



Arbitration CAS anti-doping Division (OG Rio) AD 16/006 International Olympic Committee (IOC) v. Kleber Da Silva Ramos, award of 20 August 2016

Panel: Mrs Tricia Kavanagh (Australia), President; The Hon. Michael Beloff QC (United Kingdom); Mr Juan Pablo Arriagada (Chile)

Cycling
Doping (EPO CERA)

I. FACTS

1. On 11 August 2016, the IOC filed an Application with the Court of Arbitration Anti-Doping Division (“CAS ADD”) concerning a second Adverse Analytical Finding against Mr. Kleber Da Silva Ramos (the “Athlete”).
2. The Athlete is a representative of the Brazilian National Olympic Committee (“NOC”). His discipline is cycling. The Athlete took part in a Road Race on 6 August 2016.
3. On 4 August 2016, the Athlete underwent an out-of-competition doping control providing both a urine and blood sample.
4. Both the A and B Samples in the urine and blood sample analysis revealed the presence in the Athlete’s body of methoxy polyethylene glycop-epoetin beta (“CERA”). It is a non-specified substance - an EPA prohibited under S2.1.1 of the WADA Prohibited List.
5. The Athlete was notified of the Adverse Analytical Finding by letter of 9 August 2016.
6. Additionally, on 9 August 2016, the IOC filed an application with respect to the same athlete (CAS AD 16/003). In that matter, there was an Adverse Analytical Finding made against the Athlete for the presence of the same substance CERA in both his A and B urine sample. The Athlete was subsequently provisionally suspended.
7. On the application of the IOC, matter CAS AD 16/006 was referred to the same Panel appointed to consider the CAS AD 16/003 matter. The Panel, at the request of the IOC, suspended CAS AD 16/006 pending its resolution.
8. On 18 August 2016 at 16h24, the Panel issued its final award on the Application in CAS AD 16/003 determining that the Athlete committed an anti-doping rule violation. The Athlete was declared ineligible to compete in all competitions in which he had not yet participated at the Olympic Games Rio 2016 (the “Rio Games”) and was excluded from the Rio Games. His accreditation (number 1210046) was withdrawn. The matter, as to consequences associated therewith, was referred to the UCI accordingly.

9. Given the above circumstances and the publication of the Award in matter CAS AD 16/003, the Panel now addresses the Application brought by the IOC in CAS AD 16/006 which Application had been suspended.
10. The only outstanding matters as to the relief claimed by the IOC are the question of whether there is an anti-doping rule violation and whether there should be a referral to the UCI on the consequences. Otherwise, the same relief has been sought in CAS AD 16/003 as in CAS AD 16/006, and such relief has already been granted in CAS AD 16/003.
11. The Athlete was given the right to be heard orally or provide written submissions.
12. In reply, the Athlete responded as follows:

“... the Respondent states that, at this point, does not wish to submit any further written submissions.

However, as an urgent matter, in order to guarantee the Respondent’s right to be heard and due process in the course of this case, we would like to bring to the attention of the Tribunal that the above submissions are in addition and without prejudice to the Respondent’s future right to plead and bring on record before the UCI Tribunal.

Thus, the Respondent expressly states that he has not committed any anti-Doping rule violation, and reserves his right to produce all relevant evidence with respect to the absence of any fault in this case, the source of the substance allegedly found in his samples, any expert evidence and all other such relevant evidence as we may deem fit and appropriate for the present case”.

13. On 20 August 2016 at 12h21, the parties were informed that the Panel deemed itself sufficiently well informed to render a decision based on the parties’ submissions without a hearing.

III. JURISDICTION

14. Pursuant to Rule 59.2.4 of the IOC Olympic Charter, the IOC Executive Board has delegated to the CAS ADD its power to decide upon any violation of the World Anti Doping Code arising within the Olympic Games. (Article 8.2.2 of the IOC ADR)

15. Pursuant to Article 8.1.1 of the IOC ADR:

“Where the IOC decides to assert an anti-doping rule violation the IOC shall promptly file an application with the CAS Anti-Doping Division as per the CAS Anti -Doping Rules”.

16. Pursuant to Article 1 of the Arbitration Rules applicable to the CAS ADD:

“The CAS ADD shall be the first instance authority for doping related matters, responsible for the conduct of the proceedings and the issuance of decisions when an alleged anti-doping rule violation has been asserted and referred to it under the IOC ADR”.

17. The parties do not contest the jurisdiction of the CAS ADD to decide the dispute. It follows that CAS is competent and has jurisdiction over the Application.

IV. APPLICABLE LAW

18. The IOC ADD Article 2, so far as it is material, provides the following:

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.

Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that Intent, Fault, Negligence or Knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

19. As to the duty of the Athlete

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

20. Art. 3.1 IOC ADR reads as follows:

3.1 Burdens and Standards of Proof

The IOC shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IOC has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made.

This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

21. Art 8.2 IOC ADR reads as follows:

8.2 Hearings and disciplinary procedures of the CAS Anti-Doping Division

8.2.1 *In all procedures relating to any alleged anti-doping rule violation pursuant to these Anti-Doping Rules, the right of any Person to be heard pursuant to paragraph 3 to the Bye-law to Rule 59 of the Olympic Charter will be exercised solely before the CAS Anti-Doping Division.*

V. MERITS

22. The A and B Samples in both urine and blood tests were positive and the Athlete has chosen to adduce no evidence or make any submissions to challenge the two Adverse Analytical Findings. Therefore, in accordance with the Panel's functions under the IOC ADR and the CAS Anti-Doping Arbitration Rules, the Panel finds, to its comfortable satisfaction, that the Athlete committed an anti-doping rule violation in the Rio Games.
23. Both parties have requested the matter be referred to the UCI. The Panel accedes to this request. It would be for the UCI to determine in the light of any evidence or submissions that the Athlete may bring before it, and how it will deal with his case.

VI. CONCLUSION

24. As the Athlete committed an anti-doping rule violation in connection with the Olympic Games Rio 2016, the Panel finds it appropriate to impose on the Athlete the following consequences:
1. The Athlete committed an anti-doping rule violation in accordance with Article 2.1 of the IOC Anti-Doping Rules applicable to the Rio Games.
 2. The responsibility for the Athlete's results management in terms of sanction beyond the Rio Games is referred to the UCI being the applicable International Federation.
 3. All remaining requests for relief are denied as moot.

The anti-doping Division of the Court of Arbitration for Sport renders the following decision:

On the basis of the facts and legal submissions recited above, the Application of the IOC is granted as follows:

1. The Athlete has committed an anti-doping rule violation in accordance with Article 2.1 of the IOC Anti-Doping Rules applicable to the Olympic Games Rio 2016.
2. The responsibility for the Athlete's results management in terms of sanction beyond the Olympic Games Rio 2016 is referred to the UCI being the applicable International Federation.
3. All remaining requests for relief are denied as moot.