



**Arbitration CAS 98/218 H. / Fédération Internationale de Natation (FINA), award of 27 May 1999**

Panel: Mr. Jan Paulsson (France), President; Mr. Michael Beloff QC (England); Mr. Denis Oswald (Switzerland)

*Swimming*

*Doping (cannabinoids)*

*Adoption of IOC Medical Code by International Federations*

*Out-of-competition testing for cannabinoids*

- 1. The requirement of an agreement between the IOC and the relevant federation in order to proscribe cannabinoids applies only in the context of Olympic competition. Outside that context, the IOC Medical Code is applicable only to the extent it is voluntarily adopted by the relevant federation.**
- 2. According to FINA Regulations, cannabinoids fall within the list of prohibited substances which are the target of out-of-competition testing.**

H.'s Statement of Appeal dated 24 November 1998, seeking to challenge a three-month suspension pronounced by FINA's Doping Panel by a decision made on 6 November 1998 of which H. acknowledged notice on 12 November 1998, was submitted in timely fashion under Art. R48 of the Code of Sports-related Arbitration, as was his Appeal Brief dated 22 December 1998.

An application by H. for preliminary relief was denied by an Order of the President of the Appeals Arbitration Division of CAS on 30 November 1998.

On the same day, H. obtained a Temporary Restraining Order from the United States District Court for the District of Arizona which purported to order FINA not to enforce the suspension of H. decided by the Doping Panel, and furthermore purported – without any explanation of the basis for its jurisdiction with respect to events taking place outside Arizona and indeed the United States – to declare that H. was permitted “*to participate in any activities of FINA or any of its member federations, including international competition, as a competitor until further notice of this Court.*”

H. accordingly competed in a World Cup competition in December 1998 in disregard of both the Doping Panel's decision and the Order from the President of the CAS Appeals Arbitration Division.

The composition of the Panel constituted for this case was notified to the Parties by CAS on 11 February 1999.

H. from the outset cited financial constraints and requested that this case be heard in Denver; FINA urged that the venue should be Lausanne. The Panel considered that the nature of the case lent itself to a decision based solely on the documentary record, and decided to deliberate and decide without an oral hearing. A Procedural Order to this effect was issued by CAS on 25 February 1999, giving the Parties a final opportunity to supplement the record.

On 15 May 1998, H. was subjected to an unannounced doping control. The two samples analysed by the accredited laboratory were found to contain cannabinoids.

Following a provisional suspension imposed by FINA's Executive Bureau and covering the period from 15 June to 12 August, the case was heard and decided by the FINA Doping Panel on 6 November 1998. H. did not appear in person, but a Hearing Memorandum was submitted by counsel on his behalf.

In its decision, the Doping Panel noted that H. did not challenge the results of the laboratory analyses, but rather contended that cannabinoids are not a prohibited substance, and that unannounced testing for this substance was contrary to the rules applicable to out-of-competition testing. Nevertheless, the Doping Panel found that H. had committed a doping offence under FINA Rule DC 1.2(a), and held that unannounced testing may, under FINA Rule 6.3, be conducted with respect to any prohibited substance. Accordingly, the Doping Panel pronounced a three-month suspension consonant with the rules pertaining to first-time offences.

In light of the effluxion of the provisional suspension, the effect of this decision was to impose, in principle (but see above), a further one-month suspension.

## LAW

1. H. argues that cannabinoids are not a "banned substance" under the IOC Medical Code, and invokes to that effect the case of *R. v. IOC* (CAS OG 98/002, *Digest of CAS Awards 1986-1998*, Staempfli Editions, Berne 1998, p. 419).
2. This argument ignores the fact that the IOC Medical Code was the directly applicable text in the case of *R.*, whereas in the present context it appears as an appendix to so-called Guidelines for Doping Control which are defined in Article 1.4 of FINA's Doping Control Rules (hereafter referred to as "DC") as being of a "procedural and administrative nature". The IOC Medical Code applies to all sports in the context of Olympic competition. Otherwise, it is applicable only to the extent it is voluntarily adopted by the relevant federation. In the case of FINA, the Medical Code was never adopted in its entirety, but only

for the purposes described in paragraph 15. Moreover, the Guidelines expressly state in italicised print at the bottom of its Table of Contents:

*“These Guidelines are complimentary [sic] to the FINA Doping Control Rules and they should be followed as far as is reasonably practicable. In any case of contradiction between the FINA Doping Control Rules and these Guidelines, the Doping Control Rules shall prevail.”*

3. The DC is thus the prevailing text, and the starting point for present purposes is DC 1.2, i.e. the basis given by FINA’s Doping Panel for its suspension of H. It provides that *“the offence of doping occurs when ... a banned substance (see DC 2) is found to be present within a competitor’s body tissue or fluids”*. DC 2, entitled “Banned Substances,” states that banned substances “include” those that are listed in Appendix 1 to the Guidelines. This Appendix 1 is the IOC Medical Code, under which marijuana is part of a “restricted” rather than a “prohibited” class of substances. H. contends on this basis that marijuana is not a banned substance. But DC 2.1 states that banned substances *include* those listed in Appendix 1. This clearly means that the substances *listed* in the IOC Medical Code are banned under DC 2.1 even if they are merely “restricted” for the purposes of the IOC Medical Code (It should be clearly understood that the requirement of an agreement between the IOC and the relevant federation in order to proscribe a substance applies only in the context of Olympic competition; outside that context, FINA did not need the IOC’s assent). It also means that the list is not exhaustive. DC 9 is entitled “Sanctions” and establishes in Article DC 9.2(d) that “cannabinoids (such as marijuana and hashish)” lead to serious sanctions – up to lifetime expulsion in the event of a third offence; up to three months in a case of first offence. In accordance with ordinary principles of construction, DC should be read as a coherent whole. The conclusion must be that cannabinoids are a banned substance for the purposes of FINA and its DC.
4. The inclusion of cannabinoids was decided by the FINA Congress on 17 July 1996, and made effective on 17 September 1996. H., who had tested positive for marijuana in July 1996 (at the Atlanta Olympic Games) and concedes that he was given a warning the following month, is in no position to claim ignorance of this development. Such ignorance would in any event be no defence.
5. H. also raises as a procedural argument, namely that FINA failed to give adequate information as to the scope of out-of-competition testing. Indeed, it is the exclusive subject of both the first and last paragraphs of his Appeal Brief, and the *only* argument of his Supplemental Statement.
6. DC 6.3 reads as follows:  
*“Unannounced testing may be conducted with respect to any banned substance or banned technique, focusing upon anabolic agents and other substances which will effect the detection of anabolic agents, and other substances which may be specially so identified in the Guidelines”.*

It would require an over-indulgent reading of this provision to conclude that the words “focusing upon” have the meaning of “limited to.” (To achieve the effect desired by H., the drafters of FINA Rule DC 6.3 would not have needed the eight words *“any banned substance or banned technique, focusing upon.”* Legal texts are presumed not to contain superfluous words). To

read it sensibly does no injustice to H., since as noted above he was given a warning by FINA after testing positive for marijuana in 1996.

7. H. invokes the following passage from *A.C. v. FINA* (CAS 96/149, *Digest of CAS Awards 1986-1998*, *op. cit.* para. 13, p. 251):

*“[i]t is equally important that athletes in any sport ... know clearly where they stand. It is unfair if they are found to be guilty of offences in circumstances where they neither knew or [sic] reasonably could have known what they were doing was wrong”.*

8. Construed in context, the passage in *A.C.* is a statement of desirable practice, not a proposition of law, but in any event the precedent is inapposite. The issue H. is raising is not, in fact, whether he should have known that *“what he was doing was wrong”*, but *whether he was entitled to do wrong with full confidence that he would not be found out.*
9. In a related argument, H. affirms that the IOC Medical Code lists categories of prohibited substances which are to be the exclusive targets of out-of-competition testing, and that the fact that marijuana does not fall within any of those categories bars FINA from testing for cannabinoids. This argument fails for the reasons stated in paragraphs 1-4.
10. Finally, H. has raised an objection with respect to the computation of the time of his suspension, principally to the effect that it should have run from the date of 15 May 1998, when the samples were taken. Coming from a competitor who has used his local courts to neutralise the mechanism to which the FINA regulations refer, and thus to disregard the suspension to which he was in principle subjected, this is hardly an attractive agreement. Indeed, there might be some justification in considering that the remaining month's suspension *has yet to run*. Such relief has not however been requested by FINA and will therefore not be granted.
11. In his Supplemental Statement, H. requested that the members of the Panel *“set aside their personal views about the moral and/or social propriety of marijuana use, and focus on the fundamental legal principle involved here”*. It is odd that H. should have thought it necessary to make this plea, since his counsel is familiar with the R. case (see paragraph 1), where the CAS Panel stated as follows:

*“26. In reaching our result, we do not suggest for a moment that the use of marijuana should be condoned, nor do we suggest that sports authorities are not entitled to exclude athletes found to use cannabis. But if sports authorities wish to add their own sanctions to those that are edicted by public authorities, they must do so in an explicit fashion. That has not been done here. Indeed, Mr. Hodler expressly affirmed that FIS does not consider cannabis consumption as a doping offense and that although FIS discourages both alcohol and cannabis consumption it has never positively enacted specific prohibitions with respect to either. The Panel recognizes that from an ethical and medical perspective, cannabis consumption is a matter of serious social concern. CAS is not, however, a criminal court and can neither promulgate nor apply penal laws. We must decide within the context of the law of sports, and cannot invent prohibition or sanctions where none appear”.*

As in the *R.* case, the CAS Panel does not make the law, but evaluates compliance with it. But unlike the situation in *R.*, here there was a prohibition, and the sanction had a legal basis.

12. The Panel is not impressed with H.'s reliance on alleged oral representations made to him and to his father to the effect that cannabinoids were not the target of out-of-competition testing. The proper reflection of such concern on their part would have been for them to read the relevant rules, rather than to rely on any oral statements that there was a "policy" of, in effect, selective application.
13. Given H.'s unwillingness to accept rules of competition designed to be applied in the interest of all athletes, his persistence in pursuing an unmeritorious challenge, and his de facto evasion of sanctions legitimately imposed upon him by going outside the dispute resolution mechanism to which both he and FINA are subjected, the Panel awards costs to FINA in the amount of CHF 10'000.--.

#### **The Court of Arbitration for Sport:**

1. Rejects the appeal against the FINA decision dated 6 November 1998.
2. Declares that any results achieved by H. in competitions during the period of his suspension shall be considered null and void.
3. Orders H. to pay FINA the amount of CHF 10'000.-- with interest running at 5% per annum starting with the 30th day after notification of this Award.