CAS 2004/A/628

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President: Mr Peter **Leaver** QC, Barrister-at-Law, London, England

Arbitrators: Mr **Loh** Lin Kok , Attorney-at-Law, Singapore
Professor Martin **Hunter**, Barrister-at-Law, London, England

Ad Hoc Clerk: Ms Anna **Boase**, Barrister-at-Law, London, England

in the arbitration between:

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, represented by Mr Michael Beloff QC and Mr Mark Gay, Solicitor, of Denton Wilde Sapte, London, England

Appellant

v/

USA TRACK AND FIELD, represented by Mr Javier H. Rubinstein, Attorney-at-Law, of Mayer, Brown, Rowe & Maw LLP, Chicago, Illinois, United States of America

First Respondent

and

JEROME YOUNG, represented by Ms Julie H. North and Mr Stephen C. Chien, Attorneys-at-Law, of Cravath, Swaine & Moore LLP, New York, United States of America

Second Respondent

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A. INTRODUCTION

(1) The Parties

1. The Appellant, International Association of Athletics Federations ("the IAAF"), is the international federation which governs the sport of athletics throughout the world. The IAAF has its seat in the Principality of Monaco.

2. The First Respondent, USA Track & Field ("USATF"), is the national federation which governs the sport of athletics in the United States of America. USATF has its seat in Indianapolis, and is recognised under United States law as a National Governing Body.

3. The Second Respondent, Jerome Young ("Mr Young"), is an athlete who has competed in major athletics events for the United States of America. Mr Young was born in Jamaica, but became a United States citizen in 1995.

(2) The Arbitration Agreement and Jurisdiction

4. The Arbitration Agreement is dated 13 May 2004, and is in the following terms:

> *"**THIS ARBITRATION AGREEMENT** is made on 13 May 2004*
>
> ***B E T W E E N:***
>
> (1) ***INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS ("IAAF")**, an International Sports Federation, having its offices at 17 Rue Princesse Florestine, BP 359, MC 98007, Monaco Cedex;*
>
> (2) ***USA TRACK & FIELD ("USATF")**, a Member of the IAAF, having its offices at One RCA Dome, Suite #140, Indianapolis, Indiana 46225, United States; and*
>
> (3) ***MR JEROME YOUNG**, an athlete subject to the disciplinary jurisdiction of USATF and IAAF, of 1321 Alexis Avenue, Apartment 288, Fort Worth, Texas 76120, United States.*
>
> ***W H E R E A S:***
>
> *(A) The IAAF is in dispute with USATF as the IAAF considers that USATF breached IAAF Rule 21.3(ii) in that the USATF Doping Appeals Board reached an erroneous conclusion on 10 July 2000 in exonerating Mr Young of a Doping Offence.*

(B) The IAAF is also in dispute with Mr Young because it considers by virtue of having committed a Doping Offence as defined under IAAF Rules, Mr Young should have been declared ineligible from competition for a two year period from the date of his sample on 26 June 1999 to 26 June 2001.

(C) What the IAAF believes to be the reason for the delay in referring this matter to arbitration is clearly set out by the IAAF in its Statement in Support of its reference to arbitration at paragraphs 1 to 29. It is the IAAF's position that due to the conduct of USATF and the importance of the case, the Arbitration Panel should exercise its discretion to accept jurisdiction outside the six month deadline set out in IAAF Rule 21.1 as it is fair and reasonable to do so.

***NOW IT IS AGREED** as follows:*

1 Agreement to Arbitrate

1.1 The IAAF, USATF and Mr Young agree to submit to arbitration the following issues:

"(i) Pursuant to IAAF Rule 21.1 in IAAF Handbook 2000-2001, would it be fair and reasonable for a Panel in the position of the IAAF Arbitration Panel to accept jurisdiction in this case outside the six month deadline?; and

(ii) Did the USATF Doping Appeals Board misdirect itself or otherwise reach an erroneous conclusion on 10 July 2000 when it exonerated Mr Young of a Doping Offence?"

2 Constitution of the Arbitration Panel

2.1 The arbitration will take place before the Appeals Division of the Court of Arbitration for Sport.

2.2 The Panel shall consist of three arbitrators. One shall be selected by the IAAF and one shall be jointly selected by USATF and Mr Young. The two appointed arbitrators shall then have 10 days in which to agree upon a Chairman of the Arbitration Panel. Failing such an agreement the Chairman of the Arbitration Panel shall be selected by the President of the Division within 7 days. The Chairman may not be a citizen of, resident, or domiciled in the United States of America or Monaco.

2.3 No more than 1 arbitrator may be a citizen of, resident, or domiciled in the United States of America.

2.4 No arbitrator may be selected who has sat as an arbitrator or acted as Counsel in CAS 2002/O/401 IAAF –v- USATF.

2.5 No arbitrator may be selected who has sat on as a Commission member or acted as Counsel on:

(i) the Enquiry by the International Review Commission into USATF's non-disclosure of positive cases; and

(ii) the IOC/WADA Enquiries into Mr Young's positive sample.

2.6 If any arbitrator or the Chairman cannot sit on the agreed hearing date set out in the Schedule, another arbitrator or Chairman will be nominated who is available to sit on the agreed hearing date.

3 Place of Arbitration

3.1 Subject to the agreement of CAS, the arbitration will be held in London.

4 Procedural Issues

4.1 The arbitration shall be conducted subject to the timetable and procedural directions to be found at Schedule 1 to this Arbitration Agreement. The IAAF's Notice of Referral and Statement in Support both dated 18 February 2004 shall stand as the Statement of Appeal and Appeal Brief in this case.

4.2 In the event of any conflict between this Arbitration Agreement and the CAS Rules, this Arbitration Agreement shall govern and control the CAS arbitration.

4.3 The language of the arbitration shall be English. Any party wishing to submit documents written in a language other than English must have such documents translated into the English language. The party offering such translated documents shall bear the expense of such translation, subject to the Arbitration Panel's award of costs at the conclusion of the arbitration.

5 The Decision

5.1 The Arbitration Panel shall deliver its reasoned decision by 10 July 2004; or if the Panel is unable to do so by that date, it shall inform the parties of the outcome of the arbitration by 10 July 2004, with a written decision to follow as soon as possible thereafter but in no event later than 17 July 2004, and such decision and award shall be final and binding on all parties.

5.2 The decision shall be in English.

5.3 The decision shall not be confidential.

> ***6 Applicable Rules and Applicable Law***
>
> *6.1 The Applicable Rules to be applied by the Arbitration Panel are those published in IAAF Handbook 2000-2001.*
>
> *6.2 This Agreement shall be governed by and construed in accordance with Swiss law.*
>
> *6.3 The arbitration shall be subject to the procedural law of the Swiss courts. If the Panel find it necessary to select a substantive law governing the proceedings, it shall do so in accordance with Article 187 of the Swiss Federal Code on Private International Law."*

5. It was common ground between the parties that, pursuant to the Arbitration Agreement, the CAS has jurisdiction to determine the two issues referred to it.

(3) The Relevant IAAF Regulations

6. As is stated in Paragraph 1.1(i) of the Arbitration Agreement, the relevant IAAF Regulations are those which appear in the IAAF Handbook 2000-2001, and, in particular, Rule 21.1.of those Regulations.

7. Rule 21.1 is in the following terms:

> "*General Disputes*
>
> *1.*
>
> *All disputes between Members, or between a Member and the Council or Congress, however arising, shall be submitted to the Arbitration Panel for determination within six months of the date upon which the disputed decision was made.*
>
> *Disputes referred after this point may be accepted by the Arbitrators where the Arbitrators consider it to be fair and reasonable so to do."*

8. Rule 22 is concerned with the "Constitution of the Arbitration Panel." It is not necessary to set out its provisions in this Award, but it is mentioned both for the sake of completeness and so that the reader of this Award will know where to find the relevant definition.

9. The IAAF also published "Procedural Guidelines for Doping Control". The 2000 Edition of those Guidelines provided, inter alia:

> *"1. INTRODUCTION*
>
> *1.1 Athletes, coaches and team officials should acquaint themselves with the Doping Control Procedures contained in IAAF Rules 55-61 and in these Procedural Guidelines. Although they directly govern only testing carried out by the IAAF, it is intended that they are closely followed by all Members and acted as a model for testing throughout the World.*

*"**Communication of Results***

…….

2.51 If the analysis of the main "A" sample indicates the presence of a prohibited substance, the laboratory shall inform the IAAF immediately. The IAAF shall then inform the athlete's National Federation and request that the National Federation seek an explanation from the athlete within a period set by the IAAF. The National Federation shall, in turn, inform the athlete of the results of the analysis as soon as is reasonably practicable and seek such an explanation. The explanation, if any, should be conveyed by the National Federation to the IAAF as soon as reasonably practicable, but within the time limit set by the IAAF.

……..

2.63 If the athlete is found at a hearing before his National Federation to have committed a doping offence, or he waives his right to a hearing, he shall be declared ineligible where appropriate. His ineligibility shall begin from the date on which it is decided that a doping offence has been committed (Rule 60.2 (a) and (b))."

(4) USATF's Confidentiality Regulation

10. The relevant Regulation is set out in Paragraph 15 below. It was considered by both the McLaren Commission and the First CAS Panel, which came to rather different conclusions about its force and relevance.

B. HISTORY

(5) Introduction

11. The history of this matter is lengthy and complicated, and makes it both unique and peculiar. It is necessary to state it in some detail so that the issues argued before this Panel can be fully understood.

12. It is well-known that doping has for many years been the scourge of competitive sport. The International Olympic Committee ("the IOC") has led the fight against doping, and has encouraged the international federations which it recognises to take an active role in the fight. As part of that fight, on 10 November 1999 the World Anti-Doping Agency ("WADA") was formed, and, at the instigation of the IOC and WADA the World Anti-Doping Code ("the WADC") was adopted at the Copenhagen Conference in November 2003. The IOC now insists that any sport that wishes to take part in the Olympic Games, whether the Olympic Summer Games or the Olympic Winter Games, should incorporate the WADC into its rules.

13. However, the formation of WADA and the adoption of the WADC are recent developments in the fight against doping. For many years, the international federations, and their member federations, conducted the fight without the assistance of WADA or the WADC. They relied upon their own rules, which took many forms, some more satisfactory than others.

14. For many years, the IAAF has included in its rules a comprehensive anti-doping code, and has insisted that its member federations, such as the USATF, should include an anti-doping code in their domestic rules.

15. The USATF did include an anti-doping code in its domestic rules. Those rules also contained a confidentiality provision. The form of that confidentiality provision changed from time to time, but at the time which is relevant for the purposes of this Award, that is, June 1999, it was in the following terms:

> *"**Confidentiality and publication of drug test results:** The names of athletes who have tested negative or who have provided valid excuses for failure to appear for testing shall be made available to the public. The names of athletes testing positive shall not be made publicly available until an athlete has been deemed ineligible by a DHB (Doping Hearing Board), or when the findings of the DHB have been reaffirmed by the DAB (DAB), when appropriate. Any other information will be made available only with prior consent of the athlete…."*.[1]

(6) USATF Proceedings

16. On 26 June 1999 Mr Young was competing at the USATF Outdoor National Championships in Eugene, Oregon, where he was required to provide a urine sample ("the Eugene sample") as part of the USATF's doping control programme. Six days later, on 2 July 1999, Mr Young was again required to provide a urine sample ("the Lausanne sample") whilst competing in Lausanne, Switzerland. Prior to giving the Eugene sample, on 12 June 1999 Mr Young had given a sample while competing at Raleigh, North Carolina ("the Raleigh sample").

17. Analysis of the Eugene sample at the IOC accredited laboratory in Indianapolis, showed that it was positive for Nandrolone Metabolites. The Raleigh and Lausanne samples tested negative. Testing of the B sample confirmed the positive results of the Eugene A sample. As was his right, Mr Young requested a hearing.

18. On 11 March 2000 the USATF Doping Hearing Panel found that a doping violation had been committed. Mr Young was suspended from competition on 3 April 2000, but appealed the decision and was exonerated by the USATF Doping Appeals Board ("DAB") on 10 July 2000. The DAB found that the fact of the negative test results produced in Lausanne six days after the Eugene sample was taken raised a reasonable doubt as to whether a violation had been committed (the "DAB Decision"). The DAB

[1] USATF Regulation 10 (G), as in force from December 1998 to December 1999.

relied upon expert evidence from Mr Young's expert, preferring that evidence to that of the USATF's expert, Professor Larry Bowers.

19. In August 2000 the Olympic Summer Games took place in Sydney. Shortly beforehand, the Indianapolis laboratory provided the IAAF with records which indicated that there were 17 cases, identified only by numbers, of which the IAAF had not been notified, in which samples taken from anonymous US athletes had tested positive. This fact appeared in the press during the Games.

20. The IAAF was concerned that none of the 17 athletes, whose cases had not been considered for review by the IAAF, should compete in the Games. The IAAF sought the assurance of the USATF to this effect. Mr Young was in fact among the 17 athletes. He competed in the Olympic Games in Sydney, and won a Gold Medal.

21. In September 2000, and thereafter, the IAAF requested, in writing on several occasions, from the USATF the identity of the athletes, a copy of the doping control form and copies of documents relating to the disciplinary conclusion in each of the 17 cases, including that of Mr Young. The USATF refused to disclose any such information or documents, and contended that it was prevented from doing so by its own confidentiality regulations: see Paragraph 15 above.

(7) McLaren Commission

22. On 29 September 2000 the USATF appointed an Independent International Review Commission on Doping Control chaired by Professor Richard McLaren (the "McLaren Commission"). Its purpose was to enquire into questions raised about USATF's compliance with national and international anti-doping norms.

23. The McLaren Commission interviewed representatives from all relevant organizations and reviewed their files, publishing its findings on 11 July 2001 (the "McLaren Report"). The McLaren Report reviewed the extent to which the USATF had complied with the IAAF Rules which required national bodies to disclose to it all positive results.

24. The McLaren Report found that: first, the IAAF had not reported all positive results, in particular those in which the athlete had ultimately been exonerated; secondly, the USATF had interpreted its own confidentiality regulations so restrictively as to prevent the IAAF from enforcing its doping controls; thirdly, there was no US law impediment to the disclosure of information relating to positive results; fourthly, the IAAF was the ultimate arbiter of its own rules and the USATF was on notice that it regarded the USATF refusal to disclose to be contrary to the IAAF regime; fifthly, the duty to disclose was inherent in the Rules; sixthly, the USATF had failed to impose immediate provisional suspensions following positive results. The fourth of those findings is particularly relevant in the light of later events, and, in particular, the First CAS Decision.

25. In August 2001 a meeting between representatives of the USATF and IAAF took place in Edmonton, Alberta, followed by correspondence between those organizations during the autumn, with a view to the IAAF obtaining disclosure of material in relation to the 17 cases.

26. No disclosure was forthcoming from the USATF, which relied, in part, on what was said to be an objection by the United States Olympic Committee ("USOC") to such disclosure. However, in February 2002, it became clear during meetings in Salt Lake City between representatives of the USOC and the IOC that the USOC had no such objection. After those meetings, the Presidents of the International Olympic Committee ("IOC) and WADA made public statements condemning the USATF's refusal to disclose the required information.

(8) First CAS Decision

27. On 10 July 2002 the IAAF and USATF signed an Arbitration Agreement, to submit to arbitration at the Court of Arbitration for Sport ("CAS") the following questions:

> *(1) Properly construed, at all material times did IAAF Rules provide that USATF was obliged:*
>
> *(a) to furnish the results of positive tests to the IAAF;*
>
> *(b) to provide the IAAF with copies of decisions of USATF Hearing Panels exonerating athletes of Doping Offences, and*
>
> *(c) to provide the IAAF with the material it needs to decide whether or not to seek to have a Hearing Panel's decision reviewed by its own Arbitration Panel or CAS?*
>
> *(2) If IAAF Rules did so provide, is there any valid reason why USATF should not be required to comply with these Rules?*

28. The first CAS hearing took place in November 2002 and the Arbitral Award was published on 10 January 2003 (the "First CAS Decision"), in which both questions were answered in the affirmative. The First CAS Decision held that although the IAAF Rules did oblige the USATF to disclose the relevant information, there was a valid reason why the USATF should not be *required* to disclose such information.

29. The First CAS Panel's reasoning on the second question is found in paragraphs 135 to 140 of the First CAS Decision. In summary, the reasoning was that the IAAF had been asked by the USATF to substantiate its requests for information by reference to the relevant IAAF Rule(s) and to reply to USATF's interpretation of the rules, and that the IAAF had failed or refused to do so. By such failure or refusal the IAAF had led the USATF to understand that whilst it would like disclosure, the Rules did not explicitly require it and it could not be compelled. In the circumstances, this failure or refusal created an estoppel. The circumstances included the "dramatic and undoubtedly painful consequences" for the athletes in question if disclosure were

made obligatory so long after the events in issue and so long after they were led to believe that their cases were closed.

30. No specific reference was made by the First CAS Panel to the fourth finding by the McLaren Commission, summarised in Paragraph 24 above, that the IAAF was the ultimate arbiter of its own rules and the USATF was on notice that it regarded the USATF refusal to disclose to be contrary to the IAAF regime.

31. It appears to this Panel that in this regard, at least, there is an inconsistency between the reasoning in the First CAS Decision and that of the McLaren Commission.

(9) Events after First CAS Decision

32. On 27 August 2003 the Los Angeles Times revealed that Mr Young was the athlete who had competed in Sydney following a positive test. Shortly afterwards, on 29 August 2003, Mr Young himself confirmed in the media that he had tested positive in June 1999 but that he had subsequently been exonerated of a doping violation. This was the first time that Mr Young had been identified.

33. On 28 August 2003, the IOC wrote to the IAAF, USOC and WADA requesting information on Mr Young's case. On 29 August 2003 WADA wrote to the IAAF demanding that it take action in the light of the new information. In its response to the IOC, dated 11 September 2003, the IAAF stated that it was bound by the First CAS Decision, that disclosure of the name of the athlete in the press did not alter the IAAF's position, and that it was unable to take further action "in the absence of voluntary disclosure of the information or an admission by the athlete in question". The IAAF made a similar response to WADA.

34. As the Panel understands the IAAF's position, it was saying that because it was bound by the First CAS Decision it could not *require* USATF to disclose detailed information in Mr Young's case.

35. On 10 September 2003 a Joint IOC/ WADA Enquiry Commission *In Re Jerome Young* was established (the "Joint Commission") to "examine all relevant facts …through all written evidence available and to assess, from such relevant facts, the legal implications and possible means of actions to have the JY case reconsidered by any competent body or organization."

36. On 19 September 2003, the Joint Commission wrote to the IAAF expressing the view that disclosure of the athlete's name removed the reason why disclosure could not be required, and asking the IAAF to exercise its authority over the USATF and demand full and unrestricted cooperation.

37. The USOC wrote to the IOC on 25 September 2003 formally confirming Mr Young's identity. On 30 September 2003 the IOC Executive Board decided to establish a Disciplinary Commission into the entry and participation of Mr Young in the Sydney Olympic Summer Games.

38. On 8 October 2003 the Disciplinary Commission forwarded to the IAAF a file of information which it had received from the IOC, including a version of the DAB Decision redacted to omit the name of the athlete. In its covering letter the Disciplinary Commission stated that "the IAAF now has all necessary elements and support to exercise its authority on the USATF and to act accordingly." However, largely because the version of the DAB Decision that it had received was redacted, so that Mr Young's name did not appear, the IAAF still did not believe that it had sufficient material on which to proceed to review Mr Young's case. The IAAF's decision not to institute proceedings against Mr Young in October 2003 is criticised in the present case by both the USATF and Mr Young.

39. During October and November 2003 the USATF indicated that it had unsuccessfully sought the agreement of Mr Young's lawyers to allow the USATF formally to disclose his identity. The IAAF sought the assistance of the Disciplinary Committee in obtaining an unredacted version of the DAB Decision, which it said it needed in order to decide whether to review the case.

40. International efforts to obtain the unredacted DAB Decision culminated in a fax of 29 January 2004 from USOC to USATF in which it made two key statements. First, that the IOC Executive Board would be considering the matter at its February 2004 meeting and would "take whatever actions it deems necessary and appropriate against USATF and its leadership if this matter is not resolved to the satisfaction of the IOC before that meeting". Secondly, irrespective of any action by the IOC, unless there was a resolution of the matter by 24 February 2004, the USOC Executive Committee would be asked to "initiate decertification proceedings against USATF's national governing body status".

41. On 1 February 2004 USATF replied to USOC, confirming Mr Young's identity, and enclosing the unredacted DAB Decision. The letter stated, inter alia, "USATF sincerely regrets and apologises for the difficulties that this case has caused for the USOC, IOC, IAAF and our own organization. By adhering to our confidentiality rules, we never intended to embarrass the Olympic Movement…. We were not and are not perfect with respect to anti-doping activities and we are sorry for any mistakes we made."

42. The USATF's letter of 1 February 2004 and its enclosure were forwarded to the IAAF through the IOC. Thereafter, the IAAF produced a Notice of Referral to Arbitration on 18 February 2004.

C. THE PARTIES' SUBMISSIONS

(10) Issue (1)

"Pursuant to IAAF Rule 21.1 in IAAF Handbook 2000-2001, would it be fair and reasonable for a Panel in the position of the IAAF Arbitration Panel to accept jurisdiction in this case outside the six month deadline?"

43. The Panel has received voluminous pleadings from the parties. In this Section of the Award it will do no more than attempt to summarise the parties' respective submissions on the two issues that it has to decide.

(i) IAAF's Submissions

44. IAAF submits that it would be fair and reasonable for a Panel in the position of the IAAF Arbitration Panel to accept jurisdiction outside the six month deadline. It points out that both the McLaren Commission and the First CAS Panel decided that USATF was obliged to pass on positive results to it so as to enable it to decide whether to take proceedings against an athlete who had been found to have a prohibited substance in his or her body.

45. It had been prevented from making that decision in Mr Young's case by the USATF's failure to satisfy that obligation.

46. Although the First CAS Panel had held that the USATF was not *required* to disclose the information that IAAF needed to enable it to make that decision because, at least in part, of IAAF's conduct, in the events which have happened and in which IAAF is now in possession of that information, it is fair and reasonable for such a Panel to accept jurisdiction. The delay had been caused principally by the USATF, but Mr Young could have accelerated the matter by consenting to IAAF being provided with the information, at least since 29 August 2003, when he was reported as accepting that he was the athlete whose identity IAAF had been attempting to discover.

47. There had been no unreasonable delay by the IAAF between August 2003, when Mr Young's name was first made public in the Los Angeles Times, or between October 2003, when the IAAF first received a redacted copy of the DAB Decision, and February 2004, when it gave the Notice of Reference to Arbitration.

(ii) USATF's Submissions

48. For the most part, USATF is content to adopt the submissions made on behalf of Mr Young. It does so because it contends that it has a "limited role in the present arbitration".

49. However, USATF forcefully submits that the First CAS Decision is "dispositive of the equitable questions at issue in these proceedings". It submits that the unnamed athletes, whose cases lay at the heart of the First CAS Decision, had and have a legitimate expectation that that Decision would be final.

(iii) Mr Young's Submissions

50. Mr Young's submissions are, first, that it would not be fair and reasonable to consider his case as more than six months have elapsed since the disputed decision; and, secondly, that, in the circumstances, he would suffer unfair prejudice and irreparable

harm if the IAAF were permitted to "re-open" his case. He submits that it was the IAAF that substantially caused the delay, and that it should not be able to avoid that responsibility.

51. In addition, Mr Young submits that the IAAF is bound by the First CAS Decision, and that "fairness, legitimate expectations and estoppel" should preclude the re-opening of the case.

52. Finally, Mr Young criticises the manner in which the IAAF came into possession of his name and the DAB Decision, and submits that the IAAF should not be permitted to avoid the effect of the First CAS Decision by using evidence which was "tainted". He submits that the IAAF should not be permitted to use the "fruit of the poisoned tree". The only circumstance in which the IAAF could be permitted to take proceedings against him would be if he had made a voluntary admission or disclosure. He had not done so, and, accordingly, no proceedings should be permitted to be taken against him.

(11) Issue (2)

"Did the USATF Doping Appeals Board misdirect itself or otherwise reach an erroneous conclusion on 10 July 2000 when it exonerated Mr Young of a Doping Offence?"

(i) IAAF's Submissions

53. IAAF submits that it is clear that the DAB misdirected itself, and reached an erroneous conclusion, when it exonerated Mr Young. If it had directed itself properly, and in accordance with the evidence, it should have accepted Professor Larry Bowers' evidence, and ignored the opinion of Mr Young's witness to the effect that the negative test some 6 days after the positive test in some way cast doubt on the positive test.

(ii) USATF's Submissions

54. USATF rejects any suggestion that it failed to follow proper procedures, or that it misdirected itself. In respect of this submission, USATF does not appear to distinguish between itself and the DAB, although from time to time it distances itself from the DAB by stating that it is "a distinct entity" from the DAB: see, for example, Paragraph 2.13 of USATF's Statement. In further support of the submission that it followed proper procedures, USATF submits that the IAAF has misunderstood the finding of the McLaren Commission on the issue of confidentiality.

(ii) Mr Young's Submissions

55. Although he does not seek to present a defence on the merits of the Doping Appeals Board Decision, Mr Young submits that that Decision should not be reconsidered on its merits. The only basis upon which that Decision could be challenged is if there were evidence of fraud or wrongdoing. There is no such evidence.

56. If, contrary to his primary submission, the Panel does reconsider the DAB's Decision, and find that Mr Young committed a doping violation, no penalty should be imposed beyond the period of suspension already served from April to July 2000. Mr Young has not committed any doping offence since July 2000, and should be treated leniently.

D. DECISION

(12) Issue (1)

57. The Panel is asked to decide whether it would be fair and reasonable for a Panel in the position of the IAAF Arbitration Panel to accept jurisdiction in this case outside the six month deadline. That decision involves, as all parties accepted, an exercise by the Panel of its discretion. In their written and oral submissions on this issue, considerable reference was made by the Respondents to the First CAS Decision. It is, therefore, necessary, as a preliminary matter, for the Panel to determine precisely what the First CAS Panel decided.

58. The First CAS Panel determined that the IAAF Rules obliged the USATF to notify the IAAF of any results of laboratory tests on urine samples in which prohibited substances were found ("positive tests"). It also determined that the IAAF Rules obliged the USATF to provide copies of any decisions exonerating athletes of doping offences, together with any material necessary for the IAAF to decide whether to seek a review of decisions that exonerated the athletes concerned. Thus, the First CAS Panel upheld the IAAF's interpretation of its own Rules. In the circumstances, it found that the USATF had acted in flagrant breach of its obligations over a significant period of time. However, the First CAS Panel also determined that, when the USATF requested an explanation as to where its obligations were to be found, the IAAF had failed to identify the relevant rules, or to explain their interpretation to the USATF. In the First CAS Panel's opinion, those failures by the IAAF constituted a valid reason why the USATF should not be *required* to comply with its obligations under the IAAF Rules in relation to the 13 anonymous athletes whose cases were primarily the subject of the arbitration.[2]

59. The First CAS Panel was not asked to consider, and did not in fact consider, whether the IAAF would be entitled to review the cases of the 13 anonymous athletes in the event that their identities and decisions exonerating them were made available to the IAAF by means other than compulsory disclosure by the USATF. Such a question would have been entirely academic at the time, and was not one of the questions that that Panel was asked to answer. In the case of athlete USOC13, now known to have been Mr Young, two and a half years had passed since the DAB Decision, during which period his anonymity had been maintained, and there was no reason to suppose that, absent USATF being required to disclose the information, the position would change.

[2] The original 17 cases had, for various reasons which it is unnecessary to state in this Award, by this time become 13.

60. The First CAS Panel's underlying assumption that its decision would, in all probability, render it impossible for the IAAF to review the 13 cases is reflected in the First CAS Decision. That assumption does not fetter this Panel's ability to consider Mr Young's case as it stands today. The circumstances which have arisen since 27 August 2003, or any such circumstances, were obviously not known to or anticipated by the First CAS Panel. It was not, and could not have been, the First CAS Panel's Decision that the case of Mr Young and the other 12 athletes should remain closed in all circumstances.

61. IAAF Rule 21.1 in IAAF Handbook 2000-2001, to which the Panel is referred in the first question, is unambiguous in stating that the time limit for review by the IAAF of decisions by national bodies is six months from the date on which the decision was made. The DAB Decision was published on 10 July 2000. The six month time limit therefore expired on 9 January 2001. Three years elapsed between the expiry of that time limit and the IAAF's referral of Mr Young's case to arbitration. IAAF Rule 21.1 provides that the IAAF Panel has a discretion to review cases outside the time limit if it is "fair and reasonable" to do so. The "fair and reasonable" test is therefore that to be applied by this Panel, standing as it does in the shoes of an IAAF Arbitration Panel in this arbitration.

62. The Panel takes into account a number of factors in deciding whether it would be fair and reasonable to exercise its discretion to extend the time limit. One of the relevant factors is the issue of why the IAAF is referring Mr Young's case to arbitration three years out of time. In considering the cause of the delay, the Panel analyses the total period of delay in three phases: first, from the date of the DAB Decision on 10 July 2000 to the date of the First CAS Decision on 10 January 2003 (the "First Period"); secondly, from 11 January 2003 to 27 August 2003, that is, up to the date of the disclosure of Mr Young's name in the Los Angeles Times (the "Second Period"); thirdly, from 28 August 2003 until 2 February 2004, when USATF finally confirmed to the IAAF Mr Young's identity and disclosed an unredacted copy of the DAB Decision (the "Third Period").

The First Period

63. During the First Period, as soon as the IAAF became aware of the positive results and exonerations in the 17 cases then at issue, it took action to obtain the information it required to decide whether to review the exonerating decisions. The IAAF pursued this line of enquiry vigorously over an extended period, in spite of adamant refusals by the USATF to co-operate. It was found in both the McLaren Report and the First CAS Decision that the USATF was in breach of the IAAF Rules in its refusal. The USATF and Mr Young submit that it follows from the First CAS Panel's finding that, during this period, and prior to it, the IAAF's failure to identify the Rule upon which it relied (which eventually, as the First CAS Panel held, estopped it from relying upon the Rules to require disclosure from the USATF of the identity of the athletes involved) means that the IAAF was to blame for the delay in the First Period. The Panel does not accept this view. The answer given by the First CAS Panel to the second question it had to decide does not lead to this inevitable conclusion.

64. The USATF had an entrenched view on the interpretation of the IAAF Rules, and defended that view throughout the First Period. It advanced that view to the First CAS Panel. There is nothing in the evidence to suggest that, if the IAAF had identified the relevant Rule, the USATF would have conceded that its construction was wrong, and immediately given disclosure. What prevented the IAAF from reviewing Mr Young's case during the First Period was the USATF's refusal to comply with their disclosure obligations, which refusal was found to have been in breach of the Rules.

65. Therefore, the Panel concludes that, whilst it may be true that the IAAF failed to take adequate steps to dissuade the USATF from its erroneous interpretation, it cannot be said that the blame for the delay lies wholly with the IAAF. In fact, the Panel considers that the USATF was at least equally to blame for the delay in the First Period.

The Second Period

66. During the Second Period, the IAAF abided loyally by the First CAS Decision, and did not take any steps to *require* the USATF to disclose material relating to Mr Young's case. Likewise, the USATF did not take any steps to disclose such material, since it had been released from complying with the IAAF Rules by the First CAS Decision. In the Panel's opinion, no blame for the inaction during the Second Period can be ascribed to any party.

The Third Period

67. The Third Period commenced with the disclosure of the identity of athlete USOC 13 in the Los Angeles Times on 27 August 2003, and the reported confirmation in the media by Mr Young on 29 August 2003 that he had tested positive, but had been exonerated. The Third Period is interrupted by the disclosure of a redacted copy of the DAB Decision to the IAAF on 8 October 2003.

68. The Panel finds that the IAAF was effectively disabled from reviewing Mr Young's case until it had seen an unredacted copy of the DAB Decision. Whether the redacted version should have been sufficient for the IAAF to proceed was a matter on which the Panel heard submissions. The Panel notes that, even if the IAAF ought to have been able to proceed on the basis of the redacted version, the maximum delay, after receipt of the redacted copy, for which the IAAF might be culpable is limited to 4 months, that is, between 8 October 2003 and the date of the Notice of Application by the IAAF . Even assuming that this period was a period in which the IAAF could have acted faster than it did, the Panel considers that such a period of delay does not mean that it would not be "fair and reasonable" for the IAAF to be permitted to bring these proceedings out of time.

69. However, the Panel is not prepared to make even that assumption. The Panel accepts that the IAAF was effectively unable to consider whether to review Mr Young's case until it had all of the materials with which to do so. These materials necessarily included, as a basic minimum, an unredacted copy of the exonerating decision identifying Mr Young. The Panel finds that the IAAF acted prudently in seeking disclosure of that decision before referring Mr Young's case to arbitration.

Therefore, the IAAF acted as soon as it reasonably could, and no blame should attach to it for any delay during the Third Period.

70. Mr Young has argued before this Panel that, because of the means by which the IAAF obtained disclosure of his identity and the DAB Decision, the IAAF should be precluded from relying upon that material. The argument was based on the legal principle that a party should not be allowed to benefit from evidence obtained by unlawful means, or to benefit from the fruits of a "poisoned tree". Mr Young argues that his confidentiality rights were violated by the wrongful publication of his name in the Los Angeles Times, and that the IAAF took a leading role in a concerted campaign which brought wrongful pressure to bear in order to obtain the disclosure forbidden by the First CAS Decision.

71. The Panel finds that this argument fails in law and in fact. As to the law, no authority was cited to the Panel, whether in United States Federal or State Law or Swiss Law or English or Commonwealth Law or of "general law", that, absent some criminal activity, which is not alleged in this case, the alleged legal principle exists. The Panel is not aware of, and heard no submissions to the effect that there is, a general principle of law that requires evidence to be excluded simply on the basis that it was obtained in violation of a person's civil rights.

72. As to the facts, the correspondence between the IAAF, USATF, IOC, USOC and WADA during the autumn 2003 does not demonstrate any wrongful pressure on the part of IAAF. On the contrary, the IAAF took a restrained and careful position for much of the Third Period, mindful of the implications of the First CAS Decision. The disclosure of the DAB Decision was eventually obtained by third parties, who had legitimate reasons of their own for wishing to see Mr Young's case examined. Furthermore, this argument on behalf of Mr Young can be seen to be, at best, technical, and, at worst, entirely without merit, in the light of Mr Young's reported (never denied) acceptance, 2 days after the report in the Los Angeles Times, that he had given a positive test in June 1999, and had competed at the Olympic Summer Games 2000 in Sydney.

73. As has been demonstrated, much of the debate before the Panel concerned the effect of the First CAS Decision. The Panel has had to consider in detail both the issues before the First CAS Panel, and the terms of the First CAS Decision. In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a coherent corpus of law, matters not.

74. In the present case, the Panel has concluded, without difficulty, that the First CAS Decision did not determine either of the issues that arise in the present arbitration. This is not an appeal against the First CAS Decision. It is a review of the DAB Decision, following its publication together with the identity of the athlete concerned. Further, the Panel takes the view that the First CAS Decision does not even impinge directly upon the issues which it has to decide.

75. It would be difficult to conceive of a CAS Panel which contained more distinguished and experienced international arbitrators than the First CAS Panel. This Panel has no doubt that the First CAS Panel limited itself, as this Panel limits itself, to a determination of the particular issues before it. The First CAS Panel had to make its decision on issues referred to it in an ad hoc arbitration agreement. It did not purport to decide, and could not have decided, issues which were not referred to it in that agreement, and if it had done so, a later CAS Panel, such as the present Panel, would have been entitled to disregard a decision on such issues.

76. For the reasons set out above, the Panel concludes that, in the exercise of its discretion, it is "fair and reasonable" to accept jurisdiction outside the six month deadline.

(13) Issue (2)

77. Having decided that it would be fair and reasonable to accept jurisdiction in Mr Young's case, the Panel proceeds to consider the question of whether the DAB misdirected itself or otherwise reached an erroneous conclusion on 10 July 2000 when it exonerated Mr Young of a Doping Offence.

78. In relation to Issue (2), the Panel is required to decide whether the DAB "*misdirect[ed] itself or otherwise reach[ed] an erroneous conclusion*". No submissions were made to the Panel as to the meaning of "*misdirect*". The Panel infers that the distinction sought to be made by the parties in agreeing this formulation was between, on the one hand, a misdirection of law, such as, for example, taking into account material which should not have been taken into account, and on the other hand, an erroneous conclusion of fact.

79. As was his right, Mr Young elected not to respond in detail to the IAAF's challenge to the DAB Decision. His position was, simply, that the DAB Decision correctly exonerated him for the reasons given in the Decision. In the circumstances, the Panel is required to assess the weight to be given to the written evidence of the IAAF's expert witnesses in the present arbitration, without the benefit of seeing them cross-examined by either of the Respondents' counsel.

80. Through his Counsel, Mr Young asked that his absence from the hearing and his failure to challenge the DAB Decision on its merits should not be construed as an admission of guilt. In particular, the Panel was asked not to draw an adverse inference from Mr Young's failure to make himself available to answer questions about his statement.

81. The USATF and Mr Young have declined to disclose in these proceedings the material which was before the DAB when it made its Decision, in particular the record of the testimony of Mr Young's expert. Therefore, the only material which is available to the Panel on the second issue is the DAB Decision itself, the Expert Report of Professor Hemmersbach and the Witness Statement of Professor Bowers, both dated 12 February 2004 and submitted by the IAAF, and Mr Young's statement dated 7 May 2004.

82. The basis upon which the DAB exonerated Mr Young was that it found that a reasonable doubt existed as to whether he had committed a Doping Offence. The DAB's reasoning appears to have been that the fact that the positive Eugene sample was preceded by the negative Raleigh sample and succeeded by the negative Lausanne sample created a reasonable doubt about the positive Eugene sample. Although there appears to have been no criticism of the taking of the sample, or the chain of custody or the analysis results of the Eugene sample, the DAB found that there had been "insufficient explanation" of how a positive sample could have been preceded and succeeded by negative samples over so short a time.

83. The DAB Decision referred to the "theories raised by the athlete's expert" and that expert's "testimony regarding the time period for elimination of the drugs from the system of the tested athlete".

84. The DAB had before it the evidence of two experts: that of the expert called on behalf of Mr Young and that of Professor Bowers for the USATF. The DAB found that the record of the Doping Hearing Panel described a "difficult and confusing examination" of Mr Young's expert, whose testimony was referred to by the DAB as "not altogether a smooth and clear read". Nevertheless, the DAB found that Mr Young's expert's testimony could be followed better on paper than it was at the time of the hearing, and preferred it to the expert evidence of Professor Bowers.

85. Although the Panel does not have a copy of the evidence of Mr Young's expert, it appears that the "theory" raised by him was on the following lines: that nandrolone metabolites pass through a person's body relatively slowly, such that detection of high levels of the substance in an athlete's body on day one and detection of none of the substance in the athlete's body on day six would be an impossible, or highly unlikely, scenario.

86. In his witness statement Professor Bowers recalls giving evidence at the Doping Hearing Panel, a record of which evidence appears to have been in front of the DAB. Professor Bowers states, at Paragraph 10:

> *"I testified that the excretion pattern of the oral precursors of nandrolone is very short and that studies published in the scientific literature showed that an athlete could have orally administered one of these precursors and been positive on 26 June 1999, but negative 6 days later on 2 July 1999."*

Professor Bowers comments, at Paragraph 11, that Mr Young's expert was an engineer with no pharmacological training or experience who relied upon:

> *"…basic pharmacokinetic equations relating to blood concentrations, which were clearly irrelevant to the issue of the urinary excretion pattern or oral precursors of nandrolone*."

87. In his Expert Report, Professor Hemmersbach was asked a number of questions, including the following:

> *"Is the fact that sample 058096 (provided on 2 July 1999) was negative and sample 109176 (provided on 26 June 1999) was positive for norandrosterone consistent with the known excretion pattern of nandrolone and/or its precursors?"*

Professor Hemmersbach answered that question in the affirmative. He said:

> *"The excretion of oral preparations containing nandrolone precursors is characterised by a rapid metabolism and consequently rapid urinary excretion compared to injected preparations. The main amount of the substance is excreted during the first 24 h. … In most of the cases the urinary concentrations will drop from 60/80 to 2 ng/ml in less than 6 days."*

88. In the light of this very clear, and uncontradicted, evidence that the negative Raleigh and Lausanne samples were not inconsistent with the positive Eugene sample, the Panel finds that the basis on which the DAB made its finding and the decision to exonerate Mr Young was erroneous. The Panel rejects the theory apparently put forward by Mr. Young's expert, which seems to have no scientific basis.

89. Accordingly, the Panel finds that on 26 June 1999 Mr Young committed a Doping Offence.

90. Further, the Panel finds that the DAB had before it material on which it could, and should, have made the correct decision, that is, to dismiss Mr Young's appeal. The only evidence before the Panel indicates that Mr Young's expert was inadequately qualified, and put forward a misguided and irrelevant theory. Indeed, on the basis of Professor Bowers' uncontradicted evidence as to the area of expertise of Mr Young's expert witness, it seems to the Panel very doubtful that his evidence should have been admitted as expert evidence at all, far less that any weight should have been attached to it. The Panel has seen no evidence to indicate why the DAB rejected the evidence of Professor Bowers.

91. For the reasons stated above, the Panel finds that the DAB misdirected itself in law in accepting, as expert evidence, the evidence of Mr Young's expert and rejecting that of Professor Bowers. On the basis of its understanding of the evidence before the DAB, which is set out in Professor Bowers' uncontradicted evidence, the DAB's Decision was capricious and one which no tribunal, properly directing itself, could have reached.

E. SANCTION

92. In addition to the submissions on sanction which appeared in the parties' written pleadings, the Panel heard oral submissions on the issue of the appropriate sanction to be imposed on Mr Young in the event that the Panel answered both of the issues in the affirmative. Clause 6.1 of the Arbitration Agreement states that *"The Applicable Rules to be applied by the Arbitration Panel are those published in IAAF Handbook 2000-2001."* It was common ground that this provision was included because of Note 2 of the Transitional Provisions to the 2002/3 Edition of the IAAF Rules, which was in the following terms:

> *"Where a dispute has arisen prior to 1 November 2001, or where a Member has made a decision concerning a doping matter before this date, then such dispute or doping matter shall be resolved in accordance with the IAAF Rules and Regulations in force immediately prior to 1 November 2001."*

93. As the dispute arose before 1 November 2001, the transitional provisions apply.

94. All parties were in agreement that it had not been their intention in signing the Arbitration Agreement to agree that the 2000-2001 Rules should necessarily apply to the question of any penalty to be imposed. The Rules in place at the time the Doping Offence was committed were the 1999-2000 Rules. Rule 60 of the 1999-2000 Rules provided, in Rule 60.2. (a) (i), for a minimum period of ineligibility for the "doping offence" of finding in an athlete's body tissues or fluids a prohibited substance, two years from the date of the provision of the sample or of the sanctionable offence and any additional period necessary to include a subsequent equivalent competition to that in which the athlete was disqualified.

95. Rule 60.4 of the 1999-2000 Rules provided that where an athlete had been declared ineligible, that athlete should not be entitled to any award or addition to the trust fund to which he would have been entitled by virtue of his appearance and/or performance at the athletics meeting at which the doping offence took place, or at any subsequent meetings.

96. It is clear to the Panel, and the IAAF was prepared to accept that, when the Statement in support of the Reference to Arbitration was prepared, it had Rule 60.2 (a) (i) in mind. Thus, it sought an order that Mr Young should be "*deemed to have been ineligible from competition for the two year period from the date of his sample on 26 June 1999 until 26 June 2001*". It is accepted by the IAAF that the end date of the period of ineligibility should have been stated as 25 June 2001.

97. The Panel agrees with the IAAF's position, as stated in the Statement in support of the Reference to Arbitration, and finds that it would be appropriate to apply the 1999-2000 Rules to the question of the sanction to be applied to Mr Young. Accordingly, the Panel finds that Mr Young's period of ineligibility should have been from 26 June 1999 to 25 June 2001.

98. The consequence of this finding is that Mr Young should not have been eligible to compete in any competition during that period, including the Olympic Summer Games in Sydney in 2000.

99. It was urged upon the Panel that the consequence of finding that Mr Young had been guilty of a doping offence, and that he should have been ineligible to compete in the Olympic Summer Games in Sydney, would be that the other members of the United States relay team would inevitably lose their Gold Medals. The Panel could not take that possibility into account in deciding Issue (2). It is, however, sufficient to say that the Panel does not necessarily accept that, in the unusual circumstances of the present case, this consequence must follow. Whether it does or not is, however, a matter for the IOC and/or the IAAF to consider, and not for this Panel.

F. COSTS

100. Arts. R65.1 and R65.3 of the Code of Sports-Related Arbitration ("the Code") provide that, subject to Arts. R65.2 and R65.4, the proceedings shall be free; that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties; and that, 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. Pursuant to Art. R65.4 of the Code, the Deputy President of the CAS Appeals Arbitration Division decided that the parties should contribute to the arbitration costs and bear all costs related to the hearing, the date and location of which were agreed by the parties.

101. It was decided by the parties that a shorthand note should be taken of the proceedings. The CAS Office informed the parties that the cost of the taking of that note would have to be borne by them, and that the Panel would make an order in respect of that cost in its Award. The Panel has decided that it would be fair for the cost of the taking of the shorthand note to be borne equally between the IAAF and the USATF, but that Mr Young should not be required to make a contribution to the cost. The costs of the hearing have been assessed by the CAS Court Office at $2,600 (United States Dollars Two Thousand Six Hundred). That sum should be paid equally by the USATF and the IAAF.

102. As between the IAAF, the USATF and Mr Young, the Panel has concluded that it would be appropriate for the USATF to make a contribution of CHF 10,000 (Swiss Francs Ten Thousand) towards the cost of the IAAF in connection with the proceedings. Again, the Panel does not require Mr Young to make a contribution towards the IAAF's costs in connection with the proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. In respect of Issue 1, the answer is that it is fair and reasonable for it to accept jurisdiction outside the six month time limit.

2. In respect of Issue 2, the answer is that the Doping Appeals Board did misdirect itself and reach an erroneous conclusion when it exonerated Mr Young.

3. The cost of the shorthand note will be borne equally between the IAAF and the USATF.

4. The USATF should pay a contribution of CHF 10,000 (Swiss Francs Ten Thousand) towards the IAAF's costs in connection with the appeal.

5. The cost of the hearing in the sum of $2,600 (United States Dollars Two Thousand Six Hundred) shall be borne equally by the IAAF and the USATF.

Done at Lausanne, 28 June 2004

THE COURT OF ARBITRATION FOR SPORT

Mr Peter **Leaver** QC

President

Mr **Loh** Lin Kok

Arbitrator

Professor Martin **Hunter**

Arbitrator