



Arbitration CAS 2000/A/274 S. / Fédération Internationale de Natation (FINA), order of 26 May 2000

Conditions for granting a stay of a decision

Whereas S., a swimmer affiliated to the Italian Swimming Federation, underwent a doping control on the occasion of an event in Lyon (France) on 24 January 1999;

Whereas this doping control, performed by the IOC accredited “Laboratoire National de Dépistage du Dopage” in Châtenay-Malabry (France), revealed the following results:

“A” sample:

- Testosterone: 745 ng/ml
- Epitestosterone: 108 ng/ml
- Androsterone: 13,980 ng/ml
- Etiocholanolone: 14600 ng/ml
- T/E ratio: 6.9

Isotopic signature, from metabolites, of an administration of testosterone or of one of its precursor (signature isotopique à partir de métabolites, d'une administration de testostérone ou de l'un de ses précurseurs).

“B” sample:

- Testosterone: $545,7 \pm 26,4$ ng/ml
- Epitestosterone: $68,7 \pm 4,2$ ng/ml
- T/E ratio: 7,9

Whereas the FINA transmitted the file of S. to the Italian Swimming Federation on 23 February 1999, and advised it that this case was under its jurisdiction;

Whereas on 3 February 2000, the Italian Swimming Federation decided not to sanction the swimmer;

Whereas the FINA Bureau Executive considered that the Italian Federation has not applied correctly the FINA Doping Control Rules and referred the case to the FINA Doping Panel;

Whereas on 25 March 2000, the FINA Doping Panel heard the athlete and decided to sanction her with a four-year ban based on the findings of an elevated T/E ratio, in application of the FINA Rule DC 2.1;

Whereas on 4 May 2000, S. filed an appeal against this decision before the Court of Arbitration for Sport;

Whereas the Appellant requests the CAS to stay the execution of this decision in order to compete at the European Swimming Championships (to be held in Helsinki between 29 June and 6 July 2000) and to be able to qualify for the Olympic Games in Sydney;

Whereas the FINA asks the CAS to reject this application for provisional measures.

LAW

Whereas in view of art. C 10.8.3 and C 20 (currently C 21) of the FINA Constitution, the jurisdiction of the CAS shall be admitted;

Whereas it is for the President of the CAS Appeals Arbitration Division to decide on the application to stay the execution of the decision challenged, considering that the Panel has not been formed yet (art. R52 and R37 of the Code of Sports-related Arbitration);

Whereas the Appellant disputes the reliability of the doping tests made on the urines samples collected from her and put forward that the FINA Doping Panel did not properly consider the difference between the results of the analyses of the “A” sample and of the “B” sample;

Whereas the Appellant produces expert opinions stating that the discrepancy in the values of the “A” and the “B” samples indicates a degradation of (at least) the “B” sample;

Whereas the Professor Mario Serio (University of Florence) delivered the following statement:

“The major concern is related to the very high differences found between the first and the second analyses. (...) Because I cannot have doubts on the quality of analytical procedures (because of the experience of operators) the unique explanation of such findings is the degradation of the samples. The reference lab did not give any demonstration of the absence of degradation in the samples”;

Whereas the Prof. Dr. Roland Gärtner (University of Munich) delivered the following statement:

“We have no doubts about the quality of the test results per se. However, differences in testosterone and epitestosterone levels in samples “A” and “B” are not explained and should have been further analysed by the laboratory. Degradation processes during storage are a most likely explanation for these differences. No preliminary tests have been performed in the urine like protein content and pH of the samples, which are useful to exclude influences on degradation or in the case of proteinuria on total steroid excretion”;

Whereas the Respondent puts forward that the existence of a doping offence in the present matter is not only based on the high level of the T/E ratio but also on the IRMS (isotopic ratio

measurements) analyses showing direct evidence of exogenous administration of testosterone or testosterone precursors (androstenedione);

Whereas, as a general rule, when deciding whether to stay the execution of the decision appealed from, it is necessary to consider whether the measure is useful to protect the Appellant from irreparable harm, the likelihood of success on the merits of the appeal and whether the interests of the Appellant outweigh those of the opposite party;

Whereas it is necessary to compare the risks incurred by the Appellant in the event of immediate execution of the decision with the disadvantages for the Respondent in being deprived such execution;

Whereas the Appellant shall make at least plausible that the facts and the rights cited exist and that the material conditions for a legal action are fulfilled;

Whereas the substance testosterone is prohibited by the FINA Rules provided that the T/E ratio is greater than 6/1;

Whereas the FINA Doping Panel surprisingly based its decision on the existence of an elevated T/E ratio only and did not consider the existence of an isotopic signature establishing the administration of testosterone or testosterone precursors as reported by the laboratory of Châtenay-Malabry;

Whereas the expert opinions filed by the Appellant focus on the level of the T/E ratios and on the difference between the ratios of the “A” sample and of the “B” sample but do not approach the issue raised by the lab of a possible exogenous ingestion;

Whereas such fact shall be considered by the CAS pursuant to Art. R57 of the Code of Sports-related Arbitration, even if the FINA Doping Panel did not consider it;

Whereas on 16 May 2000, the counsel for FINA requested a confirmation from the laboratory of Châtenay-Malabry as to the existence of an exogenous administration of testosterone or testosterone precursors;

Whereas Prof. De Ceaurriz, General Director of the laboratory, replied as follows:

“...je vous confirme que le résultat de l'analyse isotopique du carbone réalisée sur l'échantillon 139708 prouve bien la prise de testostérone ou de l'un de ses précurseurs. (...).

Pour moi ce résultat est sans ambiguïté quant à la prise de testostérone ou de l'un de ses précurseurs. Il existe effectivement une variabilité analytique de la détermination du rapport T/E qui ne met pas en cause la conclusion, d'une part parce que ce rapport a toujours été trouvé > à 6 (sic) et du même ordre de grandeur, secondairement parce que les résultats de l'analyse isotopique sont déterminantes.”

Whereas it appears that the difference between the “A” analysis and the “B” analysis is likely to raise certain doubts as to the reliability of the result of the “B” sample but that these doubts are not sufficient, at least at this stage of the proceedings, to establish that both analyses are doubtful;

basically, it is not established that the possible degradation of one or both urine samples would lead to a T/E ratio lower than 6/1;

Whereas, furthermore, the isotopic analyses of the Appellant's urine samples reported by the laboratory of Châtenay-Malabry shows that the presence of testosterone (or precursors) in the urine of the Appellant seems to be due to an exogenous ingestion of such substance and not to be due to the physical conditions of the athlete;

Whereas, at this stage of the proceedings, it appears that a doping offence has been established;

Whereas, *prima facie*, it is not likely that the decision appealed from is contrary to FINA Doping Control Rules;

Whereas the arguments advanced by the Appellant in her request for provisional measures are not sufficient to justify the stay of the execution of the decision challenged, compared with the interest of the FINA to ensure the correct application of its regulations;

Whereas the application for provisional measures shall be dismissed.

The President of the CAS Appeals Arbitration Division, ruling in camera:

1. Dismisses the application for provisional measures filed by S. on 4 May 2000.
2. States that the present order is pronounced without costs.