to lift the provisional suspension.

8 CONCLUSION

- 8.1 In view of the above considerations, the Athlete's application filed on 7 August 2016 is dismissed.

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

The application filed on 7 August 2016 by Mr. Ihab Abdelrahman is dismissed.