



Arbitration CAS 2002/A/409 Longo / International Association of Athletic Federations (IAAF), award of 28 March 2003

Panel: Mr. Hans Nater (Switzerland), Sole arbitrator

Athletics

Doping

Application for early reinstatement

CAS jurisdiction

- 1. The nature of the appealed decision should determine whether an appeal is possible within the meaning of art. 47 of the Code. The test should be whether the nature of the decision is disciplinary, irrespective of whether a judicial or an administrative authority has made the decision against which an appeal is directed.**
- 2. A decision of the IAAF Council admitting an application for early reinstatement in case of exceptional circumstances (IAAF Rule 60.9) relates to the execution of a sanction, not to the sanction itself. Consequently, according to art. R47 of the Code, the CAS has no jurisdiction to review a decision of this nature.**
- 3. A right of appeal against decision of the IAAF Council could be drawn from other IAAF rules than Rule 60.9, in particular Rules 21.2 & 21.3. However applications for reinstatement based on exceptional circumstances are not proceedings between two parties in the sense of IAAF Rule 21.2 and do not fall under the category of disputes listed in IAAF Rule 21.2. Therefore decision on reinstatement applications on the grounds of exceptional circumstances pursuant to IAAF Rule 60.9 cannot be appealed against by invoking the CAS.**

The Appellant, Mr. Andrea Longo, is a professional track and field athlete. He is an Italian citizen.

Mr. Andrea Longo was tested positive for the metabolites of Nandrolone, after he had provided an in-competition sample at the Nebiolo Memorial Meeting in Turin on 9 June 2001. The sample was taken after he had competed in the 800 metres (“A” sample).

On 30 August 2001, the “B” sample analysis confirmed the result of the “A” sample.

In accordance with IAAF Rules, the Federazione Italiana di Atletica Leggera (“FIDAL”) arranged a hearing before its internal disciplinary Panel, which was held on 3 September 2001.

On 17 September 2001, a Florence laboratory analysis conducted at the request of the athlete found that a batch of the food supplement, Branched Chain Amino Acids (“BCAA”), was contaminated with prohibited substances.

On 9 November 2001, the IOC accredited laboratory in Cologne which had been asked by FIDAL to verify the analysis of the Florence laboratory, confirmed that the food supplement BCAA contained the prohibited substances, 19-norandrostenedione (a metabolite of Nandrolone), 4-androsteredione and DHEA.

On 29 November 2001, FIDAL suspended Mr. Andrea Longo for two years, starting from 17 August 2001.

Mr. Andrea Longo appealed the decision to FIDAL’s appeal tribunal, the federal appeal committee, which upheld the decision of the first instance tribunal. On 23 January 2002, FIDAL’s appeal committee found Mr. Andrea Longo guilty of a doping offence and confirmed the two-year ban.

On 6 February 2002, Mr. Andrea Longo applied to the Camera di Conciliazione e Arbitrato per lo Sport (“the Chamber of Conciliation and Arbitration for Sport”), pursuant to FIDAL’s regulations. The Chamber of Conciliation and Arbitration for Sport was set up by CONI, the Italian Olympic Committee.

Mr. Andrea Longo did not appeal against the decision of the FIDAL’s appeal tribunal of 23 January 2002 to the CAS nor to the IAAF’s Arbitration Panel.

On 13 April 2002, Mr. Andrea Longo, with the assistance of FIDAL, applied to the IAAF Council under IAAF Rule 60.9 for early reinstatement on the grounds of exceptional circumstances.

On 1 July 2002, avv. Ciro Pellegrino, acting as Sole Arbitrator of the Chamber of Conciliation and Arbitration for Sport, reduced the athlete’s two-year suspension to the time which had elapsed up to the issue of his decision, i.e. 1 July 2002, on the grounds that the food supplement BCAA was contaminated.

Although Mr. Andrea Longo’s application for early reinstatement was placed on the agenda for the Council meeting of the IAAF in Nairobi on 13 and 14 April 2002, the matter was held back for the next Council meeting scheduled for 3 and 4 July 2002 in Paris.

By letter dated 22 July 2002, Mr. Andrea Longo was informed by FIDAL that the IAAF had rejected his application for early reinstatement at the Council meeting held in Paris on 3 and 4 July 2002.

On 20 August 2002, the Appellant filed a Statement of Appeal (Déclaration d’Appel) with the Court of Arbitration for Sport (“CAS”) against the decision of the IAAF Council of 3 and 4 July 2002 rejecting Mr. Andrea Longo’s application for early reinstatement.

On 18 November 2002, the IAAF filed its Answer within the extended deadline, requesting for relief that

- “(i) *the appeal be rejected on the basis there is no jurisdiction,*
- (ii) *if there is jurisdiction, to reject the appeal whereas the appropriate standard CAS ought to adopt is whether or not the challenged decision is 'manifestly unreasonable'.*”

On 18 December 2002, the parties were summoned to appear at a hearing to take place in Lausanne on 18 February 2003.

LAW

1. Art. R47 of the Code of Sports-related Arbitration (“the Code”) provides the following in respect of appeal arbitration proceedings:

“Appeal

A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body.”

2. Art. R58 of the Code provides:

“Law applicable

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports body which has issued the challenge decision is domiciled.”

3. The regulations that are applicable to this appeal consist of the relevant rules promulgated by the IAAF.
4. The relevant provisions of the IAAF Rules include the following:

IAAF Rule 21.1, effective 1 November 2001, provides the following:

“Each member shall incorporate in its constitution provision that all disputes, however arising, whether doping or non-doping related, shall be submitted to a hearing.”

IAAF Rule 21.2, effective 1 November 2001, provides the following:

“All appeals (i) between Members, (ii) between a Member and an athlete, (iii) between the IAAF and an athlete, or (iv) between the IAAF and a Member, however arising, whether doping or nondoping related, shall be referred to the Court of Arbitration for Sport or any of its affiliates situated elsewhere (“CAS”) within 60 days of the date of communication to the prospective appellant of the decision that is to be referred.”

As examples of disputes that may be submitted to the CAS by way of an appeal, IAAF Rule 21.3 refers to the following situations:

- “(i) Where a Member has held a hearing under Rule 59.3 and the athlete believes that, in the conduct or conclusions of such hearing, the Member has misdirected itself, or otherwise reached an erroneous conclusion.*
- “(ii) Where a Member has held a hearing under Rule 59.3 and the IAAF believes that, in the conduct or conclusions of such hearing, the Member has misdirected itself, or otherwise reached an erroneous conclusion.*
- “(iii) Where testing has indicated the presence of a prohibited substance and contrary to Rule 59.3, the Member refuses to allow the athlete a hearing.*
- “(iv) Where testing by another sporting body recognised by the IAAF has indicated the presence of a prohibited substance, and the athlete considers that the decision of the other sporting body is unsatisfactory and should not be relied upon.*
- “(v) Where an athlete has been found by the IAAF to have admitted taking a prohibited substance, or using, or attempting to use, a prohibited technique, and the athlete denies having made any such admission.”*

IAAF Rule 60.9 effective 1 November 2001 provides the following:

“In exceptional circumstances, an athlete may apply to the Council for reinstatement before the IAAF's period of ineligibility has expired.

Where an athlete has provided substantial assistance to a Member in the course of an enquiry into doping carried out by that Member, this will normally be regarded by the Council as constituting exceptional circumstances.

A decision on exceptional circumstances shall be made only if the athlete is able to present three negative tests conducted by the Member or the IAAF, with a period of at least one month between each test.

However, it is emphasised that only truly exceptional circumstances will justify any reduction. Details of the procedure and the criteria for application are to be found in the "Procedural Guidelines for Doping Control.”

5. The question before the Sole Arbitrator is whether decisions of the IAAF Council on reinstatement applications on the grounds of exceptional circumstances pursuant to IAAF Rule 60.9 can be appealed against by invoking the CAS.
6. In order to invoke the CAS jurisdiction under art. R47 of the Code it is necessary for the parties to demonstrate that the decision complained of is:
 - (i) an appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports governing body, and
 - (ii) that the statutes of the body provide for such an appeal, or
 - (iii) that the parties have concluded a specific arbitration agreement.
7. Without entering into details, Mr. Andrea Longo submitted that the CAS has jurisdiction to hear the case.

8. The IAAF submitted that neither of the tests contained in art. R47 of the Code have been met. In the IAAF's view, the Council's decision to reject Mr. Andrea Longo's early reinstatement application is not a decision of a disciplinary tribunal or similar body. Secondly, the IAAF submitted that the IAAF Rules do not provide an appeal against the determination of the Council in relation to decisions to reinstate. Thirdly, the IAAF submitted that the parties have not entered into an ad hoc agreement to arbitrate.
9. The Sole Arbitrator has to examine whether the IAAF Council's decision to reinstate Mr. Andrea Longo is a decision of a disciplinary tribunal or similar body.
10. In the view of the IAAF, its Council is the body which administers the affairs of the IAAF in accordance with IAAF Rules. The Council, when considering reinstatement applications, does not act as a judicial body. It holds no oral hearings, has no formal rules of procedure and considers only the material submitted by the athlete. In considering applications for early reinstatement, the Council therefore does so solely in its capacity as administrator of the IAAF's affairs. It in no way acts as a disciplinary tribunal nor does it conduct itself as such.
11. The IAAF submitted a witness statement of Prof. Arne Ljungqvist, Chairman of the Anti-Doping Commission of the IAAF, dated 15 November 2002.

In his witness statement, Prof. Ljungqvist stated as follows:

"1. I am Senior Vice President of the IAAF and Chairman of the IAAF's Medical and Anti-Doping Commission. I am also an IOC Member and a member of its Medical Commission as well as a Member of the Board of the World Anti-Doping Agency ("WADA"). I make this Witness Statement in support of the IAAF's challenge to CAS' jurisdiction to hear Mr Andrea Longo's appeal against the "decision" of the IAAF Council rejecting Mr Andrea Longo's application for early reinstatement.

[...]

17. When an application is considered by the IAAF Council at its meeting, there is no hearing, nor will the athlete be invited to attend for the simple reason that the Council in exercising this power does not act as a disciplinary tribunal. It is not the Council's role to consider whether or not an athlete was guilty of a Doping Offence. This is the role of the relevant tribunal of the Member, or if the athlete exercises his right to appeal, CAS. In considering applications for early reinstatement the IAAF Council does so solely in its capacity as administrator of the IAAF's affairs. It in no way acts as a disciplinary tribunal, nor does it conduct itself as such. It holds no hearings and has no rules of evidence.

[...]"

At the Hearing of 18 February 2003, Prof. Ljungqvist confirmed his witness statement.

12. The Counsel to Appellant opposed to hear Prof. Ljungqvist as a witness. The Sole Arbitrator does not consider Prof. Ljungqvist to be an expert witness. Some national judicial rules make a distinction between party representatives and third-party witnesses. This distinction is not relevant to the case in hand, as the Sole Arbitrator does not need to rely on Prof. Ljungqvist's statement to form his view on the issue of jurisdiction.

13. As to the nature of the appealed decision, the Appellant takes the view that art. R47 of the Code must be construed as to contain disciplinary sanctions irrespective of whether the sanction is made by a disciplinary tribunal or an administrative body. The IAAF submits that the art. R47 of the Code provides appeals from decisions of a disciplinary tribunal or similar body of a federation only, excluding appeals against administrative bodies such as the Council of the IAAF. In other words, the Appellant is of the view that the nature of the decision should govern while the IAAF holds that the nature of the deciding body should determine whether an appeal is possible within the meaning of art. R47 of the Code.
14. The Sole Arbitrator does not accept the IAAF's submission that art. R47 of the Code provides, as a matter of principle, that the appealed decision has been rendered by a judicial body. The Sole Arbitrator sees no reason to depart from the CAS jurisprudence admitting appeals against administrative bodies on disciplinary matters (*Alain Baxter v FIS*, CAS 2002/A/396). He forms the view that the test should be whether the nature of the decision is disciplinary, irrespective of whether a judicial or an administrative authority has made the decision against which an appeal is directed.
15. A decision is of a disciplinary nature if it sanctions a behaviour in violation of statutes or rules of a federation. There can be no doubt that the FIDAL's decision imposing a two-year suspension on Mr. Andrea Longo is a decision of a disciplinary nature. Contrary to the FIDAL's decision, the IAAF's Council, in considering Mr. Andrea Longo's application for early reinstatement, did not impose, confirm, reduce or enhance a sanction. According to IAAF Rule 60.9, the IAAF Council has no jurisdiction to examine whether a sanction imposed has been justified nor to express any view as to the duration of a sanction. IAAF Rule 60.9 merely contains a right of mercy in case of exceptional circumstances, without dealing with the sanction itself. A decision of the IAAF Council admitting an application for early reinstatement in case of exceptional circumstances relates to the execution of a sanction, not to the sanction itself. Consequently, applications for early reinstatements are dealt with in a discretionary manner by an administrative body which does not abide by formal rules of procedures such as rules on hearings and rules of evidence. The extraordinary character of the application for early reinstatement is also shown by the fact that, according to section 4.2 of the IAAF Procedural Guidelines such an application should be made through the athlete's National Federation to the General Secretary of the IAAF, not by the athlete. The Sole Arbitrator considers that the IAAF Council's decisions on applications before the period of ineligibility has expired pursuant to IAAF Rule 60.9 are not of a disciplinary nature.
16. Consequently, the Sole Arbitrator reached the conclusion that, according to art. R47 of the Code, the CAS has no jurisdiction to review the decision of the IAAF Council in deciding whether to reinstate Mr. Andrea Longo pursuant to IAAF's Rule 60.9.
17. Art. R47 of the Code provides that the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the international federation. The Sole Arbitrator concludes that the requirement of exhaustion of the legal remedies available according to art. R47 of the Code does not mean that an application for

early reinstatement is lodged with the IAAF's Council. Such an application is not a legal remedy pursuant to art. R47 of the Code.

18. If a sanction has been imposed on an athlete for use of doping under IAAF Rules, he has two remedies available, which can be lodged independently of each other: (i) he can lodge an appeal with the CAS against the decision of the National Federation imposing the sanction; (ii) he can also submit an application for early reinstatement on the grounds of exceptional circumstances with the IAAF's Council, whose decision, however, cannot be appealed against by invoking the CAS.
19. The IAAF submitted that neither IAAF Rule 60.9 nor the IAAF Procedural Guidelines provide an appeal against a decision of the Council rejecting an early reinstatement application. The Sole Arbitrator does not accept this submission and considers that a right of appeal against decisions of the IAAF Council could be drawn from other IAAF Rules, in particular Rules 21.2 and 21.3 of the IAAF Rules.
20. However, the Sole Arbitrator is of the view that applications for reinstatement based on exceptional circumstances are not proceedings between two parties according to IAAF Rule 21.2, which provides that the CAS has jurisdiction over conflicts (i) between Members, (ii) between a Member and an athlete, (iii) between the IAAF and an athlete, or (iv) between the IAAF and a Member. Applications for reinstatement based on exceptional circumstances are not proceedings between two parties in the sense of IAAF Rule 21.2. For its nature, proceedings relating to the right of mercy are not proceedings between parties and do not fall under the category of disputes listed in IAAF Rule 21.2.
21. Finally, it may be made plain that neither party called the Sole Arbitrator to take into consideration let alone review the decision of the Chamber of Conciliation and Arbitration for Sport on the reduction of the sanction imposed on Mr. Andrea Longo as the appeal was directed against the IAAF Council's decision only.
22. Based on the foregoing, the Sole Arbitrator reached the conclusion that decisions of the IAAF Council on reinstatement applications on the grounds of exceptional circumstances pursuant to IAAF Rule 60.9 cannot be appealed against by invoking the CAS.

The Court of Arbitration for Sport hereby rules:

1. The jurisdiction of the Court of Arbitration for Sport is denied.
2. The appeal filed by Mr. Andrea Longo on 20 August 2002 is not entertained.
3. (...)