



Arbitration CAS ad hoc Division (OG Beijing) 08/001 Azerbaijan National Olympic Committee (ANOC), Azerbaijan Field Hockey Federation (AFHF), Hidayatova Nazira and others (the Players) v. Fédération Internationale de Hockey (FIH), award of 2 August 2008

Panel: Prof. Richard H. McLaren, President (Canada); Judge Deon H. Van Zyl (South Africa); Mr. Jingzhou Tao (France)

Field Hockey

Olympic Games 2008

Eligibility

Standing to challenge a decision

In light of the FIH Anti-Doping Policy, the Applicants have no rights of appeal against the decision taken by the FIH Disciplinary Commission. Therefore, they have no standing to request a relief challenging such decision in relation to an alleged doping case committed by players of an opponent team during a qualifying tournament held for the OG.

On 31 July 2008, the Applicant filed an application before the ad hoc Division of CAS, including an application for preliminary relief. In support of this application, the Applicant relies, in summary, on the following facts and/or legal arguments:

From 12 to 20 April 2008 one of the three Women's World Hockey Qualifier competitions was held in Baku, Azerbaijan (the "Event").

The winner of the Event would qualify for the Olympic Games.

The final of the Event was a match on Sunday, 20 April 2008, between the team representing the Real Federación Española de Hockey (RFEH) and the team representing the Azerbaijan Field Hockey Federation (AFHF).

The Spanish team won the final 3-2.

On 21 May 2008, the FIH communicated that the A-samples of two players, who competed for the Spanish team, taken during anti-doping tests carried out at the Event showed adverse analytical findings (AAF).

On 4 June 2008, the FIH communicated that the B-samples confirmed the A-samples. In the same communication, the FIH stated that the players concerned had requested a hearing by the FIH Disciplinary Commission (the "Disciplinary Commission").

The hearing impacted not only the players but could also have affected the entire Spanish team by virtue of article 11.1 of the FIH Anti-Doping Policy, which reads:

“if more than one team member in a Team Sport is found to have committed an Anti-Doping Rule violation during the Event, the team may be subject to Disqualification or other disciplinary action”.

The FIH requested that the Disciplinary Commission find that the two players had committed an anti-doping rule violation and as a result disqualify the Spanish team from the Event.

The Disciplinary Commission found that one of the players committed an anti-doping rule violation, however, there was no fault or negligence on her part so no sanction was imposed; the second player was not found to have committed an anti-doping rule violation (the “Decision”).

In a letter of 19 July 2008, the AFHF formally requested a copy of the Decision and all supporting documentation.

In a letter of 22 July 2008, the FIH refused to provide the AFHF with a copy of the Decision determining that the AFHF lacked any interest in the Decision as it was not entitled to appeal the Decision.

In another letter of 22 July 2008, FIH's attorney disclosed that the FIH acknowledges that the AFHF, ANOC and the Players have an interest in receiving information concerning the proceedings which led to the Decision.

There had been an issue between the parties as to the right to obtain a copy of the Decision. The Panel requested from the FIH and received a copy of that Decision on 1 August 2008. In accordance with fair arbitration procedure, the Panel made that decision available to the Applicant subject to the confidentiality provision of Article 14.4 of the FIH Anti-Doping Policy. That restriction is extremely important in this case because one Spanish player was determined by the Disciplinary Commission, not to have committed an anti-doping rule violation. Therefore, her name ought always to be confidential.

LAW

Procedure

1. There had been an issue between the parties as to the right to obtain a copy of the Decision. The Panel requested from the FIH and received a copy of that Decision on 1 August 2008. In accordance with fair arbitration procedure, the Panel made that decision available to the Applicant subject to the confidentiality provision of Article 14.4 of the FIH Anti-Doping Policy. That restriction is extremely important in this case because one Spanish player was

determined by the Disciplinary Commission, not to have committed an anti-doping rule violation. Therefore, her name ought always to be confidential.

Applicable law

2. The FIH Anti-Doping Policy applies in the present case. The relevant provisions read as follows:

Article 11 Consequences To Teams

11.1 Where more than one team member in a Team Sport has been notified of a possible Anti-Doping Rule violation under Article 7 in connection with an Event, the Team shall be subject to Target Testing for the Event. If more than one team member in a Team Sport is found to have committed an Anti-Doping Rule violation during the Event, the team may be subject to Disqualification or other disciplinary action.

13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions

A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that the FIH or its National Association lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension as a result of a Provisional Hearing or otherwise in violation of Article 7.4 may be appealed exclusively as provided in this Article 13.2. Notwithstanding any other provision herein, the only Person that may appeal from a Provisional Suspension is the Athlete or other Person upon whom the Provisional Suspension is imposed.

13.2.1 *In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.*

13.2.2 *In cases involving Athletes that do not have a right to appeal under Article 13.2.1, each National Association shall have in place an appeal procedure that respects the following principles: a timely hearing, a fair and impartial hearing body; the right to be represented by a counsel at the person's expense; and a timely, written, reasoned decision. FIH's rights of appeal with respect to these cases are set forth in Article 13.2.3 below.*

13.2.3 *In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the FIH and any other Anti-Doping Organisation under whose rules a sanction could have been imposed; (d) the International Olympic Committee where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games; and (e) WADA. In cases under Article 13.2.2, the parties having the right to appeal to the national-level reviewing body shall be as provided in the National Association's rules but, at a minimum, shall include: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the FIH; and (d) WADA. For cases under Article 13.2.2, WADA*

and the FIH shall also have the right to appeal to CAS with respect to the decision of the national-level reviewing body.

13.5 Time for Filing Appeals

The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having led to the decision subject to appeal:

- (a) Within ten (10) days from notice of the decision, such party/ies shall have the right to request from the body having issued the decision a copy of the file on which such body relied;*
- (b) If such a request is made within the ten-day period, then the party making such request shall have twenty-one (21) days from receipt of the file to file an appeal to CAS.*

Discussion

3. The Applicants request on the merits of the case that the decision of the Disciplinary Commission be set aside; that the case be reviewed *de novo* with the relief in that proceeding being the following:
 - the two players concerned be held to have committed anti-doping rule violations;
 - the Spanish team be disqualified from the event;
 - the Azerbaijan team be proclaimed the winner of the event; and
 - the Azerbaijan team ought to be designated as the team to replace the Spanish team at the Olympic Games.
4. In addition to the foregoing requests on the merits, the Applicants make an urgent preliminary interim relief request that provided that the *de novo* review has not led to a final award, the ANOC is authorised to enter the Azerbaijan team in the Beijing Olympic Games.
5. There is an issue between the parties as to the jurisdiction of the CAS ad hoc Division to hear and determine the matter under Article 59 of the Olympic Charter and Article 1 of the CAS ad hoc Rules. There is also an issue between the parties as to the standing of the Applicants to bring this application before the CAS ad hoc Division.
6. The Panel proceeds on the assumption it has jurisdiction, without deciding whether it has jurisdiction in this matter. Based on that assumption of jurisdiction we turn first to the standing of the Applicant. If there is standing, then the Panel will determine its jurisdiction.
7. The FIH, under Article 7.2 of the FIH Anti-Doping Policy of January 2007 (the “Anti-Doping Policy”), had responsibility for Results Management at the Event in which this matter unfolds. Notification to the Spanish players that there were AAFs was given by the FIH on 21 May 2008 in accordance with Article 7.1.3 of the Anti-Doping Policy. The case was assigned

to the Disciplinary Commission for adjudication under Article 8.1.1. In accordance with Article 8.1.8, decisions of the Disciplinary Commission may be appealed to CAS as provided for in Article 13.

8. On 17 July 2008, the Disciplinary Commission ruled that one athlete had committed an anti-doping rule violation but established that she bore no fault or negligence within the meaning of Article 10.5.1 of the Anti-Doping policy and ordered the elimination of the period of ineligibility. The Disciplinary Commission further found that the second athlete had not committed an anti-doping rule violation because “on the balance of probabilities there has been sample substitution” of her urine sample and that the sample tested was not hers.
9. This Panel has reviewed the Decision and finds it to have been one that appears to have been conducted in accordance with the FIH Anti-Doping Policy. A full and fair hearing appears to have occurred with appropriate scientific and other expert evidence and all parties’ representatives had full opportunity to make argument. The Decision is a reasoned assessment of the materials and evidence before the Disciplinary Commission with the conclusions flowing from the analysis. On this basis, the Panel accepts the Decision.
10. As the Panel writes this decision, the time period for any appeal is still running. In principle, an appeal before CAS may be commenced within twenty-one days from the date of receipt of the Decision by the appealing party (art. R49 of the Code of Sports-related Arbitration). The Decision was made on the 17th of July 2008.
11. The issue before the Panel, given the relief on the merits requested and set out at paragraphs 3.1-3.2 is one of standing to appeal. The parties who may appeal the Decision are set out in Article 13.2.3 of the Anti-Doping Policy.
12. The Spanish players' doping cases are personal matters in which the Applicants have no individual interest and would have no standing to be present before the Disciplinary Commission whilst it determines if either player committed a doping infraction. Therefore, the Applicants were not a party, nor were they entitled to be an interested party before the Disciplinary Commission.
13. Once the Disciplinary Commission has issued its Decision the listed parties to an appeal in Article 13.2.3 include the:
 - Athlete;
 - FIH, as the other party to the original decision of the Disciplinary Commission or as the organisation under whose rules a sanction would have to be imposed;
 - International Olympic Committee, where the decision may have an effect in relation to the Olympic Games; and
 - WADA.

To the time of writing, and so far as the Panel is aware, none of the named parties has filed an appeal of the Decision.

14. Noticeable for its absence is the fact that the Applicants have no rights of appeal under Article 13, and more particularly, under the applicable Article 13.2.3. The Panel must conclude that the Applicants have no standing to make this Application to the CAS ad hoc division. Without such status there is no basis either for the request for relief as to the so called merits. It follows that if there is no standing to request relief for the merits there can be no Application for extremely urgent preliminary relief, which of necessity must spring out of the merits. Therefore, this Panel concludes that on the merits of the doping cases of the two Spanish players, the Applicants have no standing to make the present application.
15. The foregoing conclusion does not totally dispose of the Application before the Panel. The consequence of the findings and determinations by the Disciplinary Commission might result in the possibility of Article 11 (Consequences to Teams) of the Anti-Doping Policy being triggered. This could result in possible standing before the Panel as a matter of eligibility to participate in the Olympic Games in the event the Spanish Team was disqualified. However, any legal interest in the decision of the Disciplinary Commission by the Applicants can only arise when there is *“more than one team member in a Team Sport [...] notified of a possible Anti-Doping Rule violation”*, as provided by Article 11. In this matter, the threshold of more than one team member has not been satisfied by the Decision which this Panel accepts as determinative of the issues before it. Therefore, it is not possible to characterize this Application as one of eligibility because the threshold for such a characterization is not present and appropriately there was no action taken by the Disciplinary Commission on consequences to the Spanish team. On that basis, there is no standing to make this Application to the ad hoc division of CAS.
16. The Panel also notes that even if there were two team members who had been found to have committed doping violations, which did not happen in the present case, it is still a discretionary matter to be determined by the Disciplinary Commission if *“the team may be subject to Disqualification or other disciplinary action”*. Therefore, any application to the Panel would have to establish an improper exercise by the Disciplinary Commission of its discretionary powers under Article 11 of the Anti-Doping Policy. No such application has been made nor could have been made given that the threshold number of players has not been met on the facts and therefore, there was no need to exercise the discretionary power of Article 11.
17. For all of the foregoing reasons the Application is dismissed for want of standing before the Panel.

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

The application filed by the Azerbaijan National Olympic Committee, the Azerbaijan Field Hockey Federation and the Players on 31 July 2008 is hereby dismissed.