Arbitration CAS anti-doping Division (OG Rio) AD 16/004 International Olympic Committee (IOC) v. Silvia Danekova, award of 12 August 2016

Panel: Justice Hugh Fraser (Canada), President; Prof. Michael Geistlinger (Austria); Mr Efraim Barak (Israel)

Athletics (3000m steeple)
Doping (EPO CERA)

I. FACTS

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 other chapters of the present award.

2. On 1 August 2016, Ms. Silvia Danekova (the "Athlete") underwent an out-of-competition doping control (blood and urine). The analysis of the B Samples, which took place on 9 August 2016, confirmed the result at the A Samples.

3. On 8 August 2016, the International Olympic Committee (the "IOC") notified the Athlete that the results of the analysis of her A Samples, both urine and blood, revealed the presence of methoxy polyethylene glycol-epoetin beta ("CERA"), which is a non-specified substance prohibited under S2.1.1 of the WADA Prohibited List.

4. Later that same day, 8 August 2016, the Athlete requested the analysis of the B Sample and the production of the associated documentation package. The Athlete also asserted her right to attend the opening of the B Sample, either in person or by her representative Angel Lozanov.

5. On 9 August 2016 at 11h52 (all times mentioned in this award are in time of Rio de Janeiro), the IOC filed an application at the Anti-Doping Division of the Court of Arbitration for Sport ("CAS ADD") asserting the following:

   (a) CERA was found in the Athlete's samples.

   (b) This is sufficient proof of an anti-doping rule violation under Article 2.1 of the IOC ADR, which requires establishment by the presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A and, if so required by the Athlete, confirmed by the B Sample.

   (c) Therefore, due to Article 2.1 of the IOC ADR, an anti-doping rule violation has been committed by the Athlete.

6. In the Application, the IOC seeks the following relief:

   (a) The Application of the International Olympic Committee is admissible.

   (b) The Athlete be found guilty of an anti-doping violation in accordance with Article 2.1 of the IOC ADR.

   (c) All results obtained by the Athlete in the Olympic Games Rio 2016 (if any) be disqualified with all consequences, including forfeiture of all medal, points and prizes.

   (d) The Athlete be declared ineligible to compete in all Competitions in which she has not yet participated at the Olympic Games Rio 2016.

   (e) The Athlete be excluded from the Olympic Games Rio 2016.

   (f) The Athlete's accreditation (number 1117181) be withdrawn.

   (g) The matter of the Athlete be referred to the International Association of Athletics Federations to impose Consequences that extend beyond the Olympic Games Rio 2016 upon the Athlete.

7. In the Application the IOC also asked the following provisional relief:

   "The Athlete be provisionally suspended".

8. On 9 August at 9h37, the Athlete filed an answer which according to the English translation of the letter in Bulgarian handwriting reads as follows:

   I do not question the results of the "A" samples analysis made by the doping control laboratory in charge for the Rio 2016 Olympic Games.

   In my defence I would like to state that I have never consciously attempted to use substances from the prohibited list.

   One month ago I had to enter a hospital due to a tonsillar abscess, involving anaemia. The attending physician prescribed for me a treatment with: glucose, iron, Vitamin C and riboxin.

   This is the only logical explanation for me how a prohibited substance could enter my blood. I repeat again this didn't happen deliberately or intentionally.

9. On 9 August 2016 at 10h20, the IOC notified the B Sample analysis result to the Athlete and filed the result with the CAS ADD.

10. On 9 August at 15h57, the CAS ADD informed the parties that the Panel was constituted as follows:

    President: Mr. Hugh Fraser

    Arbitrators: Mr. Efraim Barak and Mr. Michael Geistlinger.

11. On 10 August 2016, at 12.49, the Panel notified the parties on the imposition of a Provisional Suspension on the Athlete.

12. In the Order for Provisional Suspension, the Panel further ordered the following:

    (a) The IOC was directed to file, and send to the other parties, the documentation package associated with the Athlete's samples ("LDPs") no later than 11 August 2016, at 12h00.

    (b) The parties were directed to file written submissions in support of their position on the merits of this Application no later than Thursday, 11 August 2016, at 18h00.

    (c) The parties were invited to state their preference on the necessity of a hearing no later than Thursday, 11 August 2016, at 18h00. A party's silence was deemed to indicate a preference that no hearing shall take place.

13. On 10 August 2016, at 19h25, the IOC was granted an extension of the time to file the LDPs until Thursday, 11 August 2016, at 19h00.

14. On 11 August 2016, at 17h32, the Athlete informed the CAS ADD that she waived her right to a hearing.

15. The LDPs were sent to the other parties on 11 August at 18h34. However, the LDP on the A Sample could not be opened. A new link for the LDP on the A Sample was received on 12 August 2016 at 12h37.

II. LEGAL ASPECTS

A. Jurisdiction

16. Pursuant to Rule 59.2.4 of the 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 upon the occasion of the Olympic Games (Art. 8.2.2 IOC ADR).

17. 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".

18. 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".

19. The parties do not contest the Jurisdiction of the CAS ADD to decide the dispute.

20. It follows that the CAS ADD is competent and has jurisdiction over the Application.

B. Applicable Law

21. Article 17 CAS ADD Rules reads as follows:

"The Panel shall rule on the dispute pursuant to the IOC ADR, the applicable regulations, Swiss Law and general principles of law".

22. The Introduction to the IOC ADR refers *inter alia* to the scope of the Rules and stipulates the following:

"These Rules apply in connection with the Olympic Games Rio 2016. They shall, without limitation, apply to all Doping Controls over which the IOC has jurisdiction in connection with the Olympic Games Rio 2016.

These Rules shall, without limitation, apply automatically to (a) the IOC; (b) Athletes entered in the Olympic Games Rio 2016 …

(…)

Athletes entered in the Olympic Games Rio 2016 or who have otherwise been made subject to the authority of IOC in connection with the Olympic Games Rio 2016 are bound by these Rules as condition of eligibility to participate in the Olympic Games Rio 2016…".

23. The Panel hereby confirms that it will apply primarily the IOC ADR, and complimentary as far as needed Swiss Law and general principles of law. The Panel further confirms that these proceedings are governed by the CAS ADD Rules. 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 ADD Rules and as a result, the choice of Lausanne, Switzerland as the seat of the CAS ADD and the Panel, pursuant to Article 7 of the CAS ADD Rules.

C. Legal Framework

24. The most relevant articles of the Applicable Law for the discussion on the merits of this Application are the following:

25. Art. 2 IOC ADR reads as follows:

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.*

(…)

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.*

26. 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.

27. 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.*

28. Art. 10 IOC ADR reads as follows:

10.1 Disqualification of Results in the Olympic Games Rio 2016

An anti-doping rule violation occurring during or in connection with the Olympic Games Rio 2016 may, upon the decision of the CAS Anti-Doping Division, lead to Disqualification of all of the Athlete's individual results obtained in the Olympic Games Rio 2016 (or in one or more Events or Competitions) with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

Factors to be included in considering whether to Disqualify other results in the Olympic Games Rio 2016 might include, for example, the seriousness of the Athlete's anti-doping rule violation and whether the Athlete tested negative further to Testing conducted after other Competitions.

10.1.1. *If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified, unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the* ***Athlete's*** *anti-doping rule violation.*

10.2 Ineligibility and other consequences

10.2.1 *Should an Athlete or other Person be found to have committed an anti-doping rule violation, the CAS Anti-Doping Division may declare the Athlete or other Person ineligible for such Competitions at the Olympic Games Rio 2016 in which he/she has not yet participated, along with other sanctions and measures which may follow, such as exclusion of the Athlete and other Persons concerned from the Olympic Games Rio 2016 and the loss of accreditation.*

No Person who has been declared ineligible may, during the period of ineligibility, participate in any capacity in the Olympic Games Rio 2016.

10.2.2 *In accordance with Article 7.1.2, responsibility for results management in terms of sanctions beyond the Olympic Games Rio 2016 itself shall be referred to the applicable International Federation.*

10.3 Automatic Publication of Sanction

A mandatory part of each sanction shall include automatic publication, as provided in Article 13.3.

III. MERITS

29. The analysis of the A and B Samples revealed the presence of methoxy polyethylene glycol-epoetin beta ("CERA"), which is a non-specified substance prohibited under S2.1.1 of the WADA Prohibited List.

30. The Test Report, as well as the LDPs, were adduced and presented by the IOC. The Athlete did not adduce any documents rebutting the finding of the Adverse Analytical Finding and did not actually submit any defence except for the explanation letter dated 9 August 2016, which by itself does not deny the findings of the Test Reports and does not provide any explanation for the presence of the prohibited substance.

IV. CONCLUSION

31. In view of the above considerations, the Panel finds that the IOC met the burden of proof under Art. 3.1 IOC ADR. The documents adduced by the IOC establish sufficient proof, to the comfortable satisfaction of the Panel, that the Athlete committed an anti-doping rule violation under Art. 2 IOC ADR.

32. Moreover, the substances mentioned in the Athlete's letter do not fully correspond to the substances indicated by her on the Doping Control Form. The Athlete did not provide any evidence corroborating her statements in the letter, neither as to the origin of the Prohibited Substance found in her body, nor as to the argued lack of intent.

33. As the Athlete committed an anti-doping rule violation in connection with the Olympic Games Rio 2016, the Panel rules as follows:

    1. The Athlete is declared ineligible to compete in the Olympic Games Rio 2016.
    2. The Athlete is excluded from the Olympic Games Rio 2016.
    3. The Athlete's Accreditation (number 1117181) is withdrawn.
    4. The responsibility for the Athlete's results management in terms of sanction beyond the Olympic Games Rio 2016 is referred to the International Association of Athletics Federations being the applicable International Federation.

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

On the basis of the facts and legal arguments set forth above, the application is granted. As a consequence:

1. The Athlete is declared ineligible to compete in the Olympic Games Rio 2016.

2. The Athlete is excluded from the Olympic Games Rio 2016.

3. The Athlete's Accreditation (number 1117181) is withdrawn.

4. The responsibility for the Athlete's results management in terms of sanction beyond the Olympic Games Rio 2016 is referred to the International Association of Athletics Federations being the applicable International Federation.