



Arbitration CAS 2014/A/3868 World Anti-Doping Agency (WADA) v. Bhupender Singh and National Anti-Doping Agency of India (NADA), award of 23 November 2015

Panel: Judge James Reid QC (United Kingdom), Sole Arbitrator

Wrestling

Doping (evading a doping test)

WADA's right of appeal and CAS jurisdiction

Significant fault or negligence

Commencement of the period of ineligibility

1. According to the applicable national ADR, in cases of alleged violation of the anti-doping rules involving national-level athletes, the decision taken by a first instance adjudicating body may be appealed to an appellate body. WADA shall also have the right to appeal to CAS with respect to the decision of the appellate body. The rules provide for WADA to have the right to a second appeal to CAS in cases in which it has already been the appellant before the appellate body but is dissatisfied with the decision taken.
2. The standard penalty for evading a doping test under the relevant rules is a period of two years ineligibility. This penalty may be mitigated in certain exceptional circumstances, notably if an athlete can establish on the balance of probability that he/she bears no significant fault or negligence. Mere conjecture, youth and inexperience do not constitute a sufficient basis for finding “No Significant Fault or Negligence”. Likewise, an athlete who evidently chose not to consult either his/her coach or any doctor before drinking an energising drink and who followed a wrong advice by evading the test because of his/her fear that he/she would fail it cannot establish no significant fault or negligence.
3. According to the applicable rules, where there have been substantial delays in the hearing process not attributable to the athlete, the period of ineligibility may start at an earlier date commencing as early as the date on which the anti-doping rule violation last occurred.

I. THE PARTIES

1. The Appellant, World Anti-Doping Agency (“WADA”), is the international body charged with the fight against doping in sport.

2. The First Respondent, Mr Bhupender Singh (the “Athlete”) is a national-level wrestler, affiliated to the Wrestling Federation of India (“WFI”).
3. The Second Respondent, National Anti-Doping Agency of India (“NADA”) is the body in India which regulates the prevention and fight against doping in sport.

II. FACTS

4. Below is a summary of the main relevant facts and allegations based on the parties’ written submissions and documentary evidence provided. Additional facts and allegations may be set out, where relevant, in connection with the discussion of law and merits that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.
5. The Athlete participated in the 32nd Junior Free-Style and Greco-Roman Male National Wrestling Championship, which took place in Chandigarh from 9 May 2013 until 12 May 2013 (the “Competition”).
6. After the Athlete had completed his event at the Competition on 10 May 2013, he was randomly selected for a doping control, but upon notification the Athlete refused to sign the notification form and ran away from the venue.
7. The Athlete voluntarily provided a sample the following day (11 May 2013) following a discussion with his coach. No adverse analytical sample was returned in respect of this sample.
8. On 7 June 2013, NADA issued an anti-doping rule violation notice to the Athlete and referred the matter to the Anti-Doping Disciplinary Panel for adjudication pursuant to NADA’s Anti-Doping Rules (“ADR”).
9. By a decision of the Anti-Doping Disciplinary Panel dated 1 October 2013, the Athlete was rendered ineligible for a period of one year commencing on 1 October 2013.
10. At the hearing before the Anti-Doping Disciplinary Panel, the Athlete stated that someone had informed him that he would fail a doping test as a result of having consumed Red Bull energy drink. He said that it was for this reason that he ran away after being notified of the doping control. The Anti-Doping Disciplinary Panel accepted this statement in its decision.
11. WADA challenged this decision before the Anti-Doping Appeal Panel, which dismissed the appeal and confirmed the one-year period of ineligibility imposed upon the Athlete.
12. The decision of the Anti-Doping Appeal Panel was issued on 11 December 2014 and notified to WADA on 19 December 2014.

III. APPLICABLE RULES

13. In India the prevention of and fight against doping in sport is regulated by the ADR which have been in force since 1 January 2010.
14. Under to Article 1.1.1 of the ADR:
“The application of these Anti-Doping Rules to Participants is based on the membership obligations that exist between National Sports Federations and their members or Participants through those individuals’ agreement to participate in sport according to its rules”.
15. According to Article 1.2 of the ADR:
*“1.2.1 The NADA Anti-Doping Rules apply to all Persons who:
are members of a National Sports Federation of India, regardless of where they reside or are situated;
1.2.1.1 are members of a National Sports Federation’s affiliated members, clubs, teams, associations or leagues;
1.2.1.2 participate in any capacity in any activity organized, held, convened or authorized by a National Sports Federation of India or its affiliated members, clubs, teams, associations or leagues; and
1.2.1.3 participate in any capacity in any activity organized, held, convened or authorized by a National Event organization, or a national league not affiliated with a National Sports Federation.
1.2.2 Participants including Minors are deemed to accept, submit to and abide by these Anti-Doping Rules by virtue of their participation in sport”.*
16. The Athlete is affiliated to the WFI and takes part in national-level wrestling competitions in India (such as the Competition).
17. The ADR, which reflect the provisions of the World Anti-Doping Code (“WADC”), are applicable to this appeal.

IV. PROCEEDINGS BEFORE THE CAS

18. On 24 December 2014, WADA lodged a statement of appeal which was expressed to serve also as an appeal brief with the Court of Arbitration for Sport (“CAS”). By its statement of appeal WADA requested that the matter be referred to a sole arbitrator.
19. The notice of appeal together with letters from the CAS were delivered to NADA on 1 January 2015.
20. After various difficulties caused by the remoteness of the Athlete’s home address, the statement of appeal together with letters from the CAS were delivered to the Athlete on 7 May 2015.
21. The letters from the CAS required the Respondents to submit an answer pursuant to Article R55 of the Code of Sports-related Arbitration (the “Code”) within 20 days of the receipt of WADA’s statement of appeal serving as appeal brief.

22. On 1 July 2015, the Deputy President of the CAS Appeals Arbitration Division decided to submit the arbitration to a Sole Arbitrator.
23. Neither Respondent has submitted an answer to WADA's statement of appeal serving as appeal brief in the time limited or at all, but by e-mails dated 22 and 23 July 2015 NADA indicated that it proposed to raise the issue of the maintainability of WADA's appeal and of the propriety of making NADA a party to it with WADA.
24. By letter dated 23 July 2015, the CAS invited WADA to file its further comments on NADA's e-mails within 3 days of receipt of the letter. WADA did not do so but by a letter dated 31 July 2015 maintained its position as to its standing to file the appeal and as to the propriety of making NADA a party to the appeal.
25. On 24 July 2015, His Honour James Robert Reid QC was appointed as Sole Arbitrator to decide the case.
26. By letter dated 24 July 2015, the parties were informed of the appointment of the Sole Arbitrator and invited to inform the CAS whether they preferred that a hearing be held or the Sole Arbitrator deliver an award solely based on the parties' written submissions. By letter dated 27 August 2015, WADA expressed a preference for having the appeal determined without an oral hearing. Neither Respondent responded to the invitation.
27. The Sole Arbitrator has determined that he is sufficiently well informed to determine the matters at issue without a hearing in accordance with Article R57 of the Code.

V. JURISDICTION OF THE CAS AND ADMISSIBILITY

28. Article R47 of the Code provides as follows:
"An appeal against the decision of a federation, association or sports-related body may be filed with the 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".
29. Article 8 of the ADR sets out the disciplinary procedure to be followed in cases of alleged violations of the anti-doping rules. Article 9 ADR provides for the automatic disqualification of results and Article 10 ADR for sanctions against individuals. Article 13 ADR provides for appeals against decisions made under the ADR. *Inter alia*, by Article 13.2 ADR, a decision that an anti-doping rule violation was committed and a decision imposing consequences for an anti-doping rule violation may be appealed exclusively as provided by Article 13.2 ADR.
30. Article 13.2.1 ADR provides for appeals in cases arising from an International Event or in cases involving International-Level Athletes.

31. By Article 13.2.2 of the ADR, it is provided:
“In cases involving national-level Athletes that do not have a right to appeal under Article 13.2.the decision may be appealed to the Anti-Doping Appeal Panel”.
32. By the antepenultimate sub-paragraph of Article 13.2.3 of the ADR:
“For cases under Article 13.2.2 WADA and the International Federation shall also have the right to appeal to CAS with respect to the decision of the Anti-Doping Appeal Panel”.
33. There is no provision in the ADR to limit WADA’s right of appeal from a decision of the Anti-Doping appeal panel to cases in which WADA was not the appellant in the proceedings before the Anti-Doping Appeal Panel. In other words, the rules provide for WADA to have the right to a second appeal to CAS in cases in which it has already been the appellant before the Anti-Doping Appeal Panel but is dissatisfied with the decision of that Panel.
34. By the final subparagraph of Article 13.2.3 ADR, the filing deadline for an appeal or intervention filed by WADA shall be the later of 21 days after the last day on which any other party in the case could have appealed, or 21 days after WADA’s receipt of the complete file relating to the decision.
35. WADA lodged its statement of appeal against the decision of the Anti-Doping Appeal Panel dated 11 December and notified to WADA on 19 December 2014 on 24 December 2014, within the time limited by the ADR.
36. CAS accordingly has jurisdiction to hear this appeal and it is admissible.

VI. APPLICABLE LAW

37. Article R58 of the Code provides as follows:
“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
38. The body issuing the decision in this case is domiciled in India.
39. Accordingly, this dispute should be decided on the basis of the ADR and subsidiarily the law of India.

VII. THE PARTIES' SUBMISSIONS

A. The Appellant

40. WADA, in summary, submitted as follows.
41. CAS has enforced the terms of Article 2.3 of the ADR strictly. In particular, the defence of a "compelling justification" has been interpreted very restrictively.
42. At the hearing before the Anti-Doping Disciplinary Panel, the Athlete stated that someone had informed him that he would fail a doping test as a result of having consumed Red Bull energy drink. It was allegedly for this reason that he ran away after being notified of the doping control. Even if the Athlete's explanation were true (which WADA challenged noting that it was strange that another athlete had chosen to use the same excuse for the same behaviour at the same championship), he refused and failed to submit to, and deliberately evaded, sample collection. There was no compelling justification. Both national Panels correctly held that an anti-doping violation had been committed.
43. Article 10.3.1 of the ADR provides that the ineligibility for a violation of article 2.3 "*shall be two (2) years unless the conditions provided in Article 10.5 [...] are met*". The Athlete could not avail himself of an elimination of the period of ineligibility on the basis of article 10.5.1 (no fault or negligence). Articles 10.5.3 (*Substantial Assistance*) and 10.5.4 (*Admission of an Anti-Doping Rule Violation in the Absence of other Evidence*) were not applicable on the facts. The only basis for reducing the ordinary two-year period of ineligibility could have been article 10.5.2 (No Significant Fault or Negligence) but the Commentary to article 10.5.2 states that "*Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases*".
44. This was not a truly exceptional case. The Athlete might have been young, uneducated and inexperienced but this did not excuse him. He chose to run away without having sought advice from his coach or any doctor.

B. The Respondents

45. The Respondents made no submissions as to the substantive merits of the appeal.

VIII. MERITS OF THE APPEAL

46. On the hearing of an appeal before the CAS by Article R57 of the Code "*The Panel shall have full power to review the facts and the law*". This is a wider power than that which it appears the Anti-Doping Appeal Panel felt it had when it considered the case.
47. In the concluding paragraph of its decision it stated:
"We consider that the Disciplinary Panel has exercised its discretion taking into account the totality of circumstances and has therefore given the punishment of one year instead of two years. We do not think that the

exercise of discretion is so perverse as to invite reversal of the order of the Disciplinary Panel and to impose the punishment of two years as sought by WADA”.

48. This is the language of an appellate body reviewing the exercise by an inferior body of the inferior body’s discretion and holding that the inferior body has acted within the ambit of that discretion. It is not the language of an appellate body exercising its own discretion. While the CAS will pay proper regard to the decision being appealed, in particular where that decision is a careful and reasoned decision, in the end the CAS must make its own decision and not merely look to see whether the decision being appealed was one which fell within the wide ambit of the judicial discretion of the tribunal being appealed.
49. The standard penalty for evading a doping test under the relevant rules is a period of two years ineligibility. That standard penalty may be mitigated in certain exceptional circumstances. Those circumstances are set out in Article 10.5 of the ADR. The only one of those sets of circumstances which might be relevant in the present case is that set out in Article 10.5.2:
“No Significant Fault or Negligence
If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete’s sample in violation of Code Article 2.1 (Presence of Prohibited Substance), the Athlete shall also establish how the Prohibited Substance entered their system in order to have the period of Ineligibility reduced”.
50. The Athlete in this case deliberately evaded a doping test. He did so, it is said, as he believed that he would fail the test because he had been drinking Red Bull energy drink. That explanation was accepted by the national Panels which considered this case. While WADA does not accept that explanation, pointing to the fact that another athlete at the same championships used the same excuse in similar circumstances, the Sole Arbitrator is not prepared to differ from the views of those Panels. Unlike the Anti-Doping Disciplinary Panel and the Anti-Doping Appeal Panel, the Sole Arbitrator has not had the opportunity of seeing the Athlete in person. An equally plausible explanation for the fact that two athletes at the same championship both gave the same excuse for evading a doping test is that a rumour was current that having taken Red Bull would cause a failure of an anti-doping test. Be that as it may, the reason which the Athlete gave for evading the test was that he thought he would fail it. This can hardly be regarded as good mitigation.
51. The requirement of Article 10.5.2 is that an athlete wishing to avoid the full rigour of a two year period of ineligibility must establish on the balance of probability that he bears no significant fault or negligence. In the present case the factors found by the Anti-Doping Disciplinary Panel to justify a reduced sanction were summarised by the Anti-Doping Appeal Panel as being: (1) the Athlete voluntarily submitted to a doping test the following day; (2) no adverse analytical finding was returned in respect of that sample; (3) the Athlete is from a rural background (4) he

lacked knowledge and experience of anti-doping rules and (5) “because of wrong advice he was under fear and so could not provide his urine sample on the same day”.

52. As to the first of these points, it is irrelevant to the issue of “No Significant Fault or Negligence”. The offence was committed when the Athlete chose to run away rather than submit to the test. The fact that he thought better of his actions the next day after he had consulted his coach cannot be said to reduce his fault or negligence in failing to submit to the test in the first place.
53. It is true that there was no adverse analytical finding in respect of the sample which the Athlete submitted the following day. WADA sought to argue before the Anti-Doping Appeal Panel that that it did not follow that a negative result would have been obtained had the Athlete given a sample when he should have done, and urged that there are certain short term steroids and stimulants which could be used by athletes in “combative sports” the effect of which is spent in a very short period of time.
54. The Anti-Doping Appeal Panel pointed out that this point had not been taken before the Anti-Doping Disciplinary Panel, that there were no documents supporting the proposition before it and that it would not allow WADA to introduce fresh evidence because (a) it had not been placed before the Anti-Doping Disciplinary Panel and (b) permitting fresh evidence to be introduced would prejudice the Athlete and unnecessarily delay the decision. The Anti-Doping Appeal Panel described the proposition as “mere conjecture” and later in its decision stated *“We may observe that if the athlete had taken any prohibited substance then that would have been noticed when his urine sample given the next day was tested”*.
55. The position on this appeal is that WADA has not sought to adduce any evidence to support its contention that there are prohibited substances which may be used in “combative sports” the effect of which is spent in a very short period of time. Any suggestion that had the Athlete submitted a sample when he should have done, the resulting analysis might not have been negative is, as the Anti-Doping Appeal Panel said “mere conjecture”. But equally the suggestion that if the Athlete had taken any prohibited substance then it would have been noticed when his urine sample was given the following day is also mere conjecture.
56. Either way, the fact that he gave a sample the following day and there was no adverse analytical finding is of very little assistance to the Athlete because the offence had already been committed and his subsequent actions cannot affect the extent of his fault or negligence in committing the offence. At best it gives some assistance to the Athlete in suggesting that his running away from the test was caused by naivety and panic rather than as part of some premeditated plan.
57. The third and fourth points can be taken together. The Athlete’s rural background and his lack of knowledge and experience of anti-doping rules were accepted by the Anti-Doping Disciplinary Panel. In particular it appears he had never previously been required to submit to a doping control test. WADA does not contest these facts but argues that they are irrelevant. It points out the entire anti-doping system is predicated on personal responsibility and that there have been previous decisions of the CAS such as CAS 2009/A/1915 and CAS 2009/A/2012 which demonstrate that youth and inexperience do not constitute a sufficient basis for finding “No Significant Fault or Negligence”.

58. As the Panel observed in CAS 2006/A/1032, “[...] *either an athlete is capable of properly understanding and managing his/her anti-doping responsibilities whatever his/her age, in which case she/he must be deemed fully responsible for his/her acts as a competitor, or the athlete is not mature enough and must either not participate in competition or have his/her anti-doping responsibilities exercised by a person- coach, parent, guardian, etc.- who is capable of such understanding and management*”.
59. As to the final point, the “wrong advice” is said to have been the fact that he had been told by an unnamed source that having drunk Red Bull might cause him to fail the test. By article 2 of the ADR “*Athletes and other Persons shall be responsible for knowing what constitutes an anti-doping violation and the substances and methods which have been included in the Prohibited List*”. The Athlete evidently chose not to consult either his coach or any doctor either before drinking Red Bull or when he heard of the supposed possible consequences of drinking it. He then chose to evade the test because of his fear that he would fail it. What made him afraid (and so apparently incapable of taking the test that day) was his fear that he would fail. This fear led him to the decision to run away. It is extremely difficult to see how it could be said that this shows that there was no substantial fault or negligence in his failure to submit to the test.

IX CONCLUSION

60. None of the factors which have been urged on behalf of the Athlete enable him to rely on the provisions of Article 10.5.2 of the ADR. As the commentary points out, Articles 10.5.1 and 10.5.2 are intended to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases. While it might be easy to feel sorry for a young man who acted foolishly and later (after speaking to his coach) repented of his actions he has not shown that he was guilty of “No Significant fault or negligence”. His conduct was precisely the sort of conduct which Article 2.3 of the ADR is intended to punish and deter.
61. It follows that the appeal must be allowed and the decisions of the Anti-Doping Panel dated 1 October 2013 and of the Anti-Doping Appeal Panel set aside. A period of two years ineligibility must be imposed.
62. By Article 10.9.1 of the ADR the period of ineligibility shall start on the date of the hearing decision providing for ineligibility. *Prima facie*, therefore, the period of ineligibility should start from the date of this Award. By Article 10.9.2 any period of Provisional Suspension is to be credited against the total period of ineligibility. *Mutatis mutandis* this must apply also to any period already served as a result of the decisions at the earlier hearings (as WADA accepted in its Notice of Appeal). Furthermore, by Article 10.9.3 where there have been substantial delays in the hearing process not attributable to the athlete, the Anti-doping Disciplinary Panel may start the period of ineligibility at an earlier date commencing as early as the date on which the anti-doping rule violation last occurred.
63. In the present case there is an entirely unexplained delay of over one year between the original decision of the Anti-Doping Disciplinary Panel and the hearing by the Anti-Doping Appeal Panel. It has not been suggested that the Athlete was in any way to blame for this delay, and

indeed given his youth, his naivety and his rural background it is inherently improbable that he could have engineered, or been otherwise responsible for, such a delay.

64. In all the circumstances of the case the appropriate order is that the two-year period of ineligibility shall commence on the date of the decision of the Anti-Doping Panel, that is to say 1 October 2013, thus placing the Athlete in the position he would have been in had the Anti-Doping Panel not reached an incorrect conclusion.
65. All competitive individual results obtained by the Athlete from 10 May 2013 through the commencement of the applicable period of ineligibility are annulled, as are any results in the period from 1 October 2014 (when the Athlete was free to compete again under the order of the Anti-Doping Panel) until 30 September 2015.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal of WADA is upheld.
2. The decisions of the Anti-Doping Disciplinary Panel dated 1 October 2013 and of the National Anti-Doping Appeal Panel of India dated 11 December 2014 are set aside.
3. Mr Bhupender Singh is sanctioned with a period of two years ineligibility commencing on 1 October 2014.
4. All competitive results obtained by Mr Bhupender Singh from 10 May 2013 through the commencement of the applicable period of ineligibility and in the period from 1 October 2014 to 30 September 2015 are disqualified, including the forfeiture of any titles, awards, medals, points and prize and appearance money.
5. (...).
6. (...).