



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2008/A/1479 WADA v. CONI, FPI & Elga Comastri

AWARD

rendered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

- President: Mr. Christian Duve, Lawyer, Frankfurt, Germany
- Arbitrators: Mr. Quentin Byrne-Sutton, Lawyer, Geneva, Switzerland
Mr. Romano Subiotto, Solicitor-Advocate, Brussels, Belgium

in the arbitration between

WORLD ANTI-DOPING AGENCY, Montréal, Québec, Canada

Represented by Dr. François Kaiser, Lausanne, Switzerland

-Appellant-

and

COMITATO OLIMPICO NAZIONALE ITALIANO, Rome, Italy

-First Respondent-

and

FEDERAZIONE PUGILISTICA ITALIANA, Rome, Italy

-Second Respondent-

and

MS. ELGA COMASTRI

Represented by Ms. Paola Fava, Bologna, Italy

-Third Respondent-

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I. THE PARTIES

1. The Appellant, the World Anti-Doping Agency ("WADA"), is a Swiss foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA is an international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms.
2. The First Respondent, the Comitato Olimpico Nazionale Italiano ("CONI"), is the Italian Olympic organizing committee.
3. The Second Respondent, the Federazione Pugilistica Italiana ("FPI"), is the Italian boxing federation.
4. The Third Respondent, Ms. Elga Comastri (the "Athlete"), is an Italian boxer participating in sport through the auspices of the FPI.

II. THE ORIGIN OF THE DISPUTE

5. According to the evidence on record the Athlete declared she snorted cocaine offered to her at a friend's house approximately one week before the competition, i.e. on or around May 13, 2007, believing no trace would remain in her body beyond a period of three days from ingestion.
6. On May 20, 2007, the FPI staged the amateur Italian women's national boxing championship. The Athlete competed and was subject to doping control.
7. The Athlete's A sample tested positive for a metabolite of cocaine. Cocaine (and its metabolites) is a prohibited stimulant under the Prohibited List attached to the World Anti-Doping Code ("WADC").
8. On July 12, 2007, the National Sport Judge of the FPI suspended the Athlete pending a doping hearing.
9. On August 30, 2007, the B sample analysis requested by the Athlete confirmed the positive result of the A sample analysis.
10. On October 24, 2007, the Corte d'Appello Federale ("CAF") ruled that the Athlete had committed a doping offence and suspended her for one year based on a finding that she had committed the offence without significant fault or negligence.
11. On October 31, 2007, the CAF decision was notified to WADA.
12. On November 2, 2007, WADA appealed the CAF's decision to the *Giudice di Ultima Istanza* ("GUI") *in materia di doping del CONI*, a decision-making body to whom certain Italian doping awards can be appealed.
13. On December 4, 2007, the GUI issued its decision pursuant to the CONI anti-doping Rules ("CONI Rules"). The GUI affirmed the doping offence. It found that the circumstances of the Athlete's offence involved some fault or negligence but that in light of her contrition she did not deserve a two-year suspension. The GUI increased the Athlete's suspension to one year and eight months.

14. WADA was notified of the GUI's decision on January 14, 2008.

III. SUMMARY OF THE ARBITRAL PROCEEDINGS

15. On February 12, 2008, WADA filed its Statement of Appeal against the decision of the GUI with the Court of Arbitration for Sport ("CAS"). It appointed Mr. Quentin Byrne-Sutton as an arbitrator and requested the following relief:
- a. *"The Appeal of WADA is admissible.*
 - b. *The Decision of GUI rendered on December 4, 2007 in the matter of Ms Elga Comastri is set aside.*
 - c. *Ms. Elga Comastri is sanctioned with a two-year period of ineligibility starting on the date of the CAS hearing. Any period of ineligibility (whether imposed to or voluntary accepted by Ms Elga Comastri) before the entry into force of the CAS award shall be credited against the total period of suspension to be served.*
 - d. *All competitive results obtained by Ms Elga Comastri from May 20, 2007, through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
 - e. *WADA is granted an award for costs."*
16. On February 15, 2008, CAS acknowledged receipt of the statement of appeal and notified CONI, FPI and Ms. Elga Comastri.
17. On February 20, 2008, CONI sent a fax to CAS waiving its right of participation in these proceedings.
18. On February 25, 2008, WADA filed its appeal brief. None of the Respondents have submitted pleadings in reply.
19. On 14 April 2008, the President of the Appeal Division of CAS appointed Mr. Romano Subiotto as second arbitrator.
20. On May 30, 2008, CAS notified the parties of the formation of the Panel and the identities of the arbitrators. .
21. On June 6, 2008, CAS invited the parties to inform the Court Office whether they preferred that a hearing be held in this matter or that the Panel issues an award on the basis of the written submissions.
22. On June 16, 2008, WADA informed CAS that it preferred that the Panel issue an award solely on the basis of written submissions.

IV. THE PARTIES' CONTENTIONS

A. WADA

23. WADA submits that the alleged circumstances of ingestion of the cocaine involve significant fault or negligence on the part of the Athlete, meaning that she cannot benefit from a reduced sanction under Article 10.5.2 of the WADC.
24. WADA submits that Article 10.2 of the WADC therefore requires that the Athlete be suspended for two years.

B. The Respondents

25. By letter of February 28, 2008, Ms Paola Fava, the attorney acting on behalf of the Athlete, advised CAS that the Athlete would not be participating in these proceedings for lack of financial means and requested that the award be notified to the law firm.
26. By letter of February 19, 2008, Ettore Torri of CONI advised the CAS that CONI "... waives its right to be a party in these CAS proceedings and will fully accept and respect the upcoming CAS award."
27. The FPI communicated to the Athlete the notice of appeal but did not seek to participate in the proceedings.

V. DISCUSSION OF THE CLAIMS

A. Admissibility and Jurisdiction

28. According to Article R47 of the CAS Code: "*An appeal against the decision of a federation, association or sports-related body may be filed with CAS insofar as the statutes or regulations of the said body so provide*". Article 2.26 of the instructions to the GUI, contained in the CONI Rules, provides that all decisions of the GUI can be appealed by interested parties to the Court of Arbitration for Sport ("CAS") within 30 days of receipt of the GUI's decision.
29. Having been the Appellant in front of the GUI, WADA undoubtedly qualifies as an interested party. Furthermore, WADA's appeal to the CAS was filed within the 30-day time limit.
30. Consequently, the appeal is admissible and this CAS Panel has jurisdiction on the basis of the foregoing provisions.

B. Applicable Law

31. According to Article R58 of the CAS Code:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice,

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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".

32. In the present case, the applicable regulations are those of CONI since (i) the Athlete participates in sports through the auspices of the FPI (ii) article 1(5) of the Federal Statute of the FPI provides that the FPI accepts the anti-doping rules of CONI ("CONI Rules"), (iii) the decisions of the CAF and the GUI were taken on the basis of the CONI Rules and (iv) no party has contested the application of the CONI rules.
33. Consequently, the Panel will decide this appeal in accordance with the CONI Rules.
34. Since the CONI Rules incorporate numerous provisions of the WADC by reference, the Panel will refer directly to the latter where relevant.

C. Merits of the Appeal

35. The questions before this Panel are:
- a) Did the Athlete commit an anti-doping infraction?
 - b) If yes, has the Athlete established a positive defence?
 - c) If any, what is the applicable sanction?

a. Anti-Doping Infraction

36. Article 1(1) of the CONI Rules provides that athletes are prohibited from ingesting prohibited substances.
37. Article 4(1) of the CONI Rules stipulates that prohibited substances are those that are included on the prohibited list maintained by WADC. Cocaine is a substance included on the prohibited list of the WADC.
38. Article 2.1 of WADC provides that:
- "Article 2.1.1 - It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1. [...]"*

39. The Comment to Article 2.1.1 of WADC states that:

"For purposes of anti-doping violations involving the presence of a Prohibited Substance (or its Metabolites or Markers), the Code adopts the rule of strict liability which is found in the OMADC [Olympic Movement Anti-Doping Code] and the vast majority of existing anti-doping rules. Under the strict liability principle, an anti-doping rule violation occurs whenever a Prohibited Substance is found in an Athlete's bodily Specimen. The violation

occurs whether or not the Athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault. [...]"

[Additions made by the Panel]

40. The Athlete's admission of ingesting a prohibited substance, combined with the positive analytical result from testing of the Athlete's A sample, constitutes a doping violation under Article 1(1) of the CONI Rules. The Athlete does not contest the fact that she committed a doping violation.
41. In light of those uncontested facts, the Panel confirms and finds that the Athlete committed a doping violation which in principle would lead to a 2-year suspension since the period of ineligibility imposed for a first violation is two years under the applicable Rules.

b. Defence

42. The second question for the Panel to address is whether for any reason the foregoing disciplinary sanction can be reduced on the basis of a lack of significant fault or negligence, as permitted under Article 10.5.2 of WADC and as found (for different reasons) by both the CAF and the GUI.
43. Article 10.5.2 of WADC provides that:

10.5.2 - No Significant Fault or Negligence

This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of *Prohibited Substance* or its *Metabolites* or *Markers*). Use of a *Prohibited Substance* or *Prohibited Method* under Article 2.2, failing to submit to *Sample Collection* under Article 2.3 or administration of a *Prohibited Substance* or *Prohibited Method* under Article 2.8. If an *Athlete* establishes in an individual case involving such violations 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 minimum 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 Specimen in violation of Article 2.1 (presence of *Prohibited Substance*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced.

[...]"

44. According to the above provision, the primary condition for becoming eligible for the reduction or elimination of a sanction is for the athlete to establish how the prohibited substance entered her/his system. Indeed, under the WADC, establishing how a prohibited substance entered an athlete's system is a condition of the defences

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of "no fault or negligence" or "no significant fault or negligence" (See CAS 2006/A/1130 *WADA v. Stanic and Swiss Olympic*, at para. 39 "*Obviously this precondition is important and necessary otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up.*").

45. Furthermore, the Comment to Article 10.5.2 in the WADC states that:

"Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases." Moreover, it gives as an example of an appropriate sanction reduction based on No Significant Fault or Negligence the case where "the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional substances."

46. In the present case, the evidence on record regarding how the prohibited substance entered the Athlete's system is essentially her own declaration in October 2007 that she ingested cocaine offered to her at a friend's house while out of competition, approximately one week before the event at which she tested positive.
47. In the circumstances of this case, the Panel considers such declaration insufficient in itself to establish how and when cocaine entered her body, since the Panel has not been in a position to question the Athlete or hear any witnesses and there is no corroborating evidence on record enabling the Panel to determine that it is more likely than not that the cocaine was taken around a week before the competition rather than at another moment.
48. That said, even if the Panel were to assume that the cocaine entered the Athlete's system in the circumstances she describes, her defence could not succeed.
49. In that respect the Panel would like to point out that an important goal and consequence of the anti-doping regulatory framework is to make athletes responsible for their own actions. This includes the duty to personally manage and control their dietary and other habits in a responsible manner in light of anti-doping rules.
50. In other words, it is the duty of all athletes to be responsible for their own bodies; and, except only in the most "*truly exceptional cases*", the presence of prohibited substances in an athlete's system constitutes a failure in fulfilling that duty (see Comment to Article 10.5.2, WADC. See also CAS 2003/A/448 *IAAF / CMR*, Digest III 431, 438).
51. Pursuant to Article 2.1.1 of the WADC athletes have a personal duty to be aware of what substances are in their bodies and are deemed to know what substances are included on the prohibited list (CAS OG 06/001 *WADA v. Lund*, at para. 4.11 "*It is his failure to continue to monitor the Prohibited List, in accordance with his duty as an athlete, that has placed Mr. Lund in his present predicament.*"). Failure to know what substances are included on the prohibited list or taking a risk with respect to the detection period of a substance which is prohibited in competition are types of negligence.

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52. To discharge their duty, athletes must exercise the "*utmost caution*" at all times (pursuant to the definition of "No Fault or Negligence" of the WADC). Accordingly, the duty on athletes is rigorous: "*Anti-doping rule violations do not 'just happen' but are, in most cases, the result of a breach of that duty of care*" (CAS 2005/C/976 & 986, *FIFA / WADA*, at para 131). The WADC, which is implemented by the CONI Rules, makes clear that athletes cannot avail themselves of the "*no significant fault or negligence*" defence unless their fault or negligence was not significant in relation to the anti-doping rule violation.
53. Wilfully ingesting drugs offered by a friend, whether the Athlete knew the drugs to be prohibited or not, is an act for which the Athlete is at unmitigated fault. Whether or not the Athlete was subject to peer pressure, or whether or not the Athlete is contrite, is irrelevant (CAS 2007/A/1364 *WADA v. FAW & James*, para. 7.11 '*Mr. James knew that he was taking drugs, and any peer pressure he may have felt does not make his case 'truly exceptional' so as to reduce his responsibility. The Panel cannot accept that Mr. James's apparent inability to resist peer pressure, or his ignorance as to the effect of drugs, is a circumstance mitigating Mr. James's fault or negligence significantly or, indeed, at all. If it were to do so, this Panel would create a loophole enabling athletes who have been found guilty of a doping offence to obtain an unwarranted reduction of the sanction provided for by the applicable anti-doping regulations.*'). A high level of fault does not merit a reduction of the Athlete's sanction. As a result, any defence based on the Athlete's lack of significant fault or negligence fails.
54. Consequently, the Panel finds that the conditions set out in the applicable Rules for the elimination or reduction of the ineligibility period are not fulfilled.
55. Thus, and although the Panel notes the Athlete's sincere expression of regret, the Panel rules that the Athlete must be sanctioned with a two-year period of suspension.

c. Sanction

56. Article 10.8 of the WADC is concerned with the commencement of the Ineligibility period:

"The period of *Ineligibility* shall start on the date of the hearing decision providing for *Ineligibility* or, if the hearing is waived, on the date *Ineligibility* is accepted or otherwise imposed. Any period of *Provisional Suspension* (whether imposed or voluntarily accepted) shall be credited against the total period of *Ineligibility* to be served. Where required by fairness, such as delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of the *Sample* collection."

57. Article 10.7 of the WADC provides for the disqualification of the results in competitions subsequent to the sample collection by providing:

"In addition to the automatic *Disqualification* of the results in the *Competition* which produced the positive *Sample* under Article 9 (Automatic *Disqualification* of Individual Results), all other competitive results obtained

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from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*), or other doping violation occurred, through the commencement of any *Provisional Suspension* or *Ineligibility* period, shall, unless fairness requires otherwise, be *Disqualified* with all of the resulting consequences including forfeiture of any medals, points and prizes."

58. Under Article 10.8 of the WADC, where an athlete has been subject to a provisional suspension prior to a doping hearing, the length of the athlete's provisional suspension may be credited as time served against the athlete's final suspension. The National Sport Judge of the FPI imposed an interim suspension against the Athlete on July 12, 2007. The Athlete is therefore credited with having served her suspension since July 12, 2007.
59. In accordance with Article 10.7 of the WADC, any and all results obtained by the Athlete between the time the positive doping samples were taken on May 20, 2007, and the time of her interim suspension on July 12, 2007, are disqualified.

VI. COSTS

60. According to Article R65 of the CAS Code applicable to disciplinary cases of an international nature in appeal:

"R65.1 Subject to Articles R65.2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.

R65.2 Upon submission of the statement of appeal, the Appellant shall pay a minimum Court Office fee of Swiss francs 500.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.

R65.3 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."

61. As this is a disciplinary case of an international nature brought by WADA, the proceedings will be free, except for the minimum Court Office Fee of CHF 500, already paid by WADA, which is retained by the CAS.
62. Considering the Athlete, CONI and the FPI did not participate in these proceedings or contest the jurisdiction of CAS and that no hearing took place, and bearing in mind the financial circumstances invoked by the Athlete, the Panel finds it appropriate that each party bear its own legal costs.

ON THESE GROUNDS

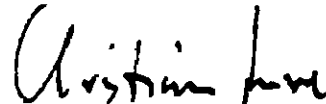
ON THESE GROUNDS

The Court of Arbitration for Sport hereby rules:

1. The decision of the *Giudice di Ultima Istanza in materia di doping del CONI* dated 4 December 2007 is set aside.
2. Ms. Elga Comastri is sanctioned with a two-year ineligibility, starting on 12 July 2007.
3. All results achieved between 20 May 2007 and 12 July 2007 are disqualified and any medals, points and prizes obtained in any sporting competition by Ms. Elga Comastri during that period are forfeited.
4. This award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss Francs) paid by WADA, which is retained by the CAS.
5. Each party shall bear all of its own legal and other costs incurred in connection with the present arbitration.
6. All other prayers for relief are dismissed.

Lausanne, 20 October 2008.

THE COURT OF ARBITRATION FOR SPORT


President of the Panel

Christian Duve