

DECISION

Pronounced: 10 February 2017

Case no.: 29/2016

Adjudication Committee Members

Ivar Sølberg, chair
Marit Forsnes
Thomas Laurenz Bornø

Parties:

Prosecution Committee for Anti-Doping Norway (ADNO)
represented by Niels R. Kiær, Attorney at Law

versus

Therese Johaug
represented by Christian B. Hjort, Attorney at Law

This case concerns a violation of the doping provisions as stated in Chapter 12 of the NOC Statutes.

Therese Johaug was born on 25 June 1988. She is a member of IL Nansen (Sports Club), which is affiliated with the Hedmark Regional Confederation and the Norwegian Ski Federation.

According to Section 12-2 of the Statutes for the Norwegian Olympic and Paralympic Committee and Confederation of Sports (the NOC Statutes), the control and prosecuting authority in doping cases is assigned to Anti-Doping Norway (ADNO).

On 22 November 2016, the Prosecution Committee of ADNO passed a resolution to file a prosecuting petition with the Adjudication Committee of the Norwegian Olympic and Paralympic Committee and Confederation of Sports against Therese Johaug. The prosecution concerns a rule violation of NOC Statutes Section 12-3(1) litra a, the presence of a prohibited substance in a doping sample. The petition was submitted to the Adjudication Committee 6 December 2016, with the following contention:

Therese Johaug to lose the right to participate in competitions and organized training, and the right to hold elected or appointed office, for a period of 14 – fourteen – months, effective from the time of the imposition of the suspension 18 October 2016.

Therese Johaug, represented by Christian B. Hjort, Attorney at Law, submitted a notice of intention to defend on 9 January 2017. It was argued that Johaug should not be declared ineligible, in the alternative that the period of ineligibility should be significantly less than 12 months.

The parties exchanged further pleadings and agreed that the Adjudication Committee would conduct a hearing in the case.

A public hearing was held in Oslo on 25 and 26 January 2017.

The background to the case:

Therese Johaug (the athlete) has been an international top-level athlete for ten years. She is currently considered to be the world's best female all-round cross-country skier. Johaug debuted in the World Cup in January 2007. Since then she has had 194 starts, whereof 100 individual podium placings and 42 individual victories. She won world championships in a number of disciplines in 2011, 2013 and 2015. In 2010, Johaug was an Olympic champion in relay. She won the World Cup overall in the 2013/2014 and 2015/2016 seasons. She won the Tour de Ski in the same two seasons.

Anti-Doping Norway has taken 88 doping samples from Johaug since 2008.

Therese Johaug tested positive in a sample taken out of competition, at her residence in Oslo, on 16 September 2016.

The analysis reports of 30 September 2016 (the A sample) and 10 October 2016 (the B sample) by the Norwegian Doping Control Laboratory, Oslo University Hospital, found the presence of Clostebol Metabolite in her urine, at an estimated concentration of 13 ng/mL.

Clostebol has long been listed on the World Anti-Doping Agency's (WADA) Prohibited List group S1 (Anabolic Agents) for substances and methods prohibited at all times, in and out of competition.

The athlete has not disputed the results of the analysis.

The athlete listed Trofodermin on the Doping Control Form on 16 September 2016. Trofodermin is a trademark/name of a pharmaceutical product, a cream, (30 grams) for use on the skin. The two active chemical substances in the product are Clostebol acetate (0.5%) and Neomycin sulphate (0.5%). This product is not registered in Norway.

In a report dated 9 January 2017, commissioned by the athlete's legal counsel, expert witness Professor Jo Klaveness, School of Pharmacy, University of Oslo, describes how, chemically, Clostebol is very similar to the male hormone testosterone, which has two primary effects: androgenic (as the male sex hormone) and anabolic (increased protein and muscle mass) effects. Klaveness explained that Clostebol is an anabolic steroid developed to achieve a substance with testosterone-like properties, whereof the anabolic effect is good, while the androgenic effect is reduced in relation to testosterone – in other words, an anabolic steroid with reduced androgenic properties.

The Adjudication Committee accepts Professor Klaveness' evidence.

The athlete testified that she sustained sunstroke while at a training camp in Seiser Alm in Italy at the end of August 2016. She developed a fever and diarrhoea, and sunburn on her lip. She felt unwell and on 28 August 2016 called the team doctor Fredrik Bendiksen, who was in Norway. One of the issues they discussed was whether she should return home, but they agreed to wait and see how the situation developed.

After a while the sunburned lip became painful. She developed large blisters, which eventually burst.

Dr Bendiksen arrived at Livigno late in the evening on 1 September 2016. He and Johaug had agreed to meet for breakfast the next day. She asked him then if he had anything for her lip. Bendiksen said he would check the medical bag, which was in Livigno, when he arrived there. Due to other priorities, he did not look in the medical bag until on the afternoon of the same day, 2 September 2016.

According to Johaug, Bendiksen told her that afternoon/evening that he did not have the product that he was looking for and that "he was going out to see if he could find something at the pharmacy".

Dr Bendiksen testified that the next day, 3 September 2016, before noon, he purchased two non-prescription pharmaceutical products at the local pharmacy. The pharmacy did not have the product that he asked for, Terra-Cortril. He described the symptoms to the pharmacist, and was recommended and purchased Keratoplastica and Trofodermin. He noted that Trofodermin contained the antibiotic neomycin.

That same day, Bendiksen gave the athlete Keratoplastica. She asked if she could use the cream, and he confirmed that she could.

Bendiksen told Johaug that he had purchased two creams at the pharmacy, and that she should tell him if the symptoms did not improve within a short period of time.

The next day, 4 September 2016, Bendiksen noted that Johaug's lip had not improved. He collected the Trofodermin ointment and gave it to her, with instructions on how to use it. At the same time, she asked Bendiksen if the cream was on the Prohibited List – "Fredrik, is this completely okay to use?"

Bendiksen assured her that she could use the cream – that it was "clean". She testified that she trusted the doctor 100 per cent and that she therefore made no further investigations.

Johaug testified that she was given the tube of ointment in its box, and that she took it with her to the hotel room. She removed the tube and the patient package insert from the box. She noted that the patient package insert was in Italian. She does not understand Italian. She threw away the box and the insert. She did not notice that on one side the box carried a red "doping warning". Johaug used the cream from 4 until 15 September 2016.

The Adjudication Committee finds these facts to have been clearly substantiated.

No information presented in this case undermines the testimonies given by Johaug and Bendiksen about how the prohibited substance entered her body. All the other information/evidence in the case confirms these testimonies. Alternative theories as to the sequence of events are in the Committee's opinion speculative derailments.

Therese Johaug has been suspended since 18 October 2016.

Anti-Doping Norway represented by Niels R. Kiær, Attorney at Law, has essentially pleaded as follows:

The presence of a prohibited substance or its metabolites in an athlete's doping sample is deemed to be a rule violation, cf. the NOC Statutes Section 12-3(1) a and WADC Art. 2.1.

Clostellol is not a specified substance and the general rule is that the first alternative stated in NOC Statutes Section 12-8(4)a will be applied.

The athlete did not act with intention or gross negligence. The general rule in such a situation is that the athlete shall be sanctioned with a period of ineligibility of two years, cf. NOC Statutes Section 12-8(4) b, second subsection.

NOC Statutes Section 12-9 and WADC Art. 10.4 will not apply, as the athlete bears fault. The athlete should have made further investigations. The athlete has been competing at the highest international level for many years and is or should be aware of an athlete's duty of care.

It is clear that by looking at the box in which the ointment was packaged the athlete would have seen the doping warning on the box. The prohibited substance was marked clearly on both the packaging and on the tube. The positive test result could therefore have been avoided by relatively simple means.

It has long been clear that an athlete is responsible for all substances that enter his or her body, cf. NOC Statutes Section 12-5 and WADC Art. 2.1.1. The case law of the Adjudication Committee and the CAS has established a very high threshold for invoking *no fault*. The Prosecution Committee is of the opinion that the argument that the athlete bears no fault cannot be accepted.

The Prosecution Committee is of the opinion that the athlete's fault is *insignificant*, thus the NOC Statutes Section 12-10 (3) and WADC Art. 10.5.2 will apply.

It is not appropriate to impose the minimum sanction of one year of ineligibility. The fact that the athlete did not make any investigations of the cream she received is an aggravating circumstance. On this basis, as well as relevant CAS case law, 14 months of ineligibility is viewed to be an appropriate sanction.

Regardless, there is no factual or legal basis for imposing less than 12 months of ineligibility.

Anti-doping Norway represented by Nils R. Kiær, Attorney at Law, entered the following prayer for relief:

Therese Johaug to be sanctioned with the loss of right to participate in competitions and organized training, and the loss of the right to hold elected or appointed office, for a period of 14 – fourteen - months, effective from the date of the imposition of the suspension, 18 October 2016.

Therese Johaug represented by Christian B. Hjort, Attorney at Law, has essentially pleaded as follows:

The athlete does not contest the facts as described by Anti-Doping Norway in its prosecuting petition. The Adjudication Committee can accept these facts. The factual circumstances in the case will however be of significance to the assessment of the sequence of events, especially the assessment of Johaug's duty of care.

It is argued in the principal that there are no grounds for ineligibility since the rule violation was caused without fault on her part, cf. NOC Statutes Section 12-9, cf. WADC Art. 10.4 *No Fault or Negligence*.

It follows from relevant sources of law that the assessment of the duty of care must be performed on the basis of the concrete circumstances in the individual case. By asking the national team doctor, who was an expert on sports medicine and doping-related issues, about the cream, Johaug exercised the degree of due care that could reasonably be expected of a top-level athlete in the given situation. He gave her his assurances that she could legally use the cream. As Anti-Doping Norway argues in the prosecuting petition, Johaug had every reason to trust Bendiksen, since he was an experienced sports physician of great integrity.

In the alternative it is submitted that under no circumstances can Johaug be considered to have borne anything other than no significant fault or negligence, cf. NOC Statutes Section 12-10(3), cf. WADC Art 10.5.2 – *No Significant Fault or Negligence*. According to the provision, the period of ineligibility can in situations such as this case be reduced to one year.

Anti-Doping Norway is wrong in concluding that Johaug did not investigate the cream she received. She had no reason to doubt the doctor's assurances, nor any reason to believe she would obtain other/further information from the packaging or the insert on a pharmaceutical substance purchased in Italy.

Nor are there other circumstances that would justify exceeding the minimum period of ineligibility of one year provided for in NOC Statutes Section 12-10(3), cf. WADC Art. 10.5.2.

There are however several circumstances that would justify a sanction of less than this minimum level. The CAS has held that the regulations governing sport must be applied in accordance with the fundamental legal principle of proportionality between rule violation and sanction. As the CAS has noted, the sliding scale of periods of ineligibility based on degree of fault provided for in these regulations safeguards the principle of proportionality in most – but not in all – cases. In our case, there are factual and legal grounds for imposing a sanction below the limit of one year.

In reality, ineligibility represents a period of professional disqualification for Johaug. Professional disqualification for a period of 12 months due to the treatment of an acute medical condition where there was no performance-enhancing intent or effect, and where

assurances were obtained from an expert, is without doubt a disproportionate sanction. The disproportionality of the sanction is enhanced significantly by the fact that Therese Johaug, as a consequence of inconsistencies in the regulations and the rigid thresholds in the system of sanctions, will be punished substantially more severely than in other cases equally or more deserving of punishment.

The Adjudication Committee must therefore, in accordance with the principle of proportionality, impose a considerably shorter period of ineligibility than 12 months.

Therese Johaug represented by Christian B. Hjort, Attorney at Law, entered the following prayer for relief:

1. In the principal, that Therese Johaug is not to be sanctioned with the loss of the right to participate in competitions and organized training, nor the loss of the right to hold elected or appointed office.
2. In the alternative, the period of ineligibility to be determined on the basis of NOC Statutes Section 12-10(3) regarding No Significant Fault, but with a period of ineligibility of substantially less than 12 months.

The Adjudication Committee notes as follows:

As noted, the Adjudication Committee finds the facts presented to be undisputed and proven in accordance with the written documentation submitted taken together with the information presented during the oral proceedings on 25 and 26 January 2017. Reference is made to the review provided above.

In addition to the testimony given by Therese Johaug, the Adjudication Committee heard testimony from advisor to ADNO, Birgit Haukland; Head of the Norwegian Doping Control Laboratory, Yvette Dehnes; expert witness Professor Jo Klaveness; Doctor Fredrik Bendiksen; and Marit Bjørgen.

The analysis result proves that *Clostebol Metabolite* was found in Johaug's urine sample taken on 16 September 2016, at her home in Oslo, outside of competition.

Clostebol is a prohibited substance in Doping Group S1 – Anabolic Agents. An anti-doping rule violation has therefore occurred, cf. NOC Statutes Section 12-3(1) a, cf. WADC Art. 2.1. The athlete is subject to *strict liability* for the positive test result, cf. NOC Statutes Section 12-5, cf. WADC Art. 2.1.1. This will *inter alia* entail that an athlete will forfeit prizes/placings if the test was taken in competition. The rule is justified by the aim of safeguarding equal conditions in competition.

Therese Johaug has proved that the presence of the substance in her body was the result of the use of the pharmaceutical substance Trofodermin, which was purchased by Dr Bendiksen at a pharmacy in Livigno, Italy, on the morning of 3 September 2016. Johaug

used the cream in accordance with the doctor's assurances and instructions for medical treatment of an injury to her lip.

Having heard the evidence, the Adjudication Committee is of the opinion, as are the parties, that it is not reasonable to assume that the use of Trofodermin in this case would produce a performance-enhancing effect from Clostebol. The dose of Clostebol was far from sufficient to have any effect on the production of steroids in the athlete's body encompassed by the steroid module at the time of the sample collection.

The Adjudication Committee must make its decision on the basis of the relevant provisions of the NOC Statutes, which must be interpreted in accordance with the provisions of the World Anti-Doping Code (WADC).

The Adjudication Committee will *inter alia* apply the following general principles:

- WADC shall be interpreted and applied in such a manner that its rules are consistent and predictable.
- The Court of Arbitration for Sport (CAS) plays an essential role in the interpretation and application of these rules.
- Principles of proportionality shall not be applied in such a manner that the rules are not consistent and predictable.
- Each case must be decided on the particular circumstances of the case.

The main question in this case is whether there are grounds in fact and in law for excluding Johaug from *inter alia* competitions and organized training and, if so, how long a period of ineligibility shall be imposed on her.

The NOC Statutes and the WADC provide that in order to be declared ineligible an athlete must bear fault or negligence.

If Johaug bears no fault or negligence, there is no legal basis/authority for any ineligibility, cf. NOC Statutes Section 12-9, which reads:

§ 12-9. Elimination of the period of ineligibility where there is no fault or negligence

If the athlete or person proves that a rule violation is caused without fault or negligence, ineligibility imposed shall be eliminated. The rule violation does not count as a first time violation in cases where this may be of relevance.

A corresponding provision – WADC Art. 10.4 – reads:

*10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence
If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.*

If the athlete bears fault or negligence, the duration of the period of ineligibility will depend on the degree of fault or negligence in the individual case: four years of ineligibility for gross fault or negligence, two years for ordinary fault or negligence and a minimum of one year of ineligibility for no significant fault or negligence.

This is provided in the NOC Statutes Sections 12-8(4) and 12-10(3), which correspond to the provisions of WADC Art. 10.2.1, Art.10.2.2 and Art. 10.2.5.

The regulations provide that the athlete must prove that she bears no fault or negligence or that the degree of fault or negligence was less than gross negligence.

Therese Johaug has argued forcefully that she, having asked the national team's doctor, received his assurances that she could use Trofodermin and that the cream was not listed on the Prohibited List. She knew that Bendiksen was an expert and that he was very thorough, in this as in other areas.

With regard to Dr Bendiksen's expertise and background, the Adjudication Committee refers to the documentation submitted in this case, especially Doc. 05,12. Among other positions of trust, he headed the Norwegian medical team in 2012-2014 in connection with the Sochi Olympic Games in 2014. He held a leading medical position during the Lillehammer Olympics in 1994. He has been a consulting physician to Norway's Olympiatoppen and was responsible for medical matters during a number of major international competitions/championships. He became an honorary member of the Norwegian Society for Sports Medicine in 2007. He has published several articles on the field of sports medicine. He has completed the two-year (part-time) "*IOC Diploma Programme in Sports Medicine*".

Therese Johaug met Dr Bendiksen for the first time in the spring of 2013, in Lillehammer. They quickly developed a trusting relationship after he became team doctor to the national women's cross-country team in 2014. The witness Marit Bjørgen testified that Bendiksen spent much of his first year as the national team's doctor "getting to know us".

It follows from relevant sources of law, particularly CAS case law, that the threshold is high for circumstances to be said to be such that an athlete is entirely without fault or negligence.

In a number of cases the athlete has argued that he/she followed the advice/instructions of acquaintances, parents, their team manager, trainer or medical personnel. In none of these cases decided by the CAS has the totality of circumstances resulted in an athlete being

found to bear "*No Fault or Negligence*", solely by referring to advice/assurances from the support team such as the team's doctor. Other circumstances have also been considered.

Some of the cases involve prohibited *specified substances*, while others concern prohibited *non-specified substances*. The difference is not of itself of any consequence in the assessment of key elements relating to whether or not the athlete bore fault or negligence in a particular case (and if so, in what degree).

The comments to the WADC use expressions such as "*exceptional circumstances*", and state by way of example that an athlete will not be without fault or negligence in the case of "*the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete.*"

On page 241 of "A Guide to the World Anti-Doping Code" 2nd edition 2013, Paul David writes *inter alia* that in order to be without fault or negligence:

"The athlete has to establish that he or she did not know or suspect and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had used...the prohibited substance... The regime under the Code can properly be described as one under which athletes have a very high degree of responsibility for what they ingest and must exercise utmost caution to avoid a positive test... only situations where the athlete can truly be said to have been prevented by the circumstances prevailing at the time of the violation from taking precautions which a reasonable athlete would have taken to prevent the violation occurring..."

An Advisory Opinion to FIFA – CAS 2005/C/976 (73) and (74), states *inter alia* that:

"...the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with..."

No fault means that the athlete has fully complied with the duty of care".

C2.215 of the book "Sport: Law and Practice" (Lewis and Taylor 3rd edition) notes that:

"...and therefore the duty on an athlete to do everything in his power to avoid ingesting a prohibited substance is said by the CAS to be a "basic principle" that is "critical to anti-doping efforts in international sport" ... "The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition."

Some decisions made by the CAS shed light on our subject and conditions:

CAS 2015/A/4233, WADA – Sundby, confirms the high threshold for *No Fault or Negligence*, (which was not invoked by the athlete). Sundby had followed the doctor's advice and

instructions. The Panel found that: (112) "The Athlete ... does not submit that he bears *"No fault or negligence"*

(a circumstance that in any case the Panel would exclude, since as explained in § 119(ii) below, it is unrealistic to conclude that there were no further steps that the Athlete could have taken to ensure that he was rule compliant)".

CAS 2011/A/2495-98 concerns four Brazilian swimmers who tested positive for a specified substance. They were found to be without fault by the swimming federation's doping panel. WADA appealed the decision to the CAS, which stated that the case *"was not a case of no fault"*.

The CAS found that the swimmers *"and their doctor had done all they could reasonably and practically have done to avoid the positive test results"*.

The CAS concluded that *"the fault of the athletes was at the lowest end of the spectrum"*; CAS issued a warning to the swimmers – the lowest reaction provided for in the regulations.

Some CAS decisions have pointed out that an athlete should, at the very least, have asked/consulted a doctor or other persons. *"At least she could have asked her doctor, coach or any other competent person..."*, *S. vs FINA (CAS 2005/A/830)*.

CAS 2005/A/951, Canas – ATP Tour (where a physician was consulted):

"It would have been normal for him to rely on the trustworthiness and knowledge of the Tournament doctor if the doctor had handed medications to him, but any professional athlete these days has to be wary when, as in this case, he receives medications which he knows have gone through several hands".

CAS 2007/A/1284 and 1308 – WADA versus FECNA and Prieto (82) – could perhaps be understood as an indication by the CAS that by consulting the team doctor the athlete could have met the due care requirement, *"...did not apply the standard of care to be expected of a top-level athlete, i.e. obtain assurances from her physician, pharmacist or team doctor..."*

The Adjudication Committee emphasises that the question of fault or negligence must always be decided on the basis of the specific circumstances of each particular case.

In this assessment, an athlete's actions/choices based on possible advice or assurances given by an expert could be seen as appropriate. Yet, in order to conclude *No Fault or Negligence*, all the relevant circumstances in the case must be considered, see for example the Sundby case.

The Adjudication Committee's assessment of fault, that is to say whether Therese Johaug bore fault or negligence pursuant to the regulations:

It will be seen from the above review that in general strict requirements apply to the degree of due care exercised in this area. This is not least due to the importance of the interests that the regulations have been put in place to protect, namely the fight against doping in sport.

Therese Johaug has for many years been one of the group of athletes on whom the very strictest due care requirements must and will be applied when it comes to the use of medicines/ pharmaceutical substances, both in and out of competition.

Johaug is expected to fully understand her responsibility and her obligations under the regulations. She has a clear duty to keep herself current on this subject. Even so, the fact that she was not among the most eager when it came to formally updating her knowledge ("Ren utøver"), is unlikely to have had any bearing on the investigations she undertook, or should have undertaken, when she received the cream.

When Johaug received the Trofodermin cream directly from the national team's doctor (Bendiksen) during the evening meal on 4 September 2016, she asked the doctor whether it was "safe to use the cream" or words to that effect, cf. the description on page 3. The wording of the doctor's response undoubtedly contained an assurance that the cream was not on the Prohibited List and that it was appropriate for her to use the cream. Dr Bendiksen belongs to a group of international experts with the greatest knowledge of sports medicine, including the rules on doping. Johaug was aware of this, and acted on this knowledge.

Johaug needed treatment for a very troublesome sore on her lip. She had frequently suffered from sores on her lips, often caused by a virus (herpes), which had been treated using medications.

For Johaug there were in general no circumstances/danger signals relating to *the injury itself* that should have led her to exercise a greater degree of care. As on so many occasions in the past she had contracted a sore lip that needed treatment. She had no reason to suspect that she was risking treatment with a medication that might be violating the anti-doping regulations. According to the information provided, Clostebol and similar substances would not be the natural/appropriate choice of medication for treating sores of this kind.

When Johaug received the Trofodermin cream, she knew that the doctor had purchased it at the same time as the other cream, Keratoplastica. She accordingly knew that the doctor had had plenty of time to investigate the product when she asked whether it was "clean".

In a contrary situation, extra diligence might have been expected on Johaug's part if, for example, she had been waiting for the doctor outside the pharmacy and had been handed the cream by the doctor there and then.

The box carried a red doping warning label on one side. However, in the assessment of the Adjudication Committee, Johaug had no particular reason to search for a label/warning of this or a similar type on the product. According to the information provided, labelling of this type is a "uniquely Italian" system, which up until that point had been unknown to the Norwegian athletes and their support team. This situation is therefore different to one in which labelling of this type was not entirely unfamiliar to Johaug. Had this been the case it would have been natural for her to examine the box more closely, in addition to consulting the doctor.

Based on the applicable regulations it is nevertheless the opinion of the Adjudication Committee that given the situation in question Johaug did not exercise the degree of care that must be expected of her in order for her to succeed with the argument that she bore "*No Fault or Negligence*".

When Johaug received and used the cream, she knew that the cause of the wound on her lip was not the usual cause. She knew/should have known that she was allowing herself to be treated with other medicines than her "usual" medicine. She also knew that the first cream, Keratoplastica, had failed to have the desired effect on her lip, and that the second cream would therefore have to have other properties/active substances. In the opinion of the Adjudication Committee, these circumstances necessitated a greater degree of care on her part.

She also knew that the national team's medical bag did not contain an appropriate medicine, and that Bendiksen "... *was going out to see if he could find something at the pharmacy*" cf. above. There was therefore a risk that Bendiksen had purchased a pharmaceutical substance that he was not (well) acquainted with.

The fact that the pharmaceutical substance was purchased in a foreign country will, in the opinion of the Adjudication Committee, of itself be sufficient to increase the degree of care expected of Johaug.

On this basis, the Adjudication Committee has determined that Johaug's questions to and assurances from the doctor did not constitute sufficient investigations on her part. At the very least, she should have satisfied herself to an even greater degree that the doctor had checked the product against the Prohibited List. It was not enough for her simply to trust that he had (probably) done so.

That Therese Johaug was probably not aware of the extent of her own responsibilities, and that she should therefore have undertaken further investigations, does not exempt her from fault. Moreover, the fact that other athletes would have acted as Johaug did does not mean that she does not bear fault or negligence. She failed to act in accordance with the finding in 2014 A/CAS/3485, WADA – Goltsova and IWF with further reference:

"... an athlete must take every conceivable effort to avoid taking a prohibited substance."

The Adjudication Committee also refers to CAS 2006/A/1133 WADA – Stauber (35): "...the... duty...requires that an athlete who relies on third party advice, effectively raises the question whether a prohibited substance is contained or not". In the opinion of the Adjudication Committee, Johaug failed to comply with the content and practice of the rules and regulations by failing to perform sufficient investigations.

The rule violation must therefore be sanctioned by the fixing of a period of ineligibility (including ineligibility for competitions and organized training). Reference is made to the general review of the regulations provided above.

The Adjudication Committee agrees with Anti-Doping Norway that Johaug's fault can be considered to be insignificant. NOC Statute § 12-10(3) cf. WADC Art. 10.5.2 – No Significant Fault or Negligence will therefore apply. It is sufficient in this regard to refer to the circumstances emphasised in the above review.

In the situation in which she found herself, Johaug did not simply passively accept the pharmaceutical substance offered by the highly competent doctor to the national team, a person she had every reason to trust.

In addition, she actively investigated the situation by asking the doctor whether the medicine was clean/safe, and also received the doctor's assurances that this was so. The fact that she undertook these inquiries and that she received concrete assurances from the national team's doctor is significant. She can therefore not be reproached to any great degree for not undertaking further investigations. For Johaug, the possibility that Dr Bendiksen might make an error of this kind was hardly imaginable.

Taking all other circumstances into account, the degree of negligence in her failure to undertake further investigations must adjudged against this background.

It is the Adjudication Committee's opinion that the degree of significance of the fault shown by Therese Johaug was such that the period of ineligibility must be fixed somewhat below the 14 months pleaded by Anti-Doping Norway.

There are some CAS decisions that provide examples of factors that might warrant the minimum period of ineligibility. The Adjudication Committee is of the opinion that a common feature of these decisions is that the degrees of fault/negligence of the athletes must be considered to be even lower than Johaug's. There should therefore be some latitude for imposing a shorter period of ineligibility in cases in which an athlete is even less at fault than Johaug. By way of examples of decisions that have involved the minimum ineligibility provided for in the regulations, the Adjudication Committee refers to CAS 2011/A/2495-98 (the four Brazilian swimmers) and CAS 2006/A/1133 (WADA versus Stauber)

Therese Johaug has argued that ineligibility for longer than "far less than one year" would conflict with the rule of proportionality. The Adjudication Committee does not agree and finds that this follows from settled case law in the CAS.

The Adjudication Committee therefore finds that Therese Johaug shall lose the right to participate in competitions and organized training for a period of 13 months.

If on the other hand Johaug's case had been such that the appropriate period of ineligibility should have been of the order of 16 months, the Adjudication Committee would have had to consider the question of whether the principle of proportionality could have provided legal grounds for making the period of ineligibility sufficiently short for her to be able to participate at the 2018 Olympics. This question does not appear to have been decided by the CAS.

The period of ineligibility in this case will take effect from the first day of Johaug's suspension, on 18 October 2016. Reference is also made to NOC Statute § 12-18(5) Status during Ineligibility.

This decision is unanimous.

CONCLUSION:

Therese Johaug, born on 25 June 1988, is to lose the right to participate in competitions and organized training, and the right to hold elected or appointed office, for a period of 13 – thirteen – months, effective from the time of the imposition of the suspension commencing on 18 October 2016.

Ivar Sølberg

Marit Forsnes

Thomas Laurendz Bornø