



**Arbitration CAS 2009/A/1918 Jakub Wawrzyniak v Hellenic Football Federation (HFF),
order of 13 August 2009**

Football

Provisional measures

Request for a stay of the decision

Mr Jakub Wawrzyniak (“Player” or the “Appellant”) is a Polish professional football player, member of the Polish national football team.

The Hellenic Football Federation (“Respondent”) is the sole and exclusively qualified competent authority to represent Greek football. It has been a member of the Fédération Internationale de Football Association (hereafter FIFA) since 1927.

On 5 April 2009, the Player, who was then a member of the Greek club Panathinaikos, underwent a doping control after the football match of the Greek 1st National Division Championships between his club and the team Skoda Xanthi.

The doping control was performed under the law and regulations of the Hellenic National Council for Combating Doping (ESKAN).

Through laboratory analysis, the substance 4-Methyl-2-hexaneamine was detected in the Appellant’s A and B urine samples. The B sample being considered as final, a disciplinary procedure was opened against the Player.

The Disciplinary Committee of the First Instance of the Super League in Greece imposed an exclusion period of three months on the Player.

On 5 June 2009 the Player lodged an appeal before the HFF Appeal Committee against this decision.

On 10 June 2006 Mrs Dimitra Papandonopoulou, Vice-President of the Appeal Committee also challenged the decision.

On 1 July 2009, the HFF Appeal Committee issued the judgement No 197/1-7-2009, appealed before CAS, which can be summarized as follows:

- First, it refers to the different provisions of the relevant Greek regulations;
- Second, the Appeal Committee sums up the facts of this case and mentions a letter dated 30 March 2009 from the World Anti-Doping Agency (WADA) to ESKAN which indicates that methylhexaneamine (the detected substance) *“is a stimulant, which has the same pharmacological*

characteristics of sympathomimetic and chemical structure similar to the substance tuaminoheptane". Sharing WADA's conclusions on this point, the Appeal Committee deems that, in spite of not being specifically mentioned on the List of Prohibited Substances dated 1 January 2009, methylhexaneamine is, on the basis of paragraph 06b of this list, a prohibited substance.

- Third, the challenged decision addresses the player's claim that *"the only thing he was taking without prescription since the beginning of February 2009 [...], after a suggestion of one of his fellow athletes and without having told anyone about it, was the compound Tight Xtreme solely in order to lose weight"*. It dismisses this claim since, according to the Committee, *"it was neither proven, nor is it permitted in accordance with the standards that apply to football activities and especially to experienced and international level athletes, without at least informing doctors of his club and without any further control of the contents of such compounds"*.
- Fourth, the Appeal Committee deals with the existence of violation and with the determination of the sanction. It deems that the Player breaches article 24 of the Disciplinary Code and underlines that the sanction is, in principle, a two year period of suspension. However, the majority of the Appeal Committee considers that he bears no significant fault or negligence and that the penalty should be reduced by half in application of article 24 chapter C para. 2 of the disciplinary code (one of its members considers that the appropriate sanction would be a two-year exclusion). The Appeal Committee essentially justified this judgement *"by the fact that the substance detected (methylhexaneamine) is not included in the list of stimulants, it is prohibited though because its pharmacological characteristics and chemical structure is similar with tuaminoheptane, a specified substance of the list"*. Furthermore, and according to the translation of the challenged decision filed by the Appellant, the Committee also considers here that there was *"justified doubt, which was shared even by a specialist in pharmacology, as to whether the certain substance qualifies directly and not by connotation, as prohibited substance, since it has not been proven that the effect of the detected substance, methylhexaneamine, is fully identified with the substance tuaminoheptane"*. However, the English translation provided by the HFF does not seem to contain such paragraph.
- For these reasons, the Appeal Committee rejects the appeal lodged by the Player, orders the forfeit of the voucher to the benefit of the HFF, admits the appeal lodged by the Vice-President of the Appeal Committee, eliminates the ruling appealed against, admits that the Player committed the disciplinary violation as charged and sanctions him, by majority, with a ban for one year, starting from 5 April 2009.

According to the Appellant, this decision was delivered to him on 13 July 2009.

On 21 July 2009, the HFF informed FIFA about this decision.

By a decision dated 27 July 2009, the Chairman of the FIFA Disciplinary Committee extended the challenged judgement, ruling that:

"1. The player Jakub Wawrzyniak is suspended worldwide for the duration of the suspension imposed by the association. This suspension covers all types of matches, including domestic, international, friendly and official fixtures.

2. The procedural costs are not to be borne by the player Jakub Wawrzyniak".

This decision can be challenged before the Chairman of the FIFA Appeal Committee.

On 24 July 2009, the Appellant filed a statement of appeal with the CAS against the Judgement No 197/1-7-2009 of the HFF Appeal Committee. He requests that the challenged judgement be replaced in its entirety with respect to the one year period of ineligibility running from 5 April 2009 and that the imposed sanction be reduced to a reprimand, according to Art. 47 section of the FIFA Anti-Doping Regulations (respectively of Art. 10.4 of the World Anti-Doping Code).

With his statement of appeal, the Appellant also filed a request for a stay of the execution of the challenged decision.

In support of his request for a stay, the Appellant mainly argues as follows:

- *With respect to irreparable harm:*

He is a member of the Polish national team and a player of the club Legia Warszawa. Should his request for provisional measures be denied he would be ineligible to participate in the European League matches played by his club, and the Polish national team's qualifying matches for the 2010 World Cup Finals. Should the CAS award not be issued before 5 April 2010, he would be excluded from his national team's preparations for the World Cup 2010 and "*would be practically unable to compete to win a place in the National Team for this most important football tournament in every player's career*". In the absence of a stay of the execution of the challenged decision, he would then suffer from financial loss (his club could be permitted to dissolve their contract) and he would not be entitled to his club's and national team's awards.

- *With respect to the likelihood of success on the merits:*

Regarding this criterion, the Appellant deems that his behaviour should not be considered negligent because:

- Methylhexaneamine is a component of Tight Xtreme, a weight reduction supporting diet supplement;
- The Appellant was assured that Tight Xtreme did not contain prohibited substances;
- The Appellant used this product for the sole purpose of weight reduction and without any intention to violate anti-doping regulations;
- Methylhexaneamine was absent from the list of prohibited substances at time the Appellant took Tight Xtreme;
- The fact that methylhexaneamine could fall within the scope of the category of prohibited stimulants is arguable (even according to an expert in pharmacology);
- The late information by WADA about methylhexaneamine being a prohibited substance.

The Player therefore considers that he has established the premise of "*likelihood of success on the merits*".

- *With respect to the balance of interests*

According to the Appellant “*exceptional circumstances of the case, lack of intention to violate anti-doping rules on his side and severe sanction imposed on the Player constitute an interest that outweighs undefined interest of national football organization, as [he] is no longer playing in Greece*”.

By letter dated 27 July 2009, the CAS Court Office *inter alia* invited the Respondent to express, by fax on or before 6 August 2009, its position/observations on the Appellant’s application for a stay. On 6 August 2009, the Respondent communicated to the CAS the decision issued by the Chairman of the FIFA Disciplinary Committee on 27 July 2009. With respect to the request for a stay, it expresses the following: “[T]he position of the Hellenic Football Federation remains unchanged and according to the decision of its competent body. The Appellant was positive during the doping control and we consider that his request has no ground and is of course inadmissible”.

LAW

CAS Jurisdiction

1. Pursuant to Article 183 of the Swiss Private International Law Act, an international arbitral tribunal sitting in Switzerland is empowered to order provisional or conservatory measures at the request of one party.
2. Pursuant to Article R52 of the Code, the President of the Appeals Arbitration Division, or his deputy, may, upon application by the Appellant, provisionally stay the execution of the appealed decision.
3. The scope of the jurisdictional analysis at this point is to assess whether on a prima facie basis the CAS can be satisfied that it has jurisdiction to hear the appeal (see RIGOZZI A., *L’arbitrage international en matière de sport*, 2005, p. 585 ff.; the order issued on 18 November 2008 in the case CAS 2008/A/1656 and the quoted references). The final decision on jurisdiction will then be made by the Panel.
4. The CAS *prima facie* jurisdiction results in casu from art. R47 of the Code and from art. 63 of FIFA Anti-Doping Regulations. Furthermore, the jurisdiction of the CAS to decide this dispute has not been challenged by the Respondent in its letter dated 6 August 2009.

Analysis

5. The Player has applied to stay the execution of challenged decision. Pursuant to articles R37 and R52 of the Code, such application is treated as a request for provisional and conservatory measures.
6. In accordance with consistent CAS jurisprudence, as a general rule, when deciding whether to stay the execution of the decision appealed from, CAS considers:
 - a) whether the measure is useful to protect the applicant from irreparable harm (“irreparable harm” test): *“The Appellant must demonstrate that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage”* (CAS 2007/A/1370-1376, CAS 2008/A/1630, 2008/A/1677);
 - b) whether the action is not deprived of any chance of success on the merits (“likelihood of success” test): *“The Appellant must make at least a plausible case that the facts relied upon by him and the rights which he seeks to enforce exist and that the material criteria for a cause of action are fulfilled”* (CAS 2008/A/1453, CAS 2008/A/1630, CAS 2008/A/1677);
 - c) whether the interests of the applicant outweigh those of the opposite party and of third parties (“balance of interest” test): *“It is then necessary to compare the disadvantage to the Appellant of immediate execution of the decision with the disadvantages for the Respondent in being deprived such execution”* (CAS 2008/A/1453, CAS 2008/A/1630, CAS 2008/A/1677).
7. In accordance with the CAS case law, these three factors are in principle cumulative (see CAS 98/200, CAS 2007/A/1397 and CAS 2008/A/1677).
8. The Deputy President of the CAS Appeals Arbitration Division hereby notes that the sporting damages put forward by the Appellant are related to international and Polish matches whereas, in the absence of any evidence to the contrary, it appears that, issued by the Hellenic Football Federation, the challenged decision is effective only on Greek territory.
9. Indeed, it is only through the decision issued on 27 July 2009 by the Chairman of the FIFA Disciplinary Committee, that the challenged judgment has been extended worldwide.
10. The Deputy President of the CAS Appeals Arbitration Division therefore considers that the Appellant has not demonstrated that the stay of the decision rendered by the HFF Appeal Committee would protect him against any irreparable harm.
11. The Appellant having failed to meet the first test (existence of an irreparable harm resulting from the execution of the challenged decision), the Deputy President deems that there is no need to evaluate whether the other conditions are fulfilled and that the request for a stay of the challenged decision shall be dismissed.

In view of Articles R37 and R52 of the Code of Sports-related Arbitration, the Deputy President of the CAS Appeals Arbitration Division hereby rules:

1. The request for a stay filed by Mr. Jakub Wawrzyniak is dismissed.

(...).