

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2020/A/7041 Nigina Tukhtaeva & Igor Obratstov v. Russian Athletics Federation

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr. André Brantjes, Attorney-at-Law, Amsterdam, the Netherlands

in the arbitration between

Nigina Tukhtaeva, Tyumen, Russia

- First Appellant –

Igor Obratstov, Ulyanovsk, Russia

- Second Appellant –

Both represented by Mr. Sergei R. Lisin and Mr. Sergei A. Mishin with Lisin Mishin & Partners,
Moscow, Russia

and

Russian Athletics Federation (RUSAF), Moscow, Russia

- Respondent -

I. PARTIES

1. Ms. Nigina Tukhtaeva (the “First Appellant”) and Mr. Igor Obraztsov (the “Second Appellant”) are national-level Russian track-and-field athletes. The First and Second Appellants are jointly referred to as the “Appellants”.
2. The Russian Athletics Federation (“RUSAF” or the “Respondent”) is the Russian national track-and-field federation and a (suspended) member of the International Association of Athletics Federations (the “IAAF”).
3. The Appellants and the Respondent are jointly referred to as the “Parties”.

II. FACTUAL BACKGROUND

4. The elements set out below are a summary of the main relevant facts, as established by the Sole Arbitrator on the basis of the submissions of the Appellants and the exhibits produced. Additional facts and allegations found in the written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Appellants in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.
5. On 27 June 2019, the First Appellant was sanctioned with a 2-year period of ineligibility as from the date of her provisional suspension (8 February 2019) by the Russian Anti-Doping Organization (RUSADA) for an anti-doping rule violation (use of Methylhexanamine S6b) pursuant to article 2.1 of the All-Russian Doping Rules (“ADR”). The sanction will expire on 7 February 2021.
6. On 23 July 2019, the Second Appellant was sanctioned with a 12-month period of ineligibility as from the date of his provisional suspension (29 April 2019) by RUSADA for an anti-doping rule violation (use of LGD-4033 metabolite S1) pursuant to article 2.1 of the ADR. The sanction expired on 28 April 2020.
7. On 2 April 2020, the Presidium of RUSAF approved eligibility criteria (the “Eligibility Criteria”) for Russian track-and-field athletes willing to join national teams or participate in sporting events (the “Appealed Decision”). The Eligibility Criteria were published on the website of RUSAF on 5 April 2020, together with an interview of the Head of the Anti-Doping Commission of RUSAF, Mr. Eduard Bezuglov.
8. According to the Eligibility Criteria, athletes sanctioned for anti-doping rule violations after 18 November 2015 were not eligible for Russian track-and-field national teams and other sporting events. The Eligibility Criteria provide *inter alia*:

“An Athlete (hereinafter, the term “Athlete” refers equally to men and women of all age groups) cannot be included on the main or on the reserve list of candidates for national track-and field sports’ teams of the Russian Federation, in any age group, or participate in any official sporting event included on the Unified calendar of inter-regional, All-Russian or international physical culture events and sport events of the Ministry of Sports of the Russian Federation in the following cases:

- *All-Russian public organization “All-Russian Athletics’ Federation (hereinafter, “RusAF” has received an official notification from an authorized anti-doping organization regarding a violation by the Athlete of anti-doping rules which led to the Athlete being sanctioned with ineligibility; ¹*
- *After 18 November 2015, the Athlete has been found guilty of an anti-doping rule violation pursuant to Art. 2.1, 2.2, 2.3, 2.5, 2.6, 2.7, 2.9 and 2.10 of the All-Russian Anti-Doping Rules by an anti-doping organization, by the Court of Arbitration for Sport in Lausanne (CAS) and has been sanctioned with ineligibility in respect of the aforementioned doping violation; ²*
- *After 18 November 2015, the Athlete has been found guilty of another disciplinary violation (violation of ethical standards) by World Athletics or the All-Russian Athletics Federation, CAS or another authorized body;”*

¹ Upon receipt by RusAF of a notice regarding a provisional suspension of the Athlete following an investigation into a possible anti-doping rule violation, the Athlete will not be called upon or invited to official national team events (competitions, training events, etc.); (at the same time, his employment contract will continue to be in effect until RusAF will have received an official notice regarding a final decision by an anti-doping organization).

² These criteria will apply to the Athletes who, after 18 November 2015, committed a violation of anti-doping rules as per art. 2.1, 2.2, 2.6, 2.7, with the use of substances or methods specified in groups S0, S1, S2, S4, S5, M1, M2, M3, of the Prohibited List.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

9. On 26 April 2020, the Appellants filed a Statement of Appeal before the Court of Arbitration for Sport (“CAS”) in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (2019 edition) (the “CAS Code”) against RUSAF with respect to the Eligibility Criteria. In their Statement of Appeal, the Appellants requested that the case be submitted to a Sole Arbitrator.
10. On 15 May 2020, the Appellants filed their Appeal Brief in accordance with Article R51 of the CAS Code, including a Request for a Stay of Execution of the Eligibility Criteria. In accordance with Article R37 of the CAS Code.
11. The Respondent never filed an Answer in accordance with Article R55 of the CAS Code.
12. On 29 June 2020, the CAS Court Office noting that the Respondent did not state any position on the Appellants’ request for a Sole Arbitrator, informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division, that Mr Andre Brantjes, Attorney-at-Law, Amsterdam, the Netherlands had been appointed as Sole Arbitrator.
13. On 3 July 2020, the Appellants signed and returned the Order of Procedure. The Respondent did not respond or otherwise object to the contents of the Order of Procedure.
14. On 6 July 2020, a video hearing was held. At the outset of the hearing, the Appellants confirmed that they had no objection to the Sole Arbitrator. The Respondent was duly invited to attend the hearing, and confirmation was obtained that they were aware of the hearing, but did not appear.

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15. In addition to the Sole Arbitrator and Mr Brent J. Nowicki, CAS Managing Counsel, the following persons attended the hearing:

For the Appellants:

- 1) Mr R. Lisin, Senior Advisor
- 2) Mr R. Mishin, Senior Counsel

16. No witnesses or experts were heard. The Parties had full opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

17. Before the hearing was concluded, the Appellants expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

18. The Sole Arbitrator confirms that he carefully heard and considered in his decision all of the submissions, evidence, and arguments presented, even if they have not been specifically summarized or referred to in the present arbitral award.

IV. PARTY SUBMISSIONS

19. The Appellants' submissions on the merits of the case, in essence, may be summarized as follows:

- a. The Eligibility Criteria represent a decision establishing the same consequences that are defined in the World Anti-Doping Code (the "WADA Code"), European Athletics and the ADR.
- b. The RUSAF By-Laws do not contain any provisions on the resolution of disputes.
- c. According to Article 1.5 and 1.6 By-Laws, RUSAF is a (suspended) member of the IAAF and operates in accordance with the rules and regulations the IAAF.
- d. The right to appeal the Eligibility Criteria to the CAS can be derived from the Article 13.2 of the WADA Code and Article 13.2 of the ADR.
- e. Adoption of the Eligibility Criteria can be qualified as a decision pursuant to Article R47 of the CAS Code.
- f. The Eligibility Criteria apply to the Appellants.
- g. The Eligibility Criteria cause a double sanction for the same offense, which conflicts with the principle of *ne bis in idem*.
- h. The RUSAF does not have the authority to impose anti-doping sanctions independently pursuant to article 1.3.1 on the ADR.
- i. The Eligibility Criteria contain inconsistencies.

20. The Sole Arbitrator noticed that the Appellants slightly changed their requests for relief in their Appeal Brief in comparison with the requests for relief in the Statement of Appeal. The Sole Arbitrator considers, therefore, the requests for relief as set out in the Appeal Brief as the relief sought by the Appellants.

21. In the prayers for relief in their joint Appeal Brief, the Appellants requested as follows:

"The Appellants hereby request the Court to i) order a temporary suspension of The Criteria by RusAF, to the extent the rights of the Appellants are concerned, until a final award under this appeal is rendered; (ii) order RusAF to cancel and/or amend the Criteria as of the date

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of their adoption to the extent the Criteria infringe upon the rights of the Appellants in connection with anti-doping regulations, and (iii) order the Respondent to pay all the costs of this appeal procedure incurred by the Appellants (if any).”

22. The Respondent did not file an answer or otherwise defend the allegations brought against it by the Appellants.

V. JURISDICTION OF THE CAS

23. Article R47 of the CAS Code provides that “[a]n appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.
24. In the absence of a specific arbitration agreement, in order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-related body from whose decision the appeal is being made must expressly recognize the CAS as an arbitral body of appeal.
25. Article 1.3.2 ADR provides, *inter alia*, as follows:

“These Rules are applied to the All-Russian Sports Federations (National Federations) [...]”

26. Article 1.3.3.1 ADR provides as follows:

“These Anti-Doping Rules shall apply to the following Persons:

- a) *All Athletes who are nationals, residents, license-holders or members of All-Russian Sports Federation in the Russian Federation, including Athletes who are not nationals or residents of the Russian Federation but who are present in the Russian Federation and Athletes that participate in Events organized by a sports organization registered on the territory of the Russian Federation;*

27. Article 1.3.3.2 ADR provides as follows:

“National-Level Athletes are considered as Athletes that participate in the competitions included in the Single Calendar Plan of inter-regional, all-Russian and international physical culture events and sport events having “all-Russian” status: Russian Championship, Russian Junior Championship, Russian Cup and other official national Russian sport events, provided that such Athletes are not classified by their respective International Federations as International-Level Athletes.”

28. Article 13.2 ADR provides as follows:

“The following decisions may be appealed exclusively as provided in Articles 13.2-13.6:

[...]

- *a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation;”*

29. Article 13.2.1 ADR provides as follows:

“In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS.”

30. Article 13.2.2.1 ADR provides as follows:

“In cases where Article 13.2.1 is not applicable, the decision may be appealed exclusively to CAS.”

31. As RUSAF is an All-Russian Sports Federation (i.e. a National Federation), the ADR applies pursuant to Article 1.3.2 ADR. As the Appellants are national-level athletes in accordance with the definition set forth in Article 1.3.3.2 ADR, the ADR applies to the Appellants on the basis of Article 1.3.3.1 ADR. The jurisdiction of the CAS derives from Article 13.2.2.1 ADR.

32. The challenged decision is the decision of the Presidium of RUSAF to approve the Eligibility Criteria for Russian track-and-field athletes willing to join national teams or participate in sporting events.

33. This is not a decision directly imposing consequence for an anti-doping rule violation because the consequences for the anti-doping rule violations committed by the Appellants were rendered on 27 June 2019 and 23 July 2019, respectively. This said, the Sole Arbitrator finds that the decision of the Presidium of RUSAF is still a decision that imposes consequences on the Appellants for the anti-doping rule violations committed by them because the consequences originally imposed are de facto expanded by the Eligibility Criteria to an exclusion from joining national teams and participating in sporting events. The Sole Arbitrator, therefore, finds that the decision of the Presidium of RUSAF falls under the category of decisions listed in Article 13.2 ADR.

34. In light of the above, the Sole Arbitrator finds that the CAS has jurisdiction to hear this matter.

VI. ADMISSIBILITY

35. According to Article R49 of the Code, *“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.”*

36. Article 13.2 of the ADR asserts a 21-day deadline from receipt of the decision for filing an appeal.

37. The Eligibility Criteria were approved on 2 April 2020 and were published on the website of RUSAF on 5 April 2020, together with an interview with the Head of the Anti-Doping Commission, Mr. Eduard Bezuglov.

38. The Sole Arbitrator finds that the Appellants would not have been able to take note of the Eligibility Criteria before 5 April 2020. As the Appellants filed their Statement of Appeal on 26 April 2019, the Sole Arbitrator finds therefore that the Statement of Appeal was filed timely within 21 days.

39. It follows, therefore, that the appeal is admissible.

VII. APPLICABLE LAW

40. Article R58 of the CAS 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.”

41. The Appellants quoted the plain language of Article R58 of the CAS Code in their Appeal Brief, but did not make any specific submissions with respect to the applicable law.
42. This said, the Appellants seem to argue that because the Appealed Decision was based on various regulations, these regulations should be applied primarily and, subsidiarily, Russian law as RUSAF is domiciled in Russia.
43. The Sole Arbitrator is satisfied to accept the application of the various regulations *inter alia* the ADR and WADA Code on a principle basis and, subsidiarily, Russian law.

VIII. MERITS

44. As a result of the above, the main issues to be resolved by the Sole Arbitrator are as follows:

- a. Do the Eligibility Criteria qualify as a decision as set out in the ADR and the IAAF Rules?
- b. Do the Eligibility Criteria apply to the Appellants?
- c. Is the principle of *ne bis in idem* violated?
- d. Is RUSAF entitled to issue these kinds of decisions?

a) Eligibility Criteria qualify as a decision?

45. As a starting point, the Sole Arbitrator must establish whether the adoption of the Eligibility Criteria qualifies as an appealable decision according to R47 of the CAS Code.
46. In this respect, the Sole Arbitrator finds that the Eligibility Criteria clearly could affect the eligibility of the Appellants if the Eligibility Criteria applied to their specific situation. In that case, the application of the Eligibility Criteria could result in an exclusion to participate in any official sporting event and Russian national team.
47. The Sole Arbitrator is of the opinion that the Eligibility Criteria are obviously intended to establish a set of rules in order to fight doping violations, however, they will simultaneously also have an immediate impact by excluding individual athletes from sporting events.
48. It follows, therefore, that the Eligibility Criteria qualify as a decision pursuant to Article R47 of the CAS Code which can be appealed at the CAS. See also CAS 2004/A/659, CAS 2004/A/748 and CAS 2004/A/899.

b) Do the Eligibility Criteria apply to the Appellants?

49. According to the Eligibility Criteria, the Appellants are not eligible to participate in sporting events. Relevant are the three situations set out therein:

(1) RUSAF has received an official notification from an authorized anti-doping organization regarding a violation by the Athlete of anti-doping rules which led to the Appellants being sanctioned with a period of ineligibility;

(2) The Appellants have been found guilty of an anti-doping rule violation after 18 November 2015, pursuant to Art. 2.1, 2.2, 2.3, 2.5, 2.6, 2.7, 2.9 and 2.10 of the ADR by an anti-doping organization and have been sanctioned with a period of ineligibility with respect to the aforementioned doping violation; and

(3) The Appellants have been found guilty of another disciplinary violation (violation of ethical standards) after 18 November 2015 by World Athletics or the All-Russian Athletics Federation, CAS or another authorized body.

50. It appears that the first situation (1) does not apply to the Appellants as no notification was sent.

51. The second situation (2) unquestionably applies to the Second Appellant. It does not, however, appear to concern the First Appellant because he was suspended for to use of the substance Methylhexanamine (S6b). This substance is not mentioned in the footnote on page 1 of the Eligibility Criteria and therefore, excluding the application of the second situation.

52. This issue was raised and discussed by the Sole Arbitrator at the hearing. In response, the Appellants asserted that the third situation (3) – not the second situation (2) - applied to the First Appellant.

53. On examination, the Sole Arbitrator finds that the third situation (3) does indeed apply to the First Appellant as this situation refers to *another* violation, which would include the First Appellant's S6b violation and therefore result in the contested ineligibility.

54. Accordingly, the Sole Arbitrator finds that the Appellants have an interest in their appeal.

c) Is the principle of *ne bis in idem* violated?

55. Considering that the Eligibility Criteria have an immediate effect on the Appellants following their ineligibility and suspension due to anti-doping violations conducted after 18 November 2015, the question is whether the impact acts as a double sanction thereby violating the principle of *ne bis in idem*.

56. The principle of *ne bis in idem* is a legal doctrine providing that no legal action can be instituted twice for the same cause of action. The doctrine is the equivalent of the double jeopardy doctrine found in common law jurisdictions.

57. CAS jurisprudence (i.e. CAS 2011/O/2422) has consistently held that the principle of *ne bis in idem* can apply to sanctions under sport law, and academic authorities on the subject have come to the same conclusion.

58. In CAS 2011/O/2422, the panel noted in this respect at paragraph 8.36:

“CAS case law has consistently held that the principle of ne bis in idem can apply to sanctions under sport law, and academic authorities on the subject have come to the same conclusion. The Panel considers that, if the ne bis in idem principle is indeed applicable to sanctions imposed under anti-doping regulations, the IOC Regulation would contravene this principle. The effective purpose of the sanction is the same (even if the underlying motivations are different); the sanction is attributable to the same behaviour, and the sanction results in the same consequence, ineligibility from Competition. As mentioned above, no ne bis in idem issue would be raised if the IOC Regulation were implemented in the WADA Code, so that one adjudicatory body would be in position to assess the proper sanction for a certain behaviour, taking into due consideration the overall effect of the sanction to be attributed. “

59. Based on the above, the Sole Arbitrator considers that the *ne bis in idem* principle is indeed applicable to sanctions imposed under anti-doping regulations and that the ADR, IAAF Rules and WADA Code would contravene this principle.

60. The Sole Arbitrator moreover considers that the Eligibility Criteria must be characterized as a sanction of ineligibility for sporting events in Russia - i.e. as a disciplinary measure taken because of a prior behavior - as opposed to a pure condition of eligibility to compete in these events. The Eligibility Criteria were likely drafted for the only purpose to prevent doping violators from competing in sporting events in Russia.

61. As the effective purpose of the sanction is the same (even if the underlying justification are different); the sanction in the Eligibility Criteria is according to the Sole Arbitrator, also attributable to the same behavior and offence, and the sanction results in the same consequence, ineligibility.

62. The same reasoning was made by the panel in CAS 2011/A/2658 in paragraph 8:33:

“For all of the foregoing reasons, the Panel finds that the Bye-Law renders an athlete ineligible to compete and does so on the basis of prior undesirable behaviour: the commission of a doping offence under the WADA Code. The fact that the Bye-Law foresees a possibility of an Appeal Procedure is certainly a good instrument to avoid totally disproportionate decisions. However, this does not change the nature of the (disciplinary) consequences of the Bye-Law and, accordingly, its non-compliance with the WADA Code: The proportionality of sanctions for anti-doping offences shall be evaluated within the worldwide harmonized system of the WADA Code – and cannot be the object of an additional disciplinary proceedings triggered by the same offence. “

63. The Sole Arbitrator finds, therefore, that the Eligibility Criteria would cause a double sanction and that the Eligibility Criteria are not in compliance with the ADR, WADA Code and IAAF Rules.

64. Because of the above, the Sole Arbitrator has found that the Eligibility Criteria will cause double sanctions for the Athletes and they are to that extent invalid and unenforceable in the case at hand.

65. The Sole Arbitrator does not have jurisdiction to implement any further directions. It is up to the Parties to give effect to this Award in good faith.

66. Finally, there is no need to order other particulars of relief in this Award. In particular, considering the timing and outcome of this Award, and as so acknowledged by the Appellants given the expedited nature of the procedure, the Appellant's request for provisional measures is moot.

IX. COSTS

67. [...]

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ON THESE GROUNDS

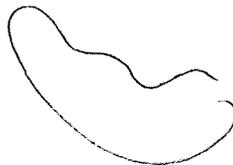
The Court of Arbitration for Sport rules that:

1. The appeal filed on 26 April 2020 by Ms. Nigina Tukhtaeva and Mr. Igor Obraztsov against the Russian Athletics Federation with respect to the decision of the Presidium of RUSAF rendered on 2 April 2020 is upheld.
2. The decision of the Presidium of RUSAF rendered on 2 April 2020 is declared invalid and unenforceable insofar as the eligibility criteria would apply to Ms. Nigina Tukhtaeva and Mr. Igor Obraztsov.
3. [...]
4. [...]
5. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 5 August 2020

THE COURT OF ARBITRATION FOR SPORT



André Brantjes
Sole Arbitrator