



Tribunal Arbitral du Sport
Court of Arbitration for Sport

TAS 2000/A/272 UCI v/Outchakov

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President: Mr. Stephen **Townley**, Attorney at law, London, England
Arbitrators: Mr. Olivier **Carrard**, Attorney at law, Geneva, Switzerland
Mr. Massimo **Coccia**, Attorney at law, Rome, Italy

between

UNION CYCLISTE INTERNATIONALE (UCI), Lausanne, Switzerland
represented by Mr. Philippe Verbiest, Attorney at law in Leuven, Belgium

and

Mr. Sergiy OUTCHAKOV, Cavernago, Italy
represented by Mr. Pierfilippo Capello, Attorney at law in Milano, Italy

I. THE PARTIES

1. The International Cycling Federation (hereinafter UCI) is an international federation of national cycling associations which is recognised by the International Olympic Committee. The UCI is governed by its constitution and regulations, among them the "Cycling Regulations" (hereinafter UCI Regulations) and the "Antidoping Examination Regulations" (hereinafter AER).
2. Mr. Sergiy Outchakov is a cyclist of the elite category with a licence delivered by the Ukrainian Cycling Federation (hereinafter UCF), which is the national federation of cycling of Ukraine and a member of UCI.

II. STATEMENT OF FACTS

3. In September 1999 Mr. Outchakov participated in the "Vuelta a Espagna", an international cycling event on the UCI's International Calendar for elite riders. After the stage of September 15 with finish in Zaragosa, Mr. Outchakov was required to submit to a doping test pursuant to the rules of the UCI's AER. Upon analysis of the A-sample, the laboratory of the Ministry of Education and Culture in Madrid, which is accredited by IOC and UCI, reported to the UCI Antidoping Commission in Lausanne, that the sample was found to contain hCG hormone (human chorionic gonadotrophin) as well as testosterone/epitestosterone (T/E) ratio of 7.1.
4. The analysis of the B-Sample took place on September 21. The result of the counter-analysis confirmed the result of the A-sample. The B-sample was found to contain both hCG hormone (human chorionic gonadotrophin) and testosterone/epitestosterone (T/E). The obtained values are higher than the UCI threshold level.
5. By letter of September 27, 1999, UCI invited Mr. Outchakov to undergo additional examinations in order to verify any pathological conditions in relation with the presence of hCG. These examinations turned out to be negative.
6. On November 8, 1999, the UCI Antidoping Commission informed the UCF about the result of the counter-analysis and requested the UCF to implement disciplinary proceedings against the rider Mr. Outchakov according to art. 69ff AER.
7. By letter of November 19, 1999 the Ukrainian Federation notified the UCI that the UCF and the UCF Antidoping Commission estimated that there was no reason for disciplinary proceedings as its experts considered that there was no doping: Moreover, the UCF had not found any intention or any fault of the athlete to use doping and have found Mr. Outchakov "guiltless".
8. In a motivated letter sent on December 8, 1999 UCI asked that this opinion be reconsidered. On December 23, 1999 the Ukrainian Federation confirmed its position by stating that there was no doping and that the situation of M. Outchakov was not subject to sanction.

9. On March 7, 1999 the UCI Antidoping Commission reminded the UCF that the national federation has the obligation to implement the procedure provided for under article 69ff AER and to bring Mr. Outchakov before the disciplinary commission of the Ukrainian Federation.
10. On March 22, 2000 the Ukrainian Federation acquitted Mr. Outchakov. The decision was sent on March 31 and received by the UCI on April 5 2000.
11. Based on article 84 and 89 AER, the UCI appealed against this decision before the CAS on April 28, 2000.
12. In his statement of appeal, the UCI requests the CAS to:
 - reform the UCF decision to dismiss the charges of doping which UCI brought against Mr. Outchakov.
 - find Mr. Outchakov guilty of doping, and
 - impose the sanctions prescribed by articles 90 to 94AER upon Mr. Outchakov.

III. PROCEEDINGS

13. The jurisdiction of CAS has been accepted by all parties, such jurisdiction having arisen under the constitution of the UCI and Article 47 of the Code of Sports Related Arbitration.
14. The parties signified their acceptance of said jurisdiction and the Order of Procedure under the Code by signing and returning the Order of Procedure dated May 2000.
15. The arbitrators that are appointed are Olivier Carrard and Massimo Coccia, with Stephan Townley being appointed as President. Said appointments were duly accepted in July 2000. No challenged have been made against these appointments.
16. The hearing took place on 19 July 2000 in Lausanne, Switzerland. The UCI was represented at the hearing by Philippe Verbiest. Mr. Outchakov, who is referred to at various points in the proceedings as both the Defendant and the Respondent, was represented at the hearing by Pierfilippo Capello.
17. In addition to oral argument, the panel inspected the pleadings, including the exhibits and, upon the application of Mr. Capello, Mr. Verbiest consenting, took into consideration a letter from the UCF handed over during the hearing.

IV. LEGAL DISCUSSION

The principal issues that fall to be determined in this arbitration are as follows:

18. At what point did the Ukrainian Cycling Federation (UCF) take a "decision" within the meaning of the Appeal Procedure of the UCI rules?

19. If it is found that the UCI complied with the time limits following on from a determination of the date of a "decision", does the panel consider that the UCF decision was, in fact, wrong?
20. If the panel were minded to make an award in favour of the UCI, are Mr Outchakov's arguments, including those on strict liability, absence of guilt, importance of this decision to the athlete's future, and proportionality, relevant to any penalties or sanctions that might be imposed?

A. At what point did the Ukrainian Cycling Federation (UCF) take a "decision" within the meaning of the Appeal Procedures of the UCI Rules?

21. The Appellant's case is that no "decision" had been taken under UCI Articles until 22 March 2000 and therefore it lodged its appeal within requisite time limits.

In support of this argument, reliance was placed by the Appellant on the text of the UCI Rules, various correspondence from the UCF, but particularly the "Resolution" of the UCF dated 31 March 2000, but referring to a decision of 22 March 2000, signed by, amongst others, the Chairman of the UCF Anti-Doping Commission, and a letter dated 23 March signed by the Chairman of the UCF Disciplinary Commission (UCI Exhibits 25 and 27 in the Appellant's bundle). The Appellant's view, partly based upon the capacity of the signatories, was that the letters from the UCF of 19 November and 23 December (UCI Exhibits 21 and 23) contained, in distinction to Exhibits 25 and 27, either "expert opinions" or other views and were not "decisions" in accordance with the Rules.

22. The Respondent's case is that a "decision" within the UCI procedure was made either on 19 November 1999 or 23 December 1999 and evidenced by the respective letters on those dates. The Respondent says that the UCI Rules do not require a high degree of formality regarding what amounts to a "decision". The Respondent then says that the UCI had failed within the time limit prescribed by Rule 86 (ordinarily one month from receipt of the file of the complaint body) to lodge its appeal from the "decisions" of 19 November and/or 23 December, and is therefore time barred. The Respondent relies, *inter alia*, upon various correspondence from the UCI, in particular the letter of 8 December 1999 (Exhibit 22 in the Appellant's bundle), in which the UCI refers to a "decision" by the UCF. The Respondent relies also upon an interpretation of Article 82 of the UCI Articles as evidence that the UCI must have regarded the UCI November or December correspondence as a "decision" within the UCI rules. The argument being that the athlete should have been automatically suspended by the UCI if a "decision" had not been taken. It was argued that no extension of time had been or could be granted without some formality. As the athlete had not been suspended, the argument is put that the UCI must therefore have taken the UCF November or December correspondence as a "decision".

23. Findings

The panel in the end preferred the view of the Appellant that a decision was taken by the UCF on or about 22 March 2000. The panel felt, however, that the UCI could have been much clearer in its correspondence on this point with the UCF. It was felt that it

could have avoided possible confusion in the minds of the UCF if the UCI had set out its views on why it believed no "decision" within the Rules had been taken by the UCF. The panel was also concerned about the apparent delay on the part of the UCI between 23 December 1999 and 6 March 2000.

B. If the UCI complied with the time limits for appealing against the UCF decision, was the UCF decision wrong? The UCF found the athlete guiltless.

24. The Appellant's case is that on a true construction of the UCI Rules, the presence of a prohibited substance in the body results in the commission of the offence, whether or not the athlete was in this case "guiltless".
25. The Respondent has through an admission by its attorney accepted the presence of a prohibited substance in the athlete's body. No evidence or argument was offered to identify any specific exception or qualification to the commission of the offence under Article 2 of the UCI Rules. Evidence was submitted to offer a possible explanation as to why the result might have proved positive.
26. Findings
The admission of the positive test and absence of evidence on how and why on any construction of Article 2, the athlete's guilt is relevant to the commission of the offence, means that the UCF were wrong in their original finding. A doping offence within the UCI Rules had, based upon the admission and evidence, been committed.

C. If the panel were minded to make an award in favour of the Appellant, are the Respondent's arguments, including those on strict liability, absence of guilt, importance of this decision to the athlete's future, and proportionality, relevant to any penalties or sanctions that might be imposed?

27. The Appellant's case is that the UCI Rules, through the discretion on sentencing within some defined parameters, enable the proper application of the so-called concept of "proportionality". The Appellant's view is that the panel can take into account a variety of relevant circumstances to determine where within the range of penalties the particular sanction in any case should apply. The Appellant further takes the view that the panel has an ability to apply probationary sanctions under Article 95 (2).
28. The Respondent's case is that the panel should give due weight (proportionality) to a combination of factors set out in the pleadings and oral presentation, including (a) the explanation given by Dr Pagani that ingestion of the substances Testis Heel and Platus Heel could have produced an increased hCG reading; (b) that these substances were homeopathic remedies, as opposed to pharmaceutical, which were not of themselves prohibited and therefore if ingested and produced a positive test, the athlete could not have avoided testing positive, but was guiltless; (c) that this was a very important time in the athlete's career with his age and the 2000 Olympic Games on the horizon, and this was a matter that the panel should take into account; (d) that there were undue delays on the part of the UCI in the application of the Articles and therefore this process.

29. Findings

The panel acknowledged the Appellant's view that it could apply "proportionality" through sentencing. In relation therefore to the issues of fact, the panel was not satisfied - although some evidence was adduced by Dr. Pagani on the Testis Heel and Platus Heel - that these results could explain the levels of concentration of hCG found in the athlete's body. The fact that such substances were homeopathic and were not on the Respondent's case did not affect the application of the UCI Articles to this case. In any event, there was no clear evidence offered as to how and when the athlete had taken these homeopathic substances.

Whilst it was noted that this was an important time in the career of the athlete, that of itself was not felt to be an issue that should influence the panel on this occasion in reaching a decision.

The panel felt, however, that the UCI could have responded in a more timely fashion, particularly between 23 December and 6 March and may have resolved this dispute earlier if it had been more specific between November 1999 and March 2000 on exactly what the UCF was required to do.

Consequently, a six-month suspension shall be imposed on the athlete. The suspension period takes effect from March 22, 2000. The present decision replaces the UCF decision which is thus cancelled.

ON THESE GROUNDS

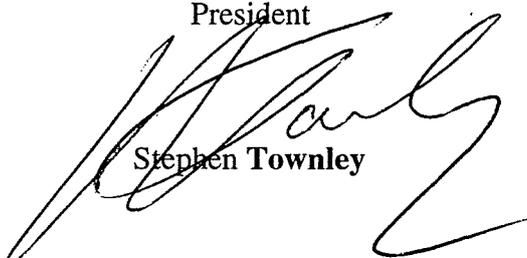
The Court of Arbitration for Sport rules and directs as follows :

1. That the appeal of the Union Cycliste Internationale (UCI), the Appellant, against the decision of the Ukrainian Cycling Federation (UCF), the Respondent, is granted and therefore the decision of UCF dated 22nd March, 2000 is hereby cancelled.
2. That Mr. Outchakov is found guilty of a doping offence under UCI Regulations.
3. That Mr. Outchakov is hereby disqualified from the "Vuelta a Espana 1999".
4. That Mr. Outchakov is suspended under the UCI Regulations with effect from the 22nd March 2000 for a period of six (6) months ending on the 22nd September 2000 with the consequence that all results and points are cancelled and other penalties or sanctions, if any, under the aforesaid Regulations shall apply during this period.
5. That Mr. Outchakov shall pay a fine under the UCI Regulations of CHF 4'000.--.
6. That Mr. Outchakov shall pay the UCI costs of this appeal limited to the amount of CHF 3'000.-- inclusive of the UCI Court Office fee of CHF 500.--.
7. That all financial amounts referred to above shall be payable within seven (7) days of the date of this award and any sums paid later shall attract interest at the rate of 6% per annum calculated on a daily basis.

Lausanne, August 30, 2000

THE COURT OF ARBITRATION FOR SPORT

President


Stephen Townley


Olivier Carrard
Arbitrator

Massimo Coccia
Arbitrator
