



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2010/A/2236 Diego Roque Navarro v/ ADoP

ARBITRAL AWARD

Delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

President: Mr Conny **Jörneklint**, Chief Judge, Kalmar, Sweden
Arbitrators: Mr João **Nogueira Da Rocha**, Attorney-at-law, Lisbon, Portugal
Prof Dr Ulrich **Haas**, Professor, Zurich, Switzerland
Ad hoc Clerk: Mr Nicolas **Cottier**, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

Diego Roque Navarro, Covilha, Portugal
represented by Mr. Nelson Soares, Attorney-at-law, Amora, Portugal,

as Appellant

and

Autoridade Antidopagem de Portugal (ADoP), Lisboa, Portugal,
represented by Mr François Kaiser and Mr Serge Vittoz, Attorneys-at-law, Lausanne,
Switzerland,

as Respondent

I. FACTUAL BACKGROUND

A. Parties

1. Diego Roque Navarro (hereinafter “the Appellant” or “the Player”) is a professional football player, who is affiliated with the Portuguese League of Professional Football (LPFP).
2. The Autoridade Antidopagem de Portugal (hereinafter “the Respondent” or “the ADoP”) is the Portuguese national anti-doping authority with corporate seat in Lisbon, Portugal.

B. Facts

3. On the occasion of an out-of-competition test performed on a bodily sample provided by the Player on August 21, 2009, the latter tested positive to Human Chorionic Gonadotropin (HCG).
4. The B-sample analysis confirmed the presence of HCG in the urine sample of the Player.
5. HGC is a Prohibited Substance classified under class S.2 (Hormones and related substances) on the ADoP 2009 List as well as on the 2009 List of the World Anti-Doping Agency (“WADA”).
6. The Player was provisionally suspended by the LPFP on September 25, 2009.
7. In a decision dated March 3, 2010, and in application of the Anti-Doping Regulations of the Portuguese Football Federation (PFF), the Disciplinary Committee of the LPFP (hereinafter “the Disciplinary Committee”) imposed on the Player a one-year period of ineligibility, with the period of preventive suspension already served by the Player discounting in the execution of this sentence. During the proceedings, the ADoP provided the Disciplinary Committee with its opinion on the sanction to be applied to the Player. This Disciplinary Committee’s decision was notified to ADoP on March 8, 2010.
8. The Player appealed this decision before the Council of Justice of the Portuguese Football Federation (hereinafter “the Council”), claiming that the minimum suspension of 6 months should apply to his case.
9. In a decision dated June 16, 2010, the Council dismissed the Player’s appeal and confirmed the one-year period of ineligibility imposed on the Player. This new decision was notified to ADoP on June 18, 2010.
10. ADoP changed the decision which resulted from the two instances of the Portuguese football authorities and rendered a new decision dated August 30, 2010 (hereinafter “the Decision”) imposing on the Player a two-year period of ineligibility in application of the Law number 27/2009.

C. Proceedings before the Court of Arbitration for Sport

11. The Player filed a statement of appeal with CAS on September 17, 2010 and requested provisional measures to stay the Decision.
12. The Player filed its appeal brief on September 30, 2010.
13. On October 11, 2011, the ADoP filed its determination on the request for provisional measures.
14. On November 2, 2010, the Deputy President of the Appeals Chamber of CAS dismissed the Player's request for provisional measures.
15. ADoP filed its answer on November 8, 2010.
16. Further to the Parties' agreement, the Panel cancelled the hearing that was initially scheduled for 24 February 2011 and ordered the exchange of a final round of submissions on February 9, 2011.
17. The Appellant filed his final brief on February 17, 2011 and the Respondent filed its brief on February 25, 2011.
18. The Parties returned to the CAS Court Office the signed Order of Procedure on February 21, 2011.
19. In view of the Parties' agreement and pursuant to Article R57 of the Code of Sports-related Arbitration (the "Code") the Panel decided not to hold a hearing in this case. The Panel therefore deliberated and issued its decision on the basis of the written proceedings.

D. The Parties' submissions

20. The Player does not dispute the fact that a prohibited substance, namely Human Chorionic Gonadotropin (HCG), was found in his urine samples collected on August 21, 2009. Without providing any further evidence, the Player claims in his final brief that he did not ingest any illegal substance, consciously or voluntarily and that he suspects that he tested positive due to a "*physiologic or even pathologic reason*".
21. The Player's main submissions relate to the issue of the applicable law *ratione temporis* as well as to the compliance of the Decision with general principles of Portuguese law.
22. Such submissions may be summarized, in essence, as follows:
 - a. In the Decision, ADoP declared that the Disciplinary Committee had violated the provisions of article 58, number 1, sub-paragraph a) and of article 63, number 1 of the Law number 27/2009 of June 19, 2009 (hereinafter "the new Law"). The Appellant argues that the new Law, or at least its regime of sanctions, could not apply to his case, on the basis of articles 62, 74 and 76 of this same new Law. Only

the regime of sanctions of article 10 of the Anti-Doping Regulations (RCA) of the Portuguese Football Federation (FPF) (hereinafter "the RCA") which were in force when the facts took place, namely on August 21, 2009, should apply, according to the Appellant.

- b. The Player claims in fact that the rules governing the issue of the application of the new Law *ratione temporis*, notably article 76 of the new Law, provide that the sanctions foreseen under the new Law are not applicable until the new Law has been integrated into the federative or professional regulations of the Portuguese Football Federation or any other relevant sport entity. Those same rules provide for a 120-day period to adapt the relevant regulations. Until then, only the federative regulations which are in force at the moment of the relevant facts and which are registered at the National Anti-Doping Council (hereinafter "the CNAD") apply, as allegedly provided under article 76 numbers 2 and 3 of the new Law. The 120-day period was still running on August 21, 2009.
- c. On the other hand, the RCA that were in force on August 21, 2009 provided under article 10 par. 1 lit. a for a sanction "*from six months to two years of suspension of sports activity, in the case of a first infraction.*"
- d. The Appellant stresses further that according to article 75 of the new Law, an order of the competent member of the Portuguese government was still required in order for the new Law to enter into force. Such order, allegedly, was given on October 1, 2009 with effect from October 2, 2009.
- e. As the ADoP applied the framework of sanctions provided under the new Law, namely a period of suspension between two and eight years for a first offense, the Appellant states that the principle of legality, as provided under the Portuguese Constitution, was violated.
- f. Based on the foregoing, the Appellant argues that a one-year suspension was a proportionate decision under the RCA, considering that this was a first offense.
- g. The Appellant then puts forward various violations of procedural rights, namely the right to be heard, provided under article 32 par. 5 of the Portuguese Constitution and under article 62 of the new Law, the prohibition of the *reformatio in pejus*, provided under article 207 of the Disciplinary Regulations of the LPFP and article 409 of the Portuguese Code of Criminal Procedure, and the principle of *res judicata*, provided under article 282 par. 3 of the Portuguese Constitution and article 56 of the rules of the Council of Justice of the Portuguese Football Federation.
- h. The Appellant's right to be heard was allegedly violated as the ADoP did not hear him before issuing the Decision on the basis of the new Law. The Appellant was never informed that the new set of sanctions would apply to him. The violation is so important that CAS jurisprudence on the curing effect of appeals before its jurisdiction cannot apply, to the Appellant's view.
- i. The Appellant claims further that ADoP, despite having the right to modify the previous decision of the Disciplinary Committee, can only exercise such right within the 60-day deadline fixed under article 57 par. 3 of the new Law. The right of

Tribunal Arbitral du Sport
Court of Arbitration for Sport

ADoP to amend a decision from another jurisdictional entity cannot be exercised at any time. When ADoP decided to rule on the case, namely on July 8, 2010, its right had expired.

- j. As ADoP did not file any appeal against the previous decisions and as it acted only after the Council's decision was final, the Appellant argues that it then cannot "pick" the case and aggravate the sanctions "unilaterally".
 - k. The Appellant sees in the alleged prerogative of ADoP to modify any decision when it deems it necessary a system which is not supported under any State of Law.
- 23 Based on these submissions, the Athlete filed the following request for relief : *"The Appellant formally requests the revocation of the referred decision and his relief"*. In his appeal brief and in his final submissions, he specified that the challenged decision should be declared null and void and that the decision of the Disciplinary Committee of 8 March 2010 should be reinstated.
- 24 The ADoP's reply to the Player's submissions can be summarized, in essence, as follows:
- a. The Respondent argues that the new Law applies to this case. It claims that the new Law entered into force on June 19, 2009 when it was published in the "Dario -da Republica".
 - b. As to the issue of the transitory period provided under article 76 par. 3 of the new Law, the Respondent explains that the Decree-Law 183/97 (hereinafter "the old Law") was repealed by the new Law according to the latter's article 77. As the RCA reflected the old Law at the Portuguese Football Federation's level, the RCA were also repealed. The Respondent is therefore of the opinion that article 76 par. 3 of the new Law is pertinent to the framework of applicable sanctions only to the extent that this framework is not in contradiction with the new Law.
 - c. As article 10 par. 1 lit. a of the RCA is not compliant with article 58 par. 1 of the new Law, the Respondent argues that such provision is not applicable since June 19, 2009. The Respondent states that its position is shared by the Council in its decision dated June 16, 2010.
 - d. As to the Appellant's submissions on the violation of his right to be heard, the Respondent explains that the Appellant could give his opinion on the applicable law back in January 2010, in the course of the proceedings before the Disciplinary Committee. The Appellant chose not to submit any comment.
 - e. ADoP's position on the applicable law was already expressed in its advisory opinion dated February 1, 2010 and the issue was covered in the Disciplinary Committee's decision. The Appellant could also express his views on this issue before the Council, which he failed to do.
 - f. Eventually, the Respondent refers to CAS case law on Art. R57 of the Code, notably CAS 2008/A/1545 with its references, according to which the CAS appeal arbitration procedure cures any infringement of due process within the context of internal disciplinary proceedings of sports organisations.

- g. The Respondent then deals with the issue of the *reformatio in pejus* and of the right for the ADoP to modify previous decisions. The Respondent stresses first that, to its point of view, should the Panel reject the application of the material provisions of the new Law, at least its procedural provisions should apply, as the prohibition of the retrospective application of law and the principle of *lex mitior* are not applicable to procedural rules. The Respondent refers there to CAS case law, notably CAS 2000/A/274.
- h. The Respondent claims further that when ADoP used its right to modify a previous anti-doping decision as provided under article 57 par. 4, the new Law had already entered into force. Based on article 57 par. 1 of the new Law, ADoP has the responsibility of the application of the sanctions, which is delegated to the sport federations. As provided under article 26 par. 1 of the new Law, the only duty of ADoP during the proceedings before the sport federations' jurisdictional bodies is to issue "*binding opinions on the mitigation of sanctions on the basis of exceptional circumstances defined by the World Anti-Doping Code*". The new Law does not provide for a right of appeal of ADoP. On the other hand, the new Law gives to ADoP the prerogative to control the correct application of the Anti-Doping rules and to change the final decisions taken if it finds it necessary.
- i. According to the Respondent, the 60 day deadline to issue a decision applies to sport federations' jurisdictional bodies. This does not apply to ADoP's right to modify final decisions. This is reflected by the fact that the deadline is set before article 57 par. 4 of the new Law, which deals with ADoP's right to modify final decisions.
- j. In any case, it is the Respondent's view that this deadline should only be considered as a merely procedural guideline.
- k. The Respondent eventually provides the Panel with a legal opinion on the application to the present case of the principles of *reformatio in pejus* under Portuguese law. The conclusion of such legal opinion is that this principle does not apply to these proceedings.
- l. With respect to *res judicata*, the Respondent deems that such principle was not breached in casu since a decision of the federations disciplinary bodies can enter into force only if ADoP does not exercise the prerogative granted to it by article 57.4 of the new Law.
- m. Coming then to the material aspects of the case, the Respondent stresses that HCG is on the ADoP 2009 Prohibited List under class S2 and is therefore prohibited at all times. The violation by the Appellant of article 3 par. 2 lit. a of the new Law being established by the presence of HCG in his bodily sample and no mitigating circumstance being established, a two-year sanction is proportionate. The Respondent stresses that the HCG has an important doping effect and constitutes a risk for football. The Appellant did not provide any explanation on the possible reasons for such a positive result, namely on how the prohibited substance entered his system. No absence of fault or significant fault as required by the World Anti-Doping Code, the new Law and CAS case law, was proven by the Appellant. The issue was not even tackled by the Appellant in his appeal brief.

- n. According to the Respondent, a minimum sanction of two years is therefore justified both under the new and the old laws and regulations related to them. Reference is made by the Respondent in this respect to CAS 2006/A/1153.

II. IN LAW

E. CAS Jurisdiction and admissibility

25. The jurisdiction of CAS is not disputed and all parties signed the order of procedure, where a specific reference is made to the competence of CAS based on article 57 of the new Law.
26. As to the time limit to lodge an appeal before CAS, in the absence of a time limit set in the new Law, article R49 of the Code applies and the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The appeal was filed on September 17, 2010 against the ADoP's Decision, which is dated August 30, 2010. The appeal was lodged within the time limit set forth by the Code, which is undisputed.
27. It follows that the appeal is admissible, which is undisputed.

F. Applicable law

28. Art. R58 of the Code provides the following:

"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. "

29. The Panel notes that the Decision was issued by the ADoP the Portuguese anti-doping organization, on the basis of article 18 par. 1 lit. n) of the new Law.
30. The Appellant argues that the new Law, notably its regime of sanctions provided under article 58, does not apply to the present case as the new Law had not been implemented yet at the moment when the anti-doping test was performed on the Athlete's bodily sample, namely on August 21, 2009.
31. The Respondent claims that the new Law entered into force when it was published on June 19, 2009. Only the new Law could apply as the old Law was repealed by the new Law upon its publication.
32. According to article 76 "Transitory provision" of the new Law, *"the regulations of federations or professional leagues shall be adapted to the provisions of this law (red. the new Law) within 120 days from the date of entry into force of this law. (par. 1). The regulations referred to in the preceding paragraph shall be registered with ADoP. (par. 2). Until this registration, the sanctions applicable to athletes and other offenders are those set out in the federation regulations that were in force and registered for this purpose with CNAD. (par. 3)."*

Tribunal Arbitral du Sport
Court of Arbitration for Sport

33. Article 77 “Repealing clause” of the new Law provides that the old Law is repealed by the new Law.
34. Article 12 “Federation Anti-Doping Regulations” provides that “*Sports federations are required to adapt their anti-doping regulations: a) to the rules established in this law and other applicable regulations; b) to the standards established under the international convention against doping in sport which Portugal has accepted or may accept; c) to the rules and guidelines established by WADA and by the respective international sports federations.* (par. 1). *The doping control regulations are registered with ADoP.* (par. 2). *Any noncompliance with the provisions of the preceding paragraphs implies, while the non compliance remains, that the sports federations may not benefit from any type of public support, without prejudice to any other sanctions to be applied.*(par. 3)”
35. Article 14 “Mandatory content of federation anti-doping regulations” provides, as to the applicable regime of sanctions, that the federation doping control regulations must contain a “*definition of disciplinary sanctions applicable to those responsible for anti-doping rule violations, whether they are athletes or athlete support personnel.*” (article 14 par. 1 lit. c) of the new Law).
36. After having carefully reviewed the Parties’ submissions on the applicable law, notably the expert opinion provided by the Respondent, and after having duly taken into consideration the relevant rules of the new Law, as quoted above, the Panel came to the following conclusion.
37. It stems from article 76 in conjunction with article 12 and 14 of the new Law that this new Law is not directly applicable but needs to be implemented in the relevant “Federation Anti-Doping Regulations”. Only the regulations of the relevant federation duly registered before the competent authority, namely ADoP for the new regulations, whereas it was CNAD for the old ones, can apply. The new Law does not provide for a direct application of its regime of sanctions but only requests a “*definition of disciplinary sanctions*” in the federation anti-doping regulations (see article 14). If such definition does not exist, the federation in breach shall face sanctions and “*may not benefit from any type of public support*” (see article 12 par. 3). Eventually, article 76 par. 3 of the new Law specifically provides that “*the sanctions applicable to athletes and other offenders are those set out in the federation regulations that were in force and registered for this purpose with CNAD*” until the new federation anti-doping regulations are registered with ADoP.
38. Based on the foregoing, the Panel finds that the new Law, notably the regime of sanctions that it provides under article 58, is not directly applicable. In this respect, the Panel cannot follow the conclusions of the expert opinion provided by the Respondent and finds that the new Law clearly and expressly provides for its implementation into the federation regulations, excluding any direct application of its provisions.
39. On August 21, 2009, the new regulations of the Portuguese Football Federation had not been issued and therefore not been registered with ADoP, which is undisputed. In fact, the new regulations of the Portuguese Football Federation were registered with ADoP on June 11, 2010.

40. Therefore, in accordance with article 76 par. 3 of the new Law, the sanctions applicable to the Player shall be those set out in the federation regulations that were in force at that time, namely the RCA of the Portuguese Football Federation, duly registered before CNAD.
41. As far as the other aspects of the new Law are concerned, the Panel follows partly the argument of the expert opinion and considers that as long as the new federation regulations have been amended and registered before ADoP, such new provisions shall apply to any pending case, even if the relevant facts have taken place before the registration of the new provisions. In other words, the non-retroactive effect of the new federation regulations is limited to the new regime of sanctions as provided under article 76 par. 3 of the new Law.
42. The Panel will thus decide the present case according to the provisions of the new Law taken over by the Portuguese Football Federation in its new regulations, subject to the regime of sanctions which will still be governed by the RCA which were in force on August 21, 2009, namely article 10 RCA.

G. Merits

Violation of procedural rights, namely the right to be heard, the prohibition of reformatio in pejus and the principle of res judicata

43. The Appellant alleges first that his right to be heard was violated by ADoP, as he did not have the opportunity to be heard before this authority. ADoP argues that the Appellant had the opportunity to raise arguments, notably on the question of the applicable sanctions, before the two previous jurisdictional authorities of the Portuguese Football Federation. ADoP refers further to the CAS Case law on the “curing effect” of an appeal to CAS with respect to procedural rights.
44. The Panel reviewed carefully the system put in place by the new Law and implemented at the federation level. It was surprised that after two levels of internal jurisdiction where an athlete is part to the procedure whereas ADoP is not, ADoP can simply assess the decision taken by the competent body of the relevant federation and then replace it on the simple basis of article 18 par. 1 lit. n and article 57 par. 4 of the new Law, together with article 47 par. 3 of the new anti-doping regulations of the Portuguese Football Federation, without the athlete being materially part to the procedure before ADoP.
45. Nevertheless, as rightly mentioned by the Respondent, the CAS case law constantly stressed that the violation of a procedural right such as the right to be heard is cured by an appeal before CAS. The Panel is indeed ruling *de novo* and the Parties have an ample opportunity to provide the Panel with their submissions and to request to be heard during a hearing (see CAS 2008/A/1545, CAS 2010/A/1920 with references). The Panel stresses that this case law is applied strictly independently from the circumstances of the violation before the previous court, so that the Appellant’s submission in this respect must be rejected.
46. Although the system in place in Portugal seems to trigger the risk of a multiplication of appeals before CAS in order to cure the alleged violation of the right to be heard, the

Panel therefore finds that the alleged violation of the right to be heard of the Appellant is not a valid ground to annul the Decision.

47. The Appellant then claims that the principle of the prohibition of the *reformatio in pejus* was violated in the Decision.
48. The Panel observes first that the regime put in place by the new Law and the new regulations of the Portuguese Football Federation does not provide ADoP with a right to appeal but with the right to check and amend decisions taken by jurisdictional bodies of sport federations. The Appellant is therefore wrong when he claims that ADoP cannot issue a new decision when it did not appeal against the previous ones.
49. Secondly, the Panel finds that the purpose of ADoP's right to amend decisions is obviously to make sure that the principles of the new Law and the sanctions provided by the corresponding regulations were properly applied in all aspects and not only for the benefit of the athletes. Should ADoP not be in a position to issue new sanctions which would be stronger than the ones issued by previous jurisdictional authorities, this would clearly contradict the objective of the new Law. It would simply mean that ADoP could only amend decisions when it finds that the athlete's sanction is too strong. Such restricted review does not seem plausible and is hardly in line with the objective of the new rules.
50. As rightly mentioned in the expert opinion provided by the Respondent, Article 57 of the new Law provides that, as the delegator of the state disciplinary authority, ADoP has full power to review the case *de novo* and to replace the decision with a new one. This seems to be confirmed by the Portuguese Code of Administration Procedure, quoted by the expert in his opinion.
51. The same reasoning applies to the issue of *res judicata* raised by the Appellant. As ADoP's prerogative to amend previous decisions is clearly expressed in the new Law and the relevant regulations, ADoP cannot be bound by the principle of *res judicata*. The application of this principle to ADoP would require that it be granted a right to appeal (subject to a deadline) against decisions taken by previous jurisdictional bodies. We have seen that the new Law did not choose this solution.
52. The Appellant then explains that according to article 57 par. 3 of the new Law, "*no more than 60 days may elapse between the notification of an anti-doping rule violation and the application of its disciplinary sanction.*" The Player claims that this deadline limits ADoP's right to modify a previous decision.
53. As rightly mentioned by the Respondent, the Panel finds that the 60-day deadline applies to the sport federations' jurisdictional bodies and not to the ADoP. The deadline is indeed fixed under article 57 par. 3 of the new Law, whereas ADoP's right to change decisions is foreseen under article 57 par. 4 of the new Law. Furthermore, article 57 par. 4 provides for ADoP's right to amend decisions "*at any time*". This wording excludes the application of the 60-day deadline to ADoP's case. Nevertheless, the Panel doubts that one can attribute such an absolute value to this deadline. Yet this issue does not need to be further developed as the deadline does not apply to the Decision.
54. Eventually, and in response to the Appellant's general remark on the admissibility of ADoP's prerogatives in any State of Law, the Panel stresses that such prerogatives are

based on Portuguese State Law. In the absence of a decision of a Portuguese constitutional court, invalidating the new Law and the corresponding federation regulations, the Panel has not sufficient grounds not to recognize ADoP's prerogatives.

55. Based on all the above, the Panel finds that the Appellant's submissions with respect to above matters must be rejected.

Doping offence

56. The Panel turns now to the material part of the case.
57. Article 3 par. 2 lit. a) of the new Law provides that "*the presence of a prohibited substance or its metabolites or markers in an athlete's sample shall constitute an anti-doping violation.* Article 1 RCA provides for the same rule.
58. Based on the analysis of the A and B samples of his bodily specimen, the Player was tested positive to Human Chorionic Gonadotropin (HCG), a Prohibited Substance, and not a Specified Substance, classified under class S.2 (Hormones and related substances) on the ADoP 2009 List as well as on the WADA 2009 List. As indicated in the ADoP 2009 List, HCG is prohibited at all times (in and out-of-competition).
59. The ADoP 2009 List provides further that "*unless the Athlete can demonstrate that the concentration was due to a physiological or pathological condition, a Sample will be deemed to contain a Prohibited Substance (as listed above) where the concentration of the Prohibited Substance or its metabolites and/or relevant ratios or markers in the Athlete's Sample satisfies positively criteria established by WADA or otherwise so exceeds the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production. If a laboratory reports, using a reliable analytical method, that the Prohibited Substance is of exogenous origin, the Sample will be deemed to contain a Prohibited Substance and shall be reported as an Adverse Analytical Finding.*" (comment to Class S2, p. 4).
60. The analysis of the samples was conducted by a WADA accredited laboratory and nothing in the file can lead to the conclusion that there has been a departure from the international standards which would cause an adverse analytical finding. The analytical method was obviously reliable. All the above is undisputed before CAS.
61. The Player tested positive to HCG and nothing in the file shows that the Player could demonstrate that the concentration was due to a physiological or pathological condition. On the other side, the information provided to the Panel with the written submissions shows that the Player's bodily sample showed a concentration of HCG well above 1 or 2 mIU/ml. Once again, the Player did not, and did not even try to, demonstrate the existence of any pathological cause to justify the concentration of HCG detected on him.
62. Based on the foregoing, the Panel finds that the Player committed an anti-doping violation which constitutes a disciplinary offence, as provided under article 54 of the new Law.

Period of ineligibility

63. As mentioned above, the sanctions applicable to the Appellant are those set out in the RCA which were in force on August 21, 2009 when the anti-doping test was performed.
64. Article 10 RCA provides that:
- “1. Practising sportsmen considered responsible for a positive result in the control test to which they have been subject under the terms of the present Regulations will be punished in the following manner:*
- a) From six months to two years of suspension from the sports activity, in the case of a first infraction;*
 - b) From two years to four years of suspension from the sports activity, in the case of a second infraction;*
 - c) From ten to twenty years of suspension from the sports activity, in the case of a third infraction;*
- 2. The sentences referred to in the previous number may be attenuated extraordinarily under the terms of the Anti-Doping Control Law.”*
65. The Player did not put forward any mitigating circumstance which could justify a reduction of the sanction for extraordinary reasons as provided under article 10 par. 2 RCA. On the other hand, no aggravating circumstance was mentioned by the Respondent.
66. Based on the foregoing, the Panel reviewed carefully the Decision as well as the two previous decisions taken by the Portuguese Football Federation’s jurisdictional bodies in order to find any hint of a mitigating or aggravating circumstance in the present case.
67. The Panel noted that ADoP justifies its Decision to sanction the Player with a two-year ineligibility period for the reason that the Portuguese Football Federation should have had implemented the new Law on August 21, 2009. The ADoP mentioned as well that the Portuguese Football Federation was affiliated with FIFA, which adopted the World Anti-Doping Code. It then added that Portugal had undersigned the Anti-Doping Convention of the Council of Europe and the International Convention Against Doping in Sport of UNESCO.
68. As to the application of the sanctions provided under the new Law, the Panel already explained the reasons why those sanctions were not applicable in the present case. As to the application of the World Anti-Doping Code and of the international conventions quoted in the Decision, ADoP, rightly, does not refer to it in its written proceedings before CAS but only in the Decision. According to a well established CAS jurisprudence (see *inter alia* CAS 2008/A/1569), the World Anti-Doping Code is not directly applicable and there is no submission in the file which could lead to another conclusion with respect to the Anti-Doping Convention of the Council of Europe and the International Convention Against Doping in Sport of UNESCO.
69. The ADoP mentions, however, in the Decision that the Council itself had found that a two-year ineligibility period should have applied. The Panel reviewed the Council’s decision and found that the Council grounded its position on no other arguments than the ones expressed by ADoP. At the end, the Council did not apply the minimal

sanction of 2 years provided by the new Law only because it considered itself to be bound by the prohibition of the *reformatio in pejus*.

70. Based on the foregoing, neither the ADoP Decision nor the Council's decision provide any information on the existence of mitigating or aggravating circumstances. The Panel notes, however, that both ADoP and the Council refer to a two-year ineligibility period, which, under the new Law, is the minimum suspension period for a first offence. This tends to show that those two authorities did not see any aggravating circumstance justifying to sanction the Player with a period of ineligibility which would be longer than two years.
71. The Panel then reviewed the decision of the first instance, namely the Disciplinary Committee of the Portuguese Football Federation. It noted that the Disciplinary Committee excluded the application of article 10 par. 2 RCA on the basis of the negative binding opinion provided by ADoP. The Disciplinary Committee then referred to article 10 par. 1 lit. a) RCA which provides for a scale of sanctions between six months and two years for a first infraction – which is the case here.
72. The Disciplinary Committee decided to sanction the Player with a one-year ineligibility period “*taking into account the period of provisional suspension served by the defendant in compliance with article 64.2 of Law 27/2009, of 19 June (red. the new Law).*”
73. The Respondent claims that if the Panel decides to apply article 10 RCA, it would then have to sanction the Player with the maximum ineligibility period of two years for a first offence. This would be justified, according to the Respondent, by an interpretation of the Regulation in a manner which would be in conformity with the currently applicable international standards and the regime put in place by the new Law.
74. This reasoning was already rejected by previous CAS panels in similar although not completely identical cases. In CAS 2008/A/1576 ad nr 97, the CAS panel explained that applying the 2 years “internationally recognized” ineligibility period “*would lead to constantly extend the period of ineligibility independently from the particular circumstances of the case*”. In that case, the applicable sanction was fixed at one year with a possibility to extend it up to two years in case of aggravating circumstances. In the present case, the situation is slightly different in the sense that article 10 RCA provides for a scale of sanctions between six months and two years and not for a reducible or extendable average period.
75. This excludes automatically sanctioning the Player with a two-year period of ineligibility in order to meet international standards but provides for enough flexibility to sanction athletes on a case by case basis.
76. Reviewing the present case *de novo* in application of article R57 of the Code, the Panel considers that in view of the absence of any mitigating or aggravating circumstances, of the lack of any elements that would plead in favor of negligence, and not of intent, on the Appellant's side, and in view of the substance at stake, neither the sanction imposed by ADoP nor the sanction imposed by the Disciplinary Committee should be confirmed.

Tribunal Arbitral du Sport
Court of Arbitration for Sport

77. Taking into account the circumstances of the present case and having considered the Parties' submissions and requests for relief, the Panel indeed decides to sanction the Player with a 18 month period of ineligibility.
78. Since in application of article 64 paragraph 2 of the new Law, which was already applied by the Disciplinary Committee, the period of provisional suspension already served shall be credited against the total period of ineligibility, the 18 month ineligibility period imposed on the Player should not start on the date of notification of the hearing decision (article 64 paragraph 1 of the new Law) but on the first day of the Player's provisional suspension, *id est* on September 25, 2009.

H. Costs

79. Pursuant to article R64.4 of the Code, the CAS Court Office shall, at the end of the proceeding, determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS. In accordance with the constant practice of the CAS, the award states only how these costs are to be apportioned between the parties. Such costs are later determined and notified to the parties by separate communication from the CAS's Court Office. Furthermore, as a general rule and in application of article R64.5, the award grants to the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceeding and the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.
80. Considering these different elements, the Panel deems that each party shall bear its own costs whereas ADoP shall bear 2/3 of the costs of this arbitration. Such costs will be determined and notified by a separate communication from CAS.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal of the Player, Diego Roque Navarro, is partially upheld.
2. The decision issued by the Autoridade Antidopagem de Portugal (ADoP) on August 30, 2011 is set aside and replaced by the present award.
3. The Player, Diego Roque Navarro is sanctioned with a period of ineligibility of 18 months starting on September 25, 2009.
4. The costs of the arbitration to be determined and served on the Parties by the CAS Court Office shall be borne for 2/3 by the Autoridade Antidopagem de Portugal (ADoP).
5. Each party shall bear its own costs.
6. All other motions or prayers for relief are dismissed.

Lausanne, 12 April 2011

THE COURT OF ARBITRATION FOR SPORT



Mr. Conny Jörnekling
President of the Panel