



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2005/A/946 IAAF v/ FIDAL & Marco Giungi

ARBITRAL AWARD

rendered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Jean-Philippe Rochat, Attorney-at-Law in Lausanne, Switzerland

Arbitrators: Mr David W. Rivkin, Attorney-at-Law in New York, USA
Prof Massimo Coccia, Attorney-at-Law in Rome, Italy

Ad hoc Clerk: Mr Andreas Zagklis, Attorney-at-Law in Athens, Greece

in the arbitration

between

THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATION (IAAF),
Monaco

Represented by Mr Mark Gay, Solicitor of DLA Piper Rudnick Gray Carey UK LLP,
London, United Kingdom

Appellant

v/

FEDERAZIONE ITALIANA DI ATLETICA LEGGERA (FIDAL)
Rome, Italy

and

MARCO GIUNGI, Italy,
Represented by Mr Pierfilippo Capello, Attorney-at-Law in Milan, Italy

Respondents

1. The Parties

- 1.1 The International Association of Athletics Federations ("IAAF" or the "Appellant") is the world governing body for the sport of athletics. It has its seat in Monte-Carlo.
- 1.2 The Federazione Italiana di Atletica Leggera ("FIDAL" or the "First Respondent") is the national governing body for athletics in Italy, and is a member of the IAAF.
- 1.3 Marco Giungi ("Mr Giungi" or the "Second Respondent") is an Italian athlete, whose particular discipline is walk. He represented Italy in the Athens 2004 Olympic Games. Mr Giungi is also a soldier and, therefore, registered with the club G.A. Fiamme Gialle, the Italian Financial Police's Track Athletic Group (the "Club").

2. The Relevant Facts

The following facts remained undisputed by the Parties:

- 2.1 On 12 September 2004, Mr Giungi participated in a national 20km walk competition "CDS Marcia" in Prato, Italy. After the end of the competition, he underwent a doping control. The urine sample was analysed by the WADA-accredited laboratory in Rome (the "Rome Laboratory").
- 2.2 By letter of 6 October 2004 the Italian Olympic Committee (Comitato Olimpico Nazionale Italiano - "CONI") notified Mr Giungi, FIDAL and the Club, that "[in] the analyses carried out by the Anti-doping Laboratory in Rome [...] traces of Norandrosterone were found at a concentration exceeding the WADA limits together with Noretiocholanolone." These results were confirmed by the analysis carried out on the "B" sample. Norandrosterone and noretiocholanolone are both metabolites of nandrolone, a prohibited substance under IAAF Rules.
- 2.3 On 6 October and 15 November 2004 the IAAF was also informed via fax by the Rome Laboratory about the results of the analysis on the "A" and "B" sample respectively.
- 2.4 On the basis of the adverse analytical findings, the CONI Anti-doping Prosecutor (the "Prosecutor") opened an investigation. On 2 December 2004 Mr Giungi, assisted by his attorney Mr Pierfilippo Capello, appeared before the Prosecutor and acknowledged having used before and after the walk race of 12 September 2004 the nutritional supplements "Pre-gara Endurance" and "Recupero". Mr Giungi had already requested a private analysis of the said supplements by the laboratory Minalab in Casalmaggiore, Italy. The results showed that both supplements contained norandrosterone and noretiocholanolone. The Prosecutor then summoned the producer of "Pre-gara Endurance" and "Recupero", DITTA DIFASS Company ("Difass"). A Difass's representative, Mr Franco Donati, appeared on 14 December 2004 before the Prosecutor and stated that after investigating the issue "it turned out that the consignment was contaminated. [...] It was finally established that the substance involved was creatine pyruvate supplied to [Difass] by the company Giusto Favarelli S.p.A.". On 23 December 2004 the Prosecutor asked the Rome Laboratory to carry on specific analyses over the supplements delivered to the Prosecutor by Mr Giungi,

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belonging to the same batch that Difass had given the athlete. On 1 March 2005 the Rome Laboratory informed the Prosecutor that "*Both products contain 19-norandrostenedione. [...] 19-norandrostenedione [is] a forerunner of 19-nortestosterone, whose ingestion causes the composition of norandrosterone and noretiocholanolone. [...] The take of one or more doses of the product could theoretically be compatible with the urinary concentration of norandrosterone beyond the WADA limit [...]*". Concluding the above investigation, the Prosecutor decided on 7 March 2005 to ask the closing of the case, since "*the athlete [...] gave full and convincing proof of taking contaminated supplements without any responsibility*".

- 2.5 On 4 April 2005 the National Judging Commission of FIDAL (Commissione Giudicante Nazionale, the "FIDAL Commission"), competent national body to decide on Mr Giungi's case, after hearing Mr Giungi's and Mr Capello's submissions held that, according to IAAF Rule 38.13, "*the determination of exceptional circumstances in cases involving international level athletes shall be made by the [IAAF] Doping Review Board. [...] Consequently the evaluation of the [Prosecutor's] closing request must be sent to the General Secretary of the Doping Review Board for the final evaluations*". On 21 April the General Secretary of FIDAL informed accordingly the IAAF General Secretary.
- 2.6 By his letter dated 29 April 2005 the IAAF General Secretary informed FIDAL that "*[Mr Giungi] is not however an International Level athlete as defined in IAAF Rules [...] and the competition at which he tested positive in Prato on 12 September 2004 was not an International Competition.*"
- 2.7 On 25 May 2005 the FIDAL Commission rendered a new decision on Mr Giungi's matter, in which *inter alia* pointed out that "*Since the authority of the superior body was denied, the closing request, at that time proposed [by] the Prosecutor, must be examined by this Commission. [...] Even if the procedural choice puzzles us, since the impossibility of the judicial commission of expressing its different opinion [...] makes useless the provision that the closing will be ordered by the "judge" and not directly by the prosecuting body [...] the closing of the action against Mr Andrea Giungi is to be ordered*". Consequently, Mr Giungi's case was closed.
- 2.8 On 18 June 2005, the IAAF received from FIDAL an English translation of the decision issued by FIDAL Commission on 25 May 2005.

3. The Parties' Respective Requests

3.1 The Appellant

In its Appeal Brief dated 22 September 2005 the IAAF challenges the decision rendered by FIDAL Commission on 25 May 2005. The Appellant submits that Mr Giungi has committed an anti-doping violation and, because no exceptional circumstances exist, it requests that Mr Giungi be declared ineligible for a minimum of two years from the date of the hearing, less any period of provisional suspension served.

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3.2 The Second Respondent

In his Answer dated 25 October 2005, the Second Respondent requests the appeal to be dismissed because "*the body exclusively competent for the appeal is the FIDAL Federal Appeals Commission and not the CAS*". In case the appeal were to be decided by CAS, the Second Respondent asks a) no sanction be imposed to him on the basis of exceptional circumstances as provided in WADA Code and IAAF Rules or b) on the same basis a reduced period of ineligibility be imposed, which should be considered served as he has not participated in any competition since the day of the doping control, i.e. 12 September 2004.

4. The Proceedings before CAS

- 4.1 By letter dated 15 August 2005 IAAF filed a Statement of Appeal with the Court of Arbitration for Sport against the decision rendered by FIDAL Commission on 25 May 2005.
- 4.2 By letter dated 22 September 2005 IAAF filed its Appeal Brief.
- 4.3 By letter dated 5 October 2005 the CAS Court Office issued a notice that the Panel was constituted in the following composition: Mr Jean-Philippe Rochat as president, Mr David W. Rivkin as arbitrator appointed by the Appellant, and Mr Massimo Coccia as arbitrator appointed by the Respondent.
- 4.4 On 25 October 2005 Mr Giungi filed his Answer in accordance with Article R55 of the Code of Sports-related Arbitration (the "Code").
- 4.5 On 4 January 2005, the President of the Panel issued an Order of Procedure that was sent to the parties. This order was returned signed by both Respondents. The Appellant, by his letter dated 12 January 2005, did not fully accept the Order of Procedure and requested an amendment concerning applicable law.
- 4.6 A hearing was held in Lausanne on 26 January 2006. FIDAL was not represented in the hearing although duly summoned; the Panel nevertheless proceeded with the hearing according to Article R57 para. 3 of the Code. During their opening statement, IAAF representatives formally accepted the Order of Procedure, reserving the Appellant's rights on the issue of applicable law, asking for IAAF's Rules and law of the Principality of Monaco, i.e. the law of IAAF's seat, to be applied. Mr Giungi was not present at the hearing, no witnesses were heard and Dr Francesco Botrè's (Scientific Director of the Rome Laboratory) written statement, provided by IAAF, was accepted by the representative of Mr Giungi. The Panel had the opportunity to hear the complete explanations of the parties, the Respondent having the final response in accordance with Articles R57 and R44.2 of the Code.
- 4.7 At the end of the hearing, the parties, after making submissions in support of their respective requests for relief, confirmed that they had no objections to raise regarding their right to be heard and to be treated equally in the arbitration proceedings.

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5. Jurisdiction of the CAS

- 5.1 The first question to be resolved is whether the CAS has jurisdiction to hear the appeal lodged by IAAF. Article R47 of the Code sets out the conditions for application of CAS Procedural Rules and, in doing so, defines the jurisdiction of CAS. It reads as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body. [...]"

- 5.2 As the Second Respondent objected to the standing of IAAF and the jurisdiction of CAS, the Panel must interpret and apply IAAF regulations to determine whether the legal remedies have been exhausted.
- 5.3 The Appellant and the Second Respondent clearly confirmed during the proceedings and at the hearing the fact that Mr Giungi was *not* an International-Level Athlete under IAAF Rules on the day of the doping control and that the 20km walk competition "CDS Marcia" which took place in Prato, Italy on 12 September 2004 was not – under the same Rules – an International Competition.

- 5.4 IAAF Rule 60.12 provides as follows:

"12. In cases which do not involve International-Level athletes (or their athlete support personnel) or which do not arise from an International Competition, whether doping or non-doping related, the decision of the relevant body of the Member may (unless Rule 60.17 below applies) be appealed to a national review body in accordance with the rules of the Member. Each Member shall have in place an appeal procedure at national level that respects the following principles: a timely hearing before a fair, impartial and independent hearing body, the right to be represented by legal counsel and interpreter (at the appellant's expense) and a timely and reasoned decision in writing. The decision of the national review body may be appealed to CAS in accordance with Rule 60.16 below." (emphasis added)

- 5.5 IAAF Rule 60.15 provides as follows:

"15. In any case which does not involve International-Level athletes (or their athlete support personnel) or which does not arise from an International Competition, the parties having the right to appeal a decision to the national level review body shall be as provided for in the rules of the Member, but shall include at a minimum: a) the athlete or other person the subject of the decision being appealed; b) the other party to the case in which the decision was rendered; c) the Member. The IAAF and WADA (in doping related cases only) shall have the right to attend any hearing before the national-level review body as an observer. The IAAF's attendance at a hearing in such capacity shall not affect its right to appeal the decision of the national level review body to CAS in accordance with Rule 60.16 below." (emphasis added)

- 5.6 IAAF Rule 60.16 provides as follows:

"The following parties shall have the right to appeal the decision of the national level review body to CAS: a) the IAAF; and b) the WADA (in doping-related cases only). No decision may be appealed to CAS until the appeal procedure at national level has been exhausted in accordance with the rules of the Member." (emphasis added)

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- 5.7 Given that IAAF Rules refer expressly to the “rules of the Member”, the Panel is of the opinion that IAAF incorporates its Members’ rules in its own regulations, as far as appeals procedures before “national level review bodies” are concerned. Consequently, in the case at hand IAAF subjects itself to FIDAL rules regarding possible internal appeal(s).
- 5.8 Articles 20.4, 20.5 of FIDAL Anti-doping Rules read as follows:
- “20.4 Appeals concerning national level athletes. In the cases in which is possible to submit an appeal as provided in the above point 2, the appeal against the decision must be submitted to the competent second degree Organ of Federal Justice (Commissione d’ Appello Federale), as provided in the present article. [...]”*
- 20.5 [...] In the cases provided in the above point 4, may appeal to the Commissione d’ Appello Federale and successively to the G.U.I., the parties of the ended proceeding and the IAAF and the WADA. The parties and the IAAF and the WADA may appeal to the TAS once completed the above mentioned degrees of national sports justice”*
- The above English translation of FIDAL Anti-doping Rules was provided by the Second Respondent accompanied by the text in Italian. The latter does not contain *prima facie* the acronym “IAAF” in Article 20.5 para. 2. The Panel considers this being only a typing error, from which no different conclusion than the abovementioned (5.7) could be drawn, since:
- a) The context clearly shows that a word is missing, given that an article appears without a noun in the text: *“le parti del processo concluso con la sentenza impugnata ovvero la e la WADA”, i.e. “the parties to the proceedings concluded with the appealed decision as well as the and the WADA”* (emphasis added).
- b) Article 20.9 of FIDAL Anti-doping Rules provides for the formal requirements concerning appeals against a decision of FIDAL Commission. Paragraph 5 of the same Article sets an exception to the rule of appeals’ fee: the Prosecutor, the WADA and the IAAF are exempted from the obligation to pay the appeals’ fee (*“Sono esentati del versamento della citata tassa l’ U.P.A., la WADA, e la I.A.A.F.”*).
- c) FIDAL Anti-doping Rules – like the anti-doping rules of all recognised Italian Federations – are, in their entirety, a reproduction of CONI Anti-doping Rules adapted to the sport of Athletics; article 20.5 para. 2 of CONI Anti-doping Rules reads: *“le parti del processo concluso con la sentenza impugnata ovvero la Federazione Internazionale competente e la WADA”, i.e. “the parties to the proceedings concluded with the appealed decision as well as the competent International Federation and the WADA”* (emphasis added).
- 5.9 In accordance with the abovementioned IAAF and FIDAL Rules, IAAF had a right to appeal against the decision rendered by the FIDAL Commission on 25 May 2005. IAAF was notified of this decision the latest on 18 June 2005, when it received an English version of the said decision from FIDAL. The procedural framework for the filing of the appeal is set up in detail in Article 20.9 of FIDAL Anti-doping Rules.
- 5.10 The same conclusion can be drawn from the wording of IAAF Rules 60.15 and 60.16. In both texts, IAAF has a right to appeal to CAS only from a decision issued by a

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"national level review body" (emphasis added). When Members' rules provide for such a national review body, like in the present case, IAAF Rules should be construed strictly, as written.

- 5.11 In addition, Rule 60.17 allows the IAAF to appeal a national level decision *directly* to CAS only when the Member's rules expressly permit it:

"17. If however, in cases not involving International-Level athletes (or their athletes support personnel) or not arising from an International Competition, the rules of the Member provide for the right of the IAAF and WADA (in doping-related cases only) to appeal a decision direct to CAS rather than to the national level review body as in Rule 60.15 above, provided the CAS Appeal is conducted in accordance with the provisions of Rule 60 below, the CAS decision shall be final and binding [...]" (emphasis added)

Apart from the fact that the "rules of the Member" are once more incorporated in the IAAF Rules, there would be no need for this provision if the IAAF had the right, on the basis of Rule 60.15, always to appeal from national first-instance level decisions directly to CAS. In view of the fact that FIDAL Anti-doping Rules do not provide the right to such direct appeal, the IAAF could not in the present case file an appeal to CAS prior to challenging the same decision before the Federal Appeals Commission.

- 5.12 The IAAF argues that it cannot subject itself to each one of its 212 Members' rules and, additionally, it cannot be in a position to know what these rules may require. The Panel points out that IAAF Rules 60.15, 60.16 and 60.17 directly refer to Members' rules, incorporate them and connect their content with specific legal consequences such as the right to appeal before CAS. Accordingly, although the Panel accepts IAAF's argument that IAAF Rules prevail over its Members' rules, it is to be admitted that the IAAF is subject to its Members' rules to the extent the former are incorporated in the IAAF Rules.
- 5.13 The IAAF argues that Rule 38.7 provides that IAAF may have an observer position, in relation to national procedures, and that this Rule overrides the generic Rule 60.15. The Panel notes that Rule 38.7 applies only in cases where the IAAF is not a party to the proceedings before a national body. On the other hand, Rule 60.15 applies to disputes (Chapter 4: Disputes) and specifically to appeals, as is the present case, referring to parties that have a right to appeal according to the Member's rules. In the Panel's view, Rule 60.15 is just as specific as Rule 38.7 and cannot in any way be considered as *lex generalis* towards Rule 38.7.
- 5.14 The IAAF argues that internal remedies were indeed exhausted, since neither of the parties to the national procedure filed an appeal against the decision of the FIDAL Commission. The Panel considers that the phrases "*insofar as the Appellant has exhausted the legal remedies available to him*" (Article R47 of the Code) and "*until the appeal procedure at national level has been exhausted*" (IAAF Rule 60.16) shall be *in casu* interpreted in conjunction with IAAF Rule 60.15. If the Member's rules grant for IAAF a right to appeal a national level decision, the requisite of exhaustion of legal remedies is fulfilled only after IAAF exercises this right in fact. In the case at hand the IAAF had such right according to FIDAL Anti-doping Rules but it did not exert it, and it cannot benefit from the fact that the other parties chose not to appeal the decision before the Federal Appeals Commission. Besides, Rule 60.15 *in fine* expressly preserves IAAF's right to appeal a decision of a national level review body

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before CAS. A review body can be understood only as a body before which an appeal against a first- or second- instance decision is submitted.

- 5.15 The IAAF finally argues that it was never notified by FIDAL of its right to appeal the decision issued by FIDAL Commission before the Federal Appeals Commission. The Panel observes that IAAF was unable to designate any legal basis, according to which FIDAL was obliged to accompany the notification of the FIDAL Commission's decision with a special indication regarding possible legal remedies. Once IAAF itself has chosen to incorporate some of its Members' rules in its own regulations, it is up to IAAF to know and understand what its rights are under its Members' rules. Therefore, the Panel cannot accept this argument.
- 5.16 Because the IAAF had the right to appeal the FIDAL Commission decision to the Federal Appeals Commission, but did not do so, this case ended when the time limit to make such an appeal expired. The IAAF therefore did not have the right to make this appeal to CAS.

6. Conclusion

- 6.1 The Panel concludes that, due to lack of jurisdiction of the Court of Arbitration for Sport, the appeal filed by the IAAF on 15 August 2005 shall be dismissed.
- 6.2 The Panel wishes to underline that it interpreted the various provisions in a manner "*which seek[ed] to discern the intention of the rule maker, not to frustrate it*" (CAS 96/149, CAS Digest I, p. 259). CAS cannot rewrite but only interpret rules set forth by sports authorities in the light of general principles of law. In this context, it is important for international federations to draft clearly their rules and, consequently, for CAS to apply them as written. In the present case the IAAF Rules should be construed also in a way that serves the certainty of law among its Members and, especially, among its Members' athletes: every athlete needs to know beforehand the procedure following an adverse analytical finding. This refers not only to administrative issues, to which the WADA Code has undoubtedly contributed, but also to available legal remedies for all involved parties (such as the athlete, NF, IF and WADA).
- 6.3 It was evident from the procedure before the Panel and indeed expressly stated by Counsel for the Appellant, that the IAAF would preferably avoid any involvement with regard to domestic proceedings for non-international-level athletes. This statement noticeably contradicts the IAAF's choice to incorporate its Members' rules in its own regulations. Again, the question for an international governing body would be either to monitor effectively its Members' rules and proceedings or to avoid its own dependence upon them.

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7. Costs

7.1 In accordance with Articles R65.1 and R65.2 of the Code, appeal arbitration proceedings are free, apart from the fee of CHF 500 paid by the Appellant upon submission of the Statement of Appeal which is retained by the CAS. The fees and costs of the arbitrators, together with the costs of the CAS are borne by the CAS.

7.2 Pursuant to Article R65.3 of the CAS Code, however, the Parties themselves are required to advance their own costs as well as the costs of experts, witnesses and interpreters, which costs are subsequently allocated by the Panel:

"The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties."

7.3 In this appeal, although the Appellant has been unsuccessful, the Panel does not consider that the decision of IAAF to file an appeal before CAS was unreasonable. CAS has applied on various occasions the principle stated in Article 2.1.1 of WADA Code ("*It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body*") in a rather strict way (CAS 2002/A/360, CAS 2002/A/385, CAS 2003/A/484). In view of the above, the Panel could not disregard the similarity of the present case to a number of doping-related disputes heard before CAS concerning contaminated nutritional supplements in which the athlete could not prove lack of negligence (see e.g. CAS 2005/A/847).

7.4 Considering all of the circumstances of this appeal including the conduct of both Parties, the Panel concludes that each party should bear its own legal costs and expenses incurred in connection with this appeal arbitration proceeding.

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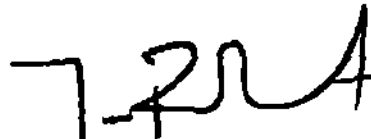
ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by the IAAF on 15 August 2005 against the decision made by the FIDAL Commission dated 25 May 2005 is dismissed.
2. Each party shall bear its own costs.

Lausanne, 2 March 2006

THE COURT OF ARBITRATION FOR SPORT



Jean-Philippe Rochat
President of the Panel