



Arbitration CAS 2019/A/6213 World Anti-Doping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Czech Swimming Federation (CSF) & Kateřina Kašková, award of 23 September 2019

Panel: Mr Ercus Stewart SC (Ireland), Sole Arbitrator

Aquatics (swimming)

Doping (metandienone)

Sanction applicable to an ADRV involving a non-specified substance

Burden of proof regarding the absence of intentionality of the violation

- 1. Article 10.2.1.1 CADC ADR provides the period of ineligibility shall be four (4) years where the anti-doping rule violation does not involve a specified substance unless the athlete can establish that the violation was not intentional.**
- 2. The athlete bears the burden of establishing that the violation was not intentional. Lack of intention cannot be inferred from protestations of innocence (however credible), the lack of a demonstrable sporting incentive to dope, unsuccessful attempts by the athlete to discover the origin of the prohibited substance or the athlete's clean record. The submissions, documents and evidence on behalf of the athlete must be persuasive that the occurrence of the circumstances which the athlete relies is more probable than their non-occurrence. It is not sufficient to suggest that the prohibited substance must have entered his/her body inadvertently from some supplements or other product. Concrete evidence should be adduced demonstrating that a particular supplement, medication or other product taken by the athlete, or that the specified product claimed to be taken, contained the substance in question. Absent any proof of purchase, information as to the specific type of supplement used, by whom it is produced, etc. and absent any disclosure of *the food supplement* on the doping control form, there is no element substantiating the athlete's contention that s/he did use that product or that it was contaminated.**

I. PARTIES

- 1. The World Anti-Doping Agency ("WADA" or "the Appellant") is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in all its forms on the basis of the World Anti-Doping Code (the "WADC"), the core document that harmonizes anti-doping policies, rules and regulations around the world.**

2. Czech Anti-Doping Committee (“CADC” or “the First Respondent”) is the supreme authority for doping matters in the Czech Republic. It has its seat in Prague, Czech Republic.
3. Czech Swimming Federation (“CSF” or “the Second Respondent”) is the national governing body for the sport of swimming, with its seat in Prague, Czech Republic.
4. Kateřina Kašková (“the Athlete” or “the Third Respondent”) is a national level swimmer of Czech nationality.
5. WADA, CADC, CSF and the Athlete are referred to as to “the Parties”. CADC, CSF and the Athlete are referred to as “the Respondents”.

II. FACTUAL BACKGROUND

6. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this Award only to the submissions and evidence he considers necessary to explain his reasoning.
7. On 4 November 2017, on the occasion of the Czech Swimming Cup event in Jhilava, Czech Republic, the Athlete underwent an in-competition doping control.
8. The analysis of the Athlete’s A-sample reported an adverse analytical finding (the “AAF”) for the presence of metandienone, known as 17 β -hydroxymethyl-17 α -methyl-18-nor-androst-1,4,13-triene-3-one, a non-specified anabolic androgenic steroid prohibited at all time under S.1.1a of the 2017 Prohibited List.
9. The B-sample analysis confirmed the presence of the metandienone metabolite.
10. On 6 December 2017, the Executive Committee of the CSF (the “EC CSF”) decided to provisionally suspend the Athlete with effect from 7 December 2017.
11. On 2 July 2018, the Disciplinary Committee of the CSF (the “DC CSF”) issued a decision finding the Athlete to have committed an anti-doping rule violation (“ADRV”) and declared her ineligible for a period of two years starting from the date of notification of such decision, giving credit to the period of provisional suspension.
12. On 20 October 2018, the EC CSF, acting as an appeal authority, confirmed the decision of the DC CSF of 2 July 2018 (the “Appealed Decision”).
13. On 11 November 2018 CADC appealed the appealed decision before the Arbitration Committee of the Czech Olympic Committee. On 27 November 2018 CADC withdrew its appeal and the appeal proceedings were terminated without any decision being taken.

14. On 28 February 2019, WADA received the complete case file from CADC.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 21 March 2019, the Appellant filed an appeal with the Court of Arbitration for Sport (the “CAS”) against the Respondents relating to the Decision pursuant to Article R47 of the Code of Sports-related Arbitration (“the Code”), requesting to submit this matter to a sole arbitrator.
16. On 4 April 2019, the CAS Court Office noted the Second Respondent’s agreement to the appointment of a Sole Arbitrator, and in view of the absence of objection of the First and Third Respondent within the prescribed deadline, informed the Parties that, pursuant to Article R50 of the Code, it will be for the President of the CAS Appeals Arbitration Division to decide this issue.
17. On 15 May 2019, the Appellant filed its Appeal Brief pursuant to Article R51 of the Code.
18. By letter of the same date, the Athlete informed the CAS Court Office that from then on she would not be represented by her lawyer, and that all communication should be sent directly to her.
19. On 17 May 2019, pursuant to Article R55 of the Code, the CAS Court Office invited the Respondents to submit an Answer within 20 days upon receipt of this letter and duly noted that the Athlete is no longer represented.
20. On 3 June 2019, the Second Respondent submitted its Answer pursuant to Article R55 of the Code, solely by email.
21. On 17 June 2019, the CAS Court Office noted that the deadline for the First and Third Respondent to submit an Answer had expired on 10 June 2019, but that no Answer or any other communication in this respect had been received from them. Attached to such correspondence, the CAS Court Office provided a copy of the DHL document indicating that the correspondence sent to them had been received on 20 May 2019.
22. On 19 June 2019, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the Parties that the Panel appointed to decide the dispute at hand was constituted as follows:

Sole Arbitrator: Mr Ercus Stewart, Barrister in Dublin, Ireland
23. On 20 June 2019, the First Respondent filed its Answer, solely by email.
24. On 25 June 2019, the CAS Court Office noted that the Appellant, First and Second Respondent expressed their preference for the case to be decided without a hearing. It further noted that WADA did not object to the admissibility of the First Respondent’s Answer with the exception of its exhibit 1 that shall be translated, and invited the Appellant, the Second and Third Respondents to state their position on the admissibility of the First Respondent’s Answer.

25. No objection was filed within the prescribed deadline with respect to the admissibility of the First Respondent's Answer.
26. On 4 July 2019, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to issue an award without a hearing.
27. On 22 July 2019, the CAS Court Office issued, on behalf of the Sole Arbitrator, an order of procedure (the "Order of Procedure"), which was signed by the Appellant on 23 July 2019 and by the Second Respondent on 24 July 2019. The First and Third Respondent did not sign such Order within the prescribed deadline.

IV. POSITION OF THE PARTIES

28. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Sole Arbitrator confirms, however, that he has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. Position of the Appellant

29. In its Statement of Appeal and in the Appeal Brief, WADA requested the following relief:

"(1) The Appeal of WADA is admissible.

(2) The decision dated 20 October 2018 rendered by the Executive Committee of the Czech Swimming Federation in the matter of Kateřina Kašková is set aside.

(3) Kateřina Kašková is found to have committed an anti-doping rule violation.

(4) Kateřina Kašková is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Kateřina Kašková before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

(5) All competitive results obtained by Kateřina Kašková from and including 4 November 2017 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

(6) The arbitration costs shall be borne by the Respondents jointly and severally or, in the alternative, by CADC.

(7) WADA is granted a significant contribution to its legal and other costs".

30. In its submissions, WADA dealt first the commission by the Athlete of an ADRV; then, it dealt with the determination of the sanction, having regard to the relevant provisions of the CADC ADR, and finally with the burden of proof of the Parties.

a) *The anti-doing rule violation*

31. With respect to the first point, WADA submits that pursuant to CADC ADR it is each athlete's personal duty to ensure that no prohibited substance enters his/her body and that athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their sample. The presence of a prohibited substance or its metabolites or markers constitutes an ADRV.
32. It is thus WADA's opinion that the Athlete breached Article 2.1 of the CADC ADR: the analysis of the sample conducted by the Laboratory revealed the presence of a prohibited substance, and the Athlete did not challenge the AAF. Therefore, an ADRV is established.

b) *The sanction*

33. With respect to the second point, Article 10.2.1.1 CADC ADR provides the period of ineligibility shall be four (4) years where the anti-doping rule violation does not involve a specified substance unless the athlete can establish that the violation was not intentional.
34. Article 10.2.3 of CADC ADR provides that the term "*intentional*" is meant to "*identify those Athletes who cheat. The term, therefore, requires that the athlete ... engaged in conduct which he or she knew constituted an anti-doping rule violation, or knew that there was a significant risk that the conduct might constitute a result in an anti-doping rule violation and manifestly disregarded that risk*".
35. WADA contends that the Athlete bears the burden of establishing that the violation was not intentional, as above, and referred to CAS jurisprudence/cases which held that he/she must necessarily establish how the substance entered her body. WADA referred to and relied on CAS cases/jurisprudence (and Sport Dispute Resolution Centre of Canada decision). WADA accepts that a number of CAS awards found that in extremely rare cases an athlete might be able to demonstrate a lack of intent even where he/she cannot establish the origin of the prohibited substance. Relying on CAS case law, WADA holds that the circumstances would have to be truly exceptional, and in particular that a lack of intention cannot be inferred from, e.g. protestations of innocence (however credible), the lack of a demonstrable sporting incentive to dope, apparently diligent but unsuccessful attempt by the athlete to discover the origin of the prohibited substance or the athlete's clean record.
36. WADA concludes that in this case the Athlete has not established the origin of the metabolite in her system and submits there are no exceptional circumstances on the facts of this appeal.

c) *Establishment of the origin of the prohibited substance*

37. WADA contends that the Athlete is required to prove the origin of the prohibited substance on the balance of probability and that this burden lies solely on the Athlete, and asserts that WADA does not have the burden to hypothesise, still less prove, an alternative source.
38. WADA submits that the balance of probability standard entails that the Athlete has the burden of convincing the Sole Arbitrator that the occurrence of the circumstances which the Athlete

relies is more probable than their non-occurrence, and that it is not sufficient for an athlete merely to make protestations of innocence and to suggest that the prohibited substance must have entered her body inadvertently from some supplements, medicine or other product, which the Athlete claims she was taking at the relevant time. WADA contends that the Athlete must adduce concrete evidence to demonstrate that a supplement, medication or other product that the Athlete took contained the substance in question, that the Athlete must provide actual evidence as opposed to mere speculation.

39. The Appellant further relies on *CAS 2014 A 3615*, whereby the panel considered that “[t]he person charged cannot discharge that burden of proof merely by showing that he made reasonable efforts to establish the source but that they were without success ... mere assertion as to what the source is, without supporting evidence, is insufficient”.
40. WADA states that it is thus not sufficient for an athlete to simply identify a potential source; the athlete must also demonstrate that the source could have caused the actual adverse finding.
41. The Appellant further submits that in the proceedings before the CADC, the Athlete submitted that the only way the prohibited substance could have entered her body was through the use of the food supplement called *Ginseng Kianpi Pil* (“Ginseng”), which she stated had been purchased by her father via the Internet to treat his long-term fatigue, weak immunity and exhaustion. She contended that as her father had found the supplement to be effective, he had recommended that she take it in order to deal with the same problems and to improve her appetite. She stated she could not submit the product for testing, as she did not have it any more. The Athlete furnished statements from her mother and from two colleagues of her father, and a report on the psychological care provided to her father and a written consultation from a toxicologist, website screenshot of *Ginseng Kianpi Pil* (“Ginseng”).
42. The Appellant contends that there is no concrete and contemporaneous evidence supporting her explanation, in particular there is no evidence of the Athlete taking *Ginseng Kianpi Pil*, no proof of purchase, no information as to the specific type of supplement used, by whom it is produced, in what dosage, et cetera and, further, the Athlete did not disclose *Ginseng Kianpi Pil* on the doping control form submitted by her.
43. WADA contends that the documents submitted by the Athlete, apart from not being contemporaneous evidence of her use of *Ginseng Kianpi Pil*, did not substantiate her contention that she did use that product.
44. WADA further contends that there was no evidence that the *Ginseng Kianpi Pil* the Athlete was allegedly using was contaminated with metandienone.
45. WADA concludes that in view of the CAS case law regarding the strict nature of the duty on athletes to establish the origin of the prohibited substance in their system, that the Athlete in this case has not satisfied this burden, and that as she has failed to meet the burden to demonstrate that the violation was not intentional that she must be sanctioned with a four-year period of ineligibility.

B. Position of the Respondents

a) Position of the First Respondent

46. CADC stated it was willing to accept a sanction of 2 years which sanction reflected an individual approach according to the WADC, to which as a national anti-doping organisation it is bound. However, CADC submitted that its main concern was related to the implementation of a preventive anti-doping programme in the event a maximum sanction is required, which in such a case it would not be possible to fulfil all obligations from the WADC.
47. CADC stated it fully agreed with the two decisions issued by the CSF; the outcome being same, this was the reason why CADC recalled the appeal, in this case, at the Czech Olympic Committee.
48. CADC requests to confirm both decisions issued by the CSF, and that “[t]he final decision should remain at the country of origin”.

b) Position of the Second Respondent

49. In its Answer, the Second Respondent requested the following relief:

- I. *The appeal of WADA is admissible.*
- II. *The decision of the Executive Committee of the Czech Swimming Federation dated 20 October 2018 in the matter of Ms. Kateřina Kašková is confirmed.*
- III. *The arbitration costs shall be borne by WADA”.*

50. The Second Respondent in essence submitted that the Decision shall be confirmed.

c) Position of the Athlete

51. The Athlete was notified of the Statement of Appeal and of the Appeal Brief. In addition, she received all correspondence sent by the CAS Court Office and the other Parties. The Athlete did not file an Answer or make any submissions to the CAS Court Office.

V. JURISDICTION

52. The jurisdiction of the CAS is not disputed by the Parties.

53. According to Article R47 of the Code:

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

54. The jurisdiction of CAS is provided by Articles 13.2.3 and 13.2.3 of the CADC ADR which grants *“WADA a right of appeal against the Appealed Decision directly to CAS if no other party has appealed the final decision within CADC’s process”*.
55. The jurisdiction was not contested by either of the Respondents. Consequently, the Sole Arbitrator has jurisdiction to decide on the appeal filed by WADA against the Decision.

VI. ADMISSIBILITY

56. The Statement of Appeal was filed by WADA on 21 March 2019, i.e. within the deadline set in Article 13.7.2 of the CADC ADR, which provides that *“...the filing deadline for an appeal or intervention filed by WADA shall be later of (a) Twenty-one days after the last day on which any other party in the case could have appealed, or (b) Twenty-one days after WADA’s receipt of the complete file relating to the decision”*, and complied with the requirements of Article R48 of the Code. The admissibility of the appeal is not challenged by any Party.
57. The appeal is therefore admissible.

VII. APPLICABLE LAW

58. The law applicable in the present arbitration is identified by the Sole Arbitrator in accordance with Article R58 of the Code.
59. Article R58 of the Code provides the following:
“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law ... the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
60. In the present case the *“applicable regulations”* for the purpose of Article R58 of the Code are, indisputably, those contained in the CADC ADR, because the appeal is directed against a decision issued by the EC CSF, which was passed applying the CADC ADR.
61. As a result, CADC regulations shall apply primarily. The law of Czech Republic, being the law of the country in which the CSF is domiciled, applies subsidiarily.

VIII. MERITS

62. The object of this arbitration is the Decision, which found the Athlete responsible for an anti-doping rule violation pursuant to 2.1 of the CADC ADR and imposed on her a period of ineligibility of 2 years pursuant to Article 10.5.1 of the CADC ADR: the Athlete’s violation was found to be not *“intentional”* as, in the EC CSF’s opinion, the Athlete had established that the

AAF was caused by the use of contaminated tablets. WADA disputes this conclusion and requests the Sole Arbitrator to find that the Athlete failed to establish the origin of the prohibited substance in her system on the balance of probabilities, and therefore that a standard sanction of a four-year period of ineligibility should be imposed.

63. Many of the facts are not in dispute.
64. The Sole Arbitrator accepts the submissions of WADA and, having regard to and fully considered the Answer filed by the First Respondent and by the Second Respondent, and all of the documentation, evidence and submissions on the file, considers that the appeal should be upheld. Article 10.2.1.1 CADC ADR provides the period of ineligibility shall be four (4) years where the anti-doping rule violation does not involve a specified substance unless the athlete can establish that the violation was not intentional. Article 10.2.3 of CADC ADR provides that the term “intentional” is meant to *“identify those Athletes who cheat. The term, therefore, requires that the athlete ... engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute a result in an anti-doping rule violation and manifestly disregarded that risk”*.
65. The Athlete bears the burden of establishing that the violation was not intentional, and a lack of intention cannot be inferred from protestations of innocence (however credible), the lack of a demonstrable sporting incentive to dope, unsuccessful attempts by the athlete to discover the origin of the prohibited substance or the athlete’s clean record. In this case the Athlete has not established the origin of the metabolite in her system and has not established any exceptional circumstances on the facts of this appeal. The submissions, documents and evidence on behalf of the Athlete are not persuasive that the occurrence of the circumstances which the Athlete relies is more probable than their non-occurrence, and it is not sufficient to make protestations of innocence and to suggest that the prohibited substance must have entered her body inadvertently from some supplements or other product, which the Athlete claims she was taking at the relevant time. The Athlete did not adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the Athlete took, or that the specified product she claims she took, contained the substance in question. In the proceedings before the CADC the Athlete submitted that the only way the prohibited substance could have entered her body was through the use of the food supplement *Ginseng Kianpi Pil* which she stated had been purchased by her father via the Internet to treat his long-term fatigue, weak immunity and exhaustion. She could not submit the product for testing, as she did not have it any more but furnished statements from her mother and colleagues of her father, a report on the care provided to her father, a written consultation from a toxicologist and website screenshot of *Ginseng Kianpi Pil* (“Ginseng”). There is no proof of purchase, no information as to the specific type of supplement used, by whom it is produced, etc. and the Athlete did not disclose *Ginseng Kianpi Pil* on the doping control form submitted by her. The documents submitted by the Athlete did not substantiate her contention that she did use that product or that it was contaminated with metandienone.
66. The Sole Arbitrator holds that the Athlete has not established that the violation was not intentional and, instead of two years which all Respondents submit was appropriate, she should be sanctioned with a four-year period of ineligibility and that the reliefs claimed by WADA

should be granted. As a consequence, the Athlete is declared ineligible for a period of four years from the date of 7 December 2017, which is the start date of the suspension currently served by the Athlete. Furthermore, all competitive results obtained by the Athlete from and including 4 November 2017 shall be disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

67. All other motions or requests for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed by the World Anti-Doping Agency on 21 March 2019 against the decision rendered by the Executive Committee of the Czech Swimming Federation on 20 October 2018 is upheld.
2. The decision rendered on 20 October 2018 by the Executive Committee of Czech Swimming Federation is set aside.
3. Ms Katerina Kašková is declared ineligible for a period of four years starting from the date of 7 December 2017.
4. All competitive results obtained by Ms Katerina Kašková from and including 4 November 2017 shall be disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).
5. (...).
6. (...).
7. All other motions and prayers for relief are dismissed.