Arbitration CAS 2008/A/1452 Kazuki Ganaha v/ Japan Professional Football League, award of 26 May 2008

Panel: Mr Malcolm Holmes QC (Australia), President; Prof. Akira Kotera (Japan); Mr Hans Nater (Switzerland)

Football
Doping
Burden of proof
Intravenous infusion justified by a legitimate medical treatment
No fault of the athlete

1. **Under the applicable 2007 WADA Code and the Anti-Doping Regulations of the J-League, the prohibited method is described as "Intravenous infusions are prohibited, except as a legitimate medical treatment". Under the wording of the 2007 WADA Code, the party alleging the infraction has to prove that there was an intravenous infusion and that it was not legitimate medical treatment.**

2. **The intravenous infusion of normal saline and vitamin B1 performed by the team doctor of a Japanese football club is a legitimate medical treatment for the Player within the meaning of the 2007 WADA Code, taking into consideration that at the time of the facts, the Japanese League had not adopted those provisions of the WADA Code which related to sanctions. The Anti-Doping Regulations of the - League which were in force at the time of the infusion provide that the Anti-Doping Special Committee is "entitled" to impose a sanction. There is an entitlement to impose a penalty but there is no mandatory obligation that a penalty be imposed for every infraction. In such circumstances, there is no need to decide if there has been a violation because it is not a case where any sanction should be imposed on the Player whose conduct is not deserving of any sanction.**

3. **Under the Anti-Doping Regulations of the J-League, a Player who bears no fault should not be sanctioned even he had committed an anti-doping violation by using a prohibited method.**

The Appellant is a professional football player with Kawasaki Frontale Co. Limited ("Kawaskai Frontale"). Kawasaki Frontale is one of the teams in the professional football league conducted by the Respondent in Japan and known as the J League. The Respondent is an entity established under the umbrella of the Japan Football Association.

The Japan Football Association became a member of the Fédération Internationale de Football Association (FIFA) in 1929. FIFA accepted the World Anti-Doping Code ("WADA Code") at its general assembly on 21 May 2004.

On 23 April 2007, an intravenous infusion was performed on Mr. Ganaha by Dr Goto, the Kawasaki Frontale team doctor. On 10 May 2007 the Respondent determined that this treatment could not "be approved as an acute and legitimate medical treatment of the health condition of Mr. Ganaha". The Respondent imposed a sanction on Mr Ganaha on the basis of findings made at a meeting of the Respondent's Doping Control Committee on 1 May 2007 that the infusion infringed the J. League Anti-Doping Regulations which incorporated the WADA Code and Mr Ganaha was suspended for 6 official games.

The decision to sanction Mr Ganaha was then the subject of ongoing correspondence between the parties, and also with a number of other parties involved in, or interested in, professional football in Japan. As Mr Ganaha wished to challenge the decision, on 6 December 2007 he announced his determination to file an appeal with CAS against the sanction imposed on him.

On 13 December 2007 Mr Ganaha and the Respondent entered into a formal Arbitration Agreement whereby they agreed to refer to the CAS Mr Ganaha's appeal against the sanction imposed by the Respondent on 10 May 2007 for his alleged doping offence for final resolution by arbitration in accordance with the procedural rules of CAS contained in the Code of Sports-related Arbitration ("the Code").

On 3 January 2008 Mr Ganaha filed his Appeal Brief with the CAS Registry in Lausanne, Switzerland. In his Statement of Appeal, Mr Ganaha sought "a cancellation of the sanction imposed on the Appellant by the Respondent dated 10 May 2007, that suspended the Appellant from 6 official games". The Respondent lodged its Answer to the Appeal Brief on 5 February 2008 in accordance with Article R55 of the Code.

On Friday 20 April 2007 the Kawasaki Frontale team and support staff travelled to Urawa City in preparation for a match the following day against the Urawa Red Diamonds. After checking into the hotel Mr. Ganaha was not feeling well and he visited Dr. Goto in the trainer's room in the evening. Mr. Ganaha told Dr. Goto that his throat was sore and that he was suffering from diarrhoea and feeling sluggish. Dr. Goto prescribed PL which is a common cold medication generally prescribed in Japan, for two days. Dr. Goto made an entry on the medical record maintained for Mr. Ganaha and known as the Soccer Healthmate ("Healthmate"), of "sore throat … PL 3 p x 3".

The Healthmate is a record of diagnoses and treatments for each athlete for the management of their physical condition. It is normally kept in the Kawasaki Frontale Medical Clinic which is in the club house next to the practice ground of the team located at Katahira, Asao-Ku, Kawasaki City. This Clinic is licensed by Kawasaki City under the Medical Care Act and is a medical facility equipped with enough diagnostic tools and medicines to perform medical treatment. The Healthmate can be taken with the athletes outside of the Clinic wherever the athletes go. Under the Medical Practitioners Act in Japan when a physician diagnoses or treats a patient he or she has to

write a medical record. The Healthmate is regarded as the medical record which was being kept for Mr. Ganaha by Dr. Goto under the Medical Practitioners Act.

Mr. Ganaha played in the match against the Urawa Red Diamonds on Saturday 21 April 2007 and he succeeded in scoring his first goal of the season. At the time Mr. Ganaha believed that he was scoring less goals than he had in previous seasons and that he ran the risk of losing his position in the starting line up. As a result he said that he tried to conceal any weakness which might have prevented him from playing. Mr. Ganaha managed to play for 87 minutes before he was substituted. He said that his diarrhoea continued and he felt that he had no appetite.

On Sunday 21 April 2007 there were no matches or practice and it was a day off for members of the Kawasaki Frontale team. Mr. Ganaha said that his diarrhoea continued and that he could eat nothing.

On Monday 23 April 2007 Mr. Ganaha participated in the practice of the Kawasaki Frontale Team for about two hours from 2.30pm. He still had diarrhoea and sore throat and after practice his physical condition worsened and he felt sick. He decided to go and see Dr. Goto again for an examination in the Clinic next to the training ground. During the practice session he had difficulty taking in fluid. He said that he normally consumed about 1,500ml and on this occasion was only able to consume about a tenth of what he normally consumed during a practice session.

During the examination Mr. Ganaha told Dr. Goto that he was feeling sick, his whole body was very sluggish and that he had no appetite and was suffering from diarrhoea, a headache and a sore throat and could not drink at all. Dr. Goto conducted an examination and made the following entries on the Healthmate: "General fatigue", "Appetite Loss", "Diarrhoea", "Nausea", "Oral intake: difficult", and "Body temperature 38.5 degrees C.". Dr. Goto noted that joint pain was negative. Dr. Goto made a drawing of an abdomen on the Healthmate and marked the lower left region of the abdomen where Mr Ganaha was complaining of abdominal pain and also recorded that his bowel sound was increasing. Dr. Goto made a drawing of the upper throat and recorded that Mr Ganaha had a sore throat and that the central region of the upper throat was swollen and red. As a result of the examination Dr. Goto recorded that Mr Ganaha had "common cold and diarrhoea" and suggested an intravenous infusion of normal saline and vitamin B1. The Clinic only had limited 100ml packs of normal saline and so Dr. Goto decided to drip feed Mr. Ganaha a few 100ml bottles and stop when Mr. Ganaha's condition improved. Dr. Goto performed the first intravenous infusion of 100ml of only normal saline and then with the next 100ml bottle of normal saline he added 100mg of vitamin B1. This infusion took approximately 30 minutes following which Mr. Ganaha said he felt better and that he felt like he could drink and the infusion was stopped. Dr Goto explained in evidence that the intravenous infusion was necessary because Mr Goto was dehydrated. Dr. Goto noted on the Healthmate that he had given an intravenous infusion of two packs of 100ml of saline and 100mg of vitamin B1. He also recorded that "patient describes he is getting better" and he again prescribed the common cold medication PL and also Biofermin 3g per day. Mr. Ganaha then left the clinic and drove home.

On 23 April 2007 Dr. Goto, after making the entries in the Healthmate also prepared a report to the Kawasaki Frontale Team Management Department on the computer at the Clinic. This report

described the treatment which had been administered, noted the symptoms and concluded with the words "further treatments will be considered based on the patient's condition tomorrow (24 April)".

There had been a J League Team Doctors Association meeting called earlier that year on 21 January 2007. At that meeting Dr Aoki, explained that the submission of a Therapeutic Use Exemption (TUE) under the WADA Code was required in all cases where an intravenous infusion was administered. Accordingly Dr. Goto said that he understood it was necessary to submit a TUE to the J League for the intravenous infusion which he gave to Mr. Ganaha but having no TUE Form at the Clinic he decided to complete one the following day.

On Tuesday 24 April 2007 Dr. Goto worked treating outpatients at the Kanto Rosai Hospital in the morning where he also kept TUE forms. He said that he took a TUE form that afternoon to the Todoraki Stadium as Kawasaki Frontale had an official practice for a game at that stadium. Dr. Goto consulted with the J League Administration Office as to how the form should be completed and after completing it, he had Mr. Ganaha sign it and he gave it to Kawasaki Frontale staff and asked that it be faxed to the J League Office. Later that date he was told by the J League Administration Office to also submit a medical certificate. At about 5pm Dr. Goto faxed to the J League a medical certificate which noted the diagnosis as "common cold, diarrhoea". As this description was too brief, Dr Aoki, through the J League secretariat, requested Dr. Goto to provide more detailed medical reasons. Accordingly, Dr Goto provided a further copy of his medical certificate on 25 April 2007 to which he had added:

> "On 23 April, symptoms (fever, pharyngeal pain, general fatigue, abdominal pain, loss of appetite) due to the above mentioned disease were found.
> As it was difficult for the patient to take in liquid and food orally, normal saline 200ml and vitamin B1 100mg were administered as an intravenous infusion".

On Tuesday 24 April 2007 an article appeared in a newspaper named "Sankei Sports". The article stated that Mr. Ganaha had "not been doing very well due to an injury to his right ankle and other problems" but that he had enlisted a secret weapon in view of the upcoming match against JEF United Chiba. The article stated that Mr. Ganaha had received a "garlic shot that is effective in relieving fatigue". The Panel was told that a garlic injection is a colloquial term for an intravenous injection of vitamin B1, used primarily to facilitate recovery from fatigue, that causes the breath to smell like garlic. The article stated that Mr. Ganaha had said "We will be having matches in a row, so, using it, I wouldn't lose anything. You'd better not come too close to me because its stinks". Mr. Ganaha denied saying these words to any journalist but after the publication of the newspaper on 24 April Kawasaki Frontale asked Mr. Ganaha not to play in the game scheduled for the following day against JEF United Chiba at Todoroki Stadium.

On 25 April 2007 Dr Aoki, as chairman of the JL Doping Control Committee faxed a letter to Kawasaki Frontale. The letter stated that an intravenous injection other than for medical treatment was prohibited and asked for a report concerning the newspaper article. Dr. Goto also on 25 April 2007 took a blood sample from Mr. Ganaha at the Kanto Rosai Hospital. The test results were consistent with the condition and treatment described above and indicated mild inflammation.

On 25 April 2007 Kawasaki Frontale wrote to Dr Aoki and indicated that it did not dispute the accuracy of the newspaper report but briefly set out the circumstances surrounding the intravenous infusion without hearing directly from Mr Ganaha or Dr Goto. A TUE application and a medical certificate from Dr. Goto were also enclosed. The letter stated that the grounds for carrying out the infusion were:

> "From the clinical standpoint, Ganaha was suffering from a common cold and showing digestive symptoms. As he had a loss of appetite and could not intake things orally, despite the increase his need for Vitamin B1 due to strenuous physical labour, I administered an infusion of normal saline solution and Vitamin B1. As for the amount used, I terminated the infusion because he showed a tendency of improvement of symptoms at the point in time when 200ml of normal saline solution was administered".

On 27 April 2007 Dr Aoki as Chairman of the Doping Control Committee, wrote to Kawasaki Frontale and asked that Dr. Goto and Mr. Ganaha together with executive committee members from Kawasaki Frontale attend a meeting of the J League Doping Control Committee on 1 May 2007.

On 1 May 2007 Mr. Takeda, the President, CEO and an executive committee member of Kawasaki Frontale, Dr. Goto and Mr. Ganaha attended a meeting with members of the Doping Control Committee. A transcript of the meeting was kept and was tendered as evidence in these proceedings. During the meeting Dr Aoki indicated that what they were "really worried about" (T5) was whether or not the treatment and the administration of the vitamin B1 and the saline fluid were "really necessary" (T5). He said at the meeting (T5) that "I guess Dr. Goto thought the treatment was adequate, but a third party has to examine to some extent whether it was really necessary and vital, or whether it was effective". Dr. Goto confirmed at the meeting that he "thought the intravenous infusion was necessary, and that it was legitimate medical treatment" (T10). Mr. Ganaha confirmed that before receiving the intravenous drip, Dr. Goto had explained about the treatment and had advised that "it was OK to use it" (T14) when you were sick. Mr. Ganaha said he "never thought that it could violate the rules for doping" (T14). Following the meeting, the J League Doping Control Committee deliberated and concluded that the infusion was not acute and legitimate medical treatment.

On 2 May 2007 the Respondent sent a letter by email addressed to Mr. Takeda advising that there was to be a meeting of the Anti-Doping Special Committee on Tuesday 7 May 2007 as a result of the decision which had been made at the Doping Control Committee meeting. The letter sought confirmation that the transcript of that meeting was accurate and stated that "proposed sanctions [would] be decided by the J League Anti-Doping Special Committee" on 7 May 2007. This letter and its contents were not addressed to, or passed on to, Mr. Ganaha. Mr Takeda, as CEO of Kawasaki Frontale replied by letter dated 2 May 2007 and confirmed the veracity of the minutes and advised that "we have no intention of using the opportunity to provide our explanations for vindication on the matter at the J League Anti-Doping Special Committee".

On 7 May 2007 the Anti-Doping Special Committee meeting was held. Kawasaki Frontale and Mr. Ganaha (who was unaware of the meeting) did not attend. The meeting decided to sanction both Kawasaki Frontale and Mr. Ganaha. On 8 May 2007 an extraordinary Board meeting of the J

League was called and approved the decision which had been taken by the Anti-Doping Special Committee to impose sanctions. Kawasaki Frontale was then advised orally of the decision.

On 10 May 2007 the Respondent wrote the following letter Kawasaki Frontale (there was no separate letter sent to Mr. Ganaha):

> "We hereby notify you by this notice that we have decided as follows on the type and the details of the sanction against the violation committed concerning your club under the Article 5 (1) of the "J. League Code, Anti-Doping Code". We ask for the fine to be paid to the bank account specified by the J. League by 29 June 2007.
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> 1. Details of Sanction
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> | (1) Party sanctions: | Kawasaki Frontale |
> | (1) Content of sanction: | Fine 10,000,000 yen |
> | (2) Rule applied: | "2007 J. League Code, Anti-Doping Code" Article 5 (Sanction Provision) (3) |
> | (2) Party sanctioned: | Athlete, Kazuki Ganaha (Kawasaki Frontale) |
> | (1) Content of sanction: | suspension from 6 official games |
> | (2) Rule applied: | "2007 J. League Code, Anti-Doping Code" Article 5 (2)-(2) (suspension from 1 to 6 official games) based on the "2007 J League Code, Anti-Doping Code" Article 5 (Sanction Provision) (1) |
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> 2. Details of violation
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> On 23 April 2007, intravenous infusion was performed on Mr. Ganaha, who complained of poor physical condition at the clubhouse, on the judgment of a team doctor of the Kawasaki Frontale. This treatment cannot be approved as an acute and legitimate medical treatment for the health condition of Mr. Ganaha, and it was confirmed that this action infringed the Anti-Doping Code at the Doping Control Committee called on 1 May 2007" (underlining added by the Panel).

LAW

The Applicable Anti-Doping Regulations

1. The J League's 2007 Anti-Doping Regulations adopted in Article 2.1 the definition of "doping" as set out in the WADA Code. Article 2.2 provided that in the event of any modifications by WADA to the WADA Code, the Respondent's regulations shall be automatically modified accordingly. Relevantly, the J League's 2007 Anti-Doping Regulation prohibited the J Clubs and individuals belonging to any of the J Clubs from being "in any way

… involved in doping, directly or indirectly". At all relevant times, doping as defined by the WADA Code, included the "use of a prohibited method".

2. The WADA Code referred to a Prohibited List of substances and methods which were regarded as doping. Rule M2.b of the 2006 Prohibited List provided under the heading "Chemical and Physical Manipulation" that "Intravenous infusions are prohibited except as a legitimate acute medical treatment".

3. In 2007 this Rule was changed and Rule M2.b of the 2007 Prohibited List stated that: "Intravenous infusions are prohibited, except as a legitimate medical treatment". The summary issued by WADA of the major modifications made by the 2007 Prohibited List stated that: "The word "acute" has been removed from the paragraph on intravenous infusions, since the legitimate use of this method for medical purposes should be left to the judgment of the acting physician".

4. In 2008, the year following the alleged infraction, Rule M2 of the Prohibited Method was changed yet again and it now provides: "Intravenous infusion is prohibited. In an acute medical situation where this method is deemed necessary, a Retroactive Therapeutic Use Exemption will be required". The summary put out by WADA of the major modifications made by the 2008 Prohibited List stated that the changes to Rule M2 were brought about because: "Based on comments from stakeholders, the wording has been changed in order to clarify that the method can be used only in an acute medical situation. The intervention has to be justified by obtaining a Retroactive Therapeutic Use Exemption".

Therapeutic Use Exemptions

5. Clause 4.4 of the WADA Code required WADA to adopt an international standard for the process of granting TUEs. Each international federation and each national anti-doping organisation is obliged to ensure for all athletes within their jurisdictions "that a process is in place whereby athletes with documented medical conditions requiring the use of a prohibited substance or a prohibited method may request a therapeutic use exemption". Such requests shall be evaluated in accordance with the international standard on therapeutic use. Under the relevant international standard, applications for a TUE are to be reviewed by a Therapeutic Use Exemption Committee (TUEC). Under Clause 6.1 of the international standard, TUECs:

> "should include at least three physicians with experience in the care and treatment of athletes and a sound knowledge of clinical, sports and exercise medicine. In order to ensure a level of independence of decisions, a majority of the members of the TUEC should not have any official responsibility in the anti-doping organisation".

6. In addition, under the international standard (Clause 16(2)), TUECs may seek whatever medical or scientific expertise they deem appropriate in reviewing the circumstances of an application for a TUE. The process envisages a thorough medical re-assessment of the circumstances and the treatment by medical practitioners. This process is quite distinct from

the process followed where there has been a claim that there has been an anti-doping violation.

7. The criteria for granting a TUE include a requirement that the athlete would experience a significant impairment to health if the prohibited substance or prohibited method were to be withheld in the course of treating an acute or chronic medical condition. Further, it is a requirement that the therapeutic use of the prohibited substance or prohibited method would produce no additional enhancement of performance other than that which might be anticipated by return to a state of normal health following the treatment of a legitimate medical condition (Clause 4.3). There must also be no reasonable therapeutic alternative to the use of the otherwise prohibited substance or prohibited method (Clause 4.4) and the necessity for the use of the otherwise prohibited substance or prohibited method cannot be a consequence, wholly or in part, of prior non-therapeutic use of any substance from a prohibited list (Clause 4.5).

8. The international standards recognises that in particular circumstances an application for a TUE with retroactive affect may be granted. However an application for a TUE will not be considered for retroactive approval except in cases where (Clause 4.7):

   (a) emergency treatment or treatment of an acute medical condition was necessary, or

   (b) due to exceptional circumstances, there was insufficient time or opportunity for an applicant to submit, or a TUEC to consider an application prior to doping control".

CAS jurisprudence

9. The administration of blood, allegedly for legitimate medical purposes may be abused as an alibi for illegal purposes such as blood doping, performance enhancing or masking of prohibited substances or methods. The use of an intravenous infusion has the potential to cause similar problems in the fight against doping in sport. The conditions under which a certain medical treatment, which would otherwise fall under the definition of doping, may be justified are truly exceptional and as a general rule must therefore be demonstrated by the athlete or the person performing such treatment (see CAS 2002/A/389/390/391/392/393 at para. 74). In previous CAS awards six tests or criteria have been identified to determine whether a certain method such as intravenous infusion may be considered as a legitimate medical treatment.

   These criteria to determine whether a certain medical treatment was legitimate were adopted by CAS before Rule M2.b of the Prohibited List came into effect however they have been applied as useful guidelines when the legitimacy of medical treatment is in question (see CAS 2002/A/389/390/391/392/393 at para. 74, and CAS 2006/A/1102 at paras. 54 to 63).

10. The six criteria are:

   (i) The medical treatment must be necessary to cure an illness or injury of the particular athlete;

(ii) Under the given circumstances, there is no valid or alternative treatment available, which would not fall under the definition of doping;

(iii) The medical treatment is not capable of enhancing the athlete's performance;

(iv) The medical treatment is preceded by a medical diagnosis of the athlete;

(v) The medical treatment is diligently applied by qualified medical personnel in an appropriate medical setting;

(vi) Adequate records of the medical treatment are kept, and are available for inspection.

11. In the present case, Dr. Goto was of the view that the infusion was necessary and there was no valid or alternative treatment for the dehydration as oral intake was difficult and even if Mr Ganaha could drink with difficulty, any water would not be absorbed because of his diarrhoea. Dr Goto said he was worried about letting Mr Ganaha drive home immediately. This view was supported by Dr. Onishi. On the other hand, Dr Aoki said that the Healthmate did not record a diagnosis of dehydration. He was of the view that "other methods or means would have sufficed". Dr Aoki said that an infusion was not necessary in the circumstances. Dr. Lefor said the appropriate treatment was to do nothing and wait for 12 to 24 hours. It was submitted on behalf of Mr Ganaha that a clinical physician could not wait until the condition worsened and that Mr Ganaha had already had diarrhoea since the previous Friday. The addition of vitamin B1 to normal saline solution was recognised as an acceptable treatment by Dr Aoki at the J League team doctors meeting on 21 January 2007. He confirmed in evidence before the Panel that provided the patient was dehydrated to a medium degree an infusion may be appropriate. He considered that it could be acceptable but that it was not in this case. Dr. Lefor also recognised that a normal saline infusion could be legitimate treatment for dehydration but said it was only in extreme cases. The Respondent also highlighted the fact that an infusion of 200ml of normal saline and 100mg of vitamin B1 to a person of the size of Mr Ganaha was unlikely to have any effect and submitted that it could hardly be considered necessary treatment. The Respondent also disputed that the diagnosis was anything more than common cold and diarrhoea because no mention of dehydration was made in the Healthmate. The Respondent also pointed to the fact that Mr Ganaha did manage to consume some, albeit it a little, water during the practice session. The Respondent also disputed the administering of vitamin B1 by means of infusion and suggested that he could have taken vitamin B1 tablets as he was ultimately prescribed PL granules and Biofermin tablets at the end of examination. The Respondent urged the Panel to find that Dr. Goto could and should have attempted supplementation of fluid orally and should have observed the condition of Mr Ganaha for some duration of time. The issue between the parties was focussed on the medical treatment and not on anything that Mr Ganaha had done or failed to do.

12. Both parties agreed that the medical treatment was not capable of enhancing Mr Ganaha's performance. Further it was stressed, on behalf of Mr Ganaha, that this case was totally unlike previous CAS cases involving an intravenous infusion or blood doping. It was stressed that there was no suspicion of doping, no enhancement of performance and no surreptitious or clandestine practices followed during the infusion. The present circumstances were totally different to cases such as the case of *Litvintchev and Others,* FISA Doping Hearing Panel, 14 January 2008. In the present case it was submitted that the intravenous infusion arose in the

normal course of the athlete as a patient seeking treatment from his medical practitioner in appropriate medical surroundings where contemporaneous records were made and kept and were available at the hearing.

13. The Respondent disputed that adequate records had been kept by pointing to what it saw as inadequacies in the documentation and material put before the Doping Control Committee of the Respondent when it was reviewing the legitimacy of the treatment and considering the TUE. It was only after the sanction had been imposed that the Healthmate was for the first time submitted to the Respondent on 16 May 2007. It is clear however that in this case the treatment was documented contemporaneously by the medical practitioner on appropriate medical records in the course of medical treatment being administered to the athlete by the medical practitioner and which was based upon his professional diagnosis. Although they were not available to the Respondent before it made its decision to impose a sanction they have been made available to the Panel and to the experts called by the parties. The difficulty which remains is that there is a disagreement between the medical experts as to whether the treatment was necessary or whether other treatments were available.

Issues

14. It was submitted on behalf of Mr Ganaha that the Respondent had made its decision to impose a sanction on the basis that the treatment did not amount to "acute" medical treatment as stated in the 2006 WADA Code. It was also submitted that the judgment of legitimate medical treatment should and can be left to the particular physician who examined the patient, prescribed the treatment and administered the treatment. Alternatively the treatment by Dr Goto was said to be necessary and appropriate by Dr. Onishi. It was submitted on behalf of Mr. Ganaha that the view that under the 2007 WADA Code it was a matter for the treating physician was supported by other sporting bodies and anti-doping bodies. The Panel considers that the decision of the treating physician cannot pre-empt any decision or review on the Appeal by this Panel although the treating doctor's opinion must be accorded significant weight. The Panel recognises that the present proceeding is not in the nature of a review panel considering an application for a therapeutic use exemption which has specialist medical expertise under the procedures laid down by the international standard as would occur if the circumstances were to occur in 2008. Furthermore, whatever may have been the interpretation placed on the applicable anti-doping regulations by the Respondent and others in 2007, it is a matter for the Panel to determine the proper meaning of the applicable regulation. This is of less importance having regard to the fact that the regulations changed again at the end of 2007.

15. It was also submitted on behalf of Mr. Ganaha that the decision taken by the Respondent failed to comply with the principles necessary to afford the athlete a right to a fair hearing as required by Article 8 of the WADA Code. It was asserted that Mr. Ganaha had effectively been denied the right to be represented by counsel at his own expense and that he had not been fairly and timely informed of the particular asserted anti-doping violation and he had not been given the right to respond and address on what sanctions, if any, should be imposed. As

has been established by CAS jurisprudence, when an athlete is given an appeal hearing before the CAS, the Panel has the full power to review the facts and the law and can issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the initial body (Article R57 of the Code). The appeal hearing thus affords both parties the opportunity to cure any procedural deficiency which may have occurred at the first instance hearing.

Onus of proof

16. The onus is on the party alleging the infraction to prove all necessary elements of the breach of the anti-doping policy. An issue arose between the parties as to whether or not Mr. Ganaha bore the onus of proving that it was legitimate medical treatment in the sense that he was asserting an exception or a defence to the claimed violation (see CAS 2002/A/389/390/391/392/393 at para. 74). It was submitted on behalf of Mr Ganaha that the Respondent, as the party alleging the infraction had the onus of proving firstly that an intravenous infusion occurred and secondly that it was not of a particular type, namely that it was not a legitimate medical treatment. Another possible analysis of this issue is to consider whether the athlete has produced some evidence before the Panel that the treatment was legitimate medical treatment and as a result, an evidentiary burden has arisen on the party alleging the infraction to rebut the effect of that evidence. Ultimately the Panel is of the view that it is a matter of construing the requirements of the 2007 WADA Code and the Anti-Doping Regulations.

In 2007 the prohibited method was described as "Intravenous infusions are prohibited, except as a legitimate medical treatment". In contrast the 2008 rule clearly suggests that *all* intravenous injections are prohibited. In 2008 the first sentence of Rule M2 states: "Intravenous infusion is prohibited". The Rule also contains a second sentence: "In an acute medical situation where this method is deemed necessary, a Retroactive Therapeutic Use Exemption will be required". The change effected by the 2008 Prohibited List wording is substantial. It is in clear contrast to the 2007 wording. The 2008 wording has a blanket ban on intravenous infusions, and that is all the prosecution need prove. The Panel is of the view that under the wording of the 2007 WADA Code, the party alleging the infraction has to prove that there was an intravenous infusion and that it was not legitimate medical treatment.

Was this an intravenous infusion which was not legitimate medical treatment?

17. As mentioned above, whilst the opinion of the treating doctor carries much weight it is not conclusive of this issue. Nor is it conclusive to say that that opinion has the support of another medical expert such as Dr. Onishi. We note that contrary opinions have been expressed by Dr. Aoki and Dr. Lefor. Had the alleged offence occurred in 2008 Dr. Goto and Mr. Ganaha would be required to seek a retroactive approval of a therapeutic use exemption from a body of independent medical experts who would conduct a medical re-assessment of the treatment.

18. Whilst the Panel might be minded to accept that in all the particular circumstances of this case, the intravenous infusion was a legitimate medical treatment for Mr. Ganaha within the meaning of the 2007 WADA Code the Panel notes that at the time the J League had not adopted those provisions of the WADA Code which related to sanctions.

19. The Anti-Doping Regulations of the J League which were in force at the time of the infusion and which were reproduced as Exhibit 2.2 in the proceedings, provide that the Anti-Doping Special Committee under Article 5.1, "shall be entitled … to impose sanctions upon players …"(underlining added by the Panel). Article 5.2 then gives examples of the types of sanctions which are referred to. The Panel has considered the proper construction of this regulation and notes that under the wording of the clause, the Committee is "entitled" to impose a sanction. There is no obligation or requirement to impose a penalty. There is an entitlement to impose a penalty but there is no mandatory obligation that a penalty be imposed for every infraction. In the present case after a careful evaluation of the evidence and the competing submissions of the parties and hearing the witnesses, the Panel has reached the conclusion that there is no need to decide if there has been a violation because the Panel is satisfied that it is not a case where any sanction should be imposed on Mr. Ganaha. His conduct is not deserving of any sanction. The phrase used in the applicable section of the WADA Code was unclear and the provision has since been revised. The explanation given by Dr. Aoki at the meeting in January 2001 was not sufficiently clear. The J League had not taken adequate action to specify the detailed conditions, both substantial and procedural, to determine what is legitimate medical treatment. There was, and still is, on the evidence divided medical views on the necessity for an intravenous infusion in the circumstances of this case. Mr. Ganaha had no capacity to evaluate the professional judgment of the treating medical practitioner. Mr Ganaha had no ability to check the medical recording and reporting by the treating medical practitioner. If the medical recording and reporting had been more complete and not deficient in the respects asserted by Dr. Aoki, Mr. Ganaha may not have been charged with an infraction of the J League Anti-Doping Regulations. The Panel is of the view that Mr. Ganaha's conduct is not deserving of any sanction and the Panel does not need to reach a conclusion on whether Mr. Gahana committed an anti-doping violation by using or applying a prohibited method or not. Even if the Panel were to reach a conclusion that Mr. Ganaha had committed an anti-doping violation by using a prohibited method he should not be sanctioned as he bears no fault. After considering the unique facts and circumstances of this case, the Panel has reached the conclusion that Mr Ganaha acted totally without fault. The Appeal is upheld and the decision with respect to Mr. Ganaha is set aside and the relief requested by the Appellant is hereby granted.

The Court of Arbitration for Sport rules:

1. The Appeal is upheld and the sanction imposed on the Appellant by the Respondent dated 10 May 2007 that the Appellant be suspended from six official games be cancelled.

2. (...).