



Arbitration CAS 95/122 National Wheelchair Basketball Association (NWBA) / International Paralympic Committee (IPC), award of 5 March 1996

Panel: Mr. Jan Paulsson (France), President; Mr. Luc Argand (Switzerland); Mr. David Dixon (England)

*Doping of an athlete member of a team (dextropropoxyphene)
Disqualification of a national basketball team from the Paralympics
Principle of strict liability*

- 1. Pursuant to the rules applicable in casu, the presence of a drug in the urine is sufficient to constitute an offence, irrespective of the route of administration.**
- 2. If a competitor, member of a team, tests positive for doping during a tournament, does it mean that the match during which the infringement took place must be forfeited by that team or that the team must be disqualified from the entire tournament? Interpretation of a rule, the wording of which is controversial.**

K. was a member of the USA Wheelchair Basketball Team which competed in the 1992 Barcelona Paralympic Games. K. is a paraplegic having suffered an injury to his spinal cord.

During a training session in France, the week before the Barcelona Paralympics, K. injured his right big toe. This injury is believed to have aggravated K.'s ongoing nerve root pain problem and, as a result, he was having difficulty sleeping. On 8 September 1992, his coach gave him a single tablet of the drug Darvocet, a painkiller. The coach had checked the Medical Controls Guide, which was part of the Handbook issued by the International Coordinating Committee of World Sports Organizations for the Disabled ("ICC") for the 1992 Barcelona Paralympics, and had not found Darvocet on the list of banned drugs. However, one of the components of Darvocet, dextropropoxyphene, is in fact a banned substance.

K. took the tablet in the early hours of the morning on 12 September 1992. The next day, the USA won the championship game against the Netherlands team. Immediately after the game, a random urine sample was taken from K.

On 15 September 1992, K's "A" sample tested positive for dextropropoxyphene. The Medical Controls Guide describes dextropropoxyphene as a "narcotic analgesic" used for the management of moderate to severe pain. Later that day, the USA chef de mission was notified in writing of the results of K's test. The next day, at a meeting organized by the ICC Doping Committee, the USA

team officials who were present confirmed that K., who had left Spain with the team to return to the USA, had taken the banned substance which had been given to him by his coach.

On 17 September 1992, the ICC Doping Committee issued a written proposal to the ICC Executive Committee and recommended:

- (1) *That the USA Team forfeit the match.*
- (2) *That K. forfeit any medal.*
- (3) *That K. be suspended from all competition for six months by IWBF.*

On 24 September 1992, the Secretary General of the ICC stated in a letter to the Presidents of the international federations within the ICC that:

“The President is of the opinion that to follow the ICC regulations it is necessary to disqualify the US team from the basketball competition and re-allocate the medals”.

On 29 September 1992, the President of the ICC issued a Statement dealing with two “doping infringements” stating in relevant part: *“Our decision is as follows:*

- 1) ...
- 2) *In the case of the USA Basketball Team, they should forfeit the match and the medals re-allocated under rule 1.1.4 of Section V of the ICC Handbook”.*

The ICC Executive Committee ratified the decision of the President of ICC on 24-25 March 1993. In accordance with this decision, in addition to the USA team forfeiting the match, the NWBA collected the gold medals from the players. The medals were sent to the International Wheelchair Basketball Federation (“IWBF”), which represented that it would hold the medals until the dispute had been resolved on appeal to the Court of Arbitration for Sport (“CAS”). The International Paralympic Committee (“IPC”), as successor to the ICC, however, demanded custody of the medals and banned from the Atlanta Paralympics all USA Wheelchair Basketball players, coaches and officials who had participated in the Barcelona games until the medals were returned to the IPC. The IPC was subsequently urged by a resolution of the four Barcelona Paralympic semi-final wheelchair basketball teams to participate in this appeal to the CAS. The IPC agreed to the appeal on the condition that the medals were delivered to the IPC. In March 1995, IPC agreed to allow the CAS to hold the medals pending this appeal.

The Appellant's initial Request for Relief included an alternative prayer that the USA team be awarded second place in the 1992 Barcelona Paralympics. This prayer was abandoned by a Motion to Amend on 9 June 1995, which recast the Request for Relief as follows:

“The National Wheelchair Basketball Association requests that the disqualification decision be reversed, and, in the alternative, either (a) that the USA wheelchair basketball team retain the 1992 Barcelona Paralympics championship, and that the USA team members retain the gold medals, or (b) that the USA wheelchair basketball team retain the 1992 Barcelona Paralympics championship, and that, with the exception of [K.], the USA team members retain the gold medals”.

LAW

1. The ICC Rules applicable to the 1992 Barcelona Paralympics did not provide for any appeal process to an independent body from a decision of the ICC President and Executive Committee.
2. The appeal to the Court of Arbitration for Sport is made pursuant to a special Arbitration Agreement entered into on 21 March 1995 between the IPC, independently and as successor to the ICC, and the NWBA.

Paragraph 3 of this Agreement provides:

“The appeal before the CAS will begin when the first place medals awarded to the United States men's wheelchair basketball team at the Barcelona Paralympics, and currently in the possession of the International Wheelchair Basketball Federation (“IWBF”), are tendered by the IWBF to the Secretary General of the CAS, to be allocated by the Secretary General in a manner consistent with the final CAS appeal decision.”

3. The Respondent contended in its brief that only ten of the twelve gold medals awarded to the USA Wheelchair Basketball Team were returned. As all the medals had not been returned at the time of the submission of the brief, the Respondent submitted that there was no jurisdiction to proceed with the appeal.
4. On 21 July 1995, the Appellant wrote to the President of the IPC explaining that the NWBA had attempted to retrieve all twelve medals from the members of the USA team. They had been successful in retrieving 10 of the medals, and had handed these over to the CAS on 16 May 1995, but attempts to retrieve the remaining two medals had been futile. One of them had been sent by Federal Express to the NWBA and had gone missing en route, and the other was still in the possession of a team member who had refused to surrender his medal. The Appellant offered, as a gesture of good faith, to pay for the cost of replacing the two missing medals.
5. On 7 September 1995, after the submissions of the parties had been filed, the Appellant sent a letter to the CAS, enclosing a cheque for the amount of \$ 2,000 to be applied towards the cost of replacing the two missing gold medals, if the CAS should find that the medals should be awarded to a team other than the US team. This was accepted by the Respondent.
6. In light of this initiative, the Respondent has withdrawn its objection to CAS jurisdiction. On the date of the hearing, counsel for both parties confirmed their acceptance of CAS jurisdiction.
7. The Order of procedure of 25 September 1995 for this case provides for the applicability in principle of Swiss law. Counsel for both sides confirmed their assent to this Order at the

outset of the hearing. Neither party, however, invoked any provisions of Swiss law. The Panel found it possible and appropriate to resolve the dispute in accordance with the relevant rules of the International Coordinating Committee, there having been no allegation that said rules would not be effective under Swiss law.

8. The Appellant's three contentions are:

(i) *The USA team should retain the Barcelona Paralympics championship, because under the ICC rules team disqualification could occur only upon a proposal of disqualification (i.e. withdrawal of all medals) from the ICC Doping Committee, and there was no such proposal.*

The Appellant considers that the ICC's decision of 29 September 1992 erroneously relied on ICC Rule 1.1.4, rather than on Rule 1.1.6, under which the ICC could have withdrawn the USA team's medals only on a proposal to that effect from the ICC Doping Committee. There was no such proposal. Thus, there was no legal basis for the sanction it pronounced.

(ii) *The USA team should retain the Barcelona Paralympics championship, because the ICC's conduct relating to administration of penalties resulted in a decision that cannot be seen as fair and reasonable under the IOC Charter against Doping in Sport.*

Under this heading, the Appellant develops a number of arguments based on perceived violations of decision-making procedures within the ICC as well as on the contention that K. and the USA team as a whole were not given an adequate opportunity to be heard prior to the determination of the offence and the sanction.

(iii) *The USA team should retain the Barcelona Paralympics championship because the penalty of withdrawal of the gold medals from the entire team is grossly disproportionate to the infringement.*

The Appellant develops an argument based on a comparison with the case of L., a South African discus thrower who won a gold medal in the Barcelona Paralympics. L. tested positive for three banned substances. The ICC nevertheless allowed him to retain his gold medal. K. urine samples showed only a trace of a banned substance. By analogy, therefore, K. gold medal should not have been withdrawn – *a fortiori* neither should those of his team mates.

9. The assessment of the Panel is set out in the following paragraphs.

10. The sanctions attendant on a doping violation are defined in ICC Rules 1.1.3 - 1.1.6, and this text was the primary focus of the hearing. Nevertheless, before dealing with sanctions one must consider whether there was a violation. The Appellant contends that the ICC Rules contain no definition of doping, but does not explain what the consequences would be with respect to sanctions if it were correct. The Panel has noted and considered the Appellant's suggestion, at pages 12-14 of its Brief, that the absence of a definition of "doping" means that the occurrence of a violation should be decided on a case-by-case assessment of subjective factors, allowing evidence to determine whether the ingestion of a banned substance was (a) intentional or (b) performance-enhancing. While a governing body may clearly adopt rules that allow for flexibility with respect to sanctions and penalties (in fact, the IOC Charter against Doping in Sport recommends this), the Panel would be reluctant to hold that the

applicable rules allowed the occurrence of a violation to be determined by reference to subjective determinations. In any case, nothing in the ICC Rules supports this conclusion. It would be rather extraordinary to find that the considerable drain on the organization's financial resources caused by its testing procedures has always been a pointless exercise, because the ICC, in the absence of any definition of doping, could never apply Rules 1.1.3-1.1.6.

11. In this respect the present case is clearly distinguishable from CAS 94/129 *USA Shooting and Q v. UIT*, where a disqualification was overturned because the federation had acted as though it were implementing a strict liability rule although the applicable rules clearly required intent. The Panel in the *USA Shooting* case stated that it was perfectly prepared to apply a strict liability test, but could not do so when faced with a clearly inconsistent provision. In this case, when the ICC implemented a strict liability principle it did not contradict any of its Rules, so unlike the situation in the *USA Shooting* case there was no violation of legitimate expectations.
12. It is true that the ICC Rules do not contain a provision that clearly calls the reader's attention to the establishment of the strict liability principle (Thus: "*Definition of doping: an athlete in whose body banned substances are detected shall be guilty of doping*"). It may well be desirable for such a provision to be articulated. Nevertheless, the Panel is satisfied that no one subject to the ICC Rules could come to the conclusion that they would excuse the inadvertent ingestion of banned substances. Indeed, the Medical Control Guide issued for the 1992 Barcelona Paralympics under the authority of Dr Riding as the ICC Medical Chairman, refers (in Dr Riding's personal introduction on page 83) to the ICC's "strict plan to deal with doping" and makes clear (*id.*) that innocent motives such as relieving nervous tension or reducing fatigue are for this purpose no different from seeking to increase muscle strength or to improve performance; and states (at page 91) that "*the presence of the drug in the urine constitutes an offence, irrespective of the route of administration*".
13. The Panel is therefore satisfied that K. was in violation of the ICC anti-doping Rules. He admitted that he ingested a Darvocet tablet; his urine samples tested positive. In the expression of the ICC Rules, he was therefore "guilty of doping". This is perhaps unfortunate phraseology, because the word "guilty" suggests reprehensible conduct and does not allow the outsider to distinguish between cheaters and inadvertent violators. There is no suggestion anywhere that K. was a cheater, in the sense of seeking an unfair advantage. He simply failed to keep his body free of banned substances. That is enough. The issue therefore becomes whether the penalties inflicted by the ICC were justified.
14. The ICC Rules provide as follows:
Rule 1.1.3
Any competitor refusing to submit to a medical control or examination or who is found guilty of doping shall be excluded.
Rule 1.1.4
If the competitor is a member of a team, the match competition or event during which the infringement took place shall be forfeited by that team.

Rule 1.1.5

After the explanations of the team have been considered and the case discussed with the IOSD concerned, a team in which one or more members have been found guilty of doping may be excluded from the Paralympic Games in which it is participating. In sports in which a team may no longer compete after a member has been excluded, the remaining members may compete in an individual capacity.

Rule 1.1.6

A medal may be withdrawn from a competitor found guilty of doping by order of the ICC on a proposal by the relevant ICC Doping Committee”.

15. This unfortunately is an example of drafting that engenders controversy. In seeking to articulate rules for many types of competition, the ICC here failed to make clear distinctions between a number of situations:
 - individual vs. team sports;
 - forfeiture of result vs. loss of medal;
 - single events (e.g. a game) vs. extended competitions (e.g. a tournament or a multi-day competition including eliminatory stages);
 - violations detected during (or before) a competition vs. violations detected after a competition;
 - disqualification vs. exclusion.

16. After careful consideration, however, the Panel has reached the conclusion that these imperfections are not fatal to the Respondent's case in this instance. To see why this is so, the Panel has examined the way in which each of the quoted ICC Rules would apply – if at all – in the circumstances presented here: a team member is detected as having committed an offence following the final match of a tournament in which his team – as a result of winning that final match – was awarded gold medals.

17. The Panel deems Rule 1.1.3 to be irrelevant because it is not the provision on the basis of which the challenged decision was made (The Panel notes in passing that the word “excluded” in Rule 1.1.3 was presumably intended to cover *forfeiture* of a result already obtained *in an individual sport* as well as *prohibition from continuing* in an on-going competition, *whether an individual or a team sport*. It is unfortunate that such basic issues are dealt with by implication rather than by clear declarative language).

18. The Panel deems Rule 1.1.4 to be the key to the matter. If an infringement by an individual takes place during a “match competition or event”, the whole team shall forfeit the “match competition or event”. Of course an infringement does not usually take place during a match, or indeed during a multi-day competition or event. Rather, the infringement typically takes place before the contest, while its detection is subsequent thereto. The meaning is nevertheless clear for present purposes: this is a severe rule, which causes a team to forfeit a match at the conclusion of which one team member is detected as having ingested a banned substance. There is no discretion here. The USA team therefore must forfeit the match it won against the Netherlands.

19. But does Rule 1.1.4 also call for the forfeiture of the entire tournament? It certainly allows for that possibility by using the expression “match competition or event”. The text does not however make clear whether it is intended to be self-applying (i.e. if the violation occurred in connection with an isolated match, the match would be forfeited; if the violation occurred in connection with a match that was part of a longer competition or event, the entire competition or event would be forfeited) or whether it is intended to allow room for discretion. In the latter case, it is not clear who is intended to exercise such discretion, nor what procedure should be followed to make the choice.
20. The Panel need not however answer this question for the simple reason that the Appellant has abandoned its initial alternative prayer for attribution of the silver medals. If that prayer had been maintained, the issue would arise as to whether only the final match should have been forfeited, the USA team becoming the silver medalist as loser by disqualification of the final match. But the Appellant wants gold or nothing at all. The question therefore arises whether it is possible for a team that forfeits the final match of a tournament (as the Panel holds must be the case with respect to the USA team in this case) nevertheless to retain the gold medals it won as the perceived winner of that match.
21. The answer must be negative. The Panel considers it absurd to imagine that a disqualified team could nevertheless retain the most cherished prize, a symbol of glory and accomplishment. Indeed, the Panel doubts that it would have occurred to anyone to advance this proposition had it not been for the presence of Rule 1.1.6, to which we shall come in a moment.
22. The Panel considers that Rule 1.1.5 is irrelevant to the present case, because its role is prospective – i.e. it considers the case of teams or non-violating team members who may otherwise be qualified to continue to compete in the multi-day Paralympic Games. For example, if a violation had been detected after the first match of a tournament, the loss of that initial match by disqualification would not necessarily eliminate the team from further competition. Rule 1.1.5 provides that the issue of such continued participation (without the individual offender) is a matter of discretion, to be decided after consultations with the bodies referred to in the Rule. It is simply inapposite to the situation with which the Panel is concerned here.
23. Rule 1.1.6 seems to suggest that a competitor found guilty of doping “may” be deprived of his or her medal on a proposal by the relevant ICC Doping Committee. In other words, it suggests that the loss of the medal is discretionary, and that a decision to that effect must follow a certain procedure.
24. This leads the Appellant to argue in its brief that Rules 1.1.4 and 1.1.6 are consistent with each other “*only if ICC Rule 1.1.4 governs non-medal games and ICC Rule 1.1.6 governs medal games*”. The argument is skillfully presented, but unconvincing on closer analysis. First of all, the Panel would need compelling evidence of a legislative intent to apply more lenient standards to medal games than to others. Moreover, there is no parallelism between the two Rules: Rule

1.1.4 explicitly contemplates the consequences of an individual violation upon a team, whereas Rule 1.1.6 explicitly considers only the consequences to the individual offender. And the latter may readily be seen to have a different purpose from that of making a special case for medal games: it allows the ICC to consider as a discretionary matter whether the nature of the violation merits loss by the individual offender of any medal in addition to forfeiture of the match (there are competitions – for example of the round-robin variety – where it is possible to lose an individual match and still win a medal). One regrets that the drafters of the ICC Rules did not address the consequences to non-violating team members of an offence; as stated above, the use of the expression “match competition or event” in Rule 1.1.4 does not resolve this matter.

25. Whatever may be the imperfections of Rule 1.1.6, it does not create any problem with respect to the specific circumstances of our case, where the precise question is whether the winning team of a final match which is disqualified under Rule 1.1.4 may nonetheless retain its gold medals. As stated in paragraph 41, the Panel has no hesitation in answering that question in the negative. The Panel is not unsympathetic with the other members of the USA team, who presumably did not want K. to take the Darvocet pill, did not know that he had done so, and most of all had no desire to seek an unfair competitive advantage. Nevertheless they were participating in a sport where international organizers had enacted a strict set of anti-doping rules, and for these purposes the implication of participating in a team sport means that the chain is no stronger than its weakest link. Several other sports have enacted anti-doping rules pursuant to which an entire team may be penalized for a violation committed by one member: for example, the rules of the International Rowing Federation and International Swimming Federation provide for mandatory disqualification of the relevant team, while the rules of the International Ice Hockey Federation, International Basketball Federation and Union Cycliste Internationale provide for penalties which in most cases apply to the team as well as to the individual offender, and in some circumstances may include disqualification of the team.
26. While the Panel does not hesitate in reaching this conclusion, it deplores the need for such a close textual analysis. Indeed, the Panel has seen ample evidence of the fact that the ICC authorities themselves had an imperfect understanding of their Rules.
27. Thus, when the Chairman of the ICC Medical Commission Doping Committee articulated its recommendations on 17 September 1992, he stated erroneously that “*the clauses relevant to the proposals for penalties ... are 4.1.4., 4.1.5 and 4.1.6*”. The numerical references are to the numbering system used in the *Paralympics Barcelona '92 Medical Control Guide*, of which chapter 4 consists of an “Extract from the ICC handbook for organizing Barcelona '92 IX Paralympic Games”. The Panel has throughout this award used the numbering system of the ICC Handbook itself in which the same Rules are numbered 1.1.4, 1.1.5 and 1.1.6. As we have seen, Rule 1.1.4 does not envisage a proposal by the Doping Committee (or anyone else); and Rule 1.1.5 is irrelevant in the aftermath of a final match. As for Rule 1.1.6, the recommendation that K. forfeit “any medal” is consistent with the proper reading of Rule 1.1.4, to the effect that loss of the final match necessarily led to loss of the gold medals, only if it is understood as relating to the possibility that the USA team as a whole would be allowed to retain the silver medals.

28. On 24 September 1992, the Secretary General of the ICC wrote to presidents of interested federations that the President of the ICC:
*“is of the opinion that to follow the ICC regulations it is necessary to disqualify the US team from the basketball **competition** and re-allocate the medals”* (emphasis added).
29. This clearly suggests total disqualification, and no medals at all.
30. On the other hand, the terms of the decision as issued by the President of the ICC on 29 September 1992 were to the effect that the USA team *“should forfeit the match and the medals re-allocated under rule 1.1.4 ...”*.
31. This leaves open the question of the possibility of retaining the silver medals.
32. But the modification of the final standings *“in accordance with the decision taken ... on 29th September 1992”* was to disqualify the USA team from the competition as a whole, out of the standings of the 11 other competing teams.
33. Indeed, there was some confusion as to the proper authority to decide sanctions; following the meeting between the ICC Doping Committee and the USA delegation on the evening of 15 September 1992, the ICC Medical Chairman issued a statement stating that the Committee: *“considers this a positive test and has referred the case to the International Wheelchair Basketball Federation [sic] for penalties”*.
34. These hesitations suggest an unmistakable need for clearer rules and more predictable practices. But for the purposes of this Panel, the imperfections of the text and its application are important only if they prejudiced the rights of K. or his team mates. The Panel finds that they did not. The Panel has held that Rule 1.1.4 requires automatic forfeiture of the game, and that a team which forfeits a final match cannot retain its gold medals. It may have been a source of irritation and frustration that various official statements suggested that there was room for discussion and therefore discretion or clemency, but such statements could do nothing to change the fact that as of the determination that K.'s test was positive, there was no hope for him or his team mates – barring a failure to apply the Rules – to retain their gold medals.
35. The Appellant complains about what it perceives as a discrepancy between this case and that of L., a competitor in the Barcelona Paralympics who is stated to have been allowed by the ICC to keep his gold medal, although he had tested positive, on account of the “blatant incompetence” of his national federation in failing to inform him that his medication was banned. The Panel cannot evaluate the merits of a case which was not brought before it, but if the Appellant's description is correct the Panel in this case would clearly consider that forfeiture of the medals was appropriate for both cases. Two wrongs do not, however, make a right (At any rate, since L. participated in an individual event (the discus), his case was presumably determined under Rules 1.1.3 and 1.1.6, and certainly could not have been

determined under Rule 1.1.4, which is in issue here, as this Rule on its terms applies only where the competitor is a member of a team).

36. The Panel's views can be stated in one sentence: *the Appellant's complaint is that the ICC did not apply its Rules with appropriate flexibility, and it fails because Rule 1.1.4, which was correctly applied as to the forfeiture of the match and the gold medals, is inflexible.* The Panel does not endorse Rule 1.1.4. It is for individual governing bodies to determine whether or not it is appropriate to follow the recommendation of the IOC Charter and allow flexibility in deciding sanctions and penalties. Nor does the Panel resolve the hypothetical issue of what it would have decided, given the ambiguity of Rule 1.1.4 in respect of tournaments as opposed to simple matches, if the Appellant had maintained its plea to be recognized as silver medalists. But with respect to the issue of the forfeiture of the final match and the consequent loss of the gold medals, the Panel considers Rule 1.1.4 to be clear, and would not presume to substitute any other rule for the inflexible one chosen for better or for worse by the ICC.
37. In conclusion, none of the Appellant's three contentions survive the Panel's analysis. First, the ICC's reliance on Rule 1.1.4 was correct insofar as it declared the USA team to be the loser of the championship and therefore also of the gold medals. Second, the ICC's conduct in administering its regime of penalties, while hesitant and confused, did not reach a level where it must be characterized as unfair or unreasonable; the result was the perfectly predictable consequence of a strict rule which the Panel can neither annul nor disregard. That is also why the third contention must fail; as it stands, Rule 1.1.4 creates a regime that does not accommodate considerations of proportionality. Whether more flexible rules are desirable is a matter for debate within the appropriate governing bodies; they cannot be imposed by this Panel.
38. Although the Respondent prevails on the merits, the Panel makes no award of costs in its favor on the grounds that the imperfections of its rules and the hesitant and ambiguous manner in which it went about applying them, while not causing substantive prejudice to the Appellant, invited controversy.

The Court of Arbitration for Sport hereby:

1. Rejects each of the Appellant's alternative prayers for relief, and accordingly.
2. Invites the Secretary General of CAS to dispose of the medals in his custody in accordance with the instructions of the Respondent, and to release the cheque in the amount of US\$ 2,000 to the Respondent upon written certification by the latter that it will apply said amount to the cost of replacing the two missing medals.
3. Makes no award of costs.