

CAS 2011/A/2403 World Anti-Doping Agency (WADA) v. Fédération Internationale de Gymnastique (FIG) & Anastasiya Melnychenko

ARBITRAL AWARD

delivered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Ercus Stewart, Senior Counsel in Dublin, Ireland

Arbitrators: Mr Patrick Lafranchi, attorney-at-law in Bern, Switzerland

Mr Denis Oswald, attorney-at-law in Colombier, Switzerland

in the arbitration between

World Anti-Doping Agency (WADA), Lausanne, Switzerland

Represented by Mr Yvan Henzer, attorney-at-law, Lausanne, Switzerland

-Appellant-

and

Fédération Internationale de Gymnastique (FIG), Lausanne, Switzerland

Represented by Dr Stephen Netzle, attorney-at-law, , Zurich

and

Anastasiya Melnychenko, Odessa, Ukraine

-Respondents-

1. THE PARTIES

- 1.1 World Anti-Doping Agency (“WADA”), the Appellant, is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was established in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms. It is also the international agency responsible for the monitoring of the World Anti-Doping Code (“WADC”).
- 1.2 The first named Respondent Fédération Internationale de Gymnastique (“the FIG”), the First Respondent, is the governing body for the sport of gymnastics in the world.
- 1.3 The second named Respondent, Ms Anastasiya Melnychenko (“the athlete”), is an athlete affiliated with the Ukrainian Gymnastics Federation (“UGF”).

2. FACTUAL BACKGROUND

- 2.1 Below is a summary of the main relevant facts and allegations based on the parties’ written submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the factual allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only the submissions and evidence it considers necessary to explain its reasoning.
- 2.2 The athlete was born 8th December, 1994 and was therefore 15 years old at the time of the testing. The athlete started gymnastics at the age of 4 and progressed to win the gold medal in the 2010 ACRO World Championships in Poland. The athlete is a gymnast who competes internationally and is affiliated with the Ukrainian Gymnastics Federation (“the UGF”). The athlete has never previously tested positive for any prohibited substances. Prior to the proceedings at issue here, the athlete had no prior experience with anti-doping proceedings.
- 2.3 On 23rd October, 2010 the athlete tested positive for the prohibited substance Furosemide at the 2nd European Team Championships in Acrobatic Gymnastics in Poland. On 7th December, 2010 the FIG notified the UGF of the results of the test and also of the athlete’s rights. The athlete did not contest the positive result. The athlete did not choose to have the B-sample tested. On 8th December, 2010 the UGF confirmed receipt of the notification. By email dated 13th December, 2010 the athlete’s father forwarded an explanatory memorandum together with a medical report from the athlete’s treating doctor to the FIG.
- 2.4 On 3rd January, 2011 the FIG informed the athlete and the UGF that the matter had been transferred to the FIG Disciplinary Commission for consideration. On 20th January, 2011 the FIG informed the athlete and the UGF that the FIG was of the

opinion that there may have been a breach of the anti-doping code by the athlete, her federation, her coach and also her team doctor. On 12th and 13th February, 2011 the athlete, her father, a representative of the UGF and both of the athlete's coaches attended a hearing before the FIG Disciplinary Commission. The Commission also sought and received answers to various written questions sent to the athlete's doctor.

- 2.5 The athlete offered an explanation for the presence of the prohibited substance in the bodily sample, such that she had been prescribed a three-day course of the medication "Lasix" for the treatment of a furuncle of her nose on 8th October, 2010. The athlete gave evidence that she had taken "Lasix" for a period of one and a half days until the pain and high temperature had subsided. It was accepted by the Commission that the medication contained the prohibited substance. No Therapeutic Use Exemption was granted to the athlete by the International Gymnastics Federation.
- 2.6 The Commission issued a decision on 25th February, 2011 wherein, *inter alia*, the athlete was declared ineligible from any sports activity for a period of two months from the date of the decision, the athlete's result in the competition were cancelled, the athlete's coaches were suspended for a period of six months and the UGF were also declared to be partially at fault (the "Decision").
- 2.7 WADA was notified by email of the decision of the Commission by FIG on 25th February, 2011 and WADA requested the full case file on 7th March, 2011, which was received on 11th March, 2011.

3. Procedure before the Court of Arbitration for Sport ("CAS")

- 3.1 On 7 April 2011, the Appellant filed a statement of appeal with the CAS against the Decision, in which it appointed Patrick Lafranchi as arbitrator.
- 3.2 By Appeal Brief dated 14 April 2011, the Appellant requested the following prayers of relief:

"WADA hereby respectfully requests CAS to rule:

- 1. The Appeal of WADA is admissible.*
- 2. The Appealed Decision rendered by the FIG Presidential Commission in the matter of Ms Anastasiya Melnychenko is set aside.*
- 3. Ms Anastasiya Melnychenko is sanctioned with two-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility, whether imposed on, or voluntarily accepted by Ms Anastasiya Melnychenko before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.*
- 4. All competitive results obtained by Ms Anastasiya Melnychenko from 23 October 2010 through the commencement of the applicable period of*

ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

5. *WADA is granted an award for costs.”*

3.3 On 21 April 2011, the Respondents informed the CAS Court office that they jointly nominate Mr. Denis Oswald as arbitrator.

3.4 On 28 April 2011, Mr. Sergey Melnychenko, the Second Respondent’s father, sent a letter to the CAS on behalf of his daughter, *inter alia*, in such terms:

“Having examined the material of the appeal, I have concluded that WADA has one goal – to get financial compensation, rather than to find the truth in the dispute. My daughter is completely controlled by me and has never been seen using any drugs. I totally trust her. As the argument WADA indicates that the content of furosemide is in 1.6 times higher than the acceptable norm. but at the same time, WADA does not consider the individual characteristics of the investigated person. To make such a statement it is necessary to carry out detailed studies of the organism of the person blamed. I want to give you an example: when the representatives of WADA visited my daughter for check urine samplings, they had to wait about three hours to get the required amount of material. And thus us in consideration of plenty of water been drunk. While being ill, my daughter was in a semiconscious state. I made a decision about her treatment and, if I had to see her in the same condition once more, I would not hesitate to act the same way. For me, the child’s health is more important than any imaginary values, and I will never sacrifice health of the child to achieve the alleged performances. I bring up my daughter as a citizen who values the reputation and who will never stain the name. I’m sure she’ll remain the same throughout the whole life. I hope the Court not to break the faith in Justice of my child. Due to economic condition, neither I nor my daughter can not attend the WADA appeal. For the same reasons we can not afford hire an attorney to represent our interests. I confirm the Explanations given on consideration to the Disciplinary Commission.”

3.5 On 23 May 2011, the First Respondent filed its Answer, which contained the following Prayer for Relief:

*“1. The Appeal filed by the WADA shall be dismissed.
2. The decision of the FIG Presidential Commission in the matter of Ms Anastasiya Melnychenko of 25 February 2011 shall be upheld.
3. The Respondent 1 shall be granted an award for costs.
4. With regard to the proceeding, Respondent 1 requests that
a. the Panel shall not hold a hearing but take its decision based on the written submissions of the Parties.*

b. However, should the Panel still decide to hold a hearing, Respondent 1 requests that the President of the Medical Commission of the FIG Dr Michel Léglise, 9 rue Van Loo, 75016 Paris, France is heard as expert witness.”

- 3.6 By letter of 6 June 2011, the CAS Court office advised the Parties that the President of the CAS Appeals Arbitration Division had nominated Mr. Ercus Stewart as President of the Panel. By letter dated of the same day, the Panel was provided with a copy of the file.
- 3.7 On the same day, the CAS Court office requested the Parties to declare whether they wished or not that a hearing be held. WADA replied that its preference is for the Panel to issue an award on the basis of the Parties’ written submissions.
- 3.8 By letter of 10 August 2011, the CAS Court office informed the Parties that the Panel has decided not to hold a hearing in the present matter.

4. Jurisdiction and Applicable Law

- 4.1 Rule 47 of the Code of Sports-related Arbitration (“CAS Code) provides, in part, as follows:

“R47 Appeal

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS 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-related body.”

- 4.2 Pursuant to Article 13.1.1 of the FIG Anti-doping Rules (“FIG Rules”), WADA has a right of appeal, where none of the parties to the FIG Disciplinary Commission’s hearing file an appeal within the period of time.
- 4.3 Neither of the Respondents contested WADA’s right of appeal. The Panel has therefore jurisdiction to consider WADA’s appeal.
- 4.4 R58 of the CAS Code provides:

“R58 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-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

- 4.5 There is no dispute between the Parties with respect to the applicable rules. Furthermore, the challenged Decision explicitly stated that the FIG Rules and the WADC applied to the present dispute.

5 Admissibility of Appeal

- 5.4 WADA's appeal was filed on 8 April 2011, which was the last day within the permitted 21 days for an appeal. In addition, the appeal brief was submitted on 14 April 2011, which was again within the permitted timeframe.
- 5.5 Accordingly, WADA submitted its appeal in accordance with article 13.6 of the FIG Rules and R48 and R51 of the CAS Code. WADA's appeal is thus admissible.

6 Submissions of the Parties

Anti-Doping Rules Violation

- 6.4 The FIG did not dispute any of WADA's submissions that the WADA Prohibited List is an integral part of the WADC. The substance Furosemide is specified as a prohibited substance on that list. Furosemide was detected in the sample provided by the athlete and the athlete did not challenge the positive test result. The FIG accepted that the presence of a WADC prohibited substance was confirmed by the sample test result. The FIG also accepted that the athlete had not applied for nor had been granted a Therapeutic Use Exemption and was therefore not authorized to ingest this substance. Therefore, the FIG accepted that the athlete had breached the FIG Rules and WADA had discharged the burden of proof that the Second Respondent had tested positive for the presence of a prohibited substance. The FIG emphasized that Furosemide was a component of the medication "Lasix" and this medication had been prescribed by the athlete's treating doctor in a hospital emergency. The FIG also pointed out that the athlete was only 15 years of age at the time of the test and the FIG did not agree that the athlete should have been aware that Furosemide was a component of "Lasix". WADA and the FIG both agreed that "Lasix" was justifiably prescribed for the treatment of the athlete's medical condition.
- 6.5 Such statement was confirmed by Ms Melnychenko's father letter of 28 April 2011 (see para. 3.4 above).

7 Legal Analysis

Determining the Sanction

- 7.1 It is accepted that Article 10.2 of the FIG Rules provides for a two-year period of ineligibility for the presence, use or attempted use, or possession of prohibited

substances or methods. Article 10.4 of the FIG Rules allows for the elimination or reduction of the period of ineligibility when an athlete can establish how the prohibited substances entered his body or came into his possession and that the substance was not intended to enhance performance or mask the presence of a performance enhancing substance. In addition, Article 10.5 of the FIG Rules provides for an elimination or reduction of the period of ineligibility and that exceptional circumstances may be taken into account when considering individual cases. Article 10.5.1 provides for elimination of the period of ineligibility in instances of no fault or negligence and Article 10.5.2 allows for the reduction of the period by up to one half in instances of no significant fault or negligence. These provisions are consistent with the recognition and protection of the rights of the athlete and the integrity of the anti-doping rules.

- 7.2 The FIG Disciplinary Commission was satisfied with the athlete's explanation as to how the Furosemide entered her system; through the ingestion of the prescription medication Lasix. There was a period of 14 days between the time of ingestion of Lasix, containing Furosemide, and the positive test. The FIG Disciplinary Commission did not have conclusive scientific evidence in relation to degradation rates of Furosemide in an athlete's body. The Appellant has provided evidence from Dr Irene Mazzoni, WADA's Research Manager, who concluded that it is highly unlikely that Furosemide would be found at the concentrations in the test results 14 days after ingestion. However, this evidence was not brought before the FIG Disciplinary Commission, these conclusions are not based on empirical testing of the particular athlete involved in this case and in any event these results are not entirely conclusive that the concentration of Furosemide found in the sample taken could not result from ingestion in the manner provided for in the athlete's evidence. Furthermore it has to be considered that Dr. Irene Mazzoni is a Research Manager from WADA, is not acting as an independent expert in this case and that her opinion must be appraised accordingly.
- 7.3 In addition, the Panel must note that there is no independent corroborative evidence of Dr Mazzoni's assertion. The Panel is of the view that the calling of additional independent evidence would involve the Panel weighing up speculative assertions in the absence of necessary empirical data compiled at the time of testing. This exercise would not advance the work of the Panel and would risk exposing the athlete to prejudicial and inaccurate conclusions arrived at a significant remove in time from the date of testing. The Panel must conclude that the FIG Disciplinary Commission was justified in accepting the explanation for the positive testing provided by the athlete and that the athlete did establish on the balance of probabilities the reason for the presence of the substance in the athlete's body. The Panel cannot agree with the position of the Appellant that the athlete has failed to discharge the burden of proof on the basis of the conclusions of Dr Mazzoni.

- 7.4 The Panel considers the most appropriate provisions to consider in this case are those which relate to the reduction of the period of ineligibility because the FIG Disciplinary Commission provided a reduced period of ineligibility and chose not to eliminate the period entirely. Article 10.4 of the FIG Rules allows the FIG Disciplinary Commission to determine a sanction for a first violation of any length of time from no period of ineligibility (and a reprimand) up to a maximum of two years. The FIG Disciplinary Commission must be satisfied with the explanation provided by the athlete, that the explanation has been corroborated and that there was no intent to enhance performance or the presence of a performance enhancing substance. The Panel does not therefore consider that the CAS case-law relating to Article 10.5 is of particular relevance to the issues in this case.
- 7.5 It is clear, and the Panel supports the contention of the Appellant in this regard, that an athlete bears a high responsibility in the choice of his medical attendant and caution must be exercised in the ingestion of medication. However the athlete in this case was 15 years of age at the time of the offence and the Panel expects that much of the responsibility normally accorded to an athlete must be expected of the athlete's coaches and the Ukrainian National Federation. The particular circumstances of this case mean that a decision relating to the health and welfare of the athlete was required to be taken quickly by the athlete's father. The FIG Disciplinary Commission had evidence before it that the athlete did ask the treating doctor whether the medication prescribed could lead to a violation and the response given was inaccurate. The Panel agrees with the FIG Disciplinary Commission that these particular circumstances should properly be taken into consideration when considering the appropriate sanction.
- 7.6 The Panel accepts that Article 2.1.1 of the FIG Rules provides that athletes are responsible for the presence of prohibited substances in their samples and that proof of knowledge or negligence is not strictly necessary. However the athlete has been sanctioned in relation to the offence and the measure of any such sanction was properly before the FIG Disciplinary Commission. Ultimately the Panel does not endorse an exercise in *ex post facto* speculation as to the athlete's state of knowledge at the time of ingesting Furosemide. It is the duty and responsibility of the athlete to be informed and the duty of FIG to teach their athletes. The FIG Disciplinary Commission has a conflict of interest to say they did not inform the athlete properly. It was open to the FIG Disciplinary Commission to accept the evidence offered by the athlete, her father, her coaches and her treating doctor. The acceptance of that evidence does not conflict with Article 2.1.1 of the FIG Rules as the FIG Disciplinary Commission determined that there had been a violation and determined the appropriate sanction in respect of that violation. The Panel notes also that the athlete's coaches were also sanctioned in respect of the violation and particularly in their failure in appreciating the procedures, and attendant risks, linked with the consumption of prohibited substances.

- 7.7 The FIG Disciplinary Commission took cognizance of the athlete's age at the time of the violation. This position reflects the importance of recognizing and respecting the need for fair procedures and also the athlete's human rights. The athlete in this case must be treated the same way as an adult in respect of a finding of fact that a prohibited substance was present in her sample. However the age of the athlete must properly be considered in the wider context of the exceptional circumstance of this case and particularly so when considering an appropriate sanction for the violation. Youth and lack of experience are explicitly stated in the FIG Rules as relevant factors to be considered in assessing an athlete's fault for a violation under Article 10.4. The Panel does not consider this finding to set a precedent for anything other than an endorsement of the commentary provided in the FIG Rules in relation to the treatment of minors. The Panel believes that this case involves specific circumstances which justified the FIG Disciplinary Commission in determining a sanction under Article 10.4 of the FIG Rules.
- 7.8 The Panel finds that the determination of the FIG Disciplinary Commission in this case accords with the findings in the cases of *Squizzato CAS 2005/A/830* and *Foschi CAS 1996/A/156* where the sanction periods were reduced on account of the athletes' age and inexperience. The Panel finds that the cases offered in support of the Appellant's submissions may be differentiated from this case on their specific facts. The case of *Canas v ATP CAS 2005/A/951* involved a professional tennis player and the case of *Hamilton CAS 2005/A/884* involved a Tour de France cyclist; the Panel does not believe these cases are appropriate comparators when considering the athlete's responsibility for the violation in this case. To allow the use of these cases as comparators would be to act in disregard of the athlete's age and inexperience in this case.
- 7.9 On the other hand an anti-doping rule violation is a serious offence for an athlete who bears the ultimate responsibility. The Panel finds therefore that it was justified for the FIG Disciplinary Commission to reduce the standard period of ineligibility and to exercise its discretion under Article 10.4 of the FIG Rules, however not to the extent they did. The Panel considers that a suspension of four months from the date of the present award, less the 2-month ban already served would better reflect the seriousness of the offense, the fundamental responsibility of the athlete and her young age and lack of experience.

* * *

8 Costs

- 8.1 R65.1 of the CAS Code provides that the proceedings shall be free in a disciplinary case of an international nature.
- 8.2 R65.2 of the CAS Code stipulates that disciplinary cases of an international nature ruled in appeal are free, except as for the Court Office fee of CHF 500 (five hundred Swiss francs) to be paid by the Appellant and which is in any event kept by the CAS.
- 8.3 R65.3 of the CAS Code provides that the parties shall advance the costs of the parties, witnesses, experts and interpreters, and that the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.
- 8.4 Having taken into account the nature of these proceedings, the conduct and financial resources of each of the parties, and the frequent practice of the CAS in doping matters, this Panel deems it appropriate that each party shall bear its own costs.

* * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by WADA on 7 April 2011 against the decision issued on 25 February 2011 by the FIG Disciplinary Commission is partially upheld.
2. The FIG Disciplinary Commission's decision dated 25 February 2011 is set aside.
3. Ms Anastasiya Melnychenko is sanctioned with a 4-month period of ineligibility as from the date of the present award; any period of ineligibility already served from 25 February 2011 to the date of this award shall be credited against the total period of ineligibility to be served.
4. This award is pronounced without costs, except for the CAS Court office fee of CHF 500 (five hundred Swiss francs) already paid by WADA and which is retained by the CAS.
5. Each party shall bear their own legal fees and expenses.
6. All other or further claims are dismissed.

Lausanne, 25 August 2011

THE COURT OF ARBITRATION FOR SPORT

Ercus **Stewart** SC
President of the Panel

Patrick Lafranchi
Arbitrator

Denis Oswald
Arbitrator