



Arbitration CAS 2015/A/3881 Fatma Omar v. International Paralympic Committee (IPC), consent award of 13 May 2015

Panel: Prof. Michael Geistlinger (Austria), President; Prof. Laurence Boisson de Chazournes (France); Mr Michele Bernasconi (Switzerland)

Paralympic powerlifting

Doping (clomiphene)

Duty of the CAS Panel to verify the bona fide nature of a settlement agreement embodied in an arbitral award

Any settlement agreement may be embodied in an arbitral award rendered by consent of the parties. It is the task of the CAS panel to verify the *bona fide* nature of a settlement agreement to ensure that the will of the parties has not been manipulated by them to commit fraud and to confirm that the terms of the settlement agreement are not contrary to public policy principles or mandatory rules of the law applicable to the dispute.

THE PARTIES

1. Ms Fatma Omar (hereinafter referred to as the “Appellant”) is an Egyptian athlete in the sport of International Paralympic Committee Powerlifting.
2. The International Paralympic Committee (hereinafter referred to as “IPC” or the “Respondent”) is the global governing body for the Paralympic Movement and, in particular, of the Paralympic Games. In addition, the IPC is the International federation of several sports, including IPC Powerlifting, it has its registered office in Bonn, Germany.

I. FACTS

3. On 8 April 2014, the Appellant competed at the 2014 IPC Powerlifting World Championships in Dubai, United Arab Emirates (hereinafter referred to as the “Event”). The Event was approved by IPC Powerlifting and the National Anti-Doping Organization of the United Arab Emirates had been assigned the function of sample collection authority.
4. After the Appellant had finished her competition on 8 April 2014, she was requested to provide a urine sample for doping control for an in-competition test.

5. The Appellant provided the sample and did not disclose on the doping control form the use of any medication and/or supplement used in the last seven days before the doping control test. She signed the form without any comment.
6. On 15 May 2014, the WADA accredited laboratory in Barcelona, Spain, reported an Adverse Analytical Finding for Clomiphene. This substance is classified under S4. Hormone and Metabolic Modulators on the WADA 2014 Prohibited List and is prohibited both in-competition and out-of-competition. It is considered a “specified substance”.
7. The initial review by the IPC determined that the Appellant did not have an applicable Therapeutic Use Exemption (TUE) for this substance and that there was no departure from the applicable WADA International Standards.
8. On 16 May 2014, the IPC notified the Appellant through the National Paralympic Committee of Egypt of the Adverse Analytical Finding and the Appellant was advised that she was provisionally suspended from that day and that, unless Article 10.4 or 10.5 of the IPC-Code applied, the standard sanctions would be imposed. The Appellant was also advised of her rights and provided a form titled “Letter of Decision”.
9. The Appellant returned the signed Letter of Decision before a prolonged deadline and stated that she requested the opening and analysis of the B sample and that she did not accept that she had committed an Anti-Doping Rule Violation and the respective consequences. She argued that there was an apparent departure from the applicable International Standards that caused the Adverse Analytical Finding.
10. The B sample analysis took place on 11 June 2014 and the analysis of the B sample confirmed the results of the A sample analysis.
11. An expedited hearing through written submissions was held on the provisional suspension and ended with the Hearing Body having upheld the provisional suspension.
12. On 25 July 2014, a hearing by teleconference before the IPC Anti-Doping Committee (hereinafter referred to as “IPC Committee”) took place in order to address the possible Anti-Doping-Rule Violation.
13. The IPC Committee found that the Appellant has failed to show how the prohibited substance entered her body. The IPC Committee summarised its finding as follows:

“Based on the material before it, the Hearing Body can only find that Mrs. Omar has failed to show how the prohibited substance that was discovered in her April 2014 sample entered her body. If the Hearing Body had evidence of use of the prohibited substance after the doping control of February 2014, the finding might be different. But there is no such evidence. For example, the Athlete did not declare the prohibited substance on the doping control form”.

The IPC Committee, thus, found that a reduction of the regular sanction based on the provisions of arts 10.4 and 10.5 IPC Code was excluded.

14. The IPC Committee recommended to the IPC Governing Board on 26 November 2014:

- “a. pursuant to Article 7.5 of the Code, confirmation of the provisional suspension from the date of notification, 16 May 2014;*
- b. pursuant to Article 9 of the Code, disqualification of the results obtained in the competition on 08 April 2014, including forfeiture of any medals, points and prizes;*
- c. pursuant to Article 10.1 of the Code, disqualification of all of the Athlete’s individual results obtained in the Event with all consequences, including forfeiture of all medals, points and prizes;*
- d. pursuant to Article 10.2 of the Code, a two (2) year period of ineligibility shall be imposed on the Athlete;*
- e. while the period of ineligibility would normally start on the date of the Governing Board’s decision (Article 10.9 of the Code), here pursuant to Article 10.9.3 of the Code the Athlete shall receive credit for the period of provisional suspension, and shall therefore be declared ineligible from 16 May 2014 (date of notification) until 15 May 2016; and*
- f. pursuant to Article 10.11 of the Code and the IPC Handbook, Section 2, Chapter 1.2 (‘Rules on the imposition of financial sanctions for anti-doping rule violation’), a financial sanction of EUR 1,500 shall be imposed on the Athlete”.*

15. On 30 November 2014, the IPC Governing Board accepted the recommendation of the IPC Committee, the contents of which (see at para 2.12), thus became part of the IPC Governing Board’s decision (hereinafter referred to as the “Challenged Decision”).

16. The Challenged Decision was notified to the Appellant through the Egyptian Paralympic Committee on 10 December 2014.

II. PROCEEDINGS BEFORE THE CAS AND EVENTS DURING THESE PROCEEDINGS

17. On 16 and 22 December 2014, the Egyptian Paralympic Committee on behalf of the Appellant approached the CAS by letters in English appealing the Challenged Decision, but not fully fulfilling the requirements of a statement of appeal as per art R48 of the Code of Sports-related Arbitration (hereinafter referred to as the “CAS Code”).

18. On 22 December 2014, the CAS Managing Counsel & Head of Arbitration set a deadline of 26 December 2014 for completion of the appeal.

19. On 25 December 2014, the Egyptian Paralympic Committee together with the Appellant’s Counsel submitted the Appellant’s statement of appeal, which as specified by letters of the Appellant’s Counsel of 6 and 7 January 2015, was to be understood also as appeal brief. The combined statement of appeal and appeal brief was done in French together with an English translation and with exhibits drafted in English and in French. The Appellant requested that the CAS proceedings be conducted in French.

20. On 9 January 2015, the CAS Counsel *inter alia* set a deadline of 10 days for the Respondent to object to the use of the French language.
21. On 20 January 2015, the Respondent objected to the use of the French language referring to art 11.1 IPC Constitution which provides for English as official language of the IPC which was accepted by the Appellant by virtue of signing the Eligibility Code Form. It further objected to the arbitrator nominated by the Appellant and proposed to have the case decided by a Sole Arbitrator.
22. On 2 February 2015, the President of the CAS Appeals Arbitration Division ordered that the dispute be submitted to a three member Panel and that the language of the procedure shall be English, but that no translations shall be requested unless ordered otherwise by the Panel. A deadline of 10 days was set for the Respondent to submit its Answer.
23. On 9 February 2015, the Respondent submitted its statement of defence and proposed a second round of written submissions.
24. On 11 February 2015, the CAS Counsel set a deadline of 16 February 2015 for the Appellant to express her position on a second round of written submissions. On 18 February 2015, this deadline was prolonged to a week from receipt of the Answer of the Respondent by courier. Due to a strike in Tunisia, the Answer of the Respondent was delivered to the Appellant only on 2 March 2015.
25. On 9 March 2015, the Appellant accepted the proposal of having a second round of written submissions.
26. On 9 March 2015, the CAS Counsel set a deadline for the Appellant to submit a second brief on or before 24 March 2015. The Respondent were given 15 days from receipt of the Appellant's second brief for its second submission.
27. On 24 March 2015, the Appellant submitted her second brief.
28. On 25 March 2015, the Parties were informed on the composition of the Panel consisting of Mr Michael Geistlinger as President and Mrs Laurence Boisson de Chazournes and Mr Michele A.R. Bernasconi as Arbitrators.
29. The Respondent submitted its second brief on 9 April 2015.
30. On 9 April 2015, the Appellant and on 14 April 2015, the Respondent signed the Order of Procedure, where they expressly agreed to CAS having jurisdiction.
31. By exchange of letters of 13, 14, 17 and 26 April 2015, the parties agreed that Ms Fatma Omar will be available by phone for the hearing and that Dr Khadija Belhor Jelliti, who submitted her

CV and indicated the topics she will be available to address as expert witness nominated by the Appellant, will also be available by phone.

32. The hearing took place at the CAS Court office on 30 April 2015. The parties were represented by their attorneys. Ms Omar was heard by phone with the help of an interpreter.
33. Towards the end of the hearing, a settlement was reached between the Parties and the Parties signed copies of the settlement agreement (hereinafter referred to as the “Settlement Agreement”) and submitted signed copies to the CAS.
34. The Parties asked the Panel to ratify the following Settlement Agreement and incorporate it into a consent award:

Settlement Agreement

between

Ms Fatma Omar

and

the International Paralympic Committee (“IPC”)

(hereinafter the “Parties”)

The Parties agree on the following:

1. *In application of article 10.4 of the IPC Anti-Doping Code, the suspension imposed to Ms Fatma Omar by the International Paralympic Committee Governing Board on 30 November 2014 shall be reduced to one (1) year and shall therefore end on 15 May 2015.*
2. *In all other respects, the decision of the IPC Governing Board of 30 November 2014 shall be confirmed.*
3. *The Parties agree to keep the present Settlement Agreement confidential until the issuance of the final Consent Award by CAS.*
4. *Each party will bear its own legal costs.*
5. *All other motions and prayers for relief shall be rejected.*
6. *The Parties request the Panel to issue a Consent Award confirming the present Settlement Agreement.*

Lausanne, 30 April 2015

On behalf of Ms Fatma Omar:

Mr Sami Boussarsar

On behalf of the International Paralympic Committee:

Mr Mike Townley

III. CAS JURISDICTION

35. The jurisdiction of CAS derives from art R47 para 1 of the CAS Code read together with arts 13.2.1 and 13.2.2 para 1 (a) IPC Code and from the signature of the Parties of the Order of the Procedure.

36. Art R47 para 1 of the CAS Code reads as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed With CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body”.

37. Arts 13.2.1 and 13.2.2 para 1 (a) of the IPC Code read as follows:

“13.2.1 Appeals Involving Consequences Imposed by the IPC

In cases arising from consequences imposed by the IPC, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court”.

13.2.2 Persons Entitled to Appeal

In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS:

*(a) the Athlete or other Person who is the subject of the decision being appealed;
...”.*

38. The Panel, thus, holds that CAS has jurisdiction.

IV. MERITS

39. Art R42 of the CAS Code reads as follows:

“[...] Any settlement agreement may be embodied in an arbitral award rendered by consent of the parties”.

40. The Parties have asked the Panel to ratify and incorporate the Settlement Agreement reproduced above into a Consent Award. It is the task of the Panel to verify the bona fide nature of the Settlement Agreement to ensure that the will of the Parties has not been manipulated by them to commit fraud and to confirm that the terms of the Settlement Agreement are not contrary to public policy principles or mandatory rules of the law applicable to the dispute.
41. After having discussed with the Parties the terms of the Settlement Agreement at the Hearing and after reviewing such terms, the Panel finds no grounds to object or to disapprove of the terms of the Settlement Agreement and is satisfied that the Settlement Agreement constitutes a bona fide settlement of the dispute brought to its attention.
42. In view of the above, and in particular of the joint request made by both parties, the present Consent Award puts an end to the arbitration procedure *CAS 2015/A/3881 Fatma Omar v International Paralympic Committee* on the terms indicated in the Settlement Agreement and those detailed below.
43. The above conclusion, finally, makes it unnecessary for the Panel to consider the other motions and prayers for relief submitted by the Parties to the Panel.

ON THESE GROUNDS

The Court of Arbitration for Sport renders the following Consent Award:

1. The Panel, with the consent of Fatma Omar and the International Paralympic Committee, hereby ratifies the Settlement Agreement signed by the parties on 30 April 2015 and incorporates its terms into this Consent Award.
2. The arbitral procedure CAS 2015/A/3881 Fatma Omar v. International Paralympic Committee is terminated and deleted from the CAS roll.
3. Each party is hereby ordered to perform the obligations and duties as per the Settlement Agreement referred to above.
4. (...).
5. (...).
6. All other motions and prayers for relief are rejected.