



Arbitration CAS ad hoc Division (O.G. Sydney) 00/015 Mihaela Melinte / International Amateur Athletic Federation (IAAF), award of 29 September 2000

Panel: Mr. Richard Young (USA), President; Mr. Thomas Lee (Malaysia); Prof. Richard McLaren (Canada)

Athletics

Doping (nandrolone)

Provisional suspension imposed by an IF during the Olympic Games

CAS jurisdiction

Principle of strict liability

- 1. By reason of their commitment to the Olympic Movement and their participation in the Olympic Games, the international federations must be deemed to have subscribed to the arbitration clause in the Olympic Charter.**
- 2. If an athlete is removed from the field of play moments before his/her turn to compete, such action creates a dispute arising during the Games within the meaning of Article 74 of the Olympic Charter. On that basis CAS has jurisdiction to rule on the dispute.**

This Application was filed at 06:30 pm 28 September 2000. The relief requested was an order directing the International Amateur Athletic Federation (“IAAF”) to allow Mihaela Melinte (the Applicant) to attempt to qualify for the women’s hammer throw finals commencing at 06:00pm the following night 29 September 2000. The granting of the requested relief would have necessitated that the Applicant’s qualifying throws take place during the morning of 29 September 2000. In light of the urgent nature of the Application for interim relief a hearing was scheduled for 10:00 pm on 28 September 2000.

The hearing commenced at 10:30 pm and concluded at approximately 01:30 am. Following the conclusion of the hearing, the Panel rendered an oral decision denying the Application.

The Applicant is the world record holder in the women’s hammer throw.

On 7 June 2000, the Applicant was drug tested at an IAAF permit competition in Milan, Italy. Applicant’s sample was sent to the IOC accredited laboratory in Rome for analysis.

The Applicant has been drug tested numerous times before and after 7 June with negative results.

On 5 September 2000, the Rome laboratory reported to the IAAF that the Applicant's "A" sample was positive for nandrolone metabolites >2ng/ml. The actual quantity of the norandrosterone metabolite detected was approximately 18 ng/ml.

Following receipt of the laboratory report the IAAF asked the laboratory to review the test results to confirm that the nandrolone metabolites detected were not the result of pregnancy or the use of birth control pills. These potential sources of nandrolone metabolites were excluded by the laboratory.

On 17 September 2000, the IAAF notified the Romanian Athletic Federation that the Applicants "A" sample had tested positive and requested that an explanation for this result be provided within two days. On 20 September, the Romanian Athletic Federation responded that the time period provided was insufficient.

After receiving this response from the Romanian Athletic Federation, the IAAF's Anti-Doping Commission considered the matter and decided to impose a provisional suspension upon the Applicant, pursuant to IAAF Rule 59. On 25 September 2000, the IAAF notified the Romanian Athletic Federation of its decision to provisionally suspend the Applicant.

The Applicant arrived in Sydney in mid-September and was credentialed to participate in the Olympic Games. She received no notice from either the Romanian Athletic Federation or the IAAF that her 7 June test had been reported positive until the morning of 27 September. That morning she was in Stadium Australia preparing to participate in the women's hammer throw qualification round when she was advised by an IAAF official that her name had been scratched from the participants' list on account of a doping violation. She was then escorted off the field.

The Applicant filed her appeal to CAS the following day.

LAW

1. These proceedings are governed by the CAS Arbitration Rules for the Games of the XXVII Olympiad in Sydney (the "ad hoc Rules") of CAS enacted by the International Council of Arbitration for Sport ("ICAS") on 29 November 1999. They are further subject to Chapter 12 of the Swiss Private International Law Act of 18 December 1987 as a result of the express choice of law contained in Article 17 ad hoc Rules and the choice of Lausanne, Switzerland, as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to Article 7 of the ad hoc Rules.
2. The jurisdiction of the ad hoc Division is based on the entry form signed by all participants in the Olympic Games and on Rule 74 of the Olympic Charter.

3. Article 17 of the ad hoc Rules requires the Panel to decide the dispute “*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the Application of which it deems appropriate*”.
4. According to Article 16 of the ad hoc Rules, the Panel has “*full power to establish the facts on which the Application is based*”.
5. The IAAF took the position that the determination of an athletes’ eligibility during the Olympic Games is the right of the International Federations and that because the IAAF Rules do not contain provisions for appeal to CAS, CAS does not have jurisdiction to rule on the Applicant’s request that her eligibility to compete be reinstated. The Panel does not accept the IAAF argument. The jurisdictional issue in this case was fully canvassed by CAS in *Baumann v. IAAF* decided earlier in this ad hoc CAS session. As stated in *Baumann*:

By reason of their commitment to the Olympic Movement and their participation in the Olympic Games, the IFs must be deemed to have subscribed to the arbitration clause in the OC. In support of this commitment we refer to Article 29 of the OC [Olympic Charter] which states:

“... *As far as the role of the IFs within the Olympic Movement is concerned, their statutes, practice and activities must be in conformity with the Olympic Charter. Subject to the foregoing, each IF maintains its independence and autonomy in the administration of its sport.*”

and

Article 30.1.4. states *the role of the IFs is to:*

“establish their criteria of eligibility to the competitions of the Olympic Games in conformity with the Olympic Charter, and to submit these to the IOC for approval;”

We adopt and apply what was said in the *Baumann* decision.

6. The absence of action by the IOC to revoke the athlete’s accreditation was asserted to mean that CAS has no jurisdiction, this being a distinguishing factor from *Baumann*. This distinction is one without effect. The athlete was removed from the field of play moments before her turn to compete. Such action creates a dispute arising during the Games within the meaning of Article 74 of the Olympic Charter. On that basis CAS has jurisdiction to deliberate upon the Application.
7. At the conclusion of the hearing, the Panel rendered the following oral ruling on the Application:
 - a. *This is an Application for urgent relief affecting the Applicant’s eligibility to compete in the hammer throw later today.*
 - b. *The Panel finds that the manner in which the Applicant was advised of her suspension and removed from the athletic field was embarrassing and disrespectful. During the hearing, the IAAF expressed its apology for this circumstance.*
 - c. *The Panel finds that it does have jurisdiction to order the relief requested if it deems that relief justified.*

- d. *The Applicant's essential contention is that the IAAF failed to follow its own rules - particularly because the athlete never had a chance to put forth her position explaining this positive test result.*
 - e. *However, the Applicant acknowledged at this hearing that she had the opportunity to present to this Panel the positions which she would have provided to the IAAF. The Panel has also heard the explanations of the IAAF.*
 - f. *The Panel has considered all of the forgoing and finds no violation by the IAAF of its rules which justifies granting the relief requested.*
 - g. *The Application is therefore denied.*
8. The Panel finds that the following major points raised by the Applicant in support of her Application were, for purposes of this expedited hearing, not sufficiently established in such a fashion as to justify granting the Application.
- a. *The Applicant was not offered the opportunity to present her explanation for the positive test. IAAF Rule 59 provides that the IAAF may provisionally suspend an athlete after a positive "A" test on the recommendation of the IAAF Anti-Doping Commission prior to the testing of the "B" sample and prior to the hearing opportunity set forth in the IAAF Rules. The Applicant has not asked this Panel to address the validity of this Rule and it has not done so. The Applicant's argument is instead directed to the obligation of the IAAF to give the Applicant a reasonable opportunity to be heard in order to present her explanation. It appears that on 17 September 2000, the IAAF notified the Romanian National Athletic Federation, who is the proper party to receive notice under the IAAF Rules. Apparently the Applicant was never advised by her National Athletic Federation that she had tested positive. She learned about it the morning of 28 September 2000 when she was removed from the field in such a humiliating fashion. Importantly, the Counsel for the Applicant acknowledged during the hearing that the information presented by the Applicant to this CAS Panel was the same information which the Applicant would have presented to the IAAF had she been given an opportunity to do so. Had this Panel been more impressed by the substance of the arguments which the Applicant raised before it, the Applicant's claim that she was denied a reasonable opportunity to be heard would have carried more weight.*
 - b. *The laboratory reported Applicant's sample positive using the 2 ng/ml reporting threshold for nandrolone applicable for men, not the 5 ng/ml reporting threshold used for women. Although the laboratory report dated 5 September 2000 reported nandrolone metabolites of ">2ng/ml" the uncontroverted testimony before the Panel was that the detected quantity of a nandrolone metabolite in Applicant's urine was approximately 18 ng/ml. The IAAF had also triggered appropriate inquiries of the laboratory on seeing the ">2 ng/ml" report which was patently irregular on its face.*
 - c. *The Rome laboratory was one day short of three months in reporting its analysis of the Applicant's "A" sample. Although this may prove to be one issue for the Applicant in a subsequent hearing, there was no evidence before this Panel that the delay undermined the validity of the laboratory test result.*

- d. *The laboratory failed to properly report the presence of both the primary metabolites of nandrolone norandrosterone and noretiocholanolone.* Both norandrosterone and noretiocholanolone are metabolites of nandrolone and its precursors. The Panel understands that both norandrosterone and noretiocholanolone may not always be in an athlete's urine following doping and that to establish a doping offence the presence of only one or the other metabolites in the urine is sufficient (see eg. Victor P. URALETS and Paul A. GILLETTE, "Over-the-Counter Anabolic Steroids 4-Androsten-3,17-dione; 4-Androsten-3 β , 17 β -diol; and 19-nor-4-Androsten-3, 17-dione: Excretion Studies in Men", *Journal of Analytical Toxicology*, Vol. 23, September 1999, p. 357). Thus, this argument is unpersuasive.
 - e. *The Rome Laboratory which analysed the Applicant's sample had previously been stripped of its IOC accreditation.* The testimony before the Panel was that the Rome laboratory was re-accredited at the time the sample was analysed.
 - f. *The IAAF did not properly consider the possibility that the Applicant's positive test result was caused by pregnancy or the use of birth control pills.* The Chair of the IAAF's Anti-Doping Commission testified that the Commission had made the necessary inquiries to exclude these possibilities as the source of the nandrolone metabolites in the Applicant's sample.
 - g. *The Applicant was tested regularly both before and after 7 June 2000 test and has never tested positive.* This may prove to be important evidence at a future hearing, however the available research indicates that this test pattern could also be consistent with the use of oral supplements containing nandrolone precursors (see *TAS 99/A/252 FLCP v. IWF*).
9. Both the Applicant and the IAAF acknowledged that this hearing before the ad hoc Division of CAS conducted on very short notice less than 24 hours before the competition finals, was not the place to reach a final resolution on the question of whether or not the Applicant has committed a doping offence. Under the IAAF Rules, the Applicant is entitled to a hearing conducted by her national federation (with the possibility of a second hearing before the IAAF), in which that question can be resolved. The reasons set forth in para. 7 above have been provided to explain the basis of this Panel's decision to deny Applicant's request for emergency relief with respect to her participation in the Olympic Games. The issues addressed in para. 7 should not be viewed as finally resolved as between the parties.

The CAS ad hoc Division rules:

The Application is dismissed.