



Arbitration CAS ad hoc Division (OG Tokyo) 20/012 Nazar Kovalenko v. World Athletics (WA) & Athletics Integrity Unit (AIU), award of 5 August 2021 (operative part of 3 August 2021)

Panel: Mrs Carine Dupeyron (France), President; Mr Manfred Nan (The Netherlands); Mrs Yasna Stavrevra (Bulgaria)

Athletics (race walking)

Non-eligibility of an athlete for failing to undergo at least three out-of-competition doping tests in the ten months before the Olympic Games

Necessary elements of a sanction

Proportionality of an eligibility rule

Exceptional circumstances

1. **The three necessary elements of a sanction are (i) adverse consequences; (ii) that are designed to punish; (iii) misconduct by the addressee of the sanction.**
2. **The notion of disproportion generally applies by comparing a behavior and a sanction attached to it. Therefore an eligibility rule cannot be reviewed under such criterion. In any event, attaching an ineligibility rule to the failure of a national federation to ensure that regular anti-doping tests would be performed on its athletes likely to participate in major competition events is not disproportionate, when one considers the objective pursued, which is to ensure a level playing field and restore the confidence of all stakeholders in Athletics.**
3. **A late qualification is an ordinary fact in the weeks leading to a competition. Admitting that it is an “*extraordinary circumstance*” that would justify an exemption to the obligation to ensure proper testing defies the terms of the expression “*extraordinary circumstance*” and could have significant consequences, such as encouraging federations to favor late qualifications in order to circumvent their testing obligations.**

1 PARTIES

- 1.1 The Applicant is Mr Nazar Kovalenko (“Mr. Kovalenko” or the “Athlete”), a Ukrainian athlete competing in the 20 km race walk discipline.
- 1.2 The Respondent is the World Athletics (“WA” previously known as the International Associations of Athletics Federations, “IAAF”), which is the international governing body for track and field athletes, with headquarters located in Monaco, taken together with its sub-

division, the Athletics Integrity Unit (“AIU”), which has been founded by the IAAF to combat doping in the sport of athletics.

- 1.3 The First Interested Party is the Ukrainian Athletics Federation (“UAF”), which is the governing body for the sports of athletics in Ukraine, with its headquarters in Kyiv, Ukraine.
- 1.4 The Second Interested Party is the International Olympic Committee (“IOC”), which is the organisation responsible for the Olympic movement, having its headquarters in Lausanne, Switzerland.
- 1.5 The Third Interested Party is the National Olympic Committee of Ukraine (“UNOC”), which is the national Olympic committee of Ukraine, with its headquarters in Kyiv, Ukraine.
- 1.6 The First, Second and Third Interested Parties are jointly referred to as the “Interested Parties”. The Applicant and the Respondent are jointly referred to as the “Parties”.

2 SUMMARY OF RELEVANT FACTS

- 2.1 The elements set out below are a summary of the main relevant facts as established by the Panel by way of a chronology, 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.
- 2.2 Mr Nazar Kovalenko is a Ukrainian race walker who has been found ineligible to compete at the XXIII Olympic Games in Tokyo (“Tokyo 2020”) due to the failure to meet the requirements set in Rule 15 of the World Athletics Anti-Doping Rules (“WA AD Rules”).
- 2.3 He started his sports career in 2006. On 9 March 2017, a provisional suspension for an anti-doping rules violation was imposed on the Applicant, which he accepted. In February – March 2020, the AIU proposed to the Applicant to accept a reduced period of ineligibility of 3 years and disqualification of all his competitive results obtained between 11 May 2012 and 17 May 2015, which was accepted by the Applicant on 6 March 2020.
- 2.4 In April 2017, WA (called IAAF at that time) set up the AIU as an independent body, with a specific mandate to protect the integrity of athletics, including all matters related to anti-doping. To ensure a level-playing field and improving the overall fight against doping in athletics, AIU conducted an intensive consultation process with Council members, the WA Athletes’ Commission and all Member Federations and Area Associations. With the benefit of this consultation, the AIU proposed amendments to the WA AD Rules, which were approved by the IAAF Council on 26 July 2018.
- 2.5 Amongst the key features of this new regulatory framework was the implementation of obligations applying to all Member Federations, the classification of Member Federations based on the level of risk that the Member Federation poses to the sport from possible doping (from A to C, with A being the highest risk), and the specific obligations determined by the category

of the Member Federation, allowing more stringent requirements to be placed on category A Member Federations than on the ones placed on category B and C.

2.6 On 27 July 2018, WA published a press release noting that:

“IAAF Council has approved new regulations which will spell out the obligations of its member federations in the fight against doping.

(...)

The current watch list of four member federations (Kenya, Ethiopia, Belarus, Ukraine) will be folded into Category A, which will include those member federations most at risk of doping. The national team athletes from these federations will have to undergo at least three out-of-competition doping tests in the ten months before a World Championship or Olympic Games”.

- 2.7 On 9 November 2018, the AIU announced in another press release the classification of all Member Federations for the purposes of the new framework as from 1 January 2019, with links to four additional documents: (1) the wording of WA AD Rule 15, which sets out the Member Federation obligations, including the Mandatory Testing Requirements, (2) the list of the categorized Member Federations, (3) the criteria applied for the purposes of categorization, and (4) a summary of the Member Federations’ obligations by category.
- 2.8 On 9 November 2018 and 20 December 2019, the AIU informed the UAF that it was placed in Category A in 2019 and 2020; this categorization was also maintained for the Olympic year 2021.
- 2.9 On 10 March 2020, the Athlete resumed his sporting activity after his 3-year suspension and started his preparation for the qualifications for the upcoming Olympic Games.
- 2.10 On 14 March 2020, 18 September 2020 and 18 October 2020, the Athlete participated in various 20 km walking races. Then, due to the second wave of COVID-19, between November 2020 until March 2021 the number of scheduled competitions was reduced.
- 2.11 On 20 March 2021, 6 June 2021 and 11 June 2021, the Athlete participated in three additional race walking competitions, and in each one of these competitions, he underwent an in-competition doping test.
- 2.12 On or around 14 June 2021, the Athlete was informed, via the WA’s website, that he met the qualification criteria to participate in the Olympic Games. According to him, the UAF was surprised of his results because it expected another athlete to be qualified.
- 2.13 On 22 June 2021 and 2 July 2021, the AIU reminded the UAF to provide the list of athletes who would compete at the Olympic Games, including the testing conducted on these athletes as per WA AD Rule 15 requirements.

- 2.14 On 29 June 2021, the UAF confirmed that the list would be provided to the AIU by the National Anti-Doping Center of Ukraine, which was done on 2 July 2021, together with indications of the various tests undergone by the athletes.
- 2.15 Based on this communication, on 5 July 2021, the AIU commented upon the list of athletes, noting that it was not able to confirm that the Mandatory Testing Requirements were met for numerous athletes. Additional email correspondence followed between the National Anti-Doping Center of Ukraine and the AIU on the athletes' doping testing data between 7 and 9 July.
- 2.16 On 6 July 2021, the Athlete passed a no-notice out-of-competition doping test.
- 2.17 On 7 July 2021, the Executive Committee of UAF confirmed the final composition of the Ukrainian Olympic Team in Athletics and the list, including the Athlete, was approved by the Executive Committee of the Ukraine NOC.
- 2.18 On 12 July 2021, the AIU confirmed that three athletes, including the Applicant, had failed to meet the Mandatory Testing Requirements and requested the National Anti-Doping Center of Ukraine, with the UAF, to provide an explanation as to why the required tests could not be conducted on these athletes, which the National Anti-Doping Center of Ukraine submitted on 13 July 2021. For the Applicant case, the explanation was that he was not initially planned to be included in the Olympic Team and his selection was only considered after he entered the list of the 60 first athletes on the WA website.
- 2.19 On 23 July 2021, AIU sent a letter to UAF informing the national federation about the AIU's Board decision, stating that:

“Following receipt of the list of Ukrainian National Team athletes on 2 July 2021, I specifically informed you that the following athletes had failed to meet the testing requirements of Rule 15 (of the AD Rules) and could no longer meet those requirements in the period remaining before the Games:

(...)

Nazar Kovalenko – 1 (out-of-competition test)

(...)

You provided a written explanation, through the Ukrainian Anti-Doping Agency as to why the testing requirements could not be met for the above 3 athletes and this explanation was forwarded to the Board (of the AIU) but they concluded that there were no exceptional circumstances warranting an exception from the clear testing requirements set out in Rule 15.5.1 (c)”.

- 2.20 On 27 July 2021, the Athlete passed a no-notice out-of-competition doping test.

- 2.21 On 28 July 2021, the AIU published on its website a statement about the athletes found ineligible to participate in the Olympic Games, referring to three Ukrainian athletes, but without mentioning their names.
- 2.22 On 29 July 2021, the UAF published on its website a statement referring to the Athlete as one of the three Ukrainian athletes ineligible to participate in the Olympic Games. According to the Athlete, this is how he was informed of his ineligibility and that it was caused by the failure to meet the requirements of WA AD Rule 15.
- 2.23 On 1 August 2021, the Athlete underwent another no-notice out-of-competition doping blood test, which was necessary for his Athlete's Biological Passport.

3 CAS PROCEEDINGS

- 3.1 On 1 August 2021 at 6:05 pm (time of Tokyo), the Applicant filed an Application with the CAS Ad Hoc Division against the First and Second Respondent with respect to the decision to declare him not eligible for Tokyo 2020.
- 3.2 On 2 August 2021, at 09:17 am (time of Tokyo), the CAS Ad Hoc Division notified the Application to the First and Second Respondent, and the Interested Parties. On the same day, at 09:24 am (time of Tokyo), the first composition of the Tribunal was sent to the Parties, and further to an inquiry by the Applicant, the CAS Ad Hoc Division notified the Parties of the composition of the Arbitral Tribunal, as follows:
- Ms. Carine Dupeyron, acting as president;
 - Ms. Yasna Stavreva and Mr. Manfred Nan, acting as co-arbitrators.
- 3.3 On the same day, at 4:49 pm (time of Tokyo), the IOC informed the CAS Court Office that it did not intend to participate as an interested party.
- 3.4 Later on the same day, procedural directions and summons to appear, together with a decision to extend the 24-hour time limit for rendering the award, were communicated to the Parties, setting in particular until 3 August at 8:30 am (time of Tokyo) for the Respondents to file their Answer and for the Interested Parties to file their *amicus curiae* briefs, and scheduling the hearing on 3 August at 2:00 pm (time of Tokyo).
- 3.5 On 3 August 2021, at 08:14 am (time of Tokyo), the Respondents filed their Answer with exhibits.
- 3.6 On the same day, at 14:00 pm (time of Tokyo), the hearing was held by videoconference and in person. The Panel was joined by Mr. Antonio de Quesada, Head of Arbitration to the CAS, and the following persons also attended the hearing:
- the Applicant, Mr. Nazar Kovalenko;

- Counsel for the Applicant: Mr. Oleksii Izotov and Mr. Oleksandr Volkov;
 - the Respondent; represented by Mr. Thomas Capdevielle;
 - Counsel for the Respondent: Mr. Ross Wenzel (in person); Mr. Nicolas Zbinden; Mr. Huw Roberts;
 - The Third Interested Party; represented by Mrs. Anna Sorokina;
 - The translator, Ms. Ekatarina Woodham.
- 3.7 The Applicant and the Respondent did not object as to the constitution of the Panel, and to the conduct of the proceedings or the Parties' rights to be heard and treated equally in these proceedings until the hearing.
- 3.8 At the hearing however, the Applicant made two objections, relating to (i) the alleged limitation of his right to cross-examine Mr. Capdevielle, who appeared as party representative, and (ii) the unequal allocation of time in pleadings, as the Applicant complied with the time indicated by the Panel (on or around 20 minutes) whereas the Respondent pled its case for over 30 minutes.
- 3.9 On the second objection, the Panel, while noting that this 10-minute time difference does not represent any serious risk for the equal treatment of the Parties, granted the Applicant a right to rebut for 10 minutes, and the objection was accordingly withdrawn.
- 3.10 On the first objection, the Panel notes that the Applicant refused, at the beginning of the hearing, to hear evidence from Mr. Capdevielle, who was offered as a witness by the Respondent. Having heard the Parties, based on this procedural decision made by the Applicant's decision that Mr. Capdevielle would not be heard and cross-examined, and the Respondent's request that Mr. Capdevielle be nonetheless present as a party representative, the Panel decided that Mr. Capdevielle would then only attend the hearing in that role, and he would be entitled to make a brief statement/just as the Applicant was entitled. Accordingly, after Mr. Kovalenko made his statement at the opening of the hearing, Mr. Capdevielle was invited to also deliver a statement for the Respondent, which consisted in briefly explaining to the Panel the genesis of the WA AD Rule 15. However, immediately thereafter, numerous questions were posed to Mr. Capdevielle by Applicant's counsel, which actually consisted in proceeding to a detailed cross-examination of Mr. Capdevielle on legal issues and exhibits in the record unrelated to his statement and status as a party representative. The Respondent's counsel protested as to the inconsistency of the posture adopted by the Applicant, who had originally refused to hear Mr. Capdevielle. Having heard both Parties, the Panel decided that the Applicant had to act in conformity with its prior objection to have Mr. Capdevielle as a witness and had to limit its questioning to the short declaration made by Mr. Capdevielle as a party representative. The Panel hereby confirms its decision, which was made to ensure a fair treatment an efficient conduct of the proceedings and the essence of the presence of Mr. Capdevielle as a party representative only, as requested by and granted to the Applicant.

4 PARTIES' SUBMISSIONS

4.1 Only the Parties' most important submissions and arguments are summarized below, but all submissions and arguments have been considered fully by the Panel in making its decision.

a. The Applicant's submission

4.2 The Applicant essentially develops three lines of arguments in support of its request, preceded by the affirmation that the AIU's letters shall be considered as an appealable decision subject to CAS review.

(i) *The existence of a decision affecting the Applicant's right*

4.3 The Applicant argues that the AIU's letter dated 23 July 2021 and/or AIU's statement dated 28 July 2021 must be considered a decision, which may be appealed before the CAS Ad Hoc Division. Referring to CAS 2017/A/5333 and CAS 2017/A/5200, the Applicant cites the various conditions for the qualification of communication as a decision, in particular that: "*(a) the form of the communication has no relevance; [...] (b) in principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties; (c) a decision is a unilateral act, sent to one or more determined recipients and is intended to produce legal effects; (d) an appealable decision of a sport association or federation is normally a communication of the association directed to a party and based on an 'animus decidendi', i.e. an intention of a body of the association to decide on a matter*".

4.4 Applying these criteria, the Applicant considers that the communication from the AIU as to his ineligibility qualifies as an appealable decision, as it affects his legal situation and bars him from competing in the Olympic Games and that the CAS Panel must accordingly decide on his appeal.

(ii) *The application of WA AD Rule 15 to the Athlete is a sanction*

4.5 As an introduction, the Applicant recalls the history of Rule 15 of the WA AD Rules, which was introduced by IAAF (now World Athletics) in 2018 to ensure the greater responsibility of national federations for anti-doping control. Citing the AIU's chair, the Applicant underscores that the main aim of adopting the WA AD Rule 15 was to tighten up certain national federation's anti-doping obligations in light of their serious and systematic failures in anti-doping programs, relieve the athletes of some of the burden of the fight against doping, and categorize national federations according to their level of doping risk, so as to adapt their anti-doping programs (Category A having the highest doping risk and Category C the lowest).

4.6 In practice, WA AD Rule 15 with respect to Category A national federations compels each "*relevant athlete*" to undergo at least three no notice out-of-competition tests, including one Athlete Biological Passport test and one EPO test, separated by a minimum 3-week interval in

a ten-month period before the start of any World Championship or Olympics Games, to be eligible to participate in these competitions. WA AD Rule 15.5.1 (c) so provides:

“Unless otherwise approved by the Integrity Unit in exceptional circumstances, no Athlete may participate as part of a National Team of a Category ‘A’ Member Federation in World Athletics World Championships or Olympic Games unless, in the 10 months prior to the competition, they have undergone at least three no notice out-of-competition tests (urine and blood) including (if they compete in any of a middle distance event from 800m upwards, a long distance event, a combined event or a race walk event) at least one Athlete Biological Passport test and one EPO test. All such tests are to be conducted under the authority of an Anti-Doping Organisation no less than 3 weeks apart and the results recorded by the relevant entity in ADAMS. Category ‘A’ Member Federations shall ensure that all Athletes to whom this requirement may be relevant receive effective written notice of it by no later than 1 January of each year”.

- 4.7 Here, the Applicant argues that the application of WA AD Rule 15.5.1 (c) to him must be qualified as an unenforceable sanction – as opposed to an eligibility rule.
- 4.8 In that respect, the Applicant cites CAS 2011/O/2422 (United States Olympic Committee (USOC) v. International Olympic Committee (IOC)), which differentiates eligibility rules and sanction, stating that eligibility rules *“do not sanction undesirable behaviour by athletes”*, contrary to rules that bar an athlete from participating and taking part in a competition due to prior undesirable behavior. For the Applicant, this analysis of the sanction nature of the application of WA AD Rule 15 is also confirmed by Appendix One and Article 10 of the WADA Code.
- 4.9 Having concluded that the AIU’s ruling shall be considered as a sanction, the Applicant concludes, based on the same case law, that the CAS Panel is required to intervene to declare this sanction unenforceable. Specifically, the Applicant highlights that it was impossible for him to take any active measures to ensure compliance with the eligibility rules set under WA AD Rule 15.5.1(c), as these actions entirely depended on third parties beyond the Applicant’s control, i.e. the Ukrainian Athletics Federation and the national anti-doping organization, who manifestly failed to do their part, to his detriment. These facts render the sanction unenforceable.

(iii) The Athlete was deprived of his rights to a fair trial and to present his case

- 4.10 The Applicant also complains that he has never been notified about the existence and application of WA AD Rule 15.5.1(c), despite the obligation made to Category ‘A’ Member Federations to ensure that all concerned athletes receive effective written notice of it by no later than 1 January of each year. The Applicant explains that he did not receive such notification since, having completed a three-year period of ineligibility in March 2020, he was not considered a likely candidate for the Tokyo 2020 in January 2020, a fact that remained true in January 2021, since at least until early June 2021, he was not seriously considered by his federation as an athlete likely to compete at the Olympic Games. In the absence of this information, the Applicant was deprived of the opportunity to exercise a due care obligation with respect to the requirements under WA AD Rule 15.5.1(c), to the extent he could even do so.

- 4.11 Worse, the application of WA AD Rule 15.5.1(c) resulted in his ineligibility, a consequence which is at odds with the rationale of WA AD Rule 15, which aimed at putting additional obligations upon national federations and, in turn, lower the respective obligations of athletes.
- 4.12 Procedurally, the Applicant also complains that the AIU failed to inform the Applicant of his ineligibility issue and did not invite the Applicant to provide his explanations, thereby depriving him of the opportunity to present his case, despite his right to do so, as confirmed in consistent CAS case law (CAS 2010/A/2275). The Applicant is bound to rely on two letters which do not elaborate on what has been put forward as exceptional circumstances that should have warranted the Applicant's exemption from testing requirement under WA AD Rule 15.5.1(c) and why these circumstances were rejected by AIU.

(iv) The Applicant actually complied with WA AD Rule 15.5.1(c) and had exceptional circumstances justifying an exemption

- 4.13 The Applicant argues that he actually complied with the goals pursued by WA AD Rule 15.5.1(c), *i.e.* to ensure that the athletes from high-risk countries are subject to an increased and adequate number of testing, as, in the period from 6 June 2021 to 27 July 2021 he was subject to four doping tests, 2 in-competition and 2 out-of-competition.
- 4.14 Moreover, while WA AD Rule 15.5.1(c) requires at least three out-of-competition tests, the Applicant notes that an out-of-competition test shortly after the Applicant's qualification result achieved on 6 June 2021 would have yielded the same practical result as the tests conducted on 6 and 11 June 2021, taken in-competition. Regarding the obligation to go through a blood test, the Applicant states that he has just done one, on 1 August 2021. Hence, the Applicant has, for all intents and purposes, complied with the WA AD Rule 15 testing requirement, and the only difference is purely formalistic, *i.e.* that the two tests in on 6 and 11 June were in-competition tests, as opposed to no-notice out-of-competition tests.
- 4.15 In this regard, the Applicant refers to the jurisprudence of the European Court of Human Rights which confirms that excessive formalism in applying the certain rules shall not impair the person's rights (Hasan Tunç and Others v. Turkey). This has also been recently judged by this CAS Ad Hoc Division in its recent award OG 20/004.
- 4.16 Accordingly, the Applicant urges the Tribunal to assess the rationale behind the WA AD Rule 15, which the Applicant claims has been complied with in the present case. Judging otherwise would also put the Applicant into a significantly unfavorable position, in comparison to that of other athletes representing Ukraine and other high-risk countries in other sports, as other international federations do not require from their respective athletes to undergo this increased number of doping tests to be qualified for Tokyo 2020.
- 4.17 Finally, the Applicant resorts to the "*exceptional circumstances*" justifying an exemption, although rejected by the AIU. The Applicant raises that the lack of a proper definition of exceptional circumstances, the absence of any explanation from the AIU and the excessive consequence of this decision justify overturning this decision, the Tribunal being fully empowered to decide

whether exceptional circumstances existed to justify the Applicant's exemption from the testing requirement under WA AD Rule 15.5.1(c).

- 4.18 In his presentation of these circumstances, the Applicant insists that he could not have been subject to the required out-of-competition doping tests anytime earlier than early June 2021 for two reasons: (i) the Applicant has never been informed of introduction of WA AD Rule 15, and (ii) the Applicant was not considered by the UAF as likely athlete to whom testing requirement under WA AD Rule 15 was applicable in light of his unpromising qualification results. As a result, the UAF and NADC did not commence the required out-of-competition testing until July 2021. These are exceptional circumstances that objectively precluded the Applicant from complying with the testing requirement under WA AD Rule 15.5.1(c).
- 4.19 For the Applicant, judging differently would be at odds with the fundamental purposes of WA, enshrined in Article 4.1(j) of its Constitution, "*to preserve the right of every individual to participate in Athletics as a sport, without unlawful discrimination of any kind undertaken in the spirit of friendship, solidarity and fair play*".
- 4.20 Other arguments raised by the Applicant refers to the general principle of *nulla poena sine culpa*, set in CAS jurisprudence (CAS 2014/A/3516), the *contra proferentem* rule, and the limits to the "*strict liability*" principle, which mandates liability even in the absence of a fault. The Applicant highlights that, for such principle to apply, Swiss law imposes that (a) a strong public interest must be protected and (b) the no-fault approach must be directly stipulated in relevant organization's statutory documents and regulations. For the Applicant, the existence of a public interest in barring athletes that have committed no doping violations from major competitions is debatable at best, and the AD Rules don't indicate that WA AD Rule 15 shall apply as a "*strict liability*" tool to athletes.
- 4.21 Overall, the Applicant concludes that he took and passed every test that was required of him, he was not afforded an opportunity to state his case, he has been and remains ready for any testing at any time, and he was not aware that WA AD Rule 15 requirements applied to him, but even if he were, an athlete isn't able to request or demand that he is tested by anti-doping authorities. In simple terms, the Applicant did absolutely nothing wrong but is now sanctioned. This is at odds with the purpose of WA AD Rule 15, which was meant to alleviate some of the anti-doping burdens off the athletes. Instead, it resulted in the Applicant's being sanctioned in an unfair, inappropriate and illegal manner, by a decision that must accordingly be struck down.

b. The Applicant's request for relief

- 4.22 The Applicant's request for relief is for the Panel to issue:

"(1) An order ruling that Mr. Nazar Kovalenko is eligible for participation in the XXXII Olympic Games in Tokyo, and setting aside the AIU/WA decision to the contrary issued on or about 23 July 2021.

(2) An order that WA, AIU and/or IOC take all reasonable measures necessary to facilitate Mr. Nazar Kovalenko's actual participation in the 20km Race Walking event of the XXXII Olympic Games in Tokyo.

(3) And an order that, while the present matter is being considered by the CAS Ad Hoc Division, WA, AIU and/or IOC take all reasonable measures necessary to facilitate Mr. Nazar Kovalenko's arrival at the site of the Olympic Games and preparation for the competition, including, but not limited, provision and/or confirmation of his accreditation, access to his place of accommodation, access to training facilities".

c. The Respondent's submission

4.23 The submissions of the Respondent, in essence, may be summarized as follows.

(i) The undisputed failure of the Applicant to meet the Mandatory Testing Requirements logically leads to his ineligibility for Tokyo 2020

4.24 For the years 2019, 2020 and 2021, the UAF, being a Category A Member Federation (i.e. belonging to high-risk Member Federations with regard to doping control), must comply with certain Mandatory Testing Requirements defined in the WA AD Rule 15.5.1 c, which includes the obligation to *"ensure a minimum of three (3) no-notice out-of-competition tests for all athletes in National team prior to the 2021 Olympic Games as per the requirements in Rule 15"*.

4.25 In the lead up to Tokyo 2020, the AIU regularly reminded Category A Member Federations, including the UAF, of their obligations under WA AD Rule 15, and in particular of the Mandatory Testing Requirements, failing which their athletes would not be eligible for the Games.

4.26 On 23 July 2021, as the Applicant failed to meet these Mandatory Testing Requirements, specifically since he *"has not undergone three no notice out-of-competition tests no less than three weeks apart"*, and no exceptional circumstances existed warranting an exemption from the Mandatory Testing Requirements, the AIU Board consequently decided that the Applicant was not eligible to participate in the 20km race walking of Tokyo 2020.

4.27 The Respondent does not dispute that the responsibility for the Applicant's non-eligibility in this case lies with the Applicant's Member Federation. Indeed, it is the Member Federation's obligation under WA AD Rule 15 to ensure that the Mandatory Testing Requirements are met for all concerned athletes. The AIU did its utmost to ensure that all Category A Member Federations, including the UAF, were well aware of the Mandatory Testing Requirements, and specifically warned these federations on numerous occasions that they had to identify all athletes who might be competing at Tokyo 2020 in order to ensure that these athletes comfortably met the Mandatory Testing Requirements, failing which they would not be eligible to compete.

4.28 Having stated the above, in the Respondent's opinion, whether the UAF failed to comply with its obligations is of no avail to the Applicant.

(ii) *The Applicant's procedural objections must be rejected*

- 4.29 Turning to the Applicant's procedural objections, the Respondent argues that these must fail, for the following reasons:
- WA AD Rule 15, which includes the Mandatory Testing Requirements, provides for obligations with respect to Member Federations; the framework of WA AD Rule 15 is therefore aimed at Member Federations and not athletes; for this reason, solely the UAF was required to provide an explanation for its failure to meet the Mandatory Testing Requirements, which it did and this was rejected by the AIU;
 - these rules are not disciplinary in nature; eligibility and/or qualification decisions are typically taken without a hearing process;
 - even assuming that there were some procedural vice, that would be cured by the hearing process before the CAS and the *de novo* review of the case, as per constant CAS case law.

(iii) *WA AD Rule 15 is not a sanction*

- 4.30 The Respondent highlights that the Mandatory Testing Requirements are not a sanction. The Applicant is not accused of committing a violation or engaging in any undesirable conduct whatsoever.
- 4.31 Therefore, the Applicant's claim that he did not commit a violation is irrelevant. The Mandatory Testing Requirements are a classic eligibility rule, as per well-established CAS case law.

(iv) *The alleged compliance by the Applicant with the goals of WA AD Rule 15 is irrelevant and does not characterize exceptional circumstances*

- 4.32 The Applicant's argument that he has been subject to sufficient testing is irrelevant, as the Mandatory Testing Requirements stipulate that the three doping controls must be without notice and out-of-competition and must be observed.
- 4.33 The reason for that is obvious: athletes know that they will be tested in-competition (or at least that there is a greater likelihood of being tested), such that they can cease using prohibited substances sufficiently in advance of the competition so as to test negative. The purpose of no-notice out-of-competition is to proceed to doping controls at different times, unexpectedly.
- 4.34 The Applicant fails to prove exceptional circumstances justifying an exemption from the Mandatory Testing Requirements for the following reasons:
- the Applicant reached the top-60 (which was required to qualify for Tokyo 2020) as a result of his victory at the Ukrainian National Championships on 6 June 2021; this was confirmed by WA already on 9 June 2021 on its website; it was therefore already publicly known that the Applicant had made the top-60 on 9 June 2021; in any event, even taking the Applicant's submissions that he had met or been informed of his qualification criteria to participate in Tokyo 2020 only on 14 June 2021, there was still a period of more than six

weeks until his participation in Tokyo 2020 (on 5 August 2021), which would have allowed the three doping controls to have occurred out-of-competitions; there is no reason put forward to explain why these out-of-competitions doping controls did not take place;

- furthermore, it would entirely undermine the Mandatory Testing Requirements if it were considered an “*exceptional circumstance*” that an athlete qualifies late on in the process; there is, on its face, nothing exceptional about late qualification; the Respondent underscores that if it were the case, (unscrupulous) national federations would be able to circumvent the rules too easily by arranging for key athletes to qualify late, thus removing them from the Mandatory Testing Requirements; that simply cannot be right;
- In any event, the rules are clear that the determination as to whether exceptional circumstances are present is reserved for the AIU. WA submits that the CAS should not lightly decide to interfere with the determination of the AIU in these circumstances and, in particular, should not substitute its discretion for that of the AIU. This is all the more the case as, with all due respect, the AIU is best placed to assess what is required to maintain an effective anti-doping program in the sport of athletics; the CAS should not interfere with the determination of exceptional circumstances unless such determination can be shown by the Applicant to have been arbitrary or unreasonable.

4.35 In summary, the eligibility requirements in the WA ADR are clear and need to be strictly applied. The Applicant simply does not meet the Mandatory Testing Requirements and a finding that his case presents exceptional circumstances that should exempt him from those requirements would entirely undermine these vitally important eligibility rules. The Applicant is not eligible to compete in Tokyo 2020 and his application must be dismissed.

d. The Respondent’s request for relief

4.36 On this basis, the Respondents request that:

“the CAS Ad-Hoc Division renders an award finding that the application filed by Nazar Kovalenko is dismissed”.

5 JURISDICTION AND ADMISSIBILITY

5.1 Article 61.2 of the Olympic Charter relevantly provides:

“Any dispute arising on the occasion of, or in conjunction 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 Moreover, Article 1 of the CAS Ad Hoc Division Rules enacted by the International Council of Arbitration for Sport (“ICAS”) on 14 October 2003 and amended on 8 July 2021 (“CAS Ad Hoc Rules”) provides:

“The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution of 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 Organizing 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”.

- 5.3 As the Applicant challenges the decision of the AIU on his ineligibility to participate in Tokyo 2020 (referred to in the AIU letter dated 23 July 2021, later published on WA’s website on 28 July 2021 and announced in the press on 29 July 2021), the Panel finds that it has jurisdiction under the requirements of Article 61.2 of the Olympic Charter and the CAS Arbitration Rules for the Olympic Games and confirms that the Application is admissible.

6 APPLICABLE LAW

- 6.1 The CAS Ad Hoc Rules state in their Article 17 that 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 In addition to the Olympic Charter, the Panel will apply the WA AD Rules, as regulations particularly relevant to these proceedings.

7 DISCUSSION

- 7.1 This case is about the question of whether the Applicant is eligible to participate as an athlete in the 20 km Race Walk at Tokyo 2020, although it is undisputed that the Athlete failed to meet the Mandatory Testing Requirements which are issued for all athletes belonging to Category A Federations under the WA AD Rule 15.5.1 c.
- 7.2 As a preliminary matter, the Panel confirms that the decision taken by the AIU to declare that the Applicant was not eligible to participate in said race is a decision capable of being appealed to the CAS Ad Hoc Division.
- 7.3 Moreover, the Panel confirms that this decision is subject to a full *de novo* review by the CAS Ad Hoc Division. In light of this power to review all issues and facts and law presented before it, the Panel does not deem necessary to opine on whether the Applicant had a right to be heard and/or was deprived of this right in the process leading to the decision of the AIU.
- 7.4 Turning now to the merits of the case, the Panel believes that three main questions are presented before it:

- Whether the ineligibility of the Applicant decided by the AIU for the failure to comply with AR Rule 15 is an unenforceable sanction;
- Whether the Applicant has, in practice, complied with the testing requirements and therefore his ineligibility would be a disproportionate, unfair and illegal measure taken against him;
- Whether the Applicant has demonstrated exceptional circumstances that would allow an exemption to the strict application of AD Rule 15.

a. The application of the AD Rule 15 in the AIU decision is not a sanction

- 7.5 The Panel has carefully examined the CAS case law provided by the Applicant supporting his analysis that the AIU decision would be characterized as a sanction for a specific behavior, as opposed to an eligibility rule, and accordingly would be unenforceable. Interestingly enough, the same case CAS 2011/O/2422 has also been cited by the Respondent to distinguish sanctions from eligibility rules, who also relied on CAS 2020/O/6689 which defines the three necessary elements of a sanction – (i) adverse consequences; (ii) that are designed to punish; (iii) misconduct by the addressee of the sanction – and concludes that they were not present in WADA eligibility rules.
- 7.6 Having reviewed these cases, the Panel concurs with the distinction made between eligibility rules and sanction, and is of the view that the Applicant’s argument on the characterization of the decision as an “unenforceable sanction” fails.
- 7.7 First, the Panel believes that, contrary to the Applicant’s argument, the AIU decision is not directed at sanctioning or punishing any misconduct specific to the Athlete. To the contrary, the AIU actually admits in its pleadings that it does not intend to accuse the Athlete of having committed an anti-doping rule violation or of any other reprehensible behavior. The Mandatory Testing Requirements have been applied without distinction to all athletes from Category A Federations intending to participate in Tokyo 2020 and accordingly, the decision by the AIU to declare the Athlete, amongst others, ineligible has nothing to do with a specific behavior attributable to him but is the (unfortunate) consequence of the failure of the Athlete’s national federation, the UAF, to abide by the WA AD Rules, and specifically Rule 15.5.1 c, despite repeated warnings.
- 7.8 As to the Applicant’s argument of disproportion, the Panel believes it necessary to recall here that WA AD Rule 15 has been implemented to encourage national federations to implement serious anti-doping monitoring and controls, to increase the overall confidence of all stakeholders (athletes, the public), by defining testing rules for eligibility. The consequence of issuing these rules and of a failure to abide by them, amongst which is the ineligibility of athletes, is therefore proportionate to the objective which is pursued, as decided in CAS 2020/O/6689.
- 7.9 Finally, the Panel believes that the reference to the reasoning in CAS 2011/O/2422 relating to a risk of double sanctioning is irrelevant in the present circumstances in the absence of any

sanctionable behavior or breach on behalf of the Applicant that would have been previously sanctioned and would risk a second unjustified sanction.

b. The Applicant's previous anti-doping tests do not comply with the purpose of WA AD Rule 15 requirements and are disproportionate

- 7.10 The Applicant argues that the various tests that were performed in the period between 6 June and 1 August 2021 suffice to comply with the requirements set in WA AD Rule 15.5.1 c, as they amount to 5 tests (two in-competition tests and three out-of-competition tests, including the blood testing of 1 August 2021). Hence, the AIU strict application of the requirements for three out-of-competitions tests to be conducted no less than 3 weeks apart is excessively formalistic and disproportionate. In response, the Respondent highlights that no-notice out-of-competition tests have a purpose and a surprise effect, which would be defeated if they could be replaced at the discretion of the Athlete by in-competition testing which, by nature, is predictable.
- 7.11 The Panel here fully concurs with the rationale for the requirement of no-notice out-of-competition testing put forward by the Respondent. Accordingly, the obligation for the Category A Member Federations to ensure that their athletes go through a certain number of tests, without any notice and within a specific time frame, shall be strictly complied with, and such no-notice tests cannot be "*replaced*" by predictable and/or expected testing during competitions or waived by neglecting the 3-week time frame between no-notice out-of-competition tests.
- 7.12 In light of the difference in the nature of the tests that the Applicant underwent when compared to the Mandatory Testing Requirements and the failure to comply with the three-week time frame between the second and third out-of-competition tests, the Panel rejects the Applicant's argument that the goals of WA AD Rule 15 would have been complied with in practice and that there should be some leeway in the application of this rule by the AIU.
- 7.13 Regarding the alleged disproportion concerning the eligibility rule set out in the WA AD Rule 15, the Panel first notes that the notion of disproportion generally applies by comparing a behavior and a sanction attached to it. As decided above, WA AD Rule 15 is not a sanction and it is not attached to a reprehensible act performed by the Applicant. Accordingly, the Panel has no reason to review it under such criterion. In any event and for the sake of completeness, the Panel is not convinced that attaching an ineligibility rule to the failure of a Category A Member Federation to ensure that regular anti-doping tests would be performed on its athletes likely to participate in major competition events would be disproportionate, when one considers the objective pursued, which is to ensure a level playing field and restore the confidence of all stakeholders in Athletics. Regarding the alleged illegality, the Panel did not find anything in the submissions of the Applicant as to which mandatory legal standards would be breached by WA AD Rule 15 and therefore rejects this argument.
- 7.14 The Panel now turns to the question of whether the Applicant has established the existence of "*exceptional circumstances*" that would justify an exemption to the application of the AD Rule 15.

c. The existence of exceptional circumstances?

- 7.15 The Applicant has raised several facts which, alone or together, constitute in his view exceptional circumstances justifying overturning the AIU decision on his ineligibility.
- 7.16 Amongst these elements, there is a timing question; the Applicant insists that his late qualification did not allow him to proceed to all three no-notice out-of-competition tests before Tokyo 2020. In addition, he argues that he is being sanctioned without any fault as he was not notified by his national federation of the existence of said rule, and in any event, organizing proper testing was not something he had control over. At the hearing, the Applicant also suggested that the Covid-19 pandemic could explain the difficulties in performing the required doping tests.
- 7.17 In response, WA first challenged the timing calculations made by the Applicant, stating that there was, in practice, sufficient time to go through these tests when his likely qualification became known and that, in any event, a late qualification is an ordinary fact in the weeks leading to a competition and it does not, in itself, qualify as an exceptional circumstance that would justify an exemption to WA AD Rule 15. Second, on the lack of notification to the Applicant of such rules and his inability to control the testing, the Respondent denies that this notification or lack thereof would have any consequence and admits that ensuring proper testing is the responsibility of the national federation but that any national federation's failure to fulfil its responsibility is not a sufficient reason to escape the application of these eligibility rules. On the pandemic, the Respondent confirmed that it has had no impact in the past ten months over the performance of out-of-competition doping controls.
- 7.18 On the Applicant's argument that his late qualification did not allow him to proceed to all three no-notice out-of-competition tests before Tokyo 2020, the Panel confirms that there was time between the likely qualification of the Athlete, on 6 June 2021, and the beginning of his competition on 5 August 2021 at Tokyo 2020 to go through the required three tests. The Panel is also sensitive to the argument developed by the Respondent that admitting that a late qualification is an "*extraordinary circumstance*" defies the terms of the expression "*extraordinary circumstance*" and could have significant consequences, such as encouraging federations to favor late qualifications in order to circumvent their testing obligations. For these reasons, the argument that the impossibility to comply with WA AD Rule 15 due to his late qualification is an extraordinary circumstance, is rejected.
- 7.19 Furthermore, the Mandatory Testing Requirements do not only apply as from an athlete's compliance with the applicable qualification criteria for Tokyo 2020, but they refer to a ten-month period prior to the start of the Olympic Games and to athletes "*likely to be selected*" for the Olympic Games. As such, the Panel finds that Category A Member Federations cannot simply wait until an athlete complies with the qualification criteria for the Olympic Games, but they should anticipate the likely qualification of athletes before they actually qualify and subject them to the required number of out-of-competition doping controls in accordance with WA AD Rule 15 to ensure their eligibility.

- 7.20 On 20 March 2021, the Applicant finished 3rd in the Winter National Championship Race Walking, resulting in an overall WA ranking of 63rd, while a top-60 ranking was required for qualification. The Panel finds that, at least since 20 March 2021, the Applicant was maybe not “*likely to be selected*”, but he was certainly a serious contender to qualify for the Olympic Games.
- 7.21 The Panel finds that it was up to UAF to determine whether the Applicant’s situation justified a conclusion that he was “*likely to be selected*” for the Olympic Games. A conservative approach in this respect brought with it the risk that athletes like the Applicant would finally qualify but that compliance with WA AD Rule 15 was in jeopardy due to the late qualification. The UAF could also have cast the net wider to avoid situations like this by applying a more progressive approach in qualifying athletes such as the Applicant as “*likely to be selected*” for the Olympic Games and submit them to testing in accordance with WA AD Rule 15, even though such athletes may finally not qualify. While this decision is not the Athlete’s this case shall serve as an indication to Member Federations to carefully select their pool of athletes with ensure that proper testing is performed on the relevant athletes.
- 7.22 The Panel is not convinced either by the alleged absence of awareness by the Applicant of these rules, and the so-called quasi-surprise of his qualification, which would have made it impossible (again) to foresee and plan a proper doping control program. As stated at the hearing, the Applicant has been an athlete since 2006, competing at international level, and even during his three-year suspension, the Applicant remained within the world of sports. His outstanding result a few days after the end of his suspension confirms that the Applicant had continued to train at the highest level. It is therefore difficult to believe that neither the Athlete nor his federation had in mind WA AD Rule 15 in the months prior to Tokyo 2020, and that the failure of the UAF to notify the athlete of a rule certainly well known in Category A Member Federation, is a relevant and even less “extraordinary” element. The limited credibility of this argument does not allow to conclude that it would be an extraordinary circumstance. At the very least, the Panel finds that the Applicant could or should have been aware of WA AD Rule 15 following the AIU’s press release of 9 November 2018 where it was announced that Ukraine was included in the list of Category A Member Federations and that the Mandatory Testing Requirements would apply to UAF athletes.
- 7.23 Finally, on the Covid-19 point, the Panel finds that the figures showing a significant increase in doping controls provided by the AIU confirms the statement made by the Respondent’s representative that the pandemic has not had any impact over doping controls in the past ten months. The Applicant’s argument in that regard is therefore rejected.
- 7.24 To conclude, the Panel find it useful to refer to the examples given by the Respondent’s representative at the hearing of what would be considered an extraordinary circumstance justifying an exemption, such as difficulties of performing doping controls in war zones or the case of an athlete whose suspension would be lifted just prior to the concerned competition. None of the elements brought to the Panel’s attention by the Applicant show a similar degree of difficulties in performing the required doping controls.

7.25 In view of the above considerations, the Applicant's application filed on 1 August 2021 is dismissed.

DECISION

The Ad Hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The application filed by Mr. Nazar Kovalenko on 1 August 2021 is rejected.
2. The Parties bear their own costs.