



Arbitration CAS ad hoc Division (O.G. Sydney) 00/011 Andreea Raducan / International Olympic Committee (IOC), award of 28 September 2000

Panel: Justice Tricia Kavanagh (Australia), President; Mr. Stephan Netzle (Switzerland); Mrs. Maidie Oliveau (USA)

Gymnastics

Doping (pseudoephedrine)

Disqualification from the event

Principle of strict liability

1. The discrepancy in the volume of urine reported in the doping control form and by the laboratory cannot reasonably be considered to have affected the results of what is a valid test, provided that the laboratory received sufficient volume of urine to conduct a valid analysis.
2. The Anti-Doping Code considers doping as a strict liability offence. This means that no intentional element is required to establish a doping offence. The mere presence of a forbidden substance in the urine sample is sufficient. This has been repeatedly confirmed by the CAS.
3. To establish a doping offence, it is not required to demonstrate that a competitive advantage was reached.

Andreea Raducan (the Applicant) was born on 30 September 1983 and is aged 16+ years. She began training as a gymnast at 4 years of age and by the time she was 7 years she was competing.

She was selected at 13 years for the National Junior Team, at 14 years for the National Senior Team. Since 1996, she has been under the control and direction of, among others, Dr. Ioachin Oana, the Romanian gymnastics team doctor.

In 1999, she won gold as an individual in the Floor Exercises and gold in the Team Event at the World Gymnastics Championships. She also won a silver medal on the Beam. In August 2000, she won the Romanian National Individual All-Around Championship and was selected to compete in the Sydney Olympics.

On 19 September 2000 at the Sydney Olympics she won gold in the Gymnastics (Artistic) Women's Team Finals. She was not the subject of doping control after this competition.

On 20 September 2000 she reported to Dr. Oana with a headache, a running nose and a feeling of congestion. Dr. Oana prescribed and gave her a Nurofen Cold and Flu tablet which she took in his presence.

On 21 September 2000 she competed in the Gymnastics (Artistic) Women's Individual All-Around Event. Sometime during her warm-up, before the event began, she again complained to Dr. Oana about not feeling well. He gave her a second Nurofen tablet which she took.

She won gold in the Gymnastics (Artistic) Women's Individual All-Around Event. In accordance with the anti-doping procedures for the Sydney Olympic Games (see below Doping Control Guide) she was sent to the Doping Control Station.

The Record of 22 September 2000 shows that the Applicant provided on three occasions urine totalling 62ml from 23:03 on 21 September 2000 until 00:20 on 22 September 2000. It was this sample which recorded the positive findings of pseudoephedrine.

On the Doping Control Official Record (the "Record") of 22 September 2000 signed by the Applicant, Dr. Oana, the IOC Medical Commission Representative and the Doping Control Officer, the Applicant declared she had taken one Nurofen tablet on 21 September 2000. She did not declare in the Record of 22 September 2000 the tablet that she revealed in the evidence she had taken on 20 September 2000.

The report of the Australian Sports Drug Testing Laboratory ("ASDTL") submitted to the Chairman of the IOC Medical Commission on 24 September 2000 with respect to the "A" sample of the Applicant ("the "A" Sample Lab Report") under the heading "Sample Condition" states that the specific gravity of the urine was 1.035 at collection and 1.030 in the laboratory. The "urine volume at laboratory" was 80 ml and the "urine volume on form" was N/A. The "A" Sample Lab Report results were that pseudoephedrine was confirmed to be in the sample at a concentration of more than three times the IOC threshold of 25 µg/ml. In accordance with the analysis in duplicate of the sample, the actual concentration of pseudoephedrine in urine was 90.6 µg/ml and 88.0 µg/ml.

The report of the ASDTL submitted to the IOC Medical Commission on 27 September 2000 with respect to the "B" sample of the Applicant ("the "B" Sample Lab Report") under the heading "Sample Condition" states that the specific gravity of the urine was 1.031, and the urine volume at laboratory was 20ml. There is no reference to a "form" in the "B" Sample Lab Report. In accordance with the analysis in duplicate of the sample in the "B" Sample Lab Report, the actual concentration in urine of pseudoephedrine was at a concentration of 90.8 µg/ml and 93.71 µg/ml.

On 24 September 2000, the Applicant competed in the final of the Gymnastics (Artistic) Women's Vault where she won a silver medal. She again provided a urine sample after this event and there was no positive finding for any "prohibited substance" as defined under the Olympic Movement Anti-Doping Code.

The Applicant's evidence was she took no tablet after 21 September 2000. Yet she declared in the Record made after she received her silver medal in the Gymnastics (Artistic) Individual Vault Finals dated 24 September 2000, that she took one Nurofen tablet on 23 September 2000.

The Applicant was placed first in the Gymnastics (Artistic) Women's Individual All-Around competition on 21 September 2000. She represented her country Romania.

In accordance with the Olympic Movement's Anti-Doping procedures she was required to supply a urine sample following this event.

On 21 September 2000 through the early morning of 22 September 2000 the Applicant submitted to doping control.

On 25 September 2000 the IOC Medical Commission reported to the IOC Executive Board the results of the laboratory "A" sample as follows:

The presence of pseudoephedrine was detected in the A urine sample at a concentration greater than 25 µg/ml, threshold established by the IOC. This substance is prohibited pursuant to Appendix A to the Olympic Movement Anti-Doping Code (prohibited classes of substances and prohibited methods (I.A.)).

On 25 September 2000, the Romanian Olympic Committee (the "ROC") was notified of the test result and requested the "B" sample to be tested. The ROC delegation was invited to the laboratory at 10:00 a.m. on 26 September 2000 to attend the opening of the B sample.

On 25 September 2000 at 11:00 p.m. the IOC Executive Board received the report of the Medical Commission and heard from the President of the ROC. On 26 September 2000 the IOC published its decisions (the "IOC Decision") as follows:

1. *The Athlete Raducan, Andreea, member of the Romanian (ROM) team, is disqualified from the Gymnastics (Artistic) Women's Individual All-Around competition for use of prohibited substances (Chapter II, Article 2.2. of the Olympic Movement Anti-Doping Code).*
2. *The NOC of Romania (ROM) is hereby ordered to withdraw and return the gold medal and the diploma awarded to the athlete Raducan Andreea for her first place in the Gymnastics (Artistic) Women's Individual All-Around competition.*
3. *This decision shall enter into force immediately.*

The "B" sample testing of the Applicant's urine was conducted at 10:00 a.m. on 26 September 2000 and confirmed the "A" sample finding of the presence of pseudoephedrine at the concentration greater than 25 µg/ml.

On 26 September the Applicant filed an application with the Court of Arbitration for Sport ("CAS") requesting an order setting aside the IOC Decision and restoring the gold medal to Applicant.

The Application which instituted the present proceedings was filed at 07:00 pm on 26 September 2000. A hearing was conducted on 27 September 2000 at 01:00 pm attended by the Applicant. At

the hearing, the Respondent submitted to the Panel it dismiss the application and deny the relief requested.

LAW

1. These proceedings are governed by the CAS Arbitration Rules for the Games of the XXVII Olympiad in Sydney (the “ad hoc Rules”) enacted by the International Council of Arbitration for Sport (“ICAS”) on 29 November 1999. They are further subject to Chapter 12 of the Swiss Private International Law Act of 18 December 1987 as a result of the express choice of law contained in Article 17 of the ad hoc Rules and of the choice of Lausanne, Switzerland, as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to Article 7 of the ad hoc Rules.
2. Article 17 of the ad hoc Rules requires the Panel to 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*”.
3. According to Article 16 of the ad hoc Rules, the Panel has “*full power to establish the facts on which the application is based*”.
4. Article 18 of the ad hoc Rules requires the Panel to “*give a decision within 24 hours of the lodging of the application*”, subject to extension by the President of the CAS ad hoc Division in exceptional circumstances. Such extension was granted because the Applicant had requested that the hearing take place the day following her filing the application.
5. The jurisdiction of the ad hoc Division over the Athlete is based on the entry form signed by all participants in the Olympic Games and on Rule 74 of the Olympic Charter (the “OC”). In relevant part, the entry form reads as follows:

“I agree to comply with the Olympic Charter currently in force and, in particular, with the provisions of the Olympic Charter regarding the eligibility for the Olympic Games (including Rule 45 and its bye-law), the mass media (Rule 59 and its bye-law), concerning the allowable trademark identification on clothing and equipment worn or used at the Olympic Games (Paragraph 1 of the bye-law to Rule 61), and arbitration before the Court of Arbitration for Sport (Rule 74), I agree to comply with the Olympic Movement Anti-Doping Code in force at the time of the Olympic Games.”

The relevant provisions and rules have been brought to my attention by my National Olympic Committee (NOC) and/or my National Sports Federation.

...

I agree that any dispute in connection with the Olympic Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, the Sydney Organising Committee for the Olympic Games (SOCOG) and the IOC, shall be submitted exclusively to the Court of

Arbitration for Sport (CAS) for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games in Sydney, which form part of the Code of Sports-related Arbitration.

The CAS shall rule on its jurisdiction and has the exclusive power to order provisional and conservatory measures. The decisions of the CAS shall be final”

(Emphasis added).

CAS has jurisdiction over the IOC on the basis of Article 74 of the OC.

6. In accordance with its commitment to drug-free sport, there are two policies which state the anti-doping principles of the Olympic Movement and one other relevant document:
 - a) The Olympic Charter;
 - b) The Olympic Movement Anti-Doping Code (“the Anti-Doping Code”) including its Annexes as to Prohibited Classes of Substances and Prohibited Methods and the Explanatory Memorandum dated 9 December 1999 (the “Explanatory Memorandum”); and
 - c) The Doping Control Guide issued by the Sydney Organising Committee for the Olympic Games (the “Doping Control Guide”).
7. The Olympic Charter relevantly states:

Rule 48.1. The IOC adopts a Medical Code which shall, among other things, provide for prohibition of doping, determine the prohibited classes of substances and prohibited methods, establish the list of accredited laboratories, provide for obligation of competitors to submit themselves to medical controls and examinations and make provision for sanctions to be applied in the event of a violation of such Medical Code. The Medical Code shall also include provisions relating to the medical care of the athletes.

8. The Anti-Doping Code, revised 1 January 2000, and Appendix A, revised 1 April 2000, states:

Chapter I: Definitions

Article 1: Prohibited Substance means any substance so described in this Code.

Article 2: This Code applies to all Participants.

Article 3: Notwithstanding the obligations of other Participants to comply with the provisions of this Code, it is the personal responsibility of any athlete subject to the provisions of this Code to ensure that he/she does not use or allow the use of any Prohibited Substance or any Prohibited Method.

Chapter II: The offence of Doping and its punishments

Article 1.1: Doping contravenes the fundamental principles of Olympism and sports and medical ethics.

Article 1.2: Doping is forbidden.

Article 2: Doping is:

1. *the use of an expedient (substance or method) which is potentially harmful to athletes' health and/or capable of enhancing their performance, or*

2. *the presence in the athlete's body of a Prohibited Substance or evidence of the use thereof or evidence of the use of a Prohibited Method.*
9. The Applicant was tested positive to pseudoephedrine. Relevantly therefore the Anti-Doping Code, "Prohibited Class of Substances", Appendix A, "Stimulants" applies. It states:

Appendix A

A. Stimulants

Prohibited substances in class (A) include the following examples:

*..., ephedrines ***

*** ... For ephedrine and methylephedrine, the definition of a positive is a concentration in urine greater than 10 micrograms per millilitre. For phenylpropanolamine and pseudoephedrine, the definition of a positive is a concentration in urine greater than 25 micrograms per millilitre.*

10. The Applicant does not contest either the identity and integrity of the samples or the validity of the sample analyses. However the discrepancy between the volume of urine stated in the Record of 22 September 2000 and the volume of urine recorded by the ASDTL was identified as an issue: the Record of 22 September 2000 showing 62 ml and the "laboratory" showing 100 ml. The Anti-Doping Code requires a minimum urine volume of 75 ml (the Anti-Doping Code, Appendix C, Article 3.4).
11. The Applicant submits that because the sample volume taken is unclear or open to argument the test result should be invalidated. The Panel rejects this submission. The "A" Sample Lab Report specifies that the test was conducted on 50 ml of urine. The "B" sample includes the "B" Sample Verification signed by the Applicant's representative, verifying that the "*bottle ... contained sufficient urine to continue with the analysis*". Both analyses revealed a similar result as to the concentration of pseudoephedrine in the urine.
12. The Panel finds the minor irregularity revealed in the record showing the volume of urine taken cannot reasonably be considered to have affected the results of what is a valid test (see the Anti-Doping Code, Chapter VI, Article 5). The Panel further finds, notwithstanding the discrepancy in the volume of urine reported, the laboratory received sufficient volume of urine to conduct a valid analysis.
13. The Applicant submits that she bears no responsibility for a violation of the doping rules since the Nurofen pills were given to her by her team doctor, who had taken care of her since 1997 and with whom she had a relationship of trust.
14. The Anti-Doping Code considers doping as a strict liability offence. This means that no intentional element is required to establish a doping offence. The mere presence of a forbidden substance in the urine sample is sufficient. This has been repeatedly confirmed by the CAS (see CAS 95/150 *V. v FINA* in Digest, p. 271, n. 13; CAS 96/149 *A.C. v FINA* in Digest, p. 257, n. 14-15; CAS 98/208 *W. v FINA*).

15. As was held in *W.*'s case:

it is the presence of a prohibited substance in a competitor's bodily fluid which constitutes the offence irrespective of whether or not the competitor intended to ingest the prohibited substance.

16. And in CAS 95/141 *C v FINA*:

... the system of strict liability of the athlete must prevail when sporting fairness is at stake. This means that, once a banned substance is discovered in the urine or blood of an athlete, he must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of guilt (irrebuttable presumption). It would indeed be shocking to include in a ranking an athlete who had not competed using the same means as his opponents, for whatever reasons. "The result of the event was indeed been objectively vitiated and, consequently, the intention of the author is irrelevant" (Louis Dallèves, in Sport and Law Conference, Court of Arbitration for Sport, 1993, page 26).

17. The Applicant refers to the case of Samantha Riley who was given a headache pill containing a prohibited substance by her coach. However, the competent body of FINA concluded that Riley nevertheless committed a doping offence. The only difference between Riley and the present decision concerns the sanction which was a mere warning in Riley. Such a sanction would not be in accordance with the Anti-Doping Code presently in force nor with CAS's jurisprudence.

18. The Panel finds a doping offence has been committed. The Panel's conclusion is based on the language of the Anti-Doping Code, especially Chapter II Art. 2.2, the definition of doping. Having considered all the evidence the Panel finds this is an offence to which the application of strict liability principles apply.

19. The Applicant raises the defence that she took Nurofen only because she had symptoms of influenza or a cold but not to gain a competitive advantage. She also relied upon expert opinions to confirm the amount of pseudoephedrine found in her urine sample did not have an enhancing effect on her athletic performance but would rather impair her gymnastic skills.

20. To establish a doping offence, Respondent is not required to demonstrate that a competitive advantage was reached. Chapter II, Art. 4.4 of the Anti-Doping Code states:

The success or failure of the use of a Prohibited Substance is not material. It is sufficient that the Prohibited Substance ... was used ... for the offence of doping to be considered as consummated.

21. The Applicant further suggests that her low weight of 37 kg should be taken into account in any assessment as to a positive finding. Although it may be possible that heavier athletes would not produce positive results if taking the same dosage of Nurofen as given to the Applicant, this may not serve as an excuse, since the Anti-Doping Code does not provide correcting factors relating to the body weight of the athlete.

22. Under the same premise, the Applicant's reference to her minor age (she will be 17 on 30 September 2000) does not alter the finding that she committed a doping offence. The Anti-Doping Code treats athletes of different ages alike.

23. The Applicant submits that she needed to take Nurofen to maintain her health. For this purpose other choices were available, such as other medication or prior approval of the medication in question by the competent authority of the IOC in accordance with the Doping Control Guide, Art. 5.4, *Authorised/Notified Therapeutic Use of Substances*.
24. The Panel finds the above subjective elements argued in the attack on the finding of doping by the IOC do not affect the decision on the existence of a doping offence and are submissions only related to the assessment of any disciplinary sanction imposed.
25. Having found a doping offence, the question of appropriate sanction arises and Chapter II, Art 3.3 of the Anti-Doping Code becomes relevant:

Any case of doping during a competition automatically leads to invalidation of the result obtained (with all its consequences, including forfeit of any medals and prizes), irrespective of any other sanction that may be applied, subject to the provisions of point 4 of this article.

This provision is unambiguous and the Panel agrees with the sanction imposed by the IOC.

26. The Applicant argues that Article 3.4. prevents the Respondent from invalidating the results of the competition of 21 September 2000. Article 3.4 reads:
In the event that a competitor who is a member of a team is found guilty of doping, the relevant rules of the International Federation concerned shall apply.

The Applicant submits that Art 3.4 requires the IOC to apply the relevant rules of the International Gymnastic Federation (“FIG”) as to the imposition of any sanction against the Applicant.

27. The Applicant relies upon a decision of the FIG Executive Committee dated 27 September 2000 where a determination was made in accordance with its rules not to impose any sanction upon the Applicant.
28. As a matter of fact, the Applicant participated in, and won the *individual* all-around competition and not the team event. The fact that she belongs to the Romanian gymnastics team does not change that competition to a team event. Hence, Art. 3.4. is inapplicable. This is expressly confirmed by the Explanatory Memorandum, page 7, last paragraph, which states that Chapter II, Art 3.4 “*... means that the rules of the International Federation concerned only govern the question of any invalidation of the result obtained by the team. For everything else, the athlete in question is sanctioned individually, according to the rules of the Code, in the same way as any athlete accused of doping*”.
29. The Applicant finally submits that CAS is not bound by the Anti-Doping Code in the application of the automatic invalidation required by Chapter II, Article 3.3. The Applicant invites the Panel to use its discretion in examining the facts and circumstances. The Panel has entertained this step but finds on the clear and unambiguous wording of this Article, there is an automatic invalidation of the result, having found a doping offence. Automatic means “following necessarily” (Oxford Advanced Learner’s Dictionary, 1995). The Panel supports

the strict consequence of an automatic disqualification – severe as it may be in that it affects a gold medal winner – as a matter of fairness to all other athletes.

30. In conjunction with disqualification as a sanction, a disciplinary sanction may also be applied in doping cases. The Anti-Doping Code in Chapter II Art. 3.1 gives power to the IOC also to issue a warning, a ban from competition, or a fine of up to US\$ 100'000 and/or suspension from one to six months. This provision allows for an appreciation of the subjective elements in each case. Consideration was given by the IOC to these elements in the circumstances brought before it and no further disciplinary sanction was applied. The Panel finds this was a proper decision.

The CAS ad hoc Division rules:

1. The Panel is aware of the impact its decision will have on a fine, young, elite athlete. It finds, in balancing the interests of Miss Raducan with the commitment of the Olympic Movement to drug-free sport, the Anti-Doping Code must be enforced without compromise.
2. Accordingly, the Panel finds:
 - a. The application is dismissed.
 - b. The decision of the IOC of 26 September 2000 is upheld.