



Arbitration CAS 2001/A/330 R. / Fédération Internationale des Sociétés d’Aviron (FISA), award of 23 November 2001

Panel: Mr Peter Leaver QC, (England), President; Mr Jan Paulsson (France), Mr Jean-Philippe Rochat (Switzerland)

Rowing / Olympic Games

Doping (nandrolone)

Validity of a life ban for a first doping offence

- 1. The life ban sanction imposed was based upon valid provisions of the FISA Rules. Those provisions were well-known and predictable to all rowers, and had provided for the possibility of a life ban for a first doping offence for more than 12 years. In addition, the Appellant (rower) had signed the “rower commitment”, which clearly confirmed that doping violations in the sport of rowing were punishable with a life ban for a first offence. In the circumstances, therefore, the CAS has no hesitation in finding that the sanction contained in FISA’s Rules satisfied what might be called the “predictability test”.**
- 2. Although the CAS undoubtedly has the authority to correct any penalty as it sees fit, it would hesitate for a long time before over-ruling a decision by an International Federation, unless it thought that the Federation’s decision was disproportionate to the offence. While it is clear that many International Federations have decided that a two year suspension is appropriate for a first doping offence, it is equally clear that other International Federations, such as FISA, have chosen to impose higher minimum sanctions as a demonstration of their determination and commitment to the eradication of doping in their sport.**
- 3. As a matter of principle, a life ban can be considered both justifiable and proportionate in doping cases. That is so even if the ban is imposed for a first offence.**

R., a Latvian citizen, participated in the Olympic Games rowing regatta, which took place at the Sydney International Regatta Centre between the 17th and the 24th September 2000.

On the 19th September 2000 R. participated in a race. He was selected for a doping test following that race, which he had won. The test, which involved R. providing a urine sample, was conducted by the Australian Sports Drug Agency, which, throughout the Olympic Games, conducted tests on behalf of the IOC. The tests were carried out at the Australian Sports Drug Laboratory.

R. duly completed the test, and signed the Doping Control Official Record form, confirming that the information which he had provided was complete and truthful. He listed 11 substances on the form that he had taken during the previous three days. Some of those substances were taken orally: others were administered by injection.

The "A" sample was analysed by the Australian Sports Drug Testing Laboratory, which found metabolites of the banned substance nandrolone above the permitted threshold.

On the 22nd September 2000 the Director of the Australian Sports Drug Testing Laboratory informed the Chairman of International Olympic Committee Medical Commission of the result of the analysis of the "A" sample, which was that the concentration for norandrosterone (nandrolone) was around four times greater than the International Olympic Committee threshold.

At 11.00 pm on the 23rd September 2000 R., accompanied by four representatives of the Latvian Olympic Mission, attended the International Olympic Committee Medical Commission's meeting. After hearing the arguments of the Latvian Olympic Mission and of R., the International Olympic Committee Medical Commission found that there had been a breach of the Olympic Movement Anti-Doping Code (Chapter II-Article 2.2), disqualified R. and excluded him from the Olympic Games.

On the 25th September 2000 the Latvian Olympic Committee asked for an analysis of the "B" sample. That sample was duly analysed, and, once again, the concentration of norandrosterone was found to be greater than the threshold permitted by the International Olympic Committee

In accordance with its normal procedure, as it had no jurisdiction after the end of the Olympic Games, the International Olympic Committee transferred R.'s case to FISA to consider whether further sanctions should be imposed on R. It is to be noted that R. made no contemporaneous challenge to, or appeal in respect of, the proceedings which took place in Sydney.

On the 8th January 2001 the Executive Director of FISA informed the President of the Latvian Rowing Federation that in accordance with FISA's Rules R. was provisionally suspended from international competition until a FISA Commission of Enquiry had determined "the nature, the circumstances and the gravity of the doping offences and the penalties to apply".

The Commission of Enquiry met in Lausanne on the 18th January 2001. R. denied taking any substances which might have resulted in the urine sample containing prohibited substances. He contended that the prohibited substances must have appeared "endogenously". The Commission of Enquiry found that there was no dispute about the validity of the procedure that had been adopted by the International Olympic Committee Medical Commission, and that there was no evidence presented which could possibly exonerate R. Accordingly, the Commission of Enquiry concluded that, in accordance with FISA's Rules, and, in particular, the Bye-Laws to Rules 80 to 83, R. should be banned from competitive rowing for life. The Commission of Enquiry's Report was forwarded to the Executive Committee of FISA.

At the Executive Committee meeting, which was held on the 14th May, neither R. nor any representative of the Latvian Rowing Federation attended, but the Executive Committee had before it the Latvian Rowing Federation's letter dated the 12th February 2001. The Executive Committee found that the procedure adopted by the International Olympic Committee Medical Commission had been correct; that the FISA Rules gave no discretion; and that it had to impose a life ban on R. Accordingly, the Executive Committee banned R. for life from any competition organised under the authority of FISA or any FISA affiliated Federation.

At the hearing at the CAS on the 24th September 2001, R. told the Panel that he was planning to finish his sports career after the Sydney Olympic Games, but that he wanted to support the development of rowing in Latvia. He said that it would be an advantage to those who were organising rowing regattas in Latvia to have him present, and participating in the regatta.

LAW

1. For at least the last 12 years FISA's Rules have provided for the possibility of a life ban for a first doping offence.

2. In addition, a FISA document entitled "Rower or Coxswain's Commitment", which all those rowing competitively must sign, contains the following declaration:

"... I am aware of the fight against doping which FISA is carrying out alongside others, and, in particular, the conducting of out-of-competition anti-doping tests and that severe doping violations in rowing are punished with a life ban at the first offence..."

3. In the Panel's opinion, it follows that those involved in competitive rowing have known of their sport's attitude to doping offences for many years, and of its resolve to eliminate doping from the sport. R. did not attempt to deny that he knew of the relevant Rule.

4. Rule 80 of FISA's Rules of Racing, which were in force in September 2000, was in the following terms:

"Doping is strictly prohibited.

Doping consists of the presence, above the permitted concentration, in an athlete's body, whether intentional or negligent or even innocently or inadvertently, of one or more prohibited therapeutic substances appearing on the International Olympic Committee's list of prohibited substances valid at the time at which the sample was taken, or of blood or blood products, and/or pharmacological, physical or chemical manipulation aimed at making these substances difficult to detect.

The presence of such a substance in the urine or in the blood of a rower.....shall constitute a rebuttable (sic) presumption of voluntary use."

The Bye-Law to Rules 80 to 83, entitled "Doping", contains, inter alia, the following provisions:

"1. PRINCIPLES

1.2 *Definition*

Doping consists of the presence, above the permitted concentration, in an athlete's body, whether intentional or negligent or even innocently or inadvertently, of one or more prohibited therapeutic substances appearing on the International Olympic Committee's list of prohibited substances valid at the time at which the sample was taken, or of blood or blood products, and/or pharmacological, physical or chemical manipulation aimed at making these substances difficult to detect. The presence of such a substance in the urine or in the blood of a rower or of a coxswain shall constitute a rebuttable presumption of voluntary use.

9. DISCIPLINARY MEASURES

9.3 *The penalties can affect:*

9.3.1.1 *The rower*

a) Use of anabolic agents and related substances, diuretics and related substances, peptide hormones and analogues, and all the respective releasing factors of these substances, cocaine and/all pharmacological, physical or chemical manipulation of any biological substance (blood and/or urine) whatever the circumstances of the testing:

Life ban for the first offence

5. In February 2001 FISA's Anti-Doping Rules were changed. The Panel was told that, in accordance with the *lex mitior*, if the new version of the Rules had been more favourable to R., the new version would have been applied by the Executive Committee. In fact, for the reasons discussed in the next succeeding Paragraphs of this Award, the new version of the Rules appears to the Panel to be arguably less favourable, and certainly no more favourable, to the athlete than the version which was in force during the Sydney Olympic Games.

The relevant part of the new version is in the following terms:

"Rule 81 –Anti-Doping

Doping is strictly prohibited.

(...)

In rowing, for those who infringe doping provisions, a penalty may be imposed extending to, in a relevant case, a life ban from all competition.

The version of the Olympic Movement Anti-Doping Code, its Bye-laws and the FISA Anti-Doping Bye-Laws valid at the time of the violation shall apply."

Bye-Law 20 of the Bye-Laws to Rule 81 is in the following terms:

"20. SANCTIONS

20.4 *In the case described at Art. 3.1a of Chapter ii(sic) of the Olympic Movement Anti-Doping Code, the ban will be up to 3 months, in the case described at Art. 3.1 b(iii) of Chapter ii of the Olympic*

Movement Anti-Doping Code, the ban will be for life at the first offence.”.....30. In the Olympic Movement Anti-Doping Code, the following provisions of Chapter II are relevant:

“Article 3:

1. *In a case of doping, the penalties for a first offence are as follows:*

.....

2. *In case of*

- a) intentional doping;*
- b) the use of a Masking Agent;*
- c) manoeuvres or manipulation that may prevent or distort any test contemplated in this Code;*
- d) refusal to undergo any test contemplated in this Code;*
- e) doping for which responsibility is imputable to an official or the athlete’s entourage;*
- f) complicity or other forms of involvement in an act of doping by members of a medical, pharmaceutical or related profession.*

The sanctions are as follows:

.....

- b) if the Prohibited Substance used is one other than those referred to in paragraph a) above or if it is a repeat offence (a repeat offence being constituted by a further case of doping perpetrated within a period of ten years after the preceding sanction, whatever form it took and whatever the reason for it, became final):*
 - I) a life ban on participation in any sports event in any capacity whatsoever.*
 - II) a fine of up to US \$1,000,000*
 - III) suspension (between four years and life) from all sports competition.*
 - IV)*

Article 4:

1. *Intentional doping can be proved by a means whatsoever, including presumption.”*

- 6. In the light of the fact that R. has not challenged the test results, and has offered no explanation for the presence of prohibited substances in the samples, it seems to the Panel that it would have been likely that, if the new FISA Rules had been applicable, there would have been a finding of intentional doping, which would have carried a life ban.
- 7. In these circumstances, it seems to the Panel that the following issues arise for decision:
 - (a) Is the decision of the International Olympic Committee Medical Commission challenged, and, if it is, on what grounds?
 - (b) What conclusion do we arrive at in respect of that challenge?
 - (c) Is the decision of the FISA Commission of Enquiry challenged, and, if it is, on what grounds?
 - (d) What conclusion do we arrive at in respect of that challenge?
 - (e) Is the decision of the FISA Executive Committee challenged, and, if it is, on what grounds?
 - (f) What conclusion do we arrive at in respect of that challenge?

- (g) If all of the challenges to the above decisions fail, what powers do we have as to penalty?
8. The hearing by the Panel is a complete re-hearing, and the Panel has "the full power to review the facts and the law": art. R57 of the Code of Sports-related arbitration ("the Code"). Accordingly, each of those issues is potentially relevant. However, it appeared to the Panel from its reading of the parties' written representations that the real issue upon which it would be asked to make a decision was the last issue stated above. At the hearing our pre-hearing understanding of the position was confirmed by R. For completeness, however, we formally find that there is no challenge to the decisions of either the International Olympic Committee Executive Board, or the FISA Commission of Enquiry, or the FISA Executive Board. Thus, the only issue upon which the Panel was required to exercise its "full power to review the facts and the law" was in relation to the sentence imposed on R.
 9. We must, therefore, approach this hearing as one in which it has been established that R. provided a urine sample in which nandrolone above the permitted level was found. The real issue is as to the penalty to be imposed on R. Notwithstanding the absolute terms of FISA's Rules, it is conceded by FISA that the Panel has a discretion on this aspect of the case. It will, therefore, be necessary to consider the CAS's jurisprudence in relation to drugs offences.
 10. It was R.'s case at the earlier hearings to which we have referred that he had not taken any prohibited substances, and that, therefore, the nandrolone found in the urine sample that he provided must have been produced endogenously rather than taken exogenously. In its decision the FISA Executive Committee made the following statement:
"FISA is aware of the current controversy regarding nandrolone, however at the time of this hearing, there is no scientific evidence indicating that such a positive result could come from another source than the intake of exogenous nandrolone or of one of its precursors. However, if serious new scientific evidence would come to light, FISA would be prepared to re-open the case."
 11. That statement was consistent with the provision in Rule 80 (to which we have referred above) that the presence of a prohibited substance in the urine constitutes a rebuttable presumption of voluntary use.
 12. It has, therefore, been open to R. to produce further scientific evidence to FISA to support his contention that the nandrolone that was found in the sample which he provided had been produced otherwise than by the intake of exogenous nandrolone. He has not done so. What he did, prior to the hearing before the FISA Commission of Enquiry, was to have tests conducted by the Anti-Doping Centre in Moscow after his return from the Olympic Games. Those tests showed that in the samples then provided to the Moscow Anti-Doping Centre there was no presence of nandrolone or its metabolites. It is necessary to comment about those tests that, although it is stated that the urine sample was taken on the 29th September 2000, there is, in contrast to the position in relation to the samples tested by the International Olympic Committee Medical Commission, no chain of control documentation which has been provided to the Panel, or which was provided to FISA.

13. The conclusion reached by the Director of the Moscow Anti-Doping Centre was that "there is a need to continue ... scientifically-research actions in future". Clearly, that conclusion is correct. However, the evidence before the Panel does not enable the Panel to conclude that the nandrolone found in the samples provided by R. during the Olympic Games was produced endogenously. Accordingly, the Panel must proceed on the basis that the nandrolone found in those samples was the result of exogenous intake.
14. It remains, therefore, for the Panel to decide whether the penalty imposed by the FISA Executive Committee was appropriate. As has been recorded above, FISA's Rules, which were in force at the time, provided for a life ban for a first offence.
15. As FISA is domiciled in Switzerland and in the light of art. R58 of the Code, the issues that arise in the present case must be decided in accordance with FISA's Rules, CAS's jurisprudence and Swiss Law.
16. As has been demonstrated above, FISA's Rules are unambiguous in providing for a life ban for a first doping offence. However, that sanction could be reduced if it were impeachable under Swiss Law, or in the exercise of the Panel's powers if, in the Panel's opinion, the sentence imposed was disproportionate to the offence. The Panel would require compelling evidence of invalidity under Swiss Law before it felt prepared to interfere with the decision of an International Federation, which had debated the issue of sanctions for doping offences over a long period and which had decided on a sanction which had the support of the sport as a whole. Equally, the Panel would require compelling evidence before it was prepared to exercise its powers to reduce such a sanction imposed by an International Federation as part of its well-known and widely publicised policy on the ground that the sentence was disproportionate to the offence.
17. In the present case, the Panel is in no doubt that the sanction imposed was based upon valid provisions of the FISA Rules which were then in force. Those provisions were well-known and predictable to all rowers, and had provided for the possibility of a life ban for a first doping offence for more than 12 years. In addition, R. had signed the "rower commitment", which clearly confirmed that doping violations in the sport of rowing were punishable with a life ban for a first offence. In the circumstances, therefore, the Panel has no hesitation in finding that the sanction contained in FISA's Rules satisfied what might be called the "predictability test" to which reference was made in CAS Award 94/129: see Digest of CAS Awards 1986-1998, Berne 1998 (CAS Digest) at para. 34 on pp. 197/8.
18. CAS's jurisprudence makes it clear that the sanction imposed on an athlete must not be disproportionate to the offence, and must always reflect the extent of the athlete's guilt: see CAS 95/141 C. v/ FINA, CAS Digest, p. 215 at p. 222; CAS 92/73 N. v/ FEI, CAS Digest p. 153 at p. 159; and CAS 96/156 F. v/ FINA at p. 48 (award not published).
19. In addition to CAS's own jurisprudence, the Panel has, however, to consider whether, as a matter of Swiss Law, the sanction imposed can be impeached. In general, bodies such as FISA enjoy broad autonomy in Swiss Law. This autonomy extends to its decisions in disciplinary

matters: see PERRIN J.-F., *Droit Civil V, Droit de l'association*, Fribourg 1992. By way of example, art. 72 of the Swiss Civil Code permits an association to expel a member, without stating the reasons for its decision, pursuant to properly drafted Rules.

20. Although the CAS undoubtedly has the authority to correct any penalty as it sees fit, it would hesitate for a long time before over-ruling a decision by an International Federation, unless it thought that the Federation's decision was disproportionate to the offence. This is particularly the case when the decision has been taken by the Congress of the relevant International Federation and been confirmed over a number of years, and represents the Federation's clear, well-publicised and well-known policy.
21. While it is clear to the Panel that many International Federations have decided that a two year suspension is appropriate for a first doping offence, it is equally clear that other International Federations, such as FISA, have chosen to impose higher minimum sanctions as a demonstration of their determination and commitment to the eradication of doping in their sport.
22. Although the issue has never been directly considered or decided, either by CAS Panels, or by the Swiss Federal Tribunal in rulings on CAS decisions, it seems to the Panel, as a matter of principle, that a life ban can be considered both justifiable and proportionate in doping cases: see the decision of the Swiss Federal Tribunal in N., J., Y., V. (ref: 5P.83/99). That is so even if the ban is imposed for a first offence.
23. In the present case the Panel has concluded that the life ban on R. from competitive rowing is justified for the following reasons:
 - (a) There is nothing wrong in principle, as a matter of CAS's jurisprudence or Swiss Law, in the imposition of a life ban in a proper case;
 - (b) FISA's principles and policy on doping offences are well-known, and have been in existence for many years;
 - (c) In the present case, R. put forward no mitigation: he simply expressed an inchoate wish that at some stage in the future he would be allowed to be involved in coaching young rowers;
 - (d) In those circumstances, it seemed to the Panel that the sentence imposed was proportional and proper, and that there was no basis upon which the Panel could exercise its undoubted discretion to reduce the sentence.
24. The Panel has no doubt that the penalty imposed was an entirely proper penalty, even for a first offence. In reaching its decision the Panel was particularly struck by the following facts, namely, that:
 - (a) There has been widespread discussion about nandrolone in the sporting world over a number of years: that discussion has largely centred on the difficulty of establishing positively how nandrolone was produced other than by conscious ingestion. There is no reliable medical evidence that nandrolone in large quantities can be produced endogenously. Certainly, no such medical evidence was produced by R. at any stage,

whether to the International Olympic Committee Medical Commission, or to the FISA Commission of Inquiry, or to the FISA Executive Committee, or to the Panel.

- (b) R. has had a number of opportunities at hearings before FISA Commission of Enquiry, the FISA Executive Committee and the Panel to adduce evidence to demonstrate his lack of culpability, but has failed to avail himself of any of those opportunities. In particular, he failed to produce any evidence to the Panel which might have persuaded the Panel that the sentence imposed was disproportionate.
25. The Panel was also of the view that, given the state of knowledge about nandrolone that existed before and at the Olympic Games (and still exists today), R. willingly and foolishly exposed himself to a serious risk by taking such a cocktail of food supplements and other substances as is shown by the evidence that he did take.
26. Accordingly, the appeal is dismissed.
27. Neither the Panel nor FISA can exclude the possibility that, at some future date, medical science will be able to show that a concentration of nandrolone of around 4 times greater than the International Olympic Committee threshold can be produced endogenously, and naturally. At the present date, however, the best medical information available to the International Olympic Committee and FISA does not indicate that such a concentration can be produced in that way.
28. In conclusion, the Panel would like to express its satisfaction that FISA has undertaken to keep R. informed of any material developments in medical science which might be of assistance.
29. The Panel would only wish to add that if, at some future date, R. were to make a properly reasoned application for permission to coach young rowers, such application should be considered carefully and not simply rejected out of hand. Although he may never be able to expunge the stigma which attaches to him as a result of the matters to which we have referred, it is conceivable that with proper safeguards R. could contribute to the development of young rowers in Latvia.

The Court of Arbitration for Sport rules:

1. The appeal filed by R. on the 24th May 2001 is dismissed.
2. (...).