Arbitration CAS 2011/A/2479 Patrik Sinkewitz v. Union Cycliste Internationale (UCI), order of 8 July 2011

Cycling
Doping (recombinant human growth hormone – rhGH)
Request for provisional measures
Irreparable harm

1. **As a general rule, when deciding whether to grant a provisional measure, CAS considers the three below mentioned factors that are, in principle, cumulative: (a) whether the measure is useful to protect the applicant from irreparable harm ("irreparable harm" test); (b) whether the action is not deprived of any chance of success on the merits ("likelihood of success" test); and (c) whether the interests of the applicant outweigh those of the opposite party and of third parties ("balance of interest" test).**

2. **The fact that a professional athlete is prevented from competing in sports events in general is not sufficient to justify a stay in itself. Since there cannot be any security for a professional rider, even if he/she belongs to the best ones, to win a competition and the respective prize money, the fact of perhaps losing prize money during a period of time does not create *per se* irreparable harm. Nobody can predict the outcome and results of a future competition.**

3. **It is quite common in the cycling sport that teams suspend immediately their riders in the event they are notified with a positive test result. If the rider has not given any concrete evidence that his/her team would lift the contractual suspension, neither that he/she would be able to participate in the competitions mentioned in his request, he/she has not necessarily established that he/she would be exposed to a risk of irreparable harm if the provisional measure was not granted.**

In view of the in-competition test performed on 27 February 2011 on Mr Patrik Sinkewitz (the "Appellant"), which revealed the presence of the prohibited substance recombinant human growth hormone (rhGH) in both the A and B samples of urine;

In view of the provisional suspension imposed on the Appellant by the Union Cycliste Internationale (UCI; the "Respondent") on 18 March 2011 in accordance with Article 235 of the UCI Anti-doping rules (UCI ADR);

In view of the decision issued by the UCI Anti-Doping Commission on 3 June 2011 (the "Decision"), whereby the provisional suspension imposed on the Appellant by decision of the UCI of 18 March 2011, was not lifted;

In view of the statement of appeal filed on 16 June 2011 against the Decision;

In view of the request for interim relief, i.e. the lift of the provisional suspension, made by Counsel for the Appellant within his statement of appeal, whereby he alleges, *inter alia:*

- that such lift would avoid further irreparable harm to him, since i) he is a professional racing cyclist living from the remunerations obtained by his team and the results in the competitions to which he takes part; ii) he has not taken part in any competition for almost three months and has thus *"lost"* one third of the 2011 season; iii) not competing for three months *"is fatal to the career of a professional racing cyclist"*; iv) the contract with his team (Croft Sports Limited) has been suspended since then with immediate effect; v) if the suspension is lifted *"Appellant will be able to return to the team and participate in the remaining races in season 2011 immediately"*; vi) he would lose any chance to secure the conclusion of a new contract for the next season 2012; vii) *"in short, if the Provisional Suspension is not lifted at once by way of interim relief, in order to allow Appellant to return to competition and to participate in the remaining races in season 2011, Appellant's career as a professional racing cyclist is over and gone forever. That harmful consequence would be unavoidable and – irreparable".*
- that such lift is indicated since the Appellant's appeal is likely to succeed on the merits, since i) the Appellant's procedural rights have been violated; ii) no disciplinary proceedings have been initiated yet; iii) the method applied by the laboratory *"lacks a sufficient scientific validation and is not Fit-for-purpose"*; iv) the A sample analysis is neither sustained by a conclusive second opinion nor confirmed by a conclusive analysis of the B sample;
- that the Appellant's interest in such a lift prevails over the Respondent's interest, since i) Appellant has a strong interest to return to competition; ii) Respondent has no interest to keep the Appellant *"«away from the road» for an indefinite period of time. This is even more so as Respondent effectively prevails NADA (or BRD) from initiating the disciplinary proceedings against Appellant by picking a quarrel with NADA as to the applicable regulations"*; iii) the competitions to which the Appellant would be able to take part are not qualifying competitions and thus there would be no serious consequences *"resulting from the potential need to readjust the results of certain competitions"*; iv) it would have no consequence towards the fight against doping, but *"not lifting the Provisional Suspension would essentially approve the inactiveness of NADA (respectively BRD) (...) lift the Provisional Suspension would restore the correct balance between the general interest to keep doping out of sports and the athletes' (fundamental) rights"*;

In view of the Respondent's observations on the Appellant's request for provisional measures, whereby it objected to the lift of the provisional suspension imposed on the Appellant, *inter alia*, as follows:

- that at first stage, one should analyse whether the conditions for the provisional suspension are fulfilled rather than the ones concerning a lifting or not of such suspension;

- that in accordance with Article 239 of the UCI ADR *"the provisional suspension shall not be lifted «unless the Rider established that the apparent anti-doping rule violation has no reasonable prospect of being upheld or that he has a strong arguable case that he bears No Fault or Negligence for such violation»"*;
- that the Appellant did not bring forward any argument to establish his absence of fault or (significant) negligence but rather bases its entire defence in trying to demonstrate that he did not take the prohibited substance hGH which has been found in his urine samples (A and B) and did therefore not commit an anti-doping rule violation;
- that in view of the above, the Appellant's request is part of a provisional procedure since the issue whether he will be definitely suspended or not is part of a separate procedure on the merits of the case itself which is to be handled by the German's National Anti-Doping Agency (NADA);
- that the Appellant's request must be dismissed since a decision on such request would already be a decision on the merits of his appeal before CAS;
- that the Appellant's harm is certainly inherent to the concept of suspension, however it is not an argument for a lift of a suspension and the question is rather *"whether the granting of the interim relief requested would prevent further harm to occur"*;
- that the Appellant did not make such demonstration and he can neither rely on the letter addressed to him by its team, whereby it suspended him from participating in races for the team since the latter's reaction was his positive test result and not the provisional suspension;
- that in view of a positive result, it is quite common that *"teams suspend riders who have tested positive or do not take them to race any more, even before the case has been finally decided and no obligatory provisional suspension applies (e.g. E., T.; P. and F.)"*;
- that the *"races for which the Appellant was apparently scheduled to participate in the past were of a lot more importance than the ones to come. Also, the Appellant did not provide any document or other piece of evidence that he was indeed meant to participate in these races. It may be doubtful for example that the German Cycling Federation would admit a rider that is under a disciplinary procedure following a positive doping control (A and B) for its national championships even if the provisional suspension is lifted"*;
- that the fact that there is very doubtful that the Appellant will be able to compete again immediately in the event his provisional suspension would be lifted, is an important element for the balance of interest;
- that the fight against doping being an important issue, (which is not contested by the Appellant), the UCI must also consider *"the interest of all other athletes participating in cycling competitions that have not tested positive and that would possibly compete against a rider who did so. Its aim is to preserve the fairness of the competition as a whole"*;
- that it is provided in the UCI ADR and in the World Anti-doping Code (WADC) that a provisional suspension shall be imposed on an athlete who has an adverse analytical finding (AAF) for a prohibited substance which is not a specified one;
- that in view of this, the Respondent did not act arbitrarily so that the Appellant's interests cannot prevail in the present matter since the conditions of Article 235 of the UCI ADR,

"any analysis of an A Sample that has resulted in an Adverse Analytical Finding for a Prohibited Substance that is not a Specified Substance (…) the Rider shall be Provisionally Suspended pending the hearing panel's determination of whether he has committed an anti-doping rule violation" were fulfilled;

- that *prima facie* considering on the one hand the Appellant's clear AAF, the documentation package submitted to the UCI and then to the Appellant by specialised experienced and WADA-accredited laboratory, the confirmation of second and third reliable opinions and *"the absence of any serious contention by the Appellant that a departure from the IST or the ISL occurred that caused the AAF"*, and on the other hand that the scientific discussion will have to take place in the proceedings on the merits, it cannot be accepted that the appeal has a reasonable chance of success;
- that finally the three conditions to grant preliminary measures are not fulfilled in the present case and the Appellant's request shall therefore be denied.

LAW

1. In view of Article 183 of the Swiss Private International Law Act ("PIL Act"), according to which an international arbitral tribunal sitting in Switzerland is empowered to order provisional or conservatory measures at the request of one party;

2. In view of Article R37 of the Code of Sports-related Arbitration ("the Code") which expressly entitles the President, or his Deputy, of the CAS Appeals Arbitration Division to decide on an application for provisional measures;

3. In view of Article R47 of the Code as well as of Article 329.9 of the UCI ADR;

4. In view of CAS jurisprudence, according to which, as a general rule, when deciding whether to grant a provisional measure, CAS considers the three below mentioned factors that are, in principle, cumulative (see CAS 2008/A/1677, CAS 2009/A/1920, CAS 2010/A/2113):

   (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 2010/A/2113 and references cited).

   (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 2010/A/2113 and references cited).

   (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 2010/A/2113 and references cited).

5. Considering that *prima facie* CAS jurisdiction results *in casu* from Article R47 of the Code as well as from Article 329.9 of the UCI ADR;

6. Considering that a provisional suspension has been imposed on the Appellant in accordance with Article 235 of the UCI ADR and that the merits of the case must still be examined by the previous instance;

7. Considering that pursuant to Article 239 of the UCI ADR the Respondent denied to lift the provisional suspension since the Appellant has not proven that he bears no fault or negligence but based his entire argumentation on the fact that he did not take the prohibited substance found in the A and B Samples and thus did not commit any anti-doping rule violation;

8. Considering that according to CAS's case law, *"The fact that a professional athlete is prevented from competing in sports events in general is not sufficient to justify a stay in itself"*, and *"In sports-related cases, one needs to bear in mind, both the financial and the sporting consequences. Even when dealing with a professional rider, the CAS tends to give the sporting consequences more weight. Since there cannot be any security for a professional rider, even if she belongs to the best ones, to win a competition and the respective prize money, the fact of perhaps losing prize money during a period of time does not create* per se *irreparable harm. Nobody can predict the outcome and results of a future competition"* (cf. CAS 2008/A/1569);

9. Considering that it is quite common in the cycling sport that teams suspend immediately their riders in the event they are notified with a positive test result concerning one of their riders;

10. Considering that in his request for interim relief the Appellant has not necessarily established that he would be exposed to a risk of irreparable harm if the provisional measure was not granted. The Appellant has in particular not given any concrete evidence that his team would lift the contractual suspension, neither that he would be able to participate in the competitions mentioned in his request;

11. Considering that the Appellant has therefore failed to meet the first test, the conditions to grant the requested provisional measures are equally clearly not fulfilled here;

12. Accordingly, taking into account the above, the Deputy President of the CAS Appeals Arbitration Division deems that the Appellant's request for provisional measures shall be dismissed and that in application of the principle of procedural efficiency there is no need to further examine the UCI's argument that the Appellant's request would in reality concern the merits of the case.

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

1. The request for provisional measures filed on behalf of Mr Patrik Sinkewitz on16 June 2011 is dismissed.