



Arbitration CAS 2015/A/3970 K. v. Turkish Athletics Federation (TAF) & World Anti-Doping Agency (WADA), award on jurisdiction of 17 November 2015

Panel: His Honour James Robert Reid QC (United Kingdom), President; Mr Jeffrey Benz (USA); Ms Andrea Carska-Sheppard (Czech Republic)

Athletics

Doping

CAS jurisdiction

Control by the International Federation of the jurisdictional system of one of its national federations

- 1. If the rules of a national association do not provide jurisdiction to CAS or to an independent and impartial arbitration court, this cannot as such create a CAS jurisdiction by default. There must be a specific jurisdiction clause in the national federation's statutes and regulations as this is reflected under R47 of the Code.**
- 2. If an International Federation finds that the jurisdictional system of one of its national federations does not comply with its statutes, it will need to take the necessary measures towards the national association in order for the latter to introduce a valid jurisdiction clause in favour of CAS and/or establish an arbitration court which meets the International Federation's criteria on independence and impartiality. In the meantime, it will be a matter of domestic law, to decide whether a party concerned by a decision issued by national federation's body has the right to appeal against such decision before a competent state court.**

I. PARTIES

1. K. (the "Appellant") is an athletics coach who coached and trained athletes in Turkey. K. is not an International-Level Athlete as defined by the rules of the International Association of Athletics Federations ("IAAF") nor is he support personnel for an International-Level Athlete as defined.
2. The Turkish Athletics Federation ("TAF" or "First Respondent") is the body governing and regulating the sport of athletics in Turkey.
3. The World Anti-Doping Agency ("WADA" or the "Second Respondent") is the independent international anti-doping agency, constituted as a private law foundation under Swiss Law with its seat in Lausanne, Switzerland, and having its headquarters in Montreal, Canada. Its aim is to promote and coordinate the fight against doping in sport internationally.

II. BACKGROUND FACTS

4. Between January and August 2013, samples provided by 41 Turkish athletics athletes (the “Athletes”) were found to contain substances listed under the World Anti-Doping Agency’s Prohibited List. Disciplinary cases were then launched against these athletes and each athlete was sanctioned with a two-year period of ineligibility in accordance with the IAAF Anti-Doping Rules and the Turkish Anti-Doping Code. Two of the athletes, A. and B., were coached by the Appellant.
5. During the course of the TAF’s investigation into the widespread doping violations, the TAF Penal Board sanctioned the Appellant (among other coaches) for a period of 36 months on the basis that he was “*responsible [for] the actions of [his] athletes*”.
6. This decision was appealed before the Sports General Directorate Appeals Body (the “Appeals Tribunal”), and the challenged decision was subsequently reversed. The decision then directed the TAF Penal Board to conduct a new trial and in doing so, consider certain statements made by various athletes and coaches with respect to the alleged doping ring.
7. Following the direction of the Appeals Tribunal, the TAF launched new disciplinary proceedings against the Appellant. Following a submission of defense by the Appellant, the TAF Penal Board imposed a 4-year period of ineligibility on the Appellant for administering and trafficking prohibited substances.
8. On 10 July 2014, the Appellant filed a new appeal with the Appeals Tribunal against the newly-imposed sanction. On 7 August 2014, the Appeals Tribunal again reversed the TAF Penal Board, this time on the basis that the TAF Penal Board wrongfully applied TAF Penal Code instead of the Turkish Anti-Doping Regulations (“TADR”).
9. By decision dated 19 September 2014, the TAF Penal Board imposed a 4-year period of ineligibility on the Appellant for an anti-doping rule violation under the TADR (the “Appealed Decision”).
10. The Appellant asserts that the Appealed Decision was notified to the Appellant’s counsel on 21 January 2015. It is from the Appealed Decision that the Appellant now appeals to the Court of Arbitration for Sport (“CAS”).

III. CAS PROCEEDINGS

11. On 6 March 2015, the Appellant filed an appeal against the Appealed Decision with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”). In his statement of appeal, the Appellant requested that this appeal be referred to a Sole Arbitrator.
12. On 30 March 2015, the parties were informed that the President of the Appeals Arbitration Division, in accordance with Article R50 of the Code and following the First Respondent’s silence on the issue, decided to refer this appeal to a three-member Panel.
13. On 7 April 2015, the Appellant nominated Mr. Jeffrey Benz, attorney-at-law in Los Angeles, California and London, UK as arbitrator.

14. On 10 April 2015, the Appellant filed his appeal brief in accordance with Article R51 of the Code.
15. On 4 May 2015, the Second Respondent filed its request to participate in this appeal as an interested party in accordance with Article R41.3 of the Code.
16. On 19 May 2015, the CAS Court Office, in the absence of any objection from the Appellant and First Respondent, confirmed the participation of the Second Respondent in this appeal on behalf of the President of the Appeals Arbitration Division in accordance with Article R41.3 of the Code.
17. On 27 May 2015, the Second Respondent filed its objection to Admissibility and CAS Jurisdiction. In doing so, the Second Respondent requested that its objection be decided upon as a preliminary matter.
18. On 3 June 2015, the First Respondent filed its answer in accordance with Article R55 of the Code. The Second Respondent's deadline to file its answer was duly suspended in accordance with Article R32 of the Code.
19. On 8 June 2015, the Appellant filed his response to the Second Respondent's objection to CAS jurisdiction.
20. On 3 August 2015, the CAS Court Office confirmed with the parties that the Panel appointed to decide this appeal was as follows:
President: His Honour James Robert Reid QC, retired judge, West Liss, Hampshire, United Kingdom
Arbitrators: Mr Jeffrey G Benz, attorney-at-law, Los Angeles, USA and London, United Kingdom
Ms Andrea Carska-Sheppard, attorney-at-law, Slovak Republic
21. On 21 August 2015, the Appellant was invited to supplement his response to the Second Respondent's objection to Admissibility and CAS Jurisdiction within seven (7) days.
22. On 1 September 2015, the Appellant filed a supplemental submission on Admissibility and CAS Jurisdiction.
23. By letters dated 2 and 15 September 2015, the CAS Court Office confirmed the parties' preferences that the Panel decide the preliminary issue of Admissibility and CAS Jurisdiction as a threshold matter, based solely on the parties' written submissions without a hearing.
24. On 2 October 2014, the CAS Court Office informed the parties that the Panel was sufficiently well informed to render a preliminary decision on Admissibility and CAS Jurisdiction based on the parties' written submissions, without a hearing.

IV. THE PARTIES' SUBMISSIONS ON ADMISIBILITY AND JURISDICTION

A. The Appellant's Submission

25. The Appellant's submission on Admissibility and CAS Jurisdiction may be summarized as

follows:

26. The Appellant is not considered to be an “International-Level Athlete” according to the definitions in the IAAF Competition Rules (the “IAAF Rules”) (and World Anti-Doping Code).
27. Rule 42.4 of the IAAF Rules, which covers appeals which do not arise from International Competitions or involve International-level Athletes (or their support personnel), entitles the Appellant to appeal against the Appealed Decision to “*an independent and impartial body in accordance with rules established by the Member*” (i.e. Turkey in this case). Rule 42.4 provides that:
 - The rules for such appeal shall respect the following principles;*
 - a timely hearing;*
 - a fair and impartial hearing panel;*
 - the right to be represented by counsel at the Person’s own expense;*
 - the right to have an interpreter at the hearing at the Person’s own expense; and*
 - a timely, written, reasoned decision.*
28. The TADR provide that the decision of the Disciplinary Board may be appealed before the Arbitration Board of the SGD in Turkey. This provision is also set out at the end of the decisions being appealed. These rules do not make a distinction between International and non-International Level Athletes similar to the rules of the IAAF.
29. The SGD is not a body that ensures independence, impartiality and equal representation to Athletes or their Athlete Support Personnel for several reasons, the first of which is that the TAF is governed both administratively and also financially by the SGD.
30. The IAAF Rules make a distinction between International-Level Athletes and non-International Level Athletes regarding the appeal procedure under its rule 42.3 and 42.4. In particular, under to Rule 42.3, International-Level Athletes (and their support personnel) are entitled to appeal against the first instance decisions before CAS. However, under Rule 42.4, non-International Level Athletes and their support personnel are entitled to appeal against the first-instance decisions before an independent and impartial body at national level provided that it respects and safeguards the above-mentioned principles.
31. In the Appellant’s case, there is a clear absence of an independent and impartial body at a national level. Therefore, the Appellant can no longer be considered within the scope of Rule 42.4 but instead Rule 42.3, which entitles him to appeal against the Appealed Decision before CAS.
32. Further, the Appellant also wishes to highlight that the Second Respondent has the power and duty to ensure that its rules are respected and applied in all cases.
33. As to the timing of the appeal, the Appellant has produced the covering letters under which the signed decisions were sent to the Appellant’s counsel on 20 January 2015. It was not notified to the Appellant himself. Therefore, the statement of appeal lodged on 6 March 2015 was timely.

34. So far as relates to Admissibility and CAS Jurisdiction, the Appellant requested that CAS rule that it does have jurisdiction in the appeal.

B. The First Respondent's Submission

35. The First Respondent's submission on Admissibility and CAS Jurisdiction may be summarized as follows:

36. There are three preconditions for an appeal to CAS: (1) there is an arbitration provision in the regulations of the relevant sports organisation; (2) there has been a decision taken by that sports organisation; and (3) all appeal remedies must have been exhausted within the judicial mechanism of the sports organisation. The TADR in force at the relevant time, in parallel with the WADA regulations, provided that incidents relating to international athletes or arising due to participation in international events may be appealed to CAS within 21 days of the date of the decision. In other circumstances (similar to IAAF Rule 42) appeals might be submitted to the Arbitration Board. Only the IAAF, IOC or WADA may appeal the decision of the Arbitration Board at national level to CAS. The decision of the Arbitration Board is otherwise final and cannot be appealed. The Appellant had no international status, the incident was at national level and as there is no arbitration agreement, CAS has no jurisdiction.

37. In any event the Disciplinary Board imposed a period of 4-years ineligibility on the Athlete which was notified to the Athlete on 2 October 2014. The decision of the Arbitration Board was notified on 27 November 2014 and the appeal notice was therefore out of time.

38. In its Answer, the First Respondent asserted the following request for relief as it related to Admissibility and CAS Jurisdiction:

Firstly, as CAS has no jurisdiction, the appeal should be dismissed.

Secondly, even if CAS has jurisdiction, as the appeal was not submitted in the legal time limit, the appeal should be dismissed.

C. The Second Respondent's Submission

39. The Second Respondent's submission on Admissibility and CAS Jurisdiction may be summarized as follows:

40. There is no CAS arbitration agreement. The Appellant seeks to establish CAS jurisdiction on the basis of Rule 42.4 of the IAAF Competition Rules which reflects art. 13.2.2 of the 2015 World Anti-Doping Code and is also implemented at art. 13.2.2 of the TADR. This provides for an appeal to a national-level appeal body in doping cases which do not involve International-Level Athletes and their support personnel and do not arise from International Competitions. It was not accepted that the IAAF Competition Rules (as opposed to the TADR) are applicable to these proceedings. Neither Rule 42.4 of the IAAF Competition Rules nor its equivalent under the TADR contains any reference to CAS, still less an arbitration agreement in favour of CAS.

41. Article R47 of the Code provides that 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 [...]*". There is no applicable regulation which entitles the Appellant to appeal to CAS and there is no specific CAS arbitration agreement

between the parties. Therefore CAS lacks jurisdiction. Indeed, CAS case law has confirmed that, in accordance with Article R47 of the Code of Sports-related Arbitration, “*in order for CAS to have jurisdiction to bear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made must expressly recognise CAS as an arbitral body of appeal*” (see paragraph 7.2 of CAS 2006/A/1190).

42. The argument that, notwithstanding the lack of an arbitration agreement, the CAS should assume jurisdiction on the basis that the Arbitration Board of the SGD does not meet the requirement of impartiality and independence referred to in Rule 42.4 of the IAAF Competition Rules is misconceived.
43. Even assuming for the purposes of the argument that the SGD Arbitration Board is not impartial and independent, this would not give CAS jurisdiction by default. As set out at paragraph 23 of CAS 2010/A/2171, “*if the rules of a national association do not provide jurisdiction to CAS or to an independent and impartial arbitration court, this cannot as such create a CAS jurisdiction by default. There must be a specific jurisdiction clause in the national federation’s statutes and regulations as this is reflected under R47 of the Code*”. The argument that CAS should accept jurisdiction (notwithstanding the absence of an arbitration agreement) on the basis of an alleged lack of impartiality and independence of the designated national appeal body lacks any basis in law and has been dismissed by previous CAS Panels.
44. The Appellant asserts that he was not notified of the appealed decision because his attorney was notified and then only on 21 January 2015, several months after it was issued and that he appealed directly to CAS. If this were factually accurate (which is disputed) the Appellant failed to appeal to the SGD Arbitration Board and therefore failed to “*exhaust the legal remedies available to [them] prior to the appeal*” within the meaning of Article R47 of the Code.
45. The regulation cited by the Appellant as the basis for the CAS jurisdiction reflects the system of appeals instituted by the World Anti-Doping Code. This provides that national anti-doping appeals be heard by a national appeal body. Only WADA, the International Federation and, in certain circumstances, the International Olympic Committee and the International Paralympic Committee may appeal against the decision of the national appeal body.
46. The appealed decisions were issued by a national body in respect of a national case and on the basis of the national anti-doping regulation. The applicable regulations within the meaning of Article R58 of the Code are the TADR. Pursuant to art. 13.7.1 of the TADR, appeals must be filed with CAS within 21 days of notification of the decision. Under art. 13.7.2 of the TADR, appeals to the Arbitration Board of the SGD must be filed within ten days of receipt of the decision. Even if the Appellant’s attorney was notified of the Appealed Decision on 21 January 2015 as is claimed the Statement of Appeal was filed well outside any deadline provided for by the applicable TADR and so is inadmissible.
47. In its submission, the Second Respondent made the following requests for relief:
 - (i) a ruling that CAS does not have jurisdiction in respect of the appeal against the Appealed Decision;
 - (ii) on a subsidiary basis that the appeal be dismissed;
 - (iii) that the appellant bear the entirety of the arbitration costs for these appeal proceedings; and

(iv) that the Appellant bear substantially all of the Second Respondent's legal costs.

V. ANALYSIS ON JURISDICTION

48. For the purposes of considering these preliminary issues only, and making no findings on the point, the Panel assumes that the Appellants has an arguable case for asserting that the SGD Arbitration Board does not fulfil the requirements of Rule 42.4 of the IAAF Competition Rules as being a “*fair and impartial hearing panel*”.
49. CAS is an arbitral tribunal and as such has only such jurisdiction as the parties have conferred on it. By Article R47 of the Code:

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.

50. In the present case, the Appellant was sanctioned with a 4-year period of ineligibility by the TAF Disciplinary Board for anti-doping rule violations under the TADR. Those regulations are a local adoption of the WADC.
51. Under those rules, as is common ground between the parties, there is provision by which the Appellant, as a support personnel for national-level athletes, could appeal the decision of the TAF Disciplinary Board to the SGD Arbitration Board. It is also common ground that there is no express provision for an appeal to CAS except in cases arising from participation in an International Event or in cases involving International-Level Athletes (or their support staff). The Appellant concedes that he is not “International” related for purposes of the relevant anti-doping rules.
52. However, the Appellant seeks to draw support from IAAF Rule 42.4. This provides that in the case of appeals which do not involve International-Level Athletes or their Support Personnel, “*the decision of the relevant Member [in this case TAF] may [subject to an exception not relevant here] be appealed to an independent and impartial body in accordance with the rules established by the Member*”.
53. The Appellant’s argument, based on the proposition that the SGD Arbitration Board is not an independent and impartial body, is that it follows from the absence of a national-level appeal body which satisfies the requirements of IAAF Rule 42.4 that the Appellant must be treated as “International-Level Athletes or their Athlete Support Personnel” and so afforded an appeal direct to CAS under IAAF Rule 42.3 and its equivalent in the TADR which provides that in cases arising from participation in an international event or in cases involving International-Level Athletes the decision may be “*appealed exclusively to CAS in accordance with the provisions applicable before such court*”.
54. This argument proceeds on the assumption that there must be a right of appeal which satisfies the provisions of IAAF Rule 42.4 and that if there is not, then there must by default be an appeal to CAS.

55. The argument is fallacious. There is no logical or jurisprudential reason why the Appellant (or for that matter any national level athletes) should be treated as being of international level because the appeal tribunal provided for them does not meet the requisite criteria. That defect, if such it be, cannot convert national level athletes and support staff into International-Level Athletes. Further there is no basis for saying that CAS should be treated as a default appeal tribunal. There is nothing in the TADR which provides that the Appellant's appeal can be filed with CAS nor is there any specific arbitration agreement giving CAS jurisdiction.

56. As the Panel observed at paras 23 and 24 of CAS 2010/A/2170:

23. Therefore, if the rules of a national association do not provide jurisdiction to CAS or to an independent and impartial arbitration court, this cannot as such create a CAS jurisdiction by default. There must be a specific jurisdiction clause in the national federation's statutes and regulations as this is reflected under R47 of the Code.

24. If FIFA finds that the jurisdictional system of a national federation does not comply with article 63 of its statutes, it will then take the necessary measures towards the national association in order for it to introduce a valid jurisdiction clause in favour of CAS and/or establish an arbitration court which meets FIFA's criteria on independence and impartiality. In the meantime, it will be a matter of domestic law, Greek law in the present case, to decide whether a party concerned by a decision issued by a HFF body has the right to appeal against such decision before a competent state court.

57. In this case, if the Turkish rules do not comply with the requirements of the IAAF it is for the IAAF to take the necessary steps to ensure that the TAF does whatever is needed to comply with the IAAF's rules. In the meantime, it is a matter of domestic Turkish law to decide whether the Appellant has a right to appeal against the penalties imposed on them before the competent state court.

58. In these circumstances, it is unnecessary for the Panel to consider the preliminary question of whether, if CAS did have jurisdiction, the appeal would have been timely. Even if the appeal had been filed within the time limit, this Panel would be precluded to hear the appeal because of lack of jurisdiction. The determination whether the appeal was filed on time would have involved further factual investigation of the rival contentions as to what notice of the decisions of 19 September 2014 and when they received it, and in the circumstances the panel does not find it necessary to consider the issue further.

VI. CONCLUSION

59. In the light of the foregoing, the Panel finds that it has no jurisdiction to hear the appeal brought by the Appellant against the decision of 19 September 2014. As a result, the Panel does not need to address the issue of timeliness of the appeal or any other issues raised by any party herein.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has no jurisdiction to decide upon the appeal brought by K. against the decision of the TAF Penal Board dated 19 September 2014.
- (...)
4. All other claims and/or requests for relief are dismissed.