TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
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COURT OF ARBITRATION FOR SPORT (CAS)

Anti-Doping Division – Games of the XXXI Olympiad in Rio de Janeiro

CAS OG AD 16/03 International Olympic Committee v. Kleber Da Silva Ramos

AWARD

in the arbitration between

International Olympic Committee

(the "Applicant")

and

Kleber Da Silva Ramos

(the "Respondent")

I. FACTS

1. Kleber Da Silva Ramos (the "Athlete") is a representative of the Brazilian National Committee. His sport is cycling. He took part in the Road Race, at the Olympic Games, Rio de Janeiro (the "Games") on 6 August 2016.

2. On 31 July 2016, the Athlete underwent an out-of-competition doping control by way of supplying a urine sample.

3. On 7 August 2016, the International Olympic Committee (the "IOC") informed the Athlete the results of the analysis of his A Sample revealed the presence of methoxy polyethylene glycol-epoetin beta ("CERA"). It is an EPO-mimetic peptide which is a non-specified substance prohibited under S2.1 of the World Anti-Doping ("WADA") Code Prohibited List.

4. The Athlete requested the analysis of his B Sample and the production of the associated documentation package. He did not attend the opening of the B sample.

5. On 9 August 2016 at 15h04 (the times are those of Rio de Janeiro) the IOC filed an application with the Court of Arbitration for Sport, Anti-Doping Division ("CAS ADD") seeking the enforcement of a Provisional Suspension of the Athlete from the Games with immediate effect in accordance with Article 7.6.1 of the IOC Anti-Doping Rules.

6. The IOC asserted the presence of such a prohibited substance in the Athlete's A sample mandated the immediate Provisional Suspension of the Athlete in accordance Article 7.6.1 of the CAS ADD Rules.

7. In addition, as the Provisional Suspension, the IOC also sought, depending on the Athlete's submission, a declaration of the Athlete's ineligibility to further compete in the Games; the Athlete's exclusion from the Games; the Athlete's Accreditation be withdrawn; the Athlete be excluded from the Games.

8. On 9 August 2016 at 10h57, the CAS acknowledged receipt of the Application. A Panel of Arbitrators constituted by Tricia Kavanagh, President, Michael Beloff QC and Juan Pablo Arriagada Ajaro was appointed.

9. In accordance with Article 15 lit. b of the CAS ADD and Article 7.6.3 of the IOC Anti-Doping Rules ("IOC ADR"), the Panel granted the Athlete an opportunity to be heard orally or to file written submissions with respect to the IOC'S request for a Provisional Suspension.

10. On 10 August 2016 the Applicant, through his solicitor, wrote "*...the Athlete hereby voluntarily accepts the Provisional Suspension requested by the International Olympic Committee*".

11. According to Rule 14 of the CAS ADD Rules, the Panel must rule on an application for a Provisional Suspension. It is mandatory for a panel to rule on the application once it receives notification of an A sample result where there is, by the accredited laboratory, identification of a substance banned on the WADA List of Prohibited Substances which leads the laboratory to determine an Adverse Analytical Finding.

12. The IOC ADR, Article 7.6.1 addresses the circumstance where Voluntary Provisional Suspension is agreed to by the Athlete

> *"In all cases where an Athlete or other person has been notified of an anti doping rule violation but a Provisional Suspension has not been imposed on him or her, the Athlete or other person shall have the opportunity to accept a Provisional Suspension voluntarily pending the resolution of the matter."*

13. On 12 August 2016, at 16h00, on the basis of the above facts, and in particular, the voluntary acceptance of the Provisional Suspension by the Athlete, the Panel considered the IOC Application and published its Order and Reasons.

14. The Panel determined the IOC's Application for Provisional Suspension was deemed moot and the Athlete was, by his own volition, Provisionally Suspended. He was further declared ineligible to compete in the Games, pending the results of the testing of his B Sample. Such suspension, it was determined by the Panel, would remain in legal effect until the final resolution of the dispute, unless the result of the B sample did not confirm the A Sample Adverse Analytical Finding.

15. The Panel then gave further directions for the conduct of the hearing on the Merits.

16. On 14 August 2016 at 10h25, the IOC provided the laboratory finding on the analysis of the Athlete's B Sample taken on 31 July 2016. It confirmed the finding of CERA in the Athlete's B Sample and the laboratory made a further Adverse Analytical Finding. A second opinion was sought on both the A and B Sample findings by the laboratory from Dr Jean-Francois Naud whose opinion confirmed the analysis and the Adverse Analytical Finding of the laboratory.

17. On 17 August 2016 at 11h52, the Panel informed the parties that it deemed itself sufficiently well informed to render a decision based on the written submissions, without a hearing.

II. SUBMISSIONS

18. The IOC submitted :

    a) According to Article 2.1 of the IOC ADR the "Presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's Sample" constitutes an anti-doping rule violation.

    b) Sufficient proof of an anti-doping rule violation under Article 2.1 is established by the presence of the Prohibited Substance or its Metabolites or Markers in the Athlete's sample "*where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its metabolites(sic) or Markers found in the Athlete's A Sample*" (Article 2.1.2 of the IOC ADR).

    c) Methoxy polethylene glycol-epoetin beta (CERA) was found in the Athlete's body in both the A and B Sample. Therefore, the Athlete committed an anti-doping rule violation.

    d) Having succeeded in the application for the Provisional Suspension of the Athlete, the IOC presses in its application for Disqualification should the athlete obtain any results in the Games. It asserts the anti–doping rule violation was very serious.

    e) Further reliance was placed on Articles 10 and 10.1.1 and 10.2.1 of the IOC ADR in support of the application for a Disqualification Order (if the circumstance is established); an Ineligible to Compete Order (for all competitions of the Games and the Athlete's Accreditation (number 1210046) be withdrawn.

19. The Athlete submitted to a Provisional Suspension in the letter of the 10 August 2016. In the letter, he also made a number of submissions as to matters that could be taken into account on sanction. He did not address the merits of the matter. In a further letter dated 16 August 2016, he waived the right to an oral hearing on the merits and made no further submissions on the Merits.

III. JURISDICTION

20. Pursuant to Rule 59.2.4 of the IOC Olympic Charter, the IOC Executive Board has delegated to the CAS ADD its power to decide upon any violation of the World Anti Doping Code arising within the Olympic Games. (Article 8.2.2 of the IOC ADR)

21. Pursuant to Article 8.1.1of the IOC ADR:

> *"Where the IOC decides to assert an anti-doping rule violation the IOC shall promptly file an application with the CAS Anti-Doping Division as per the CAS Anti -Doping Rules."*

22. Pursuant to Article 1 of the Arbitration Rules applicable to the CAS ADD:

> *"The CAS ADD shall be the first instance authority for doping related matters, responsible for the conduct of the proceedings and the issuance of decisions when an alleged anti-doping rule violation has been asserted and referred to it under the IOC ADR"*

23. The parties do not contest the jurisdiction of the CAS ADD to decide the dispute. It follows that CAS is competent and has Jurisdiction over the Application.

IV. APPLICABLE LAW

24. The IOC ADD Article 2, so far as it is material, provides the following:

> ***ARTICLE 2 ANTI-DOPING RULE VIOLATIONS***
>
> *The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.*
>
> *Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.*
>
> *The following constitute anti-doping rule violations:*
>
> ***2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample***
>
> ***2.1.1*** *It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that Intent, Fault, Negligence or Knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.*
>
> ***2.1.2*** *Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B*

Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

25. As to the duty of the Athlete

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 *It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*

26. Art. 3.1 IOC ADR reads as follows:

3.1 Burdens and Standards of Proof

The IOC shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IOC has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made.
This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

27. Art 8.2 IOC ADR reads as follows:

8.2 Hearings and disciplinary procedures of the CAS Anti-Doping Division
8.2.1 *In all procedures relating to any alleged anti-doping rule violation pursuant to these Anti-Doping Rules, the right of any Person to be heard pursuant to paragraph 3 to the Bye-law to Rule 59 of the Olympic Charter will be exercised solely before the CAS Anti-Doping Division.*

V. MERITS

28. The analysis of the A and B Samples revealed the presence of methoxy polyethylene glycol-epoetin "CERA" in the Athlete's body. It is an EPA-mimetic peptide which is a non-specified substance prohibited under S 2.1 of the WADA Prohibited List.

29. The Athlete did not adduce any documents rebutting the Adverse Analytical Finding and did not submit any defence. He does not deny the Test Reports and he does not give any alternative explanation for the presence of the prohibited substance. He voluntarily agreed to a provisional suspension after the A Sample result was notified. He made no submission after the B Sample result was notified. He agreed to waive hearing and made no submissions on the merits. He requested the matter be referred to the Union Cycliste Internationale (UCI)

VI. CONCLUSION

30. In view of the above consideration, the Panel finds that the IOC has met the burden of proof required under Article 3.1 IOC ADR. The documents produced by the IOC establish sufficient proof, to the comfortable satisfaction of the Panel, that the Athlete has committed an anti-doping rule violation under Article 2 IOC ADR.

31. As the Athlete committed an anti-doping rule violation in connection with the Olympic Games Rio 2016, the Panel finds it appropriate to impose on the Athlete the following consequences:

    1. The Athlete has committed an anti-doping rule violation in accordance with Article 2.1 of the IOC Anti-Doping Rules applicable to the Olympic Games Rio 2016.
    2. All results obtained by the Athlete in the Olympic Games Rio 2016 are disqualified with all consequences, including forfeiture of all medals, points and prizes.
    3. The Athlete is excluded from the Olympic Games Rio 2016.
    4. The Athlete's Accreditation (number 1210046) is withdrawn.
    5. The responsibility for the Athlete's results management in terms of sanction beyond the Olympic Games Rio 2016 is referred to the UCI being the applicable International Federation.

DECISION

On the basis of the facts and legal submissions recited above, the Application of the IOC is granted as follows:

1. The Athlete has committed an anti-doping rule violation in accordance with Article 2.1 of the IOC Anti-Doping Rules applicable to the Olympic Games Rio 2016.
2. All results obtained by the Athlete in the Olympic Games Rio 2016 are disqualified with all consequences, including forfeiture of all medals, points and prizes.
3. The Athlete is excluded from the Olympic Games Rio 2016.
4. The Athlete's Accreditation (number 1210046) is withdrawn.
5. The responsibility for the Athlete's results management in terms of sanction beyond the Olympic Games Rio 2016 is referred to the UCI being the applicable International Federation.

Rio de Janeiro, 18 August 2016:

Dr Tricia Kavanagh
President of the Panel

Hon. Michael J. Beloff QC.
Arbitrator

Juan Pablo Arriagada
Arbitrator